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WITNESS AS PARTICIPANT IN THE CRIMINAL PROCEEDINGS

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Abstract: *In modern society characterized by globalization processes and continuous development of technique and technology, unfortunately there is a progress of organized crime and commission of a variety of criminal acts. States on domestic and international level strive to provide conditions for the most effective fight against crime through normative approach. The legal and correct way to fight perpetrators of crimes is criminal prosecution, where any form of assistance to state authorities represents a great support. Testimony is one of the most important ways of gathering evidence in criminal proceedings. Therefore, author deals with witness as a person who possesses certain knowledge about committed crime and perpetrator. Author defines the term witness and indicates the importance of testimony for a legal court decision. Also, the paper describes examination process and highlights the necessity of witness protection during criminal proceedings.*

In this sense, the roll of the state authorities is pointed out, which have the task of providing conditions for the witness to feel comfortable during testimony, that will result in obtaining useful information on the basis of which the criminal sanction prescribed by the law will be imposed on the accused person. Testimony is rightfully considered one of the most important means of gathering evidence and its application goes back to the distant past. During the criminal proceedings witness has the obligation to tell nothing but the truth, which will ensure conditions for the court to make a legal verdict. Therefore, it is not surprising that in XXI century there is a whole series of rights and obligations that regulate the position of witness, as well as other subjects that are part of the criminal proceedings. By providing guarantees to the witness that he/she will feel safe during the testimony the state simultaneously sends message that it has necessary capacity to provide protection to persons who decide to give assistance to competent institutions in the fight against organized crime and all other illegal acts.

Keywords: *witness, criminal proceedings, examination, evidence, protection.*

1. INTRODUCTION

The legality of forms is the limit of excessive judicial power, it is an antidote against abuse of the accused, moreover, it is a bulwark of the principle of equality (Amodio, 2016). On the other hand, by prescribing criminal acts state tries to protect life, property, safety and a number of other values that are protected as inviolable by relevant international and domestic acts. In the case of violation of the aforementioned protected rights, competent state authorities carry out activities in order to determine the criminal act perpetrator and motive for committing crime. On that occasion, a person could be deprived of liberty and the further collection of valid evidence will enable initiation of criminal proceedings that will result in imposition of a criminal sanction. Criminal prosecution is undertaken against perpetrators of criminal acts in order to establish all relevant facts that will serve as evidence in court proceedings (Totić, 2023: 205). Evidence is provided by the public prosecutor and police forces whose main task is to collect useful information from citizens and persons who possess scientific and professional knowledge in certain fields. Witnesses and experts who help with their knowledge shed more light on a specific criminal matter, which will consequently have an impact on the judgment within procedure where the accused person will be guaranteed the right to a fair trial, as one of the basic human rights. Experts provide professional assistance in a variety of fields (finance, medicine, traffic...) and must be morally eligible and disinterested in the outcome of the procedure in which they participate. Witnesses are persons who have certain knowledge about criminal act and its perpetrator, so their existence and subsequent statement is the most used evidentiary material. Practice testifies that a crime can be very well planned and executed, but in a large number of cases perpetrators are discovered and prosecuted precisely on the basis of witness statements. Testimony as a proof is an extremely effective method that leads to resolution of both recent cases and cases that may have been committed years or even decades ago. Quite often, criminal act which solving represents almost insurmountable obstacle is solved by the witness testimony and provision of useful information about perpetrator and the reasons for committing crime. Civic duty requires that every person who has knowledge of a criminal offense report the latter to the competent authorities. In this way, contributes to the efficiency of the judicial system and significantly affects the increase of people's trust in state institutions. Strong and fair judicial systems assure citizens that the state is willing and able to take action against criminals (Njeri Kariri & Salifu, 2016).

Testimony is one of the best allies of judicial authorities in the fight against crime. The truthfulness of the witness testimony becomes the cornerstone of justice and that's why witness must give a sworn statement (Bajpai, 2009). Evidence is a mean of establishing and proving the truth or falsity of any given fact (Gardner & Anderson, 2016). These are factual data that in the procedural forms provided by law establish or dispute the existence of a criminal offense and guilt of a person called to criminal responsibility (Lukić, 2011: 289). On the other hand, testimony is an evidentiary tool that is extremely important for

the purpose of discovering and proving criminal activities, which implies that witness has the power to reproduce facts that must be established. It should be pointed out that witness does not belong to the main subjects of criminal proceedings. Lack of interest in the outcome of proceedings places him/her among secondary subjects, which means that even without his/her presence criminal proceedings can be initiated, conducted and ended. Bearing in mind the fact that witness is always a natural person and that people of various ages can be placed in that role, it is necessary to prescribe and respect rules that regulate their hearing. People of younger age and particularly sensitive persons whose questioning is left to expert examiners must be treated with care. This ensures that testimony is usable and that represents reproduction of observations of past events related to the criminal act and perpetrator. Since a minor could also appear as witness, the court has obligation to examine him/her with the help of psychologists, pedagogues and other experts. The attention is directed to two points that differ from each other, but are closely related and often mixed up in practice. On one side, the minor's ability to testify, and on the other the reliability and credibility of statements (Pansini, 2017:59). In particularly sensitive cases witness identity can be concealed, because the person who testifies exposes himself/herself and family to great security risks. These are the cases of organized crime or war crimes, as particularly delicate areas that justice system continuously deals with. Undoubtedly, the success of the testimony depends on the fact whether the witness is able to present all known information. Therefore, testimony always refers to the circumstances that took place in the past and have relevance to the criminal proceedings and the future verdict. The importance of witness derives from the irreplaceable role of eyewitness to a criminal event, who only by reproducing experiences and observations in criminal proceedings acquires the status of witness (Knežević, 2015).

2. WITNESS AS A SUBJECT OF CRIMINAL PROCEDURE

Witness is a person who gives statement about committed criminal act or perpetrator and who possesses important facts for the court. Witness does not have to be present at the crime scene, but might also have indirect information about the latter, obtained from another person. So, here another person intervenes between the witness and the fact, and that person would be the best witness (Grilli, 2009). It must be noted that if it is difficult to judge a person who talks about what he/she directly experienced, since might have misperceived, remembered or narrated a certain event, the problems are exponentially increase in the case of those persons who have only indirect experience (Manzini, 1967). The position of witness in criminal proceeding is determined by prescribed rights and obligations that must be respected, and are the result of efforts aimed to obtain quality statement during testimony. Therefore, during proceedings witness must not be guided by personal beliefs or relationship to the accused, but must give statement in an impartial manner. Witness has the obligation to show up at court, as well as to speak the truth while giving statement. If fails to show up at court, he/she will be fined and forcibly brought.

The protection of witness is particularly highlighted, since the court has obligation to protect him/her from any form of harassment, mistreatment or intimidation to which might be exposed. The court must guarantee to the witness a comfortable feeling when testifying, which includes the right for the latter to refuse to appear in that capacity or to withhold an answer to a question that exposes him/her to inconvenience. The most important duty of a witness is to testify truthfully and not to keep silent about anything he/she knows. That is why before testifying court has the obligation to inform the witness that false testimony is a criminal offense punishable by law. The importance of a truthful statement is best seen in the fact that any other statement, like false, incomplete or unclear to a significant extent, either prevents or slows down the process of successfully solving a certain criminal matter. We should hope that among citizens there is a clearly developed awareness of the importance of giving a truthful statement, although practice also testifies to cases of giving false statements in court. In addition to duty to tell the truth during testimony, witness also has the obligation to inform authority about any change of permanent and temporary residence, which ensures his/her availability and presence in the proceedings. Failure to report a change of address is usually seen as avoiding to respond to a court summons, which does not contribute to the efficiency of criminal proceedings. In the case of need witness is also obliged to face the other witness or defendant, as well as to recognize face, things, photographs and voice of the defendant, when the authority of the procedure requires him/her to do so, because these are just different ways of obtaining testimony from witness (Bejatović, 2016).

Witness is a person different from the defendant who knows something about the facts that must be established in the criminal proceedings, and who was invited by the court to testify about these facts. (Bayer, 1980) It is any person who, within the framework of the procedure and for the purpose of establishing the factual situation, gives statements to the judge intended to make a decision on guilt (Keane & McKeown, 2014). Given the importance of testimony as an evidentiary action, it is necessary to point out the importance of finding witnesses and ensuring conditions for giving valid statements that will result in useful information. That is why the public prosecutor, as a state body in charge of prosecuting criminal acts *ex officio*, must find persons who will testify in a certain criminal matter. Of course, public prosecutor must act objectively and impartially, so he/she will treat in the same way persons who testify both against and in favor of the accused person. The parties to the proceedings can also call witnesses who will strengthen their claims before the court, but at the same time weaken the arguments of the opposing side. The criminal court, as a procedural body, has duty to find the person, thereby exerting a significant influence on the resolution of criminal offenses. The prosecutor in the proceedings has the right and duty to propose witnesses, while the defendant only has the right, but not the obligation to do so. In practice, most often police officers who are engaged in a specific case suggest persons who have information about criminal offense. Also, the police often inform the public prosecutor about all the collected evidence. Respecting such information, public prosecutor invites certain persons to testify before

the court as witnesses. The person accused in the proceedings or his/her attorney has the right to suggest to the public prosecutor a person to be called as a witness. However, public prosecutor has no obligation to act on their proposal. Witness testimony is always recorded, and is actually an official document. It contains all statements, because it is of crucial importance for the court that witness statement is not forgotten, and saved unchanged in accordance with the form prescribed by law. The recorder has the obligation to record everything what was told to him/her and without possibility to decide which facts are important and which are not. It is necessary the record to be legibly written and not to contain grammatical errors, while at the same time it must reflect the true picture of the testimony of the witness. No modifications or deletions of what was entered in the record are allowed. If there is a need for subsequent changes, they must be registered at the end, while the record has to be authenticated and signed. There is an obligation of all participants in the procedure to take care of what is written in the record, as well as the obligation of the parties to sign it.

3. EXAMINATION OF WITNESS

Witness testimony is obtained by questioning (Đurđević, 2019: 21). Examination of witness is considered to be a complex action, which presupposes knowledge not only of procedural provisions that regulate the matter, but also of criminal tactics and psychology (Simonović, 1997). It is done in the investigation by public prosecutor after passing the order. At this stage of the procedure public prosecutor can also entrust investigation to police officers or another competent prosecutor. The latter has the option to declare himself incompetent and hand over the investigation to the competent public prosecutor. It should be emphasized that it is important to distinguish witness statements from informal statements obtained from citizens, which are collected by the public prosecutor and police, because such statements cannot be used as evidence in the proceedings. During questioning of witness at the main trial the same rules apply like in the investigation, with certain adopted provisions. The examination of witness during the main trial is done primarily by the parties, and only exceptionally the court can play active role. Criminal Procedure Code provides that aggrieved party, subsidiary prosecutor and private prosecutor can be examined as witnesses (Milošević & Dautbegović, 2014). At first questions to the witness makes the party that proposed him/her to appear before the court. If both parties proposed the same witness, priority will be given to the one whose proposal was first recorded in the court. The examination at the main trial is carried out through several stages. The first stage is the basic examination, which has a mandatory character, and is carried out by party that proposed the witness. Second stage is cross-examination, which is only an option and is carried out by the opposite party. After that, if the judge allows, additional questioning of the witness by the party who asked questions during the basic examination may follow. If none of the parties proposed a certain witness, but the court did so, questioning of that witness is done firstly by the judge (or more of them),

according to the rules that apply to the basic examination, then by the prosecutor, the aggrieved party or his legal representative and attorney, the accused and his attorney (if there is one), an expert or an expert advisor, according to the rules of cross-examination (Criminal Procedure Code of the Republic of Serbia). Also, a witness can be questioned at the hearing before the second-instance court. This refers to a situation where there is an incomplete or wrongly established factual situation and it is necessary to present evidence that was either already presented before the first-instance court or was rejected by the latter for a certain reason. However, at the hearing before the second-instance court, it is not necessary to examine all the witnesses who participated in the proceedings before the first-instance court. In this case, the second-instance court has the right to decide to call only those witnesses considered relevant for decision. In general, the role of the court regarding the presentation of evidence is subsidiary, corrective and auxiliary (Ilić & Majić & Beljanski & Trešnjev, 2012).

Conversely, the role of witnesses at trial is particularly important in adversarial criminal proceedings when the prosecution has to prove its claims based on evidence, most often through oral examination of witnesses, which the defense can challenge at a public hearing (Mackarel & Raitt & Moody, 2001). The witness examination procedure can be divided into two parts. Namely, in the first part, the court introduces the witness to the testimony procedure. It is the phase in which the witness is informed about his/her rights and obligations. This is especially important when the person testifies for the first time. The second part is characterized by the examination of the witness, which refers to his/her knowledge about the perpetrator and criminal act, as well as other relevant facts that need to be established. When a witness freely testifies about a certain criminal matter, the practice is not to be interrupted during the presentation, unless speaks without reason about some irrelevant facts for the asked question. Since a large number of witnesses might appear during the criminal proceedings, the rule is that they are examined individually, which means without the presence of those who have not yet testified. This enables the originality of the testimony of each witness, because it is impossible for those who will be later questioned to harmonize their statements with those given by previous witnesses. The witness answers the questions orally, unless it is a person who has certain physical disabilities. Then the questioning is conducted in such a way as to enable the witness to testify according to communicative abilities. For example, if a witness is deaf but has the ability to speak, questions will be asked in writing, while he/she will answer orally. As the last solution, there is a possibility to use an interpreter who knows the sign language of deaf-mute witnesses, and who has the skills to communicate with them. Witness can also dictate testimony into the record with the court approval, but this right will be denied if he/she abuses it in any way. During interrogation the witness cannot be asked questions that contain deception, while the law stipulates that testimony cannot be the result of threats, coercion or any form of force, as well as the use of medical devices. Therefore, the main goal is to protect the witness who will voluntarily provide information to the court during examination. Also, it is possible to conduct an identification procedure in which

witness testimony will be subject to verification. Namely, the law stipulates that during the process of identification of a person or object, a witness can be shown several mutually similar persons or objects with the aim of identifying the perpetrator or an object relevant to a specific criminal offense. Witness can identify a face or an object using photography, while a person can be identified by voice recognition. When it comes to the identification of a person, it must be secured that the witness in pre-investigation procedure or during the investigation is not able to hear or to see the person who has to recognize before the beginning of identification process. In the same manner, person who is the object of identification cannot hear or see a witness who identifies him/her.

4. PROTECTION OF WITNESS

Testimony is a story about an event, that is, a product of a set of factors that are partly composed of only objective, and partly of subjective elements (Musatti, 1931). Due to the importance of testimony for the resolution of a certain criminal matter, the protection of witnesses is primarily an obligation of the state. It is not realistic to expect that witnesses will lightly agree to fulfill their civic duty if the court does not guarantee them protection from intimidation. The state's obligation is to guarantee the protection of basic human rights and freedoms to every person, and therefore also to the persons who testify in court during criminal proceedings. The Constitution of the Republic of Serbia guarantees the inviolability of physical and psychological integrity, which is the legal basis for witness protection, while the Criminal Procedure Code from 2011 provides respect for the personality of the accused person during the hearing, which also applies to the witness. Therefore, the right to protection of witness is an individual right. Nowadays, witness protection is ensured by means of procedural and non-procedural measures. Procedural measures include, for example, concealing the identity of a witness or preventing a physical meeting between the witness and the defendant. Non-procedural measures have a police character and are part of the Witness Protection Program. They are characterized by the protection not only of witnesses, but of a wider circle of persons, which primarily refers to persons close to them. Unlike procedural measures of protection, non-procedural ones are applied during, but also before and after the criminal proceedings. It is not uncommon for non-procedural measures to last for several years, especially in cases where proceedings are conducted against members of organized criminal groups. The need for procedural measures usually ends immediately after the conclusion of the criminal proceedings. The importance of non-procedural protection measures is also indicated by their regulation within the Rome Statute of the International Criminal Court, as well as the United Nations Convention against Transnational Organized Crime. Witness protection in the Republic of Serbia has been in place since 2001, when it was defined in detail for the first time by law. Four years later was formed the Unit for the Protection of Participants in Criminal Proceedings and began work on the adoption of the Law on the Protection Programme for Participants in Criminal Proceedings. The Law stipulates that protection program applies

to participants in criminal proceedings conducted against perpetrators of crimes that fall into the category of crimes against constitutional order and security, against humanity and other goods protected by international law, as well as organized crime. The program stipulates that in order to protect witness, among other things, it is possible to change his/her identity or to change his/her permanent and temporary residence, while the objects of protection are life, physical integrity and property of the person. Also, the witness can be sent to another prison in order to ensure safety. Of course, here we are talking about a person who has been deprived of freedom. One of the most common measures applied in practice is the complete or partial change of the personal data of protected person, while it is less common to resort to changing the identity of the person being protected.

Witness protection was first actualized in the United States of America in the 70s of the last century, as a legally sanctioned procedure that was used together with a program to break up criminal organizations that function in the mafia style (United Nations Office on Drugs and Crime, 2008). When it comes to procedural measures for the protection of witnesses, the Criminal Procedure Code of the Republic of Serbia provides for basic protection, protection of a particularly sensitive witness and application of measures to a protected witness. The basic protection of the witness refers to the prohibition of any type of attack, disparagement or threats that may be addressed to him/her during the proceedings. The court and public prosecutor are obliged to protect the witness from such actions, which fully guarantees respect for the integrity of the personality. On the other hand, category of particularly sensitive witnesses includes persons who feel additional negative consequences due to the committed criminal act or personal characteristics. For this reason, they are provided with additional protection during their testimony. They are very often victims of crime. The reasons may be of a subjective nature (gender, age) or a consequence of the objective circumstances under which the criminal offense was committed (method of execution). That is why there is an obligation for the police, court, public prosecution and other authorities to apply measures to help vulnerable witnesses in order to reduce discomfort or fear during testimony. These measures provide much-needed support and boost self-confidence, especially when victims of crimes come forward as witnesses. We are talking about criminal proceedings that are conducted due to the commission of criminal acts such as human trafficking or domestic violence. The questioning of sensitive witnesses must be carried out in accordance with a certain practice that has proven to be very effective over time. Namely, it is necessary to interrogate sensitive witnesses immediately after the criminal offense has been reported, which implies that urgent action must be taken in order not to lose certain parts of the memory, which may be of crucial importance for the solution of a criminal case. When it comes to women who are victims of sexual offenses, as a rule, the questioning is done by female experts. Finally, protected witness is a person who gives evidence and whose identity will not be revealed to the public. Such a status for a witness is determined by the court's decision, while special protection measures for that person are defined. Protective measures may include, for example, concealing the witness's appearance or changing voice

during questioning. It is important to point out the court's obligation that before starting examination informs the witness about persons to whom his/her identity is known. On that occasion, the court warns all those present that they must respect the secrecy of the identity of witness. Therefore, a protected witness is a person whose personal safety, or the safety of persons close to him/her, is threatened due to testimony.

CONCLUSION

Witness is a person who possesses certain knowledge that is useful in clarifying and solving a criminal matter. That is why it is most important to provide conditions for him/her to appear before the court and reproduce facts that will be crucial for the verdict. First of all it is important that witness shows up at court, thereby fulfilling civic duty. Witness testimony is undoubtedly the most important evidence that has been used in criminal and other proceedings for centuries. Due to importance, witness must feel protected because this is the only way to speak freely and honestly about the known facts. The successful protection of witnesses must also be seen as a kind of message that the state sends to all persons, as it shows willingness to provide security to those who help to effectively fight crime. The procedure of questioning witnesses is a complex action that must be approached carefully, because a verdict can only be passed on the basis of the evidence presented in court. Testimony depends on a number of circumstances, such as the age, gender, psychological state, which implies that in certain situations the help of experts is needed. This is especially noticeable when minors appear as witnesses, which often happens in cases of domestic violence. Time we are living in is characterized by increase in all types of criminal activities, particularly organized crime, and all countries that strive to ensure the rule of law on their territory must have a well-organized and functional witness protection system. It is indisputable that in this way they encourage people to report criminal acts and their perpetrators to the competent authorities, as well as to testify unhindered before the court. In order to satisfy justice and reduce criminality, courts, prosecutor's offices and police undertake actions assigned to them by law. Therefore, if the crime rate is increasing, the public will first blame them for the bad security situation and warn them about the negative consequences for the entire society. It is the reason why the aforementioned authorities bear the greatest responsibility when it comes to ensuring conditions that witness contributes to the conviction of someone who committed a crime. That is why the legislator imposed obligation to protect witness from threats, attacks or insults during the procedure. Also, protection is provided to members of family and persons close to witness in the case of need.

Practice testifies that perfect crime does not exist and that even those for whom crime is the way of living mistake in believing that their illegal actions will go unnoticed. However, very often they are noticed during the commission of criminal acts, without even being aware of it. The good thing is that still a large number of people, regardless of the possible repercussions, have desire to testify before the court, which for the latter

is usually crucial evidence at disposal. Witness can possess knowledge of a criminal offense because he/she observed a certain illegal action and the person who undertook that activity. However, witness does not have to be present at the crime scene, but can obtain information from another person, therefore, indirectly. Regardless of the fact whether it is indirect or direct knowledge, authorities have a duty to summon and examine all persons who know something about the criminal act in order to establish the final truth and make a lawful decision. It often happens that witness testimony completely changes the course of a criminal proceeding and enables its quick conclusion, even though at first it seemed that it would be very difficult to solve that criminal matter in a short period of time. These are situations when a witness suddenly appears and expresses desire to disclose known facts before the court. It is true that Republic of Serbia has a problem with organized crime and commission of various criminal acts on its territory. Particularly concerns the fact that a large number of committed crimes are accompanied by the use of violence. Nevertheless, domestic Criminal Procedure Code contains modern solutions and provides effective mechanisms to combat criminal activities. It defines witnesses as persons exposed to great pressure due to their role. For this reason, a whole series of measures are foreseen to ensure their safety, which in some cases results in relocation to other countries. Bearing in mind that the court is responsible for taking into account basic human rights, such as reputation and honor, in addition to the judicial function, the law stipulates that the court can remove from the courtroom persons who in some way prevent the witness from testifying freely and undisturbed. The witness can also testify from another room that is technically equipped, whereby his/her appearance is concealed and voice is changed. There is a possibility for the public prosecutor to examine someone who has knowledge of a crime without even informing the suspect and his/her lawyer. This can be done when public prosecutor assesses that presence of those persons may have a negative impact on the witness. All this indicates that modern legislative solutions strive to provide the witness with a favorable treatment, because the successful conclusion of criminal proceedings largely depends on testimony.

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