

Marta Kowalczyk-Ludzia*, *The Significance of Physical Evidence in the Evaluation of a Prohibited Act under the Criminal Law*

Abstract: This paper discusses issues associated with the evaluation of the usefulness of physical evidence found on the site of a crime for formulating the probable version of the course of the criminal event. For example, the very type of tool that the perpetrator uses usually indicates the intention to commit the act, making it possible to determine not only the scope of the harm caused, but also the motive for the prohibited act. The object and purpose of this paper is to answer the question about the role of physical evidence in the evaluation of a prohibited act under the criminal law. The deliberations are based on an analysis of the results of the author's own research.

Keywords: physical evidence, murder weapon, intention to commit a prohibited act, motive, impulse

*Physical evidence is exceptionally important in proceedings,
it is like a "silent witness"
that, in certain circumstances,
can take the floor and unmask more powerfully than many speaking witnesses.*
(A. Wyszynski, Teoria dowodów sądowych w prawie radzieckim, p. 330)

The comprehensive nature of a prohibited act requires complex determination of the probable course of events. In order to understand the perpetrator's motive, determine how the act was committed, and detail the consequences of the act, it is necessary to formulate a version of the crime that reflects the course of subsequent events. As a result, not only will a correct thesis of the indictment be formulated, but also a just verdict will be issued.

Thus, it is rightly emphasised that the "minutest material detail may be a step forward, which, even if it is hardly visible, is a starting point for discovering the objective truth about the event."¹

Thus, by reference to the definition of physical evidence, it may be assumed, after Stanisław Śliwiński, that these are "[...] objects, on the basis of which it is possible to determine, by examination, a certain state of affairs."²

The procedural activities that enable searching for and securing physical evidence (including, in particular, murder weapons) are: presentation (Article 173 of the Polish Code of Criminal Procedure), search (Articles 220 to 224 of the Polish Code of Criminal Procedure) and, as has already been mentioned, examination of the site of the event and of objects (207 of the Polish Code of Criminal Procedure). These activities help determine not only the site of the event, but also the perpetrator's method of action and the amount of damage done. Meanwhile, "the evidence most typically found at the site of an event are traces of fingerprints, shoes or feet,

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¹ E. Ozga, Wykorzystanie śladów zabezpieczonych podczas kryminalistycznego badania miejsca zdarzenia w postępowaniu karnym, [in:] Kryminalistyczne badanie - oględziny miejsca zdarzenia w teorii i w praktyce, Wyższa Szkoła Oficerska im. gen. F. Józwiaka - Witolda, Szczytno 1984., p. 108 – 109.

² S. Śliwiński, Polski proces karny przed sądem powszechnym. Zasady ogólne, Państwowe Wydawnictwo Naukowe, Warszawa 1959., p. 308.

mechanoscopic traces and physical evidence, such as tools to break barriers securing premises."³

As far as the examination of objects is concerned, it should be noted that "this activity may concern all the objects associated with the event. Their type and the number of objects to be examined are determined by the nature of the event and the circumstances associated with its dynamics and participants, and their method of action or negligence. [...] Examination concerns objects associated with criminal activities and causative activities, and the perpetrator or the aggrieved party."⁴

Physical evidence found at the site of a crime helps formulate a version of events that reflects the probable course of the crime. It should be noted that "perpetrators leave numerous traces at the site of the event, and finding and securing those traces is of vital importance in the evidential procedure. More information may be obtained by analysing the perpetrator's movements to and from the site of the event. This is where the perpetrator is less careful and makes more mistakes."⁵

Moreover, assuming that physical evidence is supposed to help reconstruct the events, it is of the utmost importance to properly secure it. Thus, case law rightly claims that "the need to use physical evidence justifies the efforts to properly secure evidence against damage or replacement, by means of packing and labelling."⁶

Moreover, it is emphasised that "Physical evidence should be secured against imperceptible change or deformation by being properly marked (with a specification or label) and, where it is not contrary to the nature of the evidence - packed in a way that enables examination of the object, preferably in transparent foil. Carelessly placing physical evidence in open envelopes enclosed in case files without any identifying features, etc. may result in it being excluded from reliable evidence."⁷

Thus, taking into account the methodology of correct examination of the site of the event, it should be remembered that "when lifting small objects in the hands in order to take a closer look at them, or moving larger objects, one must in the first place be careful and bear in mind the mechanism of touching respective objects in daily life. First of all, one must know where to look for fingerprints or other traces that could be found on those objects."⁸

Looking for and then properly securing evidence is the duty of representatives of pre-trial procedure authorities, and the effectiveness of these activities also depends on the implementation of the objectives of the criminal procedure (Article 297 § 1 (5) of the Polish Code of Criminal Procedure, in association with Article 2 § 1 of the Polish Code of Criminal Procedure).

On the other hand, the usefulness of physical evidence gathered in the pre-trial procedure is evaluated through the prism of the principle of the discretionary evaluation of evidence (Article 7 of the Polish Code of Criminal Procedure) and the principle of directness. According to statutory regulations, "the criminal authorities form their opinion on the basis of all the evidence taken, evaluated in a discretionary way and in accordance with the principles of correct

³ K. Witkowska, *Ogłędziny. Aspekty procesowe i kryminalistyczne*, Wydawnictwo Lex a Wolters Kluwer business, Warszawa 2013, p. 145.

⁴ *Ibid.*, p. 49.

⁵ R. Maj, *Przestępstwo zabójstwa. Aspekty karnomaterialne i elementy taktyki czynności wykrywczych*, Wydawnictwo Centrum Szkolenia Policji w Legionowie, Legionowo 2010, p. 38.

⁶ Judgement of the Court of Appeal in Kraków of 29 April 1998., II Aka 64/98, LexisNexis no. 398033.

⁷ Judgement of the Court of Appeal in Kraków of 3 September 1998., II Aka 155/98, LexisNexis no. 398277.

⁸ P. Horoszowski, *Śledcze ogłędziny miejsca*, Wydawnictwo Prawnicze, Warszawa 1959., p. 105.

reasoning, knowledge and experience" (Article 7 of the Polish Code of Criminal Procedure)⁹. Meanwhile, in line with the other principle, it is assumed that "[...] the criminal authority should come into contact with the source and evidence in a direct way, and the evidence on which the authority founds its opinion should be in the first place the original evidence. [...] The reasoning of the principle of directness is that the more intermediate the links leading to the examined circumstances, the more distortions and gaps in information about those circumstances. Each time certain information is repeated it gets deformed, and each time a document is copied the risk of new errors increases and the chances for discovering previous errors decrease."¹⁰

There may be many items of physical evidence at the site of an event, but, given the assumptions of this paper, it is worth discussing issues that concern the evaluation of the usefulness of murder weapons in determining the criminal-law aspects of the perpetrator's responsibility.

According to statutory regulations, the court is free to determine the punishment within the statutory limits, making sure that the severity of the punishment does not exceed the degree of guilt. However, such assessment should also take into consideration:

- The gravity of the social consequences of the act,
- The preventive and moral lessons the court wants to teach the convict,
- The need to develop legal awareness in the society (Article 53 of the Polish Criminal Code).¹¹

In order to determine the "gravity of the consequences of the act", it is first necessary to determine the perpetrator's intention (Article 9 of the Polish Criminal Code) and the scope of actual or potential damage resulting from the prohibited act.

Moreover, it should also be emphasised that the "motivation and behaviour of the perpetrator and the importance of the duties violated by him, as well as the type and amount of damage are among the factors determining the evaluation of the gravity of the social consequences, noting that the consequences of a crime should be interpreted broadly, taking into account the social consequences, including the moral damage done to the aggrieved party and his relatives."¹²

Taking into account the above deliberations, the following research problem was formulated: "What is the scope of the usefulness of physical evidence in the evaluation of a prohibited act under the criminal law?"

When searching for an answer to the question posed in this paper, the practical aspects of the issues discussed herein were also presented. Respecting the methodological requirements, case file examination was conducted, which enables illustrating how the phenomenon works in practice.¹³ The examination was conducted in the years 2015 and 2016 at the 2nd Criminal Division of the Regional Court in Olsztyn. For the purposes of this paper, 9 criminal case files were examined, all of which ended in a conviction for murder, either actually committed or intended.

⁹ The Polish Act of 6 June 1997 - Code of Criminal Procedure (Journal of Laws /Dz. U./ of 1997, no. 89, item 555, as amended).

¹⁰ K. Buchała, S. Waltoś, *Zasady prawa i procesu karnego*, Państwowe Wydawnictwo Naukowe, Warszawa 1975, p. 286-287.

¹¹ Polish Criminal Code - the Act of 6 June 1997 Journal of Laws /J.o.L/ No 88, item 553, as amended).

¹² Z. Muras, *Wyjaśnienia oskarżonego w procesie karnym i prawie karnym materialnym*. Komentarz, Wydawnictwo Beck, Warszawa 2005, p. 236 - 237, quotation after: A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1998, p. 352.

¹³ See J. Kasprzak, *Wybrane problemy metodologiczne badań w zakresie procesu karnego i kryminalistyki*, [in:] *Wybrane problemy procesu karnego i kryminalistyki*, J. Kasprzak, B. Młodziejowski (ed.), Wydawnictwo Volumina.pl Daniel Krzanowski, Olsztyn 2010, p. 13.

The files discussed in this paper emphasise the role of identifying the murder weapon in the evaluation of the prohibited act under the criminal law. The cases examined emphasise, among other things, the following:

- The case concerned a husband murdering his wife (Article 148 § 1 of the Polish Criminal Code) in association with the economic situation of the spouses. The defendant's wife was attacked with a knife. The indictment stated, among other things, that: "Considering the available evidence and all the subjective and objective circumstance of the case, it should be concluded that the defendant was beyond any doubt acting with the direct intention to kill the victim. In particular, the nature and location of numerous wounds in various parts of the body suggest that the defendant stabbed the victim many times, which is confirmed by forensic medical opinion. Moreover, the type of tool used by the defendant during the event, namely the knife with which he stabbed the victim with different force, including very strong force, proves his intention. Also, the number of stabs and the defendant's tenacity were taken into consideration."¹⁴
- The case concerned a murder attempt during a meeting (Articles 148 § 1 and 157 § 1 of the Polish Criminal Code). According to the indictment, the defendant "acting with a direct intention to kill, stabbed the abovementioned person with a knife in his chest, causing a stab wound in the upper part of the chest penetrating under the neck skin and ending near the right appendix."¹⁵
- The case concerned, among other things, the attempt to kill in order to steal the victim's car (Articles 148 § 2 (2) and 275 § 1 of the Polish Criminal Code). The statement of reason in the convicting verdict stated that: "The murder was a means to achieve the main goal, which was to take the victim's car, as is proven beyond any doubt by the evidence and the violence used, and the direct act of stealing the car. [...] The defendant took an axe with him that he had borrowed from his accomplice, which was to be his murder weapon."¹⁶
- The case concerned an attempt to kill a stepfather. The stepson claimed he was "defending his girlfriend." (Articles 148 § 1, 156 § and 13 § 1 of the Polish Criminal Code). The statement of reason of the convicting judgement emphasised the fact that: "The expert opinion confirmed numerous wounds in the aggrieved party's body, and that the wounds were caused by a knife rather than by fists."¹⁷
- The case concerned determining the cause of the victim's sudden and violent death. The statement of reason of both the indictment and the convicting judgement said that: "The defendant stabbed the victim with a knife in his face and chest with the direct intention to kill." (Articles 148 § 1 and 31 § 2 of the Polish Criminal Code).¹⁸
- The case concerned the murder of a husband by his wife (Articles 148 § 1 and 31 § 2 of the Polish Criminal Code), who had for many years been abused by her spouse. The defendant pleaded guilty and the statement of reason of the convicting judgement noted that at trial, she said in a composed voice that she had "put a knife in her husband's back". Thus, it was stated that "in the court's opinion, the prosecutor was right to accuse the defendant of committing the crime with a direct intention."¹⁹

¹⁴ Judgement of the Regional Court in Olsztyn - file no. II K 233/13.

¹⁵ Judgement of the Regional Court in Olsztyn - file no. II K 176/13.

¹⁶ Judgement of the Regional Court in Olsztyn - file no. II K 93/13.

¹⁷ Judgement of the Regional Court in Olsztyn - file no. II K 106/13.

¹⁸ Judgement of the Regional Court in Olsztyn - file no. II K 99/13

¹⁹ Judgement of the Regional Court in Olsztyn - file no. II K 151/12

- The indictment noted, among other things, that the defendant "acting with the direct intention to kill the victim, stabbed him a number of times with scissors and a nail file in the head and chest, causing a few shallow wounds in the forehead, a shallow stab wound under the jaw on the left, and three stab wounds in the chest, causing the victim's death." (Article 148 § 1 of the Polish Criminal Code).²⁰
- The case concerned the attempted murder of an elderly woman, whose caregiver was the defendant. In the pre-trial procedure it was determined that the perpetrator's motive was to steal a ring with a coral worth approximately 500 Polish zlotys, which belonged to the aggrieved party (Articles 148 § 1, 11 § 2, 157 § 1 and 13 § 1 of the Polish Criminal Code). Both in the pre-trial procedure and in the court procedure it was determined that the "defendant tried to kill the aggrieved party by pressing her face into the pillow, which is proven not only by numerous bruises on the woman's face, as is reflected in the expert's opinion."²¹
- The defendant tried to strangle his concubine with a wire because, as he claimed, he "was on parole and she did not want to be with him." According to witness testimony, the defendant provoked a quarrel with the aggrieved party, and it was also confirmed that he first hit the woman in the face and later tried to strangle her.²²

The table below presents the respective murder (or intended murder) weapons used by the defendants.

Case no.	Legal evaluation	Murder weapon
SO II K 233/13	Article 148 § 1 of the Polish Criminal Code	Knife
SO II K 173/13	Article 148 § 1 of the Polish Criminal Code	Knife
SO II K 93/13	Article 148 § 2 (2) of the Polish Criminal Code	Knife, axe
SO II K 106/13	Articles 148 § 1 and 156 § 3 of the Polish Criminal Code	Knife and fists
SO II K 99/13	Articles 148 § 1 and 31 § 2 of the Polish Criminal Code	Knife
SO II K 151/12	Articles 148 § 1 and 31 § 2 of the Polish Criminal Code	Knife
SO II K 222/13	Article 148 § 1 of the Polish Criminal Code	Scissors and nail file
SO II K 126/12	Articles 148 § 1, 157 § 1, 11 § 2 and 13 § 1 of the Polish Criminal Code.	Pillow
SO II K 122/12	Articles 148 § 1 and 13 § 1 of the Polish Criminal Code	TV wire

Table no. 1. Murder weapons. Source: Author's own study

²⁰ Indictment - File no. 1 Ds 631/13 Judgement of the Regional Court in Olsztyn - file no. II K 222/13

²¹ Judgement of the Regional Court in Olsztyn - file no. II K 126/12

²² Judgement of the Regional Court in Olsztyn - file no. II K 122/12.

The cognitive value of the murder weapon, as the above cases show, makes it possible to determine not only the perpetrator's method of conduct, but also the type of intention that accompanied the crime.

According to the definitions in the literature on the subject, a motive is understood as a "psychic experience of intellectual nature prompting the perpetrator to commit an act, while the impulse is an emotional experience that plays the same role."²³

On the other hand, an intention (Article 9 § 1 of the Polish Criminal Code) may be direct or conditional; in the first case, the "perpetrator wants to commit a prohibited act. If we define the will of the perpetrator as his wanting to commit an act, we assume that he is conscious of all the features of the act."²⁴; the other intention "[...] is when the perpetrator expects that a prohibited act may be committed and consents to it (Article 9 § 1 of the Polish Criminal Code)."²⁵

The murder tool used (especially such as a knife or axe) suggests the particular determination of perpetrators who, when taking the weapon to the scene of the event, plan on (or do not exclude) using it, which has a direct impact on the evaluation of a prohibited act under the criminal law.

It should also be noted that some of the cases discussed in this paper concern crimes that happened between relatives or close acquaintances. It is rightly emphasised in the literature on the subject that "in the case of the murder of a relative or close acquaintance with whom the perpetrator is or was in an emotional bond, such murders are usually committed as a result of prolonged stress, while murders of strangers are committed suddenly; in the latter case, there is no protracted conflict."²⁶

First of all, however, it is emphasised that "[...] the dominant driving force affecting a reaction of murder was jealousy of a person the perpetrator loved strongly (sometimes even "pathological" jealousy) or hatred caused by harm suffered from a close person (e.g. a husband's alcoholism)."²⁷

²³ L. Gardocki, *Prawo karne*, Wydawnictwo C. H. Beck, Warszawa 2015., p. 85.

²⁴ *Ibid*, p. 82.

²⁵ *Ibid*, p. 83.

²⁶ M. Tarnawski, *Zabójstwa uprzywilejowane w świetle badań akt sądowych i badań ankietowych*, Wydawnictwo Uniwersytetu im. Adama Mickiewicza w Poznaniu, Poznań 1985, p. 33.

²⁷ *Ibid*, p. 33.

These observations correlate with the results of the research presented in this paper. In order to realise their intention, the perpetrators had to use an adequately sharp and dangerous tool to achieve, in the perpetrator's mind, the expected effect.

However, it is often difficult and quite polemical to correctly determine the perpetrator's intention. Considering that determining the intention has a major impact on the severity of punishment, it should be noted that in many cases this aspect is controversial. Also, the tool used to realise such an intention, although it should be unequivocally qualified, is often the cause of many interpretative discrepancies.

An example of such situations is the reasoning presented in the appeal of the lawyer of the defendant in one of the above criminal cases. The appeal, dated 10 April 2014, states that "According to the defendant, when determining the punishment, the Regional Court overestimated the aggravating circumstances and underestimated the significant attenuating circumstances. [...] The defendant's act was committed with an immediate intention and it was not premeditated. The defendant committed the murder under the influence of strong emotional experiences, which he tried to drown in alcohol. The defendant consistently pleaded guilty."²⁸

By determining the *modus operandi* and the intention, it is possible to characterise the perpetrator's psychology, which in turn allows forecasting his future behaviour and choosing a just penalty for the acts committed by him.

Thus, it is rightly emphasised that "In the future, it will not be the crime itself or the defendant's guilt that will determine the judgement, but rather the perpetrator's personality, his overall psychological disposition, and in particular his antisocial tendencies."²⁹

Thus, considering the above, it should be noted that it is hard to evaluate in an equivocally positive way the behaviour and personality of the perpetrator of a crime who, by taking with him a dangerous tool, realises his criminal intention.

It is also worth noting here another aspect associated with the beneficial effect of the correct determination and recovery of physical evidence on the course of the proceedings. In association with the hearing of a defendant using the method of the selective revealing of evidence involving the selection of evidence proportionally to the degree of guilt and gradual

²⁸ Appeal of the defence lawyer of 10 April 2014 to the Judgement of the Regional Court in Olsztyn - file no. II K 233/13.

²⁹ S. Batawia, *Wstęp do nauki o przestępcy. Zagadnienie skłonności przestępczych*, Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, Wrocław, Warszawa, Kraków, Gdańsk, Łódź 1984., p. 23.

presentation thereof to the suspect³⁰, it is rightly observed that "The investigating officer, when using the method of the selective revealing of evidence, may aid himself with the demonstrative method. This involves demonstrating, in the course of the hearing, physical evidence, documents and other auxiliary items, e.g. plans, charts, drawings, etc. Demonstration of such objects triggers more precise and specific explanations, as well as the desired psychological effects that may stimulate the suspect to reveal the truth."³¹

Thus, presenting to the suspect (defendant), at hearing, for example the tool that was used to commit the crime may help, if it is done efficiently, substantiate the version of events assumed by the criminal authorities.

The importance of physical evidence, in particular of the tools used to commit a crime, should be recognised not only by representatives of the pre-trial procedure, but also by the judges adjudicating in the case concerned. According to Henryk Kempisty, "physical evidence (the tools used to commit a crime, objects that bear traces of a crime, things that were the object of a crime, etc.) enclosed in case files should be present in the courtroom when the case concerned is reviewed. The court and the parties should have access to them and be able to examine them at any time."³²

At the same time, it is emphasised that it is more important to provide for interpretation and to determine the proper role of the interpretation of evidence than to correctly determine the moment when it should be presented in the criminal procedure. Thus, it is rightly believed that "The moment when physical evidence should be presented to parties during the trial cannot be predetermined, and it depends on the development of the evidentiary hearing and its specific needs."³³

Treating physical evidence as witnesses, "silent", albeit reliable, helps reconstruct the actual course of events. The tools used to commit a crime present a lot of unsaid information that has important additional meaning. Such information is useful in evaluating a prohibited act under the criminal law, especially in forecasting the defendant's future behaviour.

However, the interpretation of physical evidence, varied as it may be, should each time be performed diligently and in a way, that displays a logical correlation with the other items of

³⁰ See K. Otłowski, *Podjejrzaný w postępowaniu karnym. Studium kryminalistyczne*, Państwowe Wydawnictwo Naukowe, Warszawa 1979, p. 80 -81.

³¹ *Ibid*, p. 81.

³² H. Kempisty, *Metodyka pracy sędziego w sprawach karnych*, Wydawnictwo Prawnicze, Warszawa 1955, p. 130.

³³ *Ibid*, p. 130.

evidence. Interpretative discrepancies are understandable due to the unique character of every criminal case. Despite the fact that the effect of the crime of murder is always the same: the victim dies, each criminal procedure is unique and different from other procedures. It is rightly observed that "[...] there are crimes so horrifying and shocking that they trigger the desire for revenge dormant in the society. There are crimes where different circumstances justify, more or less, the perpetrator's behaviour. And, even though the perpetrator is still a murderer, his social condemnation is less."³⁴

On the other hand, it is indisputable that harming another person by deliberately wounding, hitting or hurting deserves severe punishment, the harsher the more intentional the murder was. Thus, assuming that "life is the most precious thing a human being has and it should be protected above anything else"³⁵, its legal protection obliges representatives of criminal authorities to thoroughly analyse the available evidence in order to ensure that the verdict is both legal and educational for the perpetrator, and that it satisfies the social perception of justice.

³⁴ M. Tarnawski, *Zabójstwo uprzywilejowane w ujęciu polskiego prawa karnego*, Wydawnictwo Uniwersytetu im. Adama Mickiewicza w Poznaniu, Poznań 1981, p. 21, quotation after: S. Pławski, *Przestępstwa przeciwko życiu*, Warszawa 1963, p. 186

³⁵ *Ibid*, p. 29.