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Problems of the Admissibility of Tactical Techniques in the Investigation of Crimes

Abstract: The issues concerning the admissibility of tactical techniques in criminal proceedings and criminalistics are examined. A number of tactical interrogation techniques are analyzed. Practical recommendations are proposed.

Keywords: criminalistics; criminal procedure; tactics; technique; deception; admissibility.

The problem of the admissibility of tactical techniques remains relevant; however, paradoxical as it may sound, in recent times it has increasingly been "suppressed" through the efforts of representatives of the prosecution, or arbitrarily ignored without any explanation.

A brief retrospective is necessary. The assertion that lies and deception form the basis of criminalistic tactics and methodology, and therefore of the entire system, which we expressed and substantiated in 1999, was silently rejected by the majority of advocates of truth, although none of them raised any objections openly [12, pp. 396–398].

Perhaps many did not consider it necessary to do so, since at that time the issue of deception was resolved unequivocally: it was not allowed.

"Deception, blackmail, suggestion, extortion, threats, and other forms of psychological violence contradict the principles of criminal proceedings and their moral foundations and must be unconditionally excluded from the arsenal of the investigator and the officer of inquiry bodies. This is indisputable and does not require discussion" [1, p. 217].

Naturally, after such a categorical conclusion, made in 1997 by R.S. Belkin, as well as similar conclusions reached by all other well-known scholars of criminal procedure and criminalistics without exception, engaging in a debate on the admissibility of deception in criminalistics and criminal proceedings would have been, at the very least, bad manners.

However, in 2001, under the arguments of Azerbaijani scholars at a conference in Baku, and later in his final book Criminalistics: Problems of the Present Day, R.S. Belkin changed his position, stating: "The conditions for the admissibility of deception are very narrow and sufficiently strict, but in principle it should be recognized as admissible" [2, p. 114].

At the same time, R.S. Belkin noted: "Finally, it is time to recognize that the state also recognizes the admissibility of deception in the law enforcement sphere: it has legalized operational-search activity, which is largely based on disinformation and deception as a means of detecting and solving crimes. Deceiving a person opposing an operational officer is not considered immoral;

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without resorting to deception, it is impossible to infiltrate a criminal group, catch a bribe-taker, an extortionist, and the like red-handed” [2, p. 104].

It seems that the reference to the state permitting deception in law enforcement activity is incorrect. In the same way, one could justify the admissibility of executions without trial, the verdicts of so-called “troikas,” mass searches and arrests based on denunciations, and many other actions which, under certain conditions, may be formally established by a legislative or other state body, but which do not thereby become right. From our point of view, this is the simplest aspect of a multifaceted issue.

In the Criminal Procedure Code of the Russian Federation, the issue of the admissibility of deception is not specifically resolved, as evidenced by paragraph 4 of Article 164, “General Rules for the Conduct of Investigative Actions,” which states: “In the conduct of investigative actions, the use of violence, threats, and other unlawful measures is inadmissible...” [22].

The concept of “other unlawful measures” is not defined in the Criminal Procedure Code of the Russian Federation, which creates the risk of ambiguous interpretations. Thus, it may be assumed that one of the unlawful measures considered inadmissible in criminal proceedings by the Criminal Procedure Code of the Russian Federation is deception that contradicts the goals, principles, and objectives of the Code and of legal proceedings. However, assumptions should not be contained in the law.

The state cannot, or at least should not, use an immoral means to strengthen morality and legality. As is known, deception and lies are the intentional distortion of truth, untruth, false representation, and so on [14, p. 431]. Deception, fraud, trickery, and swindling are synonyms. Those who use deception and lies are called deceivers, liars, fraudsters, swindlers, and the like. It must be agreed that an investigator-liar, a prosecutor-swindler, or a judge-fraudster are not very appropriate combinations for participants in criminal proceedings.

The Russian legislator is also inconsistent on the issue of granting the right to deceive. Why is it that an investigator is allowed to deceive in all cases, except by asking leading questions, while suspects and accused persons are not allowed to do so by falsely reporting the names of specific individuals?

Lies and deception by representatives of the prosecution are directly or indirectly prohibited in all Criminal Procedure Codes of the post-Soviet countries, but let us proceed in order [20, 21, 22, 23].

The Criminal Procedure Code of the Republic of Azerbaijan of 2000 also resolves the issue of the admissibility of deception ambiguously. Article 15 of the Criminal Procedure Code states that “... in the course of criminal prosecution it is prohibited: ... to obtain testimony from the victim, suspect, or accused, as well as from other persons participating in criminal proceedings, by means of violence, threats, deception, and the use of other unlawful actions violating their rights” [19]. Thus, it turns out that under the Criminal Procedure Code of the Republic of Azerbaijan, deception in the performance of other actions is not prohibited, that is, it is permitted. In addition, the subjects to whom deception is prohibited and those to whom it is not prohibited are not defined with sufficient specificity, since not all participants in criminal proceedings are simultaneously participants in criminal prosecution.

However, let us return to criminalistic tactics and the methodology of investigating certain types of crimes based on it.

As we have argued and continue to argue, there has never been, and there is not now, any technique, recommendation, combination, or the like in criminalistic tactics that is not based on deception and lies.

At the same time, it must be taken into account that, as M.S. Strogovich rightly noted in his time, deception and lies, even when presented in a particularly ingenious form, do not cease to be deception and lies; they merely become more sophisticated and immoral [16, p. 20].

The history of criminalistic tactics, especially its Soviet period, is characterized by unsuccessful attempts to find a moral justification for the admissibility of lies and deception, or for camouflaging synonyms. In any case, these attempts were doomed to failure, since they existed within a vicious circle of interrelated Jesuitical concepts and provisions.

Thus, it was considered, and continues to be considered, that the conditions or criteria for the admissibility of a tactical technique and other elements of criminalistic tactics, and for recognizing them as lawful, are legality, meaning non-contradiction to the letter and spirit of the law, and morality, meaning conformity with moral principles [1, pp. 220-221]. Provisions prohibiting deception and lies may be removed from the law, but this will not automatically make them components of morality.

The analysis carried out of existing and recently proposed elements of criminalistic tactics allows us to assert that all of them are based on deception and lies, while those that are not based on them are not truly such elements. Let us examine the validity of this assertion.

1. The formation in the person under investigation of an erroneous idea about circumstances that could actually lead to undesirable decisions and actions. The author of this technique is A.R. Ratinov [17, p. 113]. The admissibility of this technique was recognized by R.S. Belkin, G.A. Zorin, G.F. Gorsky, and other criminalists [8, p. 291; 6, p. 102]. This refers to maintaining uncertainty in behavior regarding the amount of evidentiary information available to the investigator, or creating an exaggerated impression of it.

Having compared the above with generally accepted concepts of deception and lies, one may conclude that they are absolutely identical.

A similar essence is found in the formation in the person under investigation of an erroneous idea that the investigator is unaware of the falsity of the explanations given and the evidence presented (A.R. Ratinov) [17, p. 115]. The formation of an erroneous idea is the formation of a false idea, and this is lies and deception.

The formation in interested persons of an erroneous idea about the investigator’s awareness of the true goals they pursue is also based on deception and lies (A.R. Ratinov) [17, p. 117], as is the formation in the person under investigation of an erroneous idea about the goals of certain actions of the investigator (A.R. Ratinov) [17, p. 120].

2. Creating difficulties for interested persons in correctly assessing the true goals of the investigator (A.R. Ratinov) [17, p. 119]. This is deception combined with unlawful influence and violation of rights.

3. The formation in the person under investigation of an intention to use unsuitable means of counteracting the investigation (A.R. Ratinov) [17, p. 111]. This is the same deception: misleading a person.

4. Psychological influence during interrogation, directly aimed at overcoming an attitude toward lying and obtaining truthful testimony (A.N. Vasiliev, L.M. Karneeva) [4, p. 119].

When influencing someone for the purpose of obtaining truthful testimony and proposing that such testimony be given, a decent person, not a deceiver, not a liar, and so on, should not conceal the truth, that is, should not deceive, and should explain in advance what consequences one or another testimony may entail for that person.

Thus, when proposing that a pickpocket tell the truth about the circumstances of the committed theft, a decent person, not a deceiver, not a liar, and so on, which an investigator or prosecutor is obliged to be, must explain in advance, that is, tell the truth, that in the presence of accomplices or recidivism, the punishment may be real and more severe, rather than suspended, as in the case of committing theft for the first time and without accomplices. Likewise, when proposing that the instrument of the crime be handed over and the circumstances be described, it is necessary, without dissembling, to explain the truth, that is, not to deceive: the evidence is rather weak, and that is why it is being collected [12].

Are we exaggerating? Perhaps. But deception is deception.

5. “Inadvertent display of awareness, when the accused, entirely unwillingly and without realizing the significance of his behavior, reveals his awareness, blurting out information about the circumstances of the crime which he could not have known had he not been involved in its commission” (G.N. Mudyugin, N.I. Porubov) [13, p. 31; 15, p. 167].

This is deception with elements of the children’s game “Do not say yes or no, do not take black or white...”.

6. The investigator, based on the collected materials, unexpectedly for the accused describes to him the picture of how the crime was committed (L.M. Karneeva, S.S. Ordynsky, S.Ya. Rozenblit) [10, p. 153].

At the same time, one must not forget to warn the accused that these are assumptions and fantasies.

7. Explaining to the accused the consequences of denial (N.I. Porubov) [15, p. 168].

The technique is admissible if it is not concealed that such a position may help the person avoid criminal liability.

8. Allowing the legend (G.G. Dospulov, V.Yu. Shepitko) [7, p. 80; 26, p. 129].

This technique consists in giving the interrogated person the opportunity to freely present false testimony, after which he is exposed as lying. Thus, before the lie is stopped, the interrogated person is given the false impression that he is believed. Creating a false impression is deception.

9. Forcing the pace of interrogation and inertia (F.V. Glazyrin) [5, p. 35].

This is the same as what some criminalists call an inadvertent display of awareness; see paragraph 8.

10. Distraction of attention, or indirect interrogation (L.M. Karneeva, R.S. Belkin) [10, p. 179; 1, p. 240]. Distracting attention is a technique used by fraudsters and swindlers, and it is based on deception.

11. Silence regarding certain circumstances already known to the investigation (U.A. Usmanov) [24, p. 112]. Silence is the concealment of truth; therefore, it is deception.

12. The trap of vanity (G.A. Zorin).

“Flatter your tactical opponent: sincerely and repeatedly. He will open up sooner than you expect” [8, p. 301]. If it is sincere, then why is it a trap?

13. Waiting and challenge (L.B. Filonov, V.I. Davydov, G.A. Zorin) [25, p. 114].

"Seeing, for example, that the interrogated person is eager to talk, the investigator does not hurry with the interrogation." The psychological significance of the technique under consideration lies in making the interrogated person accept the challenge and agree to such a "duel." For this purpose, the investigator deliberately reveals a number of weak points in the accusation, which are not at all difficult for the accused to refute, and he does so. Then, having become involved in the dispute, the accused no longer wants to withdraw from it himself... The investigator, meanwhile, obtains the necessary information during the conversation itself.

14. The trap involving the activation of delusion (G.A. Zorin).

"Delusion is a deviation from the line of the route and behavior, from the given direction. ... If the investigator has 'led astray' his partner — the procedural opponent — then he may expect the emergence of reactions, thoughts, sensations, and actions unexpected for that partner..." [8, p. 508].

A decent investigator should not "lead astray" his partner and expect something from this. This is not good; this is deception.

15. The trap involving the detonation of a social stereotype (G.A. Zorin) [8, pp. 308–309]. From our point of view, this is deception with elements of zombification.

16. Intrigue (G.A. Zorin) proposes:"... to intrigue from the very first steps of communication; to stage a defeat at the first stage and then win on all fronts; ... to devalue the opponent's defense by demonstrating its shortcomings, both real and imaginary; to use hints, ... the use of tactical intrigues leads to positional victory, therefore one must take care to mitigate the traumatic impact on the psyche of the procedural opponent..." [8, pp. 175–176].

Indeed, the avalanche of deception and lies that falls upon a person involved in criminal proceedings is capable of seriously traumatizing his psyche and may lead to other negative consequences.

Is it possible to do without deception and lies in criminal proceedings and criminalistics? It is possible if deception and lies are excluded from the arsenals of all participants in criminal proceedings, both on the side of the prosecution and on the side of the defense. Let us rephrase the question: can the prosecution do without deception and lies? We will receive the same answer. Is this possible? Perhaps in a bright future, but that is the subject of another study.

So how can this vicious circle be overcome — the chain of logically interconnected provisions: deception is immoral; therefore, it is inadmissible; a state official cannot be immoral; therefore, he must not deceive, because deception is immoral, and so on.

Tactical techniques, combinations, criminalistic games, inversions, effects, traps, and the like are based on deception and represent terms and concepts from other sciences and spheres of human activity, where the issue of the admissibility of deception and lies is not so acute and where there is no need for pharisaism and hypocrisy.

Criminalistics will not be criminalistics without tactics and methodology, and the latter cannot exist without deception and lies. So, is this yet another vicious circle?

The Holy Qur'an and the Holy Books of other faiths allow deception for the good under certain conditions, when truth, paradoxically, is immoral; when a contradiction arises between individual values and a decision is required that is aimed at preserving the most significant of them.

Indeed, what is more correct: to tell the truth and doom an entire nation to destruction or slavery, or to lie? To tell the truth and cause a quarrel between friends, one of whom, in a moment of weakness, committed a wrong but correctable act, or to remain silent, that is, to conceal the truth, which is equivalent to deception? Is it moral to tell a hopelessly ill person who nevertheless hopes to recover that his days are numbered? It is impossible to list and take into account all possible examples.

The following objections are possible here:

1. “A goal that requires wrongful means is not a rightful goal” (K. Marx, F. Engels) [9, p. 65].

“To follow the unchanging rule ‘the end justifies the means’ means to forget that by using unworthy means one can spoil and distort any noble goal” (A.R. Ratinov, Yu.G. Zarkhin) [18, p. 39].

Some cases of the immorality of truth were noted above, which makes it possible to assert that deception and lies are not immoral in all cases.

Consequently, first of all, it is necessary to determine the cases or situations in which lies and deception will not contradict morality. It seems that such cases are clearly defined in the Holy sources.

2. The situation in which a lie for the good is necessary, and when it is not, will be determined by the investigator, and this will lead to subjective assessments and abuses.

There is some truth in this objection; however, in such cases deception and lies will have the character of a placebo, but nothing more.

In addition, like any human action, a lie for the good in criminalistics must, once again, be limited by certain frameworks and procedures, the main ones of which remain legality, selectivity of influence, and morality.

Legality means that the admissibility of deception in criminal proceedings must be established by law.

Selectivity of influence means that the influence is directed at certain persons and remains neutral in relation to others.

The morality of an element of criminalistic tactics based on deception, from our point of view, is fully covered by the requirements developed by I.E. Bykhovsky, who believed that a tactical technique must not:

- humiliate the honor and dignity of participants in criminal proceedings;
- influence the position of an innocent person, contributing to his confession of non-existent guilt;
- justify the commission of a crime or diminish its social significance;
- contribute to the slandering of innocent persons or to accusing guilty persons to a greater extent than corresponds to their actual guilt;
- be based on the accused person’s or other persons’ lack of awareness in matters of criminal law and procedure;
- contribute to the development in the accused or other persons of base motives and feelings, to their giving false testimony, or to their committing other immoral acts;
- undermine the authority of state law enforcement bodies and the court;
- be based on the investigator’s communication of knowingly false information during the conduct of procedural actions [3, pp. 219–220].

In the context of the above, the last requirement may seem incorrect, but this is not so.

However, without tactics there will be no judicial proceedings and, most importantly, no solving of crimes.

It seems that lies and deception underlying the elements of criminalistic tactics and the methodology of investigating certain crimes may be used only in the form of concealing truth. By contrast, the communication of knowingly false information during interrogation or other procedural actions is fraught with slander and the giving of false testimony.

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Проблемы допустимости тактических приемов расследования преступлений

Аннотация: Рассматриваются вопросы допустимости тактических приемов в уголовном процессе и криминалистике. Произведен анализ ряда тактических приемов допроса. Даны практические предложения.

Ключевые слова: криминалистика; уголовный процесс; тактика; прием; обман; допустимость.

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Cinayətlərin istintaqının taktiki üsullarının yolverilməzliyi problemləri

Xülasə: Cinayət prosesində və kriminalistikada taktiki üsullarının yolverilməsi məsələlərinə baxılır. Bir sıra dindirmə taktik üsullarının təhlili aparılıb. Praktiki təkliflər verilir.

Açar sözlər: kriminalistika; cinayət prosesi; taktika; üsul; aldatma; yolverilməzlik.

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