

Participation of witness lawyer in criminal legal proceedings

Anel Rakhmetzhanovna Ensebayeva

Kazakh-Russian University, Kabanbay batir Street, app. 8, Astana, Kazakhstan

Abstract. In this article, the author emphasizes the need for legislative regulation of the issues connected with the participation of a lawyer in criminal proceedings as an advocate of a witness in a criminal case. In particular, here are discussed the following matters: access to an advocate, payment for his service, the lack of rules governing the powers of witness's lawyer.

[Ensebayeva A.R. **Participation of witness lawyer in criminal legal proceedings.** *Life Sci J* 2014;11(12s):148-151] (ISSN:1097-8135). <http://www.lifesciencesite.com>. 28

Keywords: criminal legal proceedings, human rights, defender, witness, legal aid

Introduction

Protection of rights and freedom of a person and citizen during criminal legal proceedings is an integral duty of not only state authorities specially intended for this purpose, but also separate institutes.

The Institute for the Legal Profession (Institute of lawyers) in the legal system of Kazakhstan occupies one of the key places. This organization assists realization of, fixed in the Constitution of the Republic of Kazakhstan, human right on receiving the qualified legal assistance for the protection of his rights, freedom and legitimate interests in the sphere of criminal, civil and administrative legal proceedings.

Recently, in the legal practice, the participation of a lawyer in criminal proceedings as a witness's advocate was a novelty, because witnesses had been interrogated without the presence of a lawyer, even though this was a right by law. Until recently, defenders didn't play any significant role. Changes in the purpose of procedures and tasks regulated by criminal and procedural law, were laid down in a basis of procedural activity of lawyer/defender. These changes provided the lawyer with a wide range of possibilities at all stages of criminal legal proceedings.

Undoubtedly, ensuring protection of participants' interests in criminal legal proceedings, must correspond to the world standards, because they are require identification of new approaches to achieve a certain task[1].

The aim of my research is to study and analyze the participation of lawyers in criminal legal proceedings to render legal assistance to a witness.

In the condition of establishing a constitutional state (Law-governed state), process of strengthening guarantees to respect the rights of participants of the criminal legal proceedings, expanding and deepening both economic, and sociopolitical reforms, undoubtedly, is an indicator

of democratization process of the criminal legislation standards.

However, some defects (violation of human rights) still continue to take place. In particular, it is connected with the legal status of a witness. In order to improve this situation government has made changes in legislation. In spite of these facts and changes occurred in the legislation there are still demands for carrying out additional researches.

The role of a witness in criminal trial is very important and irreplaceable. The witness is a carrier of information that's why his participation is necessary in establishing the circumstances of the case which are subject to be proved. People become a witness not by their own will, but owing to combination of circumstances[2].

Unfortunately, a person reporting a crime or giving a witness statement can lead to that person being charged with a crime, even if they are innocent[3]. Just a few "wrong" words said in a friendly conversation with investigators may turn a witness to a suspect[4].

Nowadays, studying legal problems of participation of the witness's lawyer is very actual and significant question. In particular, the following items are very expedient:

- study effectiveness of methods which are used in the process of interrogating a witness, taking into account age, sex, education etc.;
- participation of a lawyer along with the witness during the investigative actions;
- development of new tactical methods of carrying out investigative actions with participation of witness's lawyer.

In the USA, witness assistance is provided within Victim/Witness Assistance Program. Recognizing that the criminal justice system can be confusing and frightening, Victim/Witness Assistance advocates ensure that all witnesses are treated with dignity and respect and provided with

the services and support they need, throughout their involvement with the system [5].

In association with the occurring global changes of the Criminal-procedural law, participation process of a lawyer in criminal trial, as a direct witness's lawyer, causes a particular interest.

In part 3, in article 13 of the Constitution of the Republic of Kazakhstan clearly stated that everyone shall have the right to be recognized as subject of the law and protect his rights and freedoms with all means not contradicting the law including self-defense. Everyone shall have the right to judicial defense of his rights and freedoms. Everyone shall have the right to qualified legal assistance. In cases stipulated by the law, legal assistance shall be provided free of charge[6].

This viewpoint is also declared in the Law of the Republic of Kazakhstan «About Lawyer activities»[7]. Institute of advocates of the Republic of Kazakhstan is called to promote, guaranteed by the state and fixed by the Constitution of the Republic of Kazakhstan, realization of a human right on judicial protection of his rights and freedom, as well as receiving the qualified legal aid. But previously it is necessary to find out who, from the procedural point of view, can be a witness, and what kind of rights he possesses and what are his duties.

According to article 82 of the Criminal Procedural Code of the Republic of Kazakhstan[8], any person who may know certain circumstances, material for a case may be summoned and questioned as a witness to provide testimony. The following shall not be subject to questioning as witnesses:

1) judge - with regard to circumstances of a criminal case which became known to him in connection with the participation in proceedings on a criminal case as well as in the course of discussions on issues which emerge in the course of passing a court decision in the meeting room;

2) defense of a victim, accused and equally representatives of a victim, civil plaintiff and civil defendant - with regard to circumstances which became known to him in connection with the performance of his duties in the criminal case;

3) a clergyman - with regard to circumstances which became known to him through confessions;

4) person who by virtue of his young age or psychic or physical drawbacks is not capable to correctly perceive circumstances that are material for the case and to provide testimony on those circumstances.

5) mediator - with regard to circumstances which became known to him in connection with carrying out of mediation, except for the cases provided by the law.

A witness shall have the following rights:

1) to refuse to provide testimony that may entail for himself, his spouse and close relatives prosecution for the commission of a criminally punishable act or administrative violation;

2) to provide testimony in his native language or a language in which he have command;

3) to use charge free assistance of a translator;

4) to file recusal against a translator who participates in his questioning;

5) to make protocol with his own hands with his testimony in the protocol of questioning;

6) to file petitions and to file complaints against the acts of an inquest officer, detective, procurator and court.

7) a witness shall have the right to provide testimony in the presence of his advocate if the latter does not participate in the case in any other capacity. A failure of an advocate to arrive does not impede the conduction of questioning at the time appointed by the detective;

8) for reimbursement of expenditure, incurred in connection with his participation in preliminary investigation and court.

A witness shall be obliged as follows:

1) to arrive when summoned by the inquest officer, detective, procurator and court;

2) to truthfully communicate all he knows on the case and to answer questions asked;

3) not to disclose information and circumstances known to him with regard to the case if he was warned against this by the inquest officer, investigator or procurator;

4) to comply with the procedure established for performance of investigative acts and during the court trial.

A witness may not be subjected to expert evaluation or inspected under compulsion, except for the cases indicated in Article 241 of this Code.

For giving deliberately false testimonies or for a refusal to provide testimony a witness shall be held responsible in the criminal procedure as provided for by the Criminal Code of the Republic of Kazakhstan[9]. The evasion from providing testimony or failure to arrive without a good reason when summoned by the body leading criminal procedures shall entail administrative liability.

According to articles 352 of Criminal Code of the Republic of Kazakhstan, deliberately false testimony of a witness or a victim, or findings of an expert in court, or in the carrying out of an inquest or a preliminary investigation, as well as intentionally incorrect translation made by a translator in the same cases, -shall be punished by a fine in an amount from one hundred up to two hundred monthly assessment

indices, or in an amount of wages or other income of a given convict for a period from one to two months, or by engagement in public works for a period from one hundred eighty up to two hundred forty hours, or by correctional labour for a period up to two years, or by detention under arrest for a period up to three months.

Second part of article 352 of the Criminal Code of the Republic of Kazakhstan contains the instruction that the same acts combined with an accusation of a person in the commission of a grave or an especially grave corruption crime, or combined with artificial creation of evidence for the prosecution, as well as such acts committed for venal purposes, -shall be punished by imprisonment for a period from three to eight years.

Article 353 of the Criminal Code of the Republic of Kazakhstan shows that a refusal by a witness or victim to give evidence in court, or in the course of an inquest or preliminary investigation, - shall be punished by a fine in an amount from fifty up to one hundred monthly assessment indices, or in an amount of wages or other income of a given convict for a period up to one month, or by engagement in public works for a period from one hundred twenty up to one hundred eighty hours, or by correctional labour for a period up to one year, or by detention under arrest for a period up to three months. A person shall not be subject to criminal liability for a refusal to give evidence against himself or herself, a spouse, or close relatives, as well as ecclesiastics for a refusal to testify against those who confided to them at the confessional.

With a view of strengthening the above-stated position, a refusal to give evidence, legislator also fixed that no person shall be compelled to give testimony against oneself, one's spouse and close relatives whose circle is determined by law[10]. The clergy shall not be obligated to testify against those who confided in them with some information at a confession;

Nevertheless, there is a question; how does a person know what kind of valuable information he possess, which is significant to the criminal case? Especially, this question becomes topical if the witness recollect all essential moments[11]. In addition, in the Criminal Procedure Code of Kazakhstan clearly specified that age of a witness has no any restrictions in investigation. It is considered that a person who is capable of putting his earlier imprinted information clearly, can be a witness.

A witness is one of the participants of criminal legal proceedings, who knows every detail of the criminal case, included into a subject of proving. The fact, known to a witness, important for investigation and resolution of criminal case is a

main criterion of becoming a witness, but until that moment a person is just a simple eyewitness in this criminal game.

Undoubtedly, not each citizen (or a witness) knows that after their testimony as a witness, inspector can change the status of an arrested person to the suspect or the accused. Actually, it takes place according to the illiterately given testimony by the witness who does not know how to express his thoughts and how to act in the court process. It is even more serious in interrogation when a witness of situation is a physically and mentally ill person.

If violation of the rights and legitimate interests of the witness takes place during interrogation of the witness with participation of his lawyer, lawyer in due time will make corresponding statements on it, as in the protocol of investigatory action, and if necessary, by submission of complaints to controlling and supervising bodies.

Difference between the status of a witness and a suspect is that the suspect, as well as a accused is not obliged to give evidences. From this position it is obvious that the witness has to be notified in advance about his basic procedural rights (before his appearance on interrogation). It means the witness's right, to arrive on interrogation with his advocate, should be reflected in the agenda of the witness[11].

Undoubtedly, in article 82 of part 3 of the Criminal Procedural Code of the Republic of Kazakhstan clearly specified a right of the witness to use the help of lawyer in criminal legal proceedings.

In particular, access of a lawyer to the criminal procedure is remains as an unresolved problem. The procedural opportunities of the lawyer are insufficiently regulated, that is the advocate realizes its powers within a narrow range of investigative actions. These are a few examples of incomplete defects in legislation that need to be settled.

In article 71 of the Criminal Procedure Code of RK obligatory participation of the lawyer at interrogation of the suspect, accused, and defendant is guaranteed, i.e. participation of the lawyer will be provided by the state. However, in any article of the Criminal Procedure Code of the Republic of Kazakhstan is not mentioned that participation of the lawyer as the defender for witness or victim should be provided by the body conducting the criminal trial, as realization of its constitutional right.

In certain cases, if witness: has financial difficulties (low income), does not know legal proceedings language, is minor (underage), suffers from physical or mental defects (lack of hearing, speech, sight, intellectual backwardness, epileptics, defects of memory etc.), etc., then all expenses on payment of the lawyer's services will be paid by the

state. However, very few witnesses know about this possibility[12]. So they need to be prepared for the experience of participation in criminal proceedings, with help of witness advocate[13].

Besides, in the Criminal Procedural Code of the Republic of Kazakhstan, the right of the interrogated witness or his lawyer on the petition for the announcement of break during the legal proceedings was not considered, with a view of confidential discussion some certain questions.

In the existing Criminal Procedural Code there is no norm regulating powers of the witness's lawyer that can become the cause for the offer of the lawyer's activity improvement, mentioning rules: about resistance of the lawyer, including lawyer's remuneration to the procedural costs; for rendering a legal aid;

With a view of realization the guaranteed by, the Constitution of the Republic of Kazakhstan, rights of receiving the qualified legal aid, we consider necessary, at legislative level, to settle a question of obligatory participation of the lawyer, not only as the defender of a suspect, accused, defendant, but also as the direct lawyer of the victim and witness.

On the basis of the foregoing, there are introduced corresponding changes and additions into the edition of the Criminal Procedural Code of the Republic of Kazakhstan:

Participation of a defender in execution of criminal cases shall be obligatory in the following cases:

- 1) when suspect, accused, defendant, condemned, acquitted, victim, witness petitions for that;
- 2) suspect, accused, defendant, condemned, acquitted, victim, witness has not reached the age of majority;
- 3) suspect, accused, defendant, condemned, acquitted, owing to physical or mental shortcomings may not independently exercise his right to defence;
- 4) the suspect, accused, defendant, condemned, acquitted, has no command of the language in which court proceedings are carried out;

5) victim, witness owing to physical or mental defects cannot independently realize the procedural competences;

Corresponding Author:

Dr.Ensebayeva Anel Rakhmetzhanovna
Kazakh-Russian University
Kabanbay batir Street, app. 8, Astana, Kazakhstan

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7/20/2014