

In proof in criminal cases on sexual abuse against child

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Abstract

The objectives of this research work are to reflect on the circumstances of the fact in proof in criminal cases regarding sexual violence against a child and to identify the problems of proof. The research has revealed the problems concerned with the identification, investigation, and evaluation of the circumstances to be proved. The main results of the research: the main matter of the fact in proof of sexual violence is related to the clear identification of the object of threat, the actus reus of sexual abuse. To achieve this, from the very beginning of investigation, in the pre-trial procedure, the investigating officer should be carefully prepared, including the place and time of interrogation and the choice of questions. Also, the interrogation of the injured child should be conducted according to the provisions of the Criminal Law. When investigating a case of sexual violence against child, from the very beginning of the investigation, the task of the investigating officer is to clarify and investigate the criminalistics versions in order to identify the principal fact, including the criminal act's actual circumstances.

Keywords

a specially protected injured person • child • criminal procedure • fact in proof • sexual abuse

INTRODUCTION

Publications in mass media inform on the police search activities of persons suspected of sexual abuse against a child. There are specific aspects of the facts of evidence in criminal cases on sexual abuse against a child. The specifics arise due to the fact that most cases of sexual abuse take place unwitnessed, when a person conducting a crime is sure there are no other persons around, except for the victim. Therefore, the prime evidence in such cases is the proofs of the victim – the aggrieved child himself/herself. Moreover, the injured person under 14-years-old is not warned of the responsibility for giving false evidence, as criminal responsibility rests with persons above 14-years-old.

Sexual abuse against a child is the child's intentional involving into sexual activities, applying physical influence, brute force or threats or maliciously using the acknowledged custodianship, power or influence on a child, including the family, or using situations, when a child is explicitly defenceless, especially if a child is mentally challenged, physically disabled or dependent (The Council of Europe Convention on Protection of Children against sexual exploitation and sexual abuse, 2014).

Children's rights of private life, personal inviolability and freedoms are guaranteed by Article 110 of the Constitution of

the Republic of Latvia (The Constitution of the Republic of Latvia, 1993). Paragraph 10, Article 1 of the Law on Protection of Child Rights stipulates that sexual exploitation—any action of sexual nature towards the child with the purpose to provide or obtain sexual stimulation or sexual satisfaction, or another benefit which is performed by an adult or another child who, due to his or her age or development, is in the position of authority, trust or power in relation to the victim, with physical contact or without such contact with the child's body, including subjecting the child to the sexuality of others or using information or communication technologies' (Law on Protection of Child Rights, 1998).

The literary sources legitimately reveal various ways of sexual abuse, in particular, sexual contact, touching the child's body, violation of the child's privacy, subjecting the child to sexuality of an adult, sexual exploitation of the child, and contactless sexual abuse (for instance, exhibitionism, recording child in pornography, sexual harassment, and involving into prostitution) (Cirko and Kalnina, 2019). Criminal Law has gradation of such activities, which might be conducted against a child. Sexual abuse against a child in this article is interpreted as a sexual act (vaginal, anal or oral) conducted on a child, satisfaction of sexual desire in an unnatural way related to vaginal, anal or oral penetration into a child's body, physical activities of sexual character against the body of the aggrieved child, even if these activities are not related with the penetration into the abused child's body, if such activities are conducted against child's will

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or using his/her defenceless condition (Part 1 and 3 of Article 159, Part 3, 4, 5, 6 of Article 160 of the Criminal Law, 1998). However, satisfaction of sexual desire without physical contact with the child's body against the will of the aggrieved child or using the child's defenceless condition is not covered by definitions of Articles 159 and 160 of the Criminal Law, and such activities are specified according to other qualification, namely under Article 162 of Criminal Law.

It is considered that sexual abuse against a child is the least-revealed way of abuse (Cirko and Kalnina, 2019). Victims of sexual abuse are especially defenceless, because often children do not go to the law against their offenders, and high privacy and confidence are typical to such criminal acts (Celmale, 2015). Usually, children do not inform about the experienced sexual abuse, and if claimed, it might be many years after the incident had happened (Jeglic et al., 2023).

In Latvia, most part of the sexual abuse against children happens in socially deprived families, and these acts of abuse are conducted by the family members. Often, the threats are initiated by the cohabitee of mother of the aggrieved child, a step-father, as well as by the child's father, and sexual abuse in such cases is conducted lastingly irregularly (Bozko-Cace, 2019). Statistical data by the State Police evidence that the number of sexual offences against children in Latvia has increased in the past years. There were registered: in 2015—264 cases, in 2016—193 cases, in 2017—245 cases, in 2018—297 cases, in 2019—296 cases, in 2020—304 cases, in 2021—361 cases, and in 2022—362 cases of sexual abuse against child's chastity and sexual inviolability (Information Center of the Ministry of the Interior, 2023).

The objective of this research work is to reflect on the circumstances of fact in proof in criminal cases on sexual abuse against a child, taking into consideration that during the procuring of evidence, it is required to secure a child with the rights of a specially protected person who had suffered sexual abuse.

Research methods: These include analytical methods, analysis of the literature, method of social monitoring (the author has encountered with evidences in criminal cases of this category in legal practice), and deduction method (by analysis of the specifics of fact in proof in cases of sexual abuse).

RESEARCH RESULTS AND DISCUSSION

Theoretical insights into the fact in proof in cases of sexual abuse against a child

There are various definitions of proof in legal literature. For instance, Liede defines proof as follows: 'Proof is the process of thinking and practical actions, during which, based on the stated facts, new yet unrevealed facts are being investigated.

To prove means to find out unknown with the help of already known (Liede, 1980). According to Dombrovskis (2002), proof is the activity of a participant of the criminal procedure, content of which is the justification of the existence or non-existence of the facts included into the fact in proof.

Proof—is activity of a person involved into the criminal procedure, which manifests itself as justification of existence or non-existence of the facts included into the fact in proof, using evidences (Article 123 of the Criminal Law, 2005).

In literature, the entity of the circumstances to be proved is defined using a Latin term *thema probandi*. In criminal procedure, fact in proof is considered as the entity of facts and circumstances to be proved in the criminal case.

'Fact in proof characterises the target of evidence in a criminal case',—says Liede. Fact in proof is the entity of all the circumstances, related facts and supporting facts being proved in criminal procedure (Part 1 Article 124 of the Criminal Law, 2005).

The following elements can be distinguished within fact in proof: the principal fact, related facts and supporting facts. From the point of view of theory, it is important to understand what is considered as the principal fact and what are the peculiarities in regard of cases of sexual abuse. In the criminal procedure, as the principal fact in proof, the existence or non-existence of the *corpus delicti* (constituent elements of offence) should be considered, as well as consequences of the crime and cause—effect relation with the crime in the case of *corpus delicti* of material crimes. In order to prove the existence or non-existence of *corpus delicti*, the following circumstance are to be clarified: object of the act of crime, *actus reus*, subject of crime, and *mens rea*. According to the judicial qualification, the elements of sexual abuse are most explicitly covered by Articles 159 and 160 of the Criminal Law.

Related facts or *factum probans*—is the second group of facts included in the fact in proof. Such circumstances (1) are not included into the focus of circumstances being proved in the criminal procedure, but (2) these are related and allow to make conclusions on them (Meikalisa et al., 2019: 417). The opinion of Professor Strada-Rozenberga should be disclosed as well: ... related facts are not evidences, the related facts should be proved with evidences, however there are such facts, from which conclusions can be made on facts proved in criminal procedure (Meikalisa et al., 2019: 417). As related facts in cases of sexual abuse could be threats of revenge to the aggrieved person, an extortion attempt—blackmail or squeeze, motif of the conducted criminal act, or presence in the place of criminal act within the period of crime. Anyway, credibility or non-credibility of some other proofs, as well as possibility or impossibility to use them as evidence, is justified by supporting facts (Part 4, Article 124 of the Criminal Procedure Law, 2005).

Identification of fact in proof in investigation of sexual abuse against child in the pre-trial procedure

In order that the aggrieved child who suffered the sexual abuse would not be exposed to repeated victimisation, the investigating officer shall take special care on the child's involving into the criminal procedure. Any action taken to clarify and investigate circumstances in proof in case can be one and only, which is apparent in cases of such category.

A vital problem is to clarify the circumstances in proof, which are included into the fact in proof, by using criminalistics tactics and methodologies. Namely, when preparing for investigation activities, in order to get and record personal evidences for stating presence or absence of sexual abuse, from the very beginning of the investigation process, the investigating officer may come across with legal, psychological, or moral challenges.

The first circumstance—the contradictions in the initial records and information; this may be explicit in the initial medical documentation (for instance, in extracts from the ambulatory institution or in medical records from hospital, in the protocols of interrogation submitted by orphan's court, in the initial consulting conclusions by psychologist, or in the records submitted by the educational institution). The initial documents submitted for investigation might include information on the signs of the highest level of threat of sexual abuse against a child (rape, sexual exploitation) without in-depth explanations, without a situation analysis.

The second circumstance—the documents initially are prepared by specialists of other professions, for instance, medical persons, employees of orphan courts, whose task is not to investigate, and the investigating officer might be affected by emotional 'hooks' and be influenced by information entity, especially in situations when investigating officers themselves have encountered abuse, or they have children. Hence, the initial decision and actions by the investigating officer in the case can be affected by their level of professionalism in criminal cases of such category.

One more additional circumstance, which may influence clarification of the circumstances in proof and its quality,—a possible public outcry, which might spark in the respective dwelling area, especially, if the residential area, where the case of sexual abuse has been reported, is not a big city, but a region or a parish, where the number of residents is smaller and the communication is more tight than in cities.

Therefore, putting forward a criminalistics version and its checking from the very beginning of the investigation could be a successful tool in the clarification and identification of the principal fact included into the fact in proof.

A problematic question could be the clarification and identification of the place and time (or the period of time) of the act of crime, especially in situations, if the act of sexual abuse or several acts have happened in a family. When

elucidating such circumstances, from the point of view of investigation, it would be important to clarify and identify a respective geographical referencing of the place and the location. Otherwise, if such circumstances were not clarified and identified, questions may arise in court hearing regarding not clarifying such circumstances, what might result into possible calling into doubt the event itself.

In the context of clarification and identification of *actus reus* (objective side of offence), it is important to clarify whether any tools or things were used in the act of crime; whether an act of sexual abuse has happened once or several times; during what period of time; whether sexual activities have been conducted simultaneously and form several *corpus delicti*, namely, entity, (or whether the activities were repetitive, are unified with the same intention)—in this case, the activities could correspond to unified (separate) elements of crime or whether the sexual abuse was finalised or there are detected signs of inchoate crime (which also affects the judicial qualification of the crime).

Specifics, which might crystallise out during the investigation and might denounce the existence of signs of sexual abuse, actually under Articles 160 and 161 of the Criminal Law, might be in cases, when there is reported a sexual contact with a person under 16-years-old. and there is a version that the sexual act has happened with free will of the aggrieved person, depending on the investigation situation. In this investigation case, the investigating officer is expected to search for evidences, first of all, the age of a child which was known to the suspected before conducting the act of crime; the information on the age is disclosed by the injured person, i.e. in the social networks. However, if evidences prove that sexual activities (sexual act, anal or oral sexual act, satisfaction of sexual desire in unnatural way) were conducted against the free will of the aggrieved person, or defenceless condition of the victim was used, that hindered the injured person to express his/her free will, in this case, *actus reus* stipulated by Article 161 of Criminal Law is not applicable. It should be mentioned that in contrast to Article 160 of Criminal Law, the activities specified in Article 161 might be conducted unintentionally, i.e. in case, if in regard of the age of the aggrieved person personas, the suspected offender has deliberately assumed that the sexual partner has not reached the age of 16 years.

As one of the means of proof should be mentioned the usage of special knowledge, including DNA expertise in order to identify accessory of the biological material to the suspected offender, as well as determination of paternity to a baby born as a result of sexual abuse to the underage victim, establishing psychological and psychiatric court expertise (or both expertizes as a complex) (to the suspected offender and to the child of a victim), establishing of court polygraph expertise, as well as evidences of the aggrieved child, check of these evidences at the scene of crime (*flagrante delicto*),

photo confrontation, evidences of the suspected/the accused and check of these evidences at the scene of crime, evidences of eye-witnesses and evidentiary items. Evidentiary items in sexual criminal acts are mainly biological material, i.e. sperm, epithelium, rheum, residuals of cells, elements of blood cells and hair, elements of sweat and saliva, as well as underwear of the aggrieved person and the convicted, their clothes, bed linen and other objects, on which the elements of biological material have been left.

Peculiarities of fact in proof in cases of sexual abuse against child in judicial practice

According to Article 96¹ of the Criminal Procedure Law, the legal regulations stipulate that a child, who suffered the sexual act of crime, is considered as a specially protected injured person having rights on additional court guarantees. A child has the rights to participate in the court procedure remotely and be examined with the help of technical aids in the court hearing (Part 2 Article 99 of the Criminal Procedure Law, 2005). Interrogation of the aggrieved person is executed in virtue of Articles 152, 153 of the Criminal Procedure Law. The attention to the child remote interrogation in the court hearing is focused in a separate article by the author (Bulgakova and Bozko-Cace, 2021).

To prove sexual abuse against child, there should be not only sufficient amount of proofs, but also, in interpretation of Part 5 Article 124 of the Criminal Procedure Law, a relevant level of evidence 'beyond reasonable doubt' should be achieved, according to which all doubts are evaluated in favour of the accused. In case of doubts and if the amount of proofs is insufficient, the jury might vindicate the accused, exclude from the prosecution the circumstances, which are not proved, or according to Part 3 Article 455 of the Criminal Procedure Law, the jury might re-qualify the crime, mitigating the accusation (Criminal Procedure Law, 2005).

In court practice, when evaluating the proofs, reasonable doubts arise in proving *actus reus* and *mens rea*.

If sexual acts with the injured person have been conducted multiple times and for a prolonged period of time, then, when questioning the victim and the suspected during interrogation, it is extremely important to find out the amount of such acts and when these acts were conducted against the aggrieved person. However, if the amount of proofs is insufficient in regards of the number of sexual abuse acts, then the accusation specifies only those acts, which can be supported by evidences.

In practice, specially protected aggrieved person, especially minors (underage children), often is not able to indicate precisely the time of criminal act, what gives the ground for the defence to put forward an argument that prosecution is not specific, if it does not reflect the exact time and place of the sexual crime.

Time and place as facultative elements of *actus reus* are not disclosed in Clauses 159 and 160 of the Criminal Law (Criminal Law, 1998), but in virtue of Paragraph 2 Part 1 Article 405 of the Criminal Procedure Law, prosecution shall specify factual circumstances of the criminal offence, which [circumstances] define the judicial qualification (Criminal Procedure Law, 2005). It is acknowledged by judicature that prosecution shall be compliant with the notification on the content of judicial decision as specified in Part 1 Article 527 of the CPL, having mentioned also the time and place of the criminal act, the way of conduct of crime, the form of guilt of the convicted, motives and consequences of crime and to the extent these can be clarified (Supreme Court of the Republic of Latvia, 2011).

Therefore, if a child cannot precisely remember the place and time of the act of crime, then on the court hearing, it is useful to interrogate a psychologist or other experts, who could disclose grounded reasons why there are situations when a child cannot remember precisely the place and time of the criminal act. It is useful to include a question into the court psychiatric-psychological expertise in the pre-trial procedure, due to what reason the aggrieved person does not remember or cannot specify precisely the time and place of the criminal act, in this way excluding an opportunity to challenge credibility of evidences of the injured person. In order for the prosecution to be specific, in the pre-trial procedure, it is important to clarify and specify the month and year when the criminal act has been conducted. In case of prolonged sexual abuse, the first and the last episodes of sexual abuse are clarified and specified. Interrogation of the underage injured person with the help of a psychologist provisions with the opportunity to get more exhaustive witness. Thus, we can help the aggrieved child to remember the details of the criminal event, so as to provide with the information of the criminal act's time and place.

The judicial practice encounters a problem to distinguish between sexual activities that have been conducted with physical contact with the body of the aggrieved person and the sexual activities related with penetration into the body of the injured person, as well as to put the demarcation line between sexual activities conducted with physical contact with the body of the aggrieved person and the sexual misconduct (without any physical contact with the body of the victim), if the aggrieved person was intimidated or enforced by the convicted to make sexual activities.

Therefore, it is important to clarify what way of sexual activity, in particular, was conducted. These circumstances are clarified through interrogation and questioning of the underage aggrieved person. In order to get more exhaustive evidence from the injured child, the child is being interrogated in the presence or with mediation of a psychologist according to Article 152 and 153 of the CPL. However, in order to exclude

an opportunity to challenge admissibility and credibility of the child's evidences, the process of interrogation of the underage injured person shall be recorded on video. When interrogating a specially protected victim, a strict sequence of getting information is to be followed, namely, first of all it should be clarified, whether sexual activities have been conducted with the touch of the body of the injured person or no and what are the body parts of the aggrieved person that the convicted has touched, and whether the touches were conducted by the penis of the convicted, with the fingers, tongue, lips, or some sort of objects, whether the victim was intimidated or enforced to touch the body parts of the criminal offender (genitals, thorax, etc.) for satisfaction of the sexual desire, how frequent were the touches, how intensive were the movements, whether the touches were through the clothes or those were exactly to the skin, whether after the movements the criminal has ejaculation and sperm release, as this is evidencing that the touches were conducted with the aim to satisfy sexual desire.

If an underage child indicates the presence of a physical contact, then further it is clarified, whether during such a physical contact there was conducted any penetration into the child's mouth, vagina or anal orifice, how deep was the penetration, what pains has the injured experienced during such activities, how intensive were the movements of the convicted and approximately how long the sexual activities lasted. If having identified that there was penetration into the particular body part of the underage injured person, it is clarified, whether this penetration was with the penis, fingers of the convicted or with any object. In this case, the injured person is to be asked to give details or to draw how the penis looked like, if the victim has seen it. In practice, an anatomic manikin is effectively used, on which the injured person displays the ways of sexual activities, as well as the schemes are used, on which a child with naked genitals is displayed. In all the cases, it is clarified, whether the injured person and the accused were undressed, fully or partially, what they were wearing before the act of crime. A forensic examination is appointed to confirm the fact of penetration into the body of the injured during sexual activities. Biological materials, fibre, hairs on the injured person or on their clothes may be the evidence of presence of physical contact. In this case, a forensic examination is performed and an expertise to identify the particles of fibre.

There are known problems in practice—how to distinguish between abusive sexual activities and voluntary ones. In order to prove that the sexual crime against a child was conducted against their will, having differentiated between dispositions of Articles 159 and 160 of the Criminal Law and Article 161 of the Criminal Law, it is important to prove the fact of resistance from the injured part and to identify how expressed the child's resistance against the criminal acts of the accused,

having interrogated the child about this fact, as well as it is necessary to include into decision the court's psychological–psychiatric examination of the question, whether the injured person due to his/her condition/situation could or could not manifest resistance to the accused, how did they express and if the injured person could not counteract, then what was the reason. If physical violence was applied, then most probably some bodily injuries were caused during the fight-back. Thus, bodily injuries localisation and presence are being identified, commissioning a forensic examination. In case of threats, when interrogating the underage injured person, it is important to clarify the content of threats, which have paralysed the child, so that the accused could conduct sexual acts against him/her. To prove the authority aspect, it should be clarified whether the aggrieved person had a special psychological attitude towards the offender, namely, whether the injured child perceived the convicted as a person having much influence, so the child trusted and respected him. Whether between the injured child and the accused have been formed subordinated relations. Moreover, it should be clarified, whether the accused realised that he/she has authority in front of a child and used this authority so as to bring the child's will to submission and conduct sexual activities against the injured child. To prove the aspect of trust, when interrogating a specially secured injured person, it is necessary to clarify, whether the child perceived the accused as a person, who the child shall not be afraid of and what were the relations between the injured and the offender. To prove other aspects of influence, it should be clarified who financially supported the family, whether the aggrieved person was materially dependent on the accused person, whether for not participating in the sexual acts with the accused some limitations and restrictions were imposed on some important things for the injured person.

Sexual activities are considered abusive, if the underage injured person is in a defenceless condition. Therefore, in order to prove a defenceless condition, it is necessary to identify the age of the aggrieved person, whether at the moment of criminal act, the injured person was ill with any mental disease or the victim was diagnosed with mental disability, whether the injured was ill or unconscious or was affected by any intoxicating substances, what substances were used to put the injured in such condition, and how this condition was expressed, whether the injured could or could not realise the nature and content of the conducted activities, and whether the aggrieved person could resist, defend him/herself, call for help in this condition. To prove the defenceless condition of the injured child, a complex court psychiatric–psychological evaluation is commissioned, in order to identify that the injured child due to their age or psychiatric illness/disability was unable to realise the nature and content of the activities against them, and, therefore, could not oppose and react against. If the defenceless condition to the injured

person is caused by alcohol or other intoxicating substances or due to some physical inability, then the expertise shall clarify, whether being in such a condition affected the injured child's abilities to react against and whether such condition is likened to defenceless condition. If the expert confirms that during the sexual activities, the injured child due to their age was unable to realise the meaning of such activities, and therefore could not express any resistance and protect him/herself, then the activities are qualified as abusive, not voluntary.

Often in practice, there are arguments about the injured person's age and sexual maturity, the accused indicating that he was not aware of or did not realise the age of the injured, especially, if a criminal act was conducted against the unknown person in the age between 16 years and 18 years. If the convicted was not previously aware of the age of the injured, but the aggrieved person's appearance afforded ground for considering that this person is full-aged, then the convicted could be bewildered with the actual age of the victim. Therefore, it is highly important during interrogation of the accused to clarify the circumstances: how far the suspected knows the injured, whether the offender is aware of the age of the injured, what is the date of birth of the injured, whether anyone has mentioned the age of the injured, whether any of the witnesses have told to the accused on the age of the injured, whether the victim him/herself has told their age.

In order to prove that the convicted has understood and realised that the sexual activities are conducted against the will of the injured person, using trust or authority, if the aggrieved person failed to express any signs of resistance, then in all the cases, the attitude of the convicted against the conducted sexual act of crime is being clarified, which is expressed in unwillingness of the underage injured person to enter into sexual relations with the convicted. If this is not clear from the acting of the injured person and the defenceless condition is not defined to the aggrieved person, which would prevent him/her to express any resistance, then the activities are qualified as voluntary. The convicted, when conducting an abusing sexual act of crime against the victim, should clearly realise that the aggrieved person does not want these sexual relations with the offender and clearly expresses it.

CONCLUSIONS

The principal fact comprised into fact in proof of the sexual abuse is related with clear identification of *actus reus*, the threatened object of sexual violence. In order to achieve this, from the very beginning of the investigation in the pre-trial procedure, the investigating officer should be carefully prepared, including the place and time of interrogation and

the choice of questions and the interrogation of the injured child should be conducted according to the requirements of the Criminal Law.

The Criminal Procedure Law does not comprise a regulated problem of remote interrogation of a person. Therefore, the investigating officer follows the principles of Article 140 of the Criminal Procedure Law, which regulates the usage of technical aids.

When investigating a case of sexual violence against a child, from the very beginning of the investigation, the task of the investigating officer is to put forward and check the criminalistics versions to identify the principal fact, including the criminal act's actual circumstances, which, in the interpretation of criminal law, have transformed into *corpus delicti* (object of criminal act, *actus reus*, subject, *mens rea*), or to find out absence of criminal events or absence of constituent elements of crime in the activities of the relevant person.

When proving *actus reus*, doubts arise to the jury in regard of the time and place of the act of crime, on the amount of activities, whether just a physical contact with the body or the penetration into the body of the injured person was conducted during the sexual activities, and whether these sexual activities were abusing or done voluntary. When proving *mens rea*, doubts arise to the jury in regard of whether the convicted has realised the age of the aggrieved person, whether the convicted has the intention to conduct a particular sexual activity, whether the convicted realised their authority in front of the injured person and the fact that the victim trusted the convicted.

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