

Kazimiera Juszka, Karol Juszka

Procedural-forensic confrontation in Poland: research issues

Problematyka badawcza konfrontacji procesowo-kryminalistycznej w Polsce

Introduction

Confrontation is a procedural-forensic action (Article 172 of the Polish Code of Criminal Procedure) which is treated by most of the professional literature as a facultative and special form of questioning (Hanausek, 2009, p. 255, The sentence of 12 February 2002 of the Appellate Court in Lublin). The Polish forensic doctrine points at two objectives of this action (Hanausek, 2009, p. 213). The principal objective is to clarify the contradiction in testimonies or explanations of persons questioned in the course of criminal proceedings. A secondary objective of the confrontation is the possibility of obtaining a resultant psychological effect consisting of such a powerful impression exerted by the course of confrontation upon a suspect, that he/she completely changes his/her attitude and abandons the tactics of negating the obvious facts applied so far (Hanausek, 2009, p. 213).

The objective of this paper is to present the author's own studies of 169 court and investigative cases where confrontations were conducted in court and during the investigation of killings, rapes, and burglaries. The issues associated with confrontation will be analyzed from the viewpoint of the observance of principles for conducting this procedure.

1. Methodology of studies of files of court and investigative cases

The studies involved the analysis of files of court and investigative cases in 169 criminal cases from the period 2000–2005 (K. Juszka, 2007, p. 223–243), where

confrontations were performed in cases of killings (Article 148 of the Polish Penal Code), rapes (Article 197 of the Polish Penal Code), and burglaries (Article 279 of the Polish Penal Code). The research tool used was a questionnaire covering 30 guidelines pertaining to the issues studied in this paper. In these 169 cases, a total of 30 confrontations were performed, including nine in cases of killings, 20 in cases of rapes, and one in the case of burglary.

These proceedings were conducted in 17 units of the common court system and prosecutor's offices within the areas of jurisdiction of the Appellate Court in Krakow, and the Appellate Prosecutor's Office in Krakow. The research tool used was a questionnaire containing 40 guidelines pertaining to the issues discussed in this paper, including both quantitative and qualitative features. In the 90 cases studied, a total of 251 procedures of conducting evidence by inspection were conducted, including 110 inspections of scene of events, 20 inspections of corpses, 29 bodily inspections of persons, and 92 inspections of objects.

The cases analyzed were chosen using the multi-stage sampling method (Zasępa, 1972, p. 17, 23), which in Poland is widely used in the social sciences. The first stage of the study was to determine its three layers (place, time, scope). The material from the first stage was applied to the second stage by means of simple stratified sampling which means that any file in a particular "layer" could be drawn with equal probability.

With this method it is possible to use statistical sampling to identify representative study material as it is collected in a variety of courts and prosecutors' offices. Thus, this method ensured significant cognitive and utilitarian effects.

2. Analysis of the results of research involving files of court and investigative cases

Polish forensic tactics, responding to the needs of criminal proceedings, have developed the following rules for conducting the forensic procedure discussed in this paper (K. Juszka, 2007, p. 158–184, 252–253, 294–298, 331–334, 347–348. Compare: K. Juszka, E. Żywucka-Kozłowska, 2009, p. 33–41, E. Gruza, 2009, p. 154–159K. Juszka, 2010, no. 3, p. 68–77, P. Łobacz, 2013, J. Żylińska, 2013, K. Juszka, E. Żywucka-Kozłowska, 2015, p. 527–534, K. Juszka, 2015, p. 527–534, D. Orkiszewska, 2016, E. Gruza, M. Goc, J. Moszczyński, 2020, p. 211–214, The sentence of 14 May 2019 of the Supreme Court; the sentence of 6 February 2019 of the Supreme Court, the order of 9 August 2017 r. of the Supreme Court, the sentence of 22 May 2017 of the Appeal Court in Wrocław; the order of 21

January 2016 of the Supreme Court; the sentence of 30 July 2014 of the Appeal Court in Lublin):

1. A plan of the confrontation should be prepared on a sheet of paper with particularly suitable questions resulting from the thorough analysis of earlier testimonies or explanations of the persons to be confronted,
2. the confrontation should be conducted by two investigators,
3. it is obligatory not to inform the person that his/her testimonies or explanations have been contrary to the evidence gathered in the case of an approaching confrontation,
4. it is obligatory to inform the person that his/her testimonies or explanations have conformed with the evidence gathered in the case of an approaching confrontation,
5. the availability of suitable means should be ensured, particularly visual or audio recording equipment, as well as providing technical conditions for conducting the confrontation,
6. the correct sequence of bringing in the questioned person/s to the place of confrontation should be observed,
7. the person conducting the confrontation is obliged to keep secret the information which the person/s confronted has/have testified or explained in conformity with the evidence gathered in the case,
8. the questioning of the confronted person/s should be selective,
9. the confronting persons are obliged to relate to each other only through the person conducting the confrontation, after the questions are written on a sheet of paper and handed over to the officer conducting the confrontation,
10. the tactical and procedural principles for preparing a protocol should be observed, and in particular, the requirements of signing each sheet of the protocol by each person participating in the procedure,
11. it is obligatory to promptly question a person who has changed testimonies or explanations after the confrontation was conducted.

The first principle for the correct performance of confrontation pertains to specifying the timing of this procedure in its protocol. It is correctly emphasized that the separate questioning of each person should come first, and later, after the analysis of these questionings, a decision on conducting confrontation can be taken, and then the procedure can be prepared. In order to do the latter, after a thorough analysis of the proceedings to date, confrontation questions should be competently drafted.

The author's own research on 40 cases concerning killings indicates that the duration of the procedure was specified in one out of nine confrontations.

In eight remaining protocols of this procedure, the data on this subject was not included. The author's own analysis of 20 cases concerning rapes indicates that in two out of 20 protocols of confrontations the above mentioned time taken by the performing of this procedure was correctly specified, whereas the remaining 18 protocols of confrontation lacked data in this respect. The results of the author's studies of 108 cases of burglaries showed the duration of confrontations conducted were not specified correctly.

The second important principle for conducting confrontations is connected with the logistical aspect which aims at preventing contact between the confronted persons themselves and with other persons prior to carrying out the procedure. The logistical preparations go in two directions. The first involves drafting a plan of confrontation, concerning, in particular, the preparation of the questions resulting from earlier testimonies of explanations provided by the confronted parties. The second direction concerns the police security around the place of confrontation. The tactical preparation of the place of confrontation includes, for example, such an arrangement of table and chairs that the confronted person sits at the correct distance and faces the interrogating officer rather than being in front of him. The purpose of this rule is to avoid dismissing evidence from the confrontation because of the influence between the confronted persons and affecting other persons in preparation for a confrontation.

The author's own research of the cases of killings shows that the proper time interval between the confrontations of questioned persons was observed in only three out of nine protocols of confrontation. In the author's studies of rape cases the correct time interval between confrontations was correct in three confrontations, whilst in 17 studied procedures there was no information on this subject. In the studied confrontations in cases of burglaries, the principle of keeping correct time intervals was observed.

The principal tactical directive for questioning involving confrontation is the principle that it is conducted by two investigators, one of whom must be appointed as a leader of the procedure (Otlowski, 1979, p. 118) This requirement is connected with the superior power of decision of the person leading the procedure whose duty is to see to the proper and safe course of the confrontation. These powers stem from the specific nature of the questioning involving confrontation which involves the simultaneous questioning of two persons having an antagonistic attitude to one another.

The analysis of the author's own studies of 40 cases of killings indicate that two investigators conducted the procedure in only four out of nine confrontations. The remaining five confrontations were conducted by one investigator. In the

studies of 20 cases of rapes, it was noted that in 18 procedures the above rule for conducting a confrontation was not observed. Only in two confrontations were the procedures conducted by two investigators. In 108 cases concerning burglaries just one confrontation conducted by only one investigator was found, thus breaking the principle of conducting the confrontation by two persons.

The essential principle for conducting a confrontation is to observe the rule of questioning first the person who, as indicated by the comprehensive analysis of the case file, is the person telling the truth. Questioning the second person whose testimonies or explanations contradict the evidence collected in the case, is dictated by the psychological aspect of convincing him/her that both the other person and the investigator carrying the procedure know the truth and thus they outnumber him/her.

As indicated by the author's own studies of cases involving killings, the correct sequence of questioning was applied in six out of nine confrontations. In the remaining three protocols no information on this aspect of procedure was found because neither the earlier questioning nor the protocol indicated which person was the one to whom the proceeding authority lent more credence. The studies also indicate that the principle of the proper sequence of questioning the confronted persons was observed in all confrontations performed in cases of rapes and burglaries.

The next rule to be observed when conducting a confrontation is to document the course of the procedure using visual or audio recording equipment. This method for recording the procedure is particularly useful in describing the atmosphere in the course of confrontation, including the manner in which particular questions are answered. This facilitates not only the formal verification of the course of confrontation but also that concerning the substance, e.g. taking into account body language, and the element of surprise.

The author's own studies of the cases of killings indicate the non-observance of this principle, because in only one out of nine confrontations was the procedure documented by photographs. In rape cases as well as in burglary cases, the studies found that none of the confrontations were documented with the use of visual or audio recording equipment.

The key principle for conducting confrontation is to follow its interrogative format, which consists of asking selective questions prepared beforehand by the person conducting the procedure alternatively to each of the questioned persons. Two requirements of the confronted persons are associated with this principle. The first is the obligation to answer questions directly to the investigator leading the procedure. The second is the requirement that the confronted

persons communicate between themselves exclusively through the investigator leading the confrontation.

Observance of this all-important rule was noted in the author's own studies on the cases of killings where it was noted in five confrontations, whereas in the remaining four, regular questioning by two persons was carried out without a prepared list of selective questions. In the analyzed cases of rapes, the rule calling for an interrogative format to be used during a confrontation was adhered to during 19 confrontations and not observed in one confrontation. The studies of burglary cases indicate that the interrogative format was followed in the confrontations conducted in these cases.

Account should be taken of the tactical requirements pertaining to the proper form of drafting the protocol. One of these requirements is the obligation to refer to legal grounds for conducting the confrontation, and also to the problem to be solved, resulting from a given specific case.

The analysis of the results obtained in the cases of killings with respect to referring to the legal grounds, indicates that two protocols of this important and difficult forensic procedure were not properly formulated, while the formulations of the remaining seven were correct. Additionally, the problem to be solved was clearly stated in the protocols of only four cases. In the remaining five protocols the problem was not formulated at all. The studies of files in rape cases with respect to this subject, found 17 protocols to be proper, and three remaining protocols with errors – in the routine description of the objective of confrontation due to the insertion of a 'clarifying contradictions' note. The principle was also not observed in the studied files pertaining to cases of burglaries, the code-based and tactical principle calling for the correct drafting of the protocol of confrontation. Again, the failures to comply with the principle consisted in the routine description of the objective of confrontation by inserting a 'clarifying contradictions' note.

Admitting the evidence obtained by confrontation occurs after the observance of the rule requiring that the protocol should be signed by all persons participating in the procedure has been varied. This rule pertains to both: the persons conducting the procedure and the persons questioned. If this requirement is not met, it excludes admission of the procedure of confrontation as evidence in a given case.

In the author's own studies of cases involving killings, there was just one case where this principle was breached because not all persons participating in the procedure signed the protocol. In the author's studies of rape cases, the elementary obligation of signing the protocols by all persons participating in the confrontations was fulfilled in all cases. In the analyzed protocols of confronta-

tions in cases of burglaries, the principle of signing the protocol by all persons participating in the procedure was not observed.

3. Summary results of studies of files in court and investigative cases

The studies on the methodological issues in performing a confrontation in Poland, was presented through checking the practical observance of the principles for this difficult procedural-forensic action. The analysis of the results indicates the need for sustained improvements in performing this procedure by the enforcement agencies. The tactical and procedural consequences of sticking to particular principles for conducting a confrontation will enable the manner in which it is conducted to be improved, which – as a consequence – will result in the more frequent admission of evidence obtained in this procedure in the course of criminal proceedings.

Bibliography

Normative acts

Statute of 6 June 1997 Code of Criminal Procedure, Journal of Laws of 1997, No. 89, item 555 with later amendments.

Statute of 6 June 1997 Code of Penal Law, Journal of Laws of 1997, No. 88, item 553 with later amendments.

Judicial decisions

The sentence of 14 May 2019 of the Supreme Court, II KK 293/18. Retrieved from <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%20293-18.pdf> (07.06.2021).

The sentence of 6 February 2019 of the Supreme Court, IV KS 4/19. Retrieved from <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iv%20ks%204-19.pdf> (07.06.2021).

The order of 9 August 2017 r. of the Supreme Court, II KK 182/17, <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%20182-17.pdf> (07.06.2021).

The sentence of 22 May 2017 of the Appeal Court in Wrocław, II AKa 37/17, LEX no. 2278266.

The order of 21 January 2016 of the Supreme Court, II KK 372/15, LEX no. 1959482.

The sentence of 30 July 2014 of the Appeal Court in Lublin; II AKa 153/14. Retrieved from <https://www.saos.org.pl/judgments/58037>.

The sentence of 12 February 2002 of the Appellate Court in Lublin, II AKa 336/01, OSA 2002, No. 12, item 87.

Literature

- Gruza, E. (2009). *Psychologia sądowa dla prawników*. Warszawa: Oficyna a Wolters Kluwer business.
- Gruza, E., Goc, M., Moszczyński, J. (2020). *Kryminalistyka, czyli o współczesnych metodach dowodzenia przestępstw*. Warszawa: Wolters Kluwer.
- Hanausek, T. (1970). Kryminalistyczna taktyka w zakresie szczególnych form przesłuchania świadka. *Wojskowy Przegląd Prawniczy*, 4 (57), 490–507.
- Hanausek, T. (2009). *Kryminalistyka. Zarys wykładu*. Kraków: LEX a Wolters Kluwer business.
- Juska, K. (2007). *Jakość czynności kryminalistycznych*. Lublin: Oficyna Wydawnicza Verba.
- Juska, K. (2010). Problematyka dokumentacji konfrontacji. *Prokurator*, 3, 68–77.
- Juska, K., Żywucka-Kozłowska, E. (2009). Utylitarny charakter konfrontacji. *Przegląd Policyjny*, 2, 33–41.
- Juska, K., Żywucka-Kozłowska, E. (2015). Orzecznicze podstawy sposobu przeprowadzania eksperymentu, okazania i konfrontacji w sprawach o zabójstwa. In: S. Pikulski, W. Cieślak, M. Romańczuk-Grącka (Eds.), *Przyszłość prawa karnego. Alternatywne reakcje na przestępstwo* (p. 527–534). Olsztyn: Poland: Pracownia Wydawnicza ElSet.
- Łobacz, P. (2013). *Konfrontacja. Studium karnoprawne i kryminalistyczne*. Warszawa: C.H. Beck Press.
- Orkiszewska D. (2016). *Konfrontacja w postępowaniu karnym*. Lublin: Towarzystwo Wydawnictw Naukowych LIBROPOLIS.
- Otłowski, K. (1979). *Podejrzany w postępowaniu karnym. Studium kryminalistyczne*. Warszawa: Państwowe Wydawnictwo Naukowe.
- Zasępa, R. (1972). *Metoda reprezentacyjna*. Warszawa: Państwowe Wydawnictwo Ekonomiczne.
- Żylińska, J. (2013). Przesłanki konfrontacji. *Prokuratura i Prawo*, 2, 154–168.

Summary

The objective of this paper is to present the author's own studies of 169 court and investigative cases where confrontations were conducted in court and investigative cases of killings, rapes, and burglaries. The issues associated with confrontation will be analyzed from the viewpoint of the observance of principles for conducting this procedure

KEYWORDS: confrontation, questioning, effectiveness, detection process, research results

Streszczenie

Celem artykułu jest prezentacja wyników badań własnych 169 spraw sądowych i prokuratorskich, w których przeprowadzono konfrontację w sprawach zabójstw, zgwałceń i kradzieży z włamaniem. Niniejsza problematyka zostanie poddana analizie z punktu widzenia realizacji zasad przeprowadzenia tej czynności.

SŁOWA KLUCZOWE: konfrontacja, przesłuchanie, efektywność, process wykrywczy, wyniki badań własnych.

Note of authors

Kazimiera Juszka – Dr. habil., professor of Pedagogical University of Cracow, Institute of Law, and Economics; the areas of my scientific interest include: study of procedural-forensic actions, forensic hypothesis, unconventional investigative techniques, protection of persons and property, and graphological analyses; e-mail: kazimiera.juszka@gmail.com; ORCID: 0000-0002-8466-1716.

Karol Juszka – Dr., Pedagogical University of Cracow, Institute of Law and Economics; basic research areas are the forms of ceasing the execution of the liberty deprivation penalty, probative measures, inflicting penalty, inspection in forensic sciences and human rights; e-mail: karol.juszka@gmail.com; ORCID: 0000-0001-7547-2449.

