Evidential Anomalies in Criminal Proceedings – the Use of Circumstantial Evidence

PhD Ervin Belovics*
PhD candidate Imola Szigeti*

Abstract

In criminal proceedings there are a number of difficulties in establishing proof. Evidence is always aimed at clarifying a past event, which clarification is made possible by evidence from the means of evidence. One could say that circumstantial evidence refers to the secondary circumstances related to the criminally relevant facts and, after proving these secondary circumstances, a conclusion can be drawn on the further fact, such as the fact of the crime and the identity of the perpetrator.

Circumstantial evidence is related to the main issue to be proved, or one of its elements, and can prove the main issue through the related fact in such a way that the court (prosecution, investigative authority) can draw conclusions from the circumstantial evidence, first to another fact and then to the fact to be proved relevant for prosecution. Circumstantial evidence is a particularly important component of correct, legal factual inference and, through the emergence of the structures of consciousness discussed later, of judicial conviction, the subjective elements of judicial reasoning. Circumstantial evidence is in fact an inference from fact to fact. In the case of circumstantial evidence, the emphasis is not on what the evidence is, but on its connection with other evidence. It is essential that the factual inference is made by a court and that it records both what it has inferred and what it has concluded. In the context of the jurisprudential practice regarding circumstantial evidence, in other words, when there is no direct evidence of the event relevant to criminal law, in contrast to the jurisprudential practice of the Curia, we agree with the views in the legal literature criticizing the chain theory. In the authors' view, there can be no doubt that the introduction of this interpretation of circumstantial evidence in the practice of the courts would resolve the rigidity of the interpretation of the Curia and could contribute to the ascertainability of the substantive truth.

Keywords: *circumstantial evidence, criminal proceedings, evidential anomalies, theories, direct evidence*

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* Professor and Head of Criminal Law, Criminal Procedure Law and Penal Law Department at Pázmány Péter Catholic University Faculty of Law and Political Sciences, Hungary. Contact: belovics.ervin@jak.ppke.hu.

** PhD candidate at the Doctoral School of Law and Political Sciences of the Pázmány Péter Catholic University, Hungary. Contact: szigeti.imola@gmail.com.

I. Introduction

In criminal proceedings (but in fact in all proceedings where determining legal liability is based on the clarification of a past event) there are several difficulties in establishing proof. In this paper, I want to review the problem of proof using circumstantial evidence from the perspective of its impact on the establishment of substantive truth.

Evidence is therefore always aimed at clarifying a past event, which clarification is made possible by evidence from the means of evidence. "Proof is essentially a complex and indirect process of cognition and, as a process of cognition, it can never be without direct sensory experience. However, in the case of circumstantial evidence, the basic problem is that the fact relevant for criminal law – namely, the fact to be proved – does not become known, perceivable or decodable on the basis of the acquisition and examination of the evidence, because here cognition follows a more complicated path, and circumstantial evidence as such first raises the question of informative direction, and then the question of factual direction. Thus, with regard to all circumstantial evidence, phenomena, side facts, related facts and, circumstances – in short, *indicia* (indicators) – the establishment and clarification of which are followed by conclusions on the existence or non-existence of a fact relevant to criminal law, must first be treated as facts to be proved on the basis of the source criticism, based on assessing the credibility of the available means of proof"[1].

II. Theories

Three theoretical backgrounds to circumstantial evidence have emerged. In the middle of the last century, the so-called chain theory became dominant. The theory was founded by Mittermayer and Hans Gross, and their ideas were brought to life by Vyshinsky[2]. The chain theory is that if there is no direct evidence to prove a fact, the fact can be proved using circumstantial evidence. However, this requires that the circumstantial evidence must form a chain of closely related, closed texts, and if even only one link is missing, this absence alone precludes the success of the circumstantial evidence. According to Vyshinsky, the significance of circumstantial evidence is not determined by the nature and quality of the evidence, but by its position in relation to other evidence. In conclusion:

- the relevance of the circumstantial evidence derives from its connection with other evidence;
- the interrelationship of circumstantial evidence must be such that all circumstantial evidence forms a single chain;
- if a single link falls out, the whole chain falls apart, because circumstantial evidence is left to itself,
- circumstantial evidence left to itself is individually insignificant;
- circumstantial evidence must be consistent with the fact to be proved;

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[1] F.Tremmel, *Bizonyítékok a büntetőeljárásban (Evidence in criminal proceedings),* Budapest–Pécs, Dialóg Campus Publishing, 2006, p. 109.

[2] A. Januaryevich Vyshinsky, *A perbeli bizonyítás elmélete a szovjet jogban (The Theory of Judicial Proof in Soviet Law)*, Budapest, Akadémiai Kiadó, 1952.

- none of the circumstantial evidence can be proven to the contrary; *and*
- all these must exclude all other possible alternatives beyond reasonable doubt.

It is also clear from Tremmel's reasoning that direct evidence, by its very existence, makes it relevant to prove a fact that is relevant according to criminal law, which otherwise even a single piece of evidence is fully capable of doing. In the case of circumstantial evidence, on the other hand, only after the facts proved by the circumstantial evidence have been clarified can the conclusion be drawn as to the existence or non-existence of a fact relevant for criminal liability. In the latter case, it is impossible for a single piece of circumstantial evidence to establish the criminal liability of the accused beyond reasonable doubt.

One could say that circumstantial evidence refers to the secondary circumstances related to the criminally relevant facts and, after proving these secondary circumstances, a conclusion can be drawn on the further fact, such as the fact of the crime and the identity of the perpetrator. Thus, for example, if the accused denies that he could have killed the victim by stabbing him several times, if it is established that, at the time of the crime, the accused was undoubtedly the only person in the victim's home, it can be clearly inferred from this proven and essentially incidental circumstance that the crime was committed by the accused. However, on the plane of logic, this has several conditions, such as

a) The time of the crime must be proven; in other words, the medical examiner must establish the time of death of the victim as accurately as possible.

b) It must be clearly proven (e.g. by witness statements) that the accused was present in the victim's home at the time of the victim's death. This can be achieved, for example, by the fact that the witness living in the opposite apartment saw the accused walking around in the victim's apartment several times during the time-period in question.

c) It must be proven that the victim could not have taken their own life, in which case again the medical expert's opinion is only relevant if it excludes self-inflicted injuries.

d) It must be proven that no other person was present in the victim's home at the time of the offence, for example by a camera installed and operating towards the front door of the home, so that the camera footage clearly shows that only the offender entered the victim's home.

These are the facts to be proved, which on their own are capable of forming a closed chain of evidence that clearly excludes the possibility that the crime was committed by another person.

There may, however, be other secondary circumstances that make this closed chain even stronger; for example, if it can be proved that the offender owns the instrument of the crime or if the bloodstain on the offender's clothing is from the victim.

In other words, circumstantial evidence is related to the main issue to be proved, or one of its elements, and can prove the main issue through the related fact in such a way that the court (prosecution, investigative authority) can draw conclusions from the circumstantial evidence, first to another fact and then to the fact to be proved relevant for prosecution. After the so-called intervening fact has been proved, it is possible to move on to the fact to be proved that affects the main issue.

"On the basis of the examples given, we can also say that, in the case of direct evidence, it is enough to deal with the informative direction, and then we accept the

direct evidence, and we can establish the relevant facts in criminal law, namely whether the act took place and the identity of the perpetrator. With regard to direct evidence, such cases and their focal points are practically one-sided. On the contrary, in the case of circumstantial evidence, we are always talking about ambiguous situations, problems, the further inference from the related fact, the indicium, the fact relevant to the decision on the case in criminal law terms is ambiguous, several versions can be established, several versions have probability"[3].

According to Háger, *"Evidence is considered direct if the data drawn from a lawful source relates to the criminally relevant fact itself and, therefore, if direct evidence is admitted, the criminally relevant fact can be established immediately*". However, in the case of circumstantial evidence, the direct data from a lawful source does not directly relate to the criminal fact itself, but only to another "intermediate" fact in some connection or context.

Circumstantial evidence is a particularly important component of correct, legal factual inference and, through the emergence of the structures of consciousness discussed later, of judicial conviction, the subjective elements of judicial reasoning.

A distinction can be made between circumstantial evidence in the procedural sense and circumstantial evidence in the logical sense. From a perverse point of view, evidence is circumstantial if it is not taken by the court conducting the proceedings, but by a judge on secondment or by a court seized. The basis of circumstantial evidence in the logical sense is that every positive statement has a negative effect; in other words, it necessarily excludes facts that contradict the established facts, which can be called logical truth. The two basic forms of circumstantial evidence are apagogical and disjunctive evidence. The former establishes categorical conclusions when it states two facts that are completely mutually exclusive. In criminal cases, however, circumstantial evidence is typically disjunctive in nature, because it is usually necessary to refute each possibility in turn. The cognitive process that characterizes circumstantial evidence is arguably more complex and sophisticated than that regarding direct evidence. In an undoubtedly complex logical process, the judge has to move from the available clues as provisional facts, often in a multi-step process, to the "final facts," which can be proven beyond reasonable doubt. Tremmel rejects the "chain of custody" theory often invoked in court decisions, derived from Vyshinsky, and instead argues for the synergy of circumstantial evidence, pointing out that circumstantial evidence is also relevant in cases involving direct evidence. As I have already mentioned, chain theory says that the interconnectedness of circumstantial evidence must be such that it all forms a chain, and that if one link is lost, the whole chain breaks down. Tremmel disputes this and I share his view. The chain of evidence can indeed be established in many cases, but the exclusion of some evidence, whether for procedural or substantive reasons, does not necessarily break the logical order of the process of evaluating evidence"[4].

I note that Kertész's view was that the chain theory was wrong, even at its inception, while Tibor Király pointed out that pieces of circumstantial evidence do not appear in relation to each other, but independently, in isolation. Tóth argues that

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[3] Tremmel, *op. cit.*, p. 110.

[4] T. Háger, *Gondolatok a büntetőeljárás fogalmáról és a bizonyítás elméleti hátteréről* (Reflections on the Concept of Criminal Procedure and the Theoretical Background of Evidence), Budapest, *Iustum Aequum Salutare,* 2014/3, pp. 60-61.

"Some of the requirements summarized by Vyshinsky have indeed become out of date, and it can perhaps be argued that their general validity was doubtful even when they were formulated. It cannot be agreed, for example, that all the elements of a coherent chain must connect the evidential fact to the primary fact to be proved through unbroken transmissions in a perfectly closed system, and even the complete exclusion of possible conclusions to the contrary is not necessarily a realistic requirement. It is not in the case of the existence of a chain of evidence that any conflicting evidence concerning the individual components should be excluded, but it is precisely the exclusion of conflicting evidence that can join up the individual links"[5].

III. Curia's case-law

The Curia deals with the issue in great detail in the case BH. 2021.35.

According to the reasoning of the Curia, *"The fact-finding activity of the court is inherently an indirect cognitive activity – based on factual inference – since it is not a direct observer of the fact to be proved. Circumstantial evidence is further mediation (referral)".*

Pursuant to Section 163 (1) of the Code of Criminal Procedure, a fact to be proved is that which is relevant to the application of the substantive or procedural criminal law in a given case. The evidence is the proof of the fact to be proved, and the source (the means of obtaining knowledge of it) is the means of proof. Evidence is therefore the content of the statement, document etc., based on which and from which the court establishes the facts. A personal or material means of evidence (witness, document etc.) to whom or through which the court acquires knowledge of the evidence.

The relationship between the evidence and the fact to be proved – in other words, the proof and the evidence – can be direct or circumstantial (indirect). Evidence is circumstantial if it does not refer to the fact to be proved a priori, directly, explicitly (explicitly) and conclusively, but merely points to another fact – one or more intervening, subsidiary facts – which is nevertheless relevant because it can be used to draw a conclusion on the fact to be proved (conclusively).

Circumstantial evidence is a type of evidence in case of which there is no direct evidence, no confession or testimony based on a direct perception or observation of

[5] E. Belovics, M. Tóth, *Büntető eljárásjog. Negyedik, aktualizált kiadás. Az új büntetőeljárási törvény (2017. évi XC. törvény) tankönyve* (*Criminal procedure law. Fourth, updated edition. Textbook of the new Criminal Procedure Act (Act XC of 2017*). Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2019, p. 156. Mihály Tóth also points out that Vyshinsky's theory is generally rejected, but in fact it is because he was involved in the sentencing to death of hundreds of innocent people as the chief prosecutor in Soviet conspiracy trials, and it is because of his actions, that the series of conflicts in lawbreaking between principle and practice became apparent. Mihály Tóth also refers to two other indirect theories of proof in addition to the theory of the link in judicial practice. One is the so-called rope theory, the essence of which is that the facts to be proved must be combined with the facts that can be proved by summing up the strength of several strands appearing in parallel, so that each strand becomes a cord, the cord becomes a twine, the twine becomes a rope, and although the strands, cords and twines, cannot individually support the weight hung on them, but the union as a rope can do so as a multiplied force, and the loss or breakage of one or two strands of thread etc. does not prevent the rope from doing its job. Finally, Mihály Tóth introduces the network model, the essence of which is that the relationship of each piece of evidence to the other is less emphasized, the focus being on the relationship with the facts to be proved. In this system, circumstantial evidence is linked by the fact to be proved.

what happened, or no credibility. Circumstantial evidence is always evidence of conscious facts (intentionality, negligence) and it is provided by the scientific method and physical evidence.

Circumstantial evidence (as other evidence) may lead to the finding of a fact, but this is insufficient, as it does not give an inference as to the fact to be proved. A fact established on circumstantial evidence must be capable of giving rise to an inference, either alone or in conjunction with other circumstantial evidence, of an additional fact from which the fact to be proved can be established.

Circumstantial evidence is in fact inference from fact to fact. In the case of circumstantial evidence, the emphasis is not on what the evidence is, but on its connection with other evidence. In comparison, while in the case of direct evidence only the lack of credibility is a condition for establishing the facts, in the case of circumstantial evidence the correctness of the factual conclusion must also be examined.

In this case, the conclusion or its result replaces the content of the direct evidence based on perception (which is considered credible). The essence of finding a fact to be proven is a factual conclusion. This is why the wrong conclusion is one without foundation[6].

In line with this, it is essential that the factual inference is made by a court and that it records both what it has inferred and what it has concluded. It is consistent jurisprudence to distinguish testimony based on perception from testimony based on inference[7].

In comparison, both in the context of the admissibility of circumstantial evidence and with regard to circumstantial evidence, the following elements must be examined:

- factuality or objectivity;
- the logical closure; *and*
- relevance as a counterweight to the logic of form.

The factual nature of the inference means that the circumstantial evidence, although not the evidence to be proved, is based on the perception of a fact which, as the basic data, is credible, reasonably arguable, justified and capable of a justifiable inference. If the source of the circumstantial evidence is an object of evidence, its credibility, including its creation, condition, location and circumstances of its discovery, as well as its capacity to be inferred, must also be examined, *mutatis mutandis*.

Here the Curia notes that in the absence of factual and objective evidence, circumstantial evidence is merely inferential, which is insufficient to produce a result of the same certainty as direct evidence.

The logical closure of the inference means that the circumstantial evidence, together with the consequent fact or the fact obtained from other circumstantial evidence, – alone (exclusively) provides an inference to the fact to be proved; and there are no other facts or circumstances that would refute or cast doubt on it; – it excludes or refutes the possibility of an inference (other version) that is not related to the fact to be proved or to a different or contrary inference.

"In the case of circumstantial evidence, in addition to proving the fact to be proved, it must also be made clear that it is the only one, which means the exclusion or refutation of the contrary circumstance or possibility. Circumstantial evidence is only suitable for proving a fact if it excludes the possibility of any fact other than the one to be proved"[8].

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[6] Code of Criminal Procedure (Be.) section 592 (2) (d).

[7] Court's decision no. BH1958.7.

[8] Court's decision nos. BH1975.164, BH2003.145.

Moreover, relevance means that, although circumstantial evidence alone does not allow an exclusive inference to be drawn on the fact to be proved, its content does not exclude the fact to be proved from its temporal, spatial or other physical context. Consequently, its connection with the object of the evidence has a rational basis. It is not solely opinion, it is conjectural and it is also linked to the material aspect of the fact to be proved.

In comparison, the perpetrator's intent, motivation and motive are necessarily indirect. Motive, on the other hand, is not evidence, but a psychological process that can be established from the proven facts, which is both a concept of substantive law and not a matter of statutory law.

The validity of the truth of a judgment is reality-conditioned, reality-based, and is ensured by the knowledge of reality. Hungarian procedural law allows for this through both circumstantial (indirect) and direct evidence.

The need for a closed chain of circumstantial evidence is undoubted, but it is not a chain of formal logic. The closed-loop nature of circumstantial evidence does not presuppose the smallest and equal size of links. In other words, it is not necessarily the case that the smallest details are proven as well. In fact, that would mean that the knowledge of reality is no longer indirect, but direct. And the closed chain of circumstantial evidence does not require that it shall be composed of evidence of equal value.

The emphasis is set on the closure that connects the two endpoints. Each link must be factual or objective, not speculative; it must be relevant and connected with reality [...], the evidentiary value – the judicial cognizance – is inherently limited.

At the same time, if there is no direct, justified and legitimate explanation for something, it does not mean that it is doubtful. In a lawsuit, from the point of view of evidence in a lawsuit, the statement "I believe it when I see it" does not necessarily have a decisive effect.

In the present case, the decisive fact to be proved is that the accused killed the victim and how this appeared in his mind.

The question is, therefore, whether the path to finding of a fact is the correct one from a procedural point of view, which has two essential points. The first is that the victim's death was caused by a stranger, while the second is that the stranger's hand was the defendant's.

In its judgment, the court of second instance examined the fact-finding activity of the court of first instance throughout and recorded its position on the matter, which the Curia agreed.

The essence of this, according to the Court of Appeal, is to refute the accused's account ("*it is difficult to dispute that he was not there and not when he claimed and not doing what he reported, for example smoking meat, being there between 8 pm and 8.30 pm, but this includes the allegations of being in the vicinity of the victim's workplace between 8 pm. and 9 p.m.; related to this, a conclusion can be drawn from a combined analysis of personal, documentary and communications expert evidence"*)[9].

In this context, it is necessary to refer to the aspects related to the individual assessment of the accused's testimony. In the present case, the accused was questioned as a witness in the administrative procedure; he maintained his testimony in his statement as a suspect, answered further questions, made statements before the investigating

[9] Court's decision nos. BH1975.164, BH2003.145.

judge, and then refused to testify from a stage of the procedure; in other words, he exercised his right to remain silent.

The trial court took into consideration certain details of the accused's testimony and, in comparison with the other data of the proceedings, correctly assessed them in such a way that all the essential parts of the testimony (the background, the alibi, the meeting and the victim's accompaniment, the scattering of the victim's remains) were disproved. However, the accused did not explain the circumstances in which circumstantial evidence was available.

The procedural right under Section 185 (1) of the Criminal Procedure Code – refusal to testify – is a fundamental right of incrimination, and if the accused exercises this possibility, then it is clearly not incriminating. The accused is not obliged to tell the truth.

However, it is also clear that the right to remain silent cannot be an obstacle to taking into account the silence of the accused, in circumstances which clearly require his explanation, in the course of the evidentiary procedure when examining the validity of the evidence provided by the prosecution or obtained by the court[10].

In other words, if the accused remains silent, it is not possible to infer from this that he is in a bad situation (incriminating circumstance), but neither is it possible to infer a good situation (i.e. a factual reality that is favorable to him but does not actually exist). In fact, this is the essence of the requirement under Section 7(4) of the Criminal Procedure Code. Silence in itself implies that there is no justification from the obligor or for a given element of reality.

However, the right of the accused to remain silent does not (cannot) mean that the relevant questions left unanswered (blank) cannot be known, answered or decided based on other information in the proceedings, including facts from circumstantial evidence.

According to the Court of Justice (which is in fact the result of an assessment of the evidence):

- The accused visited the victim at his place of work at the time indicated, parked his car in the yard, it was recorded when he left from there with his vehicle; the accused verified their stay together at the given time – from which the one-way movement between 21.00 and 21.20 in the direction of M.-D. can be deduced – two closely overlapping mobile phone sales of the accused – are not successfully disputable evidence. It is also part of the assessment that, apart from the evidence pointing to a direct link between this accused and the victim, nothing and no one-else can be verifiably linked to it.

- The identification of the remains found is not questionable according to the genetic expert opinion; according to the pathological-medical-chemical expert opinions, the external and internal examination of the remains found confirms the presence of a degree III–IV burn lesion; in other words, the presence of intense heat and the use of a burn accelerant, and the presence of fragments from body parts, i.e. the dismembering and burning of the body in order to destroy and hide it.

- From the evidentiary acts conducted at the three locations, further incriminating evidence was obtained or confirmed that the accused met the victim and, after a telephone call from the police, scattered the victim's remains in the place and manner described in the facts of the case on 29 May at around noon.

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[10] *Averill v United Kingdom*, 36408/97, 6 September 2000, judgment.

- The lack of credibility of the accused's testimony, the location and movements of the accused confirmed from several directions, the movement of the victim, which could be precisely matched to this, and the identical locations at the recorded times, were correctly established in the judgment.

There is no legal reason or justification for reassessing and weighing all this evidence, just as there is no legal reason or justification for doing so in the proceedings at second instance, or at third instance.

From all of this, the court of appeal correctly drew the factual conclusion that, despite the undisclosed details, the accused caused the victim's death"[11].

IV. Conclusion

In the context of the jurisprudential practice regarding circumstantial evidence; in other words, when there is no direct evidence of the event relevant to criminal law, I for my part – in contrast to the jurisprudential practice of the Curia – agree with the views in the legal literature criticizing the chain theory, according to which although the chain of evidence is a fact in a significant part of cases, the omission of certain evidence for whatever reason – as Háger points out – *"does not necessarily break the logical order of the process of evaluating evidence"*[12]. In my view, there can be no doubt that the introduction of this interpretation of circumstantial evidence in the practice of the courts would resolve the rigidity of the interpretation of the Curia and could contribute to the ascertainability of the substantive truth.

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[11] Court's decision no. 2021.35.
[12] Háger: *op. cit.*, pp. 60-61.