PROTECTION OF THREATENED WITNESSES

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Abstract

First, I wish to make a presentation of historically institution and subsequently parallels between past and current regulators to expose whether the legislature has reached desire - namely ensuring effective protection of witnesses threatened and vulnerable. Also, I decided to analyze the topic from the perspective of the criminal procedural provisions of Law 682/2002 and witness protection, which are republished to expose the conditions and criteria by which to ensure this status. I also want to present besides theoretical and practical ways in which the National Office for Witness Protection gives effective legal provisions. Not least, I will bring criticism of current regulation and not by law ferenda proposals.

Keywords: *hear witnesses, protective measures, threatened witness, danger, vulnerable witnes.*

I. Introduction

One of the most important guiding ideas of the criminal trial is finding out the judiciary truth, meaning the achievement of consistency between the surrounding reality at the time of an offense and conclusions the judicial bodies reached following the submission of evidence in criminal proceedings.

At the foundation to establishing the truth in a criminal case are witness statements that are useful to judicial bodies so that any person who has committed an offense provided under the criminal law to respond according to his/her guilt and no innocent person may be criminally prosecuted.

Relative to this category of procedure subjects, as the jurist philosopher Jeremy Bentham sustains, in conducting a difficult criminal trial, the witnesses are believed to be called the eyes and ears of the justice. The statement of these procedure subjects is particularly critical in the proceedings, and not infrequently the courts have tipped the scales of justice based on these confessions. Regarding the testimony, Alfred Binet said that a testimony can be accurate and also completely false.

In criminal proceedings several people can be heard, witnesses also being included in their category. Pursuant to provisions under Art. 114 C.p.c. *any person who has knowledge of facts or circumstances which constitute evidence in criminal case can be heard as a witness.*

In the fight against organized criminal groups in particular witnesses are the only people who can provide conclusive evidence to the judicial bodies so those who commit such crimes to be held criminally accountable. Very often, those who violated the legal compliance relation are trying to prevent these witnesses to testify, resorting to teasing or even aggressive techniques and methods. Given the fact that these witnesses fear for their or their family life or health, call for support from the state against blackmail, intimidation which they could be exposed to.

Witness protection is the process whereby procedural and non-procedural specific witnesses protection measures are ordered for those who testify in criminal proceedings in order to efciently ensure their safety - and sometimes for their relatives - before, during and after their testimony[1].

II. Generalities about the status of threatened witness

Threatened witnesses institution is not a new aspect in the new coding but it should be noted tha fact that substantial changes have been made that make the new provision to enjoy the clarity of the legislature.

The legislature intends to qualify this category as being a distinct one when considering how the magistrate will decide upon assessing the evidence. Thus, the samples do not have a predetermined value and they are subject to free assessment of the judicial bodies following consideration of all the evidence in the case. However, inasmuch as the judge considers that in that case a solution of conviction, waiver of punishment or sentence postponment should be applied, judgment can not be based mainly on statements of the investigator, of collaborators or *protected witnesses*.

We welcome the position that the legislature sought to amend the legal provision and regulate the fact that these statements should be viewed with skepticism and to be useful in order to establish the truth only to the extent that they can be corroborated by other evidence.

Separate from the provisions that we find in the Code of Criminal Procedure we observe that Law 682/2002 on the protection of witnesses also ensures the protection and assistance of witnesses, of whose

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[1] Remus Jurj-Tudoran Special surveillance methods and protection of witnesses in complex criminal cases, C.H. Beck Publisher.

physical integrity and liberty is threatened. We find that there is no overlap between the two rules invoked, the provisions of the special law being more comprehensive and useful to supplement the provisions of the common law.

III. Methodology of granting the status of threatened or vulnerable witness

We note that we will analyze the institution subject to discussion on one hand in the light of the provisions of criminal procedure and on the other hand considering Law 682/2002 on witness protection. At the same time, we make reference to the old provisions of the criminal procedure code to expose the innovations brought by the legislator to the procedural legislation.

Thus, the witness is granted this status on the suspicion that life, physical integrity, freedom, property or professional activity or family member[2] thereof may suffer changes following the elements is about to provide to judicial bodies.

The institution was introduced in the old criminal procedure code by Law 281/2003 and it was governed under Articles 86^1-86^5. We find that on one hand the legislator has broadened the scope of the situations in which a threatened witness status may be attributted, namely when the goods or professional activity of the witness could be in danger and on the other hand extension of the effects is only limited to family members and not on any other person, as it was stipulated before.

According to the special law the notion of witness means the person who is in one of the following situations:

1. is a witness, according to the Code of Criminal Procedure, and by his/hers statements providing information and data crucial for finding the truth about serious crimes or which contribute to prevention or recovery of major damage that could be caused by committing such offenses;

2. without a procedural capacity in the case, by crucial information and data he/she contributes to uncovering the truth in cases of serious crimes or to prevent major damage that could be caused by committing such offenses or their recovery; this category includes a person who is a defendant in another case;

3. he/she is executing a custodial sentence and, through crucial information and data that he/she provides, he/she contributes to uncovering the truth in cases of serious offenses or to prevent or to recover major damage that could be caused by committing such offenses.

Also, according to the special law, the protected witness is a witness, his/her family members (spouse, parents and children) and close persons thereof (the person to whom the witness is connected through strong affective relationships).

We find, therefore, that Law 682/2002 on witness protection conferres this quality to more categories of people, expanding the scope of those who will contribute to finding the truth in a criminal case and who is necessary to benefit from state protection.

The provisions of the criminal procedure are consistent with the considerations of the decesions of the European Court of Human Rights which state that Article 6 of the Convention does not explicitly requires consideration of the interests of witnesses in general and of victims of the crime in particular. However, their life, freedom or safety may be jeopardized, as well as other interests that fall within the scope of art. 8 of the Convention. Such interests of victims and witnesses are protected in principle by other substantial provisions of the Convention, which means that the signatory states should organize their criminal proceedings in such a way that those interests are not put unduly at risk[3].

Leaning over the provisions of criminal procedure, we find that the legislature does not confer the status of threatened witness to a person depending on the seriousness of the offense committed in that case, so the institution can apply whatever penalty provided by law for the offense concerned.

The literature states the view that the notion of threatened witness or vulnerable witness should be extended to co-accused who is willing to provide statements that bring criminal liability of the other perpetrator because: in factual terms, there is no distinction between actions that could be exercised against him/her and the consequences he/she might suffer in comparison with those brought against a witness.[4]

Pursuant to provisions under Art. 113 C.p.c. the injured party and the civil party benefitis from protection measures regulated by the legislator for threatened or vulnerable witness, when the conditions provided by law are met. Also, undercover investigators and collaborators with real identity or another assigned identity can be heard in criminal proceedings, taking into account the special

[2] according to Article 177 C.C. a family member means: ascendants and descendants, brothers and sisters, their children, and people became by adoption law, such relatives; husband; persons who established relationships similar to those spouses or betwen parents and children where they live toghether. The provisions of criminal law concerning family member within the limits provided in par. (1) shall apply in the case of adoption, and its offspring or adopted person in relation to natural relatives.

[3] See ECHR judgment of 26th of March 1996 in Case Doorson v. The Netherlands, par. 70.

[4] Nicholas Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci Victor widow, Teodor Viorel Gheorghe Catalin Mihai Chirita new Code of Criminal Procedure, commented, Hamangiu Publishing House, Bucharest 2014, p. 311.

provisions where threatened witnesses are heared. It is stated in the legal doctrine that the same protection should be given to the experts.

IV. Protection measures that may be ordered for witnesses

During the criminal proceedings, when the witness is given the status of a threatened person, the prosecutor, will compulsorily have to apply the following steps to protect the life, integrity or property of the person providing relevant information to the judicial bodies:

witness home or temporary housing surveillance and security providing;

escorting and securing witnesses or members of his family while traveling;

Identity Data Protection, by giving a pseudonym the witness will sign the testimony with;

examination of the witness without him/her present, by means of audiovisual, transmitting with voice and image distorted when other measures are not sufficient.

These safeguards regulated by the legislature are aimed on the one hand to anonymisation of witness so the suspect or defendant or intermediates thereto may not recognize the witness person such as to be unable to exert pressure or threats thereof or worse than this in order not to threaten his/her life or integrity.

Analyzing the covered measures we note that we face two hypotheses relative to the person of the witness. Thus, the first assumption is that the identity of the witness was never known by the suspect or defendant and in such case a pseudonym should be granted and also his/her hearing by audiovisual means and the second hypothesis is that the real identity of the witness is known and pressures or threats have been exercised thereof or on family members, and in such circumstance arises the issue of his/her protection, in which sense it is required to be supervised and accompanied to ensure a permanent protection.

Under the special law, the legislator lists additional safeguards and specialized assistance, such as witness protection in a state of detention, arrest or serving a custodial sentence, in conjunction with the bodies administrating the detainment, identity change, change of appearance, reinsertion in another social environment, professional retraining; job change or security; providing an income until inding a job.

Safeguards consisting of surveillance and guarding the house of the witness or providing a temporary shelter and companionship or providing protection of the witness or members of his family during travel will be enforced by people who work in the National Office for Witness Protection that is an operating unit of the Ministry of Internal Affairs, directly subordinated to the General Inspectorate of Romanian Police having general jurisdiction, by the police units operating in that case, prison administration, educational center or detention center.

Looking at both the provisions of the criminal procedure law and the special law rules, we raise the question whether this status of threatened witness will be assigned only with the witness approval or the judicial body could do it even against his/her will. We find that Law 682/2002 states that the consent of the witness is required in order to be included in a protection program. In our opinion, it is also necessary the manifestation of will in a positive sense by the witness where he/she was granted refugee status under the rules of criminal procedure, because this one can assess clearly whether life, integrity, goods, professional activity could be threatened by the information he/she provides in a criminal investigation.

V. Judicial bodies competent on the status of threatened witness

Judicial bodies competent on granting this status to the witness are the prosecutor, judge of preliminary chamber or trial court depending on the stage of the proceedings in which lies the criminal trial at the time the witness is exposed to one of the situations presented by law. Thus, a request to the judge for rights and freedoms requesting the arrangement of such a measure or verification of its legality will obviously be rejected as inadmissible.

We shall note that the prosecutor may order the protection of the threatened witness either ex officio or upon the request of the witness, of one of the parties or a procedural subject. It will decide by a reasoned order that will not be found in the case file because of the confidentiality reasons. Thus, if the witness would be given a pseudonym, the identity and actual address will be mentioned in a register which also will be kept under special conditions.

The protection measure taken in the prosecution stage will be maintained as long as the cause that determined its establishment exists and the prosecutor will have the obligation to check at reasonable intervals whether it is still necessary. If the threatening condition did not stop, the protection measure can be maintained throughout the criminal proceedings. Drawing a parallel with Law 682/2002 and Government Decision no. 760 of 14 May 2004 approving the regulation implementing Law no. 682/2002 on the protection of witnesses we find that the measure can be maintained as long as necessary, even after the completion of criminal proceedings.

In the preliminary chamber procedure we find that this measure may be ordered by the judge for preliminary chamber ex officio if it finds that there was a threat for the witness or upon the notification

of the prosecutor. We find as objectionable this legal text by the fact that on one hand the witness, parties or injured person is/are not conferred with the possibility to require the implementation of protection measures and on the other hand we deem impossible the hypothesis according to which the preliminary chamber judge finds that the witness is in one of the situations where protection is required, given that in this procedure no evidenceis administered. Perhaps the legislator has given an opportunity to make such requests only to the prosecutor and preliminary chamber judge, because at the time when the criminal code of procedure entered into force, the defendant only and not the other parties or the injured person could participate in the preliminary chamber procedure. To the extent that such a situation occurs, in our opinion, the witness may make a request to the preliminary chamber judge and if he shall deem appropriate, he will take this measure of protection.

In practice, the courts[5] before the entry into force of the Criminal Procedure Code, it was decided that the request of the petitioner, before the court, to be included in the Program of witness protection is inadmissible because the law stipulates cumulative fulfillment of the conditions laid down in art. 4 of Law 682/2002 and governs a special procedure in this respect, initiation of which falls within the jurisdiction of the criminal investigation body or of the prosecutor verifying the compliance with the requirements of law in order to formulate a proposal for inclusion in the program, the Court having no capacity from this perspective.

In front of the court, the legislator rightfuly understood to establish the same holders as in the prosecution stage except the suspect given the fact that this procedural subject cannot participate in this capacity during trial. The ex officio court may also order one of the protection measures listed above and additionally may decide to not make public the trial session at the hearing within which the witness shall be heard.

On the termination of these protection measures, we note that, in the prosecutor's case only, the legislator stated the obligation to check if the conditions that determined the protection measures shall be maintained and that the possibility for the trial court to rule on their termination was no regulated. We believe that in such a situation, the judge is competent to order, pursuant to art. 52 and art. 351 par. 3 Ccp because, after the case came within the competence of its administration, any measure can be taken by the court only, being inadmissible - for reasons of independence of the magistrate in the settlement - for another body to decide the case, even on incidental matters[6].

Depending on the person making the request, we note that the legislator establishes distinct ways to prove that the witness is in threat. Thus, if the prosecutor makes the proposal, the request shall contain the name of the witness to be heard during the trial and the actual reasons on the severity of the threat and the need for the measure. Instead, if the request is made by the other holders, the court may order the prosecutor to conduct some research on the merits of the request for the establishment of protection measures. That means that during the trial, the prosecutor may perform prosecution activities that will be considered by the trial court.

The procedure is conducted in a closed session, in the presence of the prosecutor and in the absence of the person who made the request. The trial court will decide in a ruling that is not subject to appeal and it shall be kept in confidence in a specially provided place at the court.

VI. Hearing of the protected witness

Both in the criminal prosecution and during the trial, the witness whom was given a protected identity will be heard by audiovisual transmission means without having to be physically in the office of the criminal investigation body or the court. Specifically, he will be in another room or location and a live voice distorted and blurred image transmission will be performed.

The practical application of these procedures require certain organizational measures, such as:

determining the location (room) in which the witness will be in order to be heard and making the connections between the equipment in the session room / room for the hearing of the criminal investigative body and the one in the location where the witness is;

prior adjustment of the equipment prior to distort the voice and image, making thus impossible the recognition of the person; the statement and questions must be understood;

if both rooms are in the same building, the protected movement of the witness, so as not to be noticed / recognized when entering / exiting the building[7].

The second paragraph of article 129 of the Criminal Procedure Code which was repealed provided that *at the request of the judicial body or of*

[5] www.legalis.ro – see decision no. 2955/16.09.2009, Iccj, Criminal Division.

[6] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminial Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 315.

[7] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 316.

the heard witness under par. (1) a probation officer can participate in the hearing, who has the obligation of keeping the professional secrecy regarding the data he acknowledged during the hearing. The judicial body has the obligation to inform the witness on the right to request a hearing in the presence of a psychologist.

Therefore, by repealing this text we note that the hearing of the witness will not be attended by a probation officer or psychologist, in our opinion the reason of the legislaton being that of limiting the number of persons who become aware of the identity of the person heard.

After the witness is heard by the judicial body, the main proceeding subjects, the parties or their lawyers can address questions to the witness. According to the legal provisions, this hearing of the witness is registered through technical means and is reproduced entirely in writing. By comparison with the normal procedure for hearing the witness we note that the registration of the statement is optional and remains at the discretion of the prosecuting authority or upon the express request of the witness.

This statement shall be signed by the prosecuting authority, the prosecutor, the judge for rights and freedoms or the presiding judge and the witness and will be kept as confidential at the prosecutor's office or at the court. We find that the only situation in which the witness could be heard by the judge for freedoms would be in the anticipated hearing procedure.

The media on which the witness statement was recorded shall be kept as confidential at the prosecutor's office and after the decision to send to trial the defendant this mean will be kept at the court so that only persons authorized to take note of it. Confidentiality should be also considered by court personnel from the time of the request in order to avoid those interested in finding out the identity of the witness. Therefore, the request must not be filed to the public file of the case, but a separate volume, non-public, kept in a special place, must be made[8] .

To the extent that such information on the real identity of the witness is disclosed, individuals who are guilty of this incident are subject to criminal liability under the accusation of disclosure of confidential or nonpublic information (art. 304 Criminal Code), negligence in keeping the confidentiality of information (art. 305 Criminal Code) and, in the circumstance of offenses committed intentionally, an offense on the undercover investigator, the protected witness or person included in the Witness Protection Program was committed, the punishment is harsher[9].

VII. The evidentiary value of threatened witness statements

The statement of the threatened witnesses enjoy divisibility but not retractability. Thus, the judicial bodies can appreciate as valid certain statements made by the witness but if such witness withdraws its statements, declaring other things, he might respond in terms of criminal law. We find that this category of statements is not subject to the principle of free assessment of evidence, but according to art. 103 par. 2 Code of Criminal Procedure, the decision to convict, waive the sanction implementation or defer the sanction cannot rely decisively on the protected witness statements.

Given that at the beginning of the study I mentioned that these provisions can be applied to investigators with real or protected identity and to collaborators, the injured person, civil party or experts, then in such case, too, their statements shall not be decisive in assessing the conviction of a person. Thus, in order to avoid mistrials based on such evidence and considering the derogating conditions of hearing these people, that restrict to some extent the possibilities of defense, the law restricted in its turn th evidentiary value of the statements of the investigators, collaborator, protected witness[10].

In an older practice, the European Court held that a breach of the art. 6 para. 1 and para. 3 letter d of the European Convention occurred, as anonymous testimonies were the sole basis of conviction, after they had represented the sole ground for prosecuting. Or, during no stage of criminal prosecution or trial the plaintiff had no opportunity to question the anonymous witnesses, while the absence of any confrontation deprived him of the right to a fair trial[11].

Given the recent jurisprudence of the European Court, I believe that *mutatis mutandis*, the rule that

[8] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 315.

[9] Art. 20 of Law 682/2002 (1) The act of disclosing intentionally the true identity, domicile or residence of the protected witness and other information that may lead to his identification, whether they are likely to endanger the life, physical integrity or health of the protected witness, shall be punished with imprisonment from 1 to 5 years. (2) the punishment is imprisonment from 5 to 10 years if: a) the act was committed by a person who had knowledge of such data while performing his duties; b) a serious physical or health injury was caused to the protected witness. (3) If the act resulted in the death or suicide of the victim, the punishment is imprisonment from 15 to 25 years. (4) If the act in para. (2) let. a) is committed by negligence, the punishment is imprisonment from 2 to 5 years.

[10] Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroşanu, Georgiana Tudor, Daniel Atasiei, Corina Voicu, Cristinel Ghigheci, Victor Văduva, Teodor-Viorel Gheorghe, Cătălin Mihai Chiriţă, New Criminal Procedure Code, commented, Publisher Hamangiu, Bucharest 2014, p. 318.

[11] See E.C.H.R., Saidi versus France, decision dated 20 September 1993, para. 44.

the court cannot rely a conviction exclusively or decisively on statements of the witnesses that could not be heard in court (exclusively or decisively) suffered a slowdown in Europe and in the protected witness matter, so that a solution of conviction based on those statements is not considered by the court as incompatible with art. 6 para. 3 letter d of the European Convention as long as the inconveniences resulted from the protection of witnesses are counterbalanced by other available procedural guarantees; one must consider that art. 103 par. 2 NCCP took over the conventional standard before the Al- Khawaja and Tahery jurisprudence, and consequently, at the moment the law provides a standard of protection which is superior to the conventional one that is binding on national courts[12].

VIII. Comparative aspects with other states and threatened witnesses institution regulation at EU level

The threatened witness institution is based on the Resolution of the European Council dated 23 November 1995 on the protection of witnesses in the international organized crime fight, the Resolution of the European Council dated 20 December 1996 on individuals who cooperate in the judicial process in the fight against organized crime and Recommendation of the European Council No. R (97)13 on the intimidation of witnesses and the rights of defense adopted on 10 September 1997 by the Committee of Ministers and addressed to Member States.

Most EU Member States have regulated provisions on the protection of witnesses in the Criminal Procedure Code or special laws. Poland has instituted an extraprocedural witness protection program and where the health or life of key witness or the person closest to him/her are in danger they can be assisted by state organs to change place of residence, service, or they may receive new identity documents in order to leave the country or even perform surgical interventions.

Switzerland considered when discussing the new unified code of criminal procedure that is necessary to have provisions on the protection of witnesses in a federal criminal procedure code. As such, it considers that it is necessary to consider the interest of finding the truth rather than the necessity of a physical protection of witnesses.

In the United States, starting from the extent of intimidation of witnesses and the enormous impact it has on solving some major criminal cases, in 1970 the Control of Organised Crime Act was adopted, which laid the foundation for Federal Protection program, now called the Witness Protection Reform Act of 1984, which is the source of programs worldwide.[13]

IX. Conclusions

In the legal doctrine[14]was raised the issue on the witness who received a new identity according to the old criminal legislation and who participates in the criminal proceedings after 1 February 2014. After the entry into force of the new Criminal Procedure Code, it is mandatory for the court vested with prosecution of such cases to review the situation of the witness to see whether protection measures regulated by the legislator should be taken, given that the laws have changed.

In a recent interview given to a publication known among legal practitioners[15], the director of the National Office for Witness Protection has provided some interesting information about the activity of the institution he leads. Thus, at the moment, in Romania 60 witnesses, Romanian and foreign citizens (70% of Romanian citizens were resettled in Romania, the remaining 30% in other countries) are offerred protection. Identity of the individuals, most of them officers of the Interior Ministry, is not public, because through them interested persons may identify witnesses who are offered protection. Referring to the site of this Office, we find that indeed, the only information available to us at the contact details is the address where the institution has its headquarters.

The person who enters the program may be forced to change jobs, and the state although it has a partnership concluded with the Ministry of Labour cannot compel an employer to relocate the witness in that institution, the Office only providing support based on the activity to be performed by the witness. At the same time, he and his family benefit from health insurance and if problems occur and visits to a doctor are required, the Office will initiate actions so as to be seen by a specific doctor, while the identity is further protected. Also, the protected person and family members will receive financial support until the witness finds another job. In order to ensure full protection, he can benefit from holding a lethal defense weapon and the contact with members of the Office shall be held by a single contact person.

We tried in this study to provide information on the threatened witness institution according to the

[12] Criminal Procedure-General part-Mihail Udroiu, Publisher C.H.Beck, Bucharest 2015, p. 316.

[13] Gheorghiță Mateuț, Protecția martorilor.Utilizarea martorilor anonimi în fața organelor procesului penal. Publisher LuminaLex, Bucharest, 2003, p. 72.

[14] Bogdan Micu, Comparative analysis of threatened witness institutions, respectively witness with protected identity and transitional situation arisen after the entry into force of the New Criminal Procedure Code, in the magazine Dreptul No.1/2016.

[15] http://www.luju.ro/institutii/politia-romana/secretele-protectiei-martorilor-casa-masa-bani-arme-restrictii?pdf

current regulations and, making special reference both to Law 682/2002 and the old Criminal Procedure Code, to criticize the legal provisions when it was imposed, and also to welcome the position of the legislator when adapted the procedural rules in the light of the European Human Rights Convention

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