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Rola seksuologii sądowej i biegłego sądowego w walce z przestępstwami na tle seksualnym oraz o zachowanie zdrowia publicznego

Streszczenie

Seksuologia sądowa jako wiedza i nauka, ma na celu prowadzenie badań oraz określanie normatywnych zasad seksualności, a także identyfikacji jej odchyleń na podstawie wyników analiz badawczych w przedmiotowej sprawie, z zastosowaniem i w odniesieniu do obowiązującego prawa. Rola biegłego sądowego jest nieodzowna, a niejednokrotnie jego decyzje stanowią podstawę do przekazania wyroków sądowych. Istnieją przypadki manipulacji materiałem dowodowym przez stronę wnoszącą oskarżenie o wykorzystanie seksualne; a wymiar sprawiedliwości dysponuje narzędziami prewencyjnymi w tym zakresie. Efektywność terapeutyczno-lecznicza skazanych niejednokrotnie jest zaburzona, lub wręcz niewykonalna z powodu braku zgody winowajcy i/lub braku stosownych uregulowań prawnych. Oddziałuje to na dobrostan społeczeństwa.

The role of forensic sexology and a court expert witness in the fight against sexual crimes and for public health

Abstract

The aim of forensic sexology as knowledge and science is to conduct research and to define standard principles of sexuality as well as to identify its deviations based on the results of a research studies of the said issue, applying and relating to the law in force. The role of an expert witness is indispensable. There are instances of evidence manipulation by the party filing a sexual abuse lawsuit; however, the justice system is equipped with means to prevent it. The efficacy of the therapeutic and medical treatment of the offenders is disturbed many a time or even unfeasible due to the lacking consent on the part of the culprit and/or the lack of appropriate legal regulations. This affects the well-being of the society.

Słowa kluczowe: gwałt, prostytutka, pedofilia, parafilia, terapia farmakologiczna, biegły sądowy, kodeks karny, oszczerstwo a potwierdzenie nieprawdy, badanie seksuologiczne, zdrowie publiczne.

Keywords: rape, prostitution, pedophilia, paraphilia, pharmacological therapy, expert witness, criminal code, slander versus perjury, sexological examination, public health.

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INTRODUCTION

The main issues of forensic sexology are sexual disorders, sexual crime, the methodology used to explain a particular problem in proving innocence or guilt determination of an offense as sexual assault. Forensic Sexology is also responsible for developing a characteristic typology of perpetrators of sexual crimes, clarifying therapeutic management for those people on the foundation of cognitive-behavioral psychological therapy.

Therapy in this area is more effective than isolation of criminals from society. However, imprisonment does not reduce significantly the likelihood of a return to deviant behavior (i.e. crimes of sexual nature). Therefore, according to the modern trends in forensic sexology, cascading solutions should be used based on: the isolation of the offender, the use of specialist medical care, implementation of methods and elements of support, as well as supervising and controlling the subjects after the release from prison. All these elements are intended to prevent recidivism of sex offenders [1].

There is no happy medium in the case of sexual deviance in sentenced to imprisonment and depends on the extent to which the law has been violated by the offender and whether he/she constitutes a real threat to the social order of norms and values. It should be noted that, in exceptional cases, pharmacological therapy is used, with the objective to reduce or prevent the sexual activity. It is not easy to apply that in practice, since pharmacological therapy is subject to failure in the absence of the consent of the deviant to this type of treatment, as well as refusal to cooperate. Legal shortcomings of the justice system are not without significance. The system does not provide for such cases a command system, as it would relate to legal incapacitation and a violation of civil rights [2].

The data on the dynamics of sexual crime confirms [3] that in the period 1998-2006 there were committed from a million to one million three hundred thousand criminal offenses based on Criminal Code of which the sexual acts were the basis. Downward trend was noted at the end of calendar year 2004.

Judicature is particularly willing to base on the opinions and expertise drawn up by experts in the field of sexology in cases of sexual crimes. This is to ensure respect for the disclosure of evidence, the objectivity of facts, and respect for all stages of the proceedings according to law and justice. In this type of activity before the actual procedure takes place, the general opinion of psychologists is sought in order to clarify aspects of the proper intellectual functioning and the functioning and structure of personality, in emotional and social terms. However, the essential scope of activities of expert psychologist-sexologist, as an institution of the judicial process law is to characterize the phenomena and processes of motivation and behavior of a person suspected or accused at the level of sexual activity, and thus establishing the factors for substantive clarity and necessary in determining investigation process. "The expert opinion is the evidence in the case. (...) as the judges admit themselves; the role of the expert in the broadly understood justice system becomes even the leading one". The overriding principle is so called "informed consent" consisting in obtaining

the consent of the suspect to undergo psychological – sexual examination. "Informed consent means that the investigated has been fully informed on the course of the test, the methods applied, its purpose and use of the results. In case of refusal to submit to testing, it is necessary to rely on Art. 74 point 2 of Code of Penal Procedure ("The accused is required to undergo psychological and psychiatric tests"). It is required to respect the "rules of accurate repression" where an expert in the field of sexology must determine own position based on acquired clinical knowledge, his own conscience with regard to the sense of justice and common sense in making decisions. Another is "the principle of good service", requiring that an expert should provide statutory authority of the litigation with evidence in the form of opinion, containing answers to questions posed by the appointing body, without the axiological foundations. "The principle of autonomy" based on respect for Art. 200 Code of Penal Procedure has provided the expert with the possibility of translation of questions of process bodies into his specialty language. This principle ensures the independence of the expert opinion with the exclusion of the pressure of process body on the process of examination among other things due to the fact that Polish law allows for the presence of the process body during the investigation process necessary for expressing opinions subject to "data collection phase", where it takes place in the presence of an interrogating officer. The next "disclosure rule" requires an expert to disclosure and production of documents and other sources, which he used in the development of expert opinion, subject to the applicable Article 51 and 52 of the Act on the Protection of Mental Health ("information that may be confidential and still used in the preparation of opinion"). Omission or deliberate concealment of information by the psychologist in relation to the opinion issued is not in accordance with law. It gives, however, possibility to draw up an opinion containing alternative findings and conflicting hypotheses explaining the results obtained.

It should be noted that it is a violation to provide the court with tests and other information that could adversely affect the accuracy and usefulness of the diagnostic tool (test material, keys, standards). This information can be transferred only to another psychologist, at the request or with the consent of the accused or as a result of an order issued by the court. This protects both parties of the process against the wrong understanding of the content, the way examinations and tests are carried out and drawing the wrong conclusions. Disclosure of raw data could make the test stimuli become widely known and lose their diagnostic power. The consequence would be a need for frequent change of psychometric tools.

A psychologist is obliged to observe the principle of truth, in formal, material, objective and judicial terms. The expert psychologist, a specialist in the field of sexology, must be guided solely by truth in scientific terms. The expert may protect the opinion with a clause of the need to secrecy or ban on copying, which is to protect the accused or any other person, being a party or a witness in the investigation process.

It should be noted that the regulations on the rights, roles and responsibilities of the expert are recorded in Chapter 22, Code of Penal Procedure/Code of Criminal Procedure.

It is important that, in accordance with Article 195 Code of Penal Procedure, in order to perform the statutory duty of an expert, not only expert witness is required, but also every person that is known of having adequate knowledge in the field. Therefore, the statutory functions of an expert witness could be performed by a person appointed by the judicial body to act as an expert in a particular case, or the one who has made a pledge, and is entered in the register of court experts. According to the Regulation of the Minister of Justice, the list of permanent expert witnesses shall be reviewed every five years. A potential expert witness must meet the following requirements: full use of the rights of a citizen, age over 25 years, proficient theoretical and practical foundations in sexology. Bearing in mind Article 197 of Code of Penal Procedure, the expert witness, while making oath, imposes upon himself the duty of integrity, honesty, impartiality in the investigation, analyzing and commenting in forensic sexology and taking responsibility for drawing up the opinion and its content. Violation of these rules or one of them, results in the deletion from the list of expert witnesses. However, when the opinion is incomplete or unclear, or if there is a contradiction in the same opinion, or between different opinions on the same issue, there can be appointed other experts according with art. 201 Code of Penal Procedure. The expert in case of breaching the law is subject to penalties under Article 233 par. 4 of the Penal Code ("Whoever as an expert (...) presents a false opinion or interpretation to be used as evidence, is subject to imprisonment up to 3 years"). Article 171 p. 5 Code of Penal Procedure warns expert psychologist-sexologist against the unacceptable use of hypnosis or chemical or technical means, affecting psychological processes of the interviewed person or controlling his/her subconscious reactions in connection with the hearing. Thus, the use of hypnosis and the use of polygraph in criminal proceedings is against the law (unless the person consents to the test in-writing). Article 192 p. point 2 of Code of Penal Procedure states: "If there is doubt as to the mental state of the witness, his state of the mental capacity to perceive or express his observations, the court or the prosecutor may order that the hearing of witness should be followed with the participation of a medical expert or an expert psychologist, and the witness can not oppose". In this case, the expert psychologist, commenting on the ability to the perception or credibility of the witness, draws up an opinion containing the assessment of the reliability of the witness' evidence and evaluation of confabulation and a tendency to fantasize. If the act applies to criminal sexual acts, the forensic sexologist shall be appointed for drawing up an opinion [4].

A particular kind of sexual offenses to which judicial sexology is sensitive, are offenses made on juvenile (pedophilia). Given the legal issues, the Polish legislation in Article 200, paragraph 1 and 2 of the Criminal Code (as novella of 27 July 2005) determines, that sexual abuse is the sexual intercourse (genital, anal-genital intercourse and its derivatives), sexual activity (where touching is a fundamental form of stimulation) and contact without touching and sexual abuse of a child in the form of child pornography. Analyzing this article, it can be concluded that the contact without touching in order to abuse a child sexually means: obscene conversation (directly or using the audio-telephone

equipment, including phones, mobile phones and other technical solutions), inducing physical sexual intercourse (with an adult or accompanied by an adult), displaying pornography (photos, videos, magazines) to minors, incitement to auto-erotic acts of a child (accompanied by an adult), incitement to prostitution (pimping), exhibitionism, use of the Internet connections to incite a child audiovisually or in writing to sexual connotations and their aftermath, as well as provocation, blackmail, obtaining consent to sexual intercourse, and the use of traditional forms of correspondence.

However, for clarification and confirmation of offenses it is necessary to establish, identify and analyze the components of the act, which include the victim, the perpetrator, type of activity, crime/aversion of the act. The basic tenet of law in determining the "victim" is no need to satisfy additional legal arguments, besides child's age defined by a specific Act. "Perpetrator" of the act is an adult, who, according to Article 10 paragraph 1 of the Criminal Code, when committing a criminal offense has completed 17th year of age. It is estimated that every fifteenth boy and every fifth female person before the age of 15 is a victim of sexual abuse stemming from adults [3].

Specific legal aspects of sexual exploitation of minors are determined by Chapter XXV of the Criminal Code, "Crimes against sexual freedom and morality," and the main provisions of the Penal Code are: Article 199 (§ 1, § 2, § 3), Article 200 (§ 1, § 2), Article 201, Article 202 (§ 1, § 2, § 3, § 4, § 4a.), Article 204 (§ 1, § 3), Rule 304 (§ 1, § 2) [5].

There are also cases of the use of law for slanderous purposes and so the sexology forensic is obliged to demarcate truth from falsehood. The following citations prove that the allegations of sexual harassment are mainly based on unsubstantiated by any evidence words. And yet it is often the case, that comes out after many years, when there is no longer witnesses who might confirm your version of events. (...) The exceptions are when the court has direct evidence, such as recording, showing that the father harasses a child – adds Dr. Cezariusz Sonta, a lawyer from the Institute of Criminal Law at the University of Warsaw. (...) Quite typical scenario – admits Dr. Ewa Milewska from Warsaw University, a psychologist and court witness. Frequently accusation appears during the divorce or after the divorce, when the father attaches great importance to contacts with the child, and the child is in preschool age. In a typical scenario, a mother, who for various reasons, wants to "get back at" her husband, visits a psychologist. Little is needed to convince him that her child, after meeting with his father, behaves strangely. A psychologist shall issue a certificate and it says that the information provided to him by the mother of the child implies that harassment might have happened. Milewska explains that every year, Polish courts get about fifteen hundred parental accusations of pedophilia. Professor Zbigniew Lew-Starowicz believes that among these accusations brought to court by the mother during the divorce, at least 30 percent are fabricated stories. In criminal cases, according to Professor sexologist, the percentage of slander is smaller. But still at least every 10th father – according to professor's practice – is falsely accused. The victims of sexual harassment accusations are usually not those fathers who do spend evenings with friends drinking beer – explains sexologist. Such people

are not charged with accusations. Only those get it in the neck that spend maximum time with their children and love them with all their heart. And then, pay a huge penalty for that they were not ashamed to show love. Once Krzysztof Oleksy was regarded as a model father. Similarly Stanislaw B., another accused in the case pending for six years on. The opinion delivered by experts from Warsaw psychologists emphasized the excellent ties between father and son. Because actually the accused devoted every free moment to his firstborn and only son. Bathing, but also other controversial plays with the son meant that, psychologists from Lodz decided that such contact with the child might cause reactions typical of sexually abused children. On this basis, the boy's father was sentenced last year to four years in prison. It was not until the middle of last year, it turned out that the court did not take into account the opinion expert witness from Warsaw who did not agree with what the experts from Lodz. The process started from the beginning, because of the scandalous neglect of the court" [6]. An issue of forensic sexology, to be taken into account is the "assessing the probability of distorted evidence of the child by suggestions from third parties" and such dilemmas are primarily the domain of court appointed experts, including cases of sexual abuse of minors.

Expert witness must determine whether the child is a real victim or the indictment stems from a minor as a result of his involuntary instill of some pseudo-facts provided by the parent/guardian and the child is characterized by a special emotional sensitivity. It happens that underage person is deliberately induced by the parent guardian to falsify evidence to plunge the opposing party, or with full knowledge convinces his/her parents/guardians that he/she was sexually abused by an adult. In such cases it is necessary to tests the environment of children in the first, second and further kinship.

Subject literature offers a range of available tools, which include: standard and clinical interview, clinical observation and method of drawings, method of projection games. For parents, in addition to construction methods based on observation, questionnaires typical for parents are used. Case files are also an important cognitive source of providing information about involvement of the parties in the course of proceedings. It is believed that one of the reasons of the suggestions for sexual offenses in the judiciary, is an emotional thread, which is often accompanied by chaos, uncertainty, disbelief, denial, fear, and extreme feelings of hurt and anger [7].

The most common sexual assaults include rapes, made on both adults and juveniles. The rape is defined in Article 197 of the Criminal Code. In accordance with paragraph 1 of the article, rape is based on bringing another person by force, threat or deception for unlawful sexual intercourse against her will or in the absence of a positive decision as to the will of certain sexual activities. It is subject to the penalty of two to a maximum of 12 years in detention center for criminals, conventionally referred to as "prison".

Broadly understood term "rape" is proved by paragraph 2 of the above mentioned article of the Criminal Code. It deals with "other sexual activity" understood as not making direct genital sexual activity, but "at least involving body and having a sexual nature activity of the victim"

(e.g. touching of genitals of the victim, exerting persuasion on the victim to palpation contact of a second individual, and forcing the exhibiting behavior or masturbation). It should be noted that the presence of at least two offenders involved in a genital rape (as described under paragraph 1 of Article 197 of the Penal Code) [3], and also rape that is a consequence of more than one sex offender, can be classified as a collective rape (Article 197 of the Penal Code paragraph 3) [3]. It is subject to imprisonment of a minimum of 3 to 15 years. However, there is no provision for prison sentence a shorter than 5 years in the case of rape with particular cruelty (Article 197, paragraph 4) [3]. Judiciary in the deliberations on the issue of rape also deals with using the helplessness of the victims within the meaning of Article 198 of the Penal Code. The helplessness of the victim of a sexual offense is defined, *inter alia*, as the mental state, temporary or permanent immobility (paralysis, the use of therapeutic technologies in orthopedics, etc), alcohol intoxication or the effects of drugs that prevent the behavior of self-defense against the perpetrator of the deed. The use by the perpetrators of the above mentioned states to discharge their sexual tension is imposed by a penalty of imprisonment ranging from a minimum of six months to a maximum of eight years. Also, abusing of official relationship of subordination in order to achieve the intended purpose of sexual intercourse, is an offense of the nature of sexual offenses (Article 199 of the Penal Code), where the relationships are defined as enforcing of the above mentioned behaviors in relationships: supervisor – subordinate, teacher – pupil, etc. with a view to, as a rule, their improvement [3].

Sexology examinations, including gynecological and general examination of the victims of sexual abuse (particularly with regard to minors), are difficult and inaccurate in the range of 50-70%, because they do not support the symptoms of sexual victimization of children [3].

The aim of examination of the victims of sexual offenses is in particular:

- Conducting and documenting medical history;
- Physical and gynecological examination;
- Diagnosing and stabilization of emergency cases;
- Assessment and treatment of physical injuries;
- Sampling of the material for bacteriological examination;
- Prevention of sexually transmitted infections;
- Guidance on the prevention of pregnancy;
- Establishing the appointments;
- Psychotherapeutic support;
- Accurate documentation of events and injuries;
- Gathering evidence;
- Gathering photographic documentation of found injuries;
- Notification of the relevant authorities about the commission of the offense [5].

Forensic sexology also deals with issues such as forced prostitution, for which the Criminal Code Article 203 provides for imprisonment from one year to 10 years. In accordance with Article 203 of the Penal Code as forced prostitution shall be considered an act using violence, unlawful threat, deceit, critical position or a situation of dependence in order to bring an individual (male or female) into prostitution. Other related crimes are pimping (Article 204 para-

graph 1 of the Criminal Code: the basis for the practice is application of only the intellectual influence “to persuade the victim” to prostitution and its follow-up, where the basis is bonus for the imposing/pimping person or another individual, who is not an induced person) pimping (article 204 paragraph 2 of the Criminal Code, “benefiting of prostitution by another person” in the continuous time-period, is punishable by imprisonment up to 3 years).

Whereas a victim of sexual violence it is not the person who agreed to leave Poland as or entered the area in order to provide conscious prostitution and was convinced to provide such services through an intermediary promising high wages. Prosecutable offense of paragraph 4 of Article 204 of the Criminal Code is the opposite situation, when a person unknowingly left of Poland (or entered the territory), tempted by the provision of high wages for the work in a different capacity than prostitution, and the situational reality forced the person to this practice [3].

As at 31.12.2008 in penitentiary institutions there were 83 152 prisoners and detainees. One psychologist, covered 191 prisoners while, a psychiatrist – 784. According to the instruction contained in the Articles 96 § 1 of the Executive Penal Code the convicted of offenses referred to in Articles 197-203 of the Penal Code, committed in connection with disorders of sexual preferences, take a penalty in the therapeutic system. Those convicted are provided with therapy with their consent, and in case of the absence thereof, the obligation to undergo treatment shall be adjudicated by the court under Article 117 Executive Penal Code. Since 2007, in the penitentiary institutions a program has been implemented consisting in therapeutic actions against the sex offenders. Psychologists, therapists and psychiatrists trained in the treatment of sexual offenders conduct these actions in therapeutic wards. They are purely psychotherapeutic individual and group interactions. The Prison Service is of the opinion that the effects of prison treatment programs for convicted sexual offenders to a large extent depend on the creation of system solutions for the continuation of treatment and supervision of offenders after they leave prison. Prisons do not employ sexologists. As noted, this specialization could be an additional competence or professional psychologist or a psychiatrist [8].

CONCLUSIONS

1. The primary, sometimes the only tool in the judgment of sexual offenses by courts of law is the opinion of and/or expert/s gaining on the probative value, and made by the expert witnesses in the field of sexology and psychology. This is to ensure respect for the disclosure of evidence, the objectivity of facts, and respect for all stages of the proceedings according to law and justice.
2. Accuracy and reliability of opinion-making of expert witnesses in such cases, must comply with the basic principles: “informed consent”, “accurate repression principle”, “the good service principle”, “the principle of autonomy”, “disclosure rules.” Court expert can be a subject to imprisonment for the unfair preparation of the opinion or expertise in an ongoing investigation about the sexual abuse.

3. The pressure of the party bringing the accusation and extortion of confirmation of untruth by presenting never existing circumstances of sexual abuse is not always disclosed or discovered during the investigation and/or trial. Slander in these cases may cause abnormalities of somatic and mental health and degradation in the public opinion, not only with regard to the individual but also to a particular social group.
4. Pharmacological therapy of sexual offenders, is subject to failure due to the absence of regulation and denial of convict.

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