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Juridical Study of Judges' Considerations in Deciding Pretrial Applications

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Abstract
The purpose of this study was to analyze the evidentiary testing system through pretrial for the crime of child intercourse, as well as to find out and analyze the basic considerations of the judge in deciding the pretrial request for the crime of child intercourse. This research used normative legal research method which were carried out by studying theories, concepts, views and legal norms related to this research as well, empirical research was carried out by approaching facts and existing phenomena. The results of this study indicated that in testing pretrial evidence, negative statutory evidence can be called negative wettelijk. determining a suspect was obtained at the investigation stage by considering the nature of the results of the post mortem et repertum, the judge can use this evidence as one of the pieces of evidence to designate someone as a suspect. As for the recommendation that law enforcement officers, especially judges, in making decisions, must be guided by the Criminal Procedure Code and the Constitutional Court Decision Number 21/PUU-XII/2014.

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Abstrak
Tujuan penelitian ini adalah menganalisis sistem pengujian pembuktian melalui praperadilan terhadap tindak pidana persetubuhan anak, serta untuk mengetahui dan menganalisis dasar pertimbangan hakim dalam memutus permohonan praperadilan terhadap tindak pidana persetubuhan anak. Penelitian ini menggunakan metode penelitian hukum normatif yang dilakukan dengan mempelajari teori-teori, konsep-konsep, pandangan-pandangan dan norma hukum yang berkaitan dengan penelitian ini juga, penelitian empiris dilakukan dengan cara pendekatan fakta dan fenomena yang ada. Hasil penelitian ini menunjukkan bahwa di dalam pengujian pembuktian praperadilan, pembuktian menurut undang-undang negative tersebut dapat disebut dengan negative wettelijk istilah ini berarti : wettelijk berdasarkan undang-undang sedangkan negative, maksudnya adalah bahwa walaupun dalam suatu perkara terdapat cukup bukti sesuai dengan undang-undang, maka hakim belum boleh menjatuhkan hukuman sebelum memperoleh keyakinan tentang kesalahan terdakwa,termohon melakukan pengumpulan alat bukti pada tingkat penyeldikan, esensi penyelidikan bertujuan untuk mencari tahu apakah suatu peristiwa yang terjadi tindak pidana atau bukan tindak pidana, adapun pertimbangan hakim praperadilan bahwa hakim menilai meskipun salah satu alat bukti yang digunakan oleh penyidik dalam menetapkan tersangka diperoleh pada tahap penyelidikan dengan mengingat sifat dari hasil visum et repertum maka alat bukti tersebut oleh hakim dapat digunakan sebagai salah satu alat bukti untuk menetapkan seseorang sebagai tersangka. Adapun rekomendasi agar aparat penegak hukum khususnya hakim dalam memberikan putusan harus berpedoman pada Kitab Undang-Undang Hukum Acara Pidana dan Putusan Mahkamah Konstitusi Nomor 21/PUU-XII/2014.

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1. INTRODUCTION

Protection of Human Rights (HAM) is one of the main pillars of a democratic state, apart from the supremacy of law which is reflected in the principle of the rule of law. As a democratic country based on law (rechtstaats), it is appropriate for Indonesia to regulate the protection of human rights (HAM) in its constitution. Human rights protection is provided to everyone, including people who are suspected and/or proven to have committed criminal acts. People who commit a criminal act (as a suspect or defendant) need to pay attention to their rights as human beings, because with their status as a suspect or accused of committing a criminal act, they will be subject to certain actions that reduce their human rights.

Law enforcement for those who have been designated as suspects must be able to provide the value of legal certainty, legal benefits and legal justice. Even though these three values are very difficult to realize simultaneously, at least in fulfilling the rights of suspects there is at least one value that must be fought for, namely, the value of legal certainty. The urgency is to provide legal status for a suspect so that the case is not suspended.

To realize legal certainty and justice in handling criminal cases, the Criminal Procedure Code (KUHAP) as stipulated in Law Number 8 of 1981 regulates the stages of handling cases which are divided into stages of Investigation, Prosecution, Trial Examination, Efforts. The law and stages of execution/implementation of decisions have also been regulated by law enforcement officers who are on duty at each stage of case handling.

Apart from being known as the principle of presumption of innocence, this principle is also known as the principle of presumption of guilt which is interpreted as the principle of presumption of innocence. This means that a person is considered guilty before a court decision declares him guilty.

The existence of the principles of presumption of innocence and presumption of guilt for each party involved in a criminal case are two difficult sides, where one side is to prove that the suspect/defendant has committed a criminal act while on the other side, the suspect/defendant cannot be declared guilty or remain guarded for is not presumed innocent before being sentenced by a court. In addition, suspects/defendants are not given the obligation to prove their innocence (except in cases of criminal acts of corruption).

Pretrial institutions to protect a person in a preliminary examination against actions by law enforcement officers that violate and harm a person's rights. Determining a suspect as part of the investigation process is an object that can be requested for protection by the legal efforts of pre-trial institutions. In essence, the definition of suspect in the Criminal Procedure Code determines that a suspect is someone who, because of his actions or circumstances, based on his actions or circumstances, based on preliminary evidence, is reasonably suspected of being the perpetrator of a criminal act.

Whereas later on, based on the decision of the Constitutional Court Number: 21/PUU/XII/2014 dated 28 April 2015, the pre-trial authority was expanded, namely that the pre-trial also had the authority to examine the legality of the determination of suspects, searches and confiscations.

Based on Constitutional Court Decision Number 21/PUU-XII/2014. The phrases "proof of origin", "sufficient proof of origin", and "sufficient evidence", through its Decision the Constitutional Court declared Article 1 point 14, Article 17, and Article 21 Paragraph (1) of the Criminal Procedure Code unconstitutional as conditionally unconstitutional as long as they mean at least two pieces of evidence. in accordance with Article 184 of the Criminal Procedure Code accompanied by an examination of potential suspects, unless the criminal act that determines it is committed without his presence. Article 77 letter a of the Criminal Procedure Code is declared conditionally unconstitutional as long as it is interpreted to include determining suspects, searches and confiscations.

The pretrial hearing examination was carried out quickly and the minutes and minutes of the proceedings anddecisionThe pre-trial is made like a short examination and is chaired by a single judge in the process, because basically the pre-trial is examined and decided based on the implementation of a quick examination procedure and this is also related to a simple form of pre-trial decision, this is the background behind the pre-trial judge being a single judge. Confirmed in Article 78 paragraph (2) of the Criminal Procedure Code, which reads "Pretrial is presided over by a single judge appointed by the Chairman of the District Court and assisted by a clerk".

Thus, it is very contradictory to the true meaning of the meaning of "investigation" itself. In the investigation process, there should be no suspect, even if there is someone who is suspected of having committed a crime, then determining the suspect is a process that occurs later, at the end of the investigation process. Finding the suspect is the final part of the investigation process.

It is nothing new that the investigation discovered. This is in accordance with the meaning of Investigation and Investigation in the Criminal Procedure Code.

In the case that occurred at the Kotamobagu District Court, the applicant submitted a pre-trial petition requesting that the status of his suspect determination be canceled and ordering the Respondent to stop the investigation of the Petitioner based on the suspect Determination Letter, so that the pre-trial petition submitted by the Petitioner stated that all decisions or determinations issued by the Respondent were invalid. the pretrial application was submitted by the Petitioner, but in the Pretrial Decision of the Kotamobagu District Court Number 3/Pid.Pra/2021/PN Ktg the judge rejected the applicant's pretrial application.

During the trial an expert was presented, namely Apriyanto Nusa, SH, MH, who basically explained that collecting evidence at the investigative level and collecting evidence at the investigative level have different objectives. Evidence collected at the investigative level aims to find out whether an incident that occurred was a criminal act or not, while evidence collected at the investigative level aims to shed more light on a criminal act in order to find the suspect.

In principle, the Judge agreed with the expert's opinion above, but after the Judge looked again at the nature of the evidence collected, the rigidity of the evidence collection process could not be applied to all types of evidence, especially documentary evidence relating to criminal acts that resulted in injuries to someone, such as evidence of a Visum et Repertum letter, bearing in mind that the results of the Visum et Repertum letter will be of different quality if the examination is carried out after the crime has occurred, several days or even weeks after the crime occurred. Therefore, the examination must be carried out immediately.

Thus, based on the considerations above, the judge considered that even though one of the pieces of evidence used by the investigator in determining the suspect was obtained at the investigation stage, bearing in mind the nature of the results of the post mortem et repertum, the judge could use this piece of evidence as evidence to designate someone as a suspect

2. RESEARCH METHOD

The type of research used in this research was normative legal research. In essence, it examines law which was conceptualized as norms or beliefs that apply in society, and became a reference for everyone's behavior. Legal research was carried out by examining library materials or secondary data.

The approach used in this research was a normative juridical approach using a statutory approach and a conceptual approach. The data sources used were secondary data sources consisting of primary legal materials and secondary. Then the legal materials were collected in the form of document studies. The data analysis technique used in this research was normative legal research, using an analytical basis, namely; Positive legal norms, jurisprudence (court decisions that already have permanent legal force), and doctrine (scholar's opinions) these three basics have a hierarchical order.

3. RESEARCH RESULTS AND DISCUSSION

A. Investigation Stages in Pretrial Petition Examination

In Article 1 Number 5 of the Criminal Procedure Code, it is stated, "Investigation is a series of investigative actions to search for and discover an incident that is suspected of being a criminal act in order to determine whether or not an investigation can be carried out according to the method regulated in this law.

In the definition of investigation above, it is necessary to underline the sentence, "Search for and discover an incident that is suspected of being a criminal act". The target of "search and find" is an event that is suspected of being a criminal act. ” in other words, “search and find” means that investigators are trying on their own initiative to find events that are suspected of being criminal acts.

Investigations are carried out before the investigation process. It has been mentioned above that investigations function to find out and determine what events have actually

occurred, whether they are events or not. When an act is considered a criminal act, an investigation can be carried out. Investigation is an inseparable part of the investigation. Investigation is a method or sub-function of investigation that precedes other actions, namely action in the form of arrest, detention, search, confiscation, examination of letters, summons, inspection action, and submission of files to the public prosecutor.

With the investigation stage, it is hoped that a more humane attitude of caution and a sense of legal responsibility will grow in carrying out law enforcement duties. Avoid methods of prosecution that lead to prioritizing confessions over finding information and evidence.

Based on this, the basic philosophy of investigative actions is to look for criminal law incidents. It is possible that the handling of an incident does not reach the investigation process, if after the investigation process is carried out it is discovered that the incident is not a criminal law event. However, in the case of being caught red-handed, the proof is very easy, and it can be confirmed that the act "caught red-handed" is a criminal incident. So, in circumstances like this, investigative actions are no longer valid, and an investigation can be carried out immediately.

In the case that the researcher studied regarding the juridical study of the judge's considerations in deciding on a pre-trial petition for the crime of child sexual intercourse at the Kotamobagu District Court, case number 3/Pid.Pra/2021/PN Ktg in the judge's consideration based on the understanding of inquiry and investigation mentioned above, it was found that the process the beginning of the investigation stage, where at this stage the investigator receives a report or complaint about a criminal act and then makes a report, after the report is made, a search for information and evidence is carried out, and then based on the results of the investigation a case is held to determine whether the incident is suspected of being a criminal act or not a criminal offence.

Procedures for handling criminal cases are based on police reports, complaints, being caught red-handed or due to court decisions. Once this basis is established, the investigation process continues

Guided by the description of the legal basis above, the judge will then consider all the evidence presented by the applicant and respondent, whether this evidence shows the validity or invalidity of the respondent's determination of the suspect.

Based on evidence P1 connected with evidence T1 to evidence letter T22, the fact is that the incident started with a report submitted by the reporting witness, namely Irfan Olii, on June 28 2021 regarding alleged sexual intercourse with the victim's child, Dewi Leksa Olii Alias Leksa, which was then based on the report. The child victim, Dewi Leksa Olii, was examined as outlined in the results of the Visum et repertum dated 28 June 2021.

Next, examinations were carried out on the victim's child, the reporting witness, the reported party, in this case the potential suspect and other witnesses, which in order are as follows:

- On June 28 2021, a request for information was made for the child victim, Dewi Leksa Olii
- On June 29 2021, a task order and investigation order were issued
- On June 29 2021, a request for information was made for reporting witness Irfan Olii and witness Salwi Rudjua
- On July 3 2021, witnesses were examined Sheli Buana Adam, Moh Fuad Laiya, Fatra Laiya, Alit Kadullah
- On July 5 2021, an examination was carried out on Moh. Fadel Laiya, Nasdawati Walangadi. Isti Usman, and additional examination of child victim Dewi Leksa Olii

On July 12 2021, an examination of the confrontation between the victim's child Dewi Leksa Olii and witness Alit Kadullah was carried out.

Based on this series of examinations, a report was then made on the results of the investigation into the alleged crime of child sexual intercourse dated 31 July 2021 with the conclusion that the case could be escalated to the investigation stage.

Based on evidence from letters P-2 and P-3, when connected with evidence from letters T-23 to evidence from letters T-35, the fact is that after the investigation report dated 31 July 2021, the next action taken by the respondent was:

- On August 2 2021, the case was held at the investigation stage
- On August 2 2021, an investigation warrant was issued, a task order to carry out the investigation, a case title was carried out, the suspect was named
- On August 2 2021, a decree was issued regarding the determination of the suspect in the name of Moh. Fuad Laiya surst notice of commencement of investigation (SPDP), confiscation order and confiscation minutes,
- On August 2 2021, an examination was carried out on the child victims Dewi Leksa Olii, Irfan Olii, Salwi Rudjua and
- On August 2 2021, a summons was issued against Moh. Fuad Laiya to provide information as a suspect on August 4 2021

During the trial an expert was presented, namely Apriyanto Nusa, SH, MH, who basically explained that collecting evidence at the investigative level and collecting evidence at the investigative level have different objectives. Evidence collected at the investigative level aims to find out whether an incident that occurred was a criminal act or not, while evidence collected at the investigative level aims to shed more light on a criminal act in order to find the suspect.

In principle, the Judge agreed with the expert's opinion above, but after the Judge looked again at the nature of the evidence collected, the rigidity of the process of collecting evidence could not be applied to all types of evidence, especially documentary evidence relating to criminal acts that resulted in injuries to someone, such as evidence of a Visum et Repertum letter, bearing in mind that the quality of the Visum et Repertum letter will be different if the examination is carried out after the crime has occurred, several days or even weeks after the crime occurred. Therefore, the examination must be carried out immediately.

Thus, based on the considerations above, the judge considered that even though one of the pieces of evidence used by the investigator in determining the suspect was obtained at the investigation stage, bearing in mind the nature of the post mortem et repertum results, the judge could use this evidence as one of the pieces of evidence to determine someone as a suspect.

According to the author's analysis, investigators in case investigations are basically looking for material truth, but in criminal case investigations, absolute material truth can never be obtained 100%, because only God knows.

In evidentiary theory, a judge may only impose a crime if at least the evidence specified by law is available, plus the judge's confidence obtained from the existence of that evidence. Article 183 of the Criminal Procedure Code states the following:

"A judge may not impose a crime on a person unless, with at least two valid pieces of evidence, he is convinced that a criminal act has actually occurred and that the defendant is guilty of committing it."

However, by paying attention to every argument and fact, no matter how small, as much evidence relating to a criminal case can be sought as possible so that an investigation can approach the truth that a criminal act has been committed and who the perpetrators are.

B. Investigations Stages in Pretrial Application Examinations

The term investigation in Dutch is the same as opsporing. Meanwhile in English it is called "Investigation". According to de Pinto, investigating {opsporing} means "a preliminary inspection by officials appointed by law as soon as they hear news that is merely reasonable that there has been a violation of the law."

According to M. Yahya Harapan, the definition of investigation is a follow-up to investigative activities with strict requirements and restrictions on the use of coercive measures after collecting sufficient initial evidence to shed light on an incident that is reasonably suspected of being a criminal act.

The definition of a KUHAP survey is conveyed in Article 1 Paragraph 2 which reads: "Investigators are a series of investigative activities according to the method specified in this law, by searching for and collecting evidence of a case and looking for suspects."

From the definition of investigation above. That the essence of the philosophy of investigative action is to search for and collect evidence, with this evidence finding out who the suspect is. In practice, this often happens. Mistakes often occur. Not infrequently, the issuance of an investigation warrant {Sprindik} which indicates that the investigation has just started, has started or coincided with the announcement of the suspect In fact, the determination of the suspect is at the end of the investigation process and not at the beginning.

The aim of investigating criminal cases is to clear up problems while preventing innocent people from taking action against them. "For this reason, the investigation process carried out by investigators often takes a long time, is tiring, and may also cause a psychological burden."

According to Expert Apriyanto Nusa, procedures for handling criminal cases are based on police reports, complaints, being caught red-handed or because of court decisions. Once this basis is established, the investigation process continues with the aim of searching for and discovering whether there is an incident that is suspected to be a criminal incident. If a criminal incident is found, the investigation process will continue. The investigation process is no longer looking for criminal incidents, but looking for and collecting evidence to shed light on criminal incidents and to find suspects.

Philosophically, the investigation process is to look for evidence related to the suspect, and at least 2 pieces of evidence are a logical consequence for determining the suspect. On the other hand, if during the investigation process no evidence is found then what applies is article 109 paragraph (2) of the Criminal Procedure Code, namely the termination of the investigation.

If during the investigation process 2 pieces of evidence are found, then based on Constitutional Court Decision Number 21 of 2014, it can be determined who is the suspect. Therefore, experts are of the opinion that it is irrelevant if before an investigation is carried out, it has been determined who the suspect is, because the investigation process is a process of searching for evidence to identify a suspect in a criminal incident.

Based on the terminology of Article 1 point 14 of the Criminal Procedure Code, a suspect is someone who, because of his actions or circumstances, based on preliminary evidence, is reasonably suspected of being the perpetrator of a criminal act. Based on the Constitutional Court Decision Number 21 of 2014, the initial evidence in Article 1 point 14 of the Criminal Procedure Code is a minimum of 2 pieces of evidence where the 2 pieces of evidence must be relevant to the actions of the potential suspect.

Based on these considerations, the judge concluded that investigators had collected 2 pieces of evidence before issuing a suspect determination letter against Moh Fuad Laiya Alias Fuad. Furthermore, regarding the examination of potential suspects, after the judge examined the evidence of the T-14 letter in the form of minutes of the interrogation of Moh Fuad Laiya, it was discovered that Moh Fuad Laiya was examined as a potential suspect on July 3 2021, which then raised the question again, whether the potential suspect should be examined at the investigative level. as a condition for determining a suspect, in this case the judge was guided by the Constitutional Court Decision Number 21/PUU-XII/2014 which basically stated that "at least 2 pieces of evidence contained in Article 184 of the Criminal Procedure Code and accompanied by the potential suspect" should be interpreted.

According to the author's analysis, the essence of the investigation stage has a different evidentiary value from that of an investigation. The aim of collecting evidence at the investigation stage is to show a criminal incident, while collecting evidence at the investigation stage is to identify a suspect. Thus, if the evidence used to determine a suspect is evidence obtained from the investigation process, then the evidence submitted is invalid because it was obtained in an illegal way.

In this case, the case raised by researchers based on Decision No.3/Pid.Pra/2021/PN Ktg occurred in 2021, therefore the Sexual Violence Crime Law cannot be used as a basis for judges in determining someone as a suspect, because the law -The new Sexual Violence Crime Law will be passed in 2022.

Therefore, the judge's consideration in determining someone as a suspect using only one piece of evidence is contrary to Article 183 of the Criminal Procedure Code and Constitutional Court Decision Number 21/PUU-XII/2014.

It is not easy to find a benchmark for a judge's decision that reflects justice. Because what is fair for one party is not necessarily fair for the other party. The task of the judge is to uphold justice in accordance with the decisions made at the head of the decision which reads "For the sake of Justice Based on Belief in the One and Only God". Justice meant in the judge's decision is impartial to one of the parties to the case, recognizing the equality of rights and obligations of both parties. In making a decision, the judge must be in accordance with existing regulations so that the decision can be in accordance with the justice desired by the community. The winning party can demand or obtain what is their right and the losing party must fulfill their obligations. In order to uphold justice, the judge's decision in court must be in accordance with its true purpose, namely to provide equal opportunities for parties to litigation in court. The value of justice can also be obtained when the case settlement process is carried out quickly, simply, at low cost because delaying the settlement of cases is also a form of injustice.

The application of the law must be appropriate to the case, so that judges are required to always be able to interpret the meaning of laws and other regulations that are used as the basis for decisions. The application of the law must be appropriate to the case, so that the judge can construct the case being tried completely, wisely and objectively. A judge's decision that contains an element of legal certainty will contribute to the development of knowledge in the legal field. This is because the judge's decision which has legal force is no longer the opinion of the judge himself but is the opinion of the court institution which will be a reference for society.

Thus, the judge's decision in an ideal court must fulfill these three principles. However, in each judge's decision there is sometimes a certain emphasis on one dominant aspect. This does not mean that the decision has ignored other related principles. It is clear that these three principles are closely interconnected in order to make the law a guide for behavior in every legal act. However, if these three principles are linked to existing reality, justice often clashes with legal certainty, or legal certainty clashes with expediency.

4. CONCLUSION

In relation to the case of the pre-trial decision of the Kotamobagu District Court Number 3/Pid.Pra/2021/PN Ktg regarding the judge's consideration, the investigation stage is at this stage where the investigator receives a report or complaint about a criminal act and then makes a report, after the report is made, a search for information is carried out and evidence, and then based on the results of the investigation, a case is carried out to determine whether the incident is suspected of being a criminal act or not.

The results of the case title determine that the incident in question was a criminal act, proceeding to the investigation stage. It was at this stage of the investigation that a search was carried out and evidence is collected to determine someone as a suspect. Thus, it can be seen that the determination of a suspect must be carried out during the investigation process and after examination of witnesses or experts to obtain sufficient initial evidence.

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