



SARA Law Research Center

International Journal of Legal and Social Order, <https://www.ccdsara.ro/ijlso>

ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188

Nº. 1 (2023), pp. 382-392

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

Z. SADÎC

Received 05.11.2023; accepted 05.12.2023

<https://doi.org/10.55516/ijlso.v3i1.169>

Zafer SADÎC

Ovidius University of Constanta

E-mail: sadiczafer@yahoo.com

ORCID ID: <https://orcid.org/0000-0001-8194-094X>

Abstract

The article introduces the main forensic tactical rules applicable to the evidentiary procedure of listening to protected witnesses during the criminal trial, through an aggregate analysis of the forensic procedures with the relevant legal norms, as well as with references to national and international jurisprudential solutions, and finally brief conclusions are expressed and Ferenda law proposals to improve the legislative framework and forensic methods in the field.

Keywords: *witness hearing, protected witness, anonymous witness, forensic tactics, forensic investigations, criminal trial*

INTRODUCTION

Throughout the history of criminal law and criminal procedure, witnesses, rightly called the eyes and ears of justice, occupied and occupy an essential role in the painstaking activity of investigators to find out the judicial truth and bring criminals to criminal responsibility.

The radiography of the European space of freedom and security, in which our country is also found, offers a rather gloomy picture of the level of crime at the beginning of the third millennium, especially of crimes of great violence or those committed by organized crime groups of the type mafia, often with transnational implications.

The evolution of legal systems at the global level has required that the evidentiary procedure of hearing to witnesses know normative regulations and adaptations of increasingly sophisticated forensic means and tactics of hearing, as the fight against criminality has acquired new values for the society based on the modern rules of the rule of law.

The emergence and development of organized crime networks, the alarming increase in corruption in the police and judicial environment, the

proliferation of vindictive actions by defendants or their relatives against witnesses in instrumentalized cases, with the inextricable consequence of obstructing justice, represented some of the most relevant arguments for the decision-makers national and international to take more effective measures to counterbalance such disruptive factors of the criminal process.

In the statement of reasons of the Romanian Code of Criminal Procedure, which entered into force on February 1, 2014, one of the objectives stated by the initiators is the establishment of an appropriate balance between the requirements for an effective criminal procedure, the protection of elementary procedural rights, but also of the fundamental ones of the person for the participants in the criminal process and the unitary observance of the principles regarding the fair conduct of the criminal process.

In order to achieve the proposed objectives, the new criminal procedural rules contain numerous rules borrowed from the panoply of forensic tactical procedures regarding the hearing of people, including witnesses and, in particular, witnesses who are in vulnerable situations and require protection from the judicial authorities.

If in the initial form adopted by the Romanian legislator, the institution of the protected witness did not benefit from a satisfactory regulation, and the success of a real protection required the adoption of ad hoc forensic tactical rules by the actors involved in criminal investigations, it can be stated that the positive experience of the judicial bodies constituted an important landmark for the creation of an adequate legal framework, covering, on the one hand, the need to obtain conclusive information for the judicial truth, ensuring the security of the providers of this data, and on the other hand, the imperative of a fair procedure for suspected persons, with special reference to respecting the right to defense in the criminal process.

I. TERMINOLOGICAL NOTIONS RELATING TO THE PROTECTED WITNESS

Evidence is defined in the criminal procedural rules as the elements of fact that serve to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair resolution of the case and which contribute to finding out the truth in the criminal process [Art. 97 para. (1) of the Criminal Procedure Code].

One of the means by which judicial evidence can be obtained resides in the statements of witnesses, and their obtaining is achieved through the evidentiary process of hearing or hearing these persons.

The forensic investigation of increasingly complex cases required the emergence of innovative legal institutions in the criminal justice landscape, which would contribute to improving the score obtained by the judicial authorities in the action to combat and control serious criminal acts.

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

One of the relatively recent institutions is also that of the anonymous or protected witness, in response to the worrying trend observed in the 20th century, as individuals investigated or tried for the suspicion of being involved in criminal activities of great gravity to intimidate or even to suppress the lives of witnesses in criminal trials, in the hope of exoneration from criminal liability.

The legal instruments at the level of the European Union, such as the Resolution on the protection of witnesses in the fight against international organized crime (1995), Recommendation (1997)¹³ on the intimidation of witnesses and the rights of the defense, Recommendation (2005)⁹ on the protection of witnesses and collaborators of justice, The framework decision of the Council of Europe on the protection of witnesses in the fight against international crime of 23.11.2005, the framework decision on combating terrorism and the framework decision of the Council on the position of victims in the criminal process, provided the common terminology at European level for full understanding of the notion of anonymous witness or protected witness.

In the national law, the institution of the protected witness has undergone successive changes, so that currently the categories of persons who can benefit from protection from the judicial authorities, respectively the threatened witness and the vulnerable witness, have been clarified.

The threatened witness is the one in relation to whom there is a reasonable suspicion that the life, bodily integrity, freedom, assets or professional activity, of himself or a family member, could be endangered as a result of the data he provides to the judicial bodies or his statements.

The vulnerable witness is defined as the witness who suffered a trauma as a result of the commission of the crime or as a result of the subsequent behavior of the suspect or defendant, as well as the minor witness.

II. THE LEGAL AND TACTICAL FRAMEWORK FOR THE ADMINISTRATION OF TESTIMONY EVIDENCE

In order to ensure the reliability of the criminal process, listening to witnesses, evaluating depositions and capitalizing on them, equally presupposes the need to comply with both the legal provisions and the forensic tactical rules [E. Stancu, 2015, p. 411].

From a criminal procedural perspective, testimonial evidence is administered by hearing as a witness any person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case [art. 114 para. (1) of the Criminal Procedure Code].

Title IV, entitled Evidence, means of proof and evidentiary procedures, of the Code of Criminal Procedure, in chapter II, section 4, includes the principle rules applicable to the hearing of witnesses, so that in section 5 the forms of protection are regulated of witnesses [art. 114 – 130 of the Criminal Procedure Code].

The general legal framework regarding witnesses in the criminal process establishes the categories of persons who can be heard as witnesses, the capacity to be a witness, the object and limits of the witness's statement, the persons who have the right to refuse to give statements as a witness, the witness's right to remain silent and non-self-incrimination, the questions regarding the person of the witness, the communication of rights and obligations, the oath and solemn declaration of the witness, the manner of hearing, the recording of statements and special cases of hearing the witness.

In the Romanian criminal law system, the principle of free assessment of the evidence is enshrined, in the sense that the evidence does not have a predetermined value, so that in making a decision regarding the existence of the crime and the guilt of the defendant, the courts have the obligation to analyze and evaluate all the evidence administered [art. 103 para. (1) and (2) of the Criminal Procedure Code].

From a forensic tactical point of view, the reliability of hearing witnesses in the criminal process requires compliance with the general framework for carrying out this judicial activity, by rigorously following the stages of the evidentiary procedure and the rules complementary to the legal framework [E. Stancu, 2015, pp. 422-437]. For this purpose, several aspects related to the preparation of the hearing, the actual hearing, the verification and assessment of witness statements and their recording will be taken into account.

1. Regarding the preparation of the hearing, the most important tactical rules consist of:

- studying the case file
- establishing the persons who can be heard as witnesses
- determining the hearing order
- determining the time of the hearing
- determining the place of the hearing
- obtaining data on the witnesses' personality
- drawing up the plan for listening to the witnesses

2. Regarding the actual hearing, the forensic tactical rules reside in the way of hearing and the conduct adopted by the judicial body in the three stages of the hearing:

- witness identification stage
- the stage of free narration
- the stage of asking questions

3. Regarding the recording of witness statements, the forensic tactical rules refer to:

- recording of statements
- fixing the statements by technical means.

4. Regarding the verification and evaluation of witness statements, necessary for the utilization as evidence of the information provided by the

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

interviewed persons, the forensic tactical rules impose, on the one hand, an inherent activity of establishing the veracity of the statements of the interviewed person, including through his additional questioning or of other people or by performing reconstructions, followed by the content, quantitative and qualitative analysis of the data made available to the investigators by the heard witness.

III. SPECIFIC HEARING OF THE PROTECTED WITNESS

The standard of fair administration of the means of evidence consisting in the statement of the protected witness was established at the European level both by the above-mentioned normative legal instruments, which, however, did not have the binding force of a convention or a treaty, but especially by the jurisprudence of the European Court of Rights Man [Guide regarding art. 6 of the European Convention on Human Rights, p. 53]. One of the most important principles emerging from the constant practice of the European Court is that, in a criminal trial, the defendant must have a real possibility to contest the accusations made against him [ECtHR, *Al-Khawaja and Tahery v. the United Kingdom (MC)*, point 127]. In this sense, the use of statements made by anonymous witnesses to substantiate a conviction would not be incompatible with the ECHR Convention in any situation [ECtHR, *Krasniki v. Czech Republic*, point 76]. Although art. 6 of the Convention does not expressly require that the interests of witnesses be taken into account, however this may be required when it comes to their life, liberty or safety. The principles of a fair trial also require that, when necessary, the interests of the defense be balanced against those of the witnesses or victims who are called upon to testify [ECtHR, *Doorson v. the Netherlands*, § 70]. Judicial authorities must cite relevant and sufficient reasons to maintain the anonymity of certain witnesses [ECtHR, *Doorson v. the Netherlands*, § 71; *Visser v. the Netherlands*, § 47]. By maintaining the anonymity of the protected witness, the defense will face difficulties that should not normally exist in a criminal trial. However, it is necessary that the procedure followed before the judicial authorities sufficiently compensates for the obstacles faced by the defense [*Doorson v. the Netherlands*, § 72]. In particular, the defendant must not be prevented from challenging the reliability of obtaining the anonymous witness's statement [ECtHR, *Kostovski v. the Netherlands*, § 42]. In addition, in order to assess whether the methods of hearing the anonymous witness offered sufficient guarantees to compensate for the difficulties caused to the defence, due regard must be had to the extent to which the anonymous testimony was decisive in the conviction of the applicant. If the testimony was not decisive in any respect, the defense was disadvantaged to a much lesser extent [ECtHR, *Krasniki v. Czech Republic*, § 79].

It is obvious that the European litigation court paid special attention to the cases whose object was the use of anonymous witnesses by the criminal investigation bodies for the administration of evidence in the prosecution.

By anonymous witnesses, the European court meant people who were heard with the protection of identity or by inclusion in special protection programs and who gave statements regarding the facts of which a person is accused and whose identity is not known to the defense. Within this notion are also included the undercover agents who are representatives of investigative bodies and who, through the activity carried out under the protection of anonymity, contribute to the gathering of evidence to accuse a person. In order to ensure respect for the principle of fairness and, in particular, that of the equality of arms between the prosecution and the defense, the ECHR ruled that in such cases the impossibility for the accused to directly question the witnesses would be counterbalanced by allowing them to ask questions to these persons, at least in writing, and if such a request is rejected during the trial, the judge should analyze or at least provide detailed explanations regarding the reason for rejecting the request for administration of evidence formulated by the defendant's defense counsel [ECtHR, *Bulfinski v. Romania*].

At the national level, through the provisions of art. 103 para. (3) from the Code of Criminal Procedure, the Romanian legislator instituted some limitations of the principle of free assessment of evidence, stating that the decision to convict, to waive the application of the penalty or to postpone the application of the penalty cannot be based to a decisive extent on the statements of the investigator, of collaborators or protected witnesses. On the other hand, the Romanian constitutional court recently rejected an exception of unconstitutionality of the provisions of art. 103 para. (3) from the Code of Criminal Procedure referred to art. 111 and 112 of the same normative act, when the omission from the list of causes of limiting the free assessment of the evidence of the statements given by the parties and the procedural subjects, especially the statements given by the injured person and the civil party [C.C.R., decision no. 48 of February 28, 2023].

The limitation in domestic law of the probative value of the statements of protected witnesses is in line with an already classic standard of the jurisprudence of the European Court of Human Rights, in the sense that, in certain circumstances, the courts can refer to the statements given during the criminal prosecution phase, especially in the case the refusal of the people who gave them to repeat them under conditions of publicity of the criminal process, for fear of the consequences they could have for their safety. Since the imperative of protection cannot affect the substance of the right to defense, as long as the rights of defense are restricted in a way incompatible with the guarantees provided by art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, when a conviction is based entirely or to a decisive extent on the testimony of a person whom the accused could not question directly or through another person on his behalf, neither in the prosecution phase, nor in the debate phase, the court is obliged to counterbalance the difficulties of the defense in an unequivocal manner, so that the fairness of the procedure is safeguarded.

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

In the light of the European standard, the Romanian legislator established that investigators can be heard as witnesses in the criminal process under the same conditions as threatened witnesses, and in exceptional situations, if the use of the undercover investigator is not sufficient to obtain data or information or is not possible, the use of a collaborator may be authorized, to whom an identity other than the real one may be assigned [art. 148 of the Criminal Procedure Code].

In the light of international regulations, European jurisprudence in the matter of fundamental human rights and the jurisprudence of the constitutional court, the Romanian legislator inserted into the content of the Code of Criminal Procedure clarifying legal norms regarding the content of protection measures for threatened and vulnerable witnesses, which are constituted in genuine forensic tactical rules applicable to the matter.

Among the most important protection measures is the protection of the identity data of the witness, by granting a pseudonym with which the witness will sign his statement.

Another protection measure provided for in the Romanian legislation is that the hearing of the protected witness can be carried out by means of audio-video means, without the witness being physically present in the place where the judicial body is located, the main procedural subjects, the parties and their lawyers being able to ask questions to the witness heard under these conditions, but the questions that could lead to the identification of the witness being rejected.

When other measures are insufficient, the voice and image of the witness heard through the closed circuit television system may be distorted so that they cannot be recognized.

For a faithful recording of the hearing, the witness's statement is recorded by video and audio technical means and is fully reproduced in written form.

During the criminal investigation, the statement will be signed by the judicial body that took it (prosecutor or judge of rights and liberties in the case of the anticipated hearing) and will be submitted to the case file. The statement will be transcribed, and the witness will sign this transcribed statement, which will be kept confidentially, at the prosecutor's office, in a special place, usually in a file, cabinet or safe to which access is restricted.

From a forensic tactical point of view, the rules of principle that must be respected when hearing a witness are applicable, *mutatis mutandis*, to the hearing of the protected witness, especially the anonymous one, but they will relate to the particularities conferred by the specific legal framework.

The preparation of the hearing of the anonymous protected witness does not differ substantially from the usual procedure, but special attention will be paid both to the choice of the persons who will benefit from the anonymous witness status, by granting a pseudonym, and to the time and place where the hearing will be held. If the reasons cited by the witness for granting the special status are not plausible and undeniable, it would be advisable for the judicial bodies (prosecutor

or judge) not to abuse this protective measure, especially in cases where the statement of the respective witness will be considered decisive, and other protective measures could sufficiently and adequately ensure the security of the person in question. On the other hand, the hearing of the anonymous witness should be carried out in the shortest possible time from the moment of identification of the said witness, since in this way possible fraudulent and intimidating actions on the part of the suspect or the defendant can be avoided, which could cause the witness to stop providing the conclusive information or refuse to cooperate with the judicial bodies. Also, as long as the place of hearing a person is not stipulated as an imperative legal rule, the hearing of the protected witness in the first phase can be done anywhere, so that anonymity is kept intact.

The actual hearing of the witness protected under a pseudonym will, as a rule, go through, in addition to the three known phases, two distinct stages, i.e. the first hearing will contain all the identification data of the person heard and all the information held by the witness, which will not be censored, but this statement will be kept at the prosecutor's office, in special places, with full assurance of confidentiality. In order to create the atmosphere of confession, specific to a sincere, correct and complete statement, it is imperative that the witness interacts with as few representatives of the judicial bodies as possible, so that his confidence in the preservation of anonymity remains intact.

In the phase of recording the statement under a pseudonym, if the possibilities of preserving anonymity vis-à-vis the suspect or defendant are minimal, as long as the law does not prohibit, it would be possible to hear the anonymous protected witness both with the real data, when his statement will not contain information relevant to the settlement of the case, as well as the hearing under a pseudonym, in which the conclusive information that can lead to establishing the existence of the crime and the defendant's guilt will be recorded.

The phase of verifying and assessing the statement of the anonymous protected witness can be considered the crucial moment of the hearing, since the factual elements resulting from this evidentiary procedure can represent the basis of the accusation in criminal matters or that of the conviction of the defendant to which the said statement refers.

It is indisputable that compliance with the tactical rules for listening to the protected witness must be carried out in such a way as to preserve the principle of loyalty in the administration of evidence, since, otherwise, the reliability of the procedure may be affected, with the consequence of the exclusion of the evidence thus obtained.

CONCLUSIONS AND PROPOSALS DE LEGE FERENDA

The recrudescence of the criminal phenomenon, mainly violent and organized crime, with transnational tendencies, has forced the decision-making factors at national and international level to adopt extraordinary measures, in

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

order to ensure for the recipients of the criminal law a space of freedom, security and justice at the higher standards.

The good performance of criminal justice requires that the administered evidence be reliable, so that it has the functional ability to lead to the discovery of the truth, by proving the existence of crimes and the guilt of those who committed them.

Among the measures to make the fight against crime more efficient is the institution of the protected witness, whose appearance in the judicial landscape came as a response to the worrying trend observed in the surrounding reality for defendants tried for alleged involvement in criminal activities of great gravity to intimidate or even suppress the lives of witnesses in criminal trials.

In order to ensure the reliability of the criminal process, listening to witnesses, assessing depositions and capitalizing on them, equally presupposes the need to comply with both the legal provisions and the forensic tactical rules.

From a forensic perspective, the general tactical framework for listening to witnesses has particularities in the case of hearing witnesses with protected identity, especially anonymous ones, who participate in the criminal process under a pseudonym. Regarding these witnesses, the specificity of the procedure requires the observance of some forensic rules regarding the preparation of the hearing, the establishment of the place and time of the hearing, so as to ensure the full security of the witness.

On the other hand, in order to create the atmosphere of confession, specific to a sincere, correct and complete statement, an imperative tactical rule is that the witness interacts with as few representatives of the judicial bodies as possible, so that his trust in the preservation of anonymity remains intact.

Ensuring the confidentiality of the identification data of the anonymous witness can be achieved in various forms, which the law does not prohibit, but the risk that the adopted procedure will be cataloged as disloyal, with the consequence of the exclusion of the evidence, as a procedural sanction, should not be overlooked.

In the light of the standard imposed by the international and domestic legal instruments, as well as the jurisprudence in the matter, the procedure of listening to the protected witness requires special attention from the judicial bodies, so that the difficulty of defending the defendant is counterbalanced by concrete and effective measures of the prosecutor or the court not to decisively affect the fundamental right to defense and, finally, the fairness of the criminal process.

*By *ferenda* law, the Romanian legislator would be required to ensure the transposition of the most appropriate rules adopted internationally or in advanced legal systems into domestic legislation, or to adjust the legal framework to the requirements imposed by the jurisprudence of the European Court of Human Rights, with the aim of to offer litigants the most effective criminal*

procedural means, through which the interests of an efficient and fair criminal justice are harmonized with the security interests of the witnesses and those of the defendants.

Next, the task of Forensic Sciences is to discover new means and tactical rules in the practice of criminal law specialists, and, by capitalizing on the positive experience of the actors involved in the investigation of crimes, to offer the most advanced answers to the questions regarding the way to increase the reliability of criminal investigations.

BIBLIOGRAPHY

1. Resolution of the European Parliament of October 23, 2013 regarding the protection of witnesses in the fight against international organized crime (OJ 2016/C 208/09);
2. Recommendation (1997)13 regarding witness intimidation and defense rights;
3. Recommendation (2005)9 regarding the protection of witnesses and justice collaborators;
4. Framework Decision 2002/475/JAI on combating terrorism;
5. The Council's framework decision regarding the position of victims in the criminal process;
6. The framework decision of the Council of Europe on the protection of witnesses in the fight against international crime of 23.11.2005;
7. E. Stancu, Treatise on Criminalistics, 6th edition, revised, Universul Juridic, Bucharest, 2015;
8. The Criminal Procedure Code, adopted by Law no. 135/2010, published in the Official Gazette no. 486 of July 15, 2010, with subsequent amendments;
9. Law no. 682/2002, published in the Official Gazette no. 964 of December 28, 2002, with subsequent amendments;
10. The European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Romania through Law 30/1994, published in M.Of. no. 135 of May 31, 1994;
11. Guide regarding art. 6 of the European Convention on Human Rights, published on the website https://www.echr.coe.int/documents/d/echr/Guide_Art_6_ROM, accessed on 6.11.2023;
12. ECtHR, judgment in Al-Khawaja and Tahery v. United Kingdom (MC), no. 26.766/05 and 22.228/06, ECHR Collection 2011;
13. ECtHR, judgment of 28 February 2006 in the Case of Krasniki v. Czech Republic, no. 51277/99, accessible on the website www.ier.ro;
14. ECtHR, judgment of 14 February 2002 in the Case of Visser v. the Netherlands, no. 26668/95, accessible on the website www.ier.ro;
15. ECtHR, Kostovski judgment against the Netherlands, accessible on the website www.ier.ro;

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED
WITNESS

16. ECtHR, Judgment of 26 March 1996 in the case of Doorson v. The Netherlands, Collection of Decisions and Judgments ECtHR 1996/II;
17. ECHR, Bulfinski case against Romania, published in M. Of. no. 21 of January 10, 2011;
18. The Constitutional Court of Romania, decision no. 48 of February 28, 2023, published in the Official Gazette no. 625 of July 10, 2023.



**This work is licensed under the Creative
Commons Attribution-NonCommercial 4.0
International License.**