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Klodian Lipa

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Procedural safeguards of the witness/collaborator of justice.

Klodian Lipa

ABSTRACT

In every country of the world, crimes and criminal offenses of various types occur every day. Law enforcement bodies with all their capacities do their best to fight these negative phenomena produced by society as a whole. But during the investigation stages, it has happened and is happening that someone wants to cooperate with the justice bodies. For this reason, the Law Witness Protection Program was created. Albania has implemented this program and in most of the sensitive criminal cases it has given results by introducing defendants to the PMD. The purpose of this paper is to highlight the procedural measures for the protection of the witness/collaborator of justice. In this paper, the empirical method of research and development of the paper was used. Also, the results of this paper are seen from the legal and procedural aspect on the effectiveness of PMD. At the end of the paper, some recommendations are given regarding the improvements that can and should be made in the field of the protection of witnesses and associates of justice.

Keywords:criminal code, witness, associate of justice, fair trial, criminal process

ABSTRACT

In every country in the world, everyday happens crimes and criminal offenses. Law Enforcement Agencies with all their capability and capacity, fight everyday with those negative phenomena that the society produces. But during the investigation stages, it happened and happen that someone or somebody want to collaborate with law enforcement agency. For this reason was created the Justice Defense Witness Program. Albania has implemented this program on most of his sensitive criminal cases wich. This program have given good results on serious criminal cases. In this article is used empirical method in search and development of this article. Also the results of this article are seen on legal aspects and on the procedural effects that JDWP. In the end of this article, are given some recommendations that should be done in the field of witness protection program.

Keywords:criminal code, witness, justice collaborator, fair trail, criminal process

FoRewoRd

In the first stages of the investigation, during the investigation but also during the sessions of the judicial process, the witness and the associate of justice, with the purpose of cooperation with the justice bodies, play a role

essential in advancing the justice of persons involved in serious criminal activities within the country as well as cross-border ones. For this reason, it is necessary that the witness or associate of justice be assured of his life and family and have his rights during the stages of the investigation or even the stages of the trial. It is the duty of the justice bodies to take measures and prevent any malicious act or action against the witness/collaborator of justice. Above all, it should not be forgotten that even though the witness/collaborator of justice have been implicated in criminal activity illegal, at the moment he/she wants to cooperate with the justice bodies, he/she must immediately enter the witness protection program. Ensuring the life, family and property of the witnesses and guaranteeing the right to a fair investigation and trial, will to facilitate the fight against organized crime and any other form of crime.

What are witness protection measures?

They are all those procedural and non-procedural measures that aim to protect a witness from:

- Bullying
- abuses
- threat
- ATTACKS
- Psychological traumas

These protective measures are taken as a result of his/her decision to cooperate with justice.

Definition of witness.

According to Albanian legislation, a witness is defined as¹:

The defendant who is accused of a crime punishable by a maximum of no less than 7 years of imprisonment, committed in cooperation, or for one of the criminal offenses provided for by letter "a", of paragraph 1, of article 75/a, of this Code, can acquire the status of associate of justice, by signing a cooperation agreement with the prosecutor. The agreement containing the conditions of cooperation can be concluded at any state and stage of the proceedings, even after the criminal decision has taken final form and has been put into execution.

According to recommendation 9 (2005)²of the Council of Europe, the witness is defined as:

"Any person who possesses relevant information regarding an ongoing investigation or an investigative process, who has given evidence on the investigative matter in question."

The institute of witness protection may include:

- VICTIMS
- The suspected
- The accused
- Associates of justice
- Informants
- Undercover agents

Agreement³is signed when the defendant testifies without any reservation or condition about all the facts and circumstances that he has knowledge of due to his participation in the criminal activity. His testimony must be decisive evidence of guilt, in terms of the provenance of the facts and their authorship , as well as for the prevention of serious crimes and the repair of damages caused by them. The defendant, in his testimony, must identify all assets of criminal origin, in

¹Article 75/a of the criminal procedure code

²Recommendation 9 (2005) of the Council of Europe

³Paragraph 2 of Article 75 of the Criminal Procedure Code

possession of him and his associates. The above data must be provided within 30 days from the date of signing the agreement.

Lawfulness of witness protection measures.

- The court must direct a behavior and a reasoning based on the law to state and consider the legal basis to put a witness under protection.
- To what degree does the person's involvement in the criminal case in question reach? Is the
- person a witness, a victim, an accomplice of justice or an undercover agent? What will be the
- physical and emotional consequences on his health?
- The judicial police, the prosecutor's office and legal psychologists must take measures for the assessment and give the relevant recommendations
- The witness must be kept informed and given approval at all times

Witness rights.⁴

The associate of justice has the right to request special protection for himself and his family, according to the legislation on the protection of witnesses and associates of justice.

In cases of cooperation with justice, the prosecutor asks the court to reduce the amount of punishment or to exempt the collaborator of justice from punishment. When the agreement is concluded at the stage of execution of the decision, the power to examine the request of the prosecutor belongs to the court that issued the decision or the court of the place of execution. The reduction of the amount of punishment or exemption from it is assessed in proportion to the contribution made by the associate of justice for the facts and circumstances indicated in paragraph 2 of this article. The provisions of paragraph 7, article 28, of the Criminal Code, as well as the rules of paragraph 1, article 480, of this Code apply.

The cooperation agreement is revoked when the associate of justice violates the terms of the cooperation agreement, hides property data or facts of interest to justice, or makes false statements or testimonies. The rules of paragraph 1, article 480, of this Code shall be applied insofar as they are compatible.

Gaining witness status.

The defendant can only acquire associate justice status when charged with crimes of a certain significance or type. The Code establishes a general criterion, which refers to the maximum punishment sanction, and a special criterion, which refers to some specific criminal offenses. Thus, cooperation is possible when the defendant is accused of a crime, for which the criminal law provides a sanction, at its maximum, not less than seven years of imprisonment. In the event that the general criterion is not met, then it should be seen if the charge has been filed for any of the criminal offenses specifically provided for in letter a) of paragraph 1 of article 75/a of the Code, which are offenses that penalize various forms of corruption. Due to the public interest in pursuing and punishing these forms of crime, the legislator allows cooperation with justice even in cases where the general criterion of the importance of the sanction is not met.

⁴Paragraphs 3, 4, 5 of Article 75 of the Criminal Procedure Code
⁵<http://komentariielektronik.magjistratura.edu.al/sq/eli/fz/2017/7905/75-a>

When the conditions provided by the law for allowing cooperation are met, the defendant and the prosecutor sign an act called the "cooperation agreement". The agreement can be concluded at any stage and stage of the proceedings: at the stage of preliminary investigations (even before the filing of charges)⁶, during the judicial examination of the case (even during the trial in the Supreme Court), as well as in the phase of execution and serving the sentence. In any case, the needs of the most effective administration of criminal justice justify the interest of the state to achieve a cooperation agreement. With its signature, the defendant acquires the status of associate of justice, from which rights and obligations arise, which will be commented on below.

The agreement contains the terms of cooperation with justice⁷. An agreement with reservations or conditions cannot be concluded. The associate of justice has the obligation to testify everything he knows about the facts and circumstances learned during the criminal activity, without hiding anything, and must identify all the assets put by the crime, in his possession or of other associates. In the absence of proof of the criminal origin of the assets, they may be subject to seizure and confiscation based on the legislation in force⁸. His testimony must meet the condition of its importance for establishing the facts. In this aspect, it should be "decisive evidence" in terms of proving the criminal facts and the guilt of the responsible persons. Even when it is not, the defendant can obtain the status of an accomplice, but only on the condition that the testimony is valid to prevent the commission of a serious crime or to repair the damages caused by the crime. Thus, for example, testimony may not be decisive evidence of guilt, but may serve to prevent a murder, free a person being held hostage, or seize stolen money in a bank.

The facts that the associate knows must be proven within a fixed period of 30 days. The establishment of a deadline within which the data must be provided is intended to avoid the tendency of the defendant to manipulate the facts for the purpose of profit, hindering the normal course of the process⁹. The testimony of the associate of justice is subject, respectively, to the careful assessment of the prosecutor and the court, according to the criteria set forth in paragraph 2 of article 36/a of the Code. Only when the source is considered reliable and the testimony true and supported¹⁰, the collaborator deserves trust and the prosecutor undertakes actions to fulfill the obligations arising from the cooperation agreement.

⁶Article 34 of the CPC (<http://komentarielektronik.magjistratura.edu.al/sq/eli/fz/2017/7905/34>)

⁷Article 37/bi CPC (<http://komentarielektronik.magjistratura.edu.al/sq/eli/fz/2017/7905/37-b>)

⁸Law No. 10 192 dated 3.12.2009 "On preventing and combating organized crime, trafficking, corruption and other crimes through preventive measures against wealth", as amended by decree No. 24/2014 and No. 70/2017.

⁹The deadline was set according to the Italian model of decree-law n. 8, dated January 15, 1991, added by law no. 45, dated 13.2.2001, article 16-quater; according to this law, the deadline is 180 days from the expression of willingness to cooperate; <http://www.camera.it/parlam/leggi/01045l.htm>

¹⁰More broadly regarding the specific evaluation criteria of a testimony, you can read: Gulotta G., "La comunicazione bugiarda", in L. de Cataldo Neuburger (a cura di), Chiamata in correità e psicologia del pentitismo nel nuovo processo penale, ISISC, Atti e documenti, Collana diretta dal Prof. M. Cherif Bassiouni, CEDAM, 1992, pages 168-170.

The associate of justice has the right to request special protection, for himself and for his family, when the criteria established by the special law are met, first of all when there is a "state of danger".

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The proposal for inclusion in the defense program is made, as the case may be, by the General Prosecutor or the Head of the Special Prosecution¹², and the decision is taken by a special commission¹³. Responsible for the implementation of the protection program is the Directorate for the Protection of Witnesses and Associates of Justice, which operates under the Ministry of the Interior.¹⁴.

The decision is taken by the court, which evaluates the request of the prosecutor in relation to the facts of the process and the contribution of the collaborator, applying the same principle rules. Of course, the court can accept the prosecutor's request, but it can also change or overturn it. The court evaluates, first of all, the reliability of the accomplice's testimony, its internal and external support and then his contribution to the aid of justice, keeping in mind the criteria set by the law and justifying all the circumstances.

When the agreement is concluded at the stage of execution of the decision, the competent court to decide the reduction of the sentence or the exemption of the accomplice from the sentence is the court that issued the decision¹⁵. This is the court that knows the facts of the process and is able to evaluate the prosecutor's proposal in relation to the contribution of the justice associate.

Possible witness categories.

The witness categories are:

- Witnesses under threat (who are protected under the criminal procedure code)
- Weak and shaky witnesses
- Protected witness entered into the witness protection program

¹¹Law No. 10173, dated 22.10.2009 "On the protection of witnesses and associates of justice", amended by laws No. 10461/2011 and No. 32/2017, article 3.6.

¹²Ibid., Article 15

¹³Committee for the Evaluation of the Protection Program for Witnesses and Associates of Justice, *ibid.*
article 9

¹⁴Ibid., Article 5

¹⁵Accordingly, according to articles 305/a and 306 of the Criminal Code.

Witness/s under threat.

According to recommendation 9 (2005) of the EC, the witness under threat is the one who, because of the information he/she has and for reasons of cooperation with the law enforcement bodies, his/her personal life, family members and private property are threatened.

Weak witnesses.

Weak and vulnerable witnesses include:

- Physically traumatized person
- Psychologically traumatized person
- Person with mental health problems
- Children
- Minors

Types of witness protection procedural measures.

- Access to psychological and emotional support
- Evidence orders at court hearings Examination of witness(es)
- Evidence given through technical and electronic devices Removal of the accused from the courtroom
- Presentation of evidence during the investigation phase Recognition of the right to be familiar with the facts and evidence Non-disclosure of the identity of the witness/collaborator

Types of non-procedural witness protection measures.

- Protection during the application in the introduction of the witness protection program PMD is subject to the secret program nn coverage for witnesses
- Protection from PMD even after the end of the judicial process

International legislation on witness protection.

Some of the international instruments are:

- UN Convention against Transnational Organized Crime
- Best Practices for Witness Protection Recommendation 13 (1997)
- Recommendation 9 (2005)
- European Convention for the Protection of Fundamental Rights and Freedoms
- UN Convention against Corruption

What is the purpose of the legislation?

- The cooperation of the witness is essential in ensuring a fair and orderly judicial process
- Ensuring protection for witnesses and victims of trafficking and those coming from conflict zones
- In the fight against organized crime, cooperation with justice is essential to bring the accused to justice
- Cooperation with justice ensures a better fight against organized crime
-

Recommendations:

- Taking practical and necessary legislative measures to allow the witness to testify without being harmed in any aspect.
- Attempts, acts and intentions to frighten, threaten or intimidate the witness/ accomplice before the judicial process should be considered as criminal offences. The witness must report any attempts at threats or pressure from outsiders and must be willing to testify in court.
- Criminal justice personnel must have appropriate training in this area.
- Unauthorized dissemination of information related to the witness should be classified as a criminal offense.
- All stages of the investigation procedure, the trial and the end of the judicial process, must be considered confidential.

REFERENCE:

(1) Criminal Procedure Code

(2) Recommendation 9 (2005) of the EC

(3) <http://komentarielektronik.magjistratura.edu.al>

(4) Law no. 10192 dt. 3-12-2009 On preventing and combating organized crime, trafficking, corruption and other crimes through preventive measures against wealth, amended by laws no. 24/2014 and no. 70/2017

(5) Law no. 10173 dt. 22-10-2009 On the protection of witnesses and associates of justice, amended by laws no. 10461/2011 and no. 32/2017

(6) Penal Code

(7) EC Recommendation 13 (1197).