ASPECTS REGARDING THE USE OF COLLABORATORS IN THE CRIMINAL TRIAL

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Abstract

This work covers the review of the main issues arising in judicial practice with regard to the use of special surveillance or investigation methods, especially the use of undercover investigators and of collaborators, starting from ordering such measures all the way through the limits the intervention of such investigator/collaborator should respect.

Keywords: *evidence taking fairness principle, special surveillance methods, collaborators, judge of rights and freedoms authorization, agent provocateur, evidence exclusion.*

1. Introduction

In matters of evidence taking during criminal prosecution, are extremely important special surveillance or investigation methods, which are, otherwise, the most used by criminal prosecution authorities. Further, more and more often, the practice of criminal prosecution authorities uses undercover investigators and collaborators.

Given that their intervention during investigations requires compliance with the safeguards provided by law, it is essential, firstly, that the mode in which criminal prosecution authorities impart a person the investigator/collaborator status meets the conditions provided by law. Secondly, the investigator/collaborator's intervention should respect both the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the privilege against self-incrimination in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

Or, judicial practice set out situations in which criminal prosecution authorities do not respect strictly the regulations in such matters, using artifices in order to obtain evidence in the criminal trial, although, in this manner, the safeguards provided by law are violated.

2. Content

Evidence taking in the criminal trial is governed by the evidence taking fairness principle, which is set out in the provisions under art. 101 CPP. According to such principle, it is forbidden to use threats, violence or other constraining methods, promises or advice for the purpose of obtaining evidence. According to para. (2) in the same article, it is forbidden to use listening methods or techniques that would result in prejudicing the status of the person listened to, that is making it impossible for such person to confess deeds voluntarily and consciously, when such deeds are the object of evidence.

Another interdiction criminal process law provides consists in forbidding criminal prosecution authorities to provoke a person to commit or continue to commit a criminal deed, in order to obtain evidence in the criminal trial. The sanction applicable to evidence obtained by illegal methods consists in evidence exclusion and in the impossibility of using such evidence in the criminal trial. Thus, pursuant to art. 102 CPP, the evidence obtained by torture or the evidence arising from the evidence obtained by torture may not be used in the criminal trial. Further, the law excludes using in the criminal trial the evidence obtained by illegal methods.

Moreover, if the act whereby evidence taking was either ordered or authorized, or whereby the evidence was taken is illegal, this fact prejudices also the evidence as such, and determines its exclusion from the criminal trial. In this meaning, is relevant the CCR dec. no. 22/2018, which established that provisions are constitutional

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only to the extent the phrase „*evidence exclusion*" would mean also „*the elimination of the evidence from the case file*".

Thus, obtaining evidence in the criminal trial should respect both the ECHR standards, and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

It is relevant also in this regard the ECtHR case law[1], which stipulates that „*the Court has no jurisdiction to assess the judiciousness of accepting and taking evidence in a certain case, this being the duty of national courts, but only the task to assess whether the proceeding as a whole, inclusively the mode in which the evidence was obtained, was fair in character*".

Pursuant to the doctrine, ECtHR underlined that one should not ignore the inherent difficulties of the investigations carried out by the police authorities that have to gather evidence regarding the crimes they investigate; for such, they are forced to appeal, more and more often, especially in the fight against organized crime and corruption, to infiltrated agents, informers and practices called generically „*undercover*".

Such practices are special methods of surveillance or investigation, and are set forth in the provisions under art. 138 CPP, namely: intercepting communications or any type of remote communication; access to a computer system; video, audio or photo surveillance; localization or tracking via technical means; obtaining data about a person's financial transactions; retaining, delivering or searching mail deliveries; using undercover investigators and collaborators; authorized participation in certain activities; delivery under surveillance; obtaining traffic and localization data processed by public electronic communication network providers or by providers of electronic communication services to the public.

The use of special investigation techniques, especially the use of infiltrated agents, should not prejudice the rights and obligations arising from international multilateral conventions on the protection of human rights.

The Court emphasized that, while the intervention of some „*infiltrated agents*" during preliminary investigations may be accepted, to the extent it is clearly based on and accompanied by adequate safeguards, public interest may not justify the use of evidence gathered as a consequence of a provocation on part of the police authorities; such procedure is prone to deprive *ab initio* and definitively the „*accused*" of a fair trial.

Thirdly, ECtHR decided that there is provocation on part of the police authorities or of the investigation authorities, in general, when the law enforcement members, or the persons intervening at their request do not limit themselves to examine passively the criminal activity, but exercise over the person carrying out such activity some influence and incite such person to commit a crime that, otherwise, that person would have not committed, for the purpose of making possible to establish that such crime was committed, therefore, in order to evidence it within criminal prosecution. Finally, the Court concluded that, in such a situation, when the information presented by the criminal prosecution authorities do not allow it establishing whether the plaintiff was or was not the victim of some provocation on part of the police authorities, it is essential that the court examines the proceeding within which the judgment was pronounced based on such „*provocation*", in order to check whether, in that case, the right to defend oneself was protected adequately, especially if the *audi alteram partem* and equality of arms principle was respected.

Based on using such criteria, in the Case *Romananskas v. Lithuania*, the Court considered that the actions of agent provocateurs, police officers, had as a consequence the instigation of the plaintiff to commit the crime he was convicted for, and no elements in the case file data indicated that, in the absence of their intervention, the defendant would have committed the relevant crime. Considering the incriminated intervention and its use in the criminal trial under discussion, the Court considered that it was not fair, violating the provisions under art. 6 ECHR.

In the same light, we underline also the fact that the right of an accused to keep silent with regard to the deeds imputed to him and the right not to contribute to their own incrimination are essential aspects of a fair proceeding in the criminal trial.

The European Court has decided constantly that, even if art. 6 ECHR fails to mention expressly such rights, they are generally recognized norms, in the center of the notion of a „*fair trial*", consecrated by this text. The reason for their recognition consists, especially, in the need to protect the person accused of committing a crime against the criminal prosecution authorities exercising some pressure, in order to avoid judicial errors and to allow achieving the purposes under art. 6. The European court decided that the right not to contribute to one's

[1] Case *Luca v. Italy*, judgment of 27.02.2001, *www.echr.coe.int*.

own incrimination involves that, in a criminal case, the prosecution tries to support their arguments, without using the evidence obtained by constraint or pressure, against the defendant's will. In this regard, such right is closely related to the presumption of innocence, as provided under art. 6 para. 2 ECHR.

In our meaning, provoking a person, in view of recognizing or generating some evidence against such person may be assimilated to the conduct forbidden by the legislator, an attitude that is also prohibited by the European Court of Human Rights.

For the same reasons, the legislator, in art. 103 para. (3) CPP, established that „*the decision to convict, waive the punishment or defer the punishment may not be grounded, to a decisive extent, on the statements of the investigator, collaborators or of protected witnesses*".

In this regard, ECtHR made a clear distinction between the provoking/setting up the defendant and the mere use of some legal techniques specific to undercover activities. Therefore, according to the European Court, the use of special investigation methods, especially of undercover techniques, may not violate in itself the right to a fair trial. The risk involved by the instigation by the police, via such techniques, involves that the use of the relevant methods is not maintained within well determined limits. The instigation by the police or by persons acting at their order will not be limited to the investigation of criminal activity passively, but will involve exercising some influence on the defendant, so that to incite the latter to commit some crime or to continue to commit some crimes, for the purpose of obtaining evidence.

Further, the distinction between „*police provocation*" and performance of some proactive investigation required the Court from Strasbourg to make a review. In this context, the Court underlined comprehensively the conditions that should be cumulatively fulfilled, so that the state agents' activity may be considered a passive activity that does not involve provocation:

- the Court established that, *ab initio*, there should be a reasonable suspicion that a person takes part in a crime, or prepares to commit such criminal deed, or has a predisposition to take part in some criminal activities;
- It is necessary that the activity of criminal prosecution authorities or their collaborators was previously authorized according to law;
- State agents or their collaborators did nothing else than giving the perpetrator an opportunity to commit crimes.

To the same effect, ECtHR sanctioned such conduct upon the ruling of the Case *Allan v. United Kingdom*. As a matter of fact, after invoking the right to silence, the defendant was placed in a cell together with an informer of the criminal prosecution authority. The evidence, namely the confession obtained by an informer who directed the conversation to the circumstances in which the crime under investigation was committed, was not obtained spontaneously and in the absence of provocation. For this reason, the European Court stipulated that the information obtained through the informer's intervention, was taken against the defendant's will. Moreover, in the Court's meaning, the use of such evidence in the criminal trial amounts to depriving the right to silence of its legal effects, being also violated thus art. 6 para. 1 ECHR.

Otherwise, national courts took over this European reasoning and stipulated that „*recalling the cases Teixeira de Castro v. Portugal of 09.06.1998 and Ramanauskas v. Lithuania of 05.02.2008, showing that agent provocateurs are state infiltrated agents, or any person acting under the management or supervision of some authority (prosecutor), who, during the activity carried out, exceed the limits of duties granted by law to act for the purpose of showing a person's criminal activity, provoking such person to commit crimes, in view of evidence taking upon prosecution*"[2].

The obligation of fair evidence taking, as well as respecting the right to silence of a person suspected of committing a crime are emphasized especially also by the recent practice of the CCR, and also of the HCCJ with regard to the witness, who is granted the right not to self-incriminate, materialized even by the judge on the merits of the case within the judgment with regard to another co-defendant.

The collaborators of criminal prosecution authorities, whether under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions with regard to alleged deeds. Further, it is evident that the purpose of the influence previously mentioned would be to obtain evidence, a conduct that is vehemently prohibited by ECtHR, as we showed previously.

[2] Judgment no. 199/18.08.2011, pronounced by Tulcea Trib., maintained also in the dec. no. 125/P/21.10.2011 of Constanța CA, sheet 6.

Consequently, by acting in such manner, the provisions under art. 6 ECHR are violated, such action amounting to the one of an agent provocateur.

Moreover, we should emphasize that the use of undercover investigators or real identity investigators and of collaborators, as provided under art. 148 CPP, is distinct from the technical surveillance of some person(s).

Pursuant to the provisions under art. 139 CPP, technical surveillance is ordered by the judge of rights and freedoms, when the following conditions are cumulatively fulfilled:

„a) there is a reasonable suspicion with regard to the preparation of or committing a crime among those provided in para. (2);

b) such measure should be proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence could not be obtained in another manner, or obtaining it would involve special difficulties that would prejudice the investigation, or there is a danger to safety of persons or of some valuables.

(2) Technical surveillance may be ordered in case of crimes against national security provided in the Criminal Code or special laws, as well as in case of crimes such as drug trafficking, doping substances, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives and restricted explosive precursors, trafficking and exploiting vulnerable persons, terrorism, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, against property, blackmail, rape, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in case of other crimes for which the law provides punishment with imprisonment for 5 years or longer."

As such, the difference is emphasized also by the need for fulfilling some different conditions from the ones provided under art. 139 CPP.

Further, under the CCR dec. no. 55/2020, the objection of unconstitutionality was admitted, and it was established that the provisions under art. 139 para. (3) final thesis CPP are constitutional to the extent they do not regard recordings resulted from the performance of activities such as information gathering, which involve restriction of the exercise of some fundamental human rights or freedoms, carried out in compliance with legal provisions, authorized pursuant to the Law no. 51/1991.

Consequently, there is a difference between the recordings mentioned under art. 139 para. (3) CPP and the recordings regarding which authorization procedures are regulated.

The decision aforementioned stated that *„therefore, when reviewing the legality of evidence and of the evidence taking the recordings were obtained by, for the system governed by the Criminal Procedure Code, the Pre-Trial Chamber judge should consider, on the one hand, the conditions imposed by the legal provisions for authorizing such measures, and, on the other hand, the authority with jurisdiction to issue such authorization*."

Pursuant to art. 148 para. (10) CPP, *„in exceptional situations, if the conditions provided in par. (1) are fulfilled, and the use of an undercover investigator is not sufficient for obtaining the data or information, or is not possible, the prosecutor that supervises or carried out the criminal prosecution may authorize the use of a collaborator, assigning the latter another identity than the real one. The provisions in para. (2)-(3) and (5)-(9) shall apply accordingly*".

Further, in accordance with art. 148 para. (1) and (2) CPP, *„(1) The prosecutor supervising or carrying out criminal prosecution may order authorization of the use of undercover investigators for a period of maximum 60 days, if:*

a) there is a reasonable suspicion with regard to the preparation of or committing a crime against national security provided by the Criminal Code and by other special laws, as well as in case of crimes such as drug trafficking, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives, trafficking and exploiting vulnerable persons, terrorism or similar, terrorism financing, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, blackmail, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in

case of other crimes for which the law provides punishment with imprisonment for 7 years or longer, or there is a reasonable suspicion that a person is involved in criminal activities in relation to the crimes listed above;

b) such measure is necessary and proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence or localization and identification of the perpetrator, suspect or the defendant could not be obtained in another manner, or obtaining such would involve special difficulties that would prejudice the investigation, or there is a danger to the safety of persons or of some valuables.

(2) The measure shall be ordered by the prosecutor ex officio or at the request of the criminal prosecution authority, via an ordinance that should contain, besides the mentions provided under art. 286 para. (2):

a) indication of the activities that the undercover investigator is authorized to carry out;

b) the period such measure was authorized for;

c) the identity assigned to the undercover investigator."

It is obvious that the legislator established very strict conditions for the scenario of using a collaborator, exactly because, most times, such evidence taking prejudices the evidence taking fairness principle, as provided under art. 101 CPP.

As regards the condition provided under art. 148 para. (1) letter b) CPP, the specialist literature states that „*the legislator regulated the measure subsidiarity principle, underlining its exceptional character, given that it is not adequate that a significant part of the evidence taking in a case consists of acts of undercover investigators, performed in the phase of preliminary acts. Other less intrusive methods should be used for discovering the crime, or for the identification of perpetrators, if liable to lead to the same results and if their use does not raise significant practical obstacles*"[3].

Consequently, the use of a collaborator and, subsequently, of conversations this had with the defendant, in relation to past deeds, is a serious violation of the right to silence and of the privilege against self-incrimination. Otherwise, the ECtHR case law sanctioned repeatedly such type of approaches.

Thus, it stated that „*the right not to contribute to one's own incrimination involves that the accusation should be grounded on evidence that should be taken without appealing to constraint or pressure, or by infringing the defendant's will*"[4].

Art. 148 para. (3) CPP states that „*if the prosecutor assesses that it is necessary that the undercover investigator be able to use technical devices in order to obtain photos or audio and video recordings, the first should inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant. The provisions under art. 141 shall apply accordingly.*"

Therefore, when, after assigning the quality of „*collaborator*" to a person, the prosecutor fails to inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant, as imperatively prescribed by the text aforementioned, the use of a collaborator is illegal.

As regards the nature of activities the prosecutor may authorize in the ordinance issued, we should state that the use of some evidence taking procedures, especially of some technical surveillance measures, could not have been included. The only technical surveillance measures that may be used by undercover investigators and by collaborators are the ones provided under art. 138 para. (1) letter c) CPP, and only if the judge of rights and freedoms issues a technical surveillance warrant for such – a warrant that evidently, considering the provisions under art. 148 para. (3) CPP, should be issued subsequent to the issuance of the ordinance on the use of collaborators. Consequently, any other technical surveillance measures might not be implemented by the collaborator, and no evidence taking procedures through the collaborator might be performed, any violation of such limitation resulting in the illegality of the evidence taken.

All these because the authorization activity, the judge's exclusive power, has as its purpose to point out the criminal activity, and should be based on the purely passive conduct of the judicial authority, while carrying out some activities without authorization is a violation of the fairness and equity principles.

Ambient recording of a conversation in virtue of the quality of collaborator is different from the scenario provided under art. 139 CPP, such distinction consisting both of the fact that a collaborator receives technical

[3] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008, p. 782.

[4] Case *Shannon v. Great Britain*, judgment of 04.10.2005, para. 32.

assistance and also of the fact that the conversation is performed deliberately by the person collaborating with the criminal prosecution authorities in a certain direction, its purpose being to obtain certain information that, in other circumstances, could not have been obtained.

All the contentions above are fully confirmed also by judiciary practice, namely by the practice of Bucharest Trib. that, in the ruling of the Pre-Trial Chamber judge dated 15.12.2016, unpublished[5], states as follows:

„The defense contented that it is illegal to intercept ambient conversation between A and B. Thus, the ambient conversation was not carried out in view of discovering some crimes, and neither was it performed because of the existence of some reasonable suspicion with regard to the preparation or committing of a corruption crime. This is assessed and ordered only in light of the preparation or committing of a crime, and only if the evidence could not be obtained in another manner, or could be obtained with difficulty.

The Court considered that interceptions should be used in a fair manner only when, in the intercepted conversations, references to facts that took place several years ago are voluntary, or when there are judicious clues that the persons involved in the relevant conversation try to cover the tracks of such facts, or to hinder the smooth course of criminal prosecution.

Thus, during the conversation, B. mentioned that he no longer remembers the actual circumstances that were the object of the criminal case. In this context, A. led deliberately the conversation towards the remembrance of some facts and circumstances related to the case matters, referring also to the defendant V.L.O. The entire conversation between the two shows clearly that B. was pressed and directed «to remember» certain matters of interest for the prosecution, and that his story, interspersed with several replies such as «I don't know», «I don't remember», was affected by the insistence and perseverance of witness A.

In such circumstances, the Pre-Trial Chamber judge considered that, in order to inspire safety in the use of evidence for finding the truth, the use of special surveillance techniques should not be «doubled» by witnesses eliciting statements from some persons subject to surveillance, about facts or circumstances that occurred years ago and that the person under surveillance does not narrate on their own, consciously, freely and voluntarily."

3. Conclusions

The use of special surveillance or investigation methods, especially of undercover techniques, may not violate by itself the right to a fair trial, while obtaining evidence in the criminal trial should respect both the ECHR standards and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

The collaborators of criminal prosecution authorities, whether they act under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions exactly as a consequence of the influence exercised on them.

Moreover, the use of undercover investigators or real identity investigators, provided under art. 148 CPP, is distinct from the technical surveillance of some person(s), being necessary that, after a person is assigned the quality of „*collaborator*", the judge of rights and freedoms is informed, in view of issuance of the technical surveillance warrant, as set forth expressly by legal provisions.

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[5] I. Neagu, M. Damaschin, A.V. Iugan, *Codul de procedură penală adnotat*, Universul Juridic Publishing House, Bucharest, 2018, p. 215.