

The Role of the Public Prosecution in the Adversarial System of Criminal Procedure and the Standard of Proof "Beyond a Reasonable Doubt"

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Abstract

The role of the prosecution is one of the features of the new adversarial system of criminal procedure and this role is a particularly changed role. The prosecution is expected to be the managing body during the investigative procedure in relation to other bodies with investigative powers, and during the procedure to be an active party whose main obligation is to prove the guilt. The Prosecutor's Office has a burden of proving guilt and an obligation to find, propose and produce evidence that the defendant's guilt is proven beyond any reasonable doubt. The public prosecutor's office must prove every element of the offense beyond a reasonable doubt to which the defendant charges him. The evidence beyond reasonable doubt does not imply proof beyond a reasonable doubt. Possible suspicions or suspicions based solely on speculation are not reasonable suspicions. Reasonable doubt is based on reason and common sense. This may arise from the evidence, the lack of evidence or the nature of the evidence. From the point of view of the professional ethics of the prosecutors, it is especially important that they present the case in order to help the court to reach a fair verdict, and not to present the case to a conviction.

The domestic Criminal procedure law (Criminal Procedure Code of the Republic of Macedonia-CPL) goes a step further by introducing the standard, in Article 403, that the prosecution shall prove the guilt beyond reasonable doubt, without giving any further definition. Unfortunately, the domestic CPL does not offer different terminologies for these two types of suspicion. The Law uses the term "suspicion" when it refers to the required level of suspicion that a person has committed the crime so that certain investigative measures, restrictions or charges can be undertaken or pressed against him/her, it also refers to the application of the principle of in dubio pro reo and the standard that the guilt shall be proven beyond reasonable doubt.

Keywords: *adversarial, prosecution, reasonable doubt, in dubio pro reo.*

1. Introduction

Contemporary law, and for our purpose criminal procedure, are facing a moment of complex transition. The multiplicity of sources and their strict intertwining, their various legislative and case law nature, their multilevel character, domestic, European, international, the hybridization between the two cultures of civil law and common law they produce pose great challenges. In this juridical Babel there is a strong need to find minimum common grounds. Such grounds will be inevitably more and more represented by European law, today also in criminal proceedings, at least for the binding

strength of European law towards domestic legal systems and for the consequent harmonizing effect that it can derive, directly or indirectly.

Among the most significant principles of European law regarding criminal proceedings, the principle of fairness has held a central role. It is a concept that is new for our modern culture, but that it seems to be also a very ancient one, as from different points of view it recalls Aristoteles's *eipeikeia* and foremost the *aequitas* of the classic and medieval ages. Conversely, such a concept is abandoned in civil law systems for the whole modern age¹, while it flows through the *aequitas canonica* to the English common law². Finally, common law values have inspired the conventional fairness.

The role of the prosecution is one of the characteristics of the new system of criminal procedure and this role is a particularly changed role. The prosecution is expected to be the managing body during the investigative procedure in relation to other bodies with investigative powers, and during the procedure to be an active party whose main obligation is to prove the guilt. The Prosecutor's Office has a burden of proving guilt and an obligation to find, propose and produce evidence that the defendant's guilt is proven beyond any reasonable doubt. The public prosecutor's office must prove every element of the offense beyond reasonable doubt to which the defendant charges him. The evidence beyond reasonable doubt does not imply proof beyond reasonable doubt. Possible suspicions or suspicions based solely on speculation are not reasonable suspicions. Reasonable doubt is reason-based and common-sense suspicion. This may arise from the evidence, the lack of evidence or the nature of the evidence. From the point of view of the professional ethics of the prosecutors, it is especially important that they present the case in order to help the court to reach a fair verdict, and not to present the case to a conviction.

In the function of proving guilt, the prosecution collects material evidence, talks with potential witnesses, undertakes expert examination during the investigative procedure, proposes holding a proof hearing, if it assesses that the conditions prescribed by the CPL are fulfilled, and the evidence is of particular importance for "The thesis of the charge".

The active role expected of the prosecution implies training of prosecutors for examining persons during the main hearing. This is especially important because in the current system, the examination for the needs of the prosecution was largely done by the court.

The new system at the main hearing requires the prosecutor to build the case through the answers received from the witnesses and experts who presume dexterity in formulating the questions and their systematization in a coherent whole, as well as a solid preparation for completing the questions of the previously received answers, and yet, within of the prepared concept of questions to be asked.

The prosecution will also have to successfully perform the role of cross-examination of defense witnesses by exploiting the weaknesses of the "thesis of defense" that the prosecutor perceived during the direct examination of the witness by the defense counsel. The prosecutor must become aware that his failure to prove guilt, that is, the failure to present convincing evidence before the court will lead to the adoption of an acquittal that would mean an absolute failure of the prosecution. So the prosecution can file a charge when it believes that there is "enough evidence." But what would such a standard mean? From federal rules of proof in the United States and from case-law, it is noted that the prosecution must present sufficient evidence in order to convince the court that there is reason to believe that the crime was committed and that

the defendant is the perpetrator. The court must be convinced and there is only such a state of facts that every reasonable person will worship the faith and will consciously lead to a strong suspicion of the guilt of the defendant.

Reasonable doubt is a legal standard of proof in US law that has less significance than a possible cause, a legal standard of arrests and orders, and is applied to justify short arrest during the investigation. But this means more than an undeveloped and non-particleized suspicion or premonition that must be based on concrete and relevant to articulate facts taken into account along with rational conclusions drawn from those facts that a person is or will be engaged in a criminal offense, all depends on the totality of the circumstances and may be the result of a combination of concrete facts, even if each of them is individually harmless. As another standard that is at the expense of proving in the United States, the supremacy of the evidence, that is, the evidence that is being carried out must be clear and convincing, that is, to be highly and substantially more likely to be true than to be untrue. The court should have a firm conviction or belief in their actuality.

The principle of *in dubio pro reo* was introduced in the national criminal procedure legislation in 1997. The new, party driven, Law on criminal procedure from 2010, (hereinafter: domestic LCP), continues to regulate this principle in Article 4, which reads that "The Court shall decide in favour of the defendant whenever there is doubt regarding the existence or non-existence of facts comprising the elements of crime, or facts which lead to the application of a certain provision of the Criminal Code". The domestic CPL goes a step further by introducing the standard, in Article 403, that the prosecution shall prove the guilt beyond reasonable doubt, without giving any further definition.

Beyond reasonable doubt, it should be defined in the Law as "proven with such certainty that one would lean forward and act in accordance with it without hesitation in its essential actions." This threshold should be mentioned in Article 404 (conviction) of the LCP, as mentioned in Article 403 (acquittal). The threshold cannot be achieved, if there are two possible possible solutions for the particular case.

In order to make a distinction between the suspicion whether a person has committed a crime (suspicion that is detrimental to the defendant and is always in favour of the indictment) and the suspicion whether that person is really the perpetrator of the crime, *i.e.* suspicion which is in favour of the defendant's innocence (positive suspicion which is always in favour of the defendant and is reflected in the principle of *in dubio pro reo* as well as in the standard that the prosecution has the burden of proof beyond reasonable doubt), the countries in the Anglo-Saxon world, as well as Italy, have been using two different terminologies. Namely, the term suspicion (in Macedonian language: сомневање) is used in a detrimental sense for the defendant and is in favour of the indictment, while the term doubt (in Macedonian language: двојба, двоумење, несигурност) is used to favour the defendant and the definition of the principle of *in dubio pro reo*, as well as for the standard of the prosecution bearing the burden of proving the guilt beyond reasonable doubt.

Unfortunately, the domestic CPL does not offer different terminologies for these two types of suspicion. The Law uses the term "suspicion" (сомневање) when it refers to the required level of suspicion that a person has committed the crime so that certain investigative measures, restrictions or charges can be undertaken or pressed against him/her., it also refers to the application of the principle of *in dubio pro reo* and the standard that the guilt shall be proven beyond reasonable doubt.

2. Standard beyond reasonable doubt

So, if the burden of proof is on the prosecution, the logical question is to what degree of certainty this shall be proven. This question leads to the issue of the degree of proof as presented both in the standard of the prosecution having to prove the defendant's guilt beyond reasonable doubt, and the principle of any reasonable doubt favouring the defendant *dubio pro reo*. This standard/principle means that the probability of the defendant's guilt is so high that it eliminates all (reasonable) doubt, because, if there is (reasonable) doubt in the defendant's guilt, he/she must be acquitted:

(...) Proof beyond reasonable doubt is the highest standard of proof, which must be reached in any criminal case. Reasonable doubt is defined as the real doubt based on common sense and logical judgment after conscientious, full, and impartial evaluation of all evidence, or the lack thereof, in the case under trial. Consequently, proof beyond reasonable doubt is proof of such a convincing nature that any person can rely on it and act upon it without dilemmas in their most significant personal affairs. It does not, however, mean absolute certainty. (...)

As it was presented before and will be presented further, it can be seen that the reasonable doubt standard of proof has evolved and matured ever since it first came into existence in the common law systems several centuries ago.

The US Supreme Court read this right into the US Constitution in the *Winship* case, holding the State (prosecuting authorities) to the standard of proof beyond a reasonable doubt. Quoting from *Coffin v. United States* (1895), the US Supreme Court in *Winship* noted:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual errors. The standard provides concrete substance for the presumption of innocence – that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”

In the common law systems the trial judge instructs and gives guidance to the jurors throughout the trial. The judge must make it explicitly clear in these instructions that the jurors should give the benefit of the doubt to the accused. If there is any reasonable doubt from the totality of the evidence, the jury must acquit the accused. The process of instructing the jury throughout the trial and how the reasonable doubt instruction at the end of the trial is to be appreciated is cogently described by Richard Uviller:

Jurors are invariably instructed by the judge – usually several times – that they have the exclusive responsibility to find the facts; they are then told at length just how they are to go about finding those facts. Addressing the raw data accumulated during the trial (actually, the evidence is hardly raw, having been refined by evidentiary and constitutional filtration), the judge will enjoin the jury to use their ordinary faculties of judgment and common sense. Jurors are told how to weigh credibility, taking into account the demeanour of witnesses on the stand, tone of voice, eye movements, body language, attitude – all the various sorts of unconscious communications that often betray the liar and confirm the account of the truthful. The jury is told that the credibility of a witness may be attacked (“impeached”) by evidence of bias, by contradiction of evidence from another source, or by inconsistency between the

witness's trial testimony and some statement on the same matter previously made by the same witness. They are instructed that the defendant (if he testifies in his own behalf) and, in some instances, co-conspirators are biased as a matter of law because of their inherent stake in the outcome. Jurors are also instructed that other witnesses may be biased in fact for any one of a number of reasons, among them a personal or professional relationship to the defendant or victim or some personal interest in the outcome. At the same time, the jurors are reminded that even a biased witness may tell the truth. In general, they are advised they may either discard the discredited portions of an impeached as the suspect product of an incredible source. Although they are enjoined to use their own "judgment" on these matters, they are warned not to "speculate." They should find the facts on the basis of the supporting evidence, they are instructed, but they are also told that they may consider the lack of evidence along with the evidence on a point.

But the jury is not merely charged at the end of the trial with the reasonable doubt instruction (however defined). The trial judge cautions the jury throughout the trial on how to consider the evidence presented under the appropriate standard. At the end of the trial, the jury is reminded that it has the exclusive responsibility of assessing the evidence. It is for the jury to determine whether, and to what extent, all elements of all charged crimes have been proven to the standard of proof beyond a reasonable doubt – a standard that for all intents and purposes amounts to near certainty (since few things in life can be proved with absolute certainty).

Yet when the jury is told to apply the reasonable doubt standard in evaluating the evidence, they are told nothing about whether they must apply some objective, majoritarian perspective in evaluating doubt or to apply their own individualistic, subjective evaluations. Uviller has insightfully described the tension between the "objective" and "subjective" interpretations of the reasonable doubt standard. He explains that the "objective" and "subjective" are two possible ways of understanding the reasonable doubt standard:

Under the objective understanding, if juror A concedes that juror B has a persistent, good faith doubt based on the evidence, then juror A must vote "not guilty" even though she does not share juror B's doubt. Even if jurors conclude only that some imaginary, conscientious juror might entertain some doubt concerning the defendant's guilt, the objective view would acknowledge a reasonable doubt in the case and require the jury to acquit though none of them actually doubts the defendant's guilt.

Under the subjective interpretation, the question is first whether an individual juror, carefully weighing all the evidence and giving due consideration to the views of fellow jurors, personally doubts the guilt of the defendant. If this step produces a subjective sense of doubt in a juror's mind, the juror must ask himself the next question: whether the doubt is reasonable. Under this subjective reading, if a juror personally has no reasonable doubt, then notwithstanding the imperfections in the proof that might give others reason for doubt, the juror should vote "guilty."

Uviller correctly argues that the subjective understanding is the right one: doubt is an individual matter; jurors must not abandon their personal conclusions or vote against their judgment.

Relying on observations by US Federal Circuit Court Judges, Patricia Wald, and Jerome Frank, Robert C. Power argues: Experience with the reasonable doubt standard, as well as common sense, support the realist criticism that judges and academics overstate the importance of legal doctrine. Our modern and somewhat jaded "realistic"

view is that jurors generally disregard the judge's instructions and just do what they want to do. Judge Wald writes that "the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system."

This irrelevance results not only from the use of guilty pleas and prosecutorial discretion but also because juries do not apply the standard. For example, "few judges ... believe that every jury slavishly and precisely follows the beyond-a-reasonable-doubt standard in deciding guilt or innocence." Judge Wald's connection to the realist view is cemented by her affirmation of Judge Frank's comment that "were the full truth declared [sic] [as to what goes on in the jury room] it is doubtful whether more than one percent of verdicts could stand."

Today, the reasonable doubt standard of proof is widely spread on the Continent as well, in the so called hybrid systems. As such, many criminal justice systems throughout Europe require from the prosecution to prove the guilt of the defendant beyond reasonable doubt or with high certainty, otherwise, the defendant shall be acquitted.

For instance, in Germany the judge's conviction of the defendant's guilt "must be subjective and must be based on persuasive factors, which leave no room for reasonable doubt."

In Italy, when referring to convicting judgment the CPL states that: "The judge shall convict the defendant only if the defendant is found guilty beyond reasonable doubt of the crime he is charged with".

In the CPL of Serbia, accused individuals may not be convicted unless the prosecution proves their guilt with certainty.

The domestic LCP, when referring to acquitting decision, states that the court shall acquit whenever the prosecution fails to prove beyond reasonable doubt that the defendant is guilty.

An interesting proposition about how the judges/jurors should use the maxim beyond reasonable doubt in order to minimize the possibility of mistakes has been made by the distinguished philosopher of science Larry Laudan, the objective of which is to not only reduce the number of false convictions, but also the number of false acquittals. He claims that there should be just one simple rule that the jurors should use in the context of the required standard of proof, and that rule being: "Figure out whether the facts established by the prosecution rule out every reasonable hypothesis you can think of that would leave the defendant innocent. If they do, convict; otherwise, acquit".

3. The application of the standard beyond reasonable doubt in the anglo-saxon world

The Supreme Court of Massachusetts case *Commonwealth v. Webster* has endured to this day for the instruction given to the jury by Chief Justice Lemuel Shaw, but it was nonetheless infamous at the time due to the public profile of the victim and the accused. Dr. John Webster, a professor of chemistry at Harvard University, was accused of murdering his colleague, Dr. George Parkman, who was a well-known figure around Boston. Webster discussed the level of certainty necessary to warrant a conviction based on circumstantial evidence and provided a definition of the reasonable doubt standard.

The Court noted that this was a case "to be proved, if proved at all, by circumstantial evidence." It indicated that because "[c]rimes are secret" it becomes

necessary to use "all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions." However, "great care and caution ought to be used in drawing inferences from proved facts," as "[t]he common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty.... It is not sufficient that it is probable only: it must be reasonable and morally certain." The Court then added that "inferences drawn from independent sources, different from each other, but tending to the same conclusion, not only support each other but do so with an increased weight." "[A]ll the facts proved must be consistent with each other, and with the main fact sought to be proved...." Thus, if any fact "necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however, plausible or apparently conclusive the other circumstances may be, the charge must fail." Furthermore, "[i]t is not sufficient that [the circumstances] create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails." Chief Justice Shaw went on to define the reasonable doubt standard:

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

Chief Justice Shaw's definition of reasonable doubt would be widely adopted by other courts. For instance, in *Victor v. Nebraska* (1994), the US Supreme Court noted with approval the Webster definition as "probably the most satisfactory definition given to the words 'reasonable doubt' in any case known to criminal jurisprudence." Some commentators criticized the Webster charge. Judge May, a contemporary of Justice Shaw, noted that although the attempt to define reasonable doubt in Webster was "unsuccessful" and "unfortunate," "the effort to give it a more practical and comprehensible exposition gives promise of a reform which must be hailed with satisfaction."

William Trickett in his article, *Preponderance of Evidence, and Reasonable Doubt* (1906), criticized Chief Justice Shaw's instruction arguing that "it is impossible to see

how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, he is to convict him."

Miles v. United States was the first case in which the US Supreme Court addressed the issue of the definition of the reasonable doubt standard. As one of the grounds of error, the petitioner referred to the jury instruction defining reasonable doubt:

The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain that it exists. A balance of proof is not sufficient.

A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.

The US Supreme Court found no error in this instruction. The US Supreme Court relied on several state cases, including Webster and Giles, reasoning that: The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favourable to the accused and is sustained by respectable authority. Portentously, the US Supreme Court observed that attempts to clarify the term "reasonable doubt" would likely result in confusion, rather than clarity. Although the US Supreme Court explicitly recognized the dangers of attempting to define the term "reasonable doubt," it did not suggest any solution to the potential problem. Professor Miller W. Shealy Jr. notes in his analysis of *Miles* the failure of the Court at this early stage "to firmly settle on a definition marks the origin of the problem."

4. The application of the standard beyond reasonable doubt in the ECtHR case-law

In the *Geerings* case the Court has found that "if it is not found beyond a reasonable doubt that the suspect has actually committed the crime and if it cannot be established as a fact that any advantage, illegal or otherwise, was actually obtained by the suspect in connection with the crime, a measure like confiscation of goods allegedly connected to the crime cannot be ordered, because it would be based on a presumption of guilt" and therefore incompatible with Article 6 (2).

The case can be summarized as follows: the applicant was arrested and placed in pre-trial detention on suspicion of involvement – together with others – in various thefts of lorries containing merchandise. After the conclusion of the investigation, a first instance national court had established that the applicant had been involved in the theft of 120 laundry dryers from a lorry and in several thefts of lorries. The applicant lodged an appeal with the local Court of Appeal which quashed the first judgment and convicted the applicant of having participated only in some of the thefts and acquitted him of the remainder of the charges.

In the meantime, the prosecutor requested the judge to issue an order for the confiscation of an illegally obtained advantage which, according to the public

prosecutor, amounted to 67,020.16 Euros, including also goods related to the charges the applicant had been acquitted of. The applicant argued that a confiscation order could only be imposed in respect of the offences of which he had been found guilty. The local Court of Appeal granted the request of the prosecutor, thus referring the confiscation also to goods related to the crimes the defendant had been acquitted of.

In the case of Telfner the Court stated that there had been a shift of the burden of proof, since the accused, who refused to give evidence, had been convicted of a road traffic offence on the basis of the fact that he was the driver of the vehicle, despite the fact that no evidence had been found to corroborate the statement. More specifically, the decision of the national court was based on the facts that, although the car was registered under his mother's name, the accused was the main user of the vehicle and that he was not at home the night of the accident - facts which required from him, according to the national court, to present evidence that he was not the driver. The Court recalled that Article 6 (2) "requires, inter alia, that the burden of proof is on the prosecution, and any doubt should benefit the accused ... Thus, the presumption of innocence is infringed where the burden of proof is shifted from the prosecution to the defence ... In requiring the applicant to provide an explanation although they had not been able to establish a convincing *prima facie* case against him, the (national) courts shifted the burden of proof from the prosecution to the defense".

5. Conclusion

The context of criminal justice, relationships between European Union member states are viewed as one of the elements in the process of Europeanization, which makes us think of ways to turn this element into an effective and productive tool aimed at strengthening the human rights protection mechanism. The recent dynamic Europeanization of criminal justice became an object of scientific discussions. It is often viewed apologetically and is highly criticized for the efforts to harmonies and simplify the criminal proceedings of the European Union member states by choosing the quickest and most effective way to achieve the goal. Establishment of the European Union (hereinafter – EU) and its further growth reveals the development of its regulated areas and competence. The significance of the legislation adopted by the EU institutions and the significance of the decisions made by the Court of Justice of the European Union (hereinafter – the Court of Justice), which explains this legislation, is undeniable for the Member States. It complements the national legal regulation of the Member States. Consequently, over time the criminal justice got into the range of many areas, which are regulated by EU. On the one hand, the aim of coordinating of the sphere, which exclusively belongs to the national law, has the negative shade, on the other hand, in the absence of regulation of the unified international cooperation, investigations of criminal cases with an international element would stagnate. All these issues are becoming more important as the increasing need to regulate the quite sensitive assessed area of law is observed. Although Member States have provided the EU institutions the right to adopt the legislation, which is binding for Member States and thereby have limited their sovereign rights in certain areas, Member States seek as much as possible to maintain their traditions, culture and national identity.

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