

Empirical Study on Court Investigation of Documentary Evidence in Criminal Trial

Taking the Substantive Trial Demonstration Court of the Court of C City as a Sample for Analysis

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Abstract—It is found in empirical analysis that although the substantive reform of court trial has improved the situation in which traditional criminal trials become formalistic to some degree, there are still problems in the investigation of documentary evidence in criminal trial, such as chaotic procedure of proof-providing, stylized procedure of cross examination and simplified procedure of certification. The main reason lies in the investigation-centered lawsuit structure and the current careless court investigation rules. In the future, under the framework of trial-centered lawsuit system reform, it is necessary to refine and improve the evidence investigation rules for operational criminal trial, and give play to the relevant supporting mechanisms on this basis, to achieve substantive and effective court investigation in criminal trials.

Keywords—*substantiation of court trial; documentary evidence; court investigation; empirical study*

I. INTRODUCTION

Theoretically, evidence can be divided into verbal evidence and physical evidence according to different forms of expression. Among them, documentary evidence is the most important physical evidence in judicial practice. For a long time, compared with verbal evidence, the credibility and probative force power of physical evidence have been ignored to a considerable extent in both evidence legislation and judicial practice.¹ With the promulgation and implementation of the two "evidence regulations" in 2010 and the introduction of the Interpretation of the Supreme People's Court on the Application of the <Criminal Procedure Law of the People's Republic of China> in 2012, the defects at the legislative level have been improved to some degree. However, due to the lack of operational procedures, the misuse of physical evidence caused by the review and judgments that are not in place often occurs in judicial practice. In recent years, some influential unjust, false and erroneous cases have also exposed the severity of this problem.

In 2014, the Decision of the Central Committee of the CPC on Comprehensively Promoting Several Major Issues

¹ Chen Ruihua: The Issue of Authenticity of Physical Evidence, Chinese Journal of Law, No. 5, 2011.

Concerning the Rule by Law adopted by the Fourth Plenary Session of the 18th CPC Central Committee requested the promotion of the "trial-centered lawsuit system reform". In practice, the substantive reform of court trial has become one of the important goals and specific contents of the trial-centered lawsuit system reform. On June 11, 2017, the Supreme People's Court formulated and promulgated the "three regulations" on deepening the substantive reform of court trial, in which the Regulation on Court Investigation in Procedures of First Instance for People's Court Handling Criminal Cases (Trial) (hereinafter referred to as the Regulations on Court Investigation) specifically lists the "procedures of proof-providing and cross-examination for evidence such as documentary evidence" as a chapter, which highlights the important significance of physical evidence investigation in criminal trials, and also provides reform opportunities for problems arising in practice.

The object of empirical study selected in this paper is the court of C City. Since February 2015, it has implemented the substantive reform of criminal trial, which was among the first pilot courts implementing the substantive reform of criminal trials in the country. During the pilot process, the court selected some cases for trial in substantive trial demonstration court, and the "C City experience" formed has been promoted nationwide. Therefore, this paper focuses on the operation of the investigation procedure of documentary evidence in the substantive trial demonstration court in criminal trials of the people's court of C City, and reflects on the effects and limitations of the reform practice, so as to provide some inspiration for further improving the investigation procedures of documentary evidence in criminal cases.

II. THE PRACTICE OF COURT INVESTIGATION OF DOCUMENTARY EVIDENCE IN CRIMINAL TRIALS

The data in this paper is from 102 cases of the substantive trial demonstration court of the court of C City in 2015-2016. After reading and sorting out the relevant file materials, and eliminating invalid cases such as cases not concluded yet or cases with incomplete file materials, 71 valid cases were obtained. After analysis, the investigation procedure of the

documentary evidence in the cases of demonstration court shows the following characteristics:

In the step of evidence presentation, the proof-providing order of 32.5% of the demonstration court cases is determined according to the disputes sorted out in pre-trial meeting, which is the most applicable proof-providing order. The remaining cases are presented in the order of evidence type, logical order or file order. In terms of the presentation method, 42 cases are presented in groups, accounting for 59.1%, which is most applicable method of evidence presentation; at the same time, the proof-providing method combining batch presentation and one-by-one presentation is adopted in 15 cases, accounting about 21.1% of the total number of demonstration court cases; in the practice, documentary evidence of about 20% of the cases are presented in batches and presented one by one. In terms of the presentation specifications of documentary evidence, the original of documentary evidence is presented in most of the cases, while there are still nearly 20% of the cases in which the original is not presented, for example: in 3 cases, only the copy of documentary evidence is presented; in 10 cases, the originals of some of the documentary evidences are presented, while some are presented in copies. From the perspective of statistics, there are a large proportion of cases among the sample cases in which the originals are not presented, and only photos or copies of the original are presented for the convenience of the accusation.

In the step of cross-examination, the defense requests cross-examination on the legality of the documentary evidence in 75.8% of the cases, and requests cross-examination on the relevance of the documentary evidence in 48.2% of the cases. 56% of the cases chose to carry out batch cross-examination of the documentary evidence, while the remaining 44% of the cases carries out one-by-one cross-examination or combines batch cross-examination with one-to-one cross-examination. It can be found in the comparison between the proof-providing method and the method of cross-examination that found among the sample cases, there are 2 cases with relatively significant controversy in which the documentary evidence is presented one by one, but the defense chooses batch cross-examination; among the 14 cases with group proof-providing, 9 cases chose batch cross-examination. In terms of the defense of the evidence objection, there were 21 cases among the sample case in which the defense objects to the documentary evidence and the prosecution responds; among them, 15 cases only use oral response, 2 cases use "oral + written" response, 1 case uses "oral response + application for attendance of witness", 1 case uses "submission of written materials + application for attendance of witness", and 2 cases postpone the trial. It can be seen that the oral response is the most common, accounting for 71.4% of the sample cases, which is the form of response most commonly used by the public prosecution.

In the certification stage, there are 9 cases in which the court certifies the whole case and the judgment is pronounced in court, that is, only less than 20% of the cases succeed in "certifying in court and pronouncing judgement in court". In terms of certification method, among the sample cases, there are 7 cases in which the judges carry out "one certificate for one evidence", in 13 cases, the judges carry out "group

certification", in 51 cases, the judges carry out "batch certification". However, it can be found through specific analysis that among the sample case, the cases in which the judges carry out batch certification of the evidence of the whole case are basically the cases in which the prosecution and the defense have no objection to the evidence presented in court during the trial.

III. REVIEW AND REFLECTION ON THE INVESTIGATION OF DOCUMENTARY EVIDENCE IN CRIMINAL TRIALS

A. *Review of Effect*

The above data show that among the cases of the substantive trial reform court, some cases determine the order of proof-providing are based on the disputes sorted out in the pre-trial meeting, and then selectively carry out proof-providing and cross-examination; in the face of the cross-examination of the defendant and defender, the prosecution in a few cases also give respond in direct ways, such as oral response, application for attendance of witnesses court or submission of written materials; in addition, in some cases, the evidence presented in the trial are certified in court, which undoubtedly reflects the transformation of previous trials that have become formalistic, and promotes the trial to develop in a more substantive direction to some degree. However, in cases of the substantive trial reform demonstration court, the overall situation of the criminal evidence investigation has not changed substantially. The investigation procedures of documentary evidence are diversified and not standardized enough in different courts and different cases, and there is still a certain gap from a series of requirements made by the substantive trial reform. The specific performance is as follows:

1) *The chaos of the proof-providing procedure*: This is first manifested in the chaotic order of evidence presentation. For example, in some cases, when evidence is presented in accordance with the legal category, the evidence is often presented in the order of factual development logic in the middle of proof-providing; proof-providing according to the legal category of evidence is mixed in group proof-providing in some cases. Secondly, it is manifested in the chaos of the evidence presentation mode, which is mainly reflected in the fact that the controversial evidence and non-controversial evidence are not presented differently. Finally, there is a situation in which the original documentary evidence is not presented, replaced by "alternative" or "transformed" presentation.

2) *Stylization of the cross-examination procedure*: For how the documentary evidence should be examined and identified, the Criminal Procedure Law and the Judicial Interpretation of the Supreme People's Court have made corresponding provisions in court investigation procedure and review content, in which the true source of the documentary evidence and the proof for the chain of custody are emphasized.² However, it can be seen from the data that in

² See Articles 190-193 of the Criminal Procedure Law of the People's Republic of China, Articles 69-73 and 218 of the Interpretation of the

practice, the cross-examination procedure has formed a set of patterns that are almost “fixed” after long-term practice, and there is still a big difference from the “law in books”. In terms of the content of cross-examination, there is no obvious procedure in trial to identify the source, collection process and authenticity of documentary evidence.³ In most cases, this step is completed by batch presentation of relevant transcript evidence. In trial investigation, the adequacy of the evidence and the whole evidence chain is seldom questioned. The cross-examination of documentary evidence mainly focuses on the fixed pattern of the “three properties” of evidence, showing the characteristics of the fixed content of cross-examination. Seeing from the method of cross-examination and the investigation procedure of controversial evidence, the current court investigation has not carried out substantive investigation and cross-examination procedures on the controversial documentary evidence. In most cases, both the prosecution and the defense only conduct a round of cross-examination on the controversial physical evidence or documentary evidence, while multiple rounds of cross-examination on controversial practical evidence or documentary evidence is seldom carried out, and the method and content of response are relatively simple.

3) *Simplification of certification procedure*: The simplification of certification procedure is mainly reflected in the simplicity of certification in court and the simplicity of argument. Seeing from the statistical data, the rate of certification of the whole case in court is low. As shown in the above statistics, among the sample cases, only 9 cases achieve the certification of the whole case and judgment in court, while certification of most cases is completed outside the court. Seeing from the content of certification in court, the content lacks substantive significance for judgement. In practice, when judicial personnel certify the documentary evidence, most of them only certify the non-controversial evidences or the evidences that have little effect on the conviction and sentencing of the case, but seldom certify the document evidences that are complicated and have significant effect on the conviction and sentencing or are still controversial in court. This is somehow consistent with the opinion of some scholars that “the certification of the evidence of the whole case is only a simple echo at the end of the court investigation, and it does not have much substantive meaning in fact”.⁴ In practice, the identification of relevant evidences still relies on the reading after court hearing, which greatly reduces the function of proof-providing and cross-examination in court. Therefore, in the current judicial practice, the so-called court certification of the judge is

actually a simple “confirmation” in court of the evidence that the prosecution and the defense have no controversy. It can be said that most of the court certifications in the current criminal trials are “in the name of court certification, but do not play the role of court certification”. In terms of certification argument, when judicial personnel decide to adopt a physical evidence or documentary evidence, there is a tendency to simplify the certification argument and rely on fuzzy argument. On the one hand, judicial personnel seldom give reasons for certification; on the other hand, judicial personnel seldom systematically explain or describe the reasons for certification even if they give reasons for certification.

B. Reflection on Reason

1) *The trial-centered lawsuit structure has not yet been formed*: Theoretically, criminal proceedings are regarded as activities in which the prosecution and the defense contest a lawsuit in equal status under the auspices of a neutral third-party court. However, for a long time, the public security organs, procuratorial organs and people's courts in our country have the unique principle of “division of labor, cooperation and mutual restraint” for litigation power in criminal proceedings, which requires the court and the investigating and prosecuting organ, namely the prosecution party, to restrict and cooperate with each other.⁵ In practice, “the public security organs, procuratorial organs and people's courts often over-emphasize cooperation and continuously weaken the function of restraint, which ultimately makes to the three organs treat each other as partner with the same goal and direction in criminal justice activities.”⁶ In terms of the court investigation mechanism, compared with the adversarial evidence mode in which the witnesses of the two opposing parties introduce the evidence, the main body of criminal trials in China is the public prosecution party, and defendant actually does not have much influence on fact finding procedure applicable to his / her case⁷; besides, the lawyer defense rate is relatively low and the role of lawyer is weakened in practice, which further restricts the effectiveness of the substantive trial reform in the steps of evidence review and identification.

2) *Lack of uniform, clear and operational evidence investigation rules*: For the investigation procedure in criminal trials, only 10 articles are used in China's Criminal Procedure Law to outline the framework of the three steps of proof-providing, cross-examination and certification. The detailed Evidence Provisions for the Handling of Death Penalty Cases only requires identifying the authenticity of the physical

Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China.

³ Some scholars refer to this as the authenticity system of physical evidence. See Chen Ruihua: The Issue of Authenticity of Physical Evidence, *Chinese Journal of Law*, No. 5, 2011.

⁴ Liang Kun, Tao Shusheng: Empirical Study on Court Certification in Criminal Trials, *The People's Judicature*, No. 15 of 2010.

⁵ Long Zongzhi: The Trial-centered Reform and Its Limits, *Peking University Law Journal*, No. 4, 2015.

⁶ Zuo Weimin: Reflection on Perfecting the Principle of Division of Labor, Cooperation and Mutual Restraint, *Law and Social Development*, No. 2, 2016.

⁷ Mirjan R. Damaska: Evidence: A Comparative Study, translated by Wu Hongyao and Wei Xiaona, Chinese People's Public Security University Press, 2006, p. 136.

evidence, but it does not stipulate the specific operational procedures, let alone the emphasis of substantive trial on court identification. Due to the lack of rules and the economic trend of criminal trials in China, 8in practice, it is common for the courts to examine the authenticity of documentary evidences in writing through “transcript evidence”. The defense can hardly find out the inherent problems in the physical evidence only through static and indirect written evidence, so it is not surprising that the cross-examination becomes formalistic.

As for the presentation specification of documentary evidence in court, the relevant judicial interpretation stipulates the principle of presenting the original. However, considering the actual circumstances of criminal trial, it also stipulates the exception of "proviso", that is, if it's really difficult to get the original, the copy can be used.⁹ This seemingly well-considered legislative clause is suspect of “overlooking purposely” in practice, which greatly weakens the function of the “principle of original”. The reason is that the definition of “it's really difficult to get the original” is very subjective, which leads to the uncertainty of its application results. In addition, the content of "proviso" is less specific, which also lowers the statutory requirements that the documentary evidence based on which the case is concluded must meet. At this time, to let the "principle of original" play a valuable role, the prosecution needs to have higher professional literacy on one hand, on the other hand, the defense shall be able to raise objections to violations of the principle in a timely manner and fully confront. However, as far as the actual situation of the current trial is concerned, it seems difficult to meet such a request. Therefore, there are a large number of phenomena of “dominated by the presentation of non-original and supplemented by originals” in practice, which “violates” the legislative spirit.

3) *Failure to let pre-trial meeting effectively play the role of connection in evidence investigation:* The core function of pre-trial meeting is to ensure the purity of the discovery function of the trial entity, to avoid interference with the centralized trials of the court due to procedural matters or evidence raids that results in lengthy trials, and also to improve the concentration of collegiate bench and ensure the trial quality.¹⁰ However, in practice, the connecting role of pre-trial meetings and court evidence investigations has not been fully utilized, which can be seen from the time when the evidence objection is raised. As shown in the statistics, pre-trial meetings are held in 69.8% of the sample cases; in 17.2% of the sample cases, the prosecution and the defense object to the documentary evidence in the pre-trial meeting; in 55.2% of the sample cases, objection to the documentary evidence is raised in court; in 27.6% of the sample cases, objection to the

documentary evidence is raised both in the pre-trial meeting and in court. It can be seen from the difference between the two groups of data that in a large number of cases in which pre-trial meetings, the relevant controversy cannot be raised before court trial, but is raised until the formal court trial, which greatly reduces the pre-trial meeting's effectiveness in sorting out controversy, and leads to indiscriminate proof-providing, cross-examination and certification of controversial and non-controversial evidence in court trials.

IV. CONCLUSION

A. *Promoting the Transformation of Trial-centered Lawsuit System*

The criminal trial becoming formalistic is one of the negative consequences of the "assembly line work" structure of the public security organs, procuratorial organs and people's courts.¹¹ Therefore, to solve this problem, it is not enough to simply improve from the technical level; instead, it is necessary to focus on the background of “trial-centered” lawsuit system reform. The "trial-centered" reform means the adjustment and reconstruction of the relationship among the public security organs, procuratorial organs and people's courts, especially the relationship between the procuratorial organs and courts, and between the procuratorial organs and the police in the judicial system, to improve the status of judicial organs in the criminal justice of our country. On the one hand, the trial-centered lawsuit system reform emphasizes the comprehensive and in-depth restrictions of the procuratorate on investigations, thus “forcing” the standardization of proof-providing of the investigation organs, and breaking the unilateral and secret evidence production mechanism of the investigation and control organs. On the other hand, it emphasizes the core control function of the court in the trial, restricts the prosecution of procuratorate through court trial, and gradually changes the situation where the court mainly accepts the public prosecution opinion of the procuratorate in the past.¹² It can be seen that the promotion of the "trial-centered" lawsuit system reform is the fundamental path to ensure the independence and substantivity of the exercise of judicial power and resolve the problem that criminal trial becomes formalistic.

B. *Promoting the Refinement and Improvement of the Rules for Evidence Investigation in Criminal Trials*

As mentioned above, many of the problems in the current evidence investigation in criminal trial are related to the careless rules for court evidence investigation. Therefore, in order to solve the universal problems in practice, it is necessary to refine the court investigation rules of documentary evidence from the legislative level: the presentation order and method of the documentary evidence should be consistent with the content of pre-trial meeting; before reading out the documentary evidence, first its

⁸ See Zuo Weimin: Economic Analysis of Criminal Proceedings, Chinese Journal of Law No. 4, 2005.

⁹ See Article 8 of the Provisions on Several Issues Concerning the Examination and Judgment Evidences in Handling Death Penalty Cases, Articles 69-73 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China.

¹⁰ Shi Pengpeng, Chen Zhennan: Review of the Criminal Pre-trial Meeting System, Jiangsu Social Sciences, 2014, No. 1.

¹¹ Chen Ruihua: Frontier Issues in Criminal Proceedings, Renmin University of China Press, 2013, P250-253.

¹² Zuo Weimin: How the Judgment Becomes the Center: Misunderstanding and the Right Way, Law Science, 2016, No. 6.

collection and custody chain should be reviewed; the collector and custodian of the controversial part are required to explain the situation in court; according to the degree of controversy, both “complicated or simple” investigation method can be taken for the documentary evidence; the original of the controversial documentary certificate shall be presented, and cross-examination and certification should be carried out in court. Only by making detailed and easy-to-operate rules for all steps of court investigation can the effectiveness of court investigation rules be maximized.

C. Implementing and Strengthening Relevant Supporting Mechanisms

1) *Making pre-trial meeting play the role of connection in investigation of trial evidences*: The Regulations on Pre-trial Meeting for People's Court to Handle Criminal Cases (Trial) (hereinafter referred to as Pre-trial Meeting Regulations), which was tried in 2018, further clarifies the contents of pre-trial meeting, including organizing both the prosecution and the defense to present evidence, listening to the opinions of both the prosecution and the defense on the evidence in the case, summarizing the focus of controversy, etc.¹³ In addition, the Pre-trial Meeting Regulations also empowers the court to organize the prosecution and defense to negotiate before the trial to determine the order and method of proof-providing in the trial, and clarifies the investigation method, key point and power of the court. It can be seen that the Pre-trial Meeting Regulations fully affirms the principle of “complicated or simple” evidence investigation, which provides a sufficient basis for the court to further carry out pre-trial sorting of controversy and clarify the court investigation procedures. In order to change the current situation where there is a certain degree of “fault” between the pre-trial meeting and the court evidence investigation in the current substantive trial reform, the most urgent task is to strictly implement the relevant provisions of the Pre-trial Meeting Regulations, make full use of the pre-trial meeting, and let pre-trial meeting further play the connecting role in the investigation of court evidence.

2) *Implementing the principle of direct verbal trial*: The principle of direct verbal trial is a basic principle of criminal proceedings established to overcome the drawbacks of written trial process. This principle emphasizes that only evidences that are directly investigated by the court can serve as a basis for judgement, and that the trial should be based on the lawsuit materials provided orally. However, this principle has not been effectively implemented in the judicial practice in China. Under the long-term trial mode of “centering on files and transcript” in our country, court trial has become a procedure for reviewing and confirming the files and transcripts, which is contrary to the principle of direct verbal trial. In addition, the provisions of judicial interpretation on the examination and judgment of physical evidence and documentary evidence clearly emphasize the confirming force

of transcripts, so there is almost no evidence owner, collector, etc. testifying in court in the trial process of the demonstration court, while the authenticity of the documentary evidence is judged only through relevant transcripts. Therefore, in the promotion of the substantive trial reform, the implementation of the principle of direct verbal trial, and the breakthrough and improvement of the trial mode centered on files and transcripts are important ways to optimize the current investigation procedure of documentary evidence in court.

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¹³ See Article 2, Article 10 of the Pre-trial Meeting for People's Court to Handle Criminal Cases (Trial).