

Making Decision in Criminal Proceedings within a General Theory of Forensic Science in Romania

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Abstract: *The judicial process of making decision in criminal cases is, generally speaking, increasingly analysed within a complex framework, one of these being harmonized with principles, and concepts organized along with the forensic activities of investigation. To this regard, the Romanian judicial activity in criminal cases is not away from these values of respecting standards in criminal proceedings. This situation is particularly viewed during the judgment phase of criminal proceedings at the stage of making decision. Taking into consideration all these aspects, the current paper is focused on the best practices of the activity of decision making in criminal cases in Romania, particular attention being paid to the forensic science and the way in which it influences the process of achieving decision in the framework of administering and assessing evidence based on forensic activity of investigation. An in-depth analysis of both the doctrine trends and the case-law presentation on the topic of decision making in criminal proceedings within the forensic framework in Romania will be presented, as well as the case-law remarks and comments of this topic. The idea of this paper was conducted by the fact that several criminal cases are usually solved by taking into account the involvement of forensic investigation records of gathering evidence which help judicial bodies in making decision in criminal proceedings.*

Key Words: *Criminal Law; Criminal Procedure Law; Criminal Matters; Court of Law; Making Decision; Criminal Proceedings; Criminal Cases; Judgment Phase; Forensic Investigation; Judicial Evidence; Scientific Evidence; Romania.*

General overview

The issue of how the doctrine in criminal matters in Romania meets the practical achievements of solving criminal cases by means provided by the forensic science concluded in a real general theory of criminal procedure law, with particular view upon the forensic science.

The literature review is currently stated at a level which involves a multidisciplinary framework, part of this being organized around the forensic science, as well as its particular application in the field of criminal justice. It begins with the school of law of Bucharest, whose prominent figure in the area of forensic science is Professor Emilian Stancu, high-respected representative of the forensic science in Romania. His lectures and studies have created a specific trend in the forensic issues in criminal proceedings, promoting opinions based on substantive elements of forensic science, within a complex environment.¹ Other discussions have also been submitted for the legal literature of criminal matters in Romania by other famous professors of criminal procedure law, who have researched in this field with particular approach in the forensic science.²

Discussing about the involvement of the forensic science in the process of decision making in criminal cases, the main point of view could be viewed upon the basic principles which balance between the investigation and prosecution, conviction and sentencing, pre-trial realize and detention, appeals and probation.³ All these institutions of criminal procedure law are concepts which lead to ruling solutions in criminal matters both legally and substantially.

Analysing the current situation of the doctrine presentations and the jurisprudence aspects in criminal cases in which the forensic investigation achievements are involved makes both practitioners and theorists rethink the idea of achieving activity of the judiciary. It is more discussed as a comprehensive and well-structured activity, organized around the complex approach of making judicial decision with the help of the other sciences, such as the forensic one, viewed in a multidisciplinary framework.

In deepening such framework, there are several principles and concepts arisen from the forensic activity, whose results consist in gathering evidence, scientific ones, with a high level of involvement in solving cri-

¹ See STANCU, E. *Tratat de criminalistică*. 6-a ed. București: Universul Juridic, 2015. 847 p. ISBN 978-606-673-673-2.

² See VOLONCIU, N. *Tratat de procedură penală: Parte generală: Vol. I. 2-a ed.* București: Paideia, 1996. 511 p. ISBN 973-9131-01-8.

³ See DONGOROZ, V., S. KAHANE, G. ANTONIU, C. BULAI, N. ILIESCU and R. STĂNOIU. *Explicații teoretice ale Codului de procedură penală român: Partea specială: Vol. VI. 2-a ed.* București: All Beck, 2003. 443 p. ISBN 973-655-357-4.

minal cases. All these aspects are structured within a complex framework, featured, among others, by:

- ✚ gathering evidence during the investigation and judgment activities;
- ✚ finding the truth in criminal cases;
- ✚ solving criminal cases legally and pertinently;
- ✚ making judicial decision in criminal cases based on evidence.

It is true that the judicial activity in criminal cases is always featured by the involvement of the other sciences, but, despite this argument, the forensic activity of the judicial bodies is provided by respecting the *principles of gathering pertinent, conclusive and legal evidence*, on the one hand, and the activity of administering and assessing it during the judgment phase of the criminal proceedings, on the other hand. Thus, the process of gathering evidence is situated in close collaboration with the activity of administering it and, more particularly, with the activity of assessing it at the stage of decision making in criminal cases in which such evidence is useful for finding the truth.

These issues have been discussed by the doctrine within criminal matters in Romania in different manners, taking into consideration that the case studies conducted on this topic have created several points of view and opened many ways of assessing, being argued differently. This is because, in practice, there are several criminal cases whose decisions are based on the forensic investigation records of gathering evidence in cases, such as road accidents, homicides, financial crimes, corruption, counterfeiting, cybercrimes and so on.⁴ For this reason, it could be stated that there are no unitary opinions expressed by the doctrine on the same activity of forensic investigation that generated the same solutions in practice.⁵

The involvement of forensic activity is prevalently disposed during the investigation phase of criminal proceedings, while the judicial body is entitled to find more items related to the crime committed. Equally, during the judgment phase of criminal proceedings the courts of law may

⁴ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 431/RC/2021 [2021-10-14]*; *Decision of the High Court of Cassation and Justice of Romania Ref. No. 140/A/2021 [2021-05-06]*; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 168/A/2021 [2021-06-22]*.

⁵ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 193/RC/2021 [2021-05-05]*; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 22/RC/2021 [2021-01-21]*.

order one or more forensic expertises⁶ that could provide them with evidence on the crime committed. These regulations of criminal procedure create a dual feature of criminal investigation by stages of criminal proceedings the cases could be investigated of.

Having regard to these aspects, the issue of solving criminal cases arises the idea of a forensic framework within the judicial activity, particular attention being paid to the process of decision making in a more comprehensive area of criminal cases. The doctrine has also emphasized that, in spite of its legal activity, the judiciary is well-structured and organized by the other sciences, as the forensic science is, which influences it directly.⁷

Rules and principles of forensic science in the decision making

As a general rule of criminal proceedings, the activity of gathering evidence necessary for the judicial bodies in making decision in criminal cases they are invested with is based on the independence of the forensic experts appointed by the judicial bodies. Nevertheless, they are connected to the judiciary and work in close cooperation with the judicial bodies for the purpose of the criminal case.

In achieving its purpose, the forensic expertise is featured by general rules, as guiding principles, which differ from an expertise to another one, due to the fact that there is no common forensic expertise ordered by the judicial bodies in different cases. Moreover, there are different stages of the forensic expertise which converge to the investigation of the crime scene, on the one hand, and the activity from within the laboratory, on the other hand.

The doctrine in criminal matters has pointed out that these rules should be viewed in a particular manner, because of the differences that exist in the two activities mentioned above. In this respect, one opinion focuses on the idea that the forensic experts are organized within complex teams of investigation during the crime scene investigation.⁸ This

⁶ According to the Article 172(2) of the Code of Criminal Procedure of Romania, adopted by *Law No. 135 of July 1, 2010, on the Code of Criminal Procedure* [2010-07-01]. Official Journal of Romania, 2010, No. 486.

⁷ See STANCU, E. *Tratat de criminalistică*. 1-a ed. București: Actami, 2001. 736 p. ISBN 973-9300-31-6.

⁸ See MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. București: Hamangiu, 2021, p. 181. ISBN 978-606-27-1804-6.

means that the forensic experts work with other specialists in the judicial field, or even with legal-medicine experts. A particular attention might be paid to the cases of homicide, where, along with the forensic experts, the activity of investigation requires other specialists, such as prosecutors, judicial police officers and legal-medicine experts as well. They have the main role in gathering human body samples, in order to be examined in laboratory. The same procedure is applied in cases of unidentified corpses, due to the fact that in such cases the forensic experts do not have competences to transport them to laboratories for examination.

A special case is created in cases of serious homicide, when only parts of corpse are located within the crime scene or cinders resulted as a consequence of the corpse burning process. The above-stated situation is featured by the rule of discovering as many evidence as the judicial bodies need in purpose to find the truth in the criminal cases they are called upon. The same is applicable in the situation of finding the rules of evidence regarding the crime committed, the circumstances the crime was committed in, as well as the identification of the perpetrator. From this point of view, the *forensic evidence – scientific one* – has a high level of probative value within the judicial activity of criminal proceedings, which will be evaluated by the court of law as long as it is corroborated with all the rules of evidence administered in criminal case. The main principle of interpreting forensic evidence is that it does not have *ex ante* an established judicial value. This means that, in case of contrary opinions submitted by different experts, the rule converges to the idea that the court of law will establish the value for any evidence administered in criminal case through a forensic expertise report, in order to state the legal decision.

A particular situation arises in cases in which the court of law orders a forensic expertise and the parties involved call for their own experts under the Article 172 paragraph 8 of the Romanian Criminal Procedure Code, which provides that *“In carrying out expertise, authorized independent experts could participate, called by the parties or by the main process parties.”* This provision must undoubtedly be corroborated with the Article 173 paragraph 4 of the Romanian Criminal Procedure Code, which states that *“The parties and main process parties are entitled to call for an expert to participate at the expertise on behalf of themselves.”*

Related to this issue, the court of law stated that the appeal submitted by the defendant on the sentence ruled over the merits of the case



without taking into consideration the independent expert's opinion represents an issue of assessing evidence, instead of its legality,⁹ and the contrary opinions provided by the independent experts called by the parties have the same judicial value at the moment of the examination of the case. In this matter, the court of law has observed that the defendant's rights during the criminal proceedings were fully respected, including the manner of calling for an independent expert that may submit objections to the expert's conclusions exclusively, but not to the other aspects relevant for the criminal case.¹⁰

Generally speaking, it is obviously that during the criminal proceedings the means of evidence through the forensic expertise reports drawn up by the experts have the role to direct the courts of law to create them a different perspective over the signification of expertise report results, as well as to facilitate them the process of evaluation of the appointed experts' conclusions.¹¹

Admitting the role of forensic evidence in criminal cases means that another rule of forensic activity is applied. It refers to the principle of opportunity of the criminal proceedings related to the activity of carrying out forensic expertises in criminal cases with a complex feature, like the cases mentioned earlier of serious homicides. Although there are several unknown aspects related to the investigated case, the forensic experts have to begin their activity of finding the evidence from the hypotheses advanced by themselves, which face relevant issues of the criminal case.

The legal doctrine has expressed several opinions regarding the activity of forensic science and its influence over the judicial activity, in particular regarding the process of making decision by means of evidence gathered from the forensic activities.

Taking into account all these aspects, at the moment of judiciary some issues will be arisen. They refer to the following elements:

-  how the judiciary meets the forensic framework;
-  the connection between the two concepts of criminal proceedings;

⁹ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020 [2020-02-27]*.

¹⁰ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020 [2020-02-27]*.

¹¹ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 62/A/2020 [2020-02-27]*.

- ✚ the solutions the forensic methods and scientific techniques provide for the judiciary;
- ✚ the involvement of forensic tactics applied as the main principle of hearing the participants in criminal proceedings.

Analysing these topics and exemplifying their specific character created a general theory of the forensic science, with a special involvement in criminal cases and its process of making decisions.¹² Despite its specific character, a standardization of proof cannot be advanced because of the entire principles of criminal proceedings, especially those applied during the judgment phase, which require an emphasized examination and analysis of the entire evidence administered in criminal cases. A unique standard applied in this field would generate a 'standardized' solution in practice, the fact that is not in accordance with the purpose of criminal trial entirely. The same is true in the matter of making solution in criminal cases when some methods and scientific techniques which belong to the forensic science are useful for the courts of law and provide guarantee for the solution which is the only one applied legally for the criminal case judged.

Consequently, the procedure of appointing forensic experts in criminal cases has as main scope establishing completely the circumstances in which the crimes were committed in. This principle is regulated by the Article 8 of the Romanian Criminal Procedure Code, which states that the scope of criminal proceedings is to establish completely and within a reasonable time the crimes committed, in such a manner that any innocent person would not be charged unfairly and all persons who committed crimes should be punished according to their guilt, stated by the court of law, with the respect of all judicial guarantees of due process.

Achievements in the case-law solutions

In the field of making decision in criminal cases, the discussion arises on many directions. These follow the rules of criminal proceedings on proposing, ordering, assessing, administering forensic evidence and pronouncing judicial decision. For the current paper, the last two issues present a particular interest for the process of decision making in criminal cases. This means that only the procedure of administering evidence by

¹² See MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. București: Hamangiu, 2021, pp. 249-272. ISBN 978-606-27-1804-6.

means of forensic science, as well as pronouncing decision in criminal cases will be taken into consideration.

First of all, the judicial activity of administering evidence by forensic science methods and techniques follows the same procedure as stated by the Article 100 of the Romanian Criminal Procedure Code, which regulates for the judgment that during this stage of criminal proceedings the court of law is entitled to administer evidence either at the prosecutor's, victim's and parties' request or *ex officio* any time it considers necessary to accustom itself with the *de facto* elements of the crime committed. As a general rule, the Romanian Criminal Procedure Code states that the proposals for administering evidence may be admitted or rejected motivated by the courts of law, under the respect of special feature of evidence – pertinent, conclusive and useful.

The main legislator's argument for this provision is related to the fact that forensic expertise reports do not meet in some cases the three above-stated conditions, as well as other conditions referring to their legality.

From the jurisprudence point of view, taking into account the general trend drawn up by the High Court of Cassation and Justice of Romania, the evidence administered in criminal cases should be analysed under the umbrella of its admissibility.¹³ In this respect, the doctrine has admitted that the activity of finding the truth in criminal cases depends on the legal conditions of administering evidence during the criminal proceedings.

Moreover, according to the Article 5 of the Romanian Criminal Procedure Code, reported to the Article 6 of the European Convention on Human Rights, the court of law has the duty to clarify cases entirely, under all aspects *de iure* and *de facto*, based on evidence stated by legal rules of evidence, gathered by the judicial bodies according to the Article 100 and the Article 101 of the Romanian Criminal Procedure Code, otherwise the latter might be rejected by the court of law.¹⁴

As a matter of fact, it is highlighted that the report of forensic expertise ordered in criminal case should be administered on the issue of es-

¹³ See VOLONCIU, N. *Tratat de procedură penală: Parte generală: Vol. I. 2-a ed.* București: Paideia, 1996. 511 p. ISBN 973-9131-01-8.

¹⁴ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 168/A/2021 [2021-06-22]*.

tablishing the authenticity of signatures issued from the parties involved. The jurisprudence has stated that the signatures on the statement of 2011 and the other documents disputed by the victim were not carried out by that person and the forensic expertise could not establish the person to whom the signatures belong.¹⁵ Equally, the jurisprudence has admitted that the admissibility of the forensic means of evidence would contribute to the proof of the witnesses' unfair testimony, also combated by the burden of proof through different forensic expertises, ordered by the court of law.¹⁶

Moreover, the court of law has the main duty of assessing conclusions provided by the forensic evidence report on the contradictory issues. In fact, the conclusions of such report stated that "According to the 2016 expertise report, the signatures applied on behalf of the victim on the two documents rewritten were not carried out by that person, but they were made through free imitation of the authentic signatures which belong to civil party."¹⁷

Thus, the condition of admissibility of evidence is rightly observed by the court of law in cases in which there is evidence administrated which combats the allegations submitted by the parties. Taking into account this solution provided by the forensic science in criminal cases, it could be concluded that if the evidence administered result that the defendant is the person who committed the offense, then the court of law should admit the defendant's request on carrying out specific forensic expertise, in order to combat the other parties' statements.

Another jurisprudence practice emphasized by the doctrine in criminal matters is that in criminal cases in which the means of evidence conclude to probative elements, any request of administering the other means of evidence could be rejected by the court of law as unlawful ones.¹⁸ This is because the court of law assures the respect of the princi-

¹⁵ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 126/A/2021 [2021-04-23]*.

¹⁶ See also a similar point of view in *Decision of the High Court of Cassation and Justice of Romania Ref. No. 20/A/2020 [2020-01-22]*, and in MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. București: Hamangiu, 2021, pp. 257-258. ISBN 978-606-27-1804-6.

¹⁷ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 126/A/2021 [2021-04-23]*.

¹⁸ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 312/A/2018 [2018-11-27]*, and also in MAGHERESCU, D. *Teoria generală a expertizelor criminalistice*. 1-a ed. București: Hamangiu, 2021, p. 258. ISBN 978-606-27-1804-6.

ple of solving criminal cases in reasonable time, an imperative condition of criminal proceedings¹⁹ stated by the Article 6 paragraph 1 of the European Convention on Human Rights.²⁰

The value of due process should be viewed in accordance with the provisions regulated by the Romanian Criminal Procedure Code, which state that “The judicial bodies are obliged to carry out the investigation and judgment activities in accordance with the proceedings guarantees and parties’ and main process parties’ rights, in such a manner so that the offences committed would be discovered in time and completely, no innocent person to be charged illegally and any person who committed an offence to be punished according to the criminal law in reasonable time.”²¹

Finally, ruling a decision based on forensic expertise reports submitted in criminal cases emphasizes another aspect of the judiciary that arises a particular interest for the current section. At the stage of decision making in criminal cases, the court of law has the main role of assessing expertise reports, on the one hand, and the conclusions stated by the experts, on the other hand. Both activities are connected to each other in a common unit that the judicial decision pronounced will provide. From this consideration, the court of law may rule its decision based either on the expertise reports exclusively, or through corroborating them with the other rules of evidence, also administered in criminal case.²²

On the one hand, specific for the judicial activity during the judgment phase of criminal proceedings is the corroboration of the forensic exper-

¹⁹ See PERGAMI, F. Next Generation EU and the Reform of Statutes of Limitation: Old and New Problems Regarding the Reasonable Length of Proceedings. *KOINONIA*. 2021, vol. 45, pp. 341-358. ISSN 0393-2230; and SMITH, A. and S. MADDAN. Misdemeanor Courts, due Process, and Case Outcomes. *Criminal Justice Policy Review* [online]. 2020, vol. 31, no. 9, pp. 1312-1339 [cit. 2022-02-16]. ISSN 1552-3586. Available at: <https://doi.org/10.1177/0887403420901759>.

²⁰ See the European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950, into force from 1953; see also TELEKI, C. Applicability of Article 6(1) ECHR. In: C. TELEKI. *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* [online]. 1st ed. Leiden; Boston: Brill Nijhoff, 2021, pp. 101-128 [cit. 2022-02-16]. Nijhoff Studies in European Union Law, vol. 18. ISBN 978-90-04-44749-3. Available at: https://doi.org/10.1163/9789004447493_008.

²¹ In accordance with the Article 8 of the Romanian Criminal Procedure Code, corroborated with the Article 6 of the European Convention on Human Rights.

²² See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

tise reports with the witnesses' testimony,²³ as it has already provided earlier. In the activity of assessing evidence administered in criminal cases, the court of law will appreciate the forensic expertise report which corresponds to the questions requested by the judicial bodies, also thoroughgoing studies from a scientific point of view and very difficult to be combated by the other means of evidence.

On the other hand, the opinions expressed by the experts may be a key element of assessing other evidence administered in criminal cases which does not have pre-established judicial value.²⁴ More particularly, the issue involved is subordinated to the general process of assessing evidence proceeded by the court of law at the stage of deliberation in criminal cases and constitutes a serious criticism of basic principles, but not those of legality of decision pronounced.

For this consideration, the doctrine has also focused its attention on the aspects of legality and basic principles of law in the procedure of assessing expertise reports. Both aspects are relevant in the process of making decision in criminal matters, in purpose to find the truth in criminal cases beyond any reasonable doubt.²⁵ Moreover, a judicial decision in criminal cases should imperatively be pronounced in accordance with the principles of due process and fair trial as well.

Conclusions

Analysing the doctrine in criminal matters along with the case-law presentation of the jurisprudence in Romania, it could be highlighted that the main rules and principles of criminal forensic science are useful for the courts of law in the process of decision making, particularly in cases of serious homicides, road accidents, corruption, counterfeiting and so on. Respecting it (i.e. the rules and principles) has consequences

²³ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 140/A/2021* [2021-05-06]; and *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

²⁴ See *Decision of the High Court of Cassation and Justice of Romania Ref. No. 174/A/2021* [2021-06-24].

²⁵ See JELLEMA, H. The Reasonable Doubt Standard as Inference to the Best Explanation. *Synthese* [online]. 2021, vol. 199, no. 1-2, pp. 949-973 [cit. 2022-02-16]. ISSN 1573-0964. Available at: <https://doi.org/10.1007/s11229-020-02743-8>; and MULÁK, J. The Principle of the Public of Criminal Proceedings as an Attribute of the Right to a Fair Trial. *The Lawyer Quarterly*. 2021, vol. 11, no. 3, pp. 518-533. ISSN 1805-8396.

throughout the entire activity of criminal proceedings, especially in the area of gathering evidence by means of forensic science.

The legality of carrying out forensic activity of expertise is regulated by the Articles 172 – 181 of the Romanian Criminal Procedure Code, as well as by other specific provisions in the matter.²⁶ The results of forensic expertise reports should ground the conclusions the experts have achieved during their examination activity. This procedure is also of an important value due to the fact that the judicial decisions made in criminal cases by the courts of law will be based on the conclusions reported by experts. This means that referring to erroneous opinions stated by the experts, the courts of law will pronounce illegal decision. Otherwise, a forensic report which respects entirely the principles and rules of gathering evidence within a forensic framework will provide the courts of law with legal conclusions and opinions and, consequently, will generate a right solution made at the end of criminal proceedings, based on conclusive, pertinent and legal forensic evidence.

For these reasons, the principle of legality should imperatively characterize the forensic activity of the judicial experts, on the one hand, and the criminal proceedings activity, on the other hand.

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²⁶ See *Government Decision No. 368 of July 3, 1998, on Establishing the National Institute of Forensic Expertises* [1998-07-03]. Official Journal of Romania, 1998, No. 248, modified subsequently by *Government Decision No. 458 of April 15, 2009, on Modifying the Government Decision No. 368 of July 3, 1998, on Establishing the National Institute of Forensic Expertises* [2009-04-15]. Official Journal of Romania, 2009, No. 276.

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