ASPECTS OF FORENSIC TACTICS IN THE CASE OF LISTENING TO WITNESSES

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Abstract

The means of proof used in criminal cases differ depending on the content of the crime and the circumstances in which it was committed. Each means of proof has its own administration procedures. Thus, the means of proof is a legal category that designates the ways or operations by which the content of the evidence is discovered and valued under the law. The witness's statement, as a means of proof, has been known since ancient times, and can be considered the first means of proof used in judicial probation, because in the periods when those who were literate were few. The doctrine has shown that witnesses are the "eyes and ears" of justice. The reports made by the witnesses, the criminal investigation or court bodies have acquired over time different names: testimonies, testimonial evidence, witness testimony, witness testimony, witness statements, etc. In the Romanian criminal trial, in the current regulation made by the new Code of Criminal Procedure, Art. 97, this means of proof is called the statements of witnesses. The new Code of Criminal Procedure defines the notion of witness as the person who has knowledge of facts or circumstances of fact that constitute the evidence in the criminal case Art. 114. to obtain written evidence were witnesses.

Keywords: *defendant, reading witness psychology, hearing, determining questions, hypothetical questions, repeat hearing, criminalistics tactics.*

JEL Classification: K14, K41

1. Introductory aspects

The witness's statement, as a means of proof, has been known since ancient times, and can be considered the first means of proof used in judicial probation, because in the times when those who were literate were few. Because of this, naturally, the main means of proof admitted, as a rule, when the parties could not obtain written evidence, were witnesses[2].

Doctrine has long shown that witnesses are the "eyes and ears" of justice[3]. The reports made by the witnesses, the criminal investigation or court bodies have received different names: testimonies, testimonial evidence, witness testimony, witness statements, etc.

In the Romanian criminal process, in the current regulation made by the new Code of Criminal Procedure, art. 97, this means of proof is called witness statements. The new Code of Criminal Procedure defines the notion of witness as the person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case[4].

2. Witness statements

In order to obtain the quality of a procedural witness, the following conditions must be met:

- the existence of a criminal trial in progress before the judicial bodies;
- the existence of a natural person who knows facts and circumstances likely to contribute to finding out the truth in the respective criminal process;
- the hearing of that person by the judicial bodies regarding the facts and circumstances he knows.

These are conditions on the existence of which the quality of witness depends and are implicitly features that determine the substantial content of this concept.

The direct perception by foreigners of the crime committed and of some facts and circumstances that are important for finding out the truth in the criminal process and listening to those

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[2] N. Văduva, *Criminalistica - tratat de tactică şi metodică*, Ed. Era, Bucharest, 2009, p. 95.

[3] J. Bentham, *Traité des preuves judiciares*, vol. I, Ed. Bossage fréres, Paris, 1823, p. 93.

[4] Art. 114 of the new Code of Criminal Procedure.

who perceived them by the criminal investigation or trial bodies in order to know the truth is the specific of this means of proof.

The importance of the statements of witnesses is particularly high because these statements may result in elements of fact useful for solving the case and which would not be highlighted by the other means of evidence administered in the same criminal case.

In the literature, most authors, although they emphasize the importance and necessity of this means of proof, appreciate that it is often insecure, it is shaky. This assessment is also based on the fact that numerous scientific studies, undertaken in the field of witness psychology, have shown that the mechanism of perception, fixation, memorization and rendering varies from person to person depending on his mental development, degree of culture, profession, the environment and conditions in which he perceived those facts and circumstances, an infinity of other elements that act initially or that overlap between the moment of perception and that of rendering, so that in any statement it is inevitable the appearance of an alteration coefficient initial or subsequent deformation.

Forensics elaborates certain tactical procedures for listening to witnesses starting, precisely, from their psychology, because the tactical procedures represent nothing but the reflection of a certain particular form of manifestation of the witness, a certain legitimacy or psychic particularity.

Given the complexity and importance of witness statements, the activity of listening to this category of persons requires thorough prior training.

According to the rules of forensic tactics, the preparation for listening to the witness includes the following activities: studying the case file; establishing the persons to be heard as witnesses; drawing up the listening plan; ensuring the conditions under which the hearing will take place; establishing the place and date of the hearing and ensuring the presence of the witness[5].

In order to hear the witnesses, it is necessary to study and analyze all the existing material in the criminal case in which the witness will be heard because:

a) the study of the materials of the case has, among other purposes, the establishment of the facts and circumstances to be clarified by listening to each witness.

During the study of the case materials, special attention should be paid to both the facts and circumstances in which witnesses may testify and other circumstances, such as: the role of witnesses in elucidating certain aspects of the case, the conditions for perceiving the fact in relation to which will be heard, the moments of the crime that could influence the perception, the aspects more difficult to understand - in relation to the preparation and age of the witnesses -, the relations between the witnesses and the parties in the trial, their personality, etc. Based on these data, the directions of the hearing are established, which can be obtained from each witness and, at the same time, the objective and subjective conditions that could influence the process of forming statements.

b) establishing the persons to be heard as witnesses.

In principle, any natural person can be summoned and heard as a witness in criminal proceedings[6]. The doctrine but also the judicial practice has ruled that a person who, due to his physical condition (blind, deaf, dumb) or mental (mental weakness) is not able to perceive phenomena through certain senses or cannot reproduce correctly perceived facts. However, the criminal investigation body may assess, on a case-by-case basis, whether listening to such a person serves to find out the truth. For example, a blind person can be listened to on some facts heard, a deaf person on a seen fact, a mentally ill person can be listened to, and his statement can be appreciated according to the disease he suffers from, etc. The minor can also be heard as a witness; until the age of 14, his obedience being made in the presence of one of the parents or of the guardian or of the person to whom he is entrusted for upbringing and education[7].

However, the Romanian law provides some exceptions to this general rule, establishing that there are categories of persons who cannot have the quality of witness in a certain criminal trial or who have the right to refuse to give statements as witnesses.

Thus, unlike the old Code of Criminal Procedure, the current Code no longer specifies that

[5] V. Berchеşan, *Ascultarea martorilor*, in *Tratat de tactică criminalistică*, Ed. Carpaţi, Craiova, 1992, p. 131.
[6] Art. 115, paragraph 1 of the new Code of Criminal Procedure.
[7] I. Neagu, *Tratat de procedură penală. Partea generală,* Ed. Universul Juridic, Bucharest, p. 461.

persons who hold professional or confidential secrets are not required to testify. Without mentioning these persons, it is left to the criminal prosecution bodies to establish the object of the witness statements, specifying that: those facts or circumstances whose secrecy or confidentiality can be opposed by law to the judicial bodies, cannot be the object of the witness statement, except where the competent authority or the authorized person agrees or where there is another legal reason for removing the obligation to maintain secrecy or confidentiality[8].

In addition to the persons mentioned above, the specialized literature as well as the judicial practice have ruled that the injured person who constitutes a civil party or participates in the trial as an injured party cannot be heard as a witness.

The prohibition to be heard as witnesses of the persons who have the quality of parties in the criminal process is determined by the procedural position they have, a position incompatible with the quality of witness, because "*nemo testis idoneus in re sua*", no one can be a witness in your own case. On the other hand, they are not obliged to testify as witnesses, so they have the right to refuse to be heard as a witness by their spouse, ascendants and descendants in a direct line, as well as the brothers and sisters of the suspect or defendant. The same right has the persons who had the quality of husband of the suspect or defendant[9].

Also, in this case the exception established by law is relative, since the mentioned persons, although they cannot be obliged to testify, still have the faculty to testify as witnesses or to abstain, the criminal investigation body having the obligation to bring them to knowledge of this right. It is recommended that the statements of such persons be examined and evaluated with the utmost care, and that recourse to this means of proof be made only in special situations[10].

According to the Code of Criminal Procedure of the Republic of Moldova, art. 90 para. (2), no person may be forced to make statements contrary to his interests or that of his close relatives, and para. and listen as witnesses:

- persons who, due to physical or mental defects, are not able to understand just the circumstances that are important for the cause and to make accurate and fair statements about them;
- the defenders, the collaborators of the law firms - for ascertaining some data that have become known to them in connection with the addressing for granting legal assistance or in connection with its granting;
- persons who know a certain information regarding the case in connection with the exercise by them of the attributions of representatives of the parties;
- the judge, the prosecutor, the representative of the criminal investigation body, the clerk - regarding the circumstances that became known to them in connection with the exercise by them of their procedural attributions, except for the cases of participation in detention in flagrante delicto, investigation of evidence acquired through them, errors or abuses in carrying out the procedure in question, re-examining the case in order to review or restore the lost file;
- the journalist - to specify the person who presented the information to him on the condition that he does not disclose his name, unless the person voluntarily wishes to testify;
- the servants of the cults - referring to the circumstances that became known to them in connection with the exercise of their attributions;
- the family doctor and other persons who provided medical care - regarding the private life of the persons they serve;
- the person against whom there is certain evidence that he has committed the crime under investigation.

The persons referred to in paragraph (3) points 5) and 7) may be summoned and heard as witnesses only if this information is absolutely necessary for the prevention or detection of particularly serious or exceptionally serious crimes.

When selecting witnesses, in relation to the nature of the crime committed, account must also be taken of persons who know how the perpetrator spent his time in a given period, those who can

[8] See the provisions of art. 116, para. 3 and 4 of the new Code of Criminal Procedure.
[9] Article 117 para. 1 of the new Code of Criminal Procedure.
[10] V. Berchеşan, *op. cit*., p. 134.

provide information on his way of life and behavior, those that can help identify the assets to be subject to precautionary measures and, last but not least, the persons who, through their statements, can contribute to the verification of the defenses formulated by the accused or defendants or to their characterization.

The criminal investigation body has the obligation to listen both to the persons who provide data regarding the establishment of the existence of the crime and to the proof of guilt, and those who can report elements likely to lead to the establishment of mitigating circumstances or even to the proof of innocence, thus ensuring the right to defense of the accused or defendant throughout the criminal proceedings[11].

c) An important moment of preparation for the hearing of witnesses is the preparation of the hearing plan. After studying the case file, the issues to be clarified with each witness or category of witnesses identified in the case are established. Determining the issues to be clarified through obedience is mandatory so as not to omit the essential aspects known to witnesses, valuable for finding out the truth.

Given the multitude of issues that need to be clarified by hearing, the position of witnesses in question, the data that characterize their personality, the need to present evidence during the hearing, it is necessary to prepare a hearing plan based on those issues. The plan contains the questions to be addressed to the witnesses and can be drawn up for each individual witness or category of witnesses, if the issues to be clarified are the same.

Practitioners believe that questions should be short, clear, precise, and allow witnesses to understand what they mean in their answers. They can be ordered logically or chronologically, in relation to what the witnesses know, to the way in which they perceived the facts or circumstances of their commission, to their personality and psychology and to their position during the hearing[12].

It is forbidden to use suggestive questions or those that are likely to put witnesses in difficulty. In the case of witnesses who are said to be trying to conceal the truth, it is advisable to ask questions in several ways and to ask alternative questions.

Regarding the content, the questions of the criminal investigation bodies will be conducted according to the principle of mobility and dynamism, they can be completed, reformulated, depending on the particularities and the evolution of the hearing, of the entire investigation[13].

Also, documents, photographs, material means of evidence that are considered necessary to be presented to the witness may be prepared, to clarify a circumstance, to verify data or, simply, for tactical purposes, to help the witness to and remember what happened.

In general, the plan for listening to witnesses is indicative, during the hearing it can be modified or supplemented, but it must be a working tool, a mandatory guide. Only in this way can the problems be clarified by a single hearing, avoiding repeated calls before the criminal investigation body.

d) For the proper conduct of the hearing and the achievement of the purpose it pursues, in relation to the nature of the case in which it is carried out, the issue to be clarified and the situation of each witness, other preparatory measures must be taken, such as be: inviting the parent, guardian, curator or educator, when the witness is a minor under the age of 14, inviting an interpreter, if the witnesses do not know the language in which the criminal proceedings take place, selecting and preparing the materials they want be used during listening and determining how, when and in what order they will be used, etc.

In addition, the right atmosphere must be created during listening; the office where the hearing is to take place must be soberly furnished, with no extra objects that could distract witnesses. In preparing for the hearing, the criminal investigation body must establish the manner in which it will approach the witnesses, the conditions that must be ensured in order to achieve the psychological contact with them.

One of the most important problems of the listening tactics is the attitude of the criminal

[11] Ibid, p. 132.
[12] Ibid, p. 136.
[13] E. Stancu, *Tratat de criminalistică*, Ed. Actami, Bucharest, 2001, p. 388.

investigation body during the development of this activity; the success of the hearing depends to a large extent on how the witnesses are approached. The difficulty is that the personality of each witness is individual. Or, the mastery of the one who leads the obedience lies precisely in finding for each a common language, an "individual approach", in the science of "reading" the psychology of the witness and making psychological contact.

The tactical listening procedures are elaborated by the forensic tactics based on the generalization of the positive experience of the judicial bodies. The tactic of listening is established in each concrete case, even in the case of each witness taken separately, because, in the last resort, each person represents a unique one.

During the hearing, the criminal investigation body must remain calm, so that the witness can be calm and collaborate effectively in finding out the truth in the criminal case.

In order for the hearing to take place in the best conditions, it is necessary for the judicial body to adopt the best listening tactics, this will be established in each concrete case, depending on[14]:

- the nature of the cause of the hearing;
- the personality and psychology of the witness;
- the facts and circumstances which are relevant to the case, known to the witnesses;
- the conditions under which the witnesses perceived the facts or circumstances on which they are to be heard;
- the position of the witness towards the suspect or defendant or the parties participating in the criminal proceedings;
- the interest that the witness may have in solving the case (relative, friend, co-worker, etc.);
- the intention not to tell the truth, so as not to be summoned before other judicial bodies.

Proper preparation for the hearing will determine the success of the activity and the operative, thorough and legal solution of the criminal case.

In practice, it has been found that sometimes suspects or defendants recognize the truth more easily than witnesses. This is because the witnesses are afraid of the consequences that could be borne by the criminals or their families or their entourage for the confessions made, but also because our legislation requires the summoning and hearing of the witness by all judicial bodies (criminal investigation body, prosecutor, the court).

e) establishing the order in which the witnesses will be heard. Usually, eyewitnesses, those who directly perceived the facts or circumstances, will be heard before indirect witnesses who obtained the data through other people or simply from public rumor.

The order of obedience is also established according to the nature of the relations between the witness and the parties to the trial, as well as according to their position towards the cause. Depending on the specificity or complexity of the investigation, the hearing of witnesses may take place either before or after the hearing of the suspect or injured person.

When establishing the order of hearing the persons, the possibility of verifying the statements of the suspects, of other witnesses, as well as the claims of the victims of the crime is taken into account.

f) establishing the objective or subjective conditions that could influence the perception and memorization of the facts or circumstances with criminal relevance. Judicial practice has shown that these conditions are much better established when reconstituting.

Knowing the basic characteristics of the personality of witnesses is a rather delicate matter and it can be done both before the hearing and during its conduct. The choice of the moment when the knowledge is to be made differs from one cause to another, in relation to the nature of the committed crime, the conditions of its commission, the number of persons who perceived the facts or circumstances, as well as the aspects that can be clarified with each witness or category of witnesses.

Knowledge is needed to choose the right time and the right tactics for listening. Knowledge involves establishing[15]:

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[14] V. Bercheşan, *op. cit.*, p. 138.

[15] In this regard see also A. Ciopraga, *Criminalistica, tratat de tactică,* Ed. Gama, Iaşi, 1996, p. 207 et seq.

- identity data of the person;
- the degree of development of thinking (especially for minors);
- the state of health in the moments of perception and memorization, but also the state of health during listening;
- profession and occupation;
- character traits (sincere or insincere, determined or indecisive, calm or agitated, cheerful or sad, sensitive, impressionable, nervous, attentive, etc.), inclination to exaggeration, dominated by the habit of distorting the truth, depending on sympathies - sometimes even in relation to sex or social position;
- criminal record;
- whether or not the person has an interest in the matter;
- from what sources does he know about the criminal act;
- establishing the previous relations and during the hearing between the witness and the suspect or defendant and the witness's relations with the victim, as well as the attitude towards the deed;
- the relations between the witness and the other participants in the commission of the deed, when there are such participants.

Having also available data, the criminal investigation body can approach the hearing of the witness from a position that will ensure the use of the most efficient tactical procedures in order to obtain complete, sincere and truthful statements.

Since the beginning of the last century, some specialists have identified three causes of errors in statements and false testimony: errors caused by the health of the witness (mentally ill or even psychopathic, is the one with hallucinations, hysteria whose dominant character is self-suggestion, the mentally weak whose testimony offers no guarantee, the imaginative who exaggerates, thickens, distorts the facts, etc.); errors that fall into the realm of conscious false testimony (the motives being interest, hatred, revenge, etc.); unconscious errors of normal individuals who are mistaken without wanting this and which come from errors of sensual perception, memory, association of ideas, etc.[16]

3. The tactics of listening to the witnesses themselves

The tactical rules for listening to witnesses are very similar to those used to hear the suspect or defendant.

The hearing of a witness, especially when he is at the first hearing, by the criminal investigation bodies or by the judicial bodies, goes through three main stages, dominated, in addition to the criminal procedural rules and forensic tactical rules, respectively: witness identification stage, stage free reporting and the stage of formulating questions and listening to the answers given by the witness.

In the first stage, the witness is asked about personal data to establish his identity in order to avoid substitutions. The data requested from the witness at this stage are identical to those requested from the suspect or defendant before the hearing[17].

Also at this stage, the witness is informed of the object of the case and is asked if he is a family member or ex-husband of the suspect or defendant, the injured person or other parties in the criminal proceedings, if he is in friendly or hostile relations with these persons, as well as if he suffered any damage as a result of the crime[18].

If measures have been ordered to protect the identification data from the witness, then no questions will be asked about his person.

The knowledge of these data allows the criminal investigation body to achieve a better knowledge of the witness, of the position he is in, and consequently of the establishment of the

[16] R. Garraud, *Traité théorique et pratique d'instruction criminelle et de procédure penalé*, vol. I, Recueil Sirey, Paris, 1929, p. 547-548.
[17] See art. 107 and art. 119 of the new Code of Criminal Procedure.
[18] E. Stancu, *op. cit.*, 2001, p. 404; A. Ciopraga, *op. cit.*, p. 214.

listening strategy, of the tactical procedures appropriate to the situation.

The rights and obligations are further communicated, and the witness is sworn in. On this occasion, he is informed that the law punishes the crime of perjury according to art. 273 of the new Criminal Code.

In order to obtain complete and sincere statements, at this stage, the criminal investigation body must be guided by certain tactical rules, among which we mention:

- receiving the witness in a fair, civilized atmosphere which must be present from the moment of waiting until the moment of hearing[19]. He must not be given the impression that he is neglected, forgotten, or cared for by anyone;

- creating a sober listening environment, characterized by seriousness, free of stressors;

- the investigator's behavior in a calm, encouraging way;

- creating the psychological climate favorable to the confession, by gaining the witness's trust, his closeness, reducing the emotional tension.

At the stage of the free report, as provided by the new Code of Criminal Procedure[20], the witness is allowed to declare everything he knows about the deed or the factual circumstances for which proof was proposed.

According to the literature and judicial practice, this stage begins by asking one or more general questions that will enable him to state everything he knows about the facts or circumstances for which clarification has been requested to be heard.

The witness must not be interrupted during the whole period of the free report, he must not be asked questions. The non-interruption of the witness has the advantage of knowing his personality, of the position from which he judges the facts he relates, it increases his self-confidence, being useful for clarifying the case[21].

In this sense, it is necessary for each investigator to know the details of a great psychologist, Milton Cameron, who in his work „*The Art of Listening to the Other. The secrets of a successful communication*", he says that: "Knowing how to listen to the other is an art that is not easy to learn"[22].

The free story has a certain advantage over the statements obtained through interrogation, due to its spontaneity, the facts being presented as they were perceived and memorized by the witness[23]. If the witness is in good faith and has nothing to hide or someone to protect, the free account is a guarantee of great fidelity.

Judicial practice has shown that this stage of free reporting is good to begin with a generic question that allows the witness to state everything he or she knows about the facts or circumstances for which he or she has been asked to testify.

Many times, in practice, it happened that the witness telling what he considers to be of interest to the criminal investigation body, to present some facts, data, circumstances hitherto unknown about the case under investigation or elements that could result in the commission of other crimes about which nothing was known until then.

If the witness is in good faith and has nothing to hide or an interest in protecting someone, his free account is a guarantee of great fidelity.

At this stage, the criminal investigation body will be guided by certain rules of forensic tactics, verified over time in practice, namely:

- the witness must be listened to patiently and calmly, without being interrupted, even if he relates the facts in great detail, some without any significance to clarify the case, but others are very important, especially since they are not known to the investigator. Witnesses often know other important facts besides the ones they were asked about, so it is not advisable to ask them to shorten their statements, because in such a situation they will not tell everything they know. The non-interruption of the witness has the advantage of knowing his personality, of the position from which

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[19] Rene Lechat, *La technique de l'enquete criminelle*, Ed. Modena, Bruxelles, 1959, p. 847.
[20] Article 122, paragraph 2.
[21] E. Stancu, *op. cit.*, p. 583.
[22] Milton Cameron, *Arta de a-l asculta pe celălalt. Secretele unei comunicări reuşite*, Ed. Polirom, Bucharest, translation of Dana Zamoşteanu, 2006, p. 25.
[23] C. L. Yescke, *The Art of Investigative Interviewing*, Butterworth-Heinemann, Boston, S.U.A., 1997, p. 7.

he judges the facts he relates, it increases his self-confidence, being useful for clarifying the case[24];

- gestures or expressions, especially ironic ones, approving or rejecting the witness's statements should be avoided. Frowning, ironic language, nervous gestures, lack of attention have the gift of blocking the witness, of creating distrust in the criminal investigation body. But approving attitudes can also lead the witness to state what he finds pleasing to the judiciary, even if he is not sure of the statements he makes.

- the witness must be helped tactfully, especially when the criminal investigation body finds that the intellectual level prevents him from making a free and somewhat coherent account, without suggesting it. It must be borne in mind that sometimes even intellectuals prove to be weak, incoherent witnesses, blocked by the situation in which they find themselves;

- if the witness is lost in detail or deliberately deviates from the subject of the report, the criminal investigation body must intervene civilly in reorienting the report to the object of the testimony. He will be interrupted and asked to focus on the issues at issue, without thereby nullifying the spontaneity of the statement;

- when it deems it necessary, the judicial body will note its most significant aspects, as well as any contradictions or ambiguities in the presentation, but without proceeding ostentatiously or interrupting the witness asking him to repeat a certain idea or to be more explicit.

If, after the free report, facts or circumstances remain unexplained, the judicial body will proceed to the third stage, that of formulating questions.

The questions are necessary as the testimony of the witness may contain objective or subjective distortions, the most common being the following[25]:

- distortion by addition, when the witness relates more than what he perceived, exaggerating or inventing imaginary facts;

- distortion by omission, when the story is incomplete, as a result of forgetting, underestimating the importance of a certain aspect, and as a result of a possible bad faith;

- distortion by substitution, in which the facts, persons, perceived real objects are replaced, substituted with others, previously perceived, as a result of the similarities between them;

- distortion by transformation, such as changing the real sequence of facts, changing the place of details in time and space.

From the perspective of forensic tactics to establish the correctness or accuracy of the witness's statement, the criminal investigation body must intervene with questions that, according to the literature, fall into several categories:[26]

- questions to supplement the aspects omitted from the statement or which contain sufficient details to establish the factual circumstances;

- clarification questions, necessary for determining exactly the circumstances of the place, time and manner of an event, as well as for establishing the sources from which the witness obtained data about the fact;

- helpful questions, intended to reactivate memory, as well as to remove distortions, such as substitutions or transformations, by referring, for example, to important events in the life of the witness, events occurring simultaneously with the facts about which he is heard;

- control questions, intended to verify the statements, based on certain data in the event of a misstatement, in particular by addition or transformation, as well as in the event of suspicion of the good faith of the witness.

From a forensic tactical point of view, according to the opinions expressed in the specialized literature, based on a long practice of the judicial bodies, in formulating and addressing the questions it is absolutely necessary to observe the following rules[27]:

- the questions must be clear, precise, concise and expressed in a form accessible to the listener, according to his age, experience, training and intelligence;

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[24] E. Stancu, *op. cit.*, p. 583.
[25] Ibid, p. 391.
[26] E. Stancu, *op. cit.,* p. 407; V. Berchеşan, *op. cit.,* 1992, p. 141-144; A. Ciopraga, *op. cit.*, p. 218-222.
[27] E. Stancu, *op. cit.*, p. 393; V. Berchеşan, op. cit., p. 141-144.

- the questions will strictly address the facts perceived by the witness, and not his point of view regarding their nature or legal issues;

- the questions will not contain elements of intimidation, of making the witness difficult or promises that the judicial body cannot keep;

- the way in which the questions are formulated and the tone in which they are addressed should not, in any case, suggest the answer;

- it is forbidden to ask the witness questions that could harm his or others' honor.

Although each of the above-mentioned tactical rules has their importance and their well-defined role in obtaining sincere and complete statements, legal theorists[28] insist on the importance of avoiding questions by which the witness can be suggested the answer. The suggestive questions lead, by their nature, to the distortion of the truth, representing, rather, the will of the investigator, which does not correspond in all cases to reality.

Depending on their degree of suggestibility, the questions could be:

- decisive, open-ended questions, devoid of elements of suggestibility ("how was the accused dressed?", "on what day of the week did the deed take place?"), as well as questions that are answered by "yes" and "no" ("Did the accused wear anything on his head?");

- incompletely or completely disjunctive, closed questions, which contain suggestive elements, especially the last ones, the witness being asked to choose between the two alternatives ("Did the victim have a bag or not?", "Was the bag black or blue?"). In this example, the witness is practically put in the situation of choosing between the two colors, especially if he remembers that the victim did have a bag, but did not retain his color;

- hypothetical questions, with a high degree of suggestibility, as they start from the assumption that the witness perceived a certain circumstance ("How was it, in the right or left hand?"), although it is possible that he did not do so. It is suggested that the accused had a knife in his hand, and the suggestion becomes even more categorical when the question begins with the words, "Isn't that so ...?" ("Isn't that why the accused threatened the victim with a knife and snatched the bag from his hand?").

Attention should also be paid to the way in which the questions are addressed, because the modulation of the voice itself, as well as the tone of the voice, in addition to revealing the investigator's dissatisfaction, can be a serious suggestion factor.

As with the hearing of the suspect or defendant, the use of violence, threats, promises or other such means to obtain statements is prohibited. The procedural documents thus obtained are struck by nullity, attracting the criminal liability of the judicial body.

Sometimes, when asking questions, it is advisable to present to the witness certain evidence from the file in order to[29]:

- to remind the witness of the facts which he has forgotten and to remove the confusions or contradictions which the witness in good faith made on the occasion of the free report;

- unmasking the false testimony and determining the witness to take a sincere position during his hearing.

Listening to the answers to the questions implies, obligatorily, the observance of a specific tactical conduct, its importance being confirmed by practice. The attitude of the investigator must be the same as in the moment of the free report, but with some tactical nuances, imposed by the fact that the dialogue with the witnesses in this phase becomes more complex, including mentally. There may be situations in which this dialogue is relatively close to the judicial duel between the magistrate and the defendant, especially if the witness proves to be insincere, seeking to simulate or conceal the truth.

The tactical rules specific to listening to the answers are summarized as follows[30]:

a. listening to the witness with all the attention and seriousness, avoiding the boredom, annoyance, expressions or gestures of approval or disapproval that will confuse the witness;

b. when notifying some contradictions in the answers of the witness, the judicial body must

[28] V. Berchеşan, *op. cit.*, p. 143.
[29] Ibid., p. 193-194.
[30] E. Stancu, *op. cit.*, p. 393.

not react immediately, to express its surprise or dissatisfaction, but to register it, for its further clarification;

c. to follow carefully, but without ostentation, the way in which the witness reacts to questions or if there have been indications of possible insincerity.

If it is found that the witness tries to lie, related to the particularities of each case, the tactical procedures are different, some approaching those specific to the tactics of listening to the accused, of course without exceeding the legal framework.

In these circumstances, the hearing will be repeated, questions will be reworded, diversified, including confrontation with other witnesses or perpetrators, insisting on details that cannot be taken into account by those who "prepare" their statement by agreement with the parties or with other witnesses.

If a witness finds it difficult to remember some data, either due to a long time elapsed from their perception, or due to factors related to the person of the witness (level of intelligence, physical defects that influence the perception or rendering, old age, lack of experience life - especially in the case of minor witnesses, inability to express oneself, etc.), in no case will suggestive questions be used, as mentioned above, and the hearing of the witness will not be necessary to resolve the case.

When there are doubts about the possibilities of perception, memorization and rendering that the witness has and his statement cannot be waived, the judicial body can turn to specialized doctors. The statements of such persons must be checked very carefully so as not to generate judicial errors[31].

Assuming that the witness overcame the moment of natural tension from the beginning of the hearing and that psychological contact was made between him and the investigator, the recurrence of emotional manifestations during the hearing (face congestion, shaking hands, irregular breathing, changing facial expressions, verbalization, a certain tension, etc.). Such reactions will be interpreted on a case-by-case basis, as they do not always represent an indication of insincerity.

The active role of the judiciary in the final stage of the hearing is therefore all the more pronounced as it becomes necessary to complete, clarify or verify some statements, especially if they are contradictory and sometimes dishonest.

In the case of honest witnesses, the hearings should be repeated as rarely as possible[32]. Therefore, during the first hearing, it is necessary to clarify all the details of that fact. Repeated hearing should be allowed only if new circumstances arise, of which the judicial body was not aware at the time of the first hearing or when the statements of witnesses are contradictory or when there are suspicions as to the veracity or correctness of the first statements of the witness. But all this refers especially to those witnesses who wish to give truthful statements, but who, for certain reasons, make certain involuntary mistakes in reproducing the facts.

Witnesses who have evidence or who have shown bad faith raise special issues. It is necessary to establish the reasons why the witness adopts such a position for the prevention of the crime of perjury and for the legal settlement of the case.

In such circumstances, a rehearsal of the witness is required, maintaining a similar tactical conduct. A witness can be determined, in the last analysis, to make a sincere statement by presenting other evidence, which clearly shows the insincerity of his previous statements (statements, documents, various records, etc.).

Verification of statements is absolutely necessary to establish the veracity of a testimony. The verification will be performed on the basis of other evidence or data existing in the file, through questions regarding the way in which the witness perceived the facts or found out about them, not excluding the performance of reconstitutions, when it is considered necessary.

The statements of witnesses shall be recorded in the same manner as the statements of the suspect or defendant. During the criminal investigation, the hearing of the witness shall be recorded by audio or audio-video technical means, if the criminal investigation body deems it necessary or if the witness expressly requests it and the recording is possible.

The specialized literature as well as the judicial practice have established a series of tactical

[31] V. Bercheşan, *op. cit*., p 195-196.
[32] S. A. Golunski, *Criminalistica,* Scientific Publishing House, Bucharest, 1954, p. 329.

rules regarding the hearing as witnesses of certain categories of persons, respectively minors, the elderly, people with disabilities, etc.

The new Code of Criminal Procedure regulates only the manner of hearing juvenile witnesses. In this sense, the provisions of art. 124 of the new Code of Criminal Procedure regulates in detail the manner of hearing juvenile witnesses under 14 years of age.

As for the protected witnesses, they can be heard without being physically present in the room where the prosecutor is or in the room where the court hearing takes place, they being heard through the audio-video means, according to the provisions of art. 129 of the new Code of Criminal Procedure.

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