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**Material evidences in a system of criminal
procedural proving**

Abstract: It is considered a notion and content of the material evidence, their place in the system of proving.

There is studied correlation of criminalistical and criminal procedural aspects of the material evidence, terms of their admissibility.

It is stated an author's point of view on definitions' essence containing in criminal procedural law.

Keywords: material evidence; proving; admissibility; subject of proving; substantial violation of law; criminal proceedings.

At research of epistemological nature of evidences in procedural and criminalistical literature is pointed out that they are the result of reflection of crime's event in environment [8, p. 30-32]. Reflection like a property of matter determined with presence of universal connection and interlink of phenomena therefore any alteration of one objects - items, events or processes- an inevitably causes appropriate changes of others that associated to them. When these alterations are the reflection of crime's event in environment then they are called the traces of crime - data, which give to investigator, court and other participants of process an opportunity to restore the picture of committed crime and establish the culprits.

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Based on above stated, before considering a notion "material evidence" it is necessary to touch briefly a definition "evidence" that stipulated in the Code of Criminal Procedure (hereinafter, the CCP) of Azerbaijan Republic, as, in our standpoint, it is contradictory and consequently wrong that accordingly impacts on the gist and content of evidences' kinds.

According to Article 124 of the CCP of Azerbaijan Republic in edition of "Juridical literature" of 2001 in Russian language under guidance of E. Mammadov, a head of working group on preparation of the project, "evidences on criminal case are recognised reliable data received by court or parties of criminal process (information, documents, item).

These evidences:

124.1.1 shall be obtained in accordance with the requirements of the Code of Criminal Procedure, without restriction of constitutional human and civil rights and liberties or with restrictions on the grounds of a court decision (on the basis of the investigator's decision in the urgent cases described in this Code);

124.1.2 shall be produced in order to show whether or not the act was a criminal one, whether or not the act committed had the ingredients of an offence, whether or not the act was committed by the accused, whether or not he is guilty, and other circumstances essential to determining the charge correctly"[10, p. 150-151].

In the wording of the CCP of 2007 in Russian edition of "juridical literature" the words "reliable data" replaced into the words "credible evidences" [11, p. 143].

In editions of the CCP in Azerbaijani language are said on "moteber deliller" [12, p. 173].

According to Azerbaijani-Russian dictionary. the word "delil" in first sense means reason, evidence, argument, and in second one - evidence (item or circumstance that is an proof of somebody guiltiness) [1, p. 727].

Thus, in our point of view, using in law the word "delil" in all cases comes to tautology, and word combination "reliable data" cannot be referred to the documents and items as they are not data themselves.

The CCP of Azerbaijan SSR of 1960 said that "evidences on criminal case are any actual data, on basis of which in established by law order bodies of inquiry, investigator and court establish presence or absence of socially danger deed, guiltiness of a person committed this offence and other circumstances having significance for right resolution of case" [9, p. 43].

Above stated seems relatively true as notion "evidences on criminal prosecution" even if not touch alogisms that contained in valid definition, willingly or unwillingly involves in criminal prosecution defence party, but this is a topic of special discussion.

As it known, data cannot coexist themselves without material carrier, but Article 124.2 of the CCP says that the following shall be accepted as evidence in criminal proceedings: statements by the suspect, the accused, the victim and witnesses; the expert's opinion; material evidence; records of investigative and court procedures; and other documents [12, p. 144].

As result, data and their carriers obtain the same meaning that in our standpoint is wrong.

Thus, a lawmaker, in our opinion, determines an evidence like deficiently clearly balanced and formulated construction in frames of criminal process, through of which should be resolved the task of cognition and achievement of reliable knowledge in stages of crimes' disclosure, preliminary investigation and achievement of truth at hearing a case in court.

From standpoint of procedural law (Art. 138 of the CCP), proof shall consist in the collection, verification and assessment of evidence in order to establish facts of importance for the lawful, thorough and equitable determination of the criminal charge [12, p.154]. At this each evidence is subject to assessment from point of relevance, admissibility, and all collected evidences in their combination - from point of adequacy (Art. 145 of the CCP) [12, p. 158].

Proof in criminal proceedings resolves two tasks: from one side - establishing of truth about circumstances of investigated crime, and from other one - foundation of data received. This task is performed in course of fulfilled in established law

order activity of bodies of investigation, prosecutor and court with participation of other subjects of proving on collection, checking and evaluation of evidences [7, p. 298].

Aim of the present article is not an optimal and correct determination of notion "material evidence" from point of view criminal process. We will try to do it from criminalistical point of view that is, first of all, to investigate an informative side of this notion from position developed with criminalistics.

From these positions process of proving is a realization of processes of crime's reflection established in material environments, testimonies, documents and inasmuch proving, in our opinion, occurs in all stages of combat to crimes, it is necessary to define a content, objectives, bounds and regulation as indicated process in whole so and the processes of proof flowing in these stages, and correlates these notions with defining of notion "material evidence". But, the objects of environment with alterations in them caused with crime are not yet evidences - they are only epistemological precondition of them. In order to be evidences on criminal case, they should be learnt and testified in the proper way by subjects of proving: court, prosecutor, investigator, inquiry officer and other participants of proceedings.

In our standpoint, due to there is discrepancies in definition by procedural science of the notion "evidence", they are reflected also in understanding of legislative definition of proving process, and in determination of order of checking and evaluation of evidences. Insufficiently clear explanation with law of the nature of interties of actual data and their carriers (sources) automatically put questions as to form of performance of procedural activity of proving so and to process its criminalistical supporting. In our standpoint this occurs due to the interpretation of notion "evidence" has not only theoretical but also practical significance, as it lies in the base of such questions like admissibility of evidences, their classification and ways of collecting, checking and evaluating, and also procedural regime of application their separate kinds in course of carrying out proving process.

According to N.F. Yakubovich, while studying regularities of collecting, researching and assessing evidences an investigator needs to make deep analysis of criminal procedural norms that regulate proving process that is a prerogative of theory of court evidences - the most important branch of science and criminal process [24, p. 62].

But the question who has to study these regularities -procedural specialists or criminalists - is not too principal. We think that if these questions investigate by those and other then juridical science would gain in whole.

According to Article128.1 of the CCP of Azerbaijan Republic, any item that can help to determine circumstances of importance to the prosecution because of its characteristics, features, origin, place and time of discovery or the imprints it bears may be considered to be material evidence [12, p. 147].

According to Article 128.3 of the CCP, a) immediately after its acquisition, the item is described in detail and sealed, and other similar acts are carried out making it impossible significantly to alter the imprints it bears and its features or characteristics and b) the suspect, accused, victim or witness recognises it immediately before it is examined in court [12, p. 148].

Thus, the text of law indicates two conditions of admissibility of items as evidences, and other are the provisions stipulated in Article 125of the CCP of Azerbaijan Republic.

Meanwhile, notion "material evidences" is interpreted in criminal procedural legislation of number states in some other way and some of formulations should be paid attention.

So, according to Article 98 of the CCP of Ukraine, "...physical evidence means tangible objects that have been used as an instrument of a criminal violation, retain traces of such or contain other information, which may be used as evidence of the fact or circumstance to be established during criminal proceedings, including the items that have been an object of criminally unlawful actions, money, valuables or other articles obtained in a criminally unlawful manner or gained by the legal person as a result of criminal violation" [22, p. 69].

According to Article 81 of the CCP of Russian Federation recognized as demonstrative proof shall be any objects: a) which have served as instruments of crime or have retained on themselves the prints of the crime; b) at which the criminal actions were aimed; property, money and other valuables gained as a result of criminal actions or acquired in a criminal way; c) the other objects and documents which can serve as the means for the exposure of the crime and for the establishment of the circumstances of the criminal case [18, p. 45].

According to Article 96 of the CCP of Belarus, material evidences as demonstrative proof shall be any objects: a) which have served as instruments of crime or have retained on themselves the prints of the crime; b) at which the criminal actions were aimed; property, money and other valuables gained as a result of criminal actions or acquired in a criminal way; c) the other objects and documents which can serve as the means for the exposure of the crime and for the establishment of the circumstances of the criminal case [13, p. 119].

According to Article 121 of the CCP of Kazakhstan, "material evidences are recognized items, which have served as instruments of crime or have retained on themselves the prints of the crime; at which the criminal actions were aimed; property, money and other valuables gained as a result of criminal actions or acquired in a criminal way; the other objects and documents which can serve as the means for the exposure of the crime and for the establishment of the circumstances of the criminal case" [14, p. 83].

According to Article 85 of the CCP of Kyrgyz Republic, "material evidences are recognized the items, which have served as instruments of crime or have retained on themselves the prints of the crime; at which the criminal actions were aimed; property, money and other valuables gained as a result of criminal actions or acquired in a criminal way; the other objects and documents which can serve as the means for the exposure of the crime and for the establishment of the circumstances of the criminal case or refutation of accusation or mitigation of responsibility" [15, p. 42-43].

According to Article 134 of CCP of Latvia, "material evidence in criminal proceedings may be any item that was used as an instrumentality or object for committing a criminal offence, or that has preserved traces of a criminal offence, or contains information in any other way regarding facts and is usable in proving. The same thing may be a material evidence in several criminal proceedings.

... If a thing is to be used in proving in connection with the thematic information included therein, such thing shall be considered not as material evidence, but rather as a document" [16, p. 42].

According to Article 158 of the CCP of Moldova, "...material evidence includes objects assumed to be used in the commission of the crime, that bear traces of criminal actions or that were the object of these actions and money and other valuables or objects or documents that may be used as sources to solve a crime, establish its circumstances, identify the guilty persons, reject the accusation or mitigate criminal liability" [17, p. 100].

According to Article 78 of the CCP of Tajikistan, "material evidences are recognized the items:

- assumed to be used in the commission of the crime;
- that were the object of these criminal actions;
- that bear objects of criminal actions;
- money and other valuables or objects received by criminal way;
- other items which may be used as sources to solve crime, establish its circumstances, identify the guilty persons, reject the accusation or mitigate criminal liability" [19, p. 26].

According to Article 130 of the CCP of Turkmenistan, "...material evidence includes objects assumed to be used in the commission of the crime, that bear traces of criminal actions or that were the object of these actions and money and other valuables or objects or documents that may be used as sources to solve a crime, establish its circumstances, identify the guilty persons, reject the accusation or mitigate criminal liability" [20, p. 45].

According to Article 203 of the CCP of Uzbekistan, "physical evidence shall be an object that bear physical features or traces, which make it possible to ascertain its origin, possession by any person, application and applicability for certain purposes, its transfer, exposure to certain objects, processes and events, and other features and traces pertaining to the circumstances of the criminal case" [21, p. 71].

Speaking on criteria of material evidences, it is necessary to note that juridical books show variety of approaches to determination of notion "admissibility of evidences". So, M.C. Strogovich pointed out that admissibility of evidence is its ability like a source of data on the fact to be a means of establishing of this fact. He distinguished two conditions of admissibility of evidences: a) conformity a source of data to certain conditions stipulated in law; b) vestment of these sources in certain procedural forms provided by law [6, p. 111-112].

G.M. Minkovsky distinguishes "the following conditions of admissibility of actual information that collected on case: a) distinction and opportunity to check its origin; b) competence and awareness of persons from which it comes from and which it gather; c) observance of general rules of proving; d) observance of the rules which guarantee comprehensiveness and accuracy of fixation collected information in the case; refusal to include surmises in it" [7, p. 213-232].

S.A. Sheifer does not distinguish a sign of evidences' source as an independent condition of admissibility. According to him, those in theory of criminal process are called the sources of proving or means of proof are the procedural form that required by law [23, p. 19-20].

P.I. Krikunov and number of other authors distinguish three criteria of admissibility of evidences: lawfulness of a source of actual data; legality of fixation of actual data [4, p. 109-110].

On opinion of N.M. Kipnis, "admissibility is a feature of evidence characterised it from standpoint of legality of the source of actual data (information) and also way of receiving of the forms of fixation of actual data of the source in order established by criminal procedural law, i.e. authorised person or body in result of conducting by them

investigative actions at strict observance of criminal procedural law, which determines the forms of this investigative action" [3, p. 27-28].

It seems that above stated in definitions the criteria of admissibility of evidences are not exhausted. Admissibility is one of the most important properties of evidences, presence of which allows actual data to be considered evidences. Admissibility characterises a source of evidences and the means, forms and conditions of its obtaining. It is formed from characteristic of the carrier of knowledge about the fact and conditions their obtaining and also the means, ways and conditions of evidences' receiving [5, p. 29-30].

In our standpoint, admissibility includes characteristic of the way and some conditions of obtaining actual data by carrier that is an important factor for further checking of reliability of evidences

Affiliation to lawful sources is an obligatory element of evidences' admissibility. This is one of the main requirements of criminal process as in addition to other principal provisions establishing of the truth determined with necessity of strict list of the means and forms of collection of evidences.

Another requirement of admissibility of the material evidences is a lawfulness of techniques, ways of their obtaining: proof should be received through procedural action that provided by law.

Fixed in the law a circle of procedural actions in future will be extended and improved, however as it was noted by scientists until new way would not entirely be developed and received all its features, it should be considered as variety of known investigative actions, and only in future might be acted as independent means of evidences' obtaining if a lawmaker recognises it as independent investigative action [2, p. 261].

Admissibility of material evidences assumes an observance of procedural order their receiving: a lawmaker not only requires from a person performed investigation to use the actions, which stipulated in law, but also establishes an order conducting of each investigative action.

Admissibility of material evidences is determined with observance of requirements of procedural form their fixation, i.e. in order to be admissible evidence should be fixed in the acts provided by the law. The forms of evidences' fixation are written (record), audio (voice record), descriptive (photo, video and cinema images), subject (casts, reprints) and other optional. It is important that a record would contain all necessary requisites that are mandatory for admissibility of evidence: description of investigative action; drawing up a record by investigator after completion of investigative action; before signing the record familiarizing with it the participants of the action and other persons (experts, specialists), and also requisites of the optional means of data fixation. The record should be indicated about application of technical means, seized of traces and other objects, their sealing etc.

Violation of these requirements is recognised an essential breach of the law and entails recognition inadmissible of the material evidences.

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