ISSUES OF CONTROVERSIAL PRACTICE REFERRING TO THE CRIME OF FALSE TESTIMONY

Mirela GORUNESCU*

Abstract

The crime of false testimony is one of the crimes which are traditionally found in our criminal legislation, the judicial practice recording also specific situations which required the application of the incrimination text which defined this crime. It can be considered that we are dealing with a crime which can no longer present any difficulties in relation to the interpretation and application of the incrimination norm with regard to the particular deeds committed. However, many elements are still encountered with respect to the interpretation of the incrimination norm, which generate different solutions of application, a fact which –in accordance with the rigors of the criminal law- is not to be desired. This study approaches two of these issues, namely the juridical significance of the refusal of the person heard as a witness to give any statements in such capacity and, on the other hand, the possibility of the realization of a formal concurrence of crimes when the person summoned as a witness, through his/her false or incomplete statement intends to create a situation more favorable to a person regarded by the factual situation.

Keywords: *false testimony; crimes against the service of justice; witness' refusal to give a statement; the privilege against self-incrimination; favoring through a false testimony*

1. General Issues

The crime of false testimony is provided under Art. 273 of the Criminal Code in a standard version and in an aggravated version. According to Art. 273 para. (1) of the Criminal Code, standard false testimony is represented by *the deed perpetrated by a witness who, within a criminal case, civil case, or any other procedure wherein witnesses are heard, makes deceitful statements or fails to tell everything s/he knows in relation to the facts or essential circumstances s/he is questioned about.*

The aggravated version constitutes, according to para. (2), *the false testimony given: a) by a witness with protected identity or found in the Witness' Protection Program; b) by an undercover investigator; c) by a person who prepares an expert appraisal report or by an interpreter; d) in connection with a deed for which the law provides the penalty by imprisonment or imprisonment for 10 years or longer.*

In accordance with doctrinarian opinions, the crime of false testimony has as its special juridical object the social relations regarding the proper service of justice. The crime can also have a secondary juridical object, consisting in the social relations regarding certain essential attributes of the person (dignity, liberty) or in the social relations with a patrimonial character, because such relations can also be breached through the perpetration of the deed[1].

In accordance with the provisions of the legislation in force, a witness is the person who, being informed of certain facts, data or circumstances which constitute evidence within a judicial lawsuit, is called to be heard. Also, the jurisprudence stated that the persons who are parties in a lawsuit[2], as well as the main subjects of the lawsuit cannot have the capacity of witness and, therefore, they cannot be active subjects of the deed of false testimony [Art. 115 para. (1) of the Criminal Procedure Code]. It is considered that the lawmaker instituted the incompatibility between the capacity of a party or of a main lawsuit subject within a lawsuit and the witness capacity, considering that, since the parties or main lawsuit subjects can be heard in such capacity, and their statements constitute evidentiary means, the accumulation of the capacity of party or main lawsuit subject and of the witness capacity cannot be justified[3]. If a person loses the capacity of party or main lawsuit subject within the lawsuit, such person may be heard as a witness.

According to Art. 117 of the Criminal Procedure Code, the following persons shall have the right to refuse to be heard as a witness: the spouse, direct ascendants and descendants, as well as the siblings of the suspect or of the defendant, and the persons who were the spouses of the suspect or of the defendant. Instead, if the abovementioned persons agree to make statements, the provisions regarding the witnesses' rights and obligations shall be applicable to such persons.

According to Art. 116 para. (3) of the Criminal Procedure Code, those facts or circumstances whose secret or confidential nature may stand good under the law in relation to the judicial bodies cannot form the

* Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email:mire_gor@yahoo.com.)

[1] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, Noul Cod penal comentat, Partea specială, Universul Juridic Publishing House, Bucharest, 2014, p. 249.

[2] Brașov Court of Appeal, Criminal Section, Dec. No. 198/A/2000, on *www.ctce.ro*.

[3] Gr. Theodoru, *Tratat de drept procesual*, Publishing House Hamangiu, Bucharest, 2007, p. 371.

object of the witness' statement. These are the facts or circumstances which came to the knowledge of the witness within the exercise of his/her profession. By exception, such facts or circumstances may form the object of the witness\ statement when the competent authority or the entitled person expresses its consent in this respect or when there is another legal cause for removing the obligation to keep the secret or maintain the confidential nature (for instance, the obligation to incriminate).

False testimony is punished in a more severe manner if it is perpetrated by a witness with protected identity or found in the Witness Protection Program, by an undercover investigator, by a person who prepares an expert appraisal report or by an interpreter. The reason for aggravation in relation to the capacity of the active subject refers to the special position of such a person in the criminal lawsuit, based on relations of trust (in case of the undercover investigator, expert or interpreter, who are specialists in certain fields and must assist the court of law in the process of finding the truth and serving justice). In the case of protected witnesses, the additional effort of the judicial bodies to ensure their protection in exchange for their testimony justifies the aggravation of the punishment in case the trust in their *bona fide* is breached.

The witness with a protected identity is the threatened witness, according to Art. 125 of the Criminal Procedure Code, in relation to whom any of the protection measures provided under Art. 126 para. (1) letters c) and d) of the Criminal Procedure Code was taken. Thus, if there is any reasonable suspicion that the life, bodily integrity, freedom, assets or professional activity of the witness or of a member of the witness' family might be endangered as a result of the data provided by such witness to the judicial bodies or as a result of his/her statements, in relation to the respective person shall be ordered the measure of the protection of the data regarding his/her identity, by giving to such person a pseudonym under which such witness shall sign his/her statement, or by hearing the respective person in his/her absence, by means of audio-video communication devices, with distorted voice and image, when the other measures are not sufficient.

The witness found in the Witness Protection Program is subject to the regulations of the Witness Protection Law[4]. The Witness' Protection Program represents the specific activities conducted by the National Office for Witness Protection, with the support of the central and local public administration authorities, for the purpose of protecting the life, bodily integrity and health of the persons who obtained the capacity of protected witnesses, under the conditions provided by the law. The protected witness is the witness, the members of the witness' family and the persons close to the witness, who are included in the Witness' Protection Program, according to the provisions of the law.

According to Art. 148 of the Criminal Procedure Code, undercover investigators are operative agents of the judicial police. In the case of investigating crimes against national security and crimes of terrorism, the operative agents of the State bodies which conduct, under the law, information activities in view of ensuring national security can also be used as undercover investigators. The authorization to use undercover investigators may be issued by the prosecutor under the conditions of Art. 148 para. (1) of the Criminal Procedure Code. Undercover investigators can be heard as witnesses within the criminal lawsuit under the same conditions as threatened witnesses.

The objective side of the crime of false testimony is realized in terms of the material element by means of two alternative methods: either deceitful statements are made, or not everything that is known about the essential circumstances in a case in which witnesses are heard is told, and we are dealing with a manifestation liable to mislead judicial bodies.

So, in the first case, we are dealing with an action, in which case the witness, expert or interpreter makes deceitful statements, while, in the second case, we are dealing with the situation when not everything that is known about the essential circumstances for the judicial case is told[5].

The normative method which is of interest for this study is „[*the witness*] *is not telling everything that she knows"*, which means manifesting reticence as far as what s/he stated is concerned, keeping quiet, concealing all or part of what the witness knows. Keeping quiet must refer to something that was known to the witness, and not what the witness might have known[6].

A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which can be the manifestation of the material element of a false testimony.[7]

The statements or omissions of a witness must refer to essential circumstances.

Essential circumstances must represent those situations and circumstances which refer to the main fact of the case, and not to any adjacent issues which are not related thereto[8]. Therefore, the following can, for instance, be considered circumstances essential to the case: the constitutive elements and the mitigating or aggravating circumstances within a criminal lawsuit; the *de facto* grounds in case of a divorce lawsuit in the

[4] Law No. 682/2002 on the witness protection, published in The Official Gazette No. 964 of December 28, 2002, as subsequently amended and supplemented.

[5] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit*., p. 249

[6] V. Dongoroz and others, *op. cit*., vol. IV, pp. 182-183., p. 183.

[7] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit.,* p. 249

[8] Idem.

civil field; as well as the other evidentiary facts which may serve to the solving of a case and to the finding of the truth.

The essential character must be determined in accordance with the object of the evidence, in the sense that it is conclusive in relation to the charge brought against the defendant or in relation to any other issue liable to influence the defendant's criminal liability.

The realization of the material element of the crime requires that the witness should have been asked by the authorized body (prosecutor's office, court of law, etc.) or by the lawsuit parties or by the main lawsuit subjects with regard to the essential circumstances. Thus, in the judicial practice it was decided that the fact that the defendant declared that she was in another locality for a certain period of time together with her husband, charged with the perpetration of a crime during the same period of time, does not represent a crime of false testimony, since she was not expressly asked whether the defendant was in the same locality as she was at the time when the crime was perpetrated and neither did she state that the defendant would not have left the locality in the mentioned period of time[9].

If, through his/her deceitful statements, the witness tries to avoid that his/her criminal liability be entailed, such fact no longer constitutes a crime (according to Art. 118 of the Criminal Procedure Code, the witness has the right to not accuse oneself). A contrary solution is considered to lead to the conclusion that the obligation of self-incrimination is incumbent on those persons who committed a crime, which conclusion cannot be accepted as long as the obligation to inform on crimes perpetrated by other persons exists only in the cases in which the law expressly provides so[10].

2. Issues Specific to the Crime of False Testimony

Constantly, in the doctrine and in the judicial practice, the issue is raised to establish whether the crime of false testimony may be perpetrated from an objective point of view is the refusal to make statements [*sic!*], namely the maintenance of passivity, given that the crime of false testimony is a crime which implies perpetration in all the cases[11].

With respect to this issue, the specialty doctrine traditionally differentiates between the normative assumption "[*the witness*] does not declare all that s/he knows" and the factual assumption to refuse to make any statements.

Thus, a doctrinarian opinion indicates that: „*A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which can be the manifestation of the material element of a false testimony. In the juridical literature, the following opinion to which we adhere was expressed, that the explicit refusal of a person who accepted to testify to answer certain questions has no criminal significance either, in the sense of the provisions of Art. 273 of the Criminal Code*[12]*. Such an explicit refusal, clearly expressed, is not, as it was stated, liable to mislead the judicial body, but it draws attention to the necessity of producing new evidence in order to find out the truth*."

The specialty doctrine often indicates that: "*the witness enjoys the right to keep quiet and to not contribute in his/her self-incrimination, to the extent to which, through his/her statement, s/he might incriminate himself/herself [for instance, in the cases in which, as a result of successive severances, a suspect or a defendant in the initial file (the basic file) becomes a witness in a file severed from the basic file; in such capacity, s/he enjoys the right to silence and to not incriminate himself/herself with regard to certain issues which, once reported, might incriminate him/her in the file in which s/he is being charged]*." [13]

Under these conditions, my refusal to make a statement does not have in any case the purpose of encumbering the service of justice, but only the purpose that the witness ***should protect his/her lawsuit situation, representing a bona fide exercise of the right to not incriminate oneself.***

In the same respect, the specialty literature[14] indicates that: "*The privilege against self-incrimination and the defendant's right to keep quiet, implicit guarantees of the right to a fair trial, have been examined, after 1993, in several cases on the dockets of the E.C.H.R. (J.B versus Switzerland, 2001, IJL GMR and AKP versus United Kingdom, 2000, Kansal versus United Kingdom, 2004, Jalloh versus Germany, 2006, Weh versus Austria, 2004, Allan versus United Kingdom, 2002, Muray versus United Kingdom, 1996, Serves versus France, 1997), being constantly revealed the necessity to prohibit the use of any coercion means in order to obtain evidence, against the defendant's will, as well as the fact that, in relation to the autonomous character of the notion of "criminal charge*", consideration should be given to the fact that

[9] HCCJ, Criminal Section, Decision No. 5430/2004, in RDP No. 4/2005, p. 147.

[10] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, op.cit., p. 249

[11] V. Dongoroz and a collective of authors, Explicaţii teoretice ale Codului penal român, The Publishing House of the Romanian Academy and C.H. Beck Publishing House, Bucharest, 2003, p. 159.

[12] A. Filipaş, *Infracţiuni contra înfăptuirii justiţiei*, The Publishing House of the Romanian Academy, Bucharest, 1985, p. 56.

[13] M. Udroiu, Drept penal, partea specială, C. H. Beck Publishing House, Bucharest, 2016, p. 256.

[14] C. Rotaru, A. Trandafir, V. Cioclei, Drept penal, Partea specială II, C.H. Beck Publishing House, Bucharest, 2016, p. 102. The author quotes from the considerations of Decision No. 213/2015 issued by the High Court of Cassation and Justice, consulted at *http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=124329*)

the witness also enjoys this right to the extent to which his/her statement might lead to self-incrimination.

In summary, the privilege against self-incrimination is a principle according to which the State cannot compel a suspect to cooperate with his/her prosecutors by providing evidence which might incriminate him/her.

Or, under the conditions of hearing a person having the witness capacity, subject to taking an oath and, especially, subject to the criminal punishment of perpetrating the crime of false testimony, with respect to facts or circumstances which might incriminate him/her, E.C.H.R. - in its jurisprudence – has elaborated the so-called "theory of the three difficult choices with which the person is faced", according to which it is not natural that the alleged perpetrator should be asked to choose between being punished for his/her refusal to cooperate, providing incriminating information to the authorities or lying and risking conviction for this reason (case Weh versus Austria, 2004)".

In the recent judicial practice, however, it was deemed that the witness either *makes deceitful statements* which entails *de plano* the fact that the witness accepts to testify but distorts the truth with respect to the essential circumstances of the case in which s/he is heard, case which is not –however- applicable in this cause – or *does not tell everything that s/he knows in connection with the facts or with the essential circumstances s/he is asked about*. Not telling everything that s/he knows means manifesting a reticence as far as his statements are concerned, keeping quiet, concealing all or part of what the author knows"[15].

Also, the court considered that, by looking at the factual method of the refusal to testify, two distinct situations can be again identified. The first is that of the "refusal to have the witness capacity – in which case the respective person refuses to take the oath and to have the witness capacity", a hypothesis in which the court deemed that we cannot be in the presence of the crime of false testimony, but eventually in the situation of committing a judicial default or of any other crime, as applicable.

The second situation concerns: "the case in which, although the oath was taken, the witness refuses to tell anything about certain essential circumstances about which s/he is asked". Against this theoretical background, the court considered that: "the total refusal to testify, given that the witness capacity is a capacity won for the case because the person took the oath, is the equivalent of: *not telling everything s/he knows* in connection with essential elements on which s/he is heard"[16].

Moreover, the court considered that: "it matters not for the existence of the crime whether the refusal is an explicit refusal – when the witness expressly declares that s/he refuses to testify – or an implicit refusal – when the witness, without making any express reference, chooses to keep quiet on certain matters related to the essential circumstances of the case in which s/he is being heard." The argument invoked by the court of law to support this statement is an argument which adds to the law, in the sense that: "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness."[17]

These arguments, which obviously represent an analogical supplement of interpretation *in malam parte* of a criminal juridical norm, reveal, in the opinion of the merits court that the witness' refusal to make a statement represents the crime of false testimony.

When analyzing the constitutive elements of the crime of false testimony, they should start from the reason for which the lawmaker would have incriminated such a behavior. Obviously, such a legal text was included in the group of crimes against the service of justice, because it allows the punishment of anti-social behaviors whereby a circumstance perceived directly by a person heard as a witness in a judicial case is presented in a distorted manner. Under these conditions, for a crime of false testimony to exist, there must exist in fact an effort to mislead the body which is conducting the hearing.

Moreover, the existence of the crime of false testimony requires that the person conducting the hearing of the person having the witness capacity, ***should have asked specific questions about the circumstances that s/he considers being essential.***

The argument made by the court according to which "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness" is, in fact, erroneous. This because the one who is apparently committing less causes more disturbance in the process of serving justice. Through the effort of making a statement which is purposefully elliptical, the person heard as a witness distorts the real facts and makes the judicial body have an erroneous representation of the factual situation, considering that such representation is correct. The behavior of refusing to make another statement is not specifically covered by the incrimination norm under Art. 273 of the Criminal Code.

Moreover, the court highlighted that the crime of false testimony constitutes a special version of favoring

[15] HCCJ, Criminal Division, Sentence No. 363/2017, final through Criminal Decision No. 13/2018, not published.
[16] HCCJ, Criminal Division, Sentence No. 363/2017, final through Criminal Decision No. 13/2018, not published.
[17] Idem.

a perpetrator since, in the criminal cases; the false testimony can also lead implicitly to the favoring of the perpetrator. Under these conditions, the court of law indicates: "regardless of the fact that, through the false testimony made, the defendant is acting with a direct intention – pursuing to favor a perpetrator – or with an indirect intention – *i.e.* not expressly pursuing to favor the perpetrator but accepting the possibility that such result could also occur – the same deed cannot meet the material elements of two distinct crimes, while only the special crime, that is the false testimony, shall be maintained."

Also in the judicial practice the issue is raised whether the crime of favoring the perpetrator may be committed under the conditions of a formal concurrence of crimes with the false testimony.

In our opinion, such a juridical classification of the deed cannot be accepted, since it is in disagreement with the specific nature of the incrimination of the deed of favoring the perpetrator. Thus, the specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained.[18]"

In the same manner, in the judicial practice it is indicated that: "the crime of favoring the perpetrator has a subsidiary nature, and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape). It is noted that, in the case, there is a special incrimination (Art. 260 of the Criminal Code – the false testimony), so that the crime of favoring the perpetrator and the crime of false testimony cannot be maintained concomitantly, but only the crime of false testimony can be maintained … "[19]

It was correctly considered that the relationship between the two crimes (namely the favoring of the perpetrator and the false testimony) is a relationship of the type genre – species, the testimony being nothing other than a special form of favoring. Under these conditions, maintaining a formal concurrence of crimes between the crime of favoring the perpetrator and the false testimony is in complete disagreement with the specific nature of the incrimination norms included in the Title referring to the crimes against the service of justice from the Criminal Code and does nothing other than breaching the *ne bis in idem* principle.

Thus, the more recent specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained[20]". In the same manner, the judicial practice indicates that: "the crime of favoring the perpetrator has a subsidiary nature and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape).

Conclusion

Although the crime of false testimony is one of the incriminations which have continuity in the field of our criminal legislation, the matters related to such crime are far from being clarified. On the contrary, in our opinion, this crime gained new interpretation and application difficulties, especially by reference to the European standard regarding the witness protection, which witness is also recognized the privilege against self-incrimination. Under these conditions, it is obvious that the refusal to make a statement in witness capacity, especially in case the judicial body hears in this capacity the very person against whom a criminal complaint is submitted, for instance, should not have any criminal valences.

References

- V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, Noul Cod penal comentat, Partea specială, Universul Juridic Publishing House, Bucharest, 2014.
- Gr. Theodoru, *Tratat de drept procesual*, Hamangiu Publishing House, Bucharest, 2007.
- V. Dongoroz and a collective of authors, Explicaţii teoretice ale Codului penal român, The Publishing House of the Romanian Academy and C.H. Beck Publishing House, Bucharest, 2003.
- A. Filipaş, *Infracţiuni contra înfăptuirii justiţiei*, The Publishing House of the Romanian Academy, Bucharest, 1985.
- M. Udroiu, Drept penal, partea specială, C.H. Beck Publishing House, Bucharest, 2016;
- C. Rotaru, A. Trandafir, V. Cioclei, Drept penal, Partea specială II, C.H. Beck Publishing House, Bucharest, 2016.

[18] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

[19] Timişoara Court of Appeal, Criminal Division, Decision No. 1174/2013 commented in C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

[20] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.