Maia Kvirikashvili*

Witness Coaching by a Prosecutor

The Article touches the rule of admissibility of communication of the Prosecutor with the witness in view of his/her preparation for the trial and the line between coaching and preparation of the witness by the prosecutor. The Code of Criminal Procedure fails to regulate the hereof issue and thus, allows interpretation of the parties of the criminal proceedings. The Article analyzes the degree of compliance of the witness preparation by the prosecutor with the principles of equality and adversarial principle between the parties of the criminal proceedings, provides the mechanisms for risk prevention not to allow coaching of the witness by the prosecutor prior to testimony turning into coaching and hence, the Article provides proposals in view of regulation of the hereof issue on the legislative level.

Key Words: *witness, preparation of the witness, coaching of the witness, adversarial principle and preparation of the witness, communication of the prosecutor with the witness, admissibility of communication with the witness, communication rule.*

1. Introduction

The Criminal Procedure Code of Georgia [1] (hereinafter referred to as the CPCG) fails to provide the hierarchy of evidences according to their prevalence. Testimony of the witness is one of the types of evidence; however there is no criminal case where the state prosecutor has not obtained the testimony of a witness in capacity of one of the evidences to confirm the culpable actions of a person. According to the testimony of a witness, as deriving from importance of one of the most relevant evidence types, the method of obtainment of testimony from a witness was long enough the subject of discussions as amongst the scientific circles so amongst the legislators. Finally, on February 20, 2016 the rule was enacted envisaging obligation of a witness to give testimony to the Court and upon investigation and the method of voluntary provision of information within interrogation to the prosecutor. The hereof legislative change aimed at exclusion of usage of a testimony obtained from the witness by means of any type of pressure thereto by the representatives of the investigative bodies at the stage of Court consideration, restriction of the witness upon testifying to the Court with the testimony given during investigation and moreover, intimidation thereof with criminal responsibility for giving conflicting testimony. However, the issue was any way put to agenda in practice whether the prosecutor is allowed of any type of communication with the person voluntarily interrogated at the investigation stage and subject to be interrogated in the Court in capacity of the witness of the prosecutor, prior to interrogation; what is the possibility, form and scopes of communication between the witness and the prosecutor to prevent any doubts about possible pressure on the witness by the prosecutor. The hereby Article aims at, though analyzing the practice of the countries of adversarial system of jurisdiction of criminal law, answering the hereof questions and submission of respective recommendations.

* Doctoral Student, TSU, Faculty of Law,

[1] Law of Georgia on "Criminal Procedure Code of Georgia", the Legislative Herald of Georgia 31, 03.11.2009.

2. Admissibility of Communication with a Witness

The reform of the Criminal Procedure Code of Georgia since 2004 has finalized with adoption of the new Criminal Procedure Code by the Parliament of Georgia on October 9, 2009. The Institutional changes have been introduced to the Criminal Procedure Code. From the principles of inquisitional (continental) law, the Criminal Process has been transferred to the system of the common (adversarial) law. The Criminal Procedure Code aimed at establishment of a system based on the adversarial, publicity, equality of arms, direct examination of evidences, respect of rights of a accused person and other progressive principles. Hence, criminal proceedings should be implemented within the adversarial process.

The key element of the adversarial process is the principles of "equality of arms", envisaging all the parties of the process to be equipped with equal opportunity to introduce their case, as actual so legal issues and to have equal possibility to submit their comments/express counter opinion to the issue raised by the opponent/adverse party.[2]

Besides, "the key elements of the adversarial principle are as follows: dissociation of the functions of the parties; adversarial principle as on the Court so on the investigation stages; right of the parties on obtainment of evidences; equality of arms to submit own evidences and the right to examine the evidences of the adverse party".[3]

Thus, the function of the state prosecution has been defined to be obtainment and submission of the evidences to the Court within the adversarial principle to, beyond the reasonable doubt, argument culpability of a person.

The testimony of a witness is one of the types of the evidence - the information provided by a person concerning the circumstances of a criminal case. True that the procedural legislation fails to envisage the hierarchy of the reliable and authentic evidences according to their form, the testimony of a witness still remains obtainable in the criminal case and thus, the most common evidence.

The prosecutor in the Court is a state accuser imposed with the burden to prove the accusation. The prosecutor, in view of confirmation of a crime, shall introduce the evidences and the hereof obligation at that shall be implemented with high professional quality and responsibility.[4] Introduction of evidences by a prosecutor implies submission thereof to the Court in due procedural form and within due terms, definition of sequence thereof, visual representation (especially if the case is considered by a jury) to facilitate to understanding of complicated legal issues. And testifying by a witness of a prosecutor is an integral part of this very process as submission of one of the evidences.

The CPC of Georgia does not provide communication either with the witness of a prosecutor or with the witness of a defense prior to testifying in the Court and especially, the rule of communication. The hereof issue has become disputable on November 16, 2015 in Tbilisi City Court upon essential hearing of the case against the employees of the Ministry of Defense of Georgia. Namely, the witness has declared that he/she met with the prosecutors prior to the trial and has been through "rehearsal". In opinion of the Public Defender of Georgia, consideration of the case circumstances with the witness prior to the interrogation at

---

2 *Wasek-Wiaderek M.,* The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries, 2000, 23.

3 The Collective of the Authors, *Giorgadze G.* (ed.), the Comment to the Code Criminal Procedure of Practice of Georgia, Tbilisi, 2015, 85.

4 The Decree of the Prosecutor General of Georgia of June 19, 2006 №5 on "Endorsement of the Code of Conduct for the Employees of the Prosecutor's Office of Georgia", Article 10, part 1.

the Court contradicts with the rule established under the Law on Interrogation of a Witness and breaches the right of the convicts on fair trial inasmuch as they never took part in this process.[5]

The hereof issue is the subject of legal discussions even in the countries with the adversarial justice. The Department of Appeals of the Supreme Court of the State of New York in re People v. Liverpool, where the lawyer put the issue under dispute that the prosecutor made the witness through improper instruction to "clean" the report of a policeman upon testifying from the problematic parts, the Court has elucidated to the jury that there was nothing wrong in communication of a prosecutor with a witness prior to the trial.[6]

"Preparation of a witness by a prosecutor is considered to be an ethical practice. The behavior shall be considered unprofessional if a witness is not prepared for testifying prior to the trial. Preparation of a witness under the Code CriminaL Procedure is an important and unalterable process allowing the prosecutor achieving the outlined goals upon seeking for justice".[7] "The prosecutor can introduce the examples to the witness about what types of issues the cross-interrogation he/she can be subject to".[8] This practice will encourage the witness to acknowledge the expected trial, to voluntarily appear to the Court and give testimony.

Under the Procedural legislation of Georgia, non-regulation of the rule of communication with the witness prior to the trial does not imply inadmissibility of communication with the witness of a prosecutor prior to the Court considerations. The prosecutor shall be granted the right to communicate with the witness prior to the trial (similar right is envisaged for the defense in regards with own witnesses) if the hereof communication aims to enable the witness prior to the Court to recall the circumstances, refresh memory in regards with the information given to the law-enforcement agencies and to be prepared for the Court.

"Meeting of a prosecutor with own witness in view of prepare thereof for the trial shall not be equalized with improper coaching of a witness. Moreover, [Anglo-American] Case Law provides that repeated hearing of the direct testimony of a witness is admitted in view of prepare of a witness for the trial".[9] The countries with the adversarial principle consider that "due preparation of a witness is an important method for the prosecutor and a witness to be prepared for the adversarial test. By means of close cooperation with the witness, the prosecutor is allowed 1) seeking for the truth in full, due and unbiased manner; 2) submitting truth in the form as he/she has become aware in the diligent, fair and effective form; and 3) protecting truth from discrediting and distortion upon adversarial attack.[10]

Thus, the prosecutor shall have the opportunity to meet with, speak with and prepare the witness of the prosecution prior to testifying in the Court. Preparation of a witness does not imply only refreshment of his/her testimony in his/her mind but provision thereof with the information about the rule of conduct in the Court, importance of his/her testimony, the course of the trial etc. The Witness-Victim Coordination Service set up at the Prosecutor's Office system of Georgia serves for support of the witness and the victim and coaching thereof, one of the functions of which, in view of increase of efficiency of communication with the Court,

---

5 See in details the Report by the Public Defender of Georgia on the State of Protection of Human Rights and Freedoms in Georgia for 2015, 648, <http://www.ombudsman.ge/uploads/other/3/3512.pdf#page=16&zoom=auto,-121,792>, [seen 05.09.2016].

6 People v Liverpool, 262 AD 2D 425 (2d Dept 1999).

7 *Brittany R.C.,* Whose Line Is It Anyway? Reducing Witness Coaching by Prosecutars, Legislation and Public Policy, Vol. 18, 989.

8 Ibid, 990.

9 Nixon v. United States, 563, 1988, Smith V. Kelly, №7:07 cv 00536, 2008 wl 345838.

10 *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 834.

is provision of the witness with the detailed information about the Court-related procedures and about the rights and obligations of a witness.[11]

Thus, communication of a prosecutor with the witness prior to testifying in the Court is uniquely admissible (at least, the prosecutor shall hold the information about the intentions of the witness supporting his/her position to appear at the trial), as well as preparation of a witness is admissible in regards with the information given thereby at the investigation stage. However, this process shall not turn into the instructing at the extent that may possibly entail unlawful impact on a witness and modification of his/her testimony.

3. Margin Between Preparation and Coaching of a Witness

In line with the CPC of Georgia, the witness is a person who may know the data necessary for determination of the circumstances of a criminal case and at that, physical and mental state of which allows him/her properly acknowledging, remembering and restoring the circumstances, necessary for the case.[12] "The greater part of the scientists considers that memory is prone to mistakes and restoration and reconstruction of stored memories is a very fragile process. …memory, language, habits – as the cognitive factors – can have impact on accuracy and precision of testimony of a witness".[13]

Thus, it is important how the prosecutor conducts preparation of a witness. The method of interviewing can trigger the witness to fill the gaps in his/her memory, eliminate vagueness or contradiction, enhance language, make accents etc. At that, the witnesses of a certain category have high acceptability of the advices by the prosecutor, for instance minor witnesses.

The margin, lying between coaching and preparation of a witness is too fragile. "The prosecutor, upon preparation a witness, shall be careful not to cross the margin serving the starting point of coaching of a witness. The term "witness coaching" implies the behavior of a prosecutor, striving to change the attitude of a witness regarding particular events. The examples of coaching of a witness are to give the records to a witness to be used upon testifying, to tell a witness that if he/she fails to say so, the case will be lost, to coach witnesses together to ensure compliance of their testimonies".[14]

The prosecutor shall particularly not consider and resume the testimony of one witness with another. This rule, in general, derives from the procedural law of Georgia, prohibiting communication of witnesses prior to their testifying. Namely, the Article 118 of the Criminal Code of Practice of Georgia, envisaging interrogation of witnesses separately from the witnesses not yet interrogated. Besides, the Court shall prevent communication of the witnesses of one and the same case prior to accomplishment of interrogation. "…Consideration shall not be admitted between the witnesses. The Statement made by one witness and evidence provided shall not be introduced to another… The witness shall give testimony free of influence of any other person. This rule hopefully reduces all possibilities that the evidences provided by a witness will be influenced by another person and also equally excludes all substantiated perception or opinion that it may take place. This is the risk, accompanying witness preparation process".[15]

---

[11] See the detailed information about the functions of the Witness-Victim Coordination Service on the web-site of the Prosecutor's Office of Georgia <http://pog.gov.ge/geo/witness>, [03,09,2016].

[12] See the Code Criminal Procedure of Georgia, the Legislative Herald of Georgia 31, 03.11.2009, Articles 20 and 50.

[13] See *Bennett L. G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 833.

[14] See *Brittany R.C.,* Whose Line Is It Anyway? Reducing Witness Coaching by Prosecutars, Legislation and Public Policy, Vol. 18,989.

[15] R v Momodou & Limani (2005) EWCA Crim 177. §.61 (2005) <http://swarb.co.uk/regina-v-momodou-and-limani-cacd-2-feb-2005-2/>, [280.2016].

Thus, "the margin telling the witness preparation apart from improper training of a witness is not always clear".[16] The prosecutor, upon preparation a witness, shall aim at "reduction of anxiety of a witness regarding appearance at the Court, at making witness familiar with the respective processes and procedures which the witness perceives intimidating and at outlining of expectations of the trial process",[17] also, the witness shall as clear as possible provide the information available in due sequence in the Court and the hereof information shall not be at any extent altered or interpreted.

4. Mechanisms Protecting a Witness from Coaching

Interrogation of a witness by the adverse party upon the adversarial process is considered to be the "mean to put the version by the prosecutor about the occurred fact under doubt".[18] It means that cross-interrogation of a witness by an adverse party is considered as a protective mechanism allowing revelation of the circumstances putting accuracy of the testimony of a witness under doubt. In re Geders v. United States, the US Supreme Court has expressed the opinion that the masterly cross-interrogation is a vital protective mechanism, the guarantee to reveal improper coaching and training of a witness. The Court presumes that the margin between ethical training and unethical witness coaching is easy to be detected and the adverse party, upon interrogation of a witness, can reveal improper impact.[19]

However, other procedural mechanisms are necessary to exist to at maximal extent reduce likelihood of witness coaching by the prosecutor and at that, availability of the hereof mechanism will prevent substantiated appeal by defense regarding putting authenticity of the testimony of a witness on the hereof basis under doubt. The hereof mechanism implies existence of prior procedural rules and protection thereof.

Witness preparation shall be conducted in camera without video or audio surveillance and without procedural documentation as the witness coaching aims at creation of stress-free environment for the witness, encouragement of the witness for cooperation and video or audio surveillance may have negative impact on his/her attitude. At that, all these are related to excessive costs.

According to the opinion that "absence of the protocol reflecting witness coaching by a prosecutor facilitates to improper coaching as the hereof process thus appears to be concealed from the supervision of the Court and the Defense",[20] it would be preferable to conclude the document reflecting witness coaching by a prosecutor to provide the time, venue, objective and the context of the meeting. In terms of the context, the hereof document is not to be the protocol of investigative actions but to be a certain procedural document composed upon witness-prosecutor communication, which according to the current practice, shall be implemented prior to initiation of the Court consideration of the case or upon essential hearing of the case in the Court. The protocol of the meeting shall be signed by the both parties, also in the event of remarks regarding accuracy, the parties will be able to introduce the hereof remarks into the protocol. Obligation to compose a certain procedural document re-regulates unsubstantiated and purposeless communication of a prosecutor with the witnesses, which can as well be recognized as the leverage for influence on a witness. Besides, the hereof protocol shall serve the defensive document of the prosecutor and the evidence confirming non-coaching of a witness thereby.

---

[16] See *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 830.

[17] Speaking to Witnesses at Court, Draft cpsp Guidance for Consultation, January 2015, 4, <https://www.cps.gov.uk/consultations/speaking_to_witnesses_at_court_responses.html>, [28.07.2016].

[18] Ibid.

[19] Geders v. United States, 425 U.S., 80 (1976).

[20] See *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 834.

Besides, the rule of witness-prosecutor communication and coaching shall necessarily be outlined in capacity of the guidelines. Availability of the hereof guidelines and existence of due retrained prosecutor re-regulate commitment of ethical misconducts due to the minor negligent behavior of a prosecutor inasmuch as often even the prosecutor may not clearly know his/her rights on providing a witness with a certain information. The best example of the similar guidelines is the Guideline developed by the Crown Prosecutor Service of UK in 2016 on "Conversation with a Witness in the Court". The hereof document aims at establishment of clear rules for the prosecutors about the ways of support the witness making him/her give the best testimony in the Court.[21]

5. Conclusion

Hence, the communication between the prosecutor and a witness, prior to testifying of the latter in the Court, is admissible and is in compliance with the equality of arms and adversarial principle inasmuch as the Defense is not prohibited from communication with the witness at any stage of case hearing.

Equality of arms implies the parties to be equipped with equal opportunities not to only provide evidences but to be prepared for provision of evidences. Thus, preparation of the witness by a prosecutor prior to testifying in the Court is an admissible and acceptable practice to ensure the witness being confident and informed about the rule of testifying in the Court providing the available information which may serve one of the important bases for enforcement of justice. However, witness training by a prosecutor shall not turn into coaching of a witness aiming at provision of the modified testimony by a witness as a result of influence by a prosecutor. In view of prevention of doubts about the communication with the witness by the prosecutor prior to testifying in the Court to allegedly have unlawful influence on a witness, the respective legislative changes to the Criminal Procedure Code of Georgia shall assign the prosecutor to compose the procedural document reflecting the communication with a witness. The hereof document will carry double meaning: first – restriction of unsubstantiated communication of a prosecutor with the witnesses, which can as well be recognized as an attempt of influence on a witness; and second – the hereof document will serve the protective document of a prosecutor himself/herself and the evidence confirming non-influence on the witness thereby.

At that, due to complexity of establishing clear margin between witness coaching and witness preparation, it is recommended to develop the detailed guideline regulating the hereof issue for the prosecutors to assist the state prosecution in exercise of their functions in professional manner and in prevention of any doubts regarding ethics of their behavior.

[21] The best practice can be the process of development of the Guideline by the Crown Prosecutor Service of UK, namely the hereof document has been uploaded on the web-site of the Crown Prosecutor Service in January, 2015 for public consideration allowing all persons concerned expressing own opinions and sharing experience. The current edition of the Guideline was published in 2016. See <https://www.google.ge/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwiTwpPSif3OAhXLOhQKHT2fDmQQFggtMAM&url=https%3A%2F%2Fwww.criminalbar.com%2Ffiles%2Fdownload.php%3Fm%3Ddocuments%26f%3D160627063558-SpeakingtoWitnessesatCourtguidance-Mar16.pdf&usg=AFQjCNHX_jY629D3oW5-WzUHUdMcFeGxAg&cad=rja>, [07.09.2016].