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OPPORTUNITIES REGARDING THE UTILISATION OF ANONYMOUS WITNESS TESTIMONY AS EVIDENCE ACCORDING TO STRASBOURG COURT CASE LAW

Introduction

Ways of gathering evidence and their legal framework are a matter of national procedural regulations. Requirements for effective yet legal gathering of evidence, relating mainly to serious and organised crime, necessitate the use of specific forms of gathering evidence. For the sake of compliance with the legality of evidence when using such special procedures, several supranational legal regulations have been adopted within the European conditions. They form the basis for the assessment of the limits of the use of specific procedures for gathering evidence, including the assessment of such limits in the form of decisions by the European Court of Human Rights in Strasbourg. The special methods of gathering evidence, the substance of which is formed by the interrogation of witness and which are legally limited by the criteria resulting from the treaty documents and legal acts of the European Union and the Council of Europe, include the interrogation of agents as witnesses as well as the interrogation of protected witnesses. They concern namely cases where to ensure the personal safety of these witnesses or their relatives it is necessary to keep their identity secret before those being incriminated by them or before their defenders. Non-disclosure of identity takes place within a special procedure in the interrogation of agent and protected witnesses, the essence of which lies in the fact that the agent and protected witness remain anonymous persons for those incriminated. The professional public and the majority of the general public have no doubt that it is necessary to address the issue of the utilisation of agents as a witness and the protection of witnesses very consistently, and to harmonise the legislation related therewith in all concerned States within the framework of regional and global integration groups or international organisations. A clear legal framework for the effective utilisation of an agent in criminal proceedings as well as fixed guarantees related to issues of the safe protection of witnesses and their family mem-

bers are also crucial in terms of the public's involvement in the fight against organised crime. A fundamental problem in meeting this requirement however is the fact that the legal regulation of undercover agents as a witness in criminal proceedings and the legal regulation of the protection of witnesses and the application thereof must not only be effective to meet the purpose but must also comply with the requirements of fair trial formulated and accepted in our territorial conditions, especially by the European integration groups that establish certain legal limits for this area of legislation and its application. The most important sources of legal limits of using evidence based on the testimony of anonymous witnesses include the relevant case law of the Strasbourg Court.

A basic question that needs to be answered in this context is an explanation of the concept of anonymous witness. In this case it is not a legal concept, it does not have any legal definition, it is defined only by theory. If we rely only on the etymological meaning of the word "anonymous", which is derived from the Greek word "anonymus", meaning unnamed or unknown, we would come closer to understanding the type of witness concerned, if only partially. Legal theory is more specific and considers an anonymous witness as a witness whose identity is not known to the defence, i.e. to the accused and their defence lawyer, or to any other persons that are involved in the criminal proceedings. Legislation that allows the identity of a witness to be kept secret, whether in the case of the testimony of an agent interrogated as a witness or in the case of the testimony of a witness who is provided, according to the Criminal Procedure Code or a special law, with the protection, is based on the fact that the competent authorities active in the criminal proceedings, as well as the competent judge, are entitled to know the real identity of such witness.

The case law of the European Court of Human Rights concerning the utilisation of testimony of anonymous witness as evidence in criminal proceedings

Since the time that witnesses started to be provided with protection by keeping their identity secret, the legal limits of the use of evidence based on the testimony of anonymous witnesses in criminal proceedings have been addressed in the case law of the European Court of Human Rights in Strasbourg (hereinafter referred to as "the Court"). Based on incentives, the Court has adopted standpoints regarding this issue as decisions, namely within the assessment of the compliance of the use of such evidence with the right to a fair trial pursuant to Article 6 Para. 1 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention")[1].

[1] For more detail on the importance of case law of the European Court of Human Rights in Strasbourg see

With regard to the use of testimony of anonymous witnesses for the conviction of perpetrators, the Court held that "in these cases it's a difficult search for the balance between the rights of the defence and the right to a fair trial on one hand, and the rights and interests of witnesses and victims on the other hand. The case law of the Court mentions anonymity in connection with random witnesses, but mainly in relation to police informers and police authorities acting as undercover agents or as members of special intervention units.

In the first two cases resolved by the Court, a conviction was based solely on the testimony of two anonymous informers before the police and the examining judge who, however, did not know their identity (KOSTOVSKI v. Netherlands) or on the testimony of two anonymous witnesses before the police (WINDISCH v. Austria). In neither case were the anonymous witnesses interviewed at the trial. The Court ascertained a violation of Art. 6. Para. 1, Para. 3 letter d) of the Convention[2]. The reflections of the Court as such forbade the conviction being based on anonymous testimony. In this connection, the Court specified in judgment WINDISCH v. Austria: "If the defence does not know the identity of the person it wants to interview, then it neither has access to the data that would enable it to determine whether such person is subjective, hostile or untrustworthy. Testimony incriminating the accused may be false or based on error. The defence cannot prove it if it has no information that would enable it to verify the credibility of the witness or that would enable it to challenge them. In addition, the absence of anonymous individuals from a trial hinders the judges who decide the case from observing such individuals' behaviour during the hearing and making their own opinion about their credibility. Even though the expansion of organised crime undoubtedly requires appropriate measures, the right to a fair trial in democratic society holds such importance that it cannot be sacrificed to purposiveness.

The Court took a similar position as in the first two cases mentioned above in another case, LŰDI v. Switzerland[3]. The merits of a complaint decided by the Court consisted in the fact that the Swiss courts had established the conviction of the accused for drug trafficking based on a report by an undercover agent[4] produced in regard to the criminal activities of such accused and on transcripts of intercepted telephone conversations between the accused and the agent, even

[2] Art. 6 Para. 3 letter d) of the Convention regulates the right of the accused „to interview witnesses against them or to have witnesses against them interviewed and to achieve summons and interrogation of witnesses on behalf of them under the same conditions as witnesses against them".

[3] Judgment LŰDI v. Switzerland of 15 June 1992, A No. 238.

[4] It was a policeman acting undercover under changed identity, i.e. legend, in the criminal environment – author's comment.

though the accused did not have the opportunity to interview such agent in the proceedings or to have them interviewed. The Swiss Federal Court formulated in the reasoning of the conviction judgment, among others, the opinion that "if we recognise the use of an agent as a legitimate public interest in terms of the most effective fight against drug trafficking, then it's not possible to simply disclose their identity and investigative methods in criminal proceedings, because otherwise their further effective use would be mostly impossible. Retaining confidentiality in regard to undercover agents does not itself violate the principles of criminal procedure and constitutional law. It is for the court assessing the evidence to decide how much weight is attributed in a particular case to statements by an undercover agent who did not testify before the court, when legally relevant facts are disputed"[5]. The Court, however, did not agree with such argumentation of the Swiss court. In its decision on this matter it stated in principle that "exceptions in the criminal proceedings must not violate the rights of the defence. In this case the secret agent was a policeman whose function was known to the examining judge, whereby by outward appearance but not by actual identity even the accused recognised him/her, as they had met personally five times. However, in the course of the criminal proceedings the examining judge, first-instance court, and appellate court acting in the case failed to interview him/her. Neither did the defence have the opportunity to interview the agent and question his/her credibility. A standard procedure, however, could have been adhered to, namely in a manner that would have taken into account also the legitimate interests of the police with regard to drug trafficking to retain the anonymity of their agent so that such could be protected and used again in the future. Even though the Swiss courts did not base the conviction of the accused only on the written statements provided by the agent, such statements played an important role in identifying factors that led to the conviction. Due to such a significant restriction of the rights of the accused to a defence, the proceedings against the accused were unfair"[6]. The Court therefore did not find any reason why the agent could not be interviewed as a witness at the trial in person, while keeping his/her true name secret, i.e. his/her true identity. The Court thereby also indicated that the Swiss courts had not complied, when using the anonymous testimony, with a less restrictive approach in relation to the rights of the defence to a fair trial, and so contravened the principle of subsidiarity[7].

[5] For more detail see: J. Babjak, Inte*rrogation of witnesses in terms of the right of the accused to a fair trial (part two)*, „Bulletin of the Slovak Bar Association" 1998, no. 5, p. 8.

[6] *Ibidem*.

[7] Compare also: B. Repík, *European Convention on Human Rights and Criminal Law*, Prague 2002, p. 205.

In the other decisions, the Court expressly acknowledged that "the use of anonymous testimony as a basis for a conviction is not always incompatible with the Convention[8]. Also in terms of the Convention, the rights and interests of individual witnesses and victims must be taken into account". Article 6 of the Convention does not explicitly require that, in general, the interests of witnesses and victims called to testify be taken into account. However, their life, liberty or safety could be threatened. And the other provisions of the Convention entailing the obligation of the State to regulate its criminal proceedings in such a way that these interests are not jeopardized protect those interests. "The interests of the defence must therefore be balanced with the interests of witnesses and victims"[9]. Since the admission of anonymous testimony weakens the rights of the defence that a fair trial guarantees, "the Court requires that the defence is provided with certain additional guarantees in order to avoid imbalances being caused between the interests of witnesses and, in general terms, the interests to detect and punish the perpetrators of serious crimes on one hand and the interests of the defence on the other hand". In this connection, the Court recognised that in such case, Article 6 Para. 1 in conjunction with Article 6 Para. 3 letter d) of the Convention require that obstacles encountered by the defence are adequately compensated by certain guarantees in the proceedings before the court"[10].

The Court also defined in its decisions these additional guarantees of the defence. The Court established these guarantees on the principle of subsidiarity, the principle of prohibition of the sole use of evidence based only on anonymous testimony, and the principle of counterbalancing factors, if the prosecution relies solely or mainly on the testimonies of anonymous witnesses, including strong procedural guarantees allowing the proper assessment of the reliability and credibility of the testimony provided. The Court formulated the subsidiarity principle in the judgment VAN MECHELEN et al. v. Netherlands and expressed it as follows: "In consideration of the extraordinary place that the right to due administration of justice has in a democratic society, any measure restricting the rights of the defence must be absolutely necessary. However, if a less restrictive measure is sufficient, then such less restrictive measure must be used". Therefore, the Court found the situation in the case VAN MECHELEN, when eleven policemen only denoted by numbers were interviewed at the trial by the examining judge in another room connected to the courtroom only by sound, as a disproportionate restriction on the rights of the defence. It was not explained why these witnesses could not have been interviewed in the courtroom, for example, visually disguised or by using technical means to distort voices. The impossibility of the

[8] Judgment Van Mechelen *et al*. v. Netherlands of 23 April 1997, Recueil III/1997.
[9] Judgment Doorson v. Netherlands of 26 March 1996.
[10] Judgment Van Mechelen *et al.* v. Netherlands of 23 April 1997, Recueil III/1997.

defence and judiciary to observe the behaviour and reactions of witnesses could not be, according to the Court, compensated by the report of the examining judge who verified the identity of witnesses and expressed an opinion on their credibility.

The Court similarly formulated also the principle of prohibition of the sole use of evidence based only on anonymous testimony. It did so in the judgment DOORSON v. Netherlands and in the judgment VAN MECHELEN v. Netherlands. According to the Court, "anonymous testimony is not ruled out as a basis for the conviction of the accused. Conviction, however, cannot be based exclusively or to a decisive extent on anonymous testimony only, but must also rely on some other evidence. At the same time, the witness statements made under conditions under which the rights of the defence could not be guaranteed to the extent normally required by the Convention must be assessed with the utmost caution". Therefore, the Court found a violation of Article 6 of the Convention in the case VAN MECHELEN, in which the conviction was based almost exclusively on the anonymous testimony of policemen. Such conclusion the Court however did not make in the case DOORSON v. Netherlands, where some other evidence was also available to the court. The Court rested its ruling in the case ELLIS, SIMMS and MARTIN v. United Kingdom, where by its judgment on the grounds of inadmissibility it rejected a complaint of the convicted in which they objected to an infringement of their rights, as they had been convicted (also) based on the testimony of anonymous witnesses, on all the principles, including the third principle provided (the principle of counterbalancing factors if the indictment is based solely or mainly on the testimony of anonymous witnesses, including strong procedural guarantees allowing the due assessment of the reliability and credibility of testimony provided). Three British youngsters Marcus Ellis, Rodrigo Simms and Nathan Antonio Martin were, based on several indirect pieces of evidence, charged with murder and attempted murder, because in January 2003 as members of an organised criminal group in a shootout with another criminal group they murdered two young women and severely injured two other women. None of the victims belonged to the first or second criminal group. Given the nature of the case, five witnesses were willing to testify, but only on the condition of the non-disclosure of their identity. The UK court then used the testimonies of these anonymous witnesses to convict. Problematic was proven in particular the testimony of witness Mark Brown (a cover name) who was connected to a rival criminal group and therefore biased against the abovementioned three defendants. The judge of the UK court, however, eventually found his testimony admissible as usable evidence. The Court established in its decision in this case that a key principle is that the defence had had an effective opportunity to challenge the evidence provided. In the case of anonymous witnesses, a member of the defence team who could examine any ambiguity in their

testimony, whereby their reactions are also watched by the judge, prosecutor or jury, confronts a testifying individual. In this case a decisive factor for the Court was that just as the defenders of the complainants, the judge and jury members had had the opportunity, at their discretion, to assess the credibility of the testimony given, including the testimony provided by the anonymous witness Mark Brown. It was because they had had the opportunity to see him when giving testimony and thus hear and observe his behaviour during the trial. The Court also established that the UK judge when adopting the decision had kept at disposition, in addition to the statements of anonymous witnesses, also some other evidence that linked the complainants with the crimes committed (purchase of the vehicle used in the shootout, phone records – its content and location). According to the Court, the UK judge when deciding the case proceeded with the necessary caution, being aware of the need to ensure appropriate procedural guarantees of the defence and the right of the complainants to a fair trial. The Court when deciding on the complaint of the complainants pointed out, inter alia, the public interest in disclosing, convicting and punishing the perpetrators of organised crime. In this case it was also held that to allow witnesses to testify while concealing their identity is an important procedural tool in the prosecution of organised criminal groups[11].

In connection with the issue of the use of anonymous testimony, Repík pointed out another problem. Problematic in terms of Article 6 of the Convention can also be the testimony of "pentiti", i.e. people who acted in criminal organisations and who cooperated with law enforcement authorities and courts. The "Pentiti" then for a promise of impunity or reduction of punishment testify against their former partners. It is recommended, in particular, that these persons do not testify anonymously. The testimony of such a witness, however, may not infringe the right to fair trial, provided the court and the defence know the identity of the witness and are familiar with the terms of an agreement concluded between the witness and the prosecution.

Conclusion

With reference to this overview, it is clear that the problem of achieving a balance between two conflicting interests, which must be objectively considered when securing the effective protection of witnesses in criminal proceedings, is solvable. The basis of such solution is that the application practice in such cases complies with procedures that accept the principle of subsidiarity, the principle of prohibition of a sole use of evidence based only on anonymous testimo-

[11] Judgment Ellis, Simms and Martin v. United Kingdom 184 (2012) of 25 April 2012.

ny, and the principle of counterbalancing factors if the prosecution relies solely or mainly on the testimony of anonymous witnesses, including strong procedural guarantees that allow a due assessment of the reliability and credibility of the testimony given, as explained in the previous section of this contribution[12].

The argument that if these principles are met in cases where the evidence based on the testimony of anonymous witnesses is used, that compliance with the prerequisites of a fair trial can be spoken about can be considered correct. In this connection, it is necessary, however, to also be aware of the fact pointed out by Molek, namely that "the right to a fair trial is specific in the sense that while the majority of other rights may guarantee an individual a certain consequential substantive claim, in the case of this right, no assurance of a result, i.e. achievement of a specific substantive right, is concerned; thus it is not the right of victory in the judicial proceedings, but only a guarantee of the quality of the path to such result"[13]. In the case of use of the evidence based on the testimony of anonymous witnesses, and even in the case of compliance with these three principles, a legitimate question can be asked whether such an action is also in line with the principle of "equality of arms" as a prerequisite of a fair trial (Art. 6 Para. 1 of the Convention). Although this opens the other side of the same problem, an analysis of which would deserve wider scope, also a brief reflection in this regard is justified. According to the case law of Strasbourg court, and according to the case law of some national constitutional courts, "the equality of arms is a fundamental requirement that each party has sufficient opportunity to present their case under such conditions that do not put them into any substantial disadvantage compared to their counterparty"[14]. This principle takes particular importance in criminal proceedings where an application of this principle by the accused is closely connected with the right to defence, the right to factual and legal arguments, as well as the right to comment on any evidence gathered. The principle of equality of parties to the criminal proceedings, except for the protection function of the status of the accused, who has the presumption of innocence, is further part of the overall concept of the democratic criminal proceedings, the essence of which is constituted by the adversarial principle. The principle of equality of arms is reflected in all stages and aspects of criminal proceedings. However it applies particularly in the evidentiary procedure, as in the exercise of the right to propose evidence, as in the right to comment on the evidence gathered. The above-mentioned Molek assertions in regard to the application of this

[12] Compare also: J. Záhora, *Crown witness*, in: *Criminal means of combating the crime, Journal of contributions from the international seminar, which took place from 29 to 31 March in Solenica, Police Academy of the Czech Republic*, Prague 2006, p. 251.

[13] P. Molek, *Right to fair trial*, Prague 2012, p. 16.

[14] Cited according to Judgment Kress v. France 11837(1998) of 7 June 2001 and according to the Findings of the Constitutional Court of the Czech Republic P1. ÚS 16/09 of 19 January 2010.

principle that "the principle of equality of arms in criminal proceedings is not absolute, however, the maxims are applied generally according to which the State (read the prosecution), compared to the accused, does not have in any context more rights or more favourable procedural position". A similar view can also be abstracted from the judgment of the Court in the case JASPER v. United Kingdom, according to which "just as the prosecution, the defence must also have in the criminal proceedings an equal opportunity to learn about the evidence provided by the counterparty and to comment on it"[15]. Although in this case the content of the argument is more reminiscent of the application of the adversarial principle applied in the process of gathering evidence, it is also linked to the principle of equality of arms.

To give a clear answer to the question as to whether the use of evidence obtained on the basis of statements by anonymous witnesses, in the case of compliance with the principles discussed by the Strasbourg case law in accordance with the requirements of a fair trial, is difficult. The above-mentioned case law and the principles defined thereby predict, however, such a conclusion. This, however, does not exclude differing opinions or their arising in the future when dealing with this issue.

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Streszczenie

Podstawową treścią artykułu jest szczegółowa analiza orzecznictwa Europejskiego Trybunału Praw Człowieka dotyczącego określenia granic korzystania z zeznań anonimowych świadków jako materiału dowodowego w postępowaniu karnym.

Słowa kluczowe: anonimowy świadek, zeznanie anonimowego świadka jako dowód, orzecznictwo strasburskie dotyczące anonimowego świadka

[15] Judgment Jasper v. United Kingdom 8403.

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Summary

The core content of the contribution consists of an analysis of European Court of Human Rights decisions relating to determining the limits of using anonymous witnesses' testimony as evidence in criminal proceedings.

Keywords: anonymous witness, testimony of anonymous witness as evidence, Strasbourg case law on anonymous witness