

## THE ISSUE OF TESTIMONY OF BAD FAITH IN THE CRIMINAL TRIAL

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### SUMMARY

*The quality of the witness takes precedence over the status of expert or lawyer, mediator or representative of one of the parties or of a main procedural subject, regarding the facts and factual circumstances that the person knew before acquiring this quality. Persons who are in a situation that reasonably doubts their ability to witness are only heard when the judiciary finds that the person is capable of consciously telling facts and factual circumstances in line with reality. In order to decide on a person's ability to be a witness, the judicial body shall, upon request or ex officio, have any necessary examination, by the means provided by law. The witness is heard on facts or factual circumstances that are the subject of the probation in the case in which he was quoted. Witness hearing can be extended to all circumstances necessary to verify its credibility*

**KEYWORDS;** *witness, judiciary, statements, perception, sensations, circumstances, good faith, etc.*

### 1. ELEMENTS OF TESTIMONY IN RELATION TO THE PERCEPTION OF FACTS AND FACTUAL CIRCUMSTANCES

The initial moment of the testimony as an act of knowledge is the perceptive moment by which the witness becomes aware of the fact that he will later report to the criminal investigation bodies.<sup>1</sup> They can be heard as a witness in accordance with the provisions of art. 114 of the Code of Criminal Procedure any person who is aware of factual facts constituting evidence in the criminal case. Any person cited as a witness has the following obligations:

- a) to appear before the judicial body that cited it at the place, day and hour appearing in the summons;
- b) to take an oath or a solemn declaration before the court;
- c) to tell the truth.

I can not object to the witness statement those facts or circumstances whose secrecy or confidentiality may be opposed by law to the judicial bodies. However, they may be the subject of a witness statement if the competent authority or person entitled to do so or when there is another legal cause to remove the obligation of secrecy or confidentiality.

Have the right to refuse to be heard as a witness by the following persons: a) the spouse, ascendants and descendants in direct line, as well as the brothers and sisters of the suspect or defendant; b) persons who have been the spouse or suspect's spouse. During

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<sup>1</sup> E. Stancu, „*Tratat de criminalistică*” Ed. Actami, București 200 p. 433.

criminal prosecution and trial, the criminal prosecution body and the president of the panel ask the witness to take the oath or the solemn declaration. Each witness is heard separately and without the presence of other witnesses. The witness is left to declare everything he knows about the facts or circumstances of fact for which he has been proposed, then he can address questions. Witnesses can not ask questions about political, ideological or religious choices, or other personal and family circumstances, unless they are strictly necessary to learn the truth in question or to verify the credibility of the witness. The hearing of the minor witness aged up to 14 years takes place in the presence of one of the parents, the guardian or the person or the representative of the institution to whom the minor is entrusted to raise and educate.

The witness comes in contact with the objects and phenomena of the surrounding world through his sense organs. Objects and phenomena of the material world acting on the sense organs give rise to psychic processes known as sensations and perceptions.

Feeling is the simplest form of sensory reflection of the isolated features of objects or people who act directly on the sense organs.

Perception is the mental process of reflecting the objects and phenomena of the surrounding world in the complexity of their attributes, a process that leads to awareness, to the identification of objects and phenomena. Perception occurs as a result of the action of objects and phenomena of the world around human analyzers.

The analyzer is a system of the human body made up of sensory organs, the nervous ways of transmitting information and the corresponding nervous centers on the cerebral cortex.

The faithful reflection of the fact of the event in the testimony of the witness is conditional at the first moment of its formation by the state of the analyzer's witnesses.

Possible pathological influences on their component parts will generate errors and inaccuracies in the testimony of the witness in question.

#### **A. Elements of testimony based on visual reception**

Most often testimonies are based on the activity of the visual analyzer. The testimony the source of which is the visual sensation is the standard testimony as in every criminal case it is felt the necessity of the most faithful reconstruction of the configuration of the place as a point in the space in which an offense was committed, the delimitation of it, the localization of objects in space related to the perpetration of the offense, to the mentioning of spatial relations between objects, between objects and persons whose presence at the place of committing the crime is in one way or another related to its commission.

The main visual elements on which the witness is called are the spatial and chromatic attributes of objects and persons in the field of deed.

The decisive objective factor that gives fullness and fidelity to the visual testimony is the intensity of light. This differs according to the moment of the day when the facts were perceived:

- during the day (natural light under diurnal vision);
- at dawn or dusk (twilight light);
- during night time (natural night light or artificial light).

And the perception of the chromatic attributes of objects is directly dependent on the lighting conditions existing at the moment of perception, because as the facts are received

during the day, we perceive them colorfully, in bitonal twilight light, and in the uni-tonal night conditions.<sup>2</sup>

Color perception can be deformed if the control potential suffers from one of the following conditions<sup>3</sup>

- acromatopsia, the inability of the human eye to distinguish other colors than black and white;

- discromatopy, the inability of human eye to distinguish certain colors well (sensitivity only for certain colors);

- daltonism, the inability of the human eye to distinguish between red and green.

The judiciary can estimate, using very simple evidence, whether the witness suffers from any of the aforementioned illnesses, any of these chromosome vices deforming the reality and the probative force of the testimony.

Because the image of the shape of the objects perceived by the witnesses does not suffer alterations, verbal misstatements, it is ideal that they reproduce it figuratively by drawing or modeling; in reality, however, few are able to reproduce verbally by drawing the objects perceived in the field of deed.<sup>4</sup>

### **B. Elements of testimony based on hearing reception**

In witnesses' testimony there is the requirement of the criminal investigation bodies to play the sounds, words, phrases, possibly the perpetrator's discussion with other persons or with the victim, which the witness perceived voluntarily or involuntarily in the field of deed.

The witness who perceives words, sentences, phrases, is called upon to recognize, identify on the basis of voice and speech the person from whom these voices are emanating. This hypothesis is verified when the identity of the person who emanates the words is unknown. Voice, the basic element through which man can communicate his ideas and feelings, characterizes man as an individual, as a personality, by virtue of his anatomical-physiological, age and gender particularities.

In all the above-mentioned situations, both the hearing and especially the assessment of the testimony will have to take into account the real possibilities of the perceiver to understand the content of a conversation, determined by the degree of complexity of the conversation, the degree of culture, the professional formation of the witness.<sup>5</sup> An important element in the auditory witness is to determine the distance to which the sound source is located. Appreciation of the distance to which a sound phenomenon has occurred, based on its intensity, may give rise to erroneous assessments. The atmospheric phenomena such as wind, mist, snow, blizzards, etc. play an important role in the correct assessment of the sound source distance.

The echo is caused by the reflection of the sound waves, so that after a certain period of time, a sound similar to the initial sound is perceived to give the impression of the perceiver that comes from another direction.

### **C. The elements of the testimony based on the skin reception**

At the skin level there are four categories of sensations: tactile (touch, pressure), hot, cold, pain (algic) sensations.

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<sup>2</sup> E. Stancu, *Tratat de criminalistică* Ed. Actami, București 200 p. 434

<sup>3</sup> Ioan Micle *Teoria, tactica și practica polițienească*, vol. II. Editura Universității Aurel Vlaicu Arad 2009 p.25

<sup>4</sup> Gh. Alecu, *„Criminalistică* Ed. Ovidius University Press, Constanța, 2004, p. 549.

<sup>5</sup> I. Mircea. *„Criminalistică* Ed. Lumina Lex. București 2001, p. 273.

<sup>6</sup> I. Doltu, *„JProbele și mijloacele de probă...”*, Ed Dobrogea, Constanța, 1997, p. 238.

Under certain conditions, any of these sensations<sup>6</sup> may play a role in forming the psychological process of the testimony, either as a result of their concurrent action or acting independently.

From the skin sensation category, the most important role in testimonies is held by tactile sensations.

Tactile sensations are the result of skin receptor stimulation by distortion or distortion of the skin as a pressure effect. The intensity of the tactile sensation is determined nditions: of two factors: the rate of deformation of the skin and the variation in pressure exerted on it. By combining the two factors, the feelings that provide information about the attributes of the surrounding objects are formed: strength, hardness, asperity, smoothness, relief, contour, by touch with the moving hand.

For visually impaired people, tactile sensitivity is highly developed as a result of the compensatory function of intact analyzers and can be a valuable help in the content of the testimony.

Thermal feelings (hot and cold) and pain are considered to be the most primitive sensations of man. They have an important role in the testimonies of witnesses who have been victims of accidents or railroad catastrophes, traffic accidents, explosions, etc.

Elements of testimony based on olfactory receptions

Olfactory sensations are the result of stimulation of olfactory receptors located in the upper part of the nasal cavity, by gaseous or vaporous substances. Independently or in conjunction with other sensations can be a source of testimony.

Olfactory sensations are important in a series of crimes such as:

- fire accidents, where the olfactory analyzer could distinguish the characteristic odor of the fire itself from the odor of the flammable substance that caused it;
- the odor of certain toxic substances;
- the medicinal odor of some substances, etc. who served or were intended to serve a crime.

The information obtained by the activity of the olfactory analyzer is inconsistent and impalpable, they can not locate the stimuli in space and can not contribute to the identification of objects or persons<sup>7</sup>, the more so since the smells are subjectively perceived by each person: what for some can make a smell pleasant, for another, it can be a disagreeable odor

#### **D. Elements of testimony based on taste receptions**

Gustative sensations are produced by the chemical properties of dissolved substances in saliva or aqueous solution that stimulate the taste buds especially in the lingual papillae.

The four sensations of human taste are: sweet, bitter, sour and salty and they are due to the receptors distributed on the lingual surface (the taste buds).

Although less used in testimonies due to the limited number of situations in which they can intervene as well as the low degree of certainty they offer, the usefulness of these testimonies is present in cases of poisoning, intentional or deliberate food intoxication, etc.

In cases of poisoning, a distinction is made between the situation in which poisoning is the activity by which the objective side of the offense is carried out or it is the means by which

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<sup>7</sup> C. Panghe, C. Dumitrescu, *portretul vorbit*", Ed. M.I., București, 1974, p. 154.

<sup>8</sup> E. Stancu, op. cit., p. 432.

<sup>9</sup>C. Beccaria, *„Jespre infracțiuni și pedepse”*, Ed. Rosetti, București, 2001, p. 61.

suicide or suicide attempts are carried out, or if such activity has resulted in the death of the person.

The testimonies of the witnesses who perceived the properties of the ingested substances through the organ of the taste, must be carefully examined, because this information may at best regard the nature of the sensation, if it is similar to a substance known to the witness, highly subjective elements.<sup>8</sup>

## **2. THE PROBLEM OF BAD FAITH TESTIMONY**

"The credibility of a testimony must be reduced in proportion to the hatred, the friendship, or the close relationship that exists between the witness and the guilty. [...]"<sup>9</sup> The credibility of a witness diminishes sensibly with the increase in the gravity of an offense or the improbability of the circumstances [...]. "The testimony raises from the beginning the problem of its infidelity, the opposition of the lie with the truth. is a perverse, malignant psychopath, fantastic as some children or parapsychics, expansive, imaginative, or purely pathological in the delusional psychosis There are also secondary forms of lies, which are done through excessive caution, through protector and opposition reactions, by group factors (where the subject is allowed to plead falsehood in order to find the truth) as well as for the purpose of revalorizing a negative situations previously experienced.<sup>10</sup> Actions or omissions that characterize the objective side of these crimes in the fundamental value of the criminal process, the truth that is necessary for the accomplishment of justice. Under the subjective aspect, actions or omissions lie at the psychological level of simulation in positive or negative forms (concealment of truth through omission).<sup>11</sup> Article 273 of the Penal Code defines the offense of false witness as the act of the witness who, a criminal, civil, or any other proceedings in which witnesses are heard, makes false allegations, or does not say all they know about the essential facts or circumstances about which they are being asked. The author is not punished if he withdraws the testimony in the cases criminal proceedings, prior to the arrest or arrest of criminal proceedings or other causes of the defendant, before a decision has been pronounced or another solution has been given as a result of the false witness, the witness withdraws testimony. It is obvious that the tolerance of criminal law is based on the psychological processes that take place in the consciousness who has made a liar and who, judging the consequences of his testimony, decides to declare the truth. Thus, from a psychological perspective, it is useful to know the content and the quality of the assessments made by a false witness in the period elapsing between the official testimony of the false testimony and its withdrawal.<sup>12</sup>

Usually, withdrawal of the false testimony is provoked, being a voluntary initiative in rare cases. It is clear from the practice of the judicial authorities in this matter that the promotion of the withdrawal of the false witness is the result of some procedural activities of analysis and evaluation of the incriminated testimony, which reveals logical conclusions that

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<sup>10</sup> Gh. Scripcaru, P. Boișteanu ș.a., *psihiatrie medico-legală*", Ed. Polirom, București, 2002, p. 254.

<sup>11</sup> N. Mitrofan, V. Zdrenghia, T. Butoi, op. cit., p. 171

<sup>12</sup> N. Mitrofan, V. Zdrenghia, T. Butoi, op. cit., p. 172.

<sup>13</sup> N. Mitrofan, V. Zdrenghia, T. Butoi, op. cit., p. 172

<sup>14</sup> N. Mitrofan, V. Zdrenghia, T. Butoi, op. cit., p. 173.

the testimony can not be credited, being suspected of being untrue. In the course of the investigations, however, it can be established that the testimony, albeit untrue, is not, however, false, the lack of truth being the result of some perceptual or error deficiencies, the proof being removed with proper motivation. Thus, the witness who has put down a liar is given a psychological chance to reflect on the consequences of his testimony.<sup>13</sup>

The concept of "essential circumstances" (because the subject of the false witness is constituted by these "essential circumstances" which the witness has not declared or made untrue statements about them) is not defined by the Criminal Code, which indicates from that they will be established in relation to the subject of each testimony.

For example, in the case of a driver's murder, if a witness is heard about the speed of the vehicle involved in relation to the traffic signs at the crime scene, and will report a liar about the real speed of the vehicle on which she knew herself in the cabin with the driver, while the technical expertise found another speed, the essential circumstance in question is that of the speed of traffic at the time of the accident, because this is the fault of the driver.<sup>14</sup> Requires the essential circumstances to be analyzed in a concrete way, because the psychological element of the intention to declare a liar bears upon an essential circumstance on which the existence or non-existence of culpability depends.<sup>15</sup>

### **3. CRITERIA FOR VERIFYING THE VERACITY OF THE JUDICIAL WITNESS SUSPECTED OF BEING FAITHFUL**

Even though these criteria have a certain degree of relativity, they need attention in order to fulfill the duty of the judicial authorities to verify testimonies about which suspicions of insincerity and fidelity arise. They are combined and are:<sup>16</sup>

#### **a. Criterion of source of testimony.**

The legal and psychological literature, but especially the judicial practice, taking into account the relationships between the fact that the facts are brought to the attention of the judicial bodies and the source, the starting point of the testimony, imposed the distinction between the direct or immediate testimony (in which the witness was present in the context of producing the facts and perceived by the appropriate stimuli the event, its development in the time and space), the mediated or mediated testimony (in which the witness indirectly provides information not on facts or circumstances perceived from the original source, a mediated source, consisting of other persons who perceived the circumstances of the offense or the perpetrator) and the "hearing" or the public rumor (in which the witness refers to the facts heard, to rumors of a notoriety, but whose original source is imprecise, indeterminate parastas).

Taking into account these three categories, the testimony from the "public rumor" appears to be the most unsafe, given that between the original source and the one through which the facts come to the knowledge of the judicial organs, a whole set of links is inserted, the number of which is The facts transmitted from one person to another are subjected to a pronounced process of alteration, denaturation and transformation, often such a testimony far from the true configuration of the facts, going as far as their total distortion.

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<sup>15</sup> N .Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 173.

<sup>16</sup> Ibidem, pp. 174 - 182 // A. Ciopraga, op. cit., pp. 206 - 209.

From the point of view of the testimony verification, the information from a source whose origin can not be individualized, from an individualized but indirect source, and finally from the original source, can not be located in the same plane under the aspect probative force. From this point of view, it is imperative to determine unequivocally the source from which the testimony comes. Once the primary source has been identified, the foundations for the verification of the deposition are set up by the confrontation process of the information from two sources, where the coincidence of the facts as a whole or the coincidence of only irrelevant elements can be noticed.

Judicial logic demonstrates that the basis of contradictions is either error or reluctance, the appreciation of such testimonies presupposing, above all, the identification of the part of the inaccuracy, and then determining whether it is due to a voluntary cause (rea- faith) or involuntary (error). For these reasons it is imperative that the appraisal of a testimony be based on two fundamental principles, namely, the sincerity of the witness and the fidelity of the perception and accuracy of the reproduction of the data concerning the perpetrator and the circumstances of the act.

**b. Criterion of the position of the witness in relation to the parts of the process.**

The relationship between the witness and the other participants in the trial must be clarified in the subjective report of the witness against the accused or defendant, the injured party, the civil party, the civilly responsible party based on kinship, friendship or affection, or feelings of sympathy, antipathy, revenge, fear, etc.).

Strong emotional ties (between husbands, mothers, and children) deform from the point of view of objectivity the real data. For example, it is not surprising from a psychological point of view that the mother who loves her child excessively does not notice moral defects, justifying her behavior in any situation. In the parents' testimony, the son being investigated for causing a scandal in public, is described as a humorous, humorous child, and the committed acts are considered simple childhood or obsolete jokes. In fact, in all situations, whether it is triggered by noble generousities, whether it is determined by inferior mobs, when the testimony is based on feelings, reality is perceived transfigured due to the change in the representations of the persons to whom the witness is emotionally bound.

**c. Criterion of the socio-moral and psychotherapeutic condition.**

The practitioners imposed a pragmatic vision on the witness, being treated not as an abstract element, but as belonging to a certain social environment that left its mark on his moral formation, giving him a moral physiognomy and a certain social status. From this point of view, it is good to know whether the witness is morally inclined towards the dominance of sincerity, honesty, fairness, modesty, generosity or selfishness, cowardice, dishonesty, etc.

Thus, the reputation, in the sense of the witness in the social environment to which it belongs, attitudes, beliefs, ideals are essential elements of appreciating the credibility of the witness.

Judicial psychology has attempted to highlight the extent to which the affiliation of a witness to a psychological type affects favorably or unfavorably perception, memory and reproduction, and to what extent the veracity of the testimony is trivial to psychological typologies, thus establishing two distinct categories of witnesses: the objective type which characterizes the witness with precision, a good observer, describing things according to their objective external attributes, not concerned with the significance of the stage at which they are assisting and in which they are not emotionally involved, the witness who correctly records and faithfully memorizes the facts perceived by their own senses) subjectively (who is

concerned about the meanings and meanings of the scenes he assists, and gives him interpretive content through his value judgments, emitted under the influence of a maximum intensity emotion).

**d) The criterion of the witness's interest in the crime.**

The way in which the perpetrator of a crime is known to occur as a witness may provide significant evidence for the assessment of the position to be taken and the veracity of the deposition as such<sup>17</sup>.

In this respect, if the witness is a person who is wholly random in the field of deeds or who is concerned about other problems in relation to the perceived event, it is possible that a number of aspects are superficially fixed in the field of attention. If, on the contrary, the witness was interested in that circumstance, it is hard to assume that he will escape some of what will happen.

In other words, the claims of the judicial body regarding the veracity and extent of data perceived by the witness will be different, depending on the degree to which they were at the periphery of their center of interest or, on the contrary, even in the sphere of concern of the witness.

**e) Good faith in the assessment of the testimony.**

Due to the immediate contact of the magistrate with the participants in the judicial process, he may and is required to interpret the data given to him by the conduct, the physiognomy and the external reactions of those with whom he is in psychological intercommunication in the judicial investigation. These interpretations will provide him with the necessary data on the thoughts and feelings that witnesses try when he denies or asserts something, all the more so since the contact of the witness with the judiciary takes place under a relatively stressful, atmospheric atmosphere.

The attempt of voluntary substitution of real deposition with imaginary or false deposition is always accompanied by reflexive physiological changes that automatically trigger and escape the censorship possibilities of the subject.

Physiological indicators of inappropriate emotional behavior are: increased heart rate and blood pressure, changes in tissue temperature, electrical changes in the skin, increased activity of sweat glands, change of breathing rate, change of phonation etc.

At the level of physiognomy, the careful investigator can capture tribute changes to the apparent behavior of emotional stress, change of mimic, facial expression, pallor or sudden redness, tremor of hands or feet, voice changes due to salivation and inconsistency in breathing.

The specialized psychological literature recommends the magistrate and the judiciary to address methodical questions in order to appreciate the witness's ability to record, memorize and render faithfully the perceived facts. However, when the magistrate remains uncertain about the verifiable ones, and witness testimony is decisive in the matter, he will have to resort to the psychological examination of the witness by testing the directly involved capabilities (ability to focus and distribute attention, memory capacity, coefficient of intelligence, visual acuity, etc.) and, in the case of a witness's suspicion of lack of good faith, to resort to its expertise through judicial biodetection.

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<sup>17</sup> Ioan Micle, *Teoria, tactica și practica polițienească, vol III*, Editura Universității "Aurel Vlaicu" Arad, 2009, p. 55