CONVICTED ON THE BASIS OF A PLEA AGREEMENT AS A WITNESS[1]

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Abstract: In practice, the extended effect of the plea agreement has been noted in criminal cases where the conviction based on the plea agreement is used as evidence in criminal proceedings against other defendants. At that, the defendant at whose trial the plea agreement or the decision based on such an agreement is used as evidence is denied the right to examine the person who has concluded the plea agreement as a witness. The paper presents the reasons due to which a defendant should be allowed to examine the person who has concluded a plea agreement in his/her capacity as a witness. It also points out to the rights of the defendant and the criminal procedure principles that are infringed upon in such a case. The attitude taken by the Supreme Court of Cassation regarding this issue has been subjected to a critical analysis and possible solutions to this problem have been suggested.

Key words: confession of a criminal offence, agreement, convict, witness.

INTRODUCTION

The Serbian legislation on criminal procedure recognizes three types of agreements between the parties: the plea agreement, the agreement on the defendant's testimony and the agreement on the testimony of the convicted person. The main purpose of the institute of the plea agreement is to simplify criminal proceedings. The criminal proceedings are expedited by avoiding the evidentiary proceedings.[3] The public prosecutor and the defendant reach an agreement on the existence of a criminal offence on the part of the defendant and if the court verifies such an agreement, the proceeding is completed.

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3 This also reduces the costs of proceedings and saves financial means, enabling at the same time courts to cope with enormous amounts of judicial cases without increasing the number of judges (Grubač, 2015: 6).

The purpose of the agreement on testifying of the defendant and the agreement on testifying of the convicted person is different. These two types of agreement represent the ways of co-opting cooperative witnesses. The goal is to obtain the statements of the cooperative witness that would allow for and facilitate the proving of criminal offences within the jurisdiction of the public prosecutor's office of special jurisdiction.

In practice, a controversial situation occurs when a decision based on a plea agreement is used as evidence in a criminal proceeding against another defendant. The said decision is used to prove certain facts and thereby extends the legal effects of the plea agreement, which is made for the purpose of summary proceedings for a criminal offence. This practice represents a way of bypassing legal provision because it serves the purpose of furtherance of the interests that can be achieved only through the agreement on testimony (Škulić, 2015: 214).

If a decision based on a plea agreement in a criminal case is used as evidence and if it is used to establishes a fact in a criminal procedure against another defendant, then it is necessary to enable the defendant to probe the veracity of such evidence by questioning the person who has concluded the plea agreement. However, in practice, the courts decline the motion of the defence to summon the person who has concluded the plea agreement to the trial in order to testify.

CASE STUDY

Criminal proceedings involving a number of co-defendants may lead to a situation in which the public prosecutor reaches a plea agreement with one of the defendants. During informal negotiations which precede the conclusion of a plea agreement, the public prosecutor can ensure that the defendant, in his statement, incriminates other co-defendants or mentions other circumstances that ease the burden of proof for the prosecution in criminal proceedings against other defendants (Bajović, 2017: 725). In return, the defendant who concludes the plea agreement will receive a more lenient punishment. In this way, the public prosecutor obtains a 'weapon' that he/she may use to prove criminal offences of other defendants. Thus in one proceeding the public prosecutor used the court decisions based on plea agreements made by persons V. B., K. J., P. D. and O. A. as a basis to prove the factual existence of an organised criminal group. At that, the court denied the proposal of the defence that the person V. B. and other individuals who had made plea agreements be examined during the trial as witnesses regarding the issue of the existence of an organised criminal group. The defence pointed out in its appeal against conviction that it was denied the constitutional and legal right to question the individual V. B. from whose statement, i.e. from whose plea agreement and the decision based on that agreement, a certain fact was established.

A final decision of the Appellate Court confirmed the view of the first-instance court that the persons convicted on the basis of plea agreements cannot be ex-

amined as witnesses in order to prevent them from being at the same time the defendants and witnesses in the course of one and the same procedure.[4]

The above mentioned example shows that there are situations in practice in which a decision reached in one proceeding is based on a decision from another proceeding, a decision that has been based on a plea agreement. Yet the defence is denied the right to question the person whose statement, i.e. whose plea agreement implicates the defendant.

THE VIEW OF THE SUPREME COURT OF CASSATION

The Supreme Court of Cassation (hereinafter: SCC) has taken a stance according to which a co-defendant, now defendant, who has concluded a plea agreement cannot be summoned to a trial and heard or questioned as a witness in a criminal proceeding against another defendant and that provision of Article 406 para. 1, item 5 of the Criminal Procedure Code (hereinafter CPC) (The Criminal Procedure Code – CPC, Official Gazette of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014) should apply to the inspection of the contents of documents on earlier statements.[5] In addition to this, the SCC lists three more procedural situations when co-defendants cannot be examined as witnesses, but the contents of their previous statements can be inspected in the manner stipulated under Article 406 para. 1, item 5 CPC. The SCC allows for a possibility that the courts, in other procedural situations and bearing in mind the principles of directness and contradiction, should not apply this provision provided that they offer a detailed and clear justification of such a decision.[6]

The first among the three mentioned procedural situations occurs when a proceeding is conducted against several persons and is repeated against a defendant who has been tried *in absentia*. In this case, Article 481 para. 2 of the Code (CPC, Official Gazette of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014) stipulates that an accomplice who has already been convicted may not be heard or confronted with the defendant but that the contents of the statement made by such a convicted accomplice may be presented to the court in keeping with Article 406, para. 1 item 5 CPC, although the decision may not be based exclusively or mainly on such evidence. The *ratio legis* is contained in the fact that the defendant tried *in absentia* is sanctioned by not being allowed to reverse the case for a re-trial.

Thus - in the situation described above - there is not only an explicit legal provision banning the accomplice who has already been convicted from being heard or confronting the defendant, but there is a justifiable reason for that. No parallel

4 See the decision of the Higer Court in Belgrade no. K Po1 37/2012 of 12.02.2014 and the decision of the Court of Appeal in Belgrade no. Kž1 Po1 22/14 of 06.02.2015.

5 The stance was taken at the session of the Criminal Division of the Supreme Court of Cassation held on 31 March 2014.

6 The stance was taken at the session of the the Criminal Division of the Supreme Court of Cassation held on 13 May 2014.

should be made between this situation and the situation of examining a person who has concluded a plea agreement as a witness. The former involves a repeated procedure on the basis of an extraordinary legal remedy, whereas the latter involves a regular criminal procedure wherein a defendant is tried for the first time.

Another procedural situation occurs when several persons are accused and when the appeal is granted to one person in the course of the appellate procedure, reversing the decision and returning the case to the first-instance court for new adjudication, whereas the appeal is not granted to the other defendants, and the first-instance decision is confirmed and final. Then the co-defendants for whom the decision has become final cannot be examined as witnesses. In this situation there is a minor infringement of the principles of directness and contradiction. The persons against whom the decision has been confirmed, have been heard within a single proceeding, so that the co-defendant whose decision was reversed had an opportunity to ask questions and raise objections to their statements (Spasojević, 2014: 20).

Finally, the third procedural situation occurs when the proceeding for a number of co-defendants is severed (regardless of whether one of the proceedings is final or whether there are two proceedings going on at the same time). According to the view of the SCC, the provision from Article 406 para. 1, item 5 CPC is also to be applied in this situation, i.e. the contents of the accomplice's statement should be presented.

The SCC has taken the said view providing a justification that it finds that "the intention of the legislator in the given procedural situations was to avoid the overlapping of procedural roles (a person being a defendant and a witness)".

THEORETICAL ANALYSIS

It appears that the view of the SCC constitutes a misinterpretation of the provision from Article 406 para.1, item 5 CPC as the said provision stipulates that the records of the co-defendants' statements may (may, but do not have to) be inspected, without mentioning that such a person may not be examined as a witness. So the provision under Article 406 para. 1 item 5 CPC allows for an insight into the statement of a co-defendant due to which the criminal proceeding was severed or finished by a final conviction, but does not make it mandatory.

In addition to this, a plea agreement and a decision on the basis of the agreement cannot be treated equally as the testimony of a co-defendant under Article 406 para.1 item 5 CPC because the said provision applies to a statement given in accordance with the provisions for a hearing. It is the statement, i.e. the defence of a co-defendant that is given in the form of a free-style narrative. After the person freely presents his/her defence, he/she is questioned by a defence counsel, prosecutor, court, co-defendant and other persons in order to probe the veracity of the testimony or to establish all relevant facts. Thus in the situation of giving

a statement in accordance with the provisions pertaining to hearing, the public prosecutor and the defendant are two opposing parties. The public prosecutor strives to prove the defendant's crime and may find it useful to question the veracity of the defendant's statement.

Conversely, in the case of a plea agreement, the public prosecutor and the defendant work together to conclude an agreement that will be accepted by the court. Moreover, the court does not examine the substantive part of the agreement, i.e. it does not check the truthfulness of the facts stated in the agreement, as it is sufficient that there is no evidence contrary to the admission and that other formal requirements are met for the court to accept the agreement.

The agreement constitutes a product of a bargain between the public prosecutor and the defendant. Both parties to the negotiations on concluding a plea agreement are usually experienced participants. Both public prosecutors and defence attorneys, based on their experience, have a good feeling for a 'market price' of a criminal offence in each individual case (Scott & Stuntz, 1992: 1922). It is necessary for the public prosecutor and the defendant to reach a consensus regarding the legal qualification of the criminal offence and its factual description, that the defendant unconditionally confesses having committed the criminal offence defined in such a way, that they agree on a specific penalty or the scope within which the court will pronounce the sentence, as well as that they agree on who will pay for the expenses of the criminal proceeding. The benefit of such 'cooperation' for the public prosecution is reflected in the significance which the defendant's testimony has for corroborating the statements of the prosecution (Ilić, Majić, Beljanski & Trešnjev, 2018: 817). On the other hand, by pleading guilty, the defendants 'sell' their procedural rights to the prosecutor, in exchange for concessions which they value above the rights that they forfeit (Easterbrook, 1992: 1975). Hence the agreements and settlements are not a reliable way towards establishing facts as is the case in some other fields (Damaška, 2004: 1032).

Based on everything said so far, it is clear that the plea agreement and the decision reached on the basis of such an agreement cannot be treated equally as the statements of co-defendants under Article 406 para.1 item 5 CPC. Hence the motion of the defence to examine the person who has concluded such an agreement cannot be denied by referring to the said legal provision.

As regards the statements of the SCC that provision from Article 406 para.1 item 5 CPC is to be applied in the specified procedural situations because it is deemed that it is the intention of the legislator to avoid - in the given procedural situations - the overlapping of procedural roles (a defendant and a witness), we would like to point out to the following.

Although it concerns the same event, it involves two different procedures, one of which has been concluded by a decision based on a plea agreement. Even if there was a joint procedure which was severed for the purpose of concluding a plea agreement, after the severance there would be two separate proceedings. This

means that the same person may be a defendant in one proceeding and a witness in the other one (Delibašić, 2014: 276).

Such a legal stance has been taken by the Supreme Court of Montenegro, which had to deal with the same disputable issue, and in its justification of the legal stance, the court pointed out the following: "There is no bar for a person who has been finally convicted on the basis of a plea agreement and who is within the reach of public authorities, to be examined in the capacity as a witness in criminal proceedings against another defendant. Such a possibility is not contrary to the prohibition of double procedural role of the same person in criminal proceedings. The reason for this is that the criminal proceedings against such persons have been finally concluded so that they no longer have the status of a party to an ongoing criminal proceeding against another defendant."[7]

"Incompatibility of the roles of a defendant and a witness is a purely theoretical construct stemming from a belief that 'a defendant cannot be trusted'. Yet the very fact that our legislation has accepted the institute of a cooperative witness, i.e. a cooperating defendant, has quashed the quoted proposition" (Bajović, 2017: 722). The cooperating defendant appears at the same time as a defendant and a witness, which indicates that the intention of the legislator is not to prevent the overlapping of procedural roles in all situations. Yet, we still support the view that in the specific case under consideration there would be no overlapping of procedural roles.

When concluding a plea agreement, the defendant is not obliged to tell the truth, that is, he/she shall not be sanctioned if the confession from the agreement does not correspond the factual state of affairs. If the defendant who has concluded an agreement were to be summoned in his capacity as a witness in criminal proceedings at which the decision based on the agreement is presented as evidence, he would, just as any other witness, be legally obliged to tell the truth. If the content of his testimony should differ from the confession from the agreement, in order not to commit the criminal offence of false testimony, and if a decision was reached based on such a testimony, a situation would occur in which two decisions could be made regarding the same event with differently established facts. However, the 2011 CPC no longer stipulates the duty of the court to fully and truthfully establish the facts, that is, to clarify everything. The truth is implicitly designated as a luxury because not only establishing the truth by the professional participants in the proceedings, but also striving towards it is not mentioned at all as a goal of the criminal procedure (Škulić, 2013:75). The investigative method has been replaced by the adversarial model and the emphasis has been placed on the burden of proof. The parties propose and present their evidence, and the court is an impartial arbiter whose task is to decide who wins the 'battle of evidence'. It is therefore even more illogical and unjust to decline the defence's motion to question the person who has concluded a plea agreement as a witness.

7 See the legal stance of the Supreme Court of Montenegro Su.VI no. 64/17, available at: *https://sudovi.me/podaci/vrhs/dokumenta/5625.pdf*, accessed on 22 January 2019.

An alternative solution, whereby the overlapping of procedural roles would be avoided, is to subject the person who has made the agreement to a hearing rather than to being questioned as a witness. Then the defendant would not be obliged to tell the truth. However, such a thing is unacceptable for a number of reasons. First, it involves an already convicted person, and only a person against whom a criminal procedure has been instituted can be subjected to hearing. Second, it is unjust and illogical to found a decision against one defendant on a testimony of a person who is not bound to tell the truth. Such a testimony should be dealt with a certain degree of caution. As opposed to the situation in which the person who has made a plea agreement is not allowed to attend the trial in order to testify, a significant difference would be the case in which the defendant would be able to question the person who has made the agreement and probe the veracity of the given testimony.

The position of the defendant in the adversarial procedural model differs from that of the defendant in our legislation. If the defendant testifies, he is examined just like any other witness, which means that he/she is sworn in and therefore criminally liable for a false testimony. His position is the same if he testifies against co-defendants. In this regards, a complex question – which calls for a comprehensive analyses of legal provisions, and concerns the situation under scrutiny in this paper – arises as to whether it would be possible and whether it should be stipulated in our legislation that a co-defendant may act in the capacity as a witness when giving the statement.

Preventing the defendant from questioning the person whose plea agreement is presented as evidence in the proceeding infringes upon the basic rights of the defendant guaranteed under Article 68, para. 1, item 10 CPC (CPC, Official Gazette of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 33 para. 5 of the RS Constitution (Constitution of the Republic of Serbia, Official Gazette of RS, No. 98/2006) and Article 6 para. 3 item d of the European Convention for the Protection of Human Rights (Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950). The above listed legal documents guarantee the defendant's right to question the witnesses for the prosecution and defence. In the specific case, the term witness should encompass co-defendants against whom procedures have already been completed as, 'from the perspective of the defence, it is irrelevant whether a testimony is given by a witness or another defendant, since both of them testify about the relevant facts and circumstances, and the court assesses both testimonies according to its discretion" (Bajović, 2017: 723).[8] The rule on the necessity of questioning the co-defendant was introduced by the European Court of Human Rights in the case of

8 Such a view was also taken by the Europran Court of Human Rights in the case of *Isgro v. Italy* stating that the statement of the codefendant that had been read at trial could be considered a statement of a witness and that the defendant should have the same right as the codefendants as well as other witnesses. See the ruling in the Case of Isgro v. Italy, Application No. 11339/85, Strasbourg 1991.

Kaste, Mathisen v. Norway, taking the stance that a ruling must not be based on the statement of the co-defendant whom the other co-defendant or his defence counsel could not question at any stage of the procedure.[9]

Further, the reading of a decision made on the basis of a plea agreement without questioning the person based on whose confession the decision has been made, constitutes a departure from the principle of directness. A situation arises in which a court bases its ruling on a statement, i.e. an agreement of a person it has never seen or heard, while on the other hand Article 419 CPC (CPC, Official Gazette of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014) stipulates that the court is to base its decisions only on the evidence presented at trial. Given the fact that the principle of directness is a rule, and that exceptions to this rule are strictly defined in the Code, the exemptions should be interpreted restrictively and not extended to similar cases. In other words, the provisions of Article 406 para. 1, item 5 CPC which pertain to the reading of the co-defendant's statement should not be extended to encompass the reading of the decision based on the plea agreement because, as we have already explained, the said decision does not constitute a statement given in keeping with provisions that apply to hearing.

There are certain situations in which the legislator stipulates that a decision may not - solely or to a decisive extent - be based on certain statements. Such a situation involves the statement of an undercover investigator. This also applies to the statement given by a witness to the public prosecutor in the absence of the suspect or his defence attorney in the course of investigation, for fear that their presence may influence the witness in the proceedings for criminal offences, especially from the domain of the public prosecutor's office of special jurisdiction. The legislator's *ratio legis* due to which the decision may not be based solely on such statements is that the defendant would be unable to question the veracity of the statement. An analogy would be in order here with a case in which a defendant is not allowed to question the person on whose confession an agreement has been based and thereby decision has been reached which is presented as evidence at trial.

Finally, if the court would grant the motion of the defence to question the person who has made an agreement as a witness, the defence would perform the examination-in-chief and the cross examination would be assigned to the prosecution. However, the defence could see the person whose plea agreement is submitted as evidence for the prosecution as a 'hostile' witness. In this light, the defence would probably feel the need to cross examine the person in order to pose leading questions. Given that the legal provisions accurately regulate who is responsible for examination-in-chief and who is in charge of cross examination, this would not be possible (Delibašić, 2015: 67).

9 See the following decisions: Case of Kaste and Mathisen v. Norway, Application No. 18885/04 and 21166/04, Strasbourg 2006; Case of Luca v. Italy, Application no. 3354/96, Strasbourg 2001; Al-Khawaja and Tahery v. United Kingdom, Application no. 26766/05 and 22228/06, Strasbourg 2011.

CONCLUSION

Extending the legal effects of the plea agreement constitutes downplaying of legal provisions. Additionally, the court flagrantly violates the fundamental right of the defendant guaranteed by the Criminal Procedure Code, the Constitution, and the European Convention on Human Rights, and that is the right to question the witnesses of both prosecution and defence. In that way the burden of proof is significantly reduced for the prosecution. On the other hand, the defence is placed in a significantly more difficult situation as it has no way to refute the evidence presented by the prosecution. This also constitutes a departure from the principle of directness as the court bases its decision on the agreement, i.e. the statement of a person whom it has never seen or heard.

It seems that the Supreme Court of Cassation has made a number of omissions when taking a legal stance that the person who has made a plea agreement cannot be questioned as a witness or heard in a proceeding wherein the agreement is presented as evidence. Initially, the provision from Article 406 para. 1 item 5 of the CPC was misinterpreted as prohibiting that a co-defendant for whom the proceeding is severed or finally completed by a conviction be questioned as a witness. Further, the plea agreement has been mistakenly equated with the statement of the co-defendant under Article 406 para. 1 item 5 CPC which pertains to the statement given in accordance with provisions pertaining to hearing. Finally, the SCC justifies its stance by claiming that the intention of the legislator is to avoid overlapping of procedural roles (a defendant and a witness) in the given procedural situations. However, as it has been explained, there is no duplication of procedural roles in the given situation because two different proceedings are involved. Besides, the existence of the institute of a cooperating defendant indicates that the intention of the legislator is not to prevent overlapping of procedural roles in all of the procedural situations.

1. Should the court allow a person who has concluded a plea agreement to be summoned to the trial, it might give rise to dilemmas of other type. The question is whether such a person should be questioned as witness or subjected to a hearing. The paper elaborates on the reasons due to which we find the first solution to be appropriate, that is, due to which the person who has made a plea agreement in respect of a certain criminal offence is to be examined as a witness. And finally, yet another problem occurs. If a person who has made a plea agreement were to be questioned in the capacity as a witness at the suggestion of the defence, then the defence would be in charge of the examination-in-chief. However, in practice, the defence is likely to perceive such persons as 'hostile witnesses' and therefore may feel the need to cross examine them in order to pose leading questions.

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