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Cezary Kulesza
University of Białystok
c_kulesza@wp.pl

Commentary on the Judgment of the Supreme Court of 14 December 2016 (Ref. No. III KK 152/16)[1]

In the case of circumstantial prosecution, an unbreakable chain of circumstantial evidence examined in mutual connection should lead to a compelling conclusion about the defendant's perpetration despite a lack of direct evidence thereof.

I. This judgment has been rendered on the grounds of the following facts.

V.B. was tried on the charge of attempted importation of a considerable amount of intoxicated substances in the form of 93,084.52 kg of heroin on 8 March 2014 into the territory of Poland across the Polish border in Dorohusk acting jointly and in mutual cooperation with other persons. Heroin was hidden in a deliberately made cubby-hole located in the Volvo truck tractor's trailer. V.B.'s plan failed because he was rejected entry into Poland by the Border Customs Service and his car was seized by the Border Guard officers, i.e. he was charged with the commission of an act under Art. 13 § 1 of the Criminal Code in connection with Art. 55 par. 3 of the Act of 29 July 2005 on Counteracting Drug Addiction.

Regional Court in (…) found the defendant guilty as charged in the judgment of 30 January 2015 in the case IV K …/14, eliminating complicity from the description of the attributed act and sentencing him to ten years of deprivation of liberty.

The judgment was challenged in the appeal submitted by the defendant's three defence counsels.

1 Lex No. 2171117.

Without getting into details of the claims raised by the defendant's three defence counsels in the appeal (concerning mainly the violation of the principle of free assessment of evidence and error as to the established facts), it should be acknowledged that the Court of Appeal in (…) modified the judgment under appeal on 14 July 2015 in the case II AKa …/15 by reducing the defendant's sentence to seven years imprisonment upholding in force the remaining part of the judgment under appeal.

The defence counsels objected in the cassation against the above judgment of the court of appeal that the court, among others, did not examine the appeal's claims pointing to the regional court's failure to fulfil the directives of assessment of evidence and presumptive evidence in the absolutely *circumstantial* case, which lacked at least one evidence proving that V.B. had been aware of the trailer wall's reconstruction and hiding drugs there, failure to check the lapse of the defendant's ban on entry to Poland, failure to consider if the poor driver maintaining two children of an impeccable opinion, with clean criminal record and without contacts with the so called dregs of society could have so much money as to purchase a considerable amount of one of the most expensive drugs in the world and travel around Europe and Asia delivering his cargo fearing nothing and not hiding at all being totally unaware of alleged smuggling of a considerable amount of drugs and not feeling guilty of anything . Moreover, the Defence claimed that it would be impossible to establish the defendant's awareness (without complicity with the third parties, which was eliminated by the regional court from the description of the act attributed to the defendant) of building in a cubby-hole in his vehicle where drugs were hidden from the materials (the expert witness confirmed that these were plastic pipes manufactured outside the EU on the specifically established date) the defendant was not able to access.

Hearing the cassation, the Supreme Court decided it was fully grounded within the scope of gross infringement of Art. 433 § 2 of the Code of Criminal Procedure in connection with Art. 457 § 3 of the CCP claimed by the Defence. The Court decided that the appellants were absolutely right saying that the claims made by the defence counsels in the appeals were examined very superficially in a manner "pretending their consideration", that is with the gross infringement of Art. 433 § 2 of the CCP. The Supreme Court held that both the courts hearing the case and the parties to the proceedings alike had agreed that the case was *circumstantial*. In the SC's opinion, such a conclusion implied, above all, the requirement of diligence in analyzing the collected evidence. The Court underlined that it is traditionally assumed in such cases that an unbreakable chain of circumstantial evidence examined in mutual connection should lead to a compelling conclusion about the defendant's perpetration despite a lack of direct evidence thereof. Reversing the court of appeal's judgment, the Supreme Court pointed out what evidence should have been taken (among others, hearing of CBŚ officers) to assure that the case's resolution satisfied the standards of a fair trial.

II. The Supreme Court's glossed judgment evokes the analysis of opinions held by the doctrine and court case law as to the essence of circumstantial evidence and circumstantial trials.

While generally accepting this judgment's thesis, we may find there at least the following assumptions.

First of all, it defines the case of "a circumstantial nature" where direct evidence does not exist.

Secondly, the Supreme Court notices that in such a case an unbreakable chain of circumstantial evidence must lead to a compelling conclusion about the defendant's perpetration.

1. Referring to the first statement, it should be noticed that the doctrine of a criminal trial traditionally distinguishes the so called direct evidence and indirect (circumstantial) evidence in the classification of evidence. The first group embraces evidence upon which a basic fact can be proven directly through deductive reasoning, which is logically reliable, whereas circumstantial evidence relies on the method of reductive reasoning, allowing to reconstruct facts upon presumptive evidence of the actual chain of prosecuted criminal events[2].

Z. Papierkowski's definition should be recognized as still up-to-date; according to it, "presumptive evidence is constructed in such a way that certain circumstances which are not directly connected with the crime have been proved while genuineness of a basic fact being the object of prosecution may be confirmed only afterwards"[3].

In the post-war subject literature, M. Cieślak claimed that direct evidence is directly aimed at proving a basic fact. On the other hand, presumptive evidence proves a basic fact through one piece of evidence or a larger number of evidence[4]. In his opinion, presumptive evidence is closer to derivative evidence because in both cases there is some agent between evidence and a basic fact. "A difference between them is the fact that in derivative evidence an additional source of evidence is an agent whereas in indirect evidence this additional element is just a piece of evidence, i.e. presumptive evidence constituting a key notion herein. Similar to the sources of evidence in derivative multifaceted evidence, presumptive evidence may be put in a chain of subsequently linked elements thus distancing an investigator from the main fact. Due to this, with regard to indirect evidence, we may also talk about their multifaceted nature depending on a number of criminal evidence being indirect elements thereof "[5].

2 R. Kmiecik, E. Skrętowicz, Proces karny. Część ogólna, Kraków 2006, p. 360; S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 358.

3 Z. Papierkowski, Dowód poszlakowy w postępowaniu karnem, Studjum procesowo-prawne, Lublin 1933, p. 33.

4 M. Cieślak, Dzieła wybrane, vol. 1, S. Waltoś (ed.), Kraków 2011, p. 72.

5 M. Cieślak, Dzieła wybrane, p. 72.

M. Cieślak emphasized that a manner of reasoning in direct and indirect evidence is similar: "in both cases proving is indirect learning, reasoning going from known consequences to unknown truths while evidence is this necessary agent linking procedural body's awareness with the fact under examination. With regard to indirect evidence, a course of procedural body's reasoning, however, becomes more complicated because an addition element is introduced"[6].

2. Hence the Supreme Court's assumption that a lack of indirect evidence decides about "a circumstantial nature of a case" must be considered. In this context, it should be noticed that the post-war subject literature also discusses the essence of a circumstantial trial as proceedings based not only fully but also partially on presumptive evidence.

According to L. Peiper, a circumstantial trial may be divided into three types of proceedings with regard to presumptive evidence[7]:

1) proceedings based exclusively on the evidence provided by the eyewitnesses of an act,
2) proceedings based exclusively on presumptive evidence,
3) proceedings based both on the eyewitnesses of an act and presumptive evidence.

L. Peiper called the last type of proceedings as a mixed trial where a verdict may eventually be passed exclusively upon presumptive evidence, e.g. when a court finds witnesses' evidence uncertain or not credible for other reasons and carries out the assessment of presumptive evidence collected in the case.

3. In any case, it should be noticed that the Supreme Court's case law consistently refers the notion of a circumstantial trial solely to cases where there is no direct evidence while the defendant's perpetration and guilt is exclusively decided upon indirect evidence.

The Supreme Court's judgment of 24 April 1975, II KR 364/74[8], which was passed still under the CCP of 1969, had a considerable impact on defining the essence of a criminal trial, which was specified as follows:

"A circumstantial trial should be understood as a trial where there are no direct proofs of guilt, presumptive evidence is not complete – there are only circumstances upon which guilt may be merely speculated about; whereas explanations of co-defendants confirming specific facts proving the defendant's guilt are not presumptive evidence but direct evidence while the assessment of their credibility does not affect their nature".

6 *Ibidem*.
7 L. Peiper, Proces poszlakowy, Głos Prawa, 1930, No. 5, p. 179-180.
8 OSNKW 1975, z. 8, item 111.

Commenting this judgment, Z. Doda and A. Gaberle ascertained that the interpretation proposed by the Supreme Court accurately specifies the essence of "a circumstantial trial", but they also noticed that the SC uses the term of "presumptive evidence" to designate different things, namely "evidence" and "a piece of evidence". According to these authors, " presumptive evidence" is by all means not "evidence" because it is "a piece of evidence" implied by "indirect evidence" ("circumstantial evidence"). In respect of "the defendant's explanations", these may be both "direct evidence" and "indirect evidence" depending on the fact whether they refer directly to the basic fact, or whether their subject are merely specific pieces of evidence ("presumptive evidence")"[9].

Furthermore, the current court case law adopts a generally "classical" definition of a circumstantial trial: "A circumstantial trial lacks direct evidence (at least derivative evidence) whereas findings about the defendant's perpetration of the criminal act he or she is charged with are merely based on indirect evidence (circumstantial)"[10]. It should be noticed that in the current case law, the Supreme Court generally attempts to avoid using a "pejorative" notion of "a circumstantial trial" if apart from presumptive evidence, there is also direct evidence in a criminal case, e.g. when the defendant pleads guilty[11].

4. Although the Supreme Court used the term "a case of a circumstantial nature" and not "a circumstantial trial" in the thesis of the glossed judgment, reading the reasons thereto, one comes to the conclusion that this court accepts herein a commonly adopted essence of this trial in its case law. It seems, however, that a different opinion may be assumed in this respect, i.e. defining a circumstantial trial **as hearing of evidence embracing accidental facts (presumptive evidence).**

Hence it may be ascertained that hearing of evidence in such a trial covers both a basic fact and accidental facts while proving them is not an ultimate purpose of proving in this trial[12].

Such a definition allows to determine a circumstantial trial *in sensu largo*, where hearing of evidence is based on both proofs (evidence) referring directly to a basic fact (direct evidence) and indirect evidence permitting to reconstruct presumptive evidence as accidental facts. On the other hand, a circumstantial trial *in sensu stricto* may be determined as hearing of evidence whose direct subject are accidental facts due to a lack of direct evidence.

The above adopted definition of a circumstantial trial may be justified by J. Nelken's opinion, who claims that "on the one hand, presumptive evidence is a direct

9 Z. Doda, A. Gaberle, Orzecznictwo Sądu Najwyższego. Komentarz tom I, Dowody w procesie karnym, Warszawa 1995, p. 35.

10 The Judgment of the Appeal Court in Gdańsk of 25 July 2013, II Aka 175/13, Lex No. 1378651.

11 See e.g. Decision of the Supreme Court of 26 November 2016, IV KO 33/16, Lex No. 2110963.

12 See e.g. C. Kulesza, (in:) C. Kulesza, P. Starzyński, Postępowanie karne, Warszawa 2017, p. 188-189.

object of hearing of evidence, while on the other hand, it does not belong to the main subject of these proceedings; it is not covered by a basic fact whose establishment is an ultimate purpose of a criminal trial with regard to factual findings. Presumptive evidence "points to" the basic fact just because it is itself beyond the basic fact, somehow outside this fact. Otherwise, it would be difficult to talk about a causal connection between presumptive evidence (accidental facts) and the basic fact"[13].

This author noticed that a role of presumptive evidence is not merely limited to indirect establishment of a basic fact but it may be a base to create a version of the event and a ground for some procedural actions such as initiating investigation procedure, charging, applying preventive measures, closing investigation procedure, and bringing indictment[14].

The above presented possibility of taking advantage of presumptive evidence not only in taking a final decision on the subject of a trial but resolving incidental issues too is a certain argument for placing "a circumstantial trial" in the sphere of hearing evidence rather than extending it for the entire criminal procedure. It may happen that during the investigation procedure (in particular in the *in rem* phase) a procedural body will only have indirect evidence and, next, it will obtain evidence referring directly to the basic fact.

Thus the notion of a circumstantial trial" adopted in the procedural theory and practice should be treated as certain simplification because it is merely a type of hearing of evidence not being a special type of criminal proceedings. Opposite to special proceedings specified in Section X of the Code of Criminal Procedure, it is not characterized by any special relation with regard to the formalism of ordinary proceedings[15].

Attempting to determine a mutual relation of the terms "presumptive evidence" and "circumstantial trial", it may be not so insightfully held that a circumstantial trial is a criminal proceeding using the structure of presumptive evidence.

Presumptive evidence in this meaning cannot be identified with a proof but evidence in the meaning of the process of proving in the real and cognitive aspect, i.e. encompassing all factual and legal actions undertaken in order to retrieve, record and use evidence in order to establish accidental facts, and then conclude about a basic fact thereon.

On the other hand, in the contemporary criminal trial, arguments against distinguishing "a circumstantial trial" as a special type of a criminal trial are provided

13 J. Nelken, Dowód poszlakowy w procesie karnym, Warszawa 1970, p. 15.

14 *Ibidem*.

15 See more: P. Starzyński, (in:) C. Kulesza, P. Starzyński, Postępowanie karne, p. 372.

by the principle of free assessment of evidence to be followed in criminal proceedings including a ban on their evaluation[16].

5. The above considerations evoke the need to comment on the second assumption adopted in the thesis of the glossed judgment and referring to "the conclusive force of evidence" of a circumstantial trial.

The subject literature still from the time of validity of the CCP of 1969 pointed out that presumptive evidence must satisfy three conditions to be recognized as the grounds for factual findings[17]:

1) it must prove the existence of a chain of presumptions which will univocally imply the resolution of a basic fact because single and not mutually connected presumptions do not prove anything;
2) the chain of presumptions must be unbreakable and without loopholes, in other words, it may not allow a rational support for yet another version;
3) all presumptive evidence must be credible and all presumptions suggested by this evidence must be proved; there is no place for weak presumptions in the chain of presumptions; a presumption must be either proved or dismissed.

Although the Supreme Court included in the thesis of the glossed judgment *expressis verbis* only the two first conditions of presumptive evidence's credibility, thorough reading of the reasons thereto allows to conclude that the Court finds the requirement of certain proving of each accidental fact to be obvious as well.

Furthermore, in the light of the valid procedural law, which by abandoning a legal theory of evidence does not evaluate any evidence in advance and does not favour some evidence over other, contemporary subject literature acknowledges that guilt may solely be proven upon legally admissible presumptions. For this reason, according to R. Kmiecik, in the so called circumstantial trial, a set of presumptions necessary to prove guilt may not evoke any loopholes or doubts whatsoever, otherwise, in accordance with the principle of *in dubio pro reo,* the defendant should be acquitted. However, the author further observes that the establishment of presumptions (accidental facts important for evidence) must be formally proved[18].

In this context, the issue of "unbreakability" of a chain of presumptions as a condition of certainty of presumptive evidence built upon them should be briefly explained. The opinion of J. Nelken is worth noticing here, who righty observed that if some presumption (or some presumptions) drops off the chain and all remaining presumptions still allow to construct such a version of the event which excludes other possible versions, then the evidence derived from the presumptions may be found

16 See M. Kurowski, (in:) Kodeks postępowania karnego. Komentarz, D. Świecki (ed.), tom I, Warszawa 2015, p. 62-65.

17 S. Waltoś, Proces karny. Zarys systemu, Warszawa 1985, p. 418.

18 R. Kmiecik, E. Skrętowicz, Proces karny…, p. 361.

certain[19]. The Supreme Court's decision of 11 December 2006[20] may be referred to in the above context, where the Court considered if removal of three findings from the chain of proven facts does not, however, entail such decomposition of the set of circumstances proved without reasonable doubts that it would lead to the abolishment of the thesis of the defendant's attributed participation in the crime. The Supreme Court supported J. Nelken's extensive considerations on the essence of presumptive evidence on the above opinion noticing that everything depends on the nature of evidence which remained unchallenged and which may and should be assessed fully univocally.

6. Summing up the above considerations justifying general approval of the opinion expressed in the thesis of the glossed judgment, it should eventually be noticed that in its case law the Supreme Court does not impose on common courts its assessment of evidence in circumstantial cases but specifies certain standards and procedure of this assessment ruling that: "Facts in a circumstantial trial are proven in two stages. The first one is limited to the establishment of accidental facts on the basis of proofs directly implying their occurrence. If a court believes these presumptions are established beyond reasonable doubt, in the second stage, the conclusions on the basic fact may be made upon them if already established facts (presumptions) provide reasonable grounds for further findings"[21].

19 J. Nelken, Dowód poszlakowy, p. 87 ff.

20 V KK 131/06, OSNKW 2007/1/9.

21 The Decision of the Supreme Court of 12 May 2010, V KK 380/09, Lex No. 584781, see also the judgment of the Supreme Court of 14 May 2015, II KK 49/15, Lex No. 1745828 and od 16 December 2016 r., III KK 296/16, Lex No. 2188642.