HEARING AS A WITNESS THE PERSON AGAINST WHOM CRIMINAL CHARGES MAY BE FILED

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Abstract

In the present study we address the issue of hearing as a witness, during the criminal trial, the person against whom, when considering the evidence included in the file, a charge could be pressed for a criminal offense. Referring to this issue, it is necessary to mention that the current Romanian Code of Criminal Procedure, entered into force on 2.1.2014, introduced a new article to the previous regulation which had enshrined the witness's right against self incrimination. As we shall see, however, this new regulation does not apply to the present case. In these circumstances, the solution whereby the person against whom there are reasonable grounds for his/her participating in committing a criminal offense shall not testify as a witness arises from the case law of the European Court of Human Rights (hereinafter ECHR).

Keywords: *witness, criminal charge, the right against self incrimination, the equity of the criminal procedure, the new Romanian Code of Criminal Procedure*

1. Introduction

In criminal proceedings, in order to establish the truth, witnesses' testimony represents crucial evidence, which has led some authors[1] to label the testimonial evidence in the criminal trial as proper, inevitable evidence, as it is the tool to be used in order to find out about the circumstances related to committing the offense. Similarly, in order to emphasize the importance of this type of evidence in criminal proceedings, some authors have called witnesses as *'the eyes and ears of justice'*[2].

In some cases, prescribed by law or, as we shall see, resulting from the case law of ECHR, some persons may not act as witnesses during the criminal trial. As noted in the literature[3], it is not about persons who cannot act as witnesses in any criminal case, but about persons who, in particular criminal cases and in relation to specific facts or circumstances, cannot be summoned as witnesses or about persons who, in certain cases, can be heard only in relation with specific facts or circumstances. In this regard, according to art. 115 and 116 of the Romanian Code of Criminal Procedure (RCCP), the parties and the main subjects, the person unable to consciously report facts and circumstances which are actually certified as accurate, as well as the persons who must keep either secrecy or confidentiality may not be heard as witnesses in the proceedings.

The parties and the main subjects cannot be heard as witnesses, as they are directly concerned in the judgment to be passed regarding the given case. The parties and the main subjects, as stakeholders, cannot become a witness, because no one can testify in his/her own case.

Moreover, it is justified to disqualify as witnesses those individuals who are unable to consciously report facts or circumstances which are actually certified as accurate. This regulation, introduced in the Romanian criminal procedure legislation in 2014, is justified by the actual impossibility of the person concerned to tell the truth.

As for the persons who are bound to keep secrecy or confidentiality, they cannot act as witnesses in the criminal proceedings, provided the following two conditions are met:

1. it has been found that the information considered relevant for the criminal case was obtained while practicing a profession or holding an office involving the obligation of keeping secrecy or confidentiality;
2. the secrecy or the confidentiality are to be opposable to criminal judicial bodies, according to the law.

In our opinion, there is one more category that might be added, besides the already three mentioned: the persons who may be prosecuted in the respective case. In other words, which is the procedural regime of the person who is summoned to testify, considering the fact that, against this person, the criminal prosecution bodies have specific information which shows that the respective person may have taken part in committing the offenses listed in the case file?

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[1] A. Ciopraga, *Evaluarea probei testimoniale în procesul penal* (Assessing testimonial evidence in criminal proceedings), Editura Junimea, Iași, 1979, p. 10.

[2] J. Bentham, *Traité des preuves judiciaires*, Ed. Bassage Freres, Paris, 1823, vol. I, p. 93, *apud* I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Editura Universul Juridic, Bucharest, 2014, p. 457.

[3] I. Neagu, M. Damaschin, *ibidem*.

2. Case Study

In the criminal case that resulted in undertaking this study, the Prosecutor's Office ordered the initiation of criminal proceedings for corruption, the referral to the criminal prosecution bodies being made by denunciation. The person who made the denunciation, heard as a witness, told the criminal prosecution authorities that the corruption offenses had been committed due to the complicity of a third party (hereinafter referred to as the *Witness*). Thus, it appears that, at the starting point of the criminal case, the prosecutor was in possession of a piece of information which might have led to allegations referring to the *Witness*'s committing the corruption offenses. In other words, at the beginning of the criminal prosecution, this piece of information could have been considered as reasonable grounds to allow the prosecutor to assume that the *Witness* had participated in committing the offenses being under criminal investigation.

Later, during the criminal investigation, the prosecutor invoked the claims of the denouncer while procedures related to taking preventive measures, and while evidentiary procedures, respectively, were being conducted. Thus, in the application for a writ of execution related to strip search, vehicle search and house search, the criminal prosecution body refers to the denouncer's statement, according to which the corruption offenses were committed with the help of the *Witness*. The probative relevance of this piece of factual evidence comes up from the resolution of the judge for rights and liberties to allow for the search. Also, the prosecutor refers to *Witness's* alleged offenses of material complicity in the draft submitted to the judge for rights and liberties on remand custody for the persons accused in this case.

Thus, it can be seen that the statement of the denouncer on the *Witness*'s alleged offenses of complicity to commit corruption offenses was provided to the criminal prosecution authorities ever since the beginning of the criminal investigation, being, subsequently, invoked while evidentiary procedures, and preventive measures, respectively, were being conducted.

Nevertheless, although invoked during the criminal investigation, these pieces of information do not corroborate other pieces of evidence presented in the case. In other words, when applying the principle of free assessment of evidence, enshrined in art. 103 para. (1) RCCP, considering the possibility for a witness's statement to be divisible, the denouncer's statements are likely to have been ignored by the criminal prosecution authorities.

In this context, the next step of the criminal prosecution proceedings taken by the criminal prosecution authorities was to hear the defendant accused of committing the offense of accepting bribe. In that statement, the defendant stated that the meeting in which the offense of corruption was committed was intermediated by the *Witness*. In a subsequent statement, the defendant reiterated the issues mentioned before, related to the *Witness*'s activity of intermediating the corruption offenses.

One should note that the denouncer's statements on the *Witness*'s offenses of complicity, given at the beginning of the criminal investigation, later invoked by the criminal prosecution authorities, corroborate the defendant's statements, accused of accepting bribe.

In this context, resulting from the evidence produced in the case, although there was enough evidence to consider the *sui generis* capacity of the possible participant in committing the corruption offenses, the criminal prosecution authority proceeded to hearing the alleged intermediary as a *Witness*. During the hearing, the *Witness* stated that he/she arranged the meeting between the defendants accused of corruption offenses. For this statement, the *Witness* was charged with the offense of perjury and criminal prosecution proceedings started herein.

3. Hearing the witness against which there is evidence opening up the possibility to press criminal charges against him/her

As far as the procedure for hearing the witness is concerned, there stands out a very interesting question related to the legality of the evidence in the criminal lawsuit, i.e. which is the manner of hearing a witness who may be criminally prosecuted in the case for which he/she is summoned? Thus, it is essential to determine which the procedural regime of the person summoned to testify as a witness is, given the fact that against this person, the criminal prosecution authorities have specific information which opens up the possibility that the respective person participated in committing the offenses listed in the case file.

Firstly, it is necessary to analyze the provisions of art. 118 RCCP, which enshrines the witness's right against self incrimination. In this sense, *'A witness's statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them.'* The legal text, though marginally called 'the right of the witness to avoid self incrimination' primarily focuses on the assumption that a person, initially heard as a witness, is subsequently charged with the offence for which he/she was heard (hence the accusation against that person refers to his/her committing an offense included in the case file, and not the offense of perjury). In this case, the initial witness statement cannot be used against the person accused, since it is an extension of the right awarded to the suspect or the defendant against self incrimination. For these reasons we consider that the provisions of art. 118 RCCP are not applicable to the specific case which led to the preparation of this study.

Secondly, provided that in the case file there is reasonable evidence[4] on the possibility of an offense by a particular person and the criminal prosecution authority does not inform this person about the criminal charge, preferring to engage him/her in criminal proceedings as a witness, legally bound to withhold nothing from what he/she knows and refrain from making false statements, thus placing him/her under the criminal rule provided for in art. 273 of the Romanian Criminal Code, the witness in this case is to choose between the following two procedural conducts:

1. either to state everything he/she knows and, thus, to contribute to his/her eventual indictment by being held criminally liable for the offense which is included in the case file,
2. or not to state what he/she knows or make false statements, thus being held criminally liable for the offense of perjury.

The thesis statement of 'the two options' described above is found in the practice of ECHR[5]. Also, this theory is present in the case law of the Supreme Court of Romania[6], in a different enunciation as 'the theory of the three difficult choices the person is faced with.' Under this thesis statement, it is not natural to require the person against whom there might be pressed a criminal charge to choose between

1. being sanctioned for his/her refusal to cooperate,
2. providing the authorities with self-incriminating information
3. lying and thus risking to be convicted for this type of conduct.

To reduce the incidence of this thesis statement, it is important to identify the answer to the following question: when will one consider that a criminal charge is likely to be pressed against a certain person?

In terms of the provisions of art. 305 para. (2) RCCP, in a criminal case, the charge shall be initiated *in personam* when, considering the existing data and evidence in the case, there shall result reasonable evidence that a particular person has committed the offense for which criminal proceedings have started. In this situation, the prosecutor shall order the criminal prosecution to be carried out against this person, who shall become the suspect.

In a broader interpretation of the concept of 'suspect', ECHR ruled that a person shall become the suspect not starting with the moment when he/she is informed about it, but *once the judicial authorities had reasonable grounds to suspect him/her to have participated in committing a certain offense*.

In this respect, in the case *Brusco v. France*[7], it was decided that the right to a fair trial was violated, by violating both the right against self incrimination and the right to remain silent. Thus, the complainant, suspected of having instigated somebody to commit an assault, was questioned as a witness after having taken an oath. Nevertheless, according to ECHR, he was not a simple witness, but he was in fact the subject of 'criminal charges' and, therefore, benefited from the right against self incrimination and the right to remain silent, as guaranteed by art. 6 para. (1) and (3) of the European Convention on Human Rights.

The *plausible reasons* which may lead the judicial authorities to conclude that a certain person participated in committing an offense are represented by data and proofs that make up the reasonable evidence about the offense being committed. So, in the case file, there should exist data and proofs that are to make up the reasonable evidence. Thus, if the evidence about the possible involvement of the *Witness* in committing the offense is, initially, included in the act of apprehension, and, subsequently, this information is taken over by the judicial bodies, serving as a factual basis for the issuance of procedural measures or for carrying out evidentiary activities, the prosecution may press criminal charges against the *Witness*. Moreover, this conclusion gets weight considering the hypothesis according to which the initial data are confirmed during the investigation by other proofs.

Given these considerations, the witness who is in the position to be indicted in connection with his/her participation in committing one of the offenses which are criminally investigated must be regarded as a suspect and, as such, he/she has the right against self incrimination, in that he/she can benefit from the right to silence.

This theory was expressly enshrined in the case law of ECHR, in the case *Serves v. France*[8], *i*n which this court ruled that against the autonomous nature of the concept of 'criminal charge', the witness has the right against self-incrimination as far as, by means of the statement he/she makes, he/she may contribute to his/her indictment.

A brief examination of the literature leads to the conclusion that the practice of hearing a person against whom there is evidence (reasonable grounds) for having participated in committing the offense which is the subject of the case file violates the right to a fair trial, in terms of violating the right of the person to avoid contributing to his/her indictment. In this regard, it was stated that 'what seems to be even worse is the practice of hearing the perpetrator (or person against

[4] Reasonable evidence is defined in numerous decisions of the ECHR as 'data, information able to convince an objective and impartial observer that a person is likely to have committed an offense.

[5] ECHR Judgment of 08.04.2004 in Case *Weh v. Austria*.

[6] High Court of Cassation and Justice of Romania, Criminal Division, Decision no. 213/2015, available on the website of the Romanian Supreme Court.

[7] ECHR Judgment of 14.10.2010 in Case *Brusco v. France*, available on the website of the Romanian Superior Council of Magistracy.

[8] ECHR Judgment of 20.10.1997 in Case *Serves v. France*, paragraphs 42-47, available on HUDOC, the electronic database of ECHR.

whom there is evidence thereof, AN) as a witness'[9]. This theory is also adopted in other papers, which have analyzed the case law of ECHR, concluding that 'a person may refuse to give statements, to answer questions or to produce evidence that could self incriminate him/her (*nemo debet prodere se ipsum*)'[10].

In conclusion, in the theoretical, as well as the case law related background described above, if in the criminal case file there are reasonable grounds on which charges may be filed against a person, this person, summoned as a witness, has the right to remain silent on issues which might incriminate him/her. Otherwise, hearing a witness – possibly a suspect – can contribute either to self incrimination or to holding him/her criminally liable for the offense of perjury.

4. Consequences of hearing as a witness a person against whom there are reasonable grounds to press a criminal charge

To identify the right solution in such a case, we will analyze a similar possible situation. In this sense, *which are the procedural consequences of hearing as a witness a person by violating that person's right to refuse to give statements as a witness and, subsequently, by indicting the respective person on charges of perjury*? Specifically, we will suppose that the defendant's ex wife, summoned to give a statement as a witness, refuses to testify. For this procedural conduct, the defendant's ex-wife is indicted, under the charge of perjury. Clearly, if the factual situation described here were real, the defendant's ex-wife could not be held criminally liable, and if this process were triggered, then the criminal action would stop, being incident the case referred to in art. 16 para. (1) (d) RCCP, 'there is a justifying cause,' i.e. 'exercising a legal right.' Thus, we believe that the defendant's ex-wife could not be held criminally liable for refusing to give statements as a witness, because exercising a legal right ignored by the judicial body may not constitute a criminal offense, as it is lawful conduct, allowed by law. We appreciate that in this case we may find ourselves in another situation which may lead to reducing the ability to 'exercise a lawful right', which adds to classical assumptions, e.g. practicing a profession, trade, other occupation or sports, the hypothesis of jurisdictional immunities, respectively.

For the same reasons, we believe that the *Witness* who refused to give statements or failed to report to judicial bodies facts and circumstances that could have contributed to his/her own indictment and, who, based on this conduct, was indicted for the offense of perjury, has exercised a right which arises from the practice of ECHR. Consequently, the solution in this case is acquitting the defendant for the offense of perjury, based on the existence of a justifying cause.

5. Conclusions

In conclusion, if in a criminal case there are reasonable grounds on which a person may be indicted, this person, summoned as a witness, has the right to remain silent on issues that might incriminate him/her. Otherwise, hearing the witness – possibly a suspect – may contribute either to self incrimination or to the likelihood of being held criminally liable for the offense of perjury.

With specific reference to the case which served as a basis for this study, we consider that by ignoring the reasonable grounds that could have given support to the criminal charge, the *Witness* was deprived of the right against self incrimination. Under these circumstances, the *Witness*'s hearing was purely formal, since the prosecutor had enough evidence to suspect him/her as a participant in committing the corruption offenses included in the case file. In the case presented, the *Witness* was not a simple witness, heard in connection with the facts and factual circumstances which constituted evidence in the respective criminal case. Against this witness a *de facto* charge was brought, about alleged complicity in corruption offenses, charge which was based on the evidence existing in the file ever since the beginning of the criminal investigation. Basically, the *Witness*'s compliance with the procedural obligations specific for being a witness could have minimized his/her right against self incrimination.

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[9] Viorel Pașca, Aspecte deontologice generate de principiul unui proces echitabil (Ethical issues arising from the principle of a fair trial), in Noile instituții ale dreptului penal și dreptului procesual penal în dialogul interprofesional între judecători și avocați (The new institutions of criminal law and criminal procedure in interprofessional dialogue between judges and lawyers), Editura Universul Juridic, Bucharest, 2015, p. 263.

[10] Mihai Udroiu, Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat* (European protection of human rights and the criminal trial in Romania. Treaty), Editura CH Beck, Bucharest, 2008, p. 664; see also Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală* (Principles of the criminal trial in the new Romanian Criminal Procedure Code), Editura Universul Juridic, Bucharest, 2014, p. 291.

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