THE WITNESS' RIGHT TO REFUSE TO TESTIFY IN THE CONTEXT OF THE EFFECTIVENESS OF ITS INVOKING IN THE POLISH CODE OF CRIMINAL PROCEDURE

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Summary

The subject of the article comes down to the analysis of the witness' procedural position in the context of the assumption of Polish Code of Criminal Procedure. The witness' right to refuse to testify will be especially pointed out. The deliberations will also be conducted concerning premises of effectively invoking above mentioned right. The categories of persons will also be indicated who can exercise this right obligatorily. Moreover, the deadline for exercising the right to refuse to testify will be determined. The entirety of the deliberations will be supported by stance included in the Polish Supreme Court judicature.

Keywords: witness, the right to refuse to testify, the closest person to the accused, witness testimony,

Introduction

One of the fundamental rights of the witness in a criminal trial is a right to refuse to testify stemming from the contents of Art. 182 § 1 Polish Code of Criminal Procedure. However, the effective application of this privilege requires connecting the contents of above shown regulation with Art. 186 § 1 Polish Code of Criminal Procedure, indicating the premises of the effective invoking of the right by the witness. While considering the scope of mutual regulations of the mentioned provisions, one must take into consideration not only the issue of determining the basis of invoking this right resulting

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from both provisions, showing who and when can exercise this right, but also in particular the moment until it is possible to effectively invoke this right. Deliberations taken in the present article will aim at conducting the detailed interpretation of the contents and the scope of the quoted regulations. As a preliminary remark to the further deliberations, it is necessary to indicate the nature of the privilege that comes from the contents of Art. 182 Polish Code of Criminal Procedure.

The substance of the right to refuse to testify

It is beyond doubt, that the right to refuse to testify which is given to a witness, guaranteed in the Art. 182 Polish Code of Penal Procedure is one of the most significant privileges of the witness in the trial. In its assumption it constitutes the essential guarantee of witness' interests. Its substance comes down to the fact that the witness is allowed to decide freely about making statements, or to refuse to do so.[2] It means that in the determined procedural position, the witness is given total freedom in terms of testifying and in case of invoking the right to refuse to testify, the judicial body will not be able to hear the witness.

In the current legal status the right to refuse to testify is limited to two fundamental groups of entities taking part in a criminal trial as the witness. It is given to:

1) the closest persons for the accused (Art. 182 § 1 Polish Code of Criminal Procedure), including former spouses or former adopted and adopting, because the right lasts in spite of the cessation of these bonds (Art. 182 § 2 Polish Code of Criminal Procedure),
2) the witness who in the pending proceeding is accused for the complicity in the crime (Art. 182 § 3 Polish Code of Criminal Procedure) – due to the possible alternation of procedural roles.

The right of the closest persons to exercise the right to refuse to testify

For deliberations in the article the major significance is gained by the former of these two categories. The right to refuse to testify entitled to persons associated with the accused by family bonds constitutes *ratio legis*

[2] R. Górecki, Świadek w postępowaniu przygotowawczym , Warszawa-Poznań 1987, s. 24.

of this institution. It is supposed to protect the special emotional relationship which joins the closest people with the accused. K. Łojewski underlines: "this right (…) aims at eliminating conflict situations for a witness who will face the dilemma whether to testify the truth and incriminate the closest person, or to lie?"[3]. The Supreme Court put this regulation in the similar manner by stating in the verdict from 11th November 1976 that: "it enables the witness to refuse to testify if the need to testify in the case against the closest person would be connected with the discomfort resulting from conflict of the conscience, or would provoke to hide the truth or even leads to false testimony"[4] . The agreeable stance of doctrine and the judicature shows that granting the witness with the right to refuse to testify due to above mentioned circumstances is in every respect justified and understandable. It would be difficult to expect from the witness who was forced to testify against the closest person not to succumb to temptation to give false evidence, even in the face of the awareness criminal liability threatening for hiding the truth.

Therefore, in line with the above dissertations, the right to refuse to testify is not an absolute right that all persons can exercise. Its legal force is exclusively limited to the accused who is the closest person for the witness. It seems essential to explain who, from a point of view of the law, is the "closest person".

The legal definition of the "closest person" is included in Art. 115 § 11 Polish Penal Code. To this category of subjects belong:

1) wife,
2) ascendants (parents, grandfathers, great-grandfathers etc.),
3) descendants (children, grandchildren, great grandchildren etc.),
4) siblings (blood brothers and sisters, as well as step ones),
5) in-laws in the same line or the degree (stepfather, stepmother, son-in-law, daughter-in-law, father-in-law, mother-in-law etc.),
6) persons remaining in the adoption-like relationship and their spouses,
7) persons remaining in cohabitation[5] .

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[3] K. Łojewski, Instytucja odmowy zeznań w prawie karnym, Warszawa 1970, s. 58.

[4] The verdict of the Supreme Court from 11th November 1976 r.,II KR 252/76, OSNPG 1977, no. 2, pos. 17.

[5] Due to the lack of statutory definition, the expression „person remaining in cohabitation" is defined exclusively by the doctrine, in which it is assumed by the principle that „cohabitation" is permanent relationship between woman and man who maintain shared household and whose relationship is marriage-like, even though it does not have a legal form e.g. A. Marek, Komentarz do art. 115 § 11 k.k., (in:) A. Marek, Kodeks Karny, Komentarz, Warszawa 2007, s. 263; It seems that this definition can be related to civil partnership and granted status of conjugal life.

The above catalogue has closed character which means, that only enumeratively listed subjects can claim the right to all of procedural powers guaranteed for the closest person. This recitation was based exclusively on showing the specific legal or actual relationship between enumerated persons and the accused, as criterion which is comparatively long-lasting and simple to verify. The existence of the emotional relationship between the recalled people remains beyond the category of any decisions. In consequence, only above mentioned persons are entitled to the right to refuse testify provided in the contents of Art. 182 Polish Code of Criminal Procedure Thus the scope of this entitlement cannot be extended by way of the interpretation to any other subjects.

It should be underlined, that exercising a right to refuse to testify by the witness is unconditional which means that the regulation included in Art. 182 Polish Code of Criminal Procedure does not impose the obligation on the witness to refuse to testify if it was supposed to bring her into conflict with the closest person, or also affect the family relations negatively. Invoking this right, and hence making procedural use of it depends on the individual decision of the witness and is an optional issue, it cannot result from the compulsion or the pressure exerted by the judicial body on the witness, or be assessed by this body in any way. The Supreme Court pointed it out in the verdict from 20th January 1981 stating that: "the Court is not entitled to the establishment and the evaluation of causes, motives, inducements of the refusal of testimony by the person entitled to it (…), because the decision whether to give the testimony or not appertains exclusively to the entitled person "[6] .

The deadline to exercise the right to refuse to testify

However, the question appears, which is an essence of the dissertations of the article: whether the right of a witness as the closest person for the accused can be effectively carried out at every single stage of the legal proceeding? Is the possibility of its invoking limited by time? The rest of the article and the deliberations will be devoted to the attempt to answer this question.

Seemingly trivial issue of showing the very last moment in which the witness is entitled to use privileges legally guaranteed to him in the contents of Art. 186 § 1 Polish Code of Criminal Procedure still stirs up controversy.

The moment up to which it is possible to exercise the right to refuse to testify is regulated in Art. 186 § 1 Polish Code of Criminal Procedure *in fine*.

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[6] The verdict of the Supreme Court from 20th January 1981 r., I KR 329/80, OSNKW 1981, no. 6, pos. 37.

This provision indicates this moment as "no later than before commencing first testifying in court proceeding". Such wording by the legislator of the deadline for exercising one's right to refuse to testify was introduced into the Polish Code of Criminal procedure by the amendment to this act from 23rd January 2003[7] . Regulations, being in force before the changes, entitled the witness to invoke the right with the reservation that it has to take place "not later than before commencing first instance hearing" (Art. 186 § 1 Polish Code of Criminal Procedure *in fine* in the version in force before the change). Original wording of Art. 186 § 1 Polish Code of Criminal Procedure from 1997 almost completely corresponded with the contents of the regulation being in force under the Polish Code of Criminal Procedure from 1969, in which it was accepted that the statement of the authorised entity on the refusal to testify should be submitted "not later than before commencing testifying during the trial in court of first instance" [Art. 168 Former Polish Code of Criminal Procedure].

Due to the dissimilarity of expressions used in quoted regulations, it is necessary to carry out an analysis on how to interpret indicated notion, and hence show its consequences.

The oldest of the quoted regulations, expressed in contents of Art. 168 Polish Code of Criminal Procedure from 1969, indicated the deadline for the possibility of invoking by the witness the right to refuse to testify by the expression: "not later than before the beginning of testifying during the trial in court of the first instance". As a consequence, against the backdrop of the contemporaneous legal status it was assumed that: "if in a court of the first instance the witness did not exercise the right to refuse to testify [Art. 165 Former Polish Code of Criminal Procedure], and in case of reconsideration of the case as a result of cancelling the previous sentence by the court of appeal – not later than before commencing the testifying during the trial in a court of first instance – the witness declared that he wished to exercise this right, it is pursuant to the Art. of 168 Polish Code of Criminal Procedure that the previous statement of such witness could not serve as evidence and could not be read out, or played back" – it is attested in the verdict of the Supreme Court from l0th November 1980[8] .

After the Polish Code of Criminal Procedure became effective from 1997, the issues connected with the deadline for exercising the right to

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[7] Ustawa z dnia 10 stycznia 2003 r. o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych (Dz. U. Nr 17 poz. 155 z póź. zm.), in wording as the date of lst July 2003.

[8] The verdict of the Supreme Court from l0th November 1980 r. , I KR 259/80, OSNKW 1981, no. 4-5, pos. 26.

refuse to testify by the witness were regulated by Art. 186 § l Polish Code of Criminal Procedure in the original wording. Against the previous legal status, this provision was supplemented with only an expression: that it concerns "the first" statement during the trial in the court of the first instance. This provision almost completely repeating the regulation which was in force under the previous code.

From the point of view of the interpretation of both provisions and the used expressions the only proper way of interpreting is the assumption that the witness could use the right only in the time clearly indicated in the provision, and his later statements in this object would not have any legal force. However, both in doctrine and judicial decision clearly discernible divergences turned up. Apart from above mentioned verdict of the Supreme Court from 10th November 1980, in the sentence from 24th January 2001 the Supreme Court presented the view that: "since the provision makes the ban on using previous testimony of the witness contingent on the submitting testimonies in the determined time, the witness can also exercise his right after the beginning of a hearing during the first trial in the court of the first instance, only in such a case, his previous testimonies can – *a contrario* from Art. 186 § 1 *in fine* – serve as evidence and can be played back" [9]. However, admission of both stances did not seem justified and was justifiably criticised. Enabling the witness to exercise his right after the date indicated in the contents of Art. 168 Former Polish Code of Criminal Procedure or also in Art. 186 § 1 Polish Code of Criminal Procedure before the amendment, was deprived of legal grounds and exclusively resulted from the legislator's inaccurate expression. It must be recognized that the right to use the refusal of testimony could be carried out only before the time determined in Art. 186 § 1 Polish Code of Criminal Procedure [Art. 168 Former Polish Code of Criminal Procedure]. As a consequence, based on this legal status one should have assumed that the witness, as a result of the passage of time determined in Art. 186 § 1 Polish Code of Criminal Procedure, will lose the right to refuse testify and will be obliged to testify, and if necessary there will be a possibility of reading out testimony given earlier by the witness based on i.e. Art. 391 § 1 Polish Code of Criminal Procedure[10] .

While interpreting previously applicable regulations, it should be assumed that "the issue of playing back testimony will be updated when that witness' statement concerning the desire to exercise the right vested in Art. 182 § 1

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[9] The verdict of the Supreme Court from 24 January 2001 r., I KZP 47/2000, OSNKW 2001, no. 3-4, pos. 18.

[10] K. Marszał, Glosa do uchwały Sądu Najwyższego z dnia 24 stycznia 2001 r., I KZP 47/2000, PiP 2001, nr 10, s. 11 i n.

Polish Code of Criminal Procedure [Art. 165 Former Polish Code of Criminal Procedure] will be submitted after overruling the decision, as well as in the proceedings conducted after stating the nullity of decision or in case of the conducting the trial from the beginning, in the situation, when in previous proceedings this witness in spite of being entitled to refuse to testify gave testimony in court; in all these cases the nonadmissibility in evidence from Art. 186 § 1 Polish Code of Criminal Procedure is not applicable; in case court in which the case is pending (from the beginning) did not conduct the examination of evidence from the witness' testimony can make use of previous testimony which would be played back (read out), using for that purpose *a contrario* interpreted in Art. 186 § 1 Polish Code of Criminal Procedure"[11]. R. A. Stefański also shared similar opinion: "Witness who is referred to in Art. 182 Polish Code of Criminal Procedure [Art. 165 Former Polish Code of Criminal Procedure] cannot refuse to testify during the court hearing conducted again after cancelling the verdict by the court of the second instance or in the proceeding conducted after stating the invalidity of the decision; because it is not the first hearing during the trial"[12] .

However, it turns out, that ambiguity resulting from the lack of precise wording by the legislator, in both provisions quoted above, of the deadline for invoking by the witness the right to refuse to testify, led to the situation in which the closest person for the accused could exercise the right not only during the first, but also every other trial in case of reconsidering the case. The only limiting condition stipulated that it had to take place not later than at the beginning of the first instance hearing[13] .While commenting on such a state of affairs K. Grzegorczyk aptly paid attention to the fact that: "previously given testimony of the witness, cannot serve as evidence, or be played back, if (…) after the beginning of the first testimony during another court hearing in the court of the first instance (e.g. after repealing the verdict or remanding the case) [witness] will declare that he wants to exercise the right to refuse to testify because such a possibility was not provided in Art. 186 § 1 Polish Code of Criminal Procedure, and in any other provision of the Polish Code of Criminal Procedure. It is to be supposed that this was the legislator's omission, which can be only be complemented by him"[14] .

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[11] P. Pratkowiecki, Glosa do uchwały Sądu Najwyższego z dnia 24 stycznia 2001 r., I KZP 47/2000, PS 2002, nr 2, s. 136 i n.

[12] R. A. Stefański, Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2001 r., WPP 2002, nr 2, s. 68

[13] K. Grzegorczyk, Glosa do uchwały SN z dnia 24 stycznia 2001 r., I KZP 47/00, WPP 2002, nr 1, s.159 i n.

[14] Ibidem

Statutory deadline to exercise the right to refuse to testify

Guidelines shown by doctrine were not overlooked by the legislator, and resulted in the current wording of Art. 186 § l Polish Code of Criminal Procedure, in the amendment from 10th January 2003. In order to eliminate all interpretative vagueness, this provision included strict time limit for declaring by the closest person the refusal to testify. Thus, it marks the distinct dividing line reducing the possibility of exercising rights stipulated in Art. 182 and 185 Polish Code of Criminal Procedure

The expression used by the legislator "not later than until commencing the first testimony in court proceedings" means that the witness can make the appropriate statement in court proceedings exclusively in the determined time which passes upon commencing first testimony. If the witness, in the determined time, exercises his right, the evidence ban will work resulting from the contents of Art. 186 § 1 Polish Code of Criminal Procedure. It will bring about the situation that it will not be possible to use the testimony previously obtained from the witness, originating e.g. from the stage of pre-trial proceedings. As a consequence, if the witness exercises his right to refuse to testify prior to the deadline, his previously made testimony will be treated as non-existent. On the other hand, if the witness files such a statement after this deadline, consequently his statement will be legally ineffective. Thus the witness will have to testify to the full extent of the law[15]. In the current wording, the witness can exercise his rights only in the indicated time, and if it is done later his refusal of testimony will be regarded as invalid[16]. Moreover, it is not possible to exercise the right to refuse to testify by changing one's mind in this respect in the course of hearing or also in a new proceeding e.g. after repealing or stating the invalidity of the verdict[17].

The Supreme Court aptly noticed in substantiation of the commented decision that in the current legal status there is no doubt as to the interpretation of Art. 186 § 1 Polish Code of Criminal Procedure because "the expression used in Art. 186 § 1 Polish Code of Criminal Procedure the first testimony in judicial proceedings does not refer to the procedural situation

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[15] See eg. Komentarz do art. 186 k.p.k. (w:) P. Hofmański (red.), Kodeks postępowania karnego, t. 1, warszawa 2004, s. 807, T. Grzegorczyk, Komentarz do art. 186 k.p.k., Kodeks postępowania karnego. Komentarz, Kraków 2003, s. 502, or the verdict of the court of appeal in Lublin from 21st June 2006 r., II Aka 131/05, Prok. i Pr. 2006, nr 6, s. 31

[16] T. Grzegorczyk, Komentarz do art. 186 k.p.k., Kodeks postępowania karnego. Komentarz, Kraków 2003, s. 502

[17] E. Gruza, Ocena wiarygodności zeznań świadka w procesie karnym. Problematyka kryminalistyczna, Zakamycze 2003, s. 176.

in which the case after repealing a verdict of the court of first instance was remanded to the court and the witness is heard again"[18] .

On the current regulation basis, it is beyond doubt that the effect determined in Art. 186 § 1 Polish Code of Criminal Procedure only takes place when the witness, as the closest person for the accused, will declare that he exercises a right to refuse to testify before the beginning of the first testimony in court proceedings. Therefore, if the witness during the first instance hearing will not exercise the right to refuse to testify and will decide to testify and later as a result of measures of appeal in new proceedings e.g. in a retrial will declare to exercise his right to refuse to testify, then in the current situation the Art. 186 § 1 Polish Code of Criminal Procedure will not be applicable.

Certain breach in this regard one should implement only in the situation if the witness was supposed to be heard for the first time in appeal hearing. One should agree with the view, that since the witness had not been heard in court proceedings, for this reason one cannot lose his right only because the hearing was delayed and postponed to the other procedural stage[19]. In that the case it is assumed that the deadline "not later than until commencing the first testifying in court proceedings" will be valid in this regard, due to the lack of the first instance hearing of a witness at the proceeding stage the deadline could not be met, thus it gives the witness the possibility to exercise the right to refuse to testify in appeal hearing. Such wording of the proper moment of exercising this right results in no doubts that if the witness was supposed to be for the first time heard only in appeal hearing (in the framework of follow-up evidentiary hearing – Art. 452 § 2 Polish Code of Criminal Procedure), then he can exercise the right to refuse to testify with effect indicated in Art. 186 § 1 *in fine*[20] .

It should also be pointed out, that the right resulting from the contents of Art. 186 § 1 Polish Code of Criminal Procedure is not an irreversible right, blocking the possibility of testifying by the witness during the later stage of the proceeding, in case the witness changes his mind in this respect. Thus, if the witness at the earlier stage of criminal proceedings effectively exercises his right to refuse to testify, however in at a later stage decides to waive this right and testifies, nothing should limit him in this regard. Court of Appeal in Katowice pointed out in the verdict from 18th December 2003: "provided pursuant to the regulation of Art. 186 § 1 Polish Criminal Code,

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[18] The verdict of the Supreme Court from 24th November 2010 r., op. cit

[19] K. Marszał, Glosa do uchwały Sądu Najwyższego z dnia 24 stycznia 2001 r., I KZP 47/2000, Prok. i Pr. 2001, nr 10, s. 111 i n.

[20] T. Grzegorczyk, op. cit., s. 502.

the statement of the person entitled to the refusal to testify, it is limited by time and cannot be made later than before the beginning of the first testimony in court proceedings, so this temporal requirement is not applicable to the right of the person who exercised the right to refuse to testify but wishes to testify at the later stages of court proceedings even if the statement in this regard was made in the appeal phase"[21] .

Having considered all the remarks, one should share a view expressed by the Supreme Court that comes down to the statement that "the expression used in Art. 186 § 1 Polish Code of Criminal Procedure the first testimony in court proceedings does not refer to the procedural situation in which the case after repealing a verdict of the court of first instance was remanded to the court and the witness is heard again"[22] . The Supreme Court aptly follows the stance of doctrine in this regard, by stating that the expression used in Art. 186 § 1 Polish Code of Criminal Procedure "the first testimony in court proceedings" does not refer to the procedural situation, in which the case after repealing a verdict of the court of first instance was remanded to the court and the witness is heard again. In that case, there are no grounds to allow the possibility to exercise the right to refuse to testify by the witness who in proceedings in a court of first instance did not use the right to refuse to testify. At the later stage of the proceeding, the witness loses his right resulting from the contents of Art. 186 § 1 *in fine*. The court will be able to draw on to the previously made testimony without any obstacles, as well as if necessary, to subpoena a witness to testify again.

Conclusions

Having no doubts as for the interpretation of existing Art. 186 § 1 Polish Code of Criminal Procedure, it must be noticed that in the considered case the justifiability of the decision made at the individual stages, should be interpreted on the basis of regulations that had been in force beforehand. Since the witness being heard for the first time, after appropriate instructing, within due time "not later than before commencing first instance hearing", did not make a statement that as the close person to the accused wishes to exercise the right to refuse to testify, and then gives a testimony, it should cause the duty of testifying on later stages of the proceeding, irrespective of

[21] The verdict of the court of appeal in Katowice from 18th December 2003 II Aka 480/03, LEX nr 120350.

[22] The verdict of the Supreme Court from 24th November 2010 r I KZP 18/10, Biuletyn SN 2010, Nr 11, s. 19.

the remanding the case for complementing in pre-trial proceedings, and in case of the refusal to testify the possibility to play back testimony obtained earlier from the witness. The witness could effectively exercise his right to refuse to testify on the first court hearing conducted as a result of remanding the case and consistently invoke it, irrespective of the amendment to the provisions regulating this issue on the later stage of the proceeding.

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