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Proof and the Principle of Real Truth in Criminal Procedural Law

Oliveira JA*

Universidade Autonoma De Lisboa-UAL, Brasil

***Corresponding author:** Jose Arnaldo Oliveira, Universidade Autonoma De Lisboa-UAL, Rua Manoel Gomes de Mendonça, 307 Condomínio Mansão Cittá di Roma - Ap. 1102 (N) Pituba Ville, Pituba Salvador - Bahia – Brasil, Tel: 5571988023206; Email: arnaldo.oliveira@trt5.jus.br

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"In any case, it can be said that the proof is an instrument that provides information about the content of a statement and makes it possible to know the circumstance that the statement is concerned with, with the consequence that the statement itself may be considered true or false. on the basis of the evidence or evidence relating to it".

- Michele Taruffo
(La prueba, artículos e conferencias)

Abstract

This article aims to address the relationship between the institute of evidence and the principle of real truth within the scope of criminal procedural law, analyzing and highlighting several elements, including etymology, object, objective, subjective purpose and the right to production of evidence within the scope of criminal procedural law, emphasizing in the present study that the truth that emerged in the process that we here name as "procedural truth" does not always represent the fact that occurred when the crime was committed. In addition, we will analyze what is "truth", its concept, origin of the word, the fact to be proven observed from a legal point of view, not forgetting also the principles of in dubio pro reo and that of "standard beyond a reasonable doubt".

Keywords: Proof; Facts; Truth; Principle of real truth; Criminal Procedural Law; Judge's conviction; It proves beyond any reasonable doubt

Introduction

This paper presents an investigation carried out on the evidence institute in relation to the principle of real truth within the scope of Criminal Procedural Law, a matter of great relevance and essential to the understanding and reflection of all who work in this branch of law.

As is well known, all those who sue in court have the right and the need to produce evidence in the case file so that, in the end, they obtain the judgment of the judge and, consequently, the prosecuted result.

Right at the beginning of the study, we highlighted the regulation on the production of evidence in the Brazilian and Portuguese Code of Criminal Procedure, demonstrating its similarity with regard to the law to guarantee the fundamental freedoms of the human person.

In this context, there is no doubt that the right to proof is a fundamental right duly guaranteed by the Constitution. It is an institute of relevant importance for procedural law, since its use aims to reconstruct the facts in order to enable the magistrate to convince.

I do not intend nor will I be able to exhaust the matter, however, I analyze the evidence institute in relation to how it appears in the process, noting that the truth is related to the

correct verification of the facts, where the "real truth" does not always coincide with that "Procedural truth". The idea is to see if the absolute truth is, in fact, attainable.

The concept of evidence is presented, as well as the origin of the word, its purpose, the main object of the test and its objectives are clarified, bringing to everyone's knowledge that the characters involved in the judicial process have the power to develop activities aimed at convincing the judgmental.

Then, we also talk about the "truth", demonstrating its etymology, concept and its aspects, observed from a philosophical point of view.

We then approached the so-called real truth, making it clear that it is not absolute and, shortly thereafter, deal with the existence of the principle of real truth within the scope of Criminal Procedural Law.

The fact observed from the legal point of view is treated as a way to better understand the theme of proof and truth, highlighting the application of the principle of in dubio por reo, in compliance with the principle of the presumption of innocence, because in doubt, it decides in favor of the accused who must be acquitted.

We ended this research work, analyzing the so-called "standard beyond a reasonable doubt", a system that requires the prosecution to present all the necessary evidence to form the defendant's guilt beyond "beyond reasonable doubt", that is, beyond reasonable possibility of innocence, a North American system that diverges from the principle of "in dubio pro reo".

Proof

Regulation, Concept, Origin of the word, Goal, Objective, Legal nature

Initially, it should be noted that in Brazilian Criminal Procedural Law, the rules on evidence are duly established in articles 155 to 250 of the Criminal Procedure Code.

In the Portuguese Penal Procedure Code, the rule on evidence is found in articles 124 to 190, demonstrating a treatment by the legislator related to meeting the principles of human dignity, intimacy and the principle of physical integrity of the person.

Manuel Monteiro Guedes Valente [1], dealing with "fundamental personal rights and freedoms" as an "insurmountable" barrier in the production of criminal evidence, with enough propriety makes it clear that "personal integrity - physical or moral - is affected whenever the action of the target results from a conditioning of autonomy of the will, so that any violation of the freedom to think, to decide and to act, promoted by the judicial operators, generates a prohibition of evidence, taking into account the offense to the essential content of the right to personal integrity and, therefore, it is stated as unacceptable offense to the dignity of the human person".

As well emphasized by teachers Fernando Gonçalves e Manuel João Alves [2], proving is the act of producing in the competent court the conviction of the truth or not of an allegation, also encompassing the means of proof, as in the case of witnesses.

Leciona Renato Gugliano Herani [3] that "the term" proof "is highly juridical-abstract, because it is distant from a physical entity, which prevents a concrete referent, and thus makes it very difficult to specify, and thus standardize, a sense of reference. Nevertheless, all designative properties invariably denote something (fact to prove, means and evidential procedure) intended to convince the judicial authority, to reach conclusions about facts. Ultimately, it indicates a process of convincing facts to reach a certain end. The etymological sense of the term reinforces this perception: it derives from the Latin proba, probare, that is, the act of demonstrating, recognizing, forming a judgment of (Silva, De P., 2002, p. 656), it also derives from probatio, essay, verification, inspection, examination, approval, confirmation (Tomé, 2008, pp. 63) ".

In this way and following the teachings of Carl Joseph Anton, we find that the proof is nothing more than "the sum of the reasons that generate certainty"[4].

The jurist Moacyr Amaral Santos defines it very similarly to the definition of Carl Joseph Anton, objectively affirming that it proves "(...) it is the sum of the facts producing the conviction, ascertained in the process" [5].

The word PROOF brings the idea of presenting every element capable of bringing to light a fact, or someone [6] and its production is intended to convince someone of the version of the alleged facts.

For Daniel González LAGIER, the proof of a fact is to demonstrate that, in light of the information we received, it is perfectly justified to accept that the fact actually occurred [7], further stating that it is the duty of the judges to ascertain whether certain facts really occurred before deciding the cases put to examination and deduced according to a certain legal order (p. 69-87).

Thus, I particularly understand that the general purpose

of the evidence is primarily to demonstrate that a certain fact existed, as it exists or in what way it exists, with the objective of proving in court the truth and the fact that the right to a given society transgressed.

Thus, the following question arises: What is the main object of the test?

The object of the evidence is related to the facts, to the events relevant to the clarification of the facts, to form the understanding of the judge in relation to what is treated in the litigation examined.

And what is the purpose of the test?

I understand that the purpose of the evidence is to obtain the conviction of the judge who, in the case of the system adopted by the Brazilian legal system, will decide according to his free conviction, provided that he is duly motivated.

Teresa Beleza [8] states that "... the characters involved in the process - the MP, the assistant, the defendant, the defender, the civil parties themselves, regarding the civil request (...) - all of them will be able to carry out an activity to convince the court as to the existence or not of criminal liability on the part of the accused and the consequences of that liability. The production of evidence is, fundamentally, that, to convince someone of a certain version of things ".

The objective is to demonstrate the truth, not the "real truth", but the "procedural truth", the possible truth, that truth that is likely to be reached, convincing the judge that his allegations are true.

"The truth pursued in the course of criminal proceedings as a goal in overcoming a state of uncertainty to that of certainty does not have an ontological nature, nor is it accessible to, as if by magic, leading the procedural subjects on a journey in the time, to the past, to understand the facts as in reality they occurred" [9].

Therefore, it is proven to demonstrate the truth about the (in) existence of alleged facts, acting on the judge's belief about their occurrence or not.

Maria Clara Calheiros [10] teaches that obtaining the truth, whether formal or material, "(...) continues to be an aim assumed as the north of legal proceedings, regardless of its nature (civil, criminal, administrative, tax, etc.) in Portugal, as in the western legal tradition in which we operate. In this context, evidence is presented as a means of establishing truth in the process, since it confirms the reality of the facts aligned by the parties to the conflict in their procedural documents. (...) ".

As for the subjective purpose of the test, argues Jordi Ferrer Beltrán (p. 27-34), "he is unable to account for the functioning of the mechanism of proof in law", because for him "to say that a fact is proven is the same to say that a given subject with authority believes that this fact occurred" Beltrán (p. 27-34).

In this way, we can say that the purpose of the proof has its completion completed when the subjectivist claim fits with the objectivist. "It is essential to understand that the justification for declarations of proven facts is related to the set of elements of judgment (or means of proof) separated from the process" ([25], p. 27-34).

Michele Taruffo [11] asserts that there is no point in talking about proof by analyzing only the theories that deny the possibility of proving true facts, outlining in his study that "proof becomes a true non sense. The evidence ends up serving to give an appearance of rational legitimacy to a set of theatrical mechanisms whose function is to hide the irrational and unjust reality of the judicial decision ".

The evidence is presented with an argumentative and non-cognitive nature, so that it may happen that a true fact becomes credible in the process, as well as a fact created or invented becomes highly relevant in the process depending on the evidence produced and its degree of persuasion.

Thus, the evidence has a legal nature of a subjective right, which is the right to be produced by each of the litigating parties within a judicial process, moving towards the purpose of clarifying the uncertainty of the facts.

The right to produce evidence is intrinsic and directly related to the principle of due process, since everyone has the right to action and defense, as well as the right to receive a fair decision. It is not only the plaintiff and the defendant, but also the Public Prosecutor, the right to prove through the various means of proof that their allegations are true.

Conversely, the absence of evidence will give rise to a lack of certainty and not confirmation that the fact alleged in the procedural scope is untrue or non-existent.

The Brazilian Criminal Procedural Law recognizes all the means of evidence admitted in law, disregarding the illicit evidence, in view of the provisions of the Federal Constitution of 1988, art. 5, LVI, stating that "Evidence obtained by illegal means is inadmissible in the process".

In Direto Português, we note that "(...) the valuation of any phonographic or photographic record (film, video, etc.) that, due to its production or use, represents any material criminal offense, in the light of the provisions of article 179

of the Penal Code ", recognizing the criterion of substantive criminal illegality [12].

In the case of illicit evidence, when mentioning the production of evidence, Gustavo Henrique Badaró[13] clarified that "illicit evidence, as already pointed out by the doctrine and jurisprudence [...] is inadmissible in the process. If it enters, it will be considered a non-act, or legally non-existent evidence".

As highlighted by Professor Doctor Geraldo Prado [14], "(...) if the starting judgment of any criminal investigation is uncertainty, affirmed by the presumption of innocence, and the punishment will only be legitimated when this state of uncertainty is overcome, the type of constitutionally appropriate" process "is that which it is characterized by enabling knowledge of the criminal offense and its authorship in a logical and legal framework that is able to support the decision in a context of "truth".

Truth

Concept, Origin of the Word, Real truth, Legal fact. In dubio pro reo, Principle of Proof beyond Reasonable Doubt

The concept or definition of "truth" is tied to what is or exists as it is. The truth originates in the things that can be felt or apprehended by our senses, in opposition to the false, this last word sustained in everything that is hidden, concealed or covered up.

The word "TRUTH" comes from the Greek that says aletheia and represents that which is not hidden, that is, which is not hidden or hidden.

For Leopoldo Justino GIRARDI and José de Quadros ODONE, "when the veil is removed, the hidden reality appears. Let yourself see how it really is" [15]. The truth appears!

In Latin, the word used to describe truth is veritas related to "the precision, rigor and accuracy of a story, in which details, details and fidelity are said of what happened"[16].

"Veritas indicates, more especially, the accuracy and rigor in saying; verum is what is faithful and accurate, complete, without omissions, a story for example, in which details and integrity are told of what something was. Veritas involves a direct reference in saying[17].

In Hebrew, truth is said emunah, having the meaning of trust and based on personal reference, since the feeling of trust is different from one person to another.

As noted, aletheia relates the concept of truth to what is present, to what is happening. Veritas directs to the facts that have already happened in the past, that are gone and emunah identifies with the things of the future, that will happen, that is, sustained in hope and trust.

Thus, from a philosophical point of view, TRUTH has three aspects, "that of seeing-perceiving, that of speaking-saying and that of believing-trusting" [16].

In my opinion, the truth is related to the correct verification of the facts, where the real truth does not always coincide with that truth that emerged in the context of criminal proceedings.

Thus, the "real truth" is not absolute, and it is up to the judge to try to get as close as possible to what is called truth.

That is why, in the context of criminal proceedings, the judge has the obligation to handle all legal means in search of the closest proximity to the truth of the facts, and cannot be limited only and only to those evidences brought to the file by the parties to the process.

However, we cannot deny that the idea of absolute truth is, in fact, unattainable.

Luigi Ferrajoli [18] defends that "The impossibility of formulating a sure criterion of truth of the judicial theses depends on the fact that the" certain "," objective "or" absolute "truth always represents the" expression of an ideal "unattainable. The contrary idea that one can achieve and assert an objective or absolutely certain truth is, in reality, an epistemological naivete ".

Despite the difficulty and / or impossibility of reaching the real truth, we cannot fail to give credibility to the decisions that took place within the process, considering that "if a criminal justice entirely 'with truth' constitutes a utopia, a criminal justice completely 'without truth' is equivalent to a system of arbitrariness "[18].

Art. 93, item IX, of the Federal Constitution of 1988 establishes that "All judgments of the Judiciary bodies will be public, and all decisions are grounded, under penalty of nullity, and the law may limit the presence, in certain acts, to the parties themselves and to their lawyers, or only to them, in cases in which the preservation of the right to privacy of the interested party in secrecy does not harm the public interest to information ".

In addition, it is common knowledge that in criminal proceedings some facts do not depend on evidence, such as notorious facts - which everyone is aware of, intuitive

facts - whose conviction has already been formed, legal presumptions - which originate in the law itself, the facts useless - because they have no ability to influence the decision and the impossible facts - without any reason to have occurred. Except for the facts previously reported, all the others must be proven in the criminal process, including those that are uncontroversial, considering that the judge can question the fact and be in doubt if it really occurred, so that he is not obliged to accept, even with the confirmation by the parties.

Ronald J Allen [19] states that "for several reasons, the law establishes direct solutions to facts that would otherwise be discussed. For example, evidence that a person was driving above the speed limit in violation of a safety rule was at some point considered to be presumed iuris et de iure for negligence. What this does mean, however, is that proof of the underlying condition - speeding, driving under the influence of alcohol, violation of a safety rule - meets the requirements of the action and, consequently, fulfills the role that of another way it should have the burden of persuasion. In other cases, this same proof is assumed for the purposes of establishing a presumption iuiris tantum, such as the presumption that a letter sent by e-mail was received by the recipient. This conclusion could be defeated by demonstrating that a rational person could infer the opposite fact by preponderance of the evidence - and this is the crucial distinction between the attribution of a persuasion charge and a production charge. However, the central difference between the two cases is the type of direct handling of the persuasion charge".

In the light of what we discussed above about truth, is it possible to affirm the effectiveness and existence of the principle of "real truth", substantial, material or objective?

Part of the doctrine says yes, claiming that the principle of real truth is intended to give the judge a sense of search, contrary to passivity [20], it is up to the judge to detect other means of evidence to achieve the real truth, acting actively to elucidate the facts.

That is how it establishes our Code of Criminal Procedure, more precisely in its article 156, determining that "the proof of the allegation will be incumbent on whoever makes it, however, being allowed to the official judge: I - to order, even before the criminal action, the advance production of evidence considered urgent and relevant, observing the necessity, adequacy and proportionality of the measure; II - determine, in the course of the instruction, or before issuing a sentence, the performance of steps to settle doubts about a relevant point".

In view of this, we believe it is permissible that the principle of real truth can effectively be realized, since it is applied in a mitigated manner due to the constitutional and procedural rules of the criminal law, as well as because it is not possible for the judge to reach an absolute truth judgment, the which we here call the "principle of procedural truth".

And the fact observed from the legal point of view?

Para Renato Gugliano Herani [3], "The legal fact always presents itself in an individual form, that is, identifiable from the criteria of time and space, and brings the problem of proof (MACCOMIRK, 2006, p.111) in the context of normative application (if it occurs an event, given the legal consequence, p will come on, then q). For this reason, the proof of the legal fact "is a problem aimed at the establishment of minor premises that are of a private character, not major premises that are universal" (Maccomirk, 2006, p.118).

And when does doubt arise in relation to evidence, in order to apply the principle of proof beyond any reasonable doubt? Initially, we need to understand the meaning of the principle of in dubio pro reo, used by the Brazilian criminal procedural law in respect of the principle of the presumption of innocence, determining that, in doubt, it is decided in favor of the accused and should be acquitted.

Távora E Rodrigues Alencar [21] teach that in case of doubt, the decision should be in favor of the accused, also stating that in the balance between the State's right to punish and the accused's freedom, the latter right prevails, since item VII of article 386 of the Code of Conduct Criminal Procedure is clear when establishing as a hypothesis of the defendant's acquittal the absence of sufficient evidence to corroborate the accusation formulated by the accusing body.

The Federal Supreme Court (STF) has recognized and applied the principle of in dubio pro reo, as we can see from the content of the menu that I am going to transcribe, *in verbis [22]*:

Criminal action. Former Secretary of State. Congressman. Peculato (art. 312 of the CP). Misuse of mattresses donated by the federal government to help flood victims. Delivery and diversion of goods for use in the event of the political association to which the defendant is affiliated. Alleged determination of the accused to assign the material. Precarious evidence of the defendant's involvement in the crime. Incidence of in dubio pro reo and favor favor. Request dismissed, with the defendant's acquittal based on art. 386, VII, of the Criminal Procedure Code. 1. The incriminated conduct consists in the diversion, for purposes other than those to which it is legally intended (to help flood victims), of mattresses donated by the Federal Government to the Civil Defense of the State of Maranhão, which, by order of the defendant, would have been handed over for use by militants of the political group to which the accused

is affiliated, in a political event held in São Luís / MA. It is said that, in addition to being improperly used, this material was subsequently not returned to the consignee body, part of which was seized by a third party, and part of which disappeared. 2. In view of the fragility of the evidence of the accused's actual involvement in the crime in question, it is the case of incidence of brocardos - in dubio pro reo and favor rei - only remaining to proclaim the rejection of the ministerial claim. 3. Criminal action dismissed. AP 678 / MA – MARANHÃO - AÇÃO PENAL. Relator (a): Min. DIAS TOFFOLI - Julgamento: 18/11/2014. Órgão Julgador: Primeira Turma. Publicação: ACÓRDÃO ELETRÔNICO - DJe-024 DIVULG 04-02-2015 PUBLIC 05-02-2015 (grifos nossos)

With these considerations in mind, we will see what the so-called standard beyond a reasonable doubt is about, "a rule adopted by the North American criminal procedural system.

In the United States of America, the rule is that no person can be accused of a crime without absolute certainty of its authorship, stressing that if the defendant does not confess, all the elements of the guilt must be proven to the jury and proven to "beyond reasonable doubt" - standard beyond a reasonable doubt.

In that system, the evidence "beyond reasonable doubt" must function as a strong belief that the fact actually occurred in order to give the judge sufficient security that the fact existed. Thus, in the criminal sphere, the juror should not condemn the defendant without taking into account all the evidence that can remove any reasonable doubt from his conviction.

Standard beyond a reasonable doubt requires the prosecution to provide all the evidence necessary to form the defendant's guilt "beyond reasonable doubt", that is, beyond the reasonable possibility of innocence.

Diverging from the principle of "in dubio pro reo", "standard beyond a reasonable doubt allows condemnation when there is doubt, however the existing doubt must be small, negligible, insignificant, unreasonable, considering that the idea formed is that of that the real truth will hardly or almost never be reached.

Para Susan Haack [23], "When talking about the credibility or endorsement of a statement, the language of probabilities is usually used (probability o likelihood) - what is the probability, given certain evidence, that the statement is right or, unconditionally, what is the probability that it says statement is true. I myself speak in this way, for example, when I ask myself what the probability, given the evidence we currently have, that there is a causal link between vaccines and autism; how likely it is that Egypt will have a genuinely democratic government within five years. According to the Osford English Dictionary; the usual meaning of "probable" (in British English) is: "Given the existing evidence, it is possible to reasonably expect something to happen or to be the case. Similarly, the Merriam-Webter´s Dictionary presents the main definition for this word (in North American English): "something sufficiently supported by the evidence to establish an assumption, but not to have it proved".

In the case of a guarantee that in fact works, the principle of proof, beyond any reasonable doubt, is based on the requirement of certainty for the conviction to occur. An example of this occurred in the trial of the OJ Simpson case, widely publicized by the press, which in 1995 was accused of the murder of his ex-wife Nicole Brown and his friend / companion Ronald Goldman, acquitted after an extensive trial and, even so, later convicted to indemnify the victims' relatives.

This case was widely publicized due to the fact that the accused is a former American football player and actor, and the sentence made by Judge Anise Aschenbach of not being convinced that the accused was guilty was known, and by the principle of proof beyond any reasonable doubt, was obliged to vote for absolution [24-28].

Final Considerations

After the study presented, we came to the conclusion that in Brazil and Portugal, as well as in a large part of Western law, the right to produce evidence is inherent to all procedural actors, because it is inherent to the principles of human dignity, intimacy and physical integrity.

Nevertheless, we note that the procedurally produced evidence may or may not coincide with that truth of the facts that actually occurred. However, such evidence will demonstrate a new institute of truth that is "procedural truth" since it is the "truth" ascertained in the process.

However, the judge is not exempt from producing evidence and appreciating all evidence and giving his judgment, duly substantiated and observing the principle of motivated free conviction of judicial decisions.

We also found that, due to the fact that a "procedural truth" emerges in the process, we cannot say that the procedural judicial system is bound to fail. No, it's not! This is because, we come to the conclusion that the truth brought to the record is the closest possible to reality, within the evidence produced and presented. Furthermore, the absolute truth is unattainable, and it is impossible to reach it or go back in time to find it in the same conditions as the

fact that occurred.

The fact to be proved is intended to convince the judicial authority, granting it the possibility of reaching conclusions and reaching a certain end, motivated to establish Justice within the legal rules defined by that society.

In this way, proving is nothing more than demonstrating the "truth" about the existence or non-existence of a certain alleged fact, acting in the conviction of the judge. Believing that the fact is proven is closely linked to the judge's belief in accepting that a certain alleged fact actually occurred.

In the field of criminal procedural law, it is up to the judge to handle all legal means in search of the closest proximity to the truth of the facts actually occurred, which is why he is not limited to accepting only the evidence produced by the parties in the process.

We identified, therefore, that the principle of real truth is applied in order to guarantee the judge a kind of pro-activity in the search for the most approximate truth of the facts, determining to the production of necessary evidence the elucidation of the facts instead of the passivity in accepting so only those produced by the parties.

However, even in the pursuit of the "real truth", the closest truth and / or possible truth, in Brazilian criminal procedural law there is provision for the application of in dubio pro reo, meaning that in doubt, it is decided in favor of the accused, respecting the principle of the presumption of innocence is taken into account, making a balance between the State's right to punish and the freedom of the human person.

In the North American penal system, the principle of "proof beyond reasonable doubt" is observed, and the juror cannot condemn the accused without taking into account all the evidence that can remove any reasonable doubt from his conviction.

Unlike the principle of in dubio pro reo, the "standard beyond a reasonable doubt" has "certainty" as a basis for the accused to be able to receive a conviction, based on the evidence forming the defendant's guilt, which is why there is a possibility in the American system condemnation when there is doubt, however, this doubt has to be small, negligible, insignificant and unreasonable.

In summary, we can say that after the occurrence of the facts, it remains impossible to reestablish the truth of the facts that occurred in its fullness, what is intended procedurally, is to pursue the truth through the production of evidence so that this new truth, the "procedural truth ", Be as close as possible to the aspects of the event that occurred for sufficient conviction of the judgment.

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