EVIDENTIARY ACTIONS IMPLEMENTED BY THE COURTS IN THE BANJA LUKA REGION IN THE CASES OF OFFENSES AGAINST SEXUAL INTEGRITY

Review Article

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Abstract: Offenses against sexual integrity are among those that are the subject of interest of all segments of the widest social community. From learning about this type of criminal offense until the final trial judgment, the public follows the course of criminal proceedings with great interest. This paper seeks to present the quantity and quality of evidence obtained during evidentiary actions through the analysis of judgments rendered by the courts in the Banja Luka region. The aim is to present the impact of the evidentiary actions implemented on the outcome of the court proceedings. This paper presents a portion of the empirical research related to the analysis of the judgments addressed in the author's doctoral dissertation.

Keywords: offense, sexual integrity, evidentiary actions, court

INTRODUCTION

Victims of offenses against sexual integrity usually involve the most vulnerable categories of society, and even though they do not frequently occur compared to other types of offense, they attract a lot of public attention due to the long-term consequences that affect victims, their families and the environment. In our country and throughout the world, the academic and expert communities are interested in this topic, while a number of scholars in our region have studied and continue to study this type of offense.

This paper presents a portion of preliminary findings of the author's doctoral dissertation entitled "Offense of illicit sexual activity" to be defended at the Faculty of Law, University of Novi Sad. Considering that the object of the empirical research of the doctoral dissertation is the analysis of the same offense through judgments, that is, the practice of the courts in Republika Srpska, this paper present a portion of the aforementioned research through data

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related to the application of evidence and the outcome of the criminal proceedings conducted in cases of crimes against sexual freedom: Rape under Article 193, Sexual intercourse with a helpless person under Article 194, Sexual abuse of a child under Article 195, Sexual intercourse by abuse of position under Article 196 and Satisfying lust in front of another under Article 197 (Krivični zakon Republike Srpske, 2003) for the Banja Luka region – local jurisdiction of the District Court in Banja Luka and the basic courts belonging to it. The sample of the empirical research of consists of 131 judgments rendered for a total of 134 criminal offenses by the District and Basic Courts in Republika Srpska for the ten-year period from 2008 to 2017,[2] and research findings pertaining to the courts within the Banja Luka region are presented in this paper.

The judgments rendered by the courts in the Banja Luka region and their representation in relation to other courts adjudicating in cases in Republika Srpska, the quantity of evidentiary actions, that is, evidence resulted from their application and their influence on the type of judgment rendered for the offenses in question were analyzed. The findings obtained led to a conclusion about the type and value of evidence used in criminal proceedings for the offenses in question belonging to the group whose object of protection is sexual integrity.

2 Judgment of the Basic Court in Banja Luka, 71 0 K 003 497 08 K dated 08/21/2009; Judgment of the Basic Court in Banja Luka, 71 0 K 011 128 07 K dated 14/05/2008; Judgment of the Basic Court in Banja Luka, 71 0 K 012 011 93 K dated 30/11/ 2009; Judgment of the Basic Court in Banja Luka, 71 0 K 012 155 07 K dated 13/02/ 2008; Judgment of the Basic Court in Banja Luka, 71 0 K 013 806 03 K dated 10/12/2008; Judgment of the Basic Court in Banja Luka, 71 0 K 063 988 10 K dated 05/31/ 2010; Judgment of the Basic Court in Banja Luka, 71 0 K 065 738 09 K dated 24/08/2010; Judgment of the Basic Court in Banja Luka, 71 0 K 065 811 09 K dated 10/11/ 2011; Judgment of the Basic Court in Banja Luka, 71 0 K 120 967 12 K dated 28/01/2013; Judgment of the Basic Court in Banja Luka, 71 0 K 131 805 11 K dated 15/12/2011; Judgment of the Basic Court in Banja Luka, 71 0 K 157 159 14 K dated 28/10/ 2015; Judgment of the Basic Court in Banja Luka, 71 0 K 189 098 14 K dated 14/02/ 2017; Judgment of the Basic Court in Banja Luka, 71 0 K 203 984 15 K dated 14/06/2016; Judgment of the Basic Court in Banja Luka, 71 0 K 208 950 15 K dated 27/07/2016; Judgment of the Basic Court in Banja Luka, 71 0 K 242 011 16 K dated 22/11/ 2016; Judgment of the Basic Court in Banja Luka, 71 0 K 250 957 17 K dated 07/12/2017; Judgment of the Basic Court in Banja Luka, 71 0 K m 150 283 12 Km dated 30/01/2013; Judgment of the Basic Court in Banja Luka, 71 0 Km 013 730 08 Km dated 23/10/2008; Judgment of the Basic Court in Banja Luka, 71 0 Km 161 759 12 Km dated 02/06/2013; Judgment of the Basic Court in Banja Luka, 71 0 Km 169 035 13 Km dated 16/10/2013; Judgment of the Basic Court in Banja Luka, 71 0 Km 175 315 13 Km dated 30/09/ 2013; Judgment of the Basic Court in Banja Luka, 71 0 Km 191 238 14 Km dated 27/08/2014; Judgment of the Basic Court in Banja Luka, 71 0 Km 245 192 16 Km dated 03/09/2017; Judgment of the Basic Court in Banja Luka, 71 0 K 232 401 16 K dated 21/12/2016; Judgment of the Basic Court in Gradiška, 72 0 K 017 378 11 K dated 30/01/ 2012; Judgment of the Basic Court in Gradiška, 72 0 K 022 074 11 K dated February 5, 2014; Judgment of the Basic Court in Gradiška, 72 0 K 047 145 15 K dated 14/10/2016; Judgment of the Basic Court in Gradiška, 72 0 Km 035 310 13 Km dated 19/02/ 2014; Judgment of the Basic Court in Gradiška, 72 0 Km 063 633 17 Km dated 27/07/ 2017; Judgment of the Basic Court in Gradiška, CMS 2999 12 K dated 20/03/ 2015; Judgment of the Basic Court in Kotor Varoš, 73 0 K 000 479 07 K dated 02/06/2008; Judgment of the Basic Court in Kotor Varoš, 73 0 K 000 713 05 K dated 09/03/2009; Judgment of the Basic Court in Kotor Varoš, 73 0 K 001 191 08 K dated 13/01/2010; Judgment of the Basic Court in Kotor Varoš, 73 0 K 001 670 08 K dated 24/12/2009; Judgment of the Basic Court in Kotor Varoš, 73 0 K 010 447 12 K dated 28/09/ 2013; Judgment of the Basic Court in Kotor Varoš, 73 0 K019 345 14 K dated 18/07/2014; Judgment of the Basic Court in Prnjavor, 78 0 K 026 130 17 dated 14/11/2017.

A STUDY OF JUDICIAL PRACTICE IN BANJA LUKA

A total of 41 judgments rendered by the District Court in Banja Luka, the Basic Court in Banja Luka, the Basic Court in Gradiška, the Basic Court in Kotor Varoš, the Basic Court in Prnjavor and the Basic Court in Mrkonjić Grad covering the Banja Luka region were obtained. No judgments were obtained from the District Court in Banja Luka, while 27 judgments were obtained from the Basic Court in Banja Luka, seven judgments from the Basic Court in Gradiška, five judgments from the Basic Court in Kotor Varoš, two judgments from the Basic Court in Prnjavor, while we were informed by the Basic Court in Mrkonjić Grad that they did not adjudicate the mentioned offenses; therefore, there are no judgment for the mentioned period of time. These data are presented in Table 1.

Table 1. Number of obtained judgments in the Banja Luka region

Name of court	Number of judgments	Number of offenses
District Court in Banja Luka	No judgments	No judgments
Basic Court in Banja Luka	27	28
Basic Court in Gradiška	7	7
Basic Court in Kotor Varoš	5	5
Basic Court in Prnjavor	2	2
Basic Court in Mrkonjić Grad	0	0
Total	**41**	**42**

A total number of offenses contained in the judgments amounts to 42, and the different number of judgments and criminal offenses stems from the fact that two criminal offenses were ruled in one judgment (Judgment of the Basic Court in Banja Luka, 2010). Data by type of criminal offense are shown in Table 2.

Table 2. Type of offenses

Type of offense	Number of offenses	Number of judgments
Rape, Article 193	15	14
Sexual intercourse with a helpless person, Article 194	6	6
Sexual abuse of a child, Article 195	14	14
Sexual intercourse by abuse of position, Article 196	1	1
Satisfying lust in front of another, Article 197.	6	6
Total	**42**	**41**

In order to have a more precise idea of the quantitative importance of the work of the Banja Luka courts in relation to other courts in Republika Srpska, the number of judgments was compared with the number of inhabitants. According to the 2013 census, 373,521 inhabitants live in the Banja Luka region,

which includes the cities of Banja Luka, Gradiška, Kneževo, Kotor Varoš, Laktaši, Mrkonjić Grad, Prnjavor, Srbac and Čelinac, while 1,170,342 inhabitants live in Republika Srpska, in other words, 31.91% of the total population of Republika Srpska resides in the Banja Luka region (Popis stanovništva, domaćinstava i stanova u Republici Srpskoj 2013. Godine. Rezultati popisa, gradovi, opštine i naseljena mjesta, 2017). Compared to the total number of processed judgments, the courts covering the region of the city of Banja Luka participate with 31.3% of the total number of judgments received, and it would be expected that this percentage would be higher if the above-mentioned missing judgments were included. Thus, in relation the available judgments, the percentage of the population of the Banja Luka region in relation to the total population of Republika Srpska and the number of judgments rendered by the courts covering the Banja Luka region in relation to the sample are approximately 31.9% versus 31.3% respectively.

THE IMPLEMENTATION OF EVIDENTIARY ACTIONS

The investigation of offenses against sexual freedom is possible by implementing both (traditional) evidentiary actions and special investigative actions. Evidentiary actions include: the search of aapartment, other premises or persons; temporary seizure of objects and property, taking action with suspicious objects, interrogation of suspects, examination of witnesses, site inspection and reconstruction, and expert analysis) contained in Chapter 13 of the current Criminal Procedure Code (Zakon o krivičnom postupku Republike Srpske, 2021), that is, Chapter 15 of the previous code which was in force for most of the proceedings for judgments that are the subject of research (Zakon o krivičnom postupku Republike Srpske, 2003). The possibility of implementing special investigative actions under the current law regarding the judgments in question was prescribed by Article 226 and Article 227, under which they may be conducted regarding offenses for which a prison sentence of at least three years or a more serious sentence can be imposed (Zakon o krivičnom postupku Republike Srpske, 2003). The current law has increased this threshold, so it is possible to implement these actions in the cases of offenses for which a prison sentence of at least five years or a more serious sentence can be imposed (Zakon o krivičnom postupku Republike Srpske, 2021). According to the previous Criminal Code of Republika Srpska, it was possible, regarding the judgments in question, to implement special investigative actions for all offenses under investigation, except for the offense of sexual intercourse by abuse of position, Article 196, paragraph 1, and the offense of satisfying lust in front of another, Article 197 (Krivični zakon Republike Srpske, 2003).

The criminalistic aspect of clarifying and investigating offenses against sexual freedom favors certain investigative actions, first of all site inspection, the examination of witnesses (victims) and interrogation of suspects, including

some expert analyses (forensic medical examination, biological and other analyses) (Vodinelić, 1972).

The use of evidence in the proceedings for the offenses in question was analyzed by observing them through the ways of obtaining them through traditional evidentiary actions, that is, special evidentiary actions, and then through the analysis of traditional evidentiary actions undertaken through the following categories: the examination of witnesses, the interrogation of suspects, investigation (crime scene), search (of apartment and other premises or persons, and vehicles), expert analyses, site inspection, temporary seizure of objects (Simović, 2005). The mentioned parameters were observed through their overall and individual representation in relation to the Banja Luka courts and some offenses in question.

An analysis of the judgments rendered by the courts in the Banja Luka region found that only traditional evidentiary actions had been implemented, while special investigative actions had not been implemented at all. Also, the offenses in question are specific due to the mutual relationship between the perpetrator and the victim, where finding of the previous analyses indicated that the perpetrator and the victim had known each other (92.7%), which certainly facilitates the investigation in terms of identifying and prosecuting the perpetrator of the offense using traditional evidentiary actions. The judgments rendered for the offenses in question and the implementation of evidentiary actions indicated that the examination of witnesses and interrogation of suspect were implemented in all cases. Also, considering a total number of judgments, an expert analysis was performed in 35 cases, that is, 85.4% of all judgments, while the largest number, a total of 25, were psychological and psychiatric expert opinions, 7 medical expert opinions (bodily injuries) and 3 biological expert opinions. All psychological, psychiatric and medical expert examinations were related to the victim of the offense, while biological examinations of the perpetrator of the offense were carried out for the purpose of obtaining evidence to identify the perpetrator. Searches had been conducted two times, investigations six times (all investigations were conducted on the scene), identification had been used in three cases, while objects had been temporarily seized six times. The Basic Court in Banja Luka used the reports of witness examinations and suspect interrogations as evidence in 27 judgments, report of the search two times, the report of the expert witness21 times, the report of the investigation 6 times, the records of crime scene inspection 3 times, and the temporarily seizure of objects 6 times. The Basic Court in Gradiška used the reports of witness examinations, suspect interrogation and expert witness as evidence in seven judgments, while investigation was used as evidence in 3 cases and the temporary seizure of objects in one case. Similarly, the court in Kotor Varoš only used the reports of witness examinations and suspect interrogations, that is, the report of expert witness in all its judgments. In addition to the aforementioned evidentiary actions used in both judgments by the court in Prnjavor, the same court used identification in one case.

Table 3

Name of offense	Number of judgments	Evidentiary actions							
		Examination of witnesses	Interrogation of suspects	Search	Expert analysis	Site inspection	Identifying objects	Temporary seizure of objects	Special investigative actions
The District Court in Banja Luka	Judgments were not received	-	-	-	-	-	-	-	-
The Basic Court in Banja Luka	27	27	27	2	21	6	3	6	0
The Basic Court in Gradiška	7	7	7	0	7	3	0	1	0
The Basic Court in Kotor Varoš	5	5	5	0	5	0	0	0	0
The Basic Court in Prnjavor	2	2	2	0	2	0	1	0	0
The Basic Court in Mrkonjić Grad	0	0	0	0	0	0	0	0	0
Total	**41**	**41**	**41**	**2**	**35**	**9**	**4**	**7**	**0**

An analysis of the finding of the representation of evidentiary actions by type compared to the offenses in question, which is presented in Table 4, indicated that the same number of the evidentiary actions regarding witness examinations and suspect interrogations that were used in the proceedings for all the offenses in question was observed. Additionally, regarding the offense of rape, a search was used in one case out of a total of 14 judgments, expert analysis in 13 cases, investigation in 5 cases, identification in two cases, and the temporary seizure of objects in 4 cases. In the case of sexual intercourse with a helpless person, expert reports were used in 5 cases and crime scene investigation in one case, while out of a total of 14 judgments rendered for the offense of sexual abuse of a child, expert reports were used in 13 cases, investigation in 3 cases, identification in one case and a temporary seizure of objects in 2 cases. Additionally, in one judgment concerning sexual intercourse through abuse of position, a search, expert analysis and a temporary seizure of objects were used, while expert analysis were used in 3 cases and identification in one case out of a total of 6 judgments rendered for the offense of satisfying lust in front of another.

It may be observed that subjective evidence was used in all cases and that it is the most represented, while expert analysis was used in the largest number of objective evidence, while other traditional evidentiary actions were used in a significantly smaller number of cases, while there is no evidence obtained through the implementation of special investigative actions. The findings obtained through an analysis conducted as a part of the dissertation demonstrate that the perpetrator and the victim had known each other for some time in three cases (two cases of rape and one case of satisfying last in front of another), and the result that identification was used in all three cases was expected, which can support the fact of the effectiveness of the criminal procedure. Considering the analysis of the results shown in Table 5 indicated a large number

of convictions and only three acquittals, it is obvious that the evidence used in the proceedings conducted by the Banja Luka courts was sufficient in both quantitative and qualitative terms to render convictions.

Table 4

Name of offense	Number of judgments	Evidentiary actions							
		Witness examination	Suspect interrogation	Search	Expert analysis	Site inspection	Identification	Temporary seizure of objects	Special investigative actions
Rape, Article 193	14	14	14	1	13	5	2	4	0
Sexual intercourse with a helpless person, Article 194	6	6	6	0	5	1	0	0	0
Sexual abuse of a child, Article 195	14	14	14	0	13	3	1	2	0
Sexual intercourse by abuse of position, Article 196	1	1	1	1	1	0	0	1	0
Satisfying lust in front of another, Article 197	6	6	6	0	3	0	1	0	0
Total	**41**	**41**	**41**	**2**	**35**	**9**	**4**	**7**	**0**

WAYS OF CONCLUDING THE PROCEDURE

This segment of research analyzed the types of judgments rendered, so the judgments were analyzed in relation to Article 288 of the Criminal Procedure Code of Republika Srpska: judgments dismissing charges, judgments acquitting the accused, and guilty judgments (Simović, 2005: 485). In relation to the prescribed ways of concluding the criminal procedure, we observed them through the categories of dismissal, acquittal, and conviction, and in relation to the court adjudicating in the case and the types of the offenses in question. The judgments also included rulings against minors, considering that, under the RS CPC, judgments which have the force of *res judicata* have been rendered (Simović, 2005: 132). The results are shown in Table 5.

Table 5

Court	Number of judgments	Dismissal	Acquittal	Conviction
The District Court in Banja Luka	Judgments were not received	0	0	0
The Basic Court in Banja Luka	27	0	3	24
The Basic Court in Gradiška	7	0	0	7
The Basic Court in Kotor Varoš	5	0	0	5
The Basic Court in Prnjavor	2	0	0	2
The Basic Court in Mrkonjić Grad	0	0	0	0
Total	41	0	3	38

Table 5, which refers to the types of judgments in relation to the courts in the Banja Luka region adjudicating in the cases, demonstrates that out of a total of 41 cases and the same number of judgments, three judgments of acquittal and 38 convictions were rendered, while no judgments dismissing charges were rendered. In terms of percentage, there were 92.7% of convictions in relation to 7.3% of acquittals. Looking at the courts adjudicating in the cases, the Basic Court in Banja Luka rendered three acquittals and 24 convictions, or 12.5% compared to 87.5%, while other courts have a conviction rate of 100%.

Table 6

Name of offense	Number of judgments	Dismissal	Acquittal	Conviction
Rape, Article 193	14	0	1	13
Sexual intercourse with a helpless person, Article 194	6	0	0	6
Sexual abuse of a child, Article 195	14	0	0	14
Sexual intercourse by abuse of position, Article 196	1	0	0	1
Satisfying lust in front of another, Article 197	6	0	2	4
Total	41	0	3	38

An analysis of the types of judgments by offenses shows that one judgment acquitting the defendant for the offense of rape was rendered, while the remaining 13 were guilty judgments. Regarding the offense of satisfying lust in front of another, two judgments are acquittals or 1/3 of the total number for these offenses, while four were guilty judgments. Judgments related to other offenses are convictions. Therefore, looking at the ratio of convictions and acquittals rendered by the courts in the Banja Luka region, a large representation in favor of convictions may be observed, while there are no judgments dismissing charges. Three judgments acquitting the accused stated different reasons for making such decisions. When the court rendered a judgment in the case of satisfying lust in front of another, it applied the code that was amended after the offense had been committed, and when applying such a code, which is more lenient for the perpetrator, the court found that the actions committed by the perpetrator did not constitute an offense (Presuda Osnovnog suda u Banja Luci, 2017). Similarly, regarding the offense of satisfying lust in front of others, the court did not find any elements concerning the nature of the offense. Regarding the offense of rape, the court acquitted the accused on the grounds that the evidence presented was not sufficient to clarify beyond reasonable doubt whether the sexual relationship between the accused and the victim was voluntary or forced (Presuda Osnovnog suda u Banja Luci, 2008). Even in criminal law theory, there are doubts regarding the essence of rape in an involuntary sexual act or an act that is carried out exclusively through coercion (Škulić, 2019: 38).

An analysis of these three judgments indicates that two judgments were rendered solely due to procedural shortcomings (concerning the absence of basic elements of the essence of offenses themselves), while the lack of quantity and quality of evidence in the third judgment influenced the court's decision to dismiss the charge. Analogous to the above, we may conclude that the quality of the evidence used in the criminal proceedings was sufficient and applicable concerning convictions. The lack of evidence that resulted in an acquittal in only one case compared to the remaining 40 judgments constitutes a small percentage of those actions used in investigations that we can evaluate as having been effective. Also, the fact that special investigative actions were not used in cases where it was possible to use means that they are not necessary, that is, traditional investigative actions are expedient in relation to the aforementioned judgments, that is, criminal procedure, which can also be seen as one of the arguments that supports the amendments to the Criminal Procedure Code of Republika Srpska, that is, the section containing a list of criminal offenses for which it is possible to undertake special investigative actions, and the section that now stipulates the same actions may be undertaken for those offenses that carry a minimum sentence of five years instead of a minimum sentence of three years.

CONCLUSION

As stated in the Introduction section and in accordance with the views of the majority of scholars, the expert community and the largest part of society in the region to which Republika Srpska belongs, offenses against sexual freedoms or sexual integrity, even though they are not frequent according to official data, attract substantial attention and affect the most vulnerable categories of society: women, children, the elderly and individuals with special needs or those victims who depend on or are subordinate to a person who, by abusing their position, becomes the perpetrator of such an offense. That is why the public expects a criminal-law response to this type of delict in both preventive and repressive terms. Almost one-third of the total number of the judgments in Republika Srpska for the offenses in question were rendered by the courts in the Banja Luka region: the District Court in Banja Luka and the Basic Courts in Banja Luka, Gradiška, Kotor Varoš, Prnjavor, and Mrkonjić Grad, which shows a slightly higher degree of representation compared to other regions if we look at them in relation to the number of inhabitants. By analyzing the evidentiary actions undertaken in relation to the judgments rendered by the courts in the Banja Luka region, we determined that the most represented evidentiary actions are witness examinations and suspect interrogations, while in relation to actions undertaken to obtain objective evidence, the action that was mainly undertaken was expert analysis (forensic medical analysis of the victim of an offense was mainly performed, and to a lesser extent forensic biological analysis was performed for the purpose of obtaining evidence against the perpetra-

tor), while other evidentiary actions were used to a lesser extent. Furthermore, an analysis of the judgments rendered by the courts in question indicated that the number of convictions is very high (92.70%), while the number of acquittals is lesser, of which only one (out of three) judgments were rendered due to insufficient evidence. These findings indicate that the evidence, that is, the evidentiary actions undertaken, both qualitatively and quantitatively, were sufficient and effective, as they made it possible to pronounce guilty judgments. Also, it was determined that only traditional evidentiary actions were used in criminal procedure, while special investigative actions had not been used even once, even though the CPC of the RS envisaged this possibility.

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