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Importance of Hearsay in Accordance with the Practice of the European Court of Human Rights

It is obvious, that Article 6 of the European Convention on Human Rights enshrined the principle that before the accused could be convicted all the evidence against him had to be produced in his presence at a public hearing with a view to adversarial argument. In addition the use of statements obtained at the pre-trial stage is not always in itself inconsistent with fair trial right if the defendant has been given an adequate and proper opportunities to challenge depositions at an investigation stage.¹ Perhaps the accused has never had a chance to question witness but it did not automatically result in a breach of fair trial right if there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of limiting witness examination right. Because the defendant faces such kind of handicaps which criminal process law does not include it is necessary to be sufficient counterbalancing factors while using hearsay evidence. Thus, in the present work we will analyze as national courts as European Court of Human Right's approach to hearsay which enables us to define the purpose of hearsay evidence for criminal process law and master in depth about international court's experience in the use of hearsay evidence.

Key words: *Confrontation right, hearsay, adversary principle, counterbalancing factors.*

1. Introduction

Evidence is the basis of persuasion. Whenever we try to sway others we cite evidence because humans do not respond to abstract, theoretical arguments.²

Certainly this is true in the courtroom. Moreover, parties use evidence in a court to prove or refuse certain facts and make their legal evaluation and court uses them to establish if there exists a fact or action why criminal proceeding is conducted.³ Therefore, we can convincingly say that evidence determines the existence or nonexistence of the proceedings and the witness testimony particularly hearsay holds a tangible place in this process.

The fact that hearsay is derived evidence⁴ and it should complete high standards of reliability besides the defendant is significantly restricted to confrontation right granted under article 6(3d) of the European Convention on Human Rights. That's why admissibility of hearsay evidence must be complied with the procedural safeguards. It can be said that the absence of an adequate procedural guarantees for using hearsay became the reason for the decision of the Constitutional Court of Georgia ac-

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¹ Windischv. Austria, 1993, ECHR, §26.

² Meritt J. D., Simmons R., Learning Evidence from the Federal Rules to the Courtroom, American Casebook Series, 2009, 1.

³ Criminal Procedure Code of Georgia, Article 3(23).

⁴ Maglakelidze L., Tumanishvili G., Importance of Indirect Evidence in Accordance with the Georgian and International Criminal Procedure, Justice and Law Journal, №1 (53), 2017, 32 (in Georgian).

ording to which accusation and conviction on the basis of hearsay evidence is unconstitutional. Despite that decision, Constitutional court does not exclude the use of hearsay in particular cases.

Exceptions may be justified for objective reasons when it is impossible to interrogate eyewitness and it is essential for the interests of justice.⁵ In particular, when witness or victim are intimidated or there is a need for their security. The unlawful act of accused – intimidation of the witness should not hinder the execution of justice. That's why in exceptional cases under adequate procedural guarantees, the court is authorized to discuss about admissibility of hearsay evidence.⁶

It is noteworthy, that abovementioned decision significantly influenced on Common Court's approach to hearsay evidence. In most cases judges discuss about probative value of hearsay if the information provided in it is confirmed by direct evidence. Doubtlessly, such approaches have increased proof standard but significantly reduced the importance of indirect evidence in criminal procedure.

It is clear that the assessing probative value of hearsay evidence is problematic. Thus, in that work we will determine the probative value of hearsay evidence and its importance in criminal procedure on the basis of legal scientific literature, legislation and both national and international judicial practices. Herewith, through the examination of the experience of International Court the procedural safeguards which should be taken into consideration while using hearsay will be determined not to infringe fair trial right.

2. An Analysis of Constitutional Court Decision Regarding the Use of Hearsay Evidence

It is an interesting fact that Constitutional Court had to evaluate the constitutionality of hearsay evidence regulatory norms.

It must be said that in 22 January, 2015 Constitutional Court of Georgia according to its decision N1/1/548 declared that the normative content of the second section of article 13 of the Criminal Procedure Code of Georgia was unconstitutional. The normative content enabled the possibility for delivery of judgement of conviction based on hearsay and the normative content of the first section of article 169 of the Criminal Procedure Code of Georgia also enabled a possibility for declaring a person to be accused based on hearsay evidence.

According to paragraph of article of the Constitution of Georgia⁷, "A decision to bring criminal charge against the accused, bill of indictment and judgement of conviction will be based only on incontrovertible evidence. Thus, within the present dispute the Constitutional Court assessed whether the possibility of using hearsay as an evidence involved risks of violation of constitutional rights and if the criminal procedure legislation contained sufficient guarantees to secure accused in the process of administering justice."⁸

⁵ *Maglakelidze L., Tumanishvili G.*, Importance of Indirect Evidence in Accordance with the Georgian and International Criminal Procedure, Justice and Law Journal, №1 (53), 2017, 36 (in Georgian).

⁶ Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548, II-36-37.

⁷ The consolidated version of the Constitution of Georgia, article 31(7), 23/03/2018.

⁸ Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548, II-4.

The court announced that the admission of testimony which is based on the statement of other person or information disseminated by him/her, involves multiple risks. For instance, it is hard to assess reliability of such information because court has a lack of opportunity to check attitude of source towards the events related to the criminal cases. Besides, it is hard to foresee what kind of testimony person would give, if he/she had been presented before the court. Doubtless, criminal law legislation contains responsibility for providing false information by the witness but this legal mechanism which is for ensuring reliability of witness testimony, in case of hearsay, loses its function because person giving hearsay cannot confirm how incontrovertible the information disseminated by other person is. Despite that attitude, court declared hearsay admissible in existing clearly formulated provisions and adequate procedural guarantees. Moreover, in every occasion the court should evaluate the circumstances which is indicated by the agency responsible for criminal prosecution of justifying the use of hearsay.⁹

Certainly, the lack of legal mechanisms for ensuring the reliability of hearsay were ground of court's explanation that automatic admissibility and use of hearsay is intolerable notwithstanding the conditions and means through which the information was acquired by witness giving it.¹⁰ Despite that fact, in exceptional cases the Constitutional Court consider possibility for admission of hearsay as evidence. When there are objective reasons and it is necessary for the interests of justice use of hearsay is allowed. For example, when witness or victim is frightened or there is a need for their security. The unlawful action of the accused - witness intimidation should not cause distortion to administration of the justice. Therefore, in exceptional cases the court should be authorized to assess necessity of admission and use of hearsay but it must be realized under adequate procedural guarantees.¹¹

In conclusion, it is true that disputed provisions were declared unconstitutional by the Constitutional Court of Georgia but it did not deny the use of hearsay as an evidence. It discussed about the conditions in which it is available to consider it credible.

3. Common Courts Practice about Using Hearsay Evidence

It is impossible to master the importance of hearsay in depth without assessing the practice of the Common Courts about hearsay evidence. It is noteworthy that the Common Courts judges often take the discussion into consideration to use hearsay developed into the decision N1/1/548 made by Constitutional Court of Georgia in 22 January, 2015. For example, according to the Supreme Court decision G.kh and G.L who were accused for extortion which means demanding another person to hand over property by more than one person that was accompanied by a threat of spreading the information that may damage victim's rights. In that case, Supreme Court judge agreed with the Court of Appeal's decision on the part of the prosecution's witnesses. Their testimonies were based on informa-

⁹ Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548. II-37.

¹⁰ Ibid, II-29, 31, 34.

¹¹ Ibid, II-36, 37.

tion provided by victim and according to article 76(1) of the Code of Criminal Procedure these were hearsay which were not enough to bring a conviction.¹²

The Supreme Court had the same approach when it shared the Court of Appeal's attitude according to which hearsay evidence does not satisfy with the constitutional standard of incontrovertibility and thus conviction based on such kind of evidence is inadmissible. Because the crime was committed by the defendant could not be proved beyond the reasonable doubt with the pieces of evidence, including hearsay, the court found verdict of not guilty.¹³

Similar decision made by Supreme Court when one of the witnesses' testimony considered as a hearsay and the conviction of the lower instance court was replaced with acquittal judgment.¹⁴

According to the case materials, the conviction was based decisively on the hearsay and the defendant not at investigation stage nor at trial had never had the opportunity to examine witness. Besides, witness statement was based on the information released by the defendant and the latter denied providing such information to him. Consequently, on the base of Constitutional Court N1/1/548 decision, dated 22 January, 2015 Supreme Court clarified that hearsay does not satisfy with the constitutional standard of incontrovertibility and in addition with no other direct evidence confirmed A.B's guiltiness the court had to made acquittal judgment.¹⁵

Approximately similar content was developed by Supreme Court of Georgia on 26 June, 2018.¹⁶ According to the case materials several hearsay evidence was based on the information released by the victim and the accused was victim's spouse. And the victim took advantage of the right granted by the Code of Criminal Procedure and refused to give testimony against close relative. Because the hearsay could not confirm by other pieces of evidence which were not hearsay, the court on the base of article 76(3) of the Criminal Code of Georgia and on 22 January, 2015 N1/1/548 decision of Constitutional Court of Georgia, explained that only hearsay evidence could not be legal ground for conviction.¹⁷

Also the witness testimonies were based on the information released by the defendant on hunting for the Red List animal.¹⁸ According to the court the evidence presented in the case did not prove the investigation version that the bear was killed by the defendant with its own gun because there was not any direct evidence proving that fact. Particularly, there has not been eyewitness and the hunters have not seen it directly but their statements were based on defendant's story that he killed bear with its own gun that was later denied by the defendant. Because the defendant's guiltiness was not confirmed by direct evidence both the first instance and the Court of Appeal, hearsay and another evidence presented to the case considered inadequate for conviction. That's why it determined acquittal judgment.

¹² Decision of Supreme Court of Georgia, Dated March 20th, 2018, №541 ap-17.

¹³ Ibid, №502 ap-17.

¹⁴ Decision of Supreme Court of Georgia, Dated June 30th, 2015, №14 ap-15.

¹⁵ Ibid.

¹⁶ Decision of Supreme Court of Georgia, Dated June 26th, 2018, №73 ap-18.

¹⁷ Ibid.

¹⁸ Decision of Supreme Court of Georgia, Dated April 27th, 2018, №646 ap-17.

We should pay attention to the Supreme Court №218ap-14 decision of 18 December, 2014 because it represents the example of Common Court's existed practice about hearsay before Constitutional Court's decision, dated 22 January, 2015.

According to that case, K.Q was charged for theft, i.e secretly taking another person's movable property for its unlawful appropriation by illegal entry into a dwelling place and which has caused considerable damage. At the trial stage, the fact that K.Q secretly took personal computer was only proved with police hearsay which had been known for him from undercover agent.¹⁹ In view of that information was operative and it was impossible to verify. The court relied on article 76(2) of the Code of Criminal Procedure according to which hearsay is admissible if the person indicates the source of information which can be identified and verified. Thus, the court did not share hearsay as evidence.²⁰

In conclusion, the approach of Common Courts about admissibility of hearsay evidence is in framework. And the decision of the Constitutional Court had a special effect on it. It is noteworthy that the courts are discussing about probative value of hearsay and sharing it or not in the process of final judgment. However, as the study of the practice of the national courts showed us judges evaluate the probative value of hearsay if there is any corroborative direct evidence in the case. Such approach increased the standard of proof but in the legal sense it is acceptable to admit hearsay as evidence when there is any corroborative indirect evidence because circumstantial evidence is as probative as direct evidence and they face similar challenges of reliability and accuracy.²¹

For more clarity, imagine the case when there are several circumstantial evidences. It is not necessary that each piece of evidence separately convince you of the defendant's guiltiness beyond a reasonable doubt but all the pieces of circumstantial evidence when considered together must reasonably and naturally lead to that conclusion. But if you can draw two or more reasonable conclusions from the circumstantial evidence the court should not rely on these ones.²² Thus, if the indirect evidence which is presented in the case satisfies the authenticity standard and also confirms the information provided in hearsay it is possible to have discussion about probative value of hearsay and with other evidences proof the defendant's guilt beyond a reasonable doubt.

4. Practice of the European Court of Human Rights on Hearsay Evidence

When we are discussing about admissibility of hearsay, we should focus on the right of confrontation provided for in article 6(3d) of the European Convention on Human Rights because it serves to examine the credibility of witness and its testimony.²³ In case of hearsay the party has no possibility to

¹⁹ Decision of Supreme Court of Georgia, Dated December 18th, 2014, №218 ap-14.

²⁰ Ibid, 4.1.1.2.

²¹ *Heeter E. M.*, Chance of Rain: Rethinking Circumstantial Evidence Jury Instructions, *Hastings Law Journal*, February 2013, 533.

²² Judicial Council of California Advisory Committee on Criminal Jury Instructions, 2018, 52.

²³ See also: *Meritt Jones D., Simmons R.*, Learning Evidence From the Federal Rules To The Courtroom, *American Casebook Series*, 2009, 720.

check its real content and credibility by questioning the witness because author of that statement cannot confirm the truth of spreading information.

In legal literature it is considered that testimony by a witness against a criminal defendant will be more reliable if it is given in open court and in the presence of the accused, enabling the defendant to cross-examine the witness face to face.²⁴ A question which arises is whether it is right to examine witness testimony at trial or is it enough for the defendant to be given an opportunity to question witness at investigative or pre-trial stage?

In this regard, ECHR approach is interesting. The best is to question a witness at trial although it will not be a violation of the right to a defendant to use as evidence such statements obtained at the pre-trial stage and an accused had an opportunity to challenge and question a witness against him when the witness was making his statement or later stage of the proceedings.²⁵ For more clarity, subparagraphs “a” of article 114 of the Criminal Procedure Code of Georgia gives opportunity to both party, as a prosecution and defense to interrogate witness before a magistrate judge. That process is taking place with the participation of the parties and the absence of the non-initiator party will not interfere in the examination (Paragraph 9 of article 114 of the Criminal Procedure Code of Georgia).

We should also pay attention to the fact that the European Convention on Human Rights does not contain any record that denies the use of hearsay in criminal proceedings. Moreover, according to ECHR practice the admissibility of evidence is primarily a matter for regulation by national law.²⁶ Although it is important to assess such kind of testimony carefully because hearsay has less weight than first-hand testimony.²⁷ Besides, a conviction should not be solely based on hearsay evidence.

It can be said that the European Court of Human Rights in the case of *Al-Khawaja and Tahery against The United Kingdom*²⁸ has developed a standard (Three-part test “Al-Khawaja test”) which should be satisfied during the use of hearsay evidence in order not to infringe the fair trial right. Namely, 1. There must be a good reason for the non-attendance of the witness; 2. Hearsay evidence must not be the sole or decisive basis for the conviction; 3. There must be sufficient counterbalancing factors to compensate for the handicaps which were caused by admission of the absent witness testimony.²⁹ Interestingly to know what the court implies in each of them.

A good reason for the non-attendance will be provided by the death of the witness, fear of death, health damage, sense of material harm and so on. In order for fear to be acceptable as a good reason the court must determine whether or not there are objective grounds for that fear and whether those objective grounds are supported by evidence. In addition, European court assesses if national courts having made all reasonable efforts to secure the attendance of a witness. Not surprisingly, the

²⁴ *Hurley J. B.*, Confrontation and the Unavailable Witness: Searching for a Standard, *Valparo University Law Review*, 1983, 193.

²⁵ *Kostowski v. The Netherlands*, 1989, ECHR, §41.

²⁶ *Garcia Ruiz v. Spain*, 1999, ECHR, §28.

²⁷ *Pichugin v. Russia*, 2012, ECHR, §198.

²⁸ *Al-Kwawaja and Tahery v. The United Kingdom*, 2011, ECHR.

²⁹ *Ibid*, §119-125.

European Court of Human Rights in its recent decision interpreted that the privilege for refusing to give evidence against relatives may be considered as a good reason for non-attendance of a witness.³⁰ This approach is absolutely different from the past practice of European Court. For instance, in case of *Unterpertinger v. Austria*³¹ an applicant had been convicted of assaulting family members. And the witnesses who gave testimony to the police at the investigation stage were victims of the crime. But later at the trial, both had refused to testify against him as they were permitted to do under national law. The ECHR concluded that the conviction was a violation of applicant's right because the defendant had not been able to cross-examine declarant about the statements at any stage of process which were ground for the conviction.³²

As for the sole or decisive basis for the conviction, the testimony of the absent witness which is the sole evidence against an accused cannot be a basis for conviction. Besides, hearsay cannot be determinative of the outcome of the case.³³ Where the untested evidence of a witness is supported by other corroborative evidence the assessment of whether it is decisive will depend on the strength of the supportive evidence. The stronger the corroborative evidence is the less influential hearsay is at the process of decision.

The counterbalancing factors for ECHR at a minimum this means that the hearsay must be approached with caution. The courts must show that they are aware that it carries less weight in the process of conviction and detailed reasoning is required to consider it reliable. Also there should be another strong accusatory evidence in the case³⁴ and the defendants should be given opportunity to submit their own version of the events to the court and in case of knowing the identity of the absent witness cast doubt on their credibility.³⁵ As for the additional safeguards which are part of the counterbalancing factors the court implies an opportunity to record video of witness questioning at the investigation stage in order to allow the prosecution and defence to observe the witness demeanour.³⁶ Also when an interrogation of witness is not possible at trial the possibility of the defense to put its own questions to the witness indirectly for example, in writing it is considered as an important procedural safeguard.³⁷ And the defense counsel's opportunity to question witness during the investigation also remote interrogation of witness is possible by using video-audio inputs.

For legal point the case of *Schatschashvili v. Germany* is very important.³⁸ In assessing the fairness of entire trial the court relied on "Al-khawaja Test". However, the court had to evaluate whether there was a breach of fair trial right if the good reason for non-attendance of witness would not be satisfied. The court noted that the absence of the good reason for the non-attendance of a witness cannot

³⁰ *N.K. v. Germany*, 2018, ECHR.

³¹ *Unterpertinger v. Austria*, 1986, ECHR.

³² *Ibid*, §33.

³³ *Ibid*, §131.

³⁴ *Paic v. Croatia*, 2016, ECHR, §43.

³⁵ *Ibid*, §45

³⁶ *Chmura v. Poland*, 2012, ECHR, §50.

³⁷ *Scholer v. Germany*, 2015, ECHR, §60.

³⁸ *Schatschashvili v. Germany*, 2015, ECHR.

itself be conclusive of the unfairness of a trial.³⁹ As for sufficient counterbalancing factors it is crucial in assessing the fairness of the entire process. The existence of sufficient counterbalancing factors must be reviewed not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant's conviction, but also in those cases whether such kind of evidence carried significant weight and that its admission handicapped the defense. Namely, the more important that evidence is the more counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.⁴⁰ Thus, the Strasbourg Court with that case ruled that despite the absence of a good reason for non-attendance of a witness it is possible to use the "Al-Khawaja test" in assessing the fairness of entire trial.

The ECHR in one more case namely in *Seton v. The United Kingdom*⁴¹ shared the approach developed in *Schatschashvili's* case and noted that the absence of a good reason for witness non-attendance could not be a decisive of entire process fairness.⁴²

The above-mentioned principles are shared by Strasbourg court in a recent case *Batek and Others v. The Czech Republic*.⁴³ According to the factual circumstances of the case the applicants worked as a custom officers at the border of Slovakia and their convictions were for bribery. There was a testimony of an anonymous policeman who had been working in custom-house for two month in order to reveal the crime and also testimonies of twenty truck drivers of different nationalities. The truck drivers were questioned before a judge but the applicants and their counsels did not attend the proceedings because they were not charged for crime. As for the anonymous witness she gave her testimony outside the courtroom using an audio streaming device. During the trial only one applicant put a question to the anonymous witness but other applicants who did not attend the court were represented by defenses, they did not enjoy the right to confront anonymous witnesses.

The applicants complained that there had not been sufficient counterbalancing factors for the failure to summon the absent witnesses to testify. Moreover, the courts had not taken any positive steps to allow the defense to cross-examine the truck drivers. And they also debated that their conviction had been based on a decisive extent on testimonies of absent witnesses.

The European Court of Human Rights discussed whether there was a good reason for witness non-attendance and interpreted that the fact that the truck drivers were not citizens of the Czech Republic and travelled frequently could not be considered as "a good reason" for failure of their attendance. But it was added that this fact cannot determine unfairness/fairness of entire process.⁴⁴

As for the anonymity of police agent from the court's perspective there was an important reason and legal basis in preserving the anonymity of an undercover agent. And whether the testimonies were sole or decisive for the defendant's conviction the court noted that the conviction was strengthened by many other inculpatory evidence and the testimonies of witnesses could not have been considered as the only basis for conviction.

³⁹ *Schatschashvili v. Germany*, 2015, ECHR. §113.

⁴⁰ *Ibid*, §116.

⁴¹ *Seton v. The United Kingdom*, 2016, ECHR.

⁴² *Ibid*, §59.

⁴³ *Batek and Others v. The Czech Republic*, 2017, ECHR.

⁴⁴ *Ibid*, §44.

Besides, the court observed if there were any sufficient counterbalancing factors and noted that there had not been any indication that national courts approached statements given by absent witnesses with any specific caution, but the applicants had the opportunity to present their own version of events. In addition, the identities of the witnesses were known to the defense which was able to contest the witnesses' credibility.

It should be noted that the court considered that all negative factors caused by the restriction of the right were balanced and declared that there had been no violation of the fair trial right.

Thus, we can convincingly say that the main premises that must be satisfied in order to consider the trial fair are assembled in the case law of European Court of Human Rights. As for the hearsay, it is clear that it is not excluded from the proceedings and it is admissible. However, when assessing its credibility peculiar caution is required and the more weight will be given to it the more counterbalancing factors will have to carry during the process.

5. Conclusion

During working on this issue, the probative value of hearsay in decision-making process has been confirmed. Furthermore, none of the provisions of the European Convention on Human Rights indicate restrictions on its use but it should be said that high standard of reliability must be satisfied while using hearsay and its probative value is significantly depended on corroborative evidence. Proving evidence can be both direct and indirect. However, as the case law of national courts has shown, judges focus on direct one. Such approach increased the standard of proof but in the legal sense it decreased the value of indirect evidence. Despite the different types of evidence, both of them must be authentic. Thus, we consider that it is possible to discuss about probative value of hearsay even it is proved with indirect one.

Because, the admission of hearsay restricts the defendant's confrontation right guaranteed by the European Convention on Human Rights⁴⁵ the court during its practice developed a number of prerequisites to balance these negative factors in order not to be infringed fair trial right. It must be mentioned that in the case of *Al-Khawaja and Tahery v. The United Kingdom*, the following three basic principles were developed: a) a good reason for witness non-attendance; b) if hearsay was the sole or decisive basis for the conviction and c) sufficient counterbalancing factors to compensate for the handicaps which were caused by admission of the absent witness testimony. This test was the guideline for both the European Court of Human Rights and the national courts of member states. It is noteworthy that the decision of the Constitutional Court of Georgia on admissibility of hearsay was based on above-mentioned principles. But the ECHR in case of *Schatschashvili v. Germany* introduced a change of assessing violation of fair trial right that was significant. In the court's view, except for counterbalancing factors which have crucial impact when assessing fairness of the whole proceed-

⁴⁵ If confrontation was absolute, it would require that all evidence be given by live witnesses in open court. See: *Hurley J. B.*, *Confrontation and the Unavailable Witness: Searching for a Standard*, *Valpar University Law Review*, 1983, 193.

ings, it is possible to perform complete Al-Khawaja test always even in cases where there is no good reason for witness non-attendance.

Consequently, there may be no good reason for witness non-attendance, but if the handicaps caused by admission of hearsay and restriction of defendant's confrontation right, will be balanced and besides, hearsay will not be sole or decisive basis for conviction, trial will be fair.

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