Journal of Namibian Studies, 33 S2(2023): 3749–3757 ISSN: 2197-5523 (online)

The Authenticity of Modern Means of Criminal Evidence

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Abstract

This research is an attempt to know the authenticity of modern means of criminal evidence. It deals with the authority of the subject judge in forming his emotional conviction from modern means of proof. Moreover, it is an attempt to highlight the rule of personal conviction of the judge and the scope of its application, as well as the persuasive power of modern means. The researcher has used the descriptive analytical method. The study has found that the criminal judge is now able to access evidence through the help of experts. It has also been found that The legislator is the one who can confront this technical and scientific development with the new means in the field of proof stipulated in the articles of the law. Moreover, the recent evidence that is gleaned from photography is a presumption, and reliance on it in convicting is subject to the judge's emotional judgment.

Introduction

It was necessary for the legislator to keep pace with the technological development by developing modern means of criminal proof, so methods of proof appeared by sound, recording, image and visuals. The genetic fingerprint (DNA) and other means of proof that contribute greatly to reaching the truth are also relied upon, and this represents the goal of the criminal judge.

This research aims to answer the following questions:

• What are the limits of the authority of the subject judge in forming his emotional conviction from modern means of proof?

• To what extent is the judge free to use modern means in the criminal case?

• What is the proving value of modern methods in criminal matters?

• What is the attitude of the Jordanian legislator regarding evidence by modern means in criminal matters?

• What is the position of jurisprudence and the judiciary on penal proof by modern means?

Therefore, this research is limited to addressing the procedural texts and subjecting them to research and analysis in order to know the role played by modern means in penal evidence. Thus, the scope of this study requires identifying the texts contained in the procedural laws in addition to the decisions of the relevant judicial rulings.

The methodology of the study is represented in combining the descriptive and analytical approach of the provisions contained in the procedural laws and judicial rulings with the aim of memorizing the explicit and implicit meanings of these texts and rulings and the results they have and their advantages and shortcomings.

Therefore, we will clarify the authenticity of the modern means of penal evidence through three sections. The first topic is concerned with the rule of personal persuasion for the judge and the scope of its application, the second topic relates to the persuasive power of modern means, while the third topic relates to the probative value of modern means, ending with a conclusion that includes the results and recommendations, and that is as follows:

The first topic: the rule of personal conviction of the judge and the scope of its application:

Certainly, reaching the truth is the supreme goal that the criminal judge seeks. There is no doubt that any goal must have means leading to its achievement, and the judge's means are the evidence. Moreover, the assessment of the productive value of these means is the right of the subject judge alone, and he has the freedom to perform his work in that. However, this freedom, even if it is broad, is not absolute to the extent that it leads to the collapse of legality or the absence of the oversight of the Supreme Court. The judge may deviate in estimating the productive value of the legal evidence, or he may overlook its illegality. Therefore, the legislator has set limits for the judge to stand, because the legislator’s goal is for the judge to reach the truth, but in the manner specified by the law, and in this research we will present it clearly in the following sections.

The first section: the concept of personal conviction of the judge:

The main pillars of the concept of personal conviction of the judge can be determined by stating the following points: 1

1. The judge's personal conviction is a mental and emotional state, meaning that it is based on mental activity that defines a clear perception of the reality of the reality presented to him.

2. It is the material facts that are dealt with in the criminal case against the judge that establish the judicial process and that lead the judge to this case.

3. The judicial conviction is the result of a logical process carried out by the criminal judge when weighing the evidence.

4. The nature of the incident reached by the criminal judge, which is the essence of conviction, depends on a practical result, which is the match made by the judge between the material facts and the model facts.

5. The criminal judge is free to derive his conviction from any evidence that he is reassuring, without being restricted in forming his conviction with a specific evidence.

6. Freedom of the criminal judge to assess the evidence presented to him, without being obligated to issue a judgment of conviction or complete innocence by taking the evidence that comforts him and presents other evidence.

For this, it can be said that the comparative criminal law has defined three systems of proof: the legal (restricted) system of evidence, the moral (free) system of evidence, and the mixed system of evidence. The best of them is the moral evidence system in which the judge is allowed to exercise his discretion in a way that enables him to reach the truth. It is considered better than the other two systems, especially that the criminal judge has the freedom to the extent that it allows him to rely on the evidence available to him to base his belief on it after removing the doubt that hinders the judgment of conviction. Consequently, the criminal judge has the right to rely on whatever evidence he wants to reach the desired truth, provided that such evidence is legally legitimate.

The second section: Scope of application of the judge's personal conviction rule:

In accordance with the provisions of Article (147/2) of the Code of Criminal Procedure, which states that "evidence shall be established in felonies, misdemeanors and infractions by all means of proof, and the judge shall judge according to his personal conviction," it is agreed that the criminal judge bases his judgment on his personal conviction. This depends on the evidence presented to him, and for this he has the right to rely on one evidence and ignore the other. This stipulates that it is not permissible for the judge to rely on his emotional conviction alone, for conscience alone is not sufficient, but rather it must be supported by evidence, and the evidence must be legitimate in its origin, since the judgment issued by the penal judge must be based on certainty, not on possibility and guesswork. 2

The second topic: the persuasive power of modern means:

The issue of the persuasive power of modern means requires us to study the authority of the criminal judge in accepting evidence for users of modern means, and this will be discussed in the first section of this topic. Moreover, estimating the evidence for users of modern means will be discussed in the second section.

The first section: the authority of the criminal judge to accept evidence derived from modern means:

It is agreed that the evidence derived from modern means is the most infringing evidence of the sanctity of private life, and therefore the evidence is not acceptable in the process of criminal proof unless it is obtained within the provisions of the law. Despite the freedom of the criminal judge to prove, he cannot accept evidence obtained from an unlawful procedurenot only because this contradicts the principles of justice, but also affects the rights of the defendant in defense. 3

The criminal judge must examine the validity of the evidence presented to him and ensure its legality. The procedures for obtaining evidence may be invalid and illegal, so the evidence that these procedures came with shall not be considered.

Referring to Article (43/1) of the Jordanian Evidence Law, it states: “Judicial presumptions are presumptions that were not stipulated by law, and the judge extracts them from the circumstances of the case and is convinced that they have certain significance, leaving it to the judge’s discretion to elicit these presumptions.” This means that it gave the Iraqi judge the right to take advantage of modern means in science to elicit the judicial presumption.

The second section: Estimating the evidence derived from modern means:

In order to arrive at the truth, the criminal judge is absolutely free to seek the help of evidence, and for this he has the right to rely on the different and varied means available to him. However, modern methods of criminal proof include an attack on the accused's private life. Therefore, the judge in this regard must take into consideration not to prejudice this right, which requires him to rely on the means of his project.

Moreover, the freedom of the criminal judge to prove does not mean that evidence is searched for or obtained in any way, 4 but that this search is restricted to respecting the rights of the defense on the one hand and the principles of justice on the other, which requires that the evidence be legitimate and permitted by law (5).

The third topic: the proving value of modern means:

The investigation of the proving value of modern methods lies in two sections. In the first section, we address the estimation of the value of

modern evidence, and in the second section, we discuss the inevitability of modern means.

The first section: Estimating the value of recent evidence:

Certainly, forensic evidence is subject to the principle of equivalence of evidence. This means that the authority of the criminal judge in evaluating modern scientific evidence requires him to take into account the privacy of these evidence as they are accurate scientific issues 6.To achieve this, it requires us to study the scientific value of the evidence and the circumstances and circumstances in which the evidence was found.

Part one: The scientific value of the evidence:

Expertise is technical advice that the investigative judge uses to assess technical issues whose assessment requires technical or scientific administrative knowledge that the investigative judge does not have by virtue of his formation 7. Or it is considered a material or mental estimation shown by the owners of art or competence in a particular issue that the investigator cannot realize on his own 8. Therefore, it may relate to the means of committing the crime or the character of the offender or the victim.

Therefore, it is necessary to refer to experts in matters that concern them scientifically. Resorting to experts has become a very important matter with regard to the field of penal evidence, because the results provided by scientific means are very accurate due to the tremendous development in the field of technology and penal proof methods.

Within the scope of the law, it allowed the judge to refer to the experts, and to use them to express their opinion on technical issues on which the decision of the case depends 9.Such cases may include causes of death, or DNA analysis to identify the identity of the body, or a girl's virginity test to verify the rape. But if the nature of the crime does not require technical expertise, then it is not necessary for the public prosecutor or the court to conduct it, because the circumstances of the case themselves refer to the opinion to be followed and the Court of Cassation has no control over it, such as crimes of defamation, slander, contempt, threats and abuse of credit.10.

In application of this, the Jordanian Court of Cassation ruled11by saying: "The victim Ahmed was medically examined, and the victim Hamza obtained a preliminary medical report stating that the anal area was free of injuries and the body's appearance was free of injuries. Swabs were taken from around the anus of the victim, inside the anus, and from the roots of the thighs to investigate for the presence of sperm, a blood sample was taken from the accused, and as a result of the laboratory examination ((DNA, it was found that the swabs taken from the victim's body belong to the accused, and the accused was arrested…".

On this the Jordanian legislator proceeded, and this is what was stipulated in Article (39/1) of the Code of Criminal Procedure. Article (147/2/3) allows the court to base its convictions on the reports of experts and technicians 12: "Evidence shall be established in felonies, misdemeanors, and infractions by all means of proof, and the judge shall rule according to his personal conviction. If the law stipulates a specific method of proof, this must be adhered to. Moreover, article (312) of the Code of Criminal Procedure stipulates that: "The court may, in a forgery lawsuit, write the suspect or the accused, with it or through the experts.

In application of this, the Jordanian Court of Cassation, Penalty 1952/2012, ruled on March 28, 2013, saying: "In the presented case, the defendant's use of modern means (computers and scanners) and by means of color photography to fabricate two identities, one of which was issued by the Royal Military Intelligence in The Kingdom of Bahrain and the other about the Defense Force in the Kingdom of Bahrain/The Royal Special Force and changing the information contained in them in a way that is contrary to the truth, then copying the seals and signatures and placing them on the copied color photos and making them appear as the original, and also for the civil status card constitutes in legal application all the elements of forgery." 13

The expert is merely an assistant to the judge, and he can use other experts to help him in technical matters in forming his opinion. Those concerned technicians must take the oath14.

Part two: the circumstances in which the evidence was found:

The issue of estimating the circumstances in which the evidence was found, even if it comes to modern scientific issues, falls within the original jurisdiction of the criminal judge. It is also subject to the principle of equivalence of evidence, as the judge here can exclude any scientific evidence that was found to be incompatible with the circumstances of the incident 15.

Therefore, it is the right of the criminal judge to assess these circumstances, depending only on what he extracted from the evidence that contributed to the formation of his emotional conviction, since the evidence may be affected by procedural defects such as invalidity. It may be unproductive in the case that the judge is considering, so he has the right to exclude it and rely on others in accordance with the principle of equality of evidence. Thus we can say that the expert's opinion does not limit the court. In this regard, Article 42 of the Code of Criminal Procedure stipulates that: "…and that this expert be replaced by another expert."

The second section: assessing the authenticity of modern means:

It is certain and constant in the penal proof that the principle of the emotional conviction of the criminal judge gives him a wide authority in

weighing the strength of the evidence derived from each element of his pure conscience, so he takes what is reassuring to his belief and ignores what does not support his conviction 16.

With regard to evaluating the evidence and its authenticity, the judge must reach the stage of conviction. He does not pay attention to evidence that has entered into doubt and possibility, because if the evidence is mixed with the possibility, the inference is invalidated. He may also find a part of the evidence that serves his conviction, so he takes it and dismisses the rest of the evidence. For this reason, visual imaging in fixed or moving cameras is classified among the clues, which are of weak significance, because this photography depends on the honesty of those in charge of it and its users. The installation of images, deletion and addition has become known to all 17. And since visual imaging when it comes within the concept of presumptions, the significance of that should not be neglected. Rather, it should be used to support other evidence, restrict the accused, and punish him with what the judge deems appropriate when other evidence joins it, as if this imaging was recorded by a reliable authority 18.

It Is clear from the foregoing that visual photography is included in the section on evidence. Moreover, it can be taken into account if the suspicion of fabrication is eliminated, the passages have been changed, deleted or added to, and the court must take it 19.

Furthermore, photography by mobile phones comes under the heading of clues, and the same is the case with surveillance cameras. However, in all cases, this presumption cannot be presented or retrieved from the scope of the investigation evidence. Rather, it must be verified by electing experts and specialists and working to unload the contents of the mobile phone. It should be preserved and considered as one of the presumptions that can be taken into account if it is supported by other evidence of criminal proof, such as the accused's acknowledgment of its content or the testimony of one accused against another.

Its accuracy, correctness, and integrity should be verified from fabrication, deletion and addition, and an original unloading report must be organized in which the date of unloading the contents of the mobile phone, the operator, and other required details must be organized 20.

Conclusion:

This research came to contribute to clarifying the argument of modern methods of penal proof, and how these methods now provide evidence that contribute to revealing facts quickly and easily, as they sometimes provide conclusive evidence that is not shrouded in doubt. It is worth noting that the field of penal evidence should not stop its development only at this point, but its development should be in line with scientific

technological development. Therefore, our study concludes by a number of results and recommendations:

Results:

First: The criminal judge is now able to access evidence through the help of experts. All of this will undoubtedly facilitate his access to the truth. Relying on experts has made modern means of proof more confident and clearer.

Second: The legislator is the one who can confront this technical and scientific development with the new means in the field of proof stipulated in the articles of the law.

Third: The recent evidence that is gleaned from photography is a presumption, and reliance on it in convicting is subject to the judge's emotional judgment.

Bibliography

(1) El-Hajj, Omer, The Limits of the Authority of the Criminal Judge in Assessing Evidence, Master's Thesis, Dr. MoulayTaherSaida University, Faculty of Law and Political Science, 2016, Algeria, p.10 and beyond.

(2) Al-Halabi, Muhammad Ali, The Freedom of the Criminal Judge to Self-Confidence in the Laws of Egypt, Jordan and Kuwait, Journal of Rights, vol. 31, number 3, 2007, Kuwait, p. 376.

(3) Abu Amer, Muhammad Zaki, Evidence in Criminal Matters, New University House, 2011, Egypt, p. 122.

(4) Omer Al-Hajj, the previous reference.

(5) Bilal, Ahmed Awad, The Rule of Exclusion of Evidence Obtained by Illicit Methods in Comparative Criminal Procedures, 3rd Edition, 2013, Dar Al-Nahda Al-Arabiya, Egypt, p. 20.

(6) Al-Haddad, Muhannad Walid, The Impact of Defective Preliminary Investigation Procedures on the Evidence of the Public Prosecution, Dar Al-Warraq, Edition 1, 2020, Jordan, p. 222.

(7) Taya, Al-Hani Muhammad, Modern Means of Criminal Proof, Brain Fingerprint – DNA Fingerprint, PhD Thesis, 2011, Cairo University, Egypt, p. 20.

(8) Abdel Muttalib, Ihab, Evidence of Evidence and its Falsehoods, Edition 1, 2009, The National Center for Legal Publications, Egypt, p. 168.

(9) Article (29): Instructions for Experts Affairs for the year 2018 stipulates that: "It is permissible to use modern electronic means for all the purposes stipulated in these instructions." Article (9): Instructions for the Functions of the Societal Penalties Directorate 2018 stipulated that: "It is permissible to use modern electronic means for all the purposes stipulated in these instructions."

(10) Taya, Al-Hani Muhammad, previous reference, p. 21.

(11) Al-Sabawi, Majid Khader Ahmed, The Theory of Causality in Criminal Law, an analytical study compared to Egyptian law and Arab and foreign laws

with a criminal philosophical perspective," 2014, National Center for Legal Publications, Cairo, pg. 445.

(12) Al-Haddad, MuhannadWalid, previous reference, p. 225.

(13) Penalty Distinction Decision No. 1899/2021 dated 9/9/2021. And the decision to distinguish the penalty 826/2012 dated 06-24-2012. And a decision of distinction, penalty No. 182/2010 dated 03-08-2011. Your Electronic Decision Program.

(14) Al-Haddad, MuhannadWalid, previous reference, p. 226.

(15) Penalty Cassation Decision No. 1409/2021 dated 07-13-2121 Your electronic decision program.

(16) Abbas, Khawla, Modern Means of Criminal Evidence in Algerian Law, Mohamed Khider University of Biskra, Faculty of Law, Master's thesis, Algeria, 2014, p. 57.

(17) Al-Hiti, Muhammad Hammad, Criminal Investigation and Criminal Evidence, Edition 1, 2010, House of Curricula and Distribution, Jordan, p. 41.

(18) Al-Obaidi, Manar Abdul-Mohsen Abdul-Ghani, The Authenticity of Criminal Evidence by Modern Visual Means – and the Judiciary's Position on it (surveillance cameras and mobile phone cameras), Tikrit University Journal of Law, Volume 1, No. 1, Part 1, 2016 AD, p. 193.

(19) Abdul Muttalib, Ihab, previous reference, pp. 14-15.

(20) Al-Obaidi, Manar, previous reference, p. 193