

On the Standard of Proof of Criminal in Absentia Trial Procedure

-- The Perspective of Fugitive in Absentia Trial

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Abstract: The standard of proof in criminal in absentia trial proceedings is that the evidence is accurate and sufficient. The adherence to a monolithic standard of proof of conviction in absentia trial proceedings is influenced by the structure and value of criminal proceedings. However, the current rules of evidence can hardly support the realization of the standard of proof in criminal absentia trials. To ensure the realization of the standard of proof, the rules of evidence in criminal in absentia proceedings must be improved, the rules of relevance and corroboration evidence must be relaxed, the rules of exclusion of illegal evidence must be used strictly, and the evidence investigation procedure must be constructed based on direct speech.

Keywords: Trial in absentia, Standard of proof, Rules of evidence.

1. Research Questions

When the Criminal Procedure Law was amended in 2018, "trial in absentia procedure" was added to the "special procedure". This procedure applies to cases where the defendant is dead, the defendant is seriously ill and unable to appear in court, and the suspect or defendant cannot appear in court outside of China. The fugitive in absentia trial, as one of the cases in the in-absentia trial procedure, was not applied for the first time until 2021 in the "Cheng Sanchang embezzlement case (Wang, 2021)." The fugitive in absentia trial procedure has improved the effectiveness of fugitive recovery and recovery of stolen goods abroad, reflecting the change of China's thinking on the rule of law. However, the standard of proof for fugitives in absentia trials has been controversial in academic circles. The mainstream view is that the standard of evidence for absentia trial procedures should be consistent with that of ordinary trial procedures. Still, some scholars believe that the standard of proof for in absentia trial procedures should be diversified (Hu, 2018; Meng, 2019; Shi, 2019; Yuan, 2019). *Article 604 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law* (from now on referred to as the *Interpretation of Criminal Procedure*) promulgated in 2021 directly stipulates that the standard of proof for conviction of fugitive in absentia trials is the certainty and sufficiency of the evidence. This provision reflects that China adheres to the "monolithic" standard of proof for the conviction of fugitives in absentia trials, which is consistent with ordinary trial procedures. However, due to the absence of the defendant in practice in absentia procedure, the litigation structure of this procedure differs from the stable litigation structure of prosecution, defense and trial in traditional criminal litigation, which may lead to the defendant's rights and interests not being adequately protected. Also, it challenges the practical realization of the single standard of proof for fugitive in absentia trials because the practical completion of the standard requires specific rules of evidence and rules of procedure. The practical realization of the standard of proof requires particular rules of evidence and practice rather than relying solely on the judge's inner

conviction. However, the standard of evidence in China's criminal proceedings is applied to the traditional three-party litigation structure of prosecution, defense and trial. The judge's inner judgment is based on the equal confrontation between the prosecution and the defense. The unique structure of fugitive trials in absentia has broken the traditional litigation structure. If we insist on the same standard of proof as that of practice in person, whether the defendant's rights and interests can be effectively protected and whether the standard of evidence will be falsified are issues that need to be resolved urgently.

2. Analysis of the Factors Influencing the Standard of Proof for Criminal Trials in Absentia

2.1. The litigation structure of criminal absentee trial

The construction of litigation depends on a certain purpose: the subject is the prosecution, defense, and trial, and the content is the legal status and interrelationship of the three parties (Zhou, 2020). It is true, as Murphy says, that the standard of proof is the degree of certainty or probability that the evidence must achieve for the subjective impression of the facts of the court that the trier of fact can produce, the degree to which the party bearing the burden of proof must convince the trier of fact in order to win the case, or to obtain a favorable judgment on a particular matter (Murphy, 2000). Thus, the standard of proof also embodies the quantitative and qualitative requirements of the law of evidence. However, this requirement is not imposed directly on the evidence itself, but rather on the degree of inner conviction of the judge.

In the case of fugitive in absentia trials, the suspect or defendant is outside the country. Although Article 293 of the *Interpretation of Criminal Procedure* guarantees the defendant's right to defense in absentia trials, it is difficult for even the defender appointed by his close relatives to know the defendant's true thoughts. If neither the defendant nor his close relatives appoint a defender, the court shall assign a lawyer from the legal aid institution to defend him, as the

fugitive-type trial in absentia is a case of mandatory appointed defense. However, even if this is the case, it is difficult for the defender to get in touch with the defendant, which makes it difficult to achieve an effective defense. In this case, although there is a defender, the absence of the defendant essentially causes the integrity of the security and the effectiveness of the reason to be weakened, forming a formal tripartite litigation structure of the prosecution, defense, and trial (Xiong, 2020), resulting in a decrease in the confrontation between the prosecution and defense. In this case, if the strict standard of proof in the criminal trial continues to be applied, it will be challenging to reach the pinnacle of evidence, and the defendant's procedural rights will be difficult to be guaranteed, which contradicts the original purpose of the *Interpretation of Criminal Procedure* to add the trial in absentia procedure. This contradicts the original intent of the *Interpretation of Criminal Procedure* of adding absentia trial procedures. In this regard, it needs to be further discussed whether it is appropriate to apply the “beyond reasonable doubt” standard of proof in the whole process of the fugitive in absentia trial cases.

2.2. The value choice of criminal absentee trial

Justice is the core value of modern criminal litigation, while efficiency is important. The relationship between the two should be positioned as “justice first, efficiency second (Chen, 2016).” Under the influence of both, the criminal in absentia procedure was born in 2018. The standard of proof of this procedure should be set to serve and be influenced by the value of criminal litigation. As mentioned earlier, the standard of proof is the degree of certainty that a judge has about the existence of a particular claim, which is essentially a degree of certainty about the existence of a specific fact in the past. The stricter the standard of proof, the more evidence the party bearing the burden of proof needs to prove the existence of the facts it claims, from the perspective of achieving justice, the stricter the standard of proof, the more conducive to the realization of justice, but from the perspective of achieving efficiency, too strict a standard of proof requires too much evidence, which will lead to inefficient litigation, or more seriously, may lead to the punishment of the more serious it may be, the more suspects should be punished and get away with it. In this regard, a reasonable standard of proof should be balanced between justice and efficiency, and seek a proper balance between justice and efficiency. Since justice is the first value in criminal proceedings, the standard of proof for conviction in criminal proceedings in China—“the facts of the case are clear, the evidence is sufficient and beyond reasonable doubt”—is often higher than the “preponderance of evidence” and “clear and convincing evidence” in civil proceedings in China, which is also known as “stronger evidence” or “more likely proof” and is usually the minimum standard of proof applicable to most civil proceedings (Leonard & Gold, 2004). In addition, judicial justice contains both substantive justice and procedural justice. The setting of the standard of proof for trial in absentia should also take into account both substantive justice and procedural justice. Substantive justice, as a kind of judicial outcome justice, too strict a standard of proof may lead to the failure of the prosecution to prove the case and thus bear the adverse consequences. On the other hand, procedural justice is the justice of the litigation process, and a reasonable litigation procedure can promote substantive justice. Therefore, the standard of proof has more impact on

substantive justice; procedural justice is only a means to find out the truth and does not affect the setting of the standard of proof.

3. Real Risk of Achieving the Standard of Proof of Certainty and Sufficiency in Trial Proceedings in Absentia

The cases to which the trial in absentia procedure applies must be those in which adequate efforts have been made to track down the fugitive. Still, the defendant is unable to appear in the case for objective reasons, and the evidence already available can eliminate reasonable doubt (Wang, 2021). Under the special litigation structure, the standard of certainty and sufficiency of conviction can guarantee that the defendant is protected by the principle of not self-incriminating, the presumption of innocence, and doubt in favor of the defendant (Lin, 2005). The absence of the defendant not only means the absence of the defendant's confession in the chain of evidence but also has a certain impact on the realization of the principle of direct speech in criminal proceedings and to a certain extent, may also cause the real risk that the standard of proof in the trial in absentia procedure is difficult to achieve.

3.1. Rules of evidence based on adversarial proceedings may lead to the risk of error or failure to prove

In China's criminal justice, the rules of evidence that are widely used are mostly the rules of relevance, the rules of reinforcement of confessions and the rules of exclusion of illegal evidence, all of which are based on the presence of the defendant at the trial.

First, overly strict adherence to the relevance rule of evidence may lead to the inadmissibility of trial proceedings in absentia. In common law evidence law, relevance is the primary condition for evidence to be admissible. However, relevance in China's law needs a clearer standard, which is more of a matter of logic and experience. Article 50 of the *Interpretation of Criminal Procedure* provides that “materials that can be used to prove the facts of a case are evidence.” This provision states that evidence is the material that can prove the facts of the case and reflects the element of proof in relevance. For a piece of evidence to be relevant, it must first be substantial and probative. Evidence is substantive as long as it can have an impact on the outcome of the case. Provenance means that a claim may be more or less true with this evidence than without it. For the trial in absentia proceedings, the special trial structure coupled with the absence of the defendant's confession leads to an incomplete system of evidence in the case, making it more difficult to prove and requiring inference through circumstantial evidence already available to prove the facts of the case. If the rules of relevant evidence are strictly observed, it will aggravate the restriction of the sources of evidence in the case, resulting in insufficient evidence in the case, making it difficult to achieve the standard of proof of the certainty and sufficiency of evidence, and also seriously limiting the realization of the purpose of the trial in absentia procedure.

Second, the rule of excluding illegal evidence may lead to proving errors in criminal trials in absentia. The main purpose of the power of excluding illegal evidence is to protect the basic human rights of criminal suspects and defendants from being violated. In the criminal in absentia trial procedure, the

application of the illegal evidence exclusion rule changes to the victim's statement and witness testimony due to the absence of the defendant. Therefore, in the trial in absentia procedure, the court should focus on examining whether the victim's statement and the witness's testimony were obtained by the investigative organ through violence, threat and illegal restriction of personal freedom and other illegal means. However, in judicial practice, excluding victim statements and witness testimonies obtained by violence, threats, and illegal restriction of personal freedom is often difficult. A related study has sorted out 109 court documents that excluded witness testimony and found that 7.2% of the total study subjects obtained witness testimony by violence, threats, and illegal restriction of personal freedom, and 4.8% obtained witness testimony by inducement and deception (Hou & Xing, 2019). This data also indicates that in judicial practice, the difficulty of excluding illegal victim statements as well as witness testimony also implies a strict exclusionary standard and an overly strict exclusionary standard obviously fails to discover whether the testimony is illegal evidence. To a certain extent it leads to probative errors in the trial in absentia proceedings.

Thirdly, the rule of corroboration may affect the difficulty of achieving the standard of proof in the criminal in absentia trial procedure. The mode of proof in China's judicial practice belongs to the subtype of free mental evidence — the mode of corroboration proof (Long, 2004), whose main way is to judge whether the evidence of the whole case forms a complete system of proof by whether the evidence corroborates each other, so as to discover the truth of the case. Article 55 of the *Interpretation of Criminal Procedure* stipulates that “a defendant shall not be convicted and sentenced to a criminal punishment merely based on the defendant's confession without other evidence; a defendant may be convicted and sentenced to a criminal punishment based on hard and sufficient evidence even without his or her confession.” This provision revolutionized the long-established confession-centeredness of ancient China. Among them, if there is no confession from the defendant and the evidence is sufficient, the defendant can be found guilty and sentenced to a punishment that embodies the rule of corroborative proof. For the trial in absentia procedure, the lack of the defendant's confession leads to the fact that the defendant can be found guilty only when other evidence is fully available, and the other evidence can corroborate with each other to form a complete chain of evidence. However, in this process, due to the lack of confessions that can directly find the defendant guilty, the corroboration process between other evidence that can find the defendant guilty may be too cumbersome, which affects the efficiency of the criminal in absentia trial procedure and defeats the original purpose of improving the efficiency of the in absentia trial procedure in tracking down fugitives and recovering stolen goods.

3.2. The absence of the principle of direct speech leads to an increased risk of vitiating trial proceedings in absentia

The direct verbal principle is not explicitly stated in our criminal procedure. However, its inclusion of the direct and verbal principles has become an accepted litigation principle in our criminal proceedings. In the trial in absentia proceedings, the defendant's inability to attend the trial leads to difficulties for the defense to object to the witness testimony, thus making it more difficult for the witness to

appear in court. According to the relevant provisions of Article 192 of the *Interpretation of Criminal Procedure*, the conditions for the appearance of witnesses are that the public prosecutor, the parties or the defense or the litigation agent have objections to the witness testimony. The witness testimony significantly impacts the conviction and sentence of the case, and the People's court considers it necessary. In the trial in absentia procedure, in order to protect the defendant's right to defense, his close relatives may appoint a defense attorney to participate in the proceedings on his behalf. However, it is difficult for the defense lawyer to contact the defendant outside the country. It is even more difficult to obtain his or her own ideas, even if the objection to the witness testimony cannot play the same role as the objection raised by the defendant himself or herself, thus leading to a decrease in the degree of confrontation between the prosecution and the defense.

In the trial in absentia proceedings, the defendant cannot appear in person to argue, and the conviction of the defendant relies only on the evidence in possession of the prosecution, which makes it difficult to guarantee the fairness of the court trial. Due to the lack of the defendant's confession, most of the evidence in the trial in absentia is presented to the judge in the form of documentary evidence, which may lead to the judge's preconceptions and prejudice against the defendant, thus undermining the fairness of the trial and, to a certain extent, affecting the realization of the standard of proof that “evidence is true and sufficient.”

4. Suggestions for Achieving the Standard of Proof Of “Substantial and Sufficient Evidence” in Absentee Trial Proceedings

4.1. Improving the Rules of Evidence in Criminal Absentee Trial Proceedings

4.1.1. Appropriately relaxing the standard of the relevant evidence rule

The aforementioned writes that for a piece of evidence to be relevant, it must first be material and probative. Evidence is material to the extent that it can have an impact on the outcome of the case. Provenance means that a claim may be more or less true with this evidence compared to without it. For the judgment of materiality and provability, the practice mainly relies on the judge's experience and logic, and there is no clear provision in the legislation. In China's judicial practice, the judgment on the relevance of evidence generally adopts the dual standard of evidentiary capacity and probative value, and pays more attention to the examination of probative value. This is mainly because the way of obtaining evidence is simpler in the ordinary procedure. The quantity of evidence is relatively sufficient, and strengthening the examination of the probative power of evidence can play the role of preliminary screening of evidence. However, due to the difficulty of obtaining evidence and the small amount of evidence in the trial in absentia procedure, if the double standard of examining the ability of evidence and its probative power is insisted on, it may lead to insufficient sources of evidence, thus making the case difficult to prove. Therefore, the examination of the probative power of evidence should be strengthened in trial in absentia cases. In this regard, judges should strengthen their experience and logical exercise in order to increase the sources of evidentiary

materials in the case and better achieve the standard of proof for trial in absentia.

4.1.2. Strictly apply the rule of excluding illegal evidence.

In the criminal in absentia trial procedure, the object of the exclusion of illegal evidence rule changes to the victim's statement and witness testimony. The focus of attention should be on whether the investigative authorities have used "violence, threats, illegal restrictions on personal freedom and other illegal means" to obtain the victim's statement and witness testimony. First of all, for the victims themselves are victims, if the standard of exclusion of illegally obtained victim statements is too high, it will cause secondary harm to the victims, which is not conducive to human rights protection. In addition, witnesses enter the criminal proceedings only to assist in the smooth conduct of the proceedings and the illegal act of obtaining evidence will cause more harm to them. Therefore, the rules of excluding illegal evidence should be applied more strictly. The standard of excluding illegal victim statements and witness testimony should differ from and appropriately lower than the standard of excluding defendant confessions obtained by illegal means.

4.1.3. Appropriate relaxation of the rules of proof of proof

China's confession reinforcement rule mainly applies to the defendant's confession, while the corroboration proof rule applies to all types of evidence. In criminal in absentia trials, due to the lack of the defendant's confession, the rule of confession reinforcement does not exist for the object being reinforced. Notwithstanding, evidence reinforcement is an integral part of the corroboration of evidence, so it can be used to make the whole case evidence form a complete proof system by way of corroboration. However, the types of fugitive absentee cases involve criminal activities that are usually more hidden and relatively difficult to obtain evidence, thus making it more difficult to corroborate. Appropriately relaxing the rules of corroborating evidence can identify the facts of the case from a diversified perspective. In addition, the threshold of access to corroborating evidence can be appropriately lowered. Evidence with evidentiary capacity can be used as corroborating evidence under the condition that the evidence collection procedure is legal and the source of evidence is legal. However, the relaxation of the rules of corroboration should also have reasonable limits. Corroboration should not be relaxed when the death penalty may be imposed in criminal absentia proceedings. This is because the defendant in such cases may face the penalty of deprivation of life. Once the relaxation of corroboration may be wrong, it may cause serious consequences of wrongful conviction.

4.2. Constructing a criminal in absentia trial evidence investigation procedure based on the principle of direct verbalization

In criminal in absentia proceedings, witness testimony and victim statements become the core of the court investigation because of the lack of the defendant's confession. However, as mentioned earlier, because the defendant is not present, it is difficult for even the defense commissioned by his close relatives on his behalf to know his true thoughts and the strength of objections to witness testimony is far less than that of his objections. In addition, the decrease in the strength of confrontation between the prosecution and the defense due to

the unique litigation structure of criminal in absentia trials may bring about more serious problems of formalization of court trials. Therefore, it is necessary to firmly establish the status of the principle of direct speech in the criminal in absentia trial procedure and set up an investigation procedure for witness testimony and victim statements. This means that witnesses can in principle, only appear in court to present their testimony, except in exceptional cases where they are not allowed to present their testimony in written form. For example, a distinction should be made between written witness statements made by the judge and those made by a non-judge. A wider range of circumstances should be set for the use of written witness statements made by the judge. In contrast, the use of written witness statements by a non-judge should be strictly limited, etc. (Du, 2020).

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