

JUDICIAL ASSISTANCE OF A WITNESS IN THE CRIMINAL TRIAL

BOGDAN-FLORIN MICU *

Abstract

As the title suggests, this study will analyze the controversial issue of a witness' legal assistance. The term "controversial" is used due to the fact that in the Criminal Procedure Code there is no mention of judicial assistance for a witness, only that for the defendant, injured party, civil party and the civil responsible party. Despite this lack of regulation, the Romanian Constitution and European Union legislation introduce the principle to a fair trial according to which any person involved has the right to be legally assisted. The article will begin with a short presentation of what the quality of a witness entails and what does legal assistance mean. Further on into the study, it will be demonstrated beyond any doubt that a witness can very easily become a defendant, and without proper legal assistance the fundamental principles of law can be broken. A problem can also be identified if one considers the fact that a defendant does not have to declare facts which might incriminate him, whereas the witness has to declare all that he knows, and thus he can incriminate himself. All these issues shall be dealt with in this study, as well as some propositions of lege feranda because there may be a growing need for a more rigorous regulation of this issue.

Keywords: *assistance of witness, Criminal Procedure Code, defendant, perjury, equitable trial*

Introduction

Judicial assistance of a witness, despite not being regulated in the Criminal Procedure Code, is an issue that can arise anytime during a criminal trial, thus it needs to be dealt with. According to the Romania's Constitution, in article 21 and to the European Union's legislation, in article 6 of the European Convention of Human Rights, all people are entitled to a fair trial, which entails being legally assisted. Despite regulating the right to a fair trial of any citizen, a few article further the Constitution regulates the right to legal assistance, in article 24, but it specifies that the parties of the trial have this right.

An interpretation of the word "parties" is in order, due to the fact that the Criminal Procedure Code includes in this category the defendant, the injured party, the civil and the civil responsible parties. Lato sensu, the witness should be included because he can become a defendant, if he declares anything that is not true or that could incriminate himself.

Apart from the Constitution, and the European legislation, there is also the law (51/1995) which regulates the legal profession, in which it is stipulated that a lawyer should represent the legal interests of any person and the client is used, without exemplifying any specific qualities.

As mentioned above, any person has the right to a fair trial. On a close analyses of this statement, we can and should understand that not only the parties, as defined in the Criminal Procedure Code, have this right and implicitly the right to legal assistance, but also the witness, the expert and other people who are involved in the criminal trial.

The Criminal Procedure Code outlines the cases in which legal assistance is mandatory, all of them include the defendant, the other parties having the right to choose a lawyer, or if they cannot afford it, one will be provided if requested. The problem encountered is that a witness must declare everything he knows, whereas the defendant declares only what he considers only what he considers to be necessary, and cannot incriminate himself through his declarations. By not having a lawyer

* Associate Professor, Ph. D., Faculty of Law, „Nicolae Titulescu” University, Bucharest (e-mail: bogdan.micu@mnpartners.ro).

present, a witness can declare facts that may incriminate him, or he may perjure himself and thus quickly become a defendant. Legal assistance is needed in order to insure that his legal rights and liberties are protected.

Before a witness is questioned the criminal judicial body informs him about the object of the cause and he is presented the facts that must be proved through his testimony and he is told that he must declare everything he knows. What is not told to him is that he can have a lawyer present at any time, chosen or appointed for him. Thus, the witness may declare a fact that might incriminate him, becoming a defendant, and not being able to invoke a breach of procedure, his testimony being admissible in court against him.

This situation should be specifically regulated, the right to a lawyer should be made known to the witness so that his rights and liberties will not be breached and the principles of a fair trial and of finding of the truth will be upheld.

Legal assistance.

Any person implicated in the criminal trial can provide his own defense, but legal assistance can also be provided. By legal assistance we understand the support given by lawyers to their clients, including advice, clarifications and interventions, as specialists in the domain.¹ It is regulated in the Criminal Procedure Code, in articles 6, 171, 172 and 173.

According to article 6 of the Criminal Procedure Code, the right to defense is guaranteed to the accused person, to the defendant and to the other parties all throughout the criminal trial.

During the criminal trial, the judicial bodies must ensure the parties' full exertion of their procedural rights, under the circumstances stipulated by the law and must administrate the evidence necessary for defense.

The judicial bodies must inform the accused person or the defendant, immediately and before hearing, of the deed of which he is held responsible and of its judicial status, and must ensure the preparation and exertion of his/ her defense. Any party is entitled to assistance by defender during the criminal trial.

The judicial bodies must inform the accused person or the defendant, before his/ her first statement, on his/ her right to be assisted by a defender; this will be recorded in the official report of the hearing. Under the circumstances and in the cases stipulated by the law, the judicial bodies must provide judicial assistance for the defendant, if the latter has not chosen a defender.²

Due to the fact that legal assistance is given by lawyers, and only by them, it was also defined as "technical assistance" by some specialists in the field.³ There are two types of legal assistance: voluntary or mandatory.

Voluntary assistance constitutes the rule⁴ and it means that the parties can choose whether or not to be assisted by a lawyer. The defendant has the right to be assisted by a lawyer during the whole criminal trial, during the criminal investigation and the actual judgment. Previous regulation did not oblige the criminal judicial body to inform the defendant of his right to be assisted. Actual regulation introduced the rule that the defendant should be informed, but it mentions nothing about the witness.

A legal assistance contract is signed between the lawyer and the client, and a fee is agreed upon by the two. If a party wishes to hire a lawyer, the court can give a continuance so that one can be chosen or appointed.

¹ O. Stoica, "Rolul avocatului în realizarea dreptului de apărare a cetățenilor", R.R.D. nr. 3/1972, pg. 111 – 112.

² Article 6 of the Criminal Procedure Code.

³ G. Leone, "Dritto procesuale penale", ed. VII, Neapole, 1968, p. 204.

⁴ Ion Neagu, „Tratat de procedură penală. Partea generală.”, București, 2008, p. 237.

Some categories of people (those stipulated in law 25/1990) can have free legal assistance, and the person can choose the advocate, contrary to other legislation that stipulates that those who can have free legal assistance must accept the lawyer who is appointed to them.⁵

Apart from voluntary legal assistance, there is also mandatory assistance, stipulated in the Criminal Procedure Code. This type of assistance applies only for the defendant, and the criminal judicial body is mandated to provide assistance if he cannot afford to. Not being provided with legal assistance is a breach of procedural regulations and all the acts drawn up can be annulled.

According to article 171, the accused person or defendant has the right to be assisted by a defender all throughout the criminal investigation and the trial, and the judicial bodies must inform him/her of this right.

Judicial assistance is obligatory when the accused person or defendant is a juvenile, military in service, military with reduced service, called-up reservist, student of a military educational institute, held in a re-education center or in a medical-educational unit, when arrested in another case, or when the criminal investigation body or the court appreciate that the accused person or defendant could not defend himself/herself, as well as in other cases stipulated by the law. During the trial, judicial assistance is obligatory, also in the cases in which the law provides for the offence committed life detention or imprisonment for 5 years or more. When judicial assistance is obligatory, if the defendant has not chosen a defender, measures are taken for appointing one *ex officio*.

When judicial assistance is obligatory, if the chosen defender does not appear, without reason, at two consecutive summons, according to the case, at the date established for an action of criminal investigation or at the date settled for trial, thus creating difficulties for the development and solution of the criminal trial, the judicial body appoints an *ex officio* defender to replace the chosen one, granting him/her the necessary time to prepare the defense, which may not be shorter than 3 days, except the solution of requests regarding preventive arrest, when the due time may not be shorter than 24 hours.

The delegation of the *ex officio* defender ceases once the chosen defender appears. If the defender is absent from the trial and cannot be replaced, the case is postponed.

When judicial assistance is obligatory, the criminal investigation body will ensure the presence of the defender at the defendant's hearing. In case the defender of the accused person or defendant is present at the performance of a criminal investigation act, this will be mentioned and the act is also signed by the defender. The arrested accused person or defendant has the right to get in touch with the defender, the confidentiality of talks being ensured.

Article 173 stipulates legal assistance for other parties, assistance which is not mandatory. The defender of the victim, of the civil party and of the party bearing the civil responsibility has the right to draw up requests and statements. During the trial, the defender exerts the rights of the party that he/she assists.

When the court considers that, for certain reasons, the victim, the civil party or the party bearing the civil responsibility cannot handle their own defense, it orders, *ex officio* or upon request, enforcement of the measures for appointing a defendant.

Statements of the witnesses as means of evidence

The first provisions that deal with the witness' rights and liberties, but also with his/her obligations are from article 78 to article 86. Article 78 offer a definition of what a witness is: the person who knows of any fact that may lead to finding the truth in the criminal trial.

There are people who cannot be witnesses and who may not declare what they know if they prefer it so. The person obliged to keep a professional secret cannot be heard as witness in relation to facts and circumstances that he/she learned about while exerting his/her profession, without the

⁵ W.J. Ganhof van der Meersch, "Convention europeene de droits de l'homme", 1983, p.148.

approval of the person or institution. Also, the accused person or defendant's spouse and close relatives are not obliged to testify as witnesses.

The quality of witness comes before that of defender, in relation with the facts and circumstances that a person learned about before becoming defender or representative of one of the parties. Also, according to article 82 the injured person may be heard as witness, if he/she does not constitute himself/herself as a civil party and will not take part in the trial as victim.

Also, the Criminal Procedure Code stipulates the possibility for a juvenile to be heard as a witness. Up to 14 years old, his hearing will be conducted in front of one of his parents or of his tutor.

The witness is obliged to come at the place and on the day and hour mentioned in the summons and has the duty to declare everything he or she knows in relation to the deeds of the case. The witness is first asked about his name, surname, age, address and occupation.

After the identity of the witness is confirmed he/she will be asked whether he/she is a spouse or relative of any of the parties and about his/her relations with the latter, as well as whether he/she has suffered any damage as a result of the offence, so that the risk of any prejudice against the defendant is eliminated.

Before being heard, the witness will take the following oath: "I swear to tell the truth and not to hide anything that I know. So help me God!" The witnesses who, from reasons of conscience or religion, do not take the oath, will utter the following formulation in front of the court: "I oblige myself to tell the truth and not to hide anything that I know."⁶

After taking the oath the witness will be informed that, by not telling the truth, he commits the offence of false testimony. The witness is informed about the object of the case and the deeds and circumstances for whose proof he/she was proposed as witness, being asked to declare everything he/she knows in relation to them.

After the witness has given his statement, he may be asked questions connected to the deeds and circumstances that need to be acknowledged in the case, related to the parties' person, as well as to the way in which he learnt about the things declared.

If there is evidence or solid indications that by declaring the real identity of the witness or his/her place of domicile or residence the life, corporal integrity or freedom of the latter or of another person might be endangered, the witness may be given permission not to declare this information, being attributed a different identity under which to appear in front of the judicial body.

This measure may be disposed by the prosecutor during criminal prosecution and by the court during trial, upon motivated request from the prosecutor, witness or any other entitled person.

The information about the real identity of the witness is mentioned in an official report that will be kept at the prosecutor's office which performed or supervised the performing of the criminal investigation or, according to the case, at the court, in a special place, in a sealed envelope, in conditions of maxim security.

The official report will be signed by the person who handed the request, as well as by the one who disposed the measure. The documents concerning the real identity of the witness shall be presented to the prosecutor or, according to the case, to the panel of judges, in conditions of strict confidentiality. Other persons who may be heard as witnesses that were attributed another identity are undercover investigators.

According to the Criminal Procedure Code there are special modalities of hearing the witnesses who are protected. If there are appropriate technical means, the prosecutor or, according to the case, the court may allow the witness to be heard without actually being present at the place where the criminal investigation body is or in the room where the judgment takes place, through technical means.

⁶ Criminal Procedure Code, article 85.

Recording the witness' statement will be performed in the presence of the prosecutor. The witnesses may be heard through a television network, with the image and voice distorted so as not to be recognized. The statements of the witnesses heard are recorded through technical video and audio means and are rendered entirely in written form.

Apart from his obligations of being present on the day decided by the criminal investigation body and to declare what he knows related to the facts and circumstances that he witnessed, he has also rights: according to article 68 Criminal procedure Code he is entitled to protection against violence and threats like any other person who gives statements during the trial, the right to ask that his statement (given so that he considers it to be accurate) is recorded and to refuse to answer any questions which are unrelated to the cause, and he has proprietary rights, the right to be awarded legal expenses, travel and boarding expenses and the income which he lost from his workplace because he had to be present in court.

Legal assistance of a witness during the criminal trial

As presented above, legal assistance is stipulated for the parties of the criminal trial, and especially for the defendant there are cases of mandatory assistance. Introducing a norm which would regulate legal assistance for a witness is necessary so that the fundamental principles of the criminal trial are upheld.

Article 81 of the Criminal Procedure Code contain the provisions according to which a juvenile can be a witness in a criminal trial, if he is up to 14 years old, but his hearing will be conducted in front of his parents, tutor or a person to whom he/she has been given for upbringing and education.

There are two problems which can arouse from this legal disposition. On the one hand, there is no mention of a lawyer in this article. The parents, the tutor or the person to whom the education of the juvenile has been given are sufficient to guaranty the rights and liberties of the juvenile because they do not have the necessary judicial training.

A lawyer is necessary when a juvenile is questioned, especially taking into consideration the fact that the people involved are emotionally involved and professionally unprepared to protect the interests and safety of the juvenile involved in the criminal trial.

On the other hand, only juveniles who are up to 14 years old can be questioned with the obligation of the parents to be present. There is no mention of juveniles who 14 and older. According to the Penal Code, minors who are between 14 and 16 is presumed to be responsible, but it is necessary to prove this through evidence before he can be held responsible for his actions.

If defendants who are minors between 14 and 16 years old need to be proven responsible for their actions, then why should witnesses of this age be considered to be responsible for what they are declaring? A lawyer needs to be present to these questionings so that the accuracy of these declarations be established correctly and so that these minors are not influenced in any way.

Juveniles' mental stability can be altered by what they have seen, they can be frightened and confused and they certainly do not have any knowledge of legal regulations, they cannot know what are their rights and liberties, therefor they should have somebody qualified to represent their interests.

The Criminal Procedure Code stipulates confrontation as a method to verify the veracity of statements. Articles 87 and 88 state that if there are contradictions between the declarations of persons heard in the same case and if it is necessary for the clarification of the case, the respective persons are confronted, the persons confronted are heard on the deeds and circumstances in relation to which the previous declarations contradict each other. The criminal investigation body or the court may approve that the confronted persons ask one another questions. The declarations made by the confronted persons are written down in an official report.

These confrontations can be emotionally unstable for all the participants involved, they can be accused of offences and so the presence of a lawyer is highly necessary to keep the defendants,

injured and civil parties and witnesses, especially if they are minors, well aware of their rights and obligations.

Mandatory legal assistance is stipulated in article 171 of the Criminal Procedure Code and is applicable only to defendants. There is a disposition that states that if a defendant is a minor then the legal assistance is mandatory. If legal assistance is mandatory for a defendant who is a juvenile, then a witness who is a juvenile should be granted the same procedural protection. Legal assistance should be mandatory for all juveniles, without distinction to whether they are defendants, injured or civil parties or witnesses.

Another issue that should be discussed is that during the criminal investigation or during the judgment, a juvenile witness can become a defendant in the current trial or in a different one by declaring something that is inaccurate or by not declaring everything he/she knows.

After identifying the witness, it is made known to him that if he does not declare everything he knows or what he declares is not the truth, than he commits the offence of false testimony, or perjury.

According to the Criminal Code, the offence of false testimony is the act of a witness who, in a criminal, civil or disciplinary cause or in any other cause in which witnesses are heard, makes false statements, or does not tell everything he/she knows regarding the essential circumstances concerning which he/she was questioned, shall be punished by strict imprisonment from one to 5 years.

Apart from the offence of perjury, a witness, due to the fact that he/she has to declare everything he/she knows, may reveal facts or circumstances that can incriminate him, whereas the defendant is not bound by this obligation.

If, in light of his testimony, a witness incriminates himself or commits perjury then he becomes a defendant and has the right to be assisted by a lawyer. The witness can become a defendant in the criminal trial in which he was declaring or in a separate one.

Through his statements a witness can become an author, accomplice, instigator or coauthor. If the penalty is higher than 5 years than legal assistance is mandatory.

Also if the witness who becomes a defendant is a minor, then the legal assistance is mandatory no matter of the punishment. In the case when legal assistance becomes mandatory, any statement given without this assistance cannot be used in the trial due to procedural breaches, because all statements must be signed by the advocate as well as the defendant.

Another reason for which legal assistance should be accessible for witnesses is article 6 of the European Convention on Human Rights which states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The minimum rights guaranteed are also outlined: to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have adequate time and the facilities for the preparation of his defense; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

This article refers to a person against whom a criminal charge exists, the defendant, but it has proven that a witness can become such a person through his statements, thus legal assistance should be available and also permitted to the witness, this right should be recognized for all those involved not only the parties.

It can be argued that the presence of an advocate of the witness is most needed during the criminal investigation, due to the fact that this phase is not public and it may present a danger to the rights of the witness, he can incriminate himself, he can give a less than objective testimony due to error, or under the influence of the criminal investigation bodies.

This provision does not preclude, however, the witness' right to have legal assistance of a lawyer throughout the criminal process. Given the fact that all processes are presumed to be public, the lawyer shall be entitled to attend the public processes in which his client as a witness makes statements, obviously, having procedural right.

Despite being able to be present, in theory, at the actual trial the advocate cannot intervene in favor of his client, cannot speak on behalf of the witness because a witness' testimony is given, exclusively, in consideration of his person. The testimony is important to the trial because it is a personal recollection of the facts and circumstances which occurred. During the trial the witness can incriminate himself and he can commit perjury, if he does not have the legal assistance of an advocate, who is qualified and who knows the law.

Despite the fact that a witness does not have the duty to inform the criminal investigation body of his own initiative, the quality of a witness is gained once he/she is called to give a statement, if the criminal investigation body discovers that the witness had knowledge of a crime having been committed and did not inform the proper authorities than the witness may be accused of committing the crimes regulated in articles 170 and 262 of the Criminal Code: non-denunciation (the act of non-denunciating the commission of any of the offences provided in art. 155-163, 165, 166¹, and 167 shall be punished by strict imprisonment from 2 to 7 years.) and the non-denunciation of certain offences (the act of not denunciating the commission of any of the offences provided in art. 174, 175, 176, 211, 212, 215¹, 217, 218 and 276 shall be punished by strict imprisonment from 3 months to 3 years).

According to the New Criminal Procedure Code offers the witness a little more protection than the present one. When a person gives statements his/her health should be taken into consideration. Concerning this aspect, the New Criminal Procedure Code stipulates that if during a hearing of a person, he/she accuses excessive tiredness or the symptoms of a disease which affects his/her physical or psychological capacity to participate at the hearing, then the judicial body must put a stop to the hearing and takes measures so that the person is consulted by a medic.

The principle of loyalty of administration of evidence is also outlined in the New Criminal Procedure Code. Therefore, it is forbidden to use violence, threatening or other means of constraint as well as promises in the scope of obtaining evidence (in this case a statement from a witness).

Tactics or methods of hearing the witnesses or parties which may affect a person's ability to remember or to consciously and voluntarily relate the facts, the interdiction applies even when the person gives his/her consent to be heard using such a method.

Also, it is forbidden for the judicial bodies or other persons who act on their behalf to provoke a witness to commit or to continue to commit a criminal act in order to obtain new evidence. The statements which have been obtained through torture cannot be used during the criminal trial.

Article 118 is introduced in the New Criminal Procedure Code, as an element of novelty and states that a witness' statement cannot be used against him/her in a criminal trial against him/her.

The European law also protects the witnesses through articles that regulate the right to a fair trial, the right to be protected against torture, inhumane treatments or unlawful prosecution.

There have also been opinions which state that a witness should not be legally assisted during the prosecution or the judgment. Such is the opinion of the prosecution office of the High Court, according to which a witness does not have to be assisted due to the fact that he is not a party in the criminal process, and if a new criminal trial begins against the witness, because of his/her statements, then the witness, as a defendant is entitled to legal assistance.

Conclusions

The witness is an important factor in determining the outcome of a trial. His/her statements can shed light on the events which took place and can assist the courts in determine whether a crime has been committed and whether the defendant is the one at blame or not.

The European Convention of Human Rights guarantees the right to a fair trial. Legal assistance plays a big role in a trial. Despite the fact that the witness is not a party in a trial, this does not entail that he/she is not entitled to be assisted.

Through his/her statements, a witness may commit perjury and so a new criminal trial may begin against him/her or he/she may incriminate him/herself and so he/she may be included in the existing trial as a coauthor, instigator or accomplice.

There are opinions for and against the legal assistance of a witness in a criminal trial. The main reasons against are the fact that the witness is not a party in the trial and that, if he/she commits perjury and a new trial begins then the witness beneficiaries of all the rights the defendant has.

The New Criminal Procedure Code includes some dispositions which offer the witness a few more rights: statements given by him/her cannot be used against them, they are protected against torture or any method which may affect their ability to correctly remember the events.

To conclude, despite the fact that the witness is not a party in the criminal trial, he/she should be legally assisted during the criminal trial, in order to insure the protection of the right to a fair trial.

References

- Neagu Ion, "Tratat de procedură penală. Parte specială.", editura Universul Juridic, București, 2009;
- Crișu Anastasiu, "Drept procesual penal", editura Hamangiu, București, 2011;
- Gheorghe Dumitru, "Drept procesual penal", editura Universul Juridic, București, 2011;
- Volonciu Nicolae, "Tratat de procedură penală. Parte specială", editura Paideia;
- Theodoru Gheorghe, "Tratat de drept procesual penal", editura Hamangiu, 2008;
- Zarafiu Andrei, "Procedură penală, Legea 202/2010. Comentarii și soluții", editura C.H. Beck, București, 2011;
- Dongoroz Vintilă, „Explicații teoretice ale Codului de procedură penală român”, ed II, C.H. Beck, 2003, București;
- Stoica O., "Rolul avocatului în realizarea dreptului de apărare a cetățenilor", R.R.D. nr. 3/1972;
- Leone G., "Dritto procesuale penale", ed. VII, Neapole, 1968;
- Ganhof van der Meersch W.J., "Convention europeene de droits de l'homme", 1983.