

# The Empire of the Presumption of Guilt: How cases are fabricated against the innocent

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December 2016

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<sup>1</sup> Russian courts of general jurisdiction acquit in fewer than 1% of cases. In Europe the average figure is around 10%. This does not indicate that the Russian law enforcement system is operating more efficiently than that of the West, just that innocent people are being incarcerated in Russia.

This is no secret, even to Yury Chaika, prosecutor general of the Russian Federation who, two years ago, admitted that “people have been illegally imprisoned for years.” The statistics suggest that little has changed since then. Data recently released by the judicial department of the Russian Supreme Court shows that, in 2014, 746,270 guilty verdicts and a total of 13 acquittals were issued by judges. Acquittals are significantly more common in trials by jury, at 15 - 20 per cent of cases considered. Comparing these figures, lawyer Henry Reznik believes we can estimate the number of people wrongfully convicted. “In other words,” he said, “the standard of proof in courts with only legal professionals is low in Russia, and judges are satisfied with evidence that juries would find less than compelling. This suggests that, in the absence of a jury, an accused’s chances of acquittal, if he does not plead guilty and persists in protesting his innocence, are practically nil.”

In Russia, it is the practice to give priority to evidence for the prosecution, the so-called “prosecutorial bias” under which, if the evidence conflicts, the benefit of the doubt is given not to the defendant but to the prosecution. This can result in all the evidence brought by the defence being written off as unsound. That is what happened in the case of Dmitry Chernyshov.

### **“Your son has committed a serious crime”**

Dmitry Chernyshov usually returned home late at night, around 11.00 pm. After the end of a theatre performance, scenery has to be dismantled. At that hour of night, suburban trains are infrequent. It was not a long journey back to Zheleznodorozhny, but he sometimes dozed off and once almost missed his stop. With barely enough time to grab his jacket from the hanger, he leapt out on to the platform and found, when he got home, that he had left his wallet with his ID in the train. Luckily, a woman who found it phoned shortly afterwards, but the incident made Dmitry decide to carry only his pass for work. That was all he had to show a policeman who stopped him one night in the courtyard of his apartment block and he was promptly taken to the police station for formal identification.

On the next day, Valentina Chernyshova brought her son’s passport to the police station but could not learn what was happening to him. She stood outside the entrance on that day and for the two following days, waiting for the investigator or other staff to come outside to smoke so that she approach them and ask what was happening. The most frequent reply was, “What are you standing out here for? He is 27 years old and he is a criminal.”

In fact, Dmitry had never been in trouble. He served in the army and worked in a school as a physical education instructor before finding work in the theater.

On the third day, a defense lawyer provided by the state informed her that Dmitry had been named as the perpetrator of a robbery. “I have to say, it doesn’t look good,” she explained. “They showed

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<sup>1</sup> This paper was written for the Russian Service of Radio Free Europe / Radio Liberty. It can be accessed at, Lyalenkova, T. “Tsarstvo prezumptsii vinovnosti”, *svoboda.org*, 12 June 2016, available at: <http://www.svoboda.org/a/27789931.html>

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me a photo, I don't see any similarity, but the victims insist it is your son." She advised Valentina to find a good, paid, lawyer.

Chernyshov was charged with robbery with violence, which carries a sentence of 18 years in prison. A local businessman and the woman he was living with arrived back, in separate cars, at the residential block where they were renting an apartment. The woman was the first to go up to the apartment and there was a stranger in the lift with her, who immediately went back down. Outside, he was joined by an accomplice, and together they approached the businessman's car. Using force, they stole, according to the victim's initial statement, cash "amounting to 70,000 (seventy thousand) rubles and 1,000 (one thousand) US dollars."

Chernyshov was charged with the use of violence to carry out a theft "on an exceptionally large scale." This is defined by the statute as "property valued in excess of 1,000,000 rubles."

At that early date, however, nobody was thinking about such details. The victim was trying to recover from his shock, and witnesses to the crime, two couples who lived in a neighboring block, were doing their best to help him. It was they who called the police when they saw what was happening and subsequently described the attackers: two skinny males. When Valentina showed them a photo of Dmitry, they immediately said he was not one of the persons that they had seen.

"My son is 1.9 meters tall," Valentina said. "He is healthy and bow-legged, while the robber they caught on video in the entrance was scrawny, had thin legs and is knock-kneed." The entrance of the block where the victim lived has CCTV surveillance, and this captured the image of the assailant the investigation claimed was Dmitry Chernyshov.

"On the video you can actually see a tag with the cap size," Valentina says. "It is a 55, while Dima's size is 62 and he doesn't look anything like the man."

Prior to his being identified by the victim, there were no grounds for detaining Dmitry. He merely did not have his passport on him at the time and was taken in to have his identity verified. When his mother brought his passport she was told that it was too late and she should come back in the morning. In the morning Dmitry was still not released, and in the afternoon the identification was made.

Valentina, who in her life has never even been fined, is now having to bone up on the law. After three days standing outside the police station, after talking to people entering that state institution and the government lawyers, she concluded that no one but she was the least bit interested in seeing justice done. Accordingly, she went herself with her son's photograph to see the witnesses, and made an inventory of incoming and outgoing telephone calls which proved that at the time of the crime Dmitry was already at home, 2.8 kilometres away from the scene of the crime, and had eight witnesses to prove it. Now she is preparing to go round all the jewellery shops looking for gold which, as became known only some time later, was stolen from the victim.

Meanwhile, she is writing appeals to the district and provincial procurators' offices and preparing to sell her apartment in order to continue paying lawyers. In addition to one-off payments, every submission to the court costs 10,000 -12,000 rubles to prepare, and the hearings are held every month. And every time, the judge asks the same perplexing question: "If Dmitry Chernyshov is innocent, why did the victims identify him?"

The judge is asking a very good question, and Valentina can only speculate. Zheleznodorozhny is a small town, however, and a good hairdresser meets a lot of people. Confronting the Russian justice system, though, she admits it is inexplicable in straightforward terms. One of the government lawyers she was allocated said, “For as long as I have been working here, I have never seen an acquittal. If that happens, I’ll take you out for a meal!”

Other, knowledgeable, people advised her that investigators can re-categorize a crime, reducing the sentence to time already spent in the remand prison, so that it is not evident that someone has been languishing in jail for a year without a case being resolved.

Does that explain the judge’s rhetorical question (rhetorical because the victim does not attend the courtroom hearings)? Zheleznodorozhny is a small town where everyone knows everybody else, and Valentina Chernyshova has carried out her own investigation.

“The police turned up at the crime scene half an hour later. During that time, several other cars came to see the victim. When the police arrived, they said, ‘You’ll be able to get 4 million off the family straight away, with another 4 million to follow later.’ I can only think they came to an agreement with him to keep their detection rate looking healthy. The victim was later cursing the eyewitnesses, saying they should never have been called. Naturally, he doesn’t want to admit now he was guilty of perjury, but all the same I’d like to ask him how he can send a young man who’s done nothing wrong to prison for 18 years.”

Dmitry Chernyshov is currently in the remand prison in Noginsk. In order not to give in to despair, he exercises. Sport has taught him patience and endurance and that is helping. Valentina does what she can to lighten her son’s imprisonment. Dmitry is brought from Noginsk to Balashikha for regular court hearings, and she tries to get gifts passed to him. ‘Last time, I fried fifty or so chicken cutlets, and my daughter grated 3 kilograms of carrots with garlic. We were busy all night, and then what happened? They only passed on three to him. God forgive them. What sort of human beings behave like that?’

### **“He gave a mandarine to his son, only to find he could not chew”**

We find that what is described as the ‘preliminary’ investigation is actually the main phase of the Russian judicial process. The investigation goes on gathering evidence and preparing the charges for months, during which time the suspect is usually being held in a remand prison. Another problem, as Henry Reznik explains, is the near impossibility of proving a negative. “You can prove that someone committed a crime,” he said, “but it is extremely rare to be able to prove that someone has not committed a crime. It is usually only possible if there is an alibi, if, for example, the accused was in different city. The whole point of the presumption of innocence is that unproven guilt is treated as proven innocence. After even the most objective, professional investigation, there are cases where it is impossible to prove guilt beyond a reasonable doubt. I calculate that in Russia, the number of cases where it is not possible to establish guilt beyond a reasonable doubt is 10,000 - 15,000 a year.”

The way the system works is that the separation of powers in the state exists only on paper. On the one hand, a substantial number of judges have previously worked in the law enforcement agencies. To make matters worse, as Sergey Pashin, a member of the Presidential Council for Development of Civil Society and Human Rights in Russia, explains, the prosecutor and the judge work in tandem,

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so it is no surprise to find that judges passing sentence regularly quote verbatim from the case for the prosecution. “The judicial system,” Pashin notes, “is not independent and, what is more, is not much bothered about that fact. The Russian legal system is an appendage of the secret police. Criminal cases are a means of legitimizing criminal prosecutions.”

Citizens do, of course, have the right to appeal, and indeed to complain, to higher authorities and, in the last hope of obtaining justice, sometimes write very detailed letters. Alas, in accordance with a long established tradition, a complaint against an investigator or prosecutor lands on his own table. That is the logic of the ‘top-down power vertical’.

Mikhail Yurievich Kalinin has been trying for four years to prove the innocence of his son, Denis Kalinin. He has dozens of letters from the loftiest authorities: from the chairman of the Prosecutor’s Office of Krasnodar Territory, the chairman of the Investigative Committee of the Russia Federation, an aide of the president of the Russian Federation, the chairman of the State Duma Committee, and so on and so forth, and his son is still in a remand prison.

The response Mikhail Kalinin received from the Presidential Administration reads, ‘Your appeal to the Presidential Administration of the Russian Federation sent on 30/03/2016, received 31/03/2016, in the form of an electronic document and registered on 31/03/2016 under Reference No. 296644 has been considered and forwarded to the Investigative Committee of the Russian Federation and the Office of the Prosecutor General of the Russian Federation with a view to objective and comprehensive review and with a request to inform you of the result of the review.’

Mikhail Kalinin has two crates of reponses like that. In 90% of cases, he says, your letter is forwarded for investigation to the very person about whose conduct you are complaining. In spite of everything, in the several years that his son has been held in the Krasnodar Remand Prison, he has achieved the impossible: a charge has been brought against the man who beat a confession out of Denis.

The Kalinins are a military family. Denis is a captain in the reserves. He served 5 years as a contract soldier and then returned to Cherepovets and worked in the insurance business. He was in Krasnodar on business. He came back to the apartment where he was staying to pick up his belongings, and was detained by the police.

Mikhail Kalinin recalls flying from Cherepovets to Krasnodar and, after two weeks of wandering about in a strange city doing the rounds of government offices, finally obtained permission to see his son. The meeting took place in the presence of the investigator and guards. He immediately noticed how ill Denis looked. He peeled a mandarin and handed it to him, only to find he could not chew it: his jaw was not functioning. That was how he found out what had been going on.

“They beat him for two days. He was grabbed in an apartment he had stayed in for only four days and which he was due to leave to go and visit an army friend. That is where the beating started. Twenty-four hours later, they took him in a private car without number plates to an office at a checkpoint, where it continued. He was beaten and tortured with electric shocks. For two days he was given no water or food, not allowed to go to the toilet, and interrogated at night. There are medical records of this because, when the guards arrived to take him to the remand prison, the signs of his beatings were noted to avoid claims against the guards. Injuries were noted to his hands, feet, face and groin. The ten days Denis was in that temporary detention unit had not been enough for the signs of his beatings to disappear, as the police who had done the beating had hoped.”

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Denis signed all the papers that were put in front of him without reading them: to the effect that the drugs found in the apartment were his, although there was no sign of his fingerprints, no sweat or grease deposits on the packages. What did disappear was some money and personal belongings of Denis, which are still to be seen in the photos taken at the apartment but mysteriously absent from the inventory. In May, it was claimed that “drops” of drugs made by Denis had been found, but it is difficult to believe they would have remained undisturbed for over two months. The local yard keepers interviewed by Mikhail Kalinin were highly sceptical, and commented that they would have been stolen within a day of being left.

The court, nevertheless, decided to focus on the confessions Denis had made under duress and which he later repudiated. At this point, Mikhail Kalinin and his lawyer decided to adopt two approaches, arguing, first, that the investigation and court had been guilty of procedural violations, and, second, initiating criminal proceedings against the police who had literally beaten the confession out of Denis.

“We arranged for an independent examination,” Mikhail Kalinin recalls, “and the specialist gave us his conclusion in writing that the signatures of Denis himself, of the witnesses, and even of Investigator Gamaleyeva, had been forged ‘by a third person imitating genuine signatures.’ In the opinion of the expert, about 80% of all the signatures in the documents of the proceedings were forged. We naturally suggested a forensic examination should be carried out, but our application was refused. To cap it all, the documents detailing the specialist’s conclusions were found to have disappeared from the materials of the case.”

The court, however, was unimpressed by the case for the defense. Denis Kalinin has been in a remand prison, an exceptionally tough one, according to the deputy prosecutor general, for more than four years, even though the judgement sentencing him to 6 years and 7 months imprisonment has not yet come into effect. The Kalinins accordingly appealed to the European Court of Human Rights, and the Russian authorities offered to make an *ex gratia* compensation payment of about €4,000. Denis Kalinin has refused the money.

In the Russian system, the defence lawyer can, of course, theoretically act as a kind of buffer. But the system has contrived to absorb even that institution into the general “power vertical”. A lawyer, who formerly worked in the investigative department, may collaborate with his pal the investigator, and advise the accused, “Confess! I’ll get you out of this. I’ll fix it with them. I’ve got a finger in every pie.” A lawyer of this stripe is on the side of his former colleague, not of the client he has undertaken to defend. Vladimir Bogushevsky’s lawyer advised him to confess to a murder he had not committed.

The case of Vladimir Bogushevsky, convicted in Yekaterinburg of the murder of an independent businesswoman whose business, according to the local press, was provision of “escort services”, even made it into the newspapers in Moscow.

The published information was inconsistent about certain details, sometimes describing Vladimir as unemployed, and elsewhere describing him as a site engineer, but in the end he was sentenced in 2007 to 9 years’ detention in a hard labour prison camp.

Vladimir has now been released on parole and can speculate about how and why he was crushed between the millstones of Russia’s justice system.

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“When I try to work out why they chose me as someone suitable to accuse of a crime, the obvious conclusion is that my family were living abroad, and it was easiest to attack someone who seemed defenseless.”

In addition, 22-year old Vladimir knew a lot of people. All sorts of people are motorcycle enthusiasts, and the whole point of belonging to a club is that everyone is equal, whether they are an ex-prosecutor, the owner of a construction company, or a brothel-keeper. It was in that sort of company that Vladimir Bogushevsky was arrested. Quite soon all but two of those held were released, but he was telephoned that evening and asked to come in for questioning.

The next day, he went voluntarily to the police station at 9 am but he was beaten and by lunchtime was having heart problems. He had a congenital condition, Wolff-Parkinson-White syndrome, and started to suffocate. The investigators, of course, did not believe him and continued plying him with the names of people he had never heard of.

“Well, in the end I began making things up: that I knew some Dagestanis who lived there. They took that in and drove off somewhere. They came back, realizing I had been talking a lot of nonsense and started putting on even more pressure. I told them anything I could think of. I can see now that actually they had no interest in discovering the truth about the weapon, the motive, the revenues, the internal organization, all the characteristics of a criminal gang you need to know about to reach a genuine verdict. It was all much more straightforward: tell us something or we beat you some more.

“And so it carried on until the evening. The next day was 1 September [the beginning of the school year], and they beat me all the more violently because they wanted to get home to their families. By 1.00 in the morning they gave up, but they couldn’t just let me go – I was half-dead – so they dragged me off to the remand prison. Only, they have a procedure there that, before admitting anyone they have to be examined and a description written of the condition they’re in. When their paramedic arrived, they refused point blank to admit me and insisted an ambulance was called to take me to intensive care.”

Vladimir was taken to the hospital where his condition was usually monitored and given cardiac stimulation. In the morning, when he came to handcuffed to the hospital bed, he was judged to be in a ‘satisfactory’ condition and no longer in need of special treatment.

“So they again decided to take me to the remand prison, but on the way, because the hospital is on the city outskirts, stopped at a pond, hauled me out of the car, and shoved me into the water up to my chest. They put a pistol to my head. ‘Nobody cares about you,’ they said. ‘We’re going to dump you here if you don’t talk, so come on, tell us something.’ At that moment I would have told them anything they wanted to hear.

“When they arrived at the prison, they could see they were not going to get any sense out of me, so they said, ‘Either you give us information, or a packet of powder is going to be found in your wife’s apartment. We’ll take her to the remand prison, and then she’ll be able to send you letters through the internal mail.’”

At that time, Vladimir was separated from his wife but not formally divorced. The love affair that had brought him back from Canada to Russia was over, but they bore no grudges and had remained

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on friendly terms. He had been going over to her apartment to water the flowers for her, and knew she had gone to Moscow.

“So I said to them, “Listen guys, you’re idiots. There’s no one you can use to blackmail me.” So then they took me outside and I see my wife standing there. Someone had told her what was happening, and she had come and brought me some biscuits. We don’t live together, but still ...”

Vladimir was recommended a lawyer, who agreed to conduct the case for 100,000 rubles, a friend of a friend, himself a motorcyclist, and the only person willing to represent him privately. He advised, “You should just confess to everything. You’ll get 7 years, we’ll have you out on parole after 5, and everything will be fine.” Bogushevsky asked him to make himself clearer.

**“So what am I supposed to confess to? Committing murder.”**

It is difficult to say now whether Vladimir Bogushevsky was persuaded by what his lawyer told him, the threats to his wife, or the poor state of his health, but he did decide to confess to murder. It was crystal clear that no evidence against him was going to be found, there were no incriminating facts, and he would publicly repudiate the confession in court on the grounds that it had been extracted under duress.

Perhaps it was that same line of reasoning that persuaded Vladimir’s companions, who had been business competitors of the murdered woman, to testify against him. They gave evidence that they had been drinking coffee with him in a café when he agreed to help them out. He disappeared for a time, and when he came back, the madam had been murdered. He had supposedly bought a gun off a taxi driver, and afterwards thrown it into a pond.

In the court, they too repudiated their testimony, stating that they had signed it under duress. They had been beaten, and promised that if they testified to Bogushevsky’s guilt they would get away with just 6 months in an open penal colony. This statement, however, the court viewed as ‘unsound’, regarding the testimony obtained within the walls of a police station as more credible.

This was a high-profile case, and accordingly there were reporters present in the courtroom, filming the proceedings for local television. Everything that transpired in the court could have been made public. It was not. It was obvious that the case was falling apart, and Vladimir supposed he would walk out of court a free man. He had not managed, as he had initially hoped, to keep the news of what was happening from his parents, and now his interests were being represented in court by his mother, who had flown in from Vancouver.

Because the evidence included a claim that Vladimir had thrown the gun into a pond, his mother found the manager of a dam who kept a daily diary of weather conditions. He stated that on 10 April the weather was still freezing, so that throwing a gun into a pond would mean it had been thrown on to ice, which seemed a strange way of disposing of a murder weapon. The court, however, viewed this evidence as “unsound”, on the grounds that the man working at the dam wore spectacles.

Lyubov Bogushevskaya asked an instructor at a shooting club to conduct a ballistic analysis. He was a former officer in the Ministry of the Interior, and demonstrated that, if the murder had been committed in the courtyard as claimed, next to parked cars, the murderer would certainly have needed to use a silencer, which nobody had mentioned in earlier evidence. The evidence of this

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expert witness was also viewed by the court as “unsound”, on the grounds that he was past retirement age.

“At this point they resorted to casuistry. There was no direct evidence, and they needed to have something, so all and sundry were enrolled as witnesses for the prosecution. The yard keeper had seen my car in the morning; a lady out walking her dog confirmed that I parked my car. I drove to my wife’s apartment and the neighbours saw me. The evidence accumulated and was added to the case file, and the more documentation there was, the more difficult it became to wade through it afterwards.”

Vladimir Bogushevsky’s case file expanded to two volumes. His father, though not a lawyer by profession, armed with the Criminal Procedure Code found evidence in this mountain of paper of more than 240 procedural violations in the records of the investigation of the crime scene, a follow-up inspection, collection of evidence, how it was transferred, and so on.

The judge acknowledged that ‘there have been violations of the Criminal Procedure Code,’ but stated “that is inconsequential, does not change the essence of the matter, and this is a serious case.” The prosecutor’s office also conducted a review of the “operational measures” that had left their mark on Bogushevsky’s body, but it was conducted by a subordinate of the same prosecutor as had been personally present while the beating was taking place.

On 7 April 2008, the court found Vladimir Bogushevsky guilty of murder and sentenced him to 9 years in a hard labour prison camp, taking account of a positive character reference from his workplace and his chronic heart condition. In December 2014 he was released on parole, but would only be fully free in September 2016.

### **“Guilty or not guilty – it is resolved in the colony”**

Russian courts prefer, as a matter of principle, to rely on initial statements, obtained during the investigation, on the grounds that in court a suspect makes statements “because he wishes to evade his legal culpability.” This cliché recurs in verdict after verdict, even where, as in the cases of Denis Kalinin and Vladimir Bogushevsky, there is officially documented evidence that they were subjected to duress.

Presumption of innocence does not operate in Russia, even in cases where no credible evidence of guilt has been found. In Western countries, cases where guilt is disputed are tried in the presence of a jury.

In Russia, this practice, even if it were to be introduced, would have little prospect of success. The problem is that, in a trial without a jury, a blind eye is turned to such practices; and in the presence of a jury a defendant is simply not permitted to talk about the torture to which he has been subjected. “In other words,” Sergey Pashin explains, “a jury can decide whether Petrov hit Ivanov over the head with an axe, but may not decide whether Sergeant Ivanov belaboured suspect Petrov about the kidneys with a rubber truncheon, because that is a legal issue and legal issues are decided by the judge. The rest of the world understands that this is a question of fact, an issue of the reliability of evidence, but in Russia that is denied. ‘No! It is a legal issue, and an ordinary human being is not competent to understand it.’”

The President of the Russian Federation did, nevertheless, recently issue an order extending the categories of crimes to be tried before a jury. At the same time, however, he halved the size of juries.

Although the institution of trial by jury (introduced in 1993) has on the whole worked very well, it is obvious that the smaller the jury, the greater the risk of arbitrary and polarized decisions. “The prosecution will find it easier to influence people,” says Sergey Pashin, “and it will be easier to plant individuals in order to rig a jury. Quite apart from that, the fewer members there are in a jury, the less evidence they will recall, and the less they will remember the judge’s final directions.”

The new rules mean that, in a punitive legal system where all the officials – the investigator, the lawyer, the judge and the prosecutor, and the other reviewing institutions – are on the side of the prosecution, and the institution of a jury has been intentionally skewed, the prospects for acquittal of an innocent defendant will now no longer just be less than 1%. They will disappear altogether.



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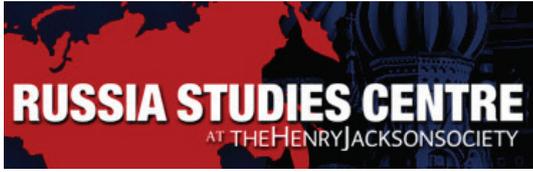
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