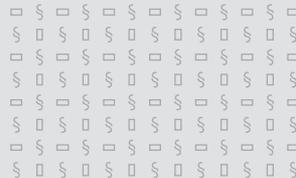


MASARYK UNIVERSITY FACULTY OF LAW

Evidence Law/ The Law of evidence

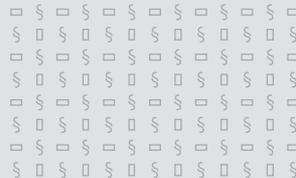
Marek FRYSTAK
Department of Criminal Law

Selected problems of Czech Criminal Law, 5th. December 2016

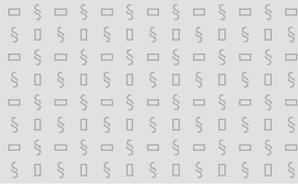


General Information

- evidence law - written law included in the Criminal Procedure Code (CPC)
- all those provisions represent a certain instruction of rational steps of investigative, prosecuting and adjudicating bodies (IPA bodies) when preparing the factual basis of their decision
- the primary source of (not only) criminal law is the law
 - state authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law
 - IPA bodies are state authorities and can exercise in criminal proceedings only what the law allows them

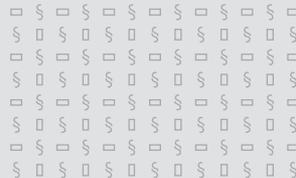


- in making decisions, (not only) judges are bound only by statutes and treaties which form a part of the legal order
 - politics, confession, momentary good or bad mood, family well-being, tiredness etc.
- judicial decisions (case law) are not the source of law
- why the courts use them and base on them their decisions?
 - respect the legal certainty of citizens based on the fact that the courts in factually similar cases decided in a similar way
 - if the courts decides the case without applied judicial decisions is real appeal court overrule this decision



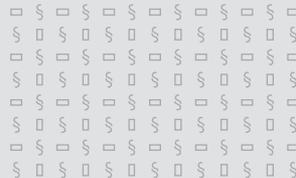
Evidence

- evidence means action (activity) of IPA bodies regulated in CPC the objective of which is to loop up evidence, produce such obtained evidence and to check and assess the obtained evidence
- evidence represents the only way in which IPA bodies may and must obtain the factual basis for its decision or for further actions

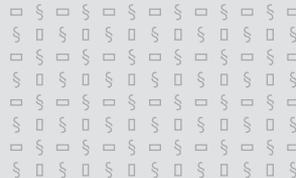


Basic Phases of Evidence

- searching for evidence - an obligation of all IPA bodies to search for anything that may be used as a mean of evidence and which may contribute to clarification of the case
 - e.g. questioning of the accused, questioning of the witness, examination of the scene of crime etc.
- producing and procedural taking of evidence - an obligation of IPA bodies to produce all found items of evidence and to take them procedurally
 - e.g. examination of the scene of crime itself and its taking in the form of a report on examination of the scene of crime, including a plan or sketch of the scene of crime, making video and audio documentation etc.



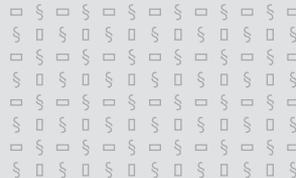
- checking and assessing the evidence - an obligation of IPA bodies to check each found evidence in details and subsequently also in mutual relations between items of evidence
 - reliability of evidence
 - the witness is advised to tell the truth but he is lying (it his reliable?)
 - correct and due performance of the check is a basic prerequisite of an objective assessment of evidence



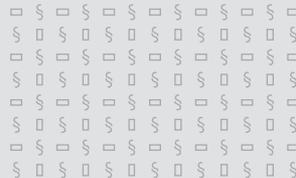
Basic Principles of Evidence

Presumption of Innocence Principle

- until guilt is declared in a final and conclusive sentencing judgment, the one against whom the criminal proceedings is conducted may not be considered guilty
- if there are any doubts about guilt of the accused and those can't be successfully removed by producing other evidence then it is necessary to decide for the benefit of the accused - principle in dubio pro reo
 - practical reaction of IPA bodies
 - „I am clear and sure about your guilty and evidence restrain me“

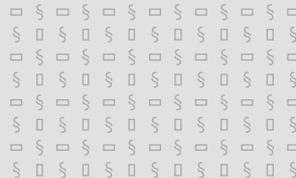


- in order to sentence the accused, his guilt must be proven as the accused is not obliged to prove his innocence or more precisely to prove any fact important for criminal proceedings
 - nemo tenetur se ipsum accusare - privilege against self-incrimination
- no conclusion regarding guilt may be deduced from activity or passivity of accused
 - accused may remain silent and totally passive (it is his fundamental right)



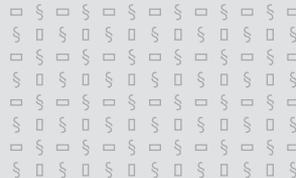
Searching Principle

- IPA bodies are obliged to ascertain ex officio facts testifying for the benefit as well as to the detriment of the accused
 - e.g on the basis of their official duty and they do not wait for any activity/motion of the parties
 - „indictment deviation“
- the accused may suggest production of a certain time of evidence
 - e.g. clarification of a fact which is important in terms of his guilt and which may even testify for his benefit
 - evidence can not be rejected just because it suggested by the accused

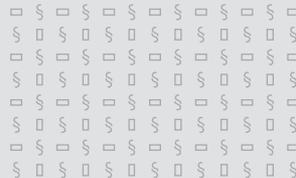


Verbal Principle

- hearing before court is verbal
- evidence in the form of testimony of witnesses, experts and the accused is usually produced by interrogation of those persons
- there is an opportunity to produce evidence by reading a record of prior questioning of accused/witness if
 - he/she refuses to give a testimony before court
 - is in relation to the accused his sibling, adoptive parents, adoptive child, spouse, partner or common law husband

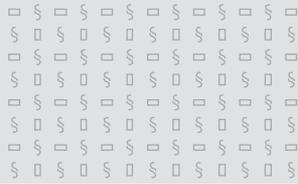


- there are differences in their current and original testimony
 - it does not mean that an accused/witness is lying (ability to remember after a long time period)
- the witness testimony does not agree with the accused testimony
 - in order to find the reliability of evidence is necessary to remove these distortions

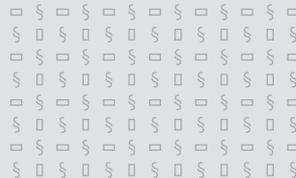


Principle of Directness

- when making a decision in the trial the court may consider only such evidence which was produced during the trial
- the rule of impossibility to change members of the court according to which only the judge who was present at the trial from its beginning until its end may render decision
 - witness testifies in favor of the accused but quite obviously he is sweating or nervous (lets ask why ?) - the reliability of evidence

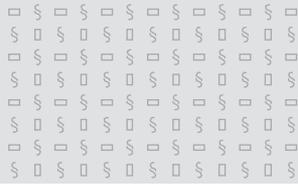


- the rule of impossibility to postpone the trial supposed to ensure that the court decides on the basis of perceptions following from facts learnt in the performed trial
 - however this does not mean that it would be impossible to postpone the trial in special cases
 - e.g. due to the provision of further evidence

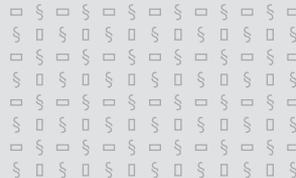


Principle of Discretionary Weighing of Evidence

- IPA bodies weigh the evidence according to their internal belief based on careful consideration of all circumstances of the case individually as well as in their aggregate
- is built on the internal belief of IPA bodies which is not created as a manifestation of subjective arbitrariness
 - it means strictly logically, based on the legal order, legal awareness, universal and logical weighing of evidence as well as the context of cases, it must result in a belief about whether and how a certain act happened and how it should be legally assessed

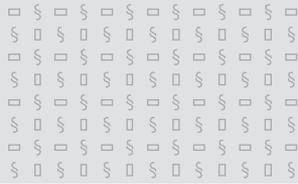


- in the court decision must be specified
 - which facts it considers proven, which evidence it used as a basis of its factual findings, the existence of which facts it considers doubtful and what are the results thereof and which considerations the court follows
 - only such decision is reviewable and may be appealed

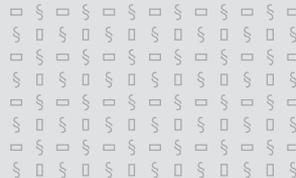


Principle of Ascertaining Facts Free of Justified Doubts

- individual facts must be proven only in the extent necessary for a decision in terms of ascertaining the facts of the case for a specific decision
- CPC does not include the principle of the so-called objective truth which allows the court, when rendering its decision, to be satisfied with such facts of the case which both parties jointly recognize proven
 - what is the truth and it is possible to ascertain the truth objective or subjective
 - whose truth is correct - yours or mine
 - in making decisions judges are bound only by statutes and treaties ... all citizens may do that which is not prohibited by law

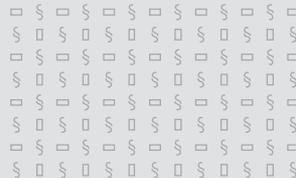


- confession of the accused does not release IPA bodies from the obligation to examine all important circumstances of the case
 - the accused may defend in any way - possibility to give false testimony



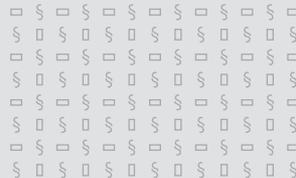
The Subject of Evidence - three basic types of facts

- circumstances important for the meritorious decision
 - e.g. circumstances forming the elements of an offence which is allegedly the prosecuted act, circumstances suggesting or disproving that the offender is the accused, circumstances important in terms of imposing a certain measure on the accused
- circumstances important for further actions in the criminal proceedings
 - e.g. circumstances justifying postpone of a trial, suspension of criminal prosecution, refusal of the obligation to testify
- circumstances that resulted in criminal activity or allowed its committing and circumstances important for the decision on assertion of a claim for damages

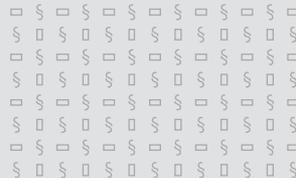


The scope of evidence

- in the necessary extent must be proven
- whether the act regarded as an offence was committed
 - e.g. whether the act was committed at all, the manner of its committing, circumstances of its committing as well as circumstances excluding unlawfulness of the act
 - e.g. extreme emergency, self-defence, approval of the injured, admissible risk or authorized use of a weapon
- whether the act was committed by the accused, identification of specific offender (state authority person, soldier the mother of a newborn baby), his age (adult, juvenile) as well as motive (vengeance, greed)

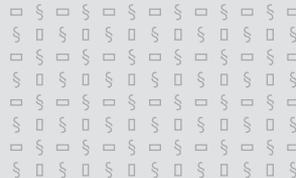


- important circumstances affecting assessment of the nature and seriousness of the act but also reasons excluding unlawfulness
 - e.g. the statute of limitations, effective regret
- circumstances important in terms of assessment of offender's personal background (facts describing the personality of the offender)
- important circumstances allowing to determine effects and the amount of damage caused by the offence
 - e.g. asking for assessment of damage or examining whether the damage has not been compensated
 - minimum is 5.000,- CZK

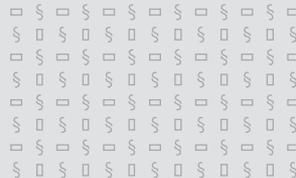


The facts which cannot be proven

- it is not necessary to prove facts which are considered true on the basis of general human experience and there are no doubts about them
 - should any doubts about those facts occur they would naturally be a subject of evidence
 - e.g. the accused was sane, a document delivered to an IPA bodies comes from the person specified therein as the sender or at 8:00 PM in the summer is still sunshine
- those facts on which a decision was rendered in a manner binding on IPA bodies or on which other bodies than IPA bodies can decide

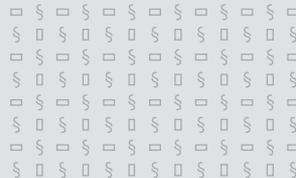


- legal regulations of the Czech Republic published or notified in the Collection of Laws and international treaties published in the Collection of International Treaties
- legal regulation published or notified in the Official Journal of the European Union
 - the court knows the law (*iura novit curia*)
 - regulations which are not published in the Collection of Laws/Official Journal and therefore they are not generally known are the subject of evidence
 - e.g. various statutes, articles or measures
 - not EU law is subject of evidence (documentary evidence)



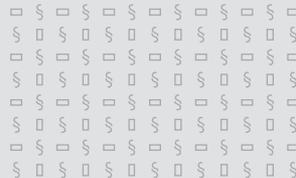
The Means of Evidence

- anything which may contribute to clarification of the case may be used as evidence
 - e.g. particular testimonies of the accused and witnesses, expert opinions, objects and documents important for criminal proceedings and examination (exhaustive list)
- each party of the criminal proceedings may look up and submit such evidence or suggest its producing - consequence of the equality of arms (only in trial!!!)
- the fact that evidence was not looked up or requested by an IPA bodies does not justify refusal of such evidence

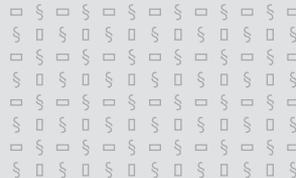


Illegal evidence

- each item of evidence must be looked up, produced, procedurally taken and assessed in accordance with the law
 - if not it would be obtained in conflict with law, it means it is illegal evidence
- such evidence de facto exists but it cannot be used and it must be regarded as if it did not exist at all
- CPC does not include any positive definition of the term of illegal evidence

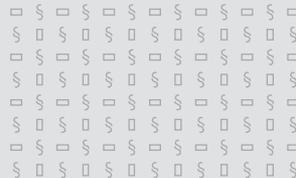


- evidence obtained by illegal coercion or threat of such coercion must not be used in criminal proceedings
 - illegal coercion may take several forms, most frequently the form of physical and psychic coercion
- such evidence suffers of a substantial defect which cannot be removed in any way during criminal proceedings and hence it may not be used within the proceedings (absolute ineffectiveness)
 - relative ineffectiveness can be removed during criminal proceedings - e.g. deprivation of confidentiality of witness
- illegal evidence may be used only as evidence against the person who applied such coercion or threat of coercion

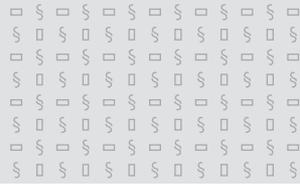


Fruit of the poisoned tree theory

- if the first evidence is obtained illegally how is it with the legality of other evidence obtained on the basis of this evidence?
- if the tree is poisoned it means all its fruits are poison
 - if the first evidence is illegal all other evidence obtained on the basis of this evidence is illegal
 - during illegal house search was obtained bank account number of the accused under which was requested bank information in accordance with the law
 - all obtained evidence is illegal

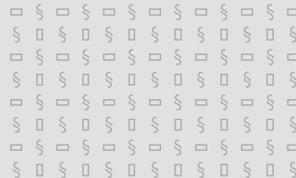


- even if the tree is poisoned it does not mean all its fruits are poison
 - if the first evidence is illegal it does not mean all other evidence obtained on the basis of this evidence is illegal
 - during illegal house search was obtained bank account number of the accused under which was requested bank information in accordance with the law
 - evidence obtained during house search is illegal, bank information is legal
- application practice accepts both approaches - depends on significance of the evidence

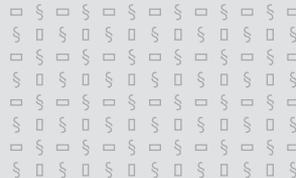


Examination of accused

- right but not the obligation to testify and comment on all the facts
 - obligation to obey the warning to attend the IPA bodies
- defend in any way - possibility to give false testimony
 - criminal liability for false accusation

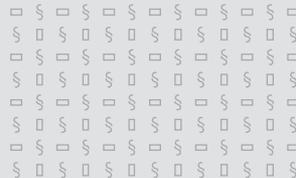


- possibilities how to ensure the presence of the accused to the acts of criminal proceedings
 - summons of the accused (volunteered to come)
 - re-imposing a disciplinary penalty up to 50.000,- CZK
 - bringing the accused (against his will)
 - arrest warrant
 - there are grounds for custody but can not summons/bring of the accused
- taking into custody
 - escape abroad or hiding in the Czech republic (preventive custody) influencing witnesses (collusive custody) and continuation of the crime (protective custody)

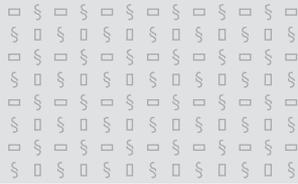


Examination of witness

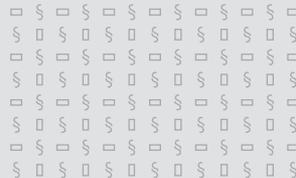
- obligation to testify
 - „the evidence which I shall give shall be the truth, the whole truth, and nothing but the truth“
 - the witness does not testify under oath but he is advised to tell the truth
 - obligation to obey the warning to attend the IPA bodies



- right to refuse testimony if the witness - necessity to be advised
 - has duty not to disclose/ pledge of confidentiality
 - he may be testified only if he is deprived of this obligation
 - is in relation to the accused his sibling, adoptive parents, adoptive child, spouse, partner or common law husband
 - CPC prefer protection of the family relationship
 - can cause the criminal prosecution itself or next of kin (sibling, adoptive parents, adoptive child, spouse, partner or common law husband) or other members in family (cousin, aunt, uncle) or cause them harm, that he feels like own harm

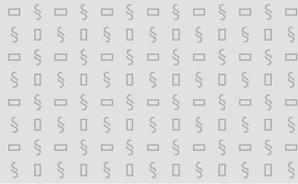


- possibilities how to ensure the presence of the witness to the acts of criminal proceedings
 - summons of the witness (volunteered to come)
 - re-imposing a disciplinary penalty
 - bringing the witness (against his will)



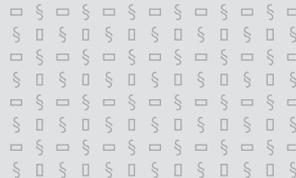
Special Methods of Evidence

- evidence as a procedural activity is very closely related to criminalistics
- criminalistic procedures and methods are directly presented when searching for, taking and using various means of evidence
- CPC regulates only some of them
 - it does not mean if a certain criminalistic method is not regulated in CPC it is illegal and therefore inadmissible from the procedural point of view
- the following methods are closely related with principle of ascertaining facts free of justified doubts
 - the reliability of evidence - where is the „true“?



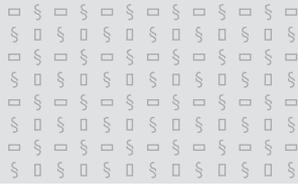
Confrontation

- if the testimony of the accused does not conform to the testimony of a witness or accomplice in significant aspects, the accused can be confronted with the witness or the accomplice face to face
- if the testimony of a witness does not conform to the testimony of the accused or another witness, the witness can be confronted with the accused or another witness face to face



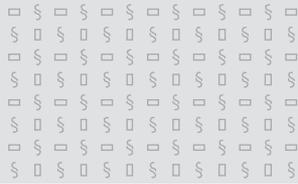
Recognition/identification

- the recognition shall be carried out should it be important for the criminal proceedings that the suspect, accused or witness repeatedly recognizes the person or thing and herewith establish his identity
- should the person be recognized, he shall be shown among at least three persons who do not differ considerably
- if it is not possible to show the person who shall be recognized, the recognition shall be carried out on the basis of a photography which is submitted with similar pictures of at least three other persons
- if the thing should be recognized it shall be showed in a group of things preferably of the same kind



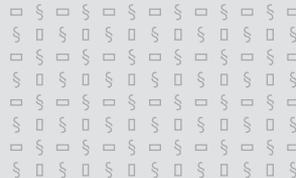
Investigatory Experiment

- the investigatory experiment is carried out if the circumstances ascertained in the criminal proceedings, eventually the new circumstances significant for the criminal proceedings, are to be verified or specified, by observation under artificially created or permutated conditions
 - was it possible to shot the victim in that distance?
 - could witness actually to see the accused?



Thanks for your attention

Questions...???



Doc. JUDr. Marek Frystak, Ph.D.
assistant professor

Department of Criminal Law
Faculty of Law - Masaryk University
Veveří 70
611 80 Brno
The Czech republic

Tel. + 420 549 493 870, Fax. + 420 541 213 162

E-mail: Marek.Frystak@law.muni.cz