THE DESTRUCTION OF EVIDENCE SEARCHED IN A SEARCH AND SEIZURE PROCEDURE

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ABSTRACT: *The article analyses the act of destroying evidence searched in a search and seizure procedure, and weather or not such an act is incriminated or should be incriminated if committed by the author of the original crime. The problem was raised as the need to respect the defendant's privilege against self-incrimination extends to the right not to provide evidence against oneself.*
Therefore, the article is set to establish the correlation between perpetrating such an act and exercising a procedural right, form a criminal law, procedural law and human rights point of view.

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1. INTRODUCTION

The Romanian Criminal Code incriminates under article 275 the theft, destruction, retention, concealment or alteration of material means of evidence or documents, if committed in order to prevent the discovery of the truth in a judicial procedure, and sets up a punishment of 6 months to 5 years imprisonment. Under paragraph 2 of the same article, the law states that preventing, in any other way, a document necessary for the resolution of a case, issued by a judicial body or addressed to it, to reach the recipient, is sanctioned with the same penalty.

This incrimination is very important in respect of the problem set to be analyzed, as the conduct of a defendant that destroys evidence in order to prevent the discovery of the truth could fall within the prescribed incriminated conduct of the above-mentioned incrimination.

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But can such a crime be committed by the defendant himself? Is such an incrimination consistent with the exercise of the privilege against self-incrimination and is it in accordance with the right to a fair trial?

Our quest must focus on determining the relation between the substantive and the procedural provisions involved, and for this reason some clarifications in defining the notions used by the legislator and also their origin is needed, in order to arrive at a proper conclusion.

2. EVIDENCE AND MEANS OF EVIDENCE

First of all, we need to establish the correlation between evidence and means of evidence (material or otherwise) as the incrimination only relates to *material means of evidence* and *documents*.

Article 97 of the Romanian Criminal Procedure Code defines evidence as any element of fact that serves to establish the existence or non-existence of a crime, to identify the person who committed it and the circumstances necessary for the just resolution of the case, as such evidence contributes to finding out the truth in the criminal process.

Evidence is obtained in the criminal trial by the following means: statements of the suspect or the defendant; statements of the injured person; declarations of the civil party or the civilly responsible party; witness statements; *documents*, expert reports or findings, minutes, photographs, *material evidence*; any other means of evidence that is not prohibited by law.

Therefore, up front we can establish that the legislator selected to incriminate under this article only the destruction of certain means of evidence and not all of them.

As shown in the doctrine (Bogdan, p. 471) most likely, the legislator sought to protect all the means of evidence that are in a docket of any judicial procedure and that were not protected by other norms, but although the reasoning of the legislator is entirely correct, some problems arose in relation to its implementation. This is because the term "documents" creates ambiguity, as it is not clear whether the text refers to any document that could contribute to finding the truth (even if it has not acquired the quality of evidence) or only to those documents that are means of evidence in a judicial procedure (including other means of evidence recorded in documents, such as expert reports, witness statements, statements of the parties, etc.) and furthermore by using the phrase "material means of evidence" the legislator leaves (probably unintentionally) out of the scope of application of the norm the hypotheses in which the author's action refers to other evidence, which are neither documents nor material means of evidence, such as certain photographs in respect to which the act will no longer be typical.

Both observations are more than pertinent. In respect to the first issue, we argue that the legislator intended to protect only documents that were administrated as evidence in a certain procedure, otherwise there would be an overlap with the general incrimination relating to the destruction of documents as all documents may at one point be regarded as having the hypothetical ability to serve as evidence. In respect to the second issue, it is more than clear that the phrasing of the text is unfortunate to say the least, and the legislator should have considered using the phrase "documents or any other means of evidence" as already proposed (Bogdan, p. 472).

3. THE REASONING BEHIND THE INCRIMINATION AND CONFLICTING RIGHTS

a. Doctrine

The incrimination protects the administration of justice, which requires respect for the safety and integrity of documents and evidence related to a judicial procedure, and aims to ensure an effective regulation regarding the security and integrity of material evidence or documents against the theft, destruction, retention, concealment or alteration that prevents the discovery of the truth in a case (Trandafir , Rotaru, & Cioclei , p. 123), or the integrity of a docket.

Such a public interest needs to be protected as the administration of justice constitutes one of the pillars of the rule of law.

However, this general interest collides with the particular interest of the perpetrator to conceal his criminal activity, as he cannot be compelled to provide evidence against himself, due to the concept known as the privilege against self-incrimination.

As Roberts and Zuckerman observed, the privilege against self-incrimination is a venerable common law institution dating from at least the seventeenth century, and on the face of it, the privilege against self-incrimination and the objective of convicting the guilty are at loggerheads. Truth-finding is best served by securing access to all information relevant to the issues in the case. Any privilege to withhold information will almost inevitably detract from effective truth-finding, the more so when the holder of the privilege is typically peculiarly well-placed to know the truth of the matters under investigation. Generally speaking, it will profit the guilty not to cooperate with police investigators, to refuse to answer questions, to withhold information, and to decline to testify, because the more they expose themselves to probing enquiries, the greater volume of incriminating evidence is likely to emerge. (Roberts & Zuckerman , 2010, pg. 541-542)

This privilege consists of the right to remain silent, a protection against immediate physical pressure, a protection against the use of deception, a right to be warned and the right not to hand over evidence (documents) (Trechsel, 2005, pg. 352-353).

It was also noted that (Roberts & Zuckerman , 2010, p. 540) this privilege consists of:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment

made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

Both optics share a common ground: the right of the accused person not to be compelled to give evidence against himself. This right is unregulated and represents the creation of both the doctrine and the jurisprudence, although in the doctrine (Roba, p. 154), in relation to a similar right, a proposal for a universal regulation that would offer sufficient and appropriate guarantees for the protection of the individual against the arbitrary of the authorities was made.

In the Romanian doctrine, professor Dobrioniu (Pascu , Dobrinoiu, & Hotca , p. 449) argued that the participant in the crime who initiated the judicial procedure, that steals or destroys material means of evidence or documents cannot have the status of an active subject in the analyzed incrimination as long as the evidence is in the possession of the perpetrator (for example, the perpetrator of a murder who later hides or destroys the weapon used will not also commit the crime of stealing or destroying evidence or documents). However, if the evidence is in the possession of the judicial body or is sent to this body, and the perpetrator steals or intercepts it, his deed will constitute a crime (for example, if the perpetrator of a murder steals the weapon from the police headquarters, the deed constitutes stealing or destroying evidence or documents). The author did not expressly identify the reason behind the argumentation, but as we will argue, this reason is the protection offered by the privilege against self-incrimination.

b. ECHR jurisprudence

This right is not recognized only in the doctrine, but also in the jurisprudence of the European Court of Human Rights.

In (Funke v. France, p. §44) for instance, the Court found that when authorities, being unable or unwilling to procure evidence by some other means, tried to compel the applicant to disclose documents through imposing a penalty and thereby to provide incriminating evidence of offences that he was suspected of, article 6 of the Convention is violated in respect to the right not to contribute to incriminating oneself.

Similarly, in (J.B. v. Switzerland , pp. §63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination.

In (Jalloh v. Germany, pp. §112-123) the Court reached the conclusion that there was a violation of article 6 when authorities used as evidence a plastic bag containing drugs, obtained by the forcible administration of emetics to the applicant, as the drugs were ingested by him when the police tried to search him. The Court stated that several elements distinguish this case from the (Saunders v. The United Kingdom) decision, a decision in which the Court concluded that there is no violation of article 6 in executing a warrant in order to obtain breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

The differences were that in *Saunders* the material was obtained for forensic purposes, the degree of force used was significantly less that in *Jalloh* and the evidence was not obtained through a procedure which violated Article 3.

c. Romanian High Court of Cassation and Justice jurisprudence

The Romanian High Court of Cassation and Justice in the Decision 3/2021 regarding the pronouncement of a preliminary decision to resolve a legal question approached the problem of whether or not a person suspected of having committed an offence cand be held liable for destroying evidence under this incrimination.

It ruled that the crime of theft or destruction of evidence or documents, provided for by art. 275 paragraph (1) of the Criminal Code, has as premise the existence of a judicial proceeding.

Secondly it ruled that the author of the crime that is the object of the criminal process in which the documents or material means of evidence are used can be an active subject of the crime of theft or destruction of evidence or documents as provided by art. 275 para. (1) of the Criminal Code.

To reach this conclusion the High Court stated that the need for the previous initiation of a judicial procedure derives from the text of the incrimination itself and from the *«nullum crimen sine lege, nulla poena sine lege»* principle, as an extensive interpretation of the norm of incrimination, done against the accused, by the broadening of the meaning of the notion of "judicial procedure" to include the period before the start of the criminal investigation would constitute a violation of article 7 of the European Convention of Human Rights.

To admit that the provisions of article 275 refers to all objects that can serve to find out the truth and to the things that serve to establish a fact in a potential judicial procedure, means to extend the norm of incrimination to an unlimited range of objects and things as any object or thing can have the ability to serve to find out the truth or to establish a fact in future and eventual legal proceedings. Such an interpretation was considered to be in breach of the foreseeability requirement derived from article 7 of the Convention.

In respect to the active subject, the Court stated that the accused can be an active subject of this offence as such a conclusion must be imposed as a result of the literal interpretation of the provisions of art. 275 of the Criminal Code, in which the legislator did not introduce any condition regarding the active subject of the crime and no exception regarding the accused person was adopted, contrary to other situations in which, when the legislator considered necessary to exclude certain people from the sphere of active subjects of certain crimes, he expressly did so.

In addition, the Court argued that neither the right not to incriminate himself nor the provisions of art. 99 para. (2) of the Code of Criminal Procedure, according to which "the suspect or defendant benefits from the presumption of innocence, not being obliged to prove his innocence, and has the right not to contribute to his own accusation", can constitute grounds for removing the criminal liability of the author of the initial crime (the crime in which the means of evidence or documents stolen, destroyed, retained, hidden or altered had the ability to be used as evidence). The decision is mandatory for all Romanian Curts, but we believe that it still needs to be scrutinized.

4. A DIFFERENT APPROACH

Professor Bogdan (Bogdan, p. 471) refers to means of evidence that are already administered in a judicial procedure and that are in the docket instrumented by the competent judicial body. Professor Dobrioniu (Pascu , Dobrinoiu, & Hotca , p. 449) refers to evidence in the possession of the judicial body or sent to this body. The High Court referred only to a procedure that has already started not to means of evidence already gathered.

The problem that arises is when does this protection afforded to means of evidence start? What happens if a certain judicial procedure has started, but up until it finishes the destruction occurs. For instance, if such a destruction occurs during a search and seizure procedure, after the interested party is summoned to voluntarily hand over the searched item, but not until the item is found, does the incrimination apply? To have a clearer picture of the argumentation, we would hypothesize on a search and seizure procedure in respect of drug possession charges, when the author of the crime destroyers the drugs that are in his possession, by flushing them in the drain, without being seen, after being summoned to voluntarily hand over any drugs he possesses, but prior to them being seized by the investigative body.

In this case the evidence is not yet gathered and it is definitely not filed with the court or the judicial body as part of the docket. We believe that the suspect does not commit the crime in question as he exercises his right not to contribute to his accusation, as presenting the objects in question would prove the crime itself. We argue this as we believe that the ruling of the High Court did not foresee all possible situations.

We think that in fact there is no contradiction between this argument and those of the High Court, as the decision is subject to further interpretation. We agree with the conclusions of the Court that the crime of theft or destruction of evidence or documents, provided for by art. 275 paragraph (1) of the Criminal Code, has as premise the existence of a judicial proceeding, as such a crime cannot be conceived prior to a procedure being started, even if such an act is committed by the author of the initial crime.

Furthermore, we concede that after evidence is gathered, even the author of the initial crime (the crime that is the object of the criminal process in which the documents or material means of evidence are used) can be an active subject of the crime of theft or destruction of evidence or documents as provided by art. 275 para. (1) of the Criminal Code.

But the question on what happens in-between was not dealt with by the Court, as the case presented to the Cort referred to the destruction of evidence immediately after the crime was committed.

The High Court referred to the *Saunders* decision. But in the hypothetical case presented above, as in other cases when the judicial body has not established the existence of the means of evidence, the *Saunders* decision does not apply, and the privilege against self-incrimination is intact (see *Funke*). The person in question can refuse to provide evidence against himself, and if he is the owner of the means of evidence (so that other offences -like general destruction of goods - can be excluded), he cannot be charged with the crime prescribed by article 275, if he disposes of the means of evidence.

After the moment that the investigative body establishes the existence of the means of evidence (for instance by finding them during the search procedure), such a crime can be committed by the initial author, so therefore he be charged with the crime prescribed by article 275, if he disposes of the means of evidence. In the Romanian Jurisprudence the Cluj Court of Appeals correctly convicted the defendant who hid the mobile phone, identified during the search on October 4th 2018, a phone that was to be seized by the criminal investigation bodies, in doing so preventing the discovery of the computer data stored on it. The Court considered that this act constitutes the offense provided for by art. 275 para. (1) Penal Code, theft or destruction of evidence or documents, and the crime was committed with intent, because when asked to return the phone he refused, showing that he no longer had it, an aspect that indicates the direct intention to hide the contents of the phone from the criminal investigation bodies (C.A. Cluj, 2019).

5. CONCLUSIONS

As the High Court of cassation and justice ruled, the crime of theft or destruction of evidence or documents, provided for by art. 275 paragraph (1) of the Criminal Code, has as premise the existence of a judicial proceeding, as such a crime cannot be conceived prior to a procedure being started, even if such an act is committed by the author of the initial crime.

After evidence is gathered, even the author of the initial crime (the crime that is the object of the criminal process in which the documents or material means of evidence are used) can be an active subject of the crime of theft or destruction of evidence or documents as provided by art. 275 para. (1) of the Criminal Code.

But if the judicial body has not established the existence of the means of evidence, the person in question can refuse to provide evidence against himself, and if he is the owner of the means of evidence, he cannot be charged with the crime prescribed by article 275 for disposing of that means of evidence.

After the moment that the investigative body establishes the existence of the means of evidence, such a crime can be committed by the initial author, so therefore he could be charged with the crime prescribed by article 275 for disposing of the means of evidence.

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