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Andrzej Sakowicz
University of Białystok
sakowicz@uwb.edu.pl

Commentary on the Judgment of the Supreme Court of 18 March 2015 (Ref. No. II KK 318/14)[1]

Envisaging an unconditioned prerequisite of reading aloud a testimony of a witness who resides abroad, the provision of Art. 391 § 1 of the Code of Criminal Procedure does not make the application of this possibility depend on any additional conditions such as, e.g., a long period of residence abroad and the importance of such evidence being read aloud to the pending proceedings, which does not exempt the court from a duty to establish whether the witness's residence abroad is a real impediment to implement the principle of immediacy.

The fact that a witness resides abroad should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before the court is impeded in a way comparable to impossibility of serving him or her with summons or with other insurmountable obstacles.

1. The statement made by the Supreme Court about a possibility of disclosing the minutes of the examination of a witness residing abroad if he or she fails to appear in the hearing if he or she was previously examined evokes fundamental doubts both about the theses and main argumentation's threads. Therefore it does require a more profound analysis because the reasoning to the above quoted theses is general, not to say – partially internally contradictory. On the one hand, the Supreme Court indicates that a possibility of free travel in the EU countries means that often the only actual impediment of giving evidence by a witness residing abroad before a judge may be a long distance from the place of the witness's residence to the court's build-

1 Supreme Court's judgment of 18 March 2015, II KK 318/14, OSNKW 2015, No. 9, item 73.

ing. However, due to the common access to means of communication, such a difficult obstacle can be overcome. Indeed it is beyond any doubts, as noticed by the Supreme Court in the reasoning, that in many cases appearance in a court will be less time consuming and burdensome for a witness residing abroad than for a witness living in a remote part of the country. This eventually leads the Supreme Court to conclude that residence abroad of a witness should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before a court is impeded to an extent comparable to a lack of possibility to serve him or her summons or other insurmountable obstacles.

On the other hand, the Supreme Court admits in another part of the reasoning to the glossed judgment that envisaging an unconditioned prerequisite of reading aloud a testimony of a witness who resides abroad, the provision of Art. 391 § 1 of the Code of Criminal Procedure does not make the application of this possibility depend on any additional conditions such as, e.g., a long period of residence abroad and the importance of such evidence being read aloud to the pending proceedings, which does not exempt the court from a duty to establish whether the witness's residence abroad is a real impediment to implement the principle of immediacy[2]. Moreover, the Supreme Court adds that the norm contained in the provision of Art. 391 § 1 of the CCP is of an "exceptional nature while the context created by other prerequisites listed therein allowing to read aloud a testimony of an absent witness do not leave any doubts that the witness's residence abroad should be treated as a sufficient prerequisite to read aloud his or her testimony given in preparatory proceedings only if his or her examination before a court is impeded to an extent comparable to a lack of possibility to serve him or her summons or other insurmountable obstacles".

2. The above opinion of the Supreme Court can be approved of solely within the scope of the exceptional nature of the provision of Art. 391 § 1 of the CCP expressing deviation from the rule of immediacy. It elevates a legal norm determining conditions to be fulfilled to allow disclosure of the minutes of the examination in a hearing if a witness fails to appear in it[3]. One of these conditions is the witness's residence abroad. The circumstance is unconditioned, the same as other conditions indicated in Art. 391 § 1 of the CCP allowing to read aloud appropriate fragments of the minutes of testimonies submitted earlier by a witness in preparatory proceedings or before a court in this or another case, or other proceedings envisaged by the Act. Admitting a possibility of reading aloud a witness's testimony both by the court and parties[4], the legislator failed to specify accurately both a kind of such residence and

2 The same opinion was expressed by the Supreme Court in the ruling of 6 April, 2006, IV KK 7/06. The Court ruled that the very fact of a witness residing abroad for a long time authorizes a court to read aloud his or her testimony regardless of its importance to pending proceedings (OSNKW 2006, No. 6, item 60).

3 D. Świecki, Bezpośredniość czy pośredniość w polskim procesie karnym, Warszawa 2012, p. 203.

4 Content *de lege lata* of Art. 391 § 1 of the CCP does not specify who may read aloud relative fragments of the minutes of a hearing. It is confirmed by the term used by the legislator therein: "allowed to read aloud". Considering

its duration[5]. The legislator implies that a possibility of reading aloud the minutes of the witness's testimony does not depend on "any additional conditions such as, e.g., a long residence abroad or the importance of such evidence being read aloud to the pending proceedings", which has also been approved of by the Supreme Court in the glossed judgment. It expresses the Supreme Court's reference merely to the rules of language interpretation and the conviction that the application of these rules eliminates the very admissibility of pursuing the interpretation with the use of still other methods. Nevertheless, it should be noticed that even an obvious effect of the language interpretation does not exempt the interpreter from a duty to refer to systemic and functional interpretation in order to explore whether the result of the language interpretation is not irrational or axiologically unacceptable. Thus the doctrine and Supreme Court's case law rightly more and more often indicate that relying only on the language interpretation as the only method of interpretation is not sufficient and may lead to the incomplete reading of a legal norm. Therefore it is postulated not to finish the process of interpretation at this stage but verify the obtained results with the use of further interpretation directives (systemic and functional) regardless of a degree of the language unambiguity[6]. Hence you do not need to be too penetrative to claim that in such a situation the result of a legal interpretation performed through the prism of many interpretative directives provides greater opportunities for obtaining a correct result of this process than limiting oneself to one method of interpretation.

Moving on the subject matter of the glossed judgment of the Supreme Court and considering the above, it is necessary to refer to extra-linguistic directives of inter-

the reading of Art. 167 of the CCP, it should be assumed that the minutes may be read aloud by the court or parties. It should be added that reading aloud the minutes of a witness hearing by the party requires a prior motion for evidence and admitting it under Art. 368 of the CCP.

5 The CCP of 1969 used an analogous expression in Art. 337 § 1 thereof. It was justified by the need to replace a prerequisite admitting reading aloud a testimony „due to a considerable distance of the place of residence", which was first occurred in Art. 340 § 1 of the CCP of 1928 (introduced by the Act of 27 April 1949 on amending provisions of the Code of Criminal Procedure, Journal of Laws No. 32, item 238), and then in Art. 299 § 1 of the CCP of 1928 after implementation of a uniform text, Journal of Laws of 1950, No. 40, item 364). Also see: T. Nowak, Zasada bezpośredniości w polskim procesie karnym, Poznań 1971, p. 138.

6 Compare: M. Zieliński, Podstawowe zasady współczesnej wykładni prawa, (in:) P. Winczorek (ed.), Teoria i praktyka wykładni prawa, Warszawa 2005, p. 118; M. Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki, Warszawa 2013, p. 314 et seq.; M. Zieliński, Osiemnaście mitów w myśleniu o wykładni prawa, (in:) L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), Dialog między sądami i trybunałami, Warszawa 2010, p. 137 et seq.; M. Peno, M. Zieliński, Koncepcja *derywacyjna* wykładni a wykładnia w orzecznictwie Izby Karnej i Izby Wojskowej Sądu Najwyższego, (in:) J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), Zagadnienia prawa dowodowego, Warszawa 2011, p. 117-136; P. Hofmański, S. Zabłocki, Elementy metodyki pracy sędziego w sprawach karnych, Warszawa 2006, p. 234; P. Gensikowski, O wykładni prawa karnego, (in:) L. Morawski (ed.), Wykładnia prawa i inne problemy filozofii i prawa, Toruń 2005, p. 114; also see: Resolution of 7 judges of Supreme Court of 24 February 2010, I KZP 28/09, OSNKW 2010, No. 3, item 21. However, a prevailing opinion thereon is still the one according to which language interpretation is the most important – see, e.g., L. Morawski, Zasady wykładni prawa, Toruń 2006, p. 67 et seq.; L. Morawski, Wykładnia w orzecznictwie sądów, Komentarz, Toruń 2002, p. 85 et seq.; J. Wróblewski, Rozumienie prawa i jego wykładnia, Wrocław 1990, p. 86; Constitutional Tribunal's judgment of 28 June 2000, K 25/99, OTK 2000, No. 5, item 141; Supreme Court's resolution of 22 March 1994, I KZP 3/94, OSNKW 1994, No. 5/6, item 29; Supreme Administrative Court's ruling of 26 January 2001, I S.A./Lu 1176/99, "Biuletyn Skarbowy" 2001, No. 4, p. 22.

pretation. In the pursuit of the above, it should be pointed out that the provision of Art. 391 § 1 of the CCP functions as an exception from the rule of immediacy to take evidence in criminal proceedings, which is commonly binding in the Polish procedure; and the same as every exception, it should be applied moderately. We should remember that despite numerous exceptions, the contemporary model of criminal proceedings is based on the rule of immediacy to take evidence proving the defendant's responsibility directly by a competent court. Two directives ensure from the rule of immediacy, i.e., the procedural body and parties should have a direct contact with the source of evidence and evidence, and the procedural body should establish facts most of all by means of original evidence[7]. Nevertheless, there are opinions enriching the content of the rule of immediacy by another directive according to which the court should rely solely on evidence taken during a hearing[8]. Anyway, leaving disputes on the content of the rule of immediacy aside, it should be underlined that a significant guarantee ensuing from the rule of immediacy is the necessity of a direct contact of the court with the evidence being taken, which allows members of the bench gather impressions necessary to assess this evidence properly. The thing is judges should be fully aware of the entire evidence used as the basis of sentencing in order to guarantee judgments actually based on the evidence that has been duly and properly verified and assessed by the judges with regard to its credibility and value. A direct contact of the court with evidence sources and a possibility of verifying its content during a trial does allow the court to fully evaluate evidence. What is more, later on, it significantly affects the accuracy of the assessed credibility of evidence and its importance with regard to the case's resolution; and in consequence, implementation of the principle of the search for the truth.

Although the addressee of the rule of immediacy is, above all, the first-instance court as this court establishes facts which are the substantial basis of a ruling on the matter of litigation, this rule applies to all procedural bodies and litigants[9]. With regard to the parties, taking evidence directly in a hearing should fully implement the right to defence and the rule of adversarial proceedings by the active participation

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7 The same, e.g.: S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 269.

8 D. Świecki, inter alia, supports the above opinion claiming that "to apply this rule properly, sentencing forum is also important because apart from a main hearing, the court may also take evidence elsewhere. Yet only in a hearing the court has the best conditions to evaluate evidence properly. It ensues from the fact that the court must disclose evidence in a hearing. This way the legislator ensures the court has a direct contact with evidence. The same, the first directive of the rule of immediacy facilitates implementation of the second directive. Thus it is also an important element of the rule of immediacy. Whereas the third directive is the essence of this rule because it creates the best conditions to search the truth" – D. Świecki, Bezpośredniość…, *op. cit.,* p. 23-24. The same opinion supported by M. Cieślak, Zasady procesu karnego i ich systemu, ZNUJ, Prawo No. 5, Kraków 1956, p. 199; T. Nowak, Zasada.., *op. cit.,* p. 44 et seq; W. Daszkiewicz, Prawo karne procesowe. Zagadnienia ogólne, t. I, Bydgoszcz 1999, p. 107 et seq.; J. Tylman, (in:) T. Grzegorczyk, J. Tylman, Polskie postępowanie karne, Warszawa 2009, p. 104; J. Grajewski, (in:) J. Grajewski (ed.), Prawo karne procesowe – część ogólna, Warszawa 2011, p.104; K. Marszał, S. Stachowiak, K. Zgryzek, Proces karny, Katowice 2003, p. 78 et seq.; B. Bieńkowska, (in:) P. Kruszyński (ed.), Wykład prawa karnego procesowego, Białystok 2003, p. 96 et seq.; A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994, p. 311-312.

9 Compare: D. Świecki, Bezpośredniość…, *op. cit.,* p. 21-22; T. Nowak, Zasada…, *op. cit.,* p. 45-48.

of the parties in hearing of evidence. In consequence, the parties may have a direct access to each piece of evidence and participate actively in hearing evidence during a trial if they are present and express their will to participate actively in hearing evidence before the court. Thus the rule of immediacy guarantees that the court will rely on the evidence obtained and taken in a way allowing full examination of the case, which is also the implementation of the defendant's procedural guarantee.

In the light of the above considerations, it cannot be claimed that a legal norm expressed in the provision of Art. 391 § 1 of the CCP allows to read aloud the witnesses' testimony in pending criminal proceedings in every situation of the witnesses' residence abroad regardless of "any additional conditions such as, e.g., a long residence abroad". If it happened, the rationale behind the rule of immediacy would be depreciated while the rule itself would be considerably weakened. That is why, bearing in mind the content of the rule of immediacy and being aware of the fact that the norm expressed in Art. 391 § 1 of the CCP is the exception thereto, it should be assumed that the obstacle in the form of the witness's residence abroad may be a prerequisite to read aloud his or her testimony given before by them if this residence is real, persistent or long-lasting and actually prevents the witness's appearance and his or her direct examination before the court. The procedural body cannot forget that Art. 391 § 1 of the CCP is a special provision which allows to depart from the rule of immediacy in specified circumstances, but it cannot be interpreted separately from other provisions of the Code of Criminal Procedure, in particular separately from the rules expressed in Art. 2 § 1 of the CCP, which bind the courts to, most of all, search for the truth while applying the provisions of the Code. In effect thereof, if the witness's testimony is considerably important to resolve the case, the court should apply Art. 391 § 1 of the CCP without prior exhaustion of the possibilities of examining the witness before the court, that is without acknowledging that there do occur insurmountable obstacles to satisfy the rule of immediacy and adversarial proceedings. Only then the witness's testimony may be read aloud within the appropriate scope regardless of its importance to the proceedings, even without the consent of the parties[10]. It certainly is not possible if the witness's residence abroad is connected with a temporary stay, visit, trip, or holiday, etc.[11] Then, it is not possible to acknowledge that there indeed occurred insurmountable obstacles to satisfy the rule of immediacy[12]. Nevertheless, each time the court decides about the disclosure of the minutes of the examination when the witness is absent in a hearing, it should consider a directive of hearing the case in a reasonable time (Art. 2 § 1 point 4 of the CCP) while

10 Supreme Court's ruling of 22 May 2014, III 117/14, Lex No. 1482405.

11 The judgment of Administrative Court in Katowice of 1 February 2008, II AKa 382/08, KZS 2008, No. 7/8, item 100; the judgment of Administrative Court in Białystok of 18 June 2015, II AKa 59/15, Lex No. 1808616.

12 Supreme Court's judgment of 15 May 1978, I KR 91/78, OSNKW 1978, No. 11, item 135; Supreme Court's judgment of 24 February 1984, II KR 35/84, OSNPG 1989, No. 8/9, item 82.

respecting the victim's legally protected interests and his or her dignity[13]. Due to this, it is accurate to claim that the Procedural Act does not make a possibility of reading aloud a testimony under Art. 391 § 1 of the CCP dependent on an ineffective attempt to summon the witness to a hearing but rationality of undertaking such activities aimed at a direct examination of the witness by the court appears quite obvious[14].

3. The Procedural Act does not make a possibility of reading aloud a testimony under Art. 391 § 1 of the CCP dependent on an ineffective attempt to summon the witness to a hearing but rationality of undertaking such activities aimed at a direct examination of the witness by the court appears quite obvious, particularly if we consider the need to respect directives composing the rule of immediacy. It undeniably refers to the situation when, e.g., the place of the witness's residence abroad is known, a distance from this place to the court's building does not exceed comparable distances within the country while it results from other evidence that the witness travels from the place of residence to Poland without greater limitations[15]. Furthermore, we cannot forget that even from the moment of enacting the provision of Art. 391 § 1 of the CCP in its current reading, since Poland joined the European Union and Schengen Area, a reference point for the term "s/he resides abroad" has changed with regard to individuals residing in the EU countries. Movement of people within the Schengen Area is undeniably easier.

Finally, the right ensuing from Art. 391 § 1 of the CCP cannot be considered separately from a more and more elaborate sphere of cooperation between judicial bodies of the EU countries regulated by treaties and conventions. It allows, among others, online examination of witnesses with the use of telecommunication devices assuring transmission of both sound and image in real time. In particular, such a possibility exists with regard to the examination of a witness and expert witness under Art. 10 of Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000[16], and under the provisions of Art. 9 and 10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters drafted in Strasbourg on 8 November 2001[17]. In both cases, hearing by video conference does not deprive a hearing of the features of immediate hearing of evidence before the court.

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13 Supreme Court rightly stated that "striving for full fulfilment of the rule of immediacy, within the limits of law obviously, may grossly contradict the postulate defined in Art. 2 § 1 point 3 of the CCP. It would strengthen a wrong opinion among the society, i.e. that a victim of a prohibited act exists in the margin of a criminal trial while the judicature is interested in him or her solely with regard to the need to hold the defendant criminally liable or acquit him or her of the charges. Such understanding of the term of insurmountable obstacles as a real possibility of deterioration of the victim's mental health due to experiences connected with appearing before the court" – compare: Supreme Court's judgment of 4 November 1988, IV KR 291/88, OSNKW 1989, z. 3/4, item 31; Supreme Court's ruling of 11 March 2003, V KK 150/02, Lex No. 77022.

14 Supreme Court's judgment of 17 May 2012, V KK 369/11, Lex No. 1165301.

15 *Ibidem*.

16 Journal of Laws of 2007, No. 135, item 950.

17 Journal of Laws of 2004, No. 139, item 1476.

Summing up, as far as witnesses residing abroad are concerned, a departure from the rule of immediacy envisaged in Art. 391 § 1 of the CCP should not be automatically applied but the court should endeavour to examine the witness in a hearing with the use of all possible means, including technical ones. The court may also take advantage of legal assistance under Art. 587 of the CCP. The above mentioned legal possibilities should be applied particularly when the testimony of a witness residing abroad is of considerable importance to the substantial hearing of the case[18]. To achieve this, the court should serve the witness with summons to the hearing scheduled on a date he or she will be able to arrive. Yet, if it was impossible, the court should launch the procedure of hearing the witness under a foreign legal assistance pursuant to the international agreement or Art. 177 § 1a of the CCP[19]. Only when the above activities appear to be ineffective should the norm expressed in Art. 391§ 1 of the CCP be applied.

18 Compare: Supreme Court's judgment of 6 June 1997, III KKN 114/96, OSPriP 1998, No. 3, item 14. Supreme Court's case law contains the opinion according to which the very fact of a witness's long residence abroad authorizes the court to read aloud his or her testimony regardless of its importance to pending criminal proceedings. It ensues from the claim that the provision of Art. 391 § 1 of the CCP ”explicitly stipulates that when a witness resides abroad, appropriate fragments of the minutes of evidence given by him or her before in the preparatory proceedings, or before the court in this or another case or in another proceedings envisaged by the Act may be read aloud. It goes without saying that such a permission is a manifestation of support for the rule of prompt and efficient trial prevailing over the rule of immediacy in this specific situation” – see: Supreme Court's ruling of 6 April 2006, IV KK 7/06, OSNKW 2006, No. 6, item 60; Supreme Court's ruling of 16 December 2003, III KK 110/03, R-OSNKW 2003, item 2722.

19 See more: A. Lach, Przesłuchanie na odległość w postępowaniu karnym, ”Państwo i Prawo” 2006, No. 12, p. 84; the same opinion was held by the Supreme Court in its ruling of 4 June 2009, V KK 295/08, Lex No. 512081 which claimed that ”examining witnesses residing abroad in a hearing by video conference with the participation of a translator by the judge of a foreign county acting as a summoned court does not violate Art. 177 § 1a of the CCP in connection with Art. 396 § 2 of the CCP”.