Hearing of the Witnesses – Psychological and Evidence Value of the Statement Given in the Pretrial Procedure

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Abstract

Witnesses are still important and very common evidence in criminal procedure. In the case of subjective evidence, it is very important to assess the credibility of the testimony correctly. The authorized official (criminalist, judge or public prosecutor) in the pretrial procedure has an extremely difficult task in evaluating the objectivity of what the witness presents during his hearing. Therefore, in addition to legal, the authorized official must also have extra-legal knowledge. To be able to conduct the hearing successfully, the authors indicate the importance of knowing the psychological processes and tactics of the authorized persons when taking the testimony from the witnesses.

At the end of this paper, the authors analyze the problems related to the probative value of the statements given in the pretrial procedure, the use and the evidence value of the statements of the witnesses given to the public prosecutor in the pretrial procedure that are used in cases of inconsistency between this statement and the statement of the witness given during the main hearing. Although the purpose of the existing Law on Criminal Procedure is primarily to present all the evidence immediately at the adversarial and public hearing, it must also provide exceptions from the direct presentation of the evidence.

Keywords: *criminal procedure, examination, psychology, witness, reliability of testimony, the probative value of the statement*

Introduction

The subject of the testimony is a criminal event that happened in the past, and it refers to the crime and the perpetrator. The criminal event is fully or partially understood by the witness, which is why the criminalist has the task of separating the information obtained from the testimony into important and unimportant for the criminal procedure.

Any person can be a witness regardless of his characteristics (psychological, physical, and age). A witness is any person who was able to observe the occurrence of the crime in a certain way, to reproduce the observations by way of memory during the procedure itself. When it comes to the age of the witness, it is irrelevant because both minors and adults can appear as witnesses. Also, children can be questioned,

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taking into account their psychological development as well as the nature of the subject for which they have to testify[1].

One of the criteria for dividing the witnesses is the way they perceived (learned about) the specific criminal event. In connection with the above, we divide the witnesses into those who testify about the criminal event based on their own observations causu criminalis or so-called, real witnesses and witnesses who came to the knowledge of a certain criminal event through an indirect way by hearing from other people which is why we call such witnesses indirect witnesses or hearsay witnesses.

Personal evidence arises as a result of observation (perception) and psychological survival of the persons who were in contact with the commission of the crime (witnesses, the injured as a special category of witnesses, and the suspect in the pretrial or the accused in the criminal procedure). The evidentiary information from these persons is taken by way of hearing. This type of evidentiary information is primarily conditioned by the possibility of noticing (perceiving), remembering and forgetting, and reproducing what was observed, which on the other hand is directly conditioned by the tactics of questioning to obtain a true statement. Apart from criminalistic tactics, forensic psychology also deals with this issue.

Signals, as carriers of criminal information, arise when a crime is committed, exist in the outside world, and contain information about both the crime and the perpetrator. Crime, as a real phenomenon that surrounds us, is not in a static state, but in rapid and constant disintegration and disorientation. From the moment when the signals of the committed crime have arisen, they begin to change, transform, and disappear, regardless of whether they are personal or material carriers of information. Psychic carriers of information, that is, memories fade and change over time. Because of this, it is necessary to take criminal measures following the principle of speed and surprise, to successfully and promptly discover and fix criminal information, because only with such action can their loss and destruction be prevented[2].

The information obtained by questioning the victim of the crime, the witness, the perpetrator, or the defendant in a situation given by law, represents a solid basis for discovering and proving the crime. Even though we are talking about the hearing of witnesses, the victim or the perpetrator, the general criminal rules that are implemented in the investigative procedure must be respected. We must mention that no precisely defined template should be used by operatives in the investigative procedure. This finding is supported by the arguments that criminal acts are grouped into several subgroups, the perpetrators of them have different character traits intellectual power, and different interests.

During the hearing of the mentioned group of persons, we meet two parties, an examiner (an authorized official) and a respondent who can appear as a suspect, witness, and victim in the pretrial procedure.

In this process of examination, an interaction is established between the participants (the respondent and the subject), which is verbal, i.e. primary, on which the secondary part is added, which is the psychosomatic behavior of the respondent (nervous behavior, dry throat while giving answers, trembling of the body and voice, wandering gaze, redness of the face etc.), which allows the examiner to build the most fruitful examination tactics[3].

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[1] N. Rot, *Opšta psihologija* [General Psychology]. Beograd, 1974, p. 115.
[2] V. Pivovarov, *Istrazhna Kriminalistika* [Criminal Investigation] kniga, Skopje, 2017, p. 4.
[3] Ž. Aleksić, *Kriminalistika* [Criminalistics] Beograd, 1982, p. 307.

1. Legal basis for examination of witnesses in pretrial procedure

Although the purpose of the existing Law on Criminal Procedure is primarily to present all the evidence immediately at the adversarial and public hearing, it must also provide exceptions to the direct presentation of the evidence. Depending on the legal situation in which the person suspected of committing the crime is, or if an accusation has been brought against him, the examination of the suspect is carried out by the criminal investigator in the pretrial procedure.

According to the LCP, a witness (testis) is any natural person, a person who is obliged in the criminal procedure to present his sensory observations about all the facts that are the subject of the proof and are of importance for the criminal event. The obligation to testify arises with the decision of the court and not with the proposal of one of the parties in the procedure.

The statement given by the witness is called testimony, by which the witness conveys his immediate observations about the facts of the past that he knew (perceived), with the help of the senses of touch (for blind people), smell, hearing, and sight, which relate to on a certain criminal event. A witness statement is a statement made by a person other than the accused, given to the authority that conducts the criminal proceedings, the same to note a fact from the past, a fact that is important for the specific case and to prove that fact[4].

All those persons who are supposed to know (personal or transmitted by another person) and who relate to the crime (perpetrator, circumstances for preparation, execution, and concealment of the same) can be called witnesses. The injured party, the injured party as plaintiff, and the private plaintiff, also according to Art. 217 paragraph 2, may be heard as a witness. Even in certain situations, the other persons participating in the procedure, such as the prosecutor, the judge, and the lay judge, may be questioned as witnesses, provided that after giving their testimony as witnesses, they are exempted from further proceedings. Age, gender, social status, and business ability of persons cannot be an obstacle for them to be called to testify about a certain criminal event[5].

The duty to testify is a legally constituted obligation of all citizens, both domestic and foreign, residing in the territory of the Republic of Macedonia unless they are exempted from the obligation to testify by special legal provisions. The obligation to testify covers the following elements: the duty of the witness to appear on the summons of the court and to give his testimony.

During the pretrial procedure (pre-investigation and investigation), the judicial police and the public prosecutor are authorized to summon persons. According to Article 43 of the Law on Police and Article 12 of the rulebook on the way of performing police work, within the framework of police investigations, the judicial police, assuming that a certain person can give notice of facts that are important for a certain criminal event, summons the same with a summons.

The police are authorized in writing with an invitation to summon citizens to give the necessary statements necessary for the performance of police work. The written summons contains the name and surname of the person being summoned, title, place,

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[4] T. Markovikj., *Savremena tehnika istrazhivanja krivichnih dela* [Modern techniques of criminal investigation], Zagreb, 1977.

[5] Z. Milovanović, *Starosna doba svedoka kao elemenat za ocenu dokazne vrednosti prepoznavanja u krivičnom postupku* [The age of the witness as an element for evaluating the probative value of recognition in criminal proceedings], Anali Pravnog fakulteta u Beogradu, 1986, p. 34 (1-3).

and address of the headquarters of the organizational unit of the Police where the person is summoned, reasons for the summons, place and time of the summons, as well as instruction on the right to a defense attorney in the police procedure, as well as the consequences if he does not respond to the invitation. The subpoenaed person can be forcibly brought only by a court order and only when he refuses to respond to a duly delivered summons in which he was warned of the possibility of forced delivery and when he does not justify his non-appearance.

The person who responds to the summons or was forcibly brought, and refused to give a statement, cannot be summoned again for the same reasons. The person who is summoned or forcibly brought is instructed about the rights from Article 34 of this law, as well as about the fact that he is not deprived of his liberty and that he can leave after giving or refusing to give a statement. For the invitation and conversation, the police officer allows the invited person to make the statement by hand in a form previously prescribed by the Minister of the Interior or, if the official enters the statement in the form, reads it out loud and finally the respondent signs it. Minors are invited by submitting a written invitation to their parents or guardians.

The Law on criminal procedure obliges the justice police, as soon as it assesses that the citizen called to give a statement can come forward as a suspect, to immediately notify the public prosecutor[6].

The witness is obliged to give a statement and speak only the truth without concealing the facts known to him, and if he gives a false statement, he commits a crime – perjury. A witness is not required to testify to certain questions only if the answers given would cause embarrassment or material damage to him or a member of his family.

The accused as a witness has the legal opportunity to defend himself by remaining silent. Only in exceptional situations, the first accused may appear as a witness when his capacity as an accused ceases or when the accused has been convicted by a final court judgment in a case in which several co-perpetrators still have the capacity of an accused. The accused may, of course, voluntarily waive any of the rights, but his examination cannot begin unless the statement that he waives any of the rights is recorded and signed by him. The accused cannot waive the right to counsel if the defense is mandatory.

At the same time, the Criminal Procedure Code provides the possibility of recording the conversations of the suspect. Namely, paragraph 1 of Art. 207 stipulates that the examination of the accused by the public prosecutor or in his presence can be recorded with a video-audio recording device. With this, they will be able to be used as evidence in the proceedings for the first time[7].

The European Court of Human Rights particularly takes into account whether the defense has been granted the right to question the witness during the investigation or at a later stage of the proceedings[8]. When the accused did not have the opportunity to ask questions of the witness, in the investigation or at the main trial, and the verdict is based exclusively or on the decisive degree of the testimony of the witness, then violated the rights of the defense to a fair trial, guaranteed by the provisions of Article 6

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[6] Criminal Procedure Law of the Republic of North Macedonia, Official gazette No. 150 from 18 November 2010, Article 279.

[7] G, Kalajdiev *Kon predlog zakon za izmeni i dopolnuvanje na zakonot za policija* [On the proposal of the law for amendments and additions to the law on the police], Makedonska revizja za kazneno pravo i kriminoloogija no.1-2 2011/2012.

[8] Case *Ludi v. Switzerland*, 12433/86 of June 15, 1992.

paragraph 1 and 3 (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[9].

The testimony of a witness given before the main trial cannot, as a rule, be used as evidence at the main trial, it is necessary for the party or the defense to prove to the court in advance that they have made efforts to ensure attendance. to the witness. and that despite that he remained unavailable

A certain group of persons, according to the Criminal Procedure Code, shall not be witnesses, namely:

- a person who would violate the duty of keeping a state or a military secret if he or she gives a statement, unless the competent entity relieves him or her of that duty;
- the defense counsel of the defendant on anything confided by the defendant in him or her as counsel, unless the defendant himself or herself demands it;
- a person who would violate the duty of keeping a business secret if he or she gives a statement, regarding anything learned during the practicing of his or her profession (religious confessor, attorney and physician), unless the person has been relieved of such a duty by a separate regulation or by a written statement, i.e. or by a verbal statement given on record by the person for whose benefit the keeping of the secret was instituted, i.e. by such a statement by his or her legal successor;
- a juvenile person who, bearing mind his or her age and mental development is not capable of understanding the significance of his or her right not to testify, unless the defendant himself or herself demands it; and
- any person who is not capable of testifying at all, due to his or her mental or physical illness or age[10].

Also, the Criminal Procedure Law provides for a group of persons who are excused from the duty to testify, that is, the testimony depends on their will. This group of persons consists of:

- the marital and illegitimate partner of the defendant;
- any blood relatives of the defendant in a direct line, any relatives in an indirect line up to the third degree, as well as in-law relatives up to the second degree; and
- an adopted child or a foster parent of the defendant[11].

2. Psychology, strategies and tactics of the witness hearing

Witnesses have always been an important and often-used evidence tool in criminal proceedings. They have not lost their importance even today, despite the knowledge that they can represent a rather unreliable source of information. Namely, witnesses are in the group of so-called subjective means of evidence, which rest on the testimony of the person about the facts perceived by the senses. With such evidentiary means, it is difficult to avoid a certain amount of subjectivism, which permeates both the stage of

[9] Case *A.G. v. Sweden*, no. 1315/09 10 January 2012.

[10] Criminal Procedure Law of the Republic of North Macedonia, Official gazette No. 15 from 18 November 2010, Article 213.

[11] Criminal Procedure Law of the Republic of North Macedonia, Official gazette No. 15 from 18 November 2010, Article 214.

the interviewee's statement and the stage of assessing his credibility. If witnesses continue to be one of the most frequently used means of evidence as sources of evidence in criminal proceedings, there is nothing left but to use the development of science to improve this evidence and neutralize its negative aspects. In this regard, we can rely on the previous achievements of forensic psychology, other psychological disciplines, logic, and criminology[12].

To be able to successfully conduct the examination, the authorized person in the pretrial procedure should first know the psychology of testimony, the methods of criminal psychology, and the general rules for conducting a conversation, and for all of the above, comprehensive preparation is required. Episodic memory is the basis for quality reproduction of what was perceived (observed) during the occurrence of a criminal event. Episodic memory is a psychological process that consists of declarative long-term memory that refers to the temporal determination of when the event occurred (episodes) and their temporal and spatial connection determining where and when some information is perceived. The problem of testimony is closely related to the properties of episodic memory[13].

a) Collecting data about the person to be interviewed is one of the most important elements in building a further strategy for conducting the interview. The data about the person with whom he is having a conversation is part of the preparatory stage for conducting a conversation, and the same is collected in an operational way (data about his personal life, his family, communication with other people, his habits and inclinations etc.) as well as by checking in the records of the internal affairs authority if the person with whom it is necessary to have an interview is already recorded in such records. A big drawback is the lack of records for persons with whom the internal affairs authority has already had a conversation on another basis, that is, data on their character traits. From such records of already registered persons, we can only obtain data about their former criminal activity, criminal communication with co-perpetrators, the way of committing crimes, the specificity for committing certain types of crimes etc. Such extensive preparation represents a solid foundation. for obtaining a successful representation for the future interlocutor and thus a basis for creating questions for which there is an interest in being fully or partially clarified.

б) In the preparatory stage, the second moment is the study of the specific criminal case, and with that, the interests of the operational worker are defined for clarifying a certain segment of the criminal event or the entire criminal event. The study of the subject refers to all the verbal and material evidence collected up to that point, and after their study, the unclear points are specified which should be clarified or specified through the conversation.

The tactic of interviewing persons is divided into three successive stages, namely:

a) Stage of getting to know the person or introductory stage,

b) Stage of free presentation of the examined person, and

c) Stage of asking questions or stage of reply[14].

a) The purpose of the first stage of getting to know each other is for the examiner to establish a seemingly informal dialogue with the respondent authoritatively so that the respondent would relax in the upcoming stages. Thanks to the quality preparation for

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[12] T. Markovikj., cited.

[13] M. Aćimović, *Uvod u psihologiju krivičnog postupka* [Introduction to the psychology of criminal procedure]. Beograd, 1979, p. 32.

[14] V. Pivovarov, *Istrazhna Kriminalistika* [Criminal Investigation], Skopje 2017, p. 4.

the hearing and previously provided knowledge about the person of the respondent, the examiner at this stage should act in a friendly tone, not raising his voice, starting the dialogue with general facts about the respondent himself, his family and the environment, indicating that he is experienced with the condition in which the respondent is, that is, that every person can be found in his condition. At this stage, it is necessary to gain trust on the part of the person being examined, because each person in contact with the examiner, represents a newly created situation in which the subject experiences stress that creates mistrust, nervousness, or restraint, which in the further examination procedure would certainly represent a problem for obtaining a quality and truthful statement, which is essentially the purpose of the hearing. The examinee must feel that he is being given sufficient and due attention by the examiner. The examiner shouldn't act arrogantly, address the respondent in a high-pitched tone, behave rigidly – bureaucratically, not to issue orders, and not to show excessive severity to the respondent. Such behavior in the respondent causes the opposite effects aimed at creating mistrust towards the examiner and on the other hand disinterest in cooperation during the examination.

Apart from gaining trust, the examiner with the initially established dialogue should also understand the intellectual capabilities of the respondent, his character traits, and his attitude towards the criminal event and the participants in it, but the most important thing is to direct the respondent in the direction of speaking only the truth. Even when establishing the first verbal contact, the examiner should monitor the psychological behavior of the examined person (trembling, rapid blinking of the eyes, wandering gaze, reddening of the face, cracking of fingers, trembling of the voice, sweating etc., as symptoms of internal psychological reaction expressed by the examined person), as an external manifestation of the respondent that may appear due to fear of false answers that he is preparing to give in the next stage of examination or fear of the newly created situation. For such symptoms that appear in the examinee, the examiner should analyze them and then come to an assessment of what they are due to.

Only after the respondent gains the trust of the examiner, the second stage of free exposure of the examined person can begin. We could not put this introductory stage into a template that would give the expected results, but the examiner himself should have a sense of finishing the first stage and starting with the stage of free presentation, which is a basic prerequisite for achieving the expected results of the hearing.

It is recommended, if the conditions allow, to have two examiners present from the beginning during the examination of persons, for the reasons that the second examiner can fully monitor the manifestation of the behavior of the person being examined.

In this stage, the examiner first determines the identity of the summoned person and the capacity in which he is summoned (witness, victim, suspect in pretrial proceedings, or defendant in criminal proceedings)

b) The stage of free presentation begins at the moment when the examiner judges that the first stage of getting to know the person has been completed, and that he is ready for the further course of the examination.

In the introductory part of the stage of free presentation, the respondent is asked general and neutral questions after which he is instructed to continue with free presentation, that is, to interpret with his vision what he perceived about a specific criminal event. The examiner is obliged to carefully follow the presentation of the person being examined, and if the same is logical and does not contradict the previously collected material and verbal evidence relating to the specific criminal event, it is not advisable to interfere with the presentation of the person being examined. Otherwise, if the examined person interprets illogical data that is in contradiction with the previously

collected material and verbal evidence relating to a specific criminal event, the examiner, by interrupting the presentation of the respondent, will try to indicate to the respondent in an indirect way that he does not speak the truth. If there are gaps in the presentation of the examined person regarding certain facts, then the examiner will refresh the respondent's memory with guiding questions. In situations where the examined person talks in general about the criminal event, which avoids the important moments that happened during the commission of the crime, and the examiner assumes that the subject knows those facts, then the examiner should react with questions that will reduce the space for an extensive (irrelevant) presentation, that is, they will return it to the desired direction of explaining specific facts. In the pretrial procedure, in a given tactical situation, the examined person is allowed to fully present his statement even though he is not telling the truth to gain the impression that the interrogator is confident in his statement.

In this stage of the examination, the examiner acts seemingly passively, expressing attention to the statement of the examined, and in essence, he makes an additional assessment of the personality of the examined, and on the other hand, he considers whether the previously repared questions for the third stage of the examination, the "replica stage", will insert new ones. questions that he did not plan and that arose from the examinee's free presentation. The examiner in a stage must write notes in his notebook, which will be of invaluable use in the next stage.

The hearing at this stage can pass in a non-conflict situation, when the examiner completely without remarks and guiding questions allows the examinee to present his presentation, and a conflict situation in which the examiner, due to the assessment made, interrupts the examinee's presentation with remarks and guiding questions. Which tactic the examiner will impose depends primarily on two factors. First, the assessment made by the examiner, and second, the course of the examinee's presentation, which can be true or false.

The examiner in this stage, the stage of free presentation of the subject, can apply the tactic of requesting a re-examination by the subject (if he doubts what was expressed by the subject), to point out the contradictions through re-exposing the subject. in his presentation.

The stage of asking questions or the so-called replica stage is the last in the examination of a person. After the examiner's assessment, the stage of free presentation ends, after which the examinee continues the course of the hearing by asking additional, reminders, control, or clarifying questions. The purpose of these questions is to supplement or check the statement given during the free presentation of the respondent, as well as a more detailed explanation of circumstances and facts that were unclear during the presentation of the examined person in the previous stage of free presentation or were not mentioned at all, to remind the subject of a fact that the examiner assumes that the subject knows that fact keeps silent, as well as to establish or remove possible misconceptions that exist among the examiner[15].

The questions that the examiner asks the respondent must meet the following criteria:

- to be clear,
- to be precise,

[15] R. Grasberger, *Psihologija krivičnog postupka* [Psychology of criminal procedure], Sarajevo, 1958, p. 67.

– not to be suggestive,
– to be understandable for the respondent,
– to have a chronological order, that is, to be in one whole.

When conducting the conversation, it is recommended that the examiner, as far as possible, conduct the conversation in the dialect used by the subject and after the previously made assessment for the subject and ask the questions depending on the intellectual development of the same.

The examiner shouldn't address the respondent in a loud and insulting tone, to ask one question that requires multiple answers. Also, the examiner should take into account the time factor, that is, by following the respondent (while conducting the conversation) to assess whether he is tired and if it is evident time to stop the hearing. After the break, the examiner continues the examination by presenting his summary of the dialogue conducted until then with the subject and even then continues with questions that follow and were previously prepared. If the examiner judges that there is no opportunity to take a break, then he continues the examination by regaining the concentration of the examinee by asking easy questions.

After a preliminary assessment, the hearing can be conducted by two examiners. Such a tactical solution has its advantages in that one examiner can be active (asks questions and leads the dialogue) and the second passive, in charge of observing the examinee, that is, his visible external manifestations, which are an expression of his inner psychological development. Also, both examiners can be active in such a way that one is the "strict" and the second is the "good" examiner, leading the subject to tell the truth to the good examiner, but always the passive examiner assumes the role of observing the external manifestations of the examinee[16].

The subject's internal mental restlessness manifests itself through increased body motility, striking gesticulation, playing of the facial muscles, vague gaze, increased sweating, drying of the lips, constant swallowing of saliva, uneven breathing, and changes in the intonation of the voice. If, during the conversation, the person under investigation manifests some of the visible signs that we listed earlier due to inner turmoil, the tactics of further conversation should be adjusted to the newly created situation.

In certain situations when the examiner decides it is possible for the stage of free presentation and the stage of asking questions to take place simultaneously, i.e. combined. This method of combined examination is applied in situations where the examiner expects the respondent for various objective or subjective reasons to give a false statement to protect himself or another person[17].

After each hearing of a person, it is necessary to analyze the recorded material from the hearing, using the comparative method to compare it with the material and verbal evidence that was collected up to the time of the hearing to determine whether the hearing has clarified all the previously foreseen circumstances and facts under which the criminal event took place, i.e. whether the purpose of the hearing was achieved. The examined person is asked to wait for a certain period after the initial hearing, and if certain facts remain unclear during the initial hearing, the conversation is continued with the respondent to clarify all the ambiguities related to his role as well as the actions of the other participants. in the criminal event. The fixed content should be brought to the attention of the respondent and he should be asked to state his objections, and

[16] V. Vodinelić, *Kriminalistika* [Criminalistics], Beograd: Savremena administracija 1982.
[17] A. Hellwig, *Moderne Kriminalistik* [Modern Criminalistics], Leipzig, 1914.

then, if there are any, to document them. When interrogating persons, the respondent should always take into account the legal position of the person being examined, i.e. whether it is a witness, victim, suspect in the pretrial procedure, or the accused in the criminal procedure[18].

3. Probative value of statements given in the pretrial procedure as the exception from direct taking of evidence

Otherwise, our theory (and practice), statements obtained by examining persons by the police, and in connection with the provision that the police may not question persons in the capacity of accused witnesses or experts, treated these statements as an informal information gathering from the citizens, which is applied before the start of the formal procedure, and thus did not consider them as evidence in the legal sense of the word, but only as evidence in the cognitive sense[19].

The LCP also leaves the possibility of using statements collected during the pretrial procedure, as an exception to the principle of immediacy, which remains one of the most important principles of the criminal procedure. The problem of the use and probative value of the statements given in the pretrial procedure, before the public prosecutor, arises in the interpretation and application of the provision of Art. 388 which governs the exception from the direct presentation of evidence. Namely, paragraph 2 of this article stipulates that the statements of the witnesses given in the investigative procedure and the statements collected within the framework of actions of the defense during the investigative procedure can be used during cross-examination or when refuting allegations presented or in response to a refutation, to assess the reliability of the statements made at the main hearing.

At the same time, the situations from paragraphs 3, 4, and 5 of this article are indisputable, which leaves the possibility, with the decision of the court, if after the start of the main hearing, indications appear based on which it can be concluded that the witness was exposed to violence, threats, a promise of money or another benefit so that he does not testify or falsely testify at the main hearing, the statements of the witness given before the public prosecutor in the pretrial procedure can be presented as evidence, as well as the minutes of statements given before the public prosecutor that can be presented as proof by reading or reproduction, if the person who gave the statement died, became mentally ill or, despite all the means provided by law for finding him, remained unavailable. At the same time, the situation from paragraph 3 is clear, which refers to the evidentiary hearing held when there is a danger that the evidence will not be able to be presented at the main hearing or that their presentation would be associated with difficulties and which, although it is part of the pretrial procedure, statements during this hearing are conducted according to the rules of the main hearing, so the question of their probative value does not arise further in the procedure.

The problem perceived in practice is, in fact, in the interpretation of paragraph 2 of Art. 388 and in paragraph 2 of Art. 400. So, in paragraph 2 of art. 388 provides that

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[18] D. Putnik. *Sudska psihologija* [Forensic psychology], Beograd, 1962, p. 39.

[19] V. Bayer, *Jugoslavensko krivično procesno pravo, Knjiga druga: Pravo o činjenicama i njihovom utvrđivanju u krivičnom postupku, Četvrto izdanje* [Yugoslav Criminal Procedure Law, Book Two: Law on facts and their determination in criminal proceedings, Fourth Edition], Pravni fakultet u Zagrebu, 1986, pp. 109 -123.

the statements from the investigation procedure, when they are used in cross-examination, it is to assess the reliability of the statements given at the main hearing, which is why in the application of the Criminal Procedure Code, practitioners interpret this as a ban on the statements reproduced in this way at the main hearing to base the judgment on.

Because of this, it is considered that the judges must not even allow their reading during the main hearing. But what, it seems, is not considered or is misunderstood, is paragraph 2 of Art. 400 of the Criminal Procedure Code. Namely, this article stipulates that the judgment cannot be based only on a statement made in this way. In other words, this means that the very fact that the Law says that a conviction cannot be based solely on a statement given in a pretrial proceeding before a public prosecutor, which was used during cross-examination at the main hearing, means that it allows the conviction to be is based on this statement, but with a limitation – only in case it is not the only evidence in the procedure. This is a completely justified exception, especially since it raises the question of what that procedure and that accusation would be, which would be based on only one piece of evidence, and even less if it was a statement.

From here, it is obvious that, if in addition to the statement from the pretrial procedure, which was reproduced at the main hearing, there are other pieces of evidence in the case, then there is no legal obstacle or prohibition for the court to allow the reproduction, and further take it taken into account when passing the verdict and its reasoning, according to the principle of free evaluation of the evidence and the right of the court to evaluate the existence or non-existence of the facts, which is not connected or limited by special formal evidentiary rules[20].

The 2018 Commentary of the Criminal Procedure Code, commenting on paragraph 2 of Article 388 of the Criminal Procedure Code, states: "The statements of witnesses given in a pretrial procedure before a public prosecutor and their statements made within the framework of the actions of the defense are used only to assess the reliability of their statements given during the main hearing, and that by themselves do not constitute evidence in the proceedings"[21].

On the other hand, commenting on paragraph 2 of article 400, it says: "Paragraph 2 limits the judge to base the judgment only on the statements that were derived from the principle of immediacy in the production of evidence, that is, by reading or reproducing minutes or recordings of statements that they gave the faces to one of the parties. In this sense, the judgment cannot be based only on statements of witnesses that were read at the hearing, and given before the public prosecutor, and on statements or parts of statements given in a pretrial procedure, presented during cross-examination..."

Such a comment, in other words, means that the judgment can be based on these statements in cases where they are not the only evidence on which the judgment will be based. The commentary in paragraph 2 of article 388 and paragraph 2 of article 400 are inconsistent, because in the commentary in paragraph 2 of article 388, it is said that these statements are not evidence in the proceedings, and in the commentary in paragraph 2 of article 400 it is said that the verdict can be based on them (if they are not the only evidence).

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[20] Criminal Procedure Law of the Republic of North Macedonia, Official gazette No. 15 from 18 November 2010, Article 16.

[21] G, Kalajdzhiev. G, Lazhetikj. L Nedelkova., M Denkovsa., M, Trombeva. T, Vitlarov. P Jankulovska., D, Kadiev. 2018, *Komentar na ZKP* [Commentary on the CPC], OBSE Skopje, 2018, p. 797.

Conclusion

The concept of testimony can be defined as a type of statement of persons given before the police authorities in the pretrial procedure or during the judicial procedure given before the court about the perceived facts of a certain crime that happened in the past. Examining a witness is a complex action that requires the expertise and precision of the criminalist or judge and their knowledge of the psychology of testimony.

A witness is any person who, in the criminal proceedings, states his observations about facts that happened in the past, during the occurrence of a certain criminal event. The witness focuses on reporting his sensory observations, while not giving his opinion on the observed facts. The witness in pretrial proceedings is an irreplaceable source of information.

Although the purpose of the existing Criminal Procedure Law is primarily to present all evidence immediately at the adversarial and public hearing, it must also provide exceptions from direct presentation of evidence. Witnesses can be called by all those persons who should know (personally or transmitted by another person) and who relate to the crime (perpetrator, circumstances of preparation, execution, and concealment of the same). The injured party, the injured party as plaintiff and the private plaintiff, also according to Art. 217 paragraph 2, can be heard as a witness. In certain situations, other persons participating in the procedure, such as the prosecutor, the judge, and the lay judge, can be heard as witnesses, provided that after giving their testimony as witnesses, they are exempted from further proceedings.

At the same time, the Law on Criminal Procedure provides for the possibility of recording the conversations of the suspect. Namely, paragraph 1 of Art. 207 provides that the examination of the accused by the public prosecutor or in his presence can be recorded by video-audio recording. With this, for the first time, they can be used as evidence in the procedure.

To be able to successfully conduct the hearing, the authorized person in the procedure should first of all know the psychology of testimony and the tactics of application during the hearing. Collecting data about the person to be interviewed is one of the main elements in building a further strategy for conducting a conversation and gaining the interviewee's trust. The tactic of interviewing people is divided into three successive phases, namely: The phase of getting to know the person or introductory phase, the Phase of free presentation of the person being questioned, the Phase of asking questions, or the phase of the replica.

The European Court of Human Rights especially takes into account whether the defense was granted the right to examine the witness during the investigation or at a later stage of the proceedings. When the accused did not have the opportunity to ask questions to the witness, in the investigation or the main trial, and the judgment is based exclusively or in a decisive measure on the testimony of the witness, the rights of the defense to a fair trial hearing, guaranteed by the provisions of Article 6, paragraph 1 and 3 (d) of the European Convention for Human Rights are violated.

The testimony of a witness taken before the main trial cannot by default be used as evidence at the main trial. It is necessary for the party or the defense attorney to prove to the court beforehand that they made efforts to secure the presence of the witness, and that despite this he remained unavailable. The court cannot use the witness's statement in the pretrial procedure if the witness is present at the main trial.

The new concept stipulates that the court decision will be based only on the evidence presented at the main trial so that the statements of the examined witnesses and the accused provided during the pretrial procedure can only be used for presentation during the main trial if these persons do not give a statement or change their statements. An exception is provided only for the evidence provided at an evidentiary hearing, where those persons who cannot be heard during the main trial will be heard as witnesses. It is obvious from the above that the probative value of the statements obtained by the witnesses heard in the pretrial procedure is not the same as the probative value of the statements of the witnesses given at the main hearing or the evidentiary hearing.

Finally, the problems surrounding the probative value of the statements made in the procedure and the use and evidentiary value of the statements made before the public prosecutor in the procedure that is used in cases of inconsistency between this statement and the witness's statement are analyzed at the main hearing.

It is evident from practice the need for further harmonization of the provisions of the Law on Criminal Procedure that refer to the use and probative value of the statements made in the pretrial procedure and refer to the exceptions to the principle of immediacy when presenting the evidence during the main hearing. At the same time, it is necessary to clarify the evidentiary value of the statements of the witnesses given before the public prosecutor in the pretriale procedure, which is used in cases of inconsistency between this statement and the statement of the witness given at the main hearing as well as the possibility of an independent judicial assessment of the reliability of this evidence and finally basing the verdict on these statements. In practice, it creates confusion, and on the other hand, the fact is that testimony used in rebuttal to assess credibility is derivative evidence, which is further used by the court according to its free judicial conviction and ultimately is testimony used. towards the (non-)existence of legally relevant facts for making the verdict has been established.

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