

ORGANIZED CRIME / WITNESS PROTECTION IN GERMANY

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I. INTRODUCTION

As we are aware, organized crime demands the use of particularly effective investigation methods for its detection and suppression, as well as particularly effective measures to protect witnesses. Organized crime has the lack of scruple and the special power to use its considerable financial resources and connections to interfere with detection, in particular to intimidate witnesses and even, where necessary, to silence them. Detection must, of necessity, remain insufficient, and indeed fail, if witness protection does not work¹.

In Germany, there are no specific legal provisions to protect witnesses against organized crime. There is however a large number of regulations aimed to protect witnesses - largely independently of the nature of the offence committed; such regulations are, for instance, also applicable to terrorist crimes or offences against sexual self-determination, and they can be applied in respect of the criminal offences of organized crime. In overall terms, there is a need here to distinguish between B. Regulations in criminal proceedings and C: Regulations in very general terms to avert danger.

II. PROVISIONS IN CRIMINAL PROCEDURE LAW

The provisions for the protection of witnesses in criminal proceedings permit

the investigation authorities and courts to proceed in several stages². They depend upon the gravity of the threat to or endangerment of the witness and the need for a particular intensity of protection.

A. Section 68 of the Code of Criminal Procedure (StPO)

In accordance with section 68 subsection 1 second sentence, witnesses who have made their observations in an official capacity (such as police officers on duty) are always entitled (but not obliged) to state their place of work instead of their place of residence³.

Independently of this provision, any witnesses may be permitted by the person leading the questioning to state their business or workplace instead of their place of residence, or another address where a summons may be served, if it is to be feared that, otherwise, he/she or another individual is threatened in relation to any protected legal interest. Under the same preconditions, the witness may be permitted to refrain from giving information as to where he/she can be reached (section 68 subsection 2 of the Code of Criminal Procedure).

In accordance with section 68 subsection 3 of the Code of Criminal Procedure, the identity of a witness (i.e. at most all

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¹ Government of FRG BT-Dr 13/8156.

² Renzikowski JZ 1999, 605 ; Griesbaum NSTz 1998, 433.

³ The same applies as well to all other office-holders, but not in cases where notice is taken of a matter in a business context ; here ,if need be, recourse may be had to section 68 II 1 StPO

personal information)⁴ may be kept confidential if there is reason to fear (the wording of the statute does not require a particularly high probability) that disclosure will place at risk the life, limb or freedom of the witness or of another individual. The documents relating to identity are kept at the public prosecution office, in other words they are not initially submitted to the court - and for this period there is also no inspection of the documents. They are not to be added to the file until the threat has ceased to apply. If witnesses are listed in the written charge or in a subsequent summons whose identity is not fully disclosed, this circumstance is to be stated.

An exemption from stating one's identity does not release one from the duty to state in the main trial⁵, when asked, in what capacity the observations were made. This is aimed at undercover investigators in particular⁶.

B. Section 68b of the Code of Criminal Procedure

This provision brings about an improvement in witness protection in that legal counsel may be appointed to the witness *ex officio* and at the expense of the state if the witness is unable to exercise his/her rights in person during questioning. In the case of witnesses to major crimes or to criminal offences committed on a

commercial or gang basis, i.e. offences of organized crime, such counsel for the witness is appointed as a rule. Counsel is to ensure in particular that the witness is able to assert his/her rights of defence and protection, and must try to ensure that the procedural measures available under the law as it stands to protect witnesses are applied to the necessary degree.

C. Section 223 of the Code of Criminal Procedure

In accordance with this provision, if there is an insuperable obstacle to a witness appearing in the main trial for a longer period or indefinitely, the court may order the witness to be questioned by an appointed judge. However, the defence counsel and the accused are entitled to attend such questioning. Having said that, it is permissible for the accused to be temporarily removed from questioning in accordance with section 247 of the Code of Criminal Procedure. Counsel for the defence may not be removed from questioning under any circumstances, not even for reasons of an endangerment to the witness.

It is also permissible for the witness to be questioned by the appointed judge using video technology in accordance with section 247 a. This video recording may be used later during the main trial.⁷

D. Section 247 of the Code of Criminal Procedure

In accordance with this provision, the court can order the accused to be removed from the courtroom during questioning if the fear exists that a co-accused or a witness will not tell the truth if questioned in the presence of the accused. The presiding judge of the court must inform the accused of the main content of what was testified in his/her absence once he/

⁴ Where a witness at risk has been given a "new identity" it may be sufficient - and therefore necessary in terms of the proportionality principle - for only the new identity to be kept secret.

⁵ This duty does not apply to interrogations during investigation proceedings.

⁶ As regards those questions to which the accused's right to put questions also applies, the fact that the prosecuting authorities used under cover investigators may be revealed during the main court hearing. If this is to be definitely avoided such witnesses will have to be dispensed with.

⁷ Kleinknecht/Meyer-Goßner § 223, 20.

she has returned.

It should be pointed out in this context that the court may also hold the proceedings in camera in accordance with section 172 of the Courts Constitution Act (Gerichtsverfassungsgesetz) if there is fear of a danger to state security or to public order or to the life, limb or freedom of a witness or of another person.

The court is under a duty to safeguard witnesses. The witness must be protected against a danger to life or limb to which he/she may be subjected as a result of participating in the court proceedings⁸.

E. Section 96 of the Code of Criminal Procedure.

In accordance with section 96, the court may not require an authority to submit files or information if the highest service authority states that the disclosure of the content of the files would be disadvantageous to the state. In similar application of this provision, it is also possible to refuse to provide to the court information on the name and address of witnesses who are being kept secret by authorities. Thus, a witness who cannot be otherwise protected, for instance because of an unusual danger, can be barred from the main trial by the police and the public prosecution office in application of section 96 of the Code of Criminal Procedure. This means that his/her identity and address are kept secret by the criminal prosecution authorities so that he/she cannot be summoned to the main trial - instead, the individuals (police, public prosecutor, judge) who have questioned this witness in the investigation proceedings are questioned as hearsay witnesses. Furthermore, in the event of such a bar, the reports of the questioning of the witness may be read out at the main

trial (section 251 of the Code of Criminal Procedure). Witness protection by means of this provision is most often applicable in the case of police officers, and undercover investigators in particular.

Furthermore, the court must examine at all times and on its own responsibility whether it should dispense with questioning a witness not barred in accordance with section 96 of the Code of Criminal Procedure because of a particular risk to this witness, for instance because of a danger to life or limb⁹.

F. Sections 110 b and 110 d

In particular the identity of undercover investigators who are working under an assumed name, i.e. a new cover, may be kept secret even after their deployment has come to an end. Only the public prosecution office and the judge responsible for deciding on deployment may demand the real identity to be revealed to them. Otherwise, it is permissible to keep the identity secret in criminal proceedings, in accordance with the abovementioned section 96 of the Code of Criminal Procedure, in particular when there is reason to fear that disclosing the real identity might place at risk the life, limb or freedom of the undercover investigator, or of another person, or reduce the possibility to deploy the undercover investigator in the future. Decisions and documents relating to the deployment of an undercover investigator are not inserted into the criminal files, but are kept by the public prosecution office. These documents are only to be included in the files if this is possible without endangering the purpose of the investigation or public security, and without placing at risk the life or limb of a person, or the possibility to deploy the undercover investigator again.

⁸ BVerfGE 57, 250, 284.

⁹ BGHSt 39, 141; BGH NStZ 1984, 31.

**G. Witness Protection Act
(Zeugenschutzgesetz)¹⁰ sections
58 a, 168 e, 247 a and 255 a**

In accordance with these provisions, witnesses may be questioned by a judge separately from the other persons concerned by the proceedings as early as in the investigation proceedings. In the main trial, witnesses do not always have to appear in the courtroom for questioning. In both cases, the testimony of the witness may be transmitted simultaneously via a permanent video connection and recorded on a picture and sound carrier if the statutory preconditions are met. It is also possible to record questioning by the police and public prosecutors.

The recording of questioning and its subsequent use as a substitute for questioning allows, in particular, witnesses to organized crime who are in serious danger to be released from appearing at the main trial and to submit their testimony to the main trial using the video questioning procedure. In detail:

- (i) In accordance with section 58 a of the Code of Criminal Procedure, any witness questioning may be recorded at any stage of the proceedings. It must be recorded if there is reason to fear that the witnesses cannot be questioned in the main trial and that the recording is required in order to ascertain the truth.
- (ii) Section 168 e of the Code of Criminal Procedure stipulates that the judge is to carry out questioning separately from the other persons involved in the proceedings, during the investigation proceedings, in the event of a serious danger to the

well-being of a witness which cannot otherwise be averted. Pictures and sound of the questioning are to be transmitted to the other persons involved in the proceedings simultaneously. The judge remains contactable by telephone or radio. It is thus ensured that defence counsel in particular is able to intervene in the questioning at any time with interjectory questions. Questioning may be recorded in order to avoid repeat questioning.

- (iii) Under the same preconditions, section 247 a of the Code of Criminal Procedure governs video questioning of a witness who is in a different location to the courtroom. The witness can therefore be in an adjacent room in the court building or in a safe place at home or abroad, for instance if it would be too dangerous for him/her to appear in court.
- (iv) Playing the video which substitutes questioning is governed by section 255 a of the Code of Criminal Procedure. The videotape may be played in all instances in which it would be permissible to read out a report of the questioning.

The following aspects are particularly significant:

- (i) With video questioning, for instance with optical transmission of the questioning of the witness during the main trial, where the witness is not in the courtroom but in a secret location, no optical barrier is permissible, such as distortion of the monitor picture or a bar over the face of the witness¹¹. If video questioning of the witness where face of the witness remains

¹⁰ BGBl. 1998 I, 820.

- recognisable does not sufficiently reduce or remedy the risk, the witness must be barred altogether in accordance with section 96 of the Code of Criminal Procedure.
- (ii) Several protective measures may be linked: It is for instance conceivable to apply for video questioning of the witness in the courtroom, to hold the proceedings in camera during questioning and to permit the witness to refuse to give personal details in accordance with section 68 subsection 3 of the Code of Criminal Procedure.
 - (iii) In its decision as to which witness protection measure to implement, the court has to take into account several criteria and to balance their significance in accordance with the facts of the individual case, namely:
 - (a) the duty to effectively detect the criminal offence in a manner in line with the principles of justice,
 - (b) the respect for the interests of the accused to have the opportunity to defend him/herself effectively, which is also necessary under the rule of law, in particular to be able to ask witnesses comprehensive questions,
 - (c) the duty to protect the witness, where necessary, such as because of a serious personal danger or because of state interests which take priority.

Therefore, a more comprehensive witness protection measure may only be ordered if a milder measure, which would prove less detrimental to detection or to

¹¹ BGHSt 32 , 221 ; Renzikowski JZ 1999 , 605 ; Kleinknecht/ Meyer-Goßner § 68 , 18 - all with more references.

- defence, would not be sufficient.¹²
- (iv) There is no questioning the fact that measures to protect witnesses who are in danger may have a considerable impact in individual cases on the potential for ascertaining the truth and on the interests of the defence. They must therefore be applied with great caution. The evaluation of the evidence by the court, in particular in the case of indirect evidence, must take this danger into account, and the principle "innocent until proved guilty" (Art. 6 II of the Convention for Protection of Human Rights and Fundamental Freedoms) may take on outstanding significance in individual cases.¹³

III. REGULATIONS UNDER POLICE LAW

The potential for protection provided by criminal procedural law is insufficient. Such protection is only effective during the criminal proceedings, but not outside the proceedings or for the subsequent period. However, a danger to witnesses may remain, or even increase, once the criminal proceedings have been concluded. During the criminal proceedings, and afterwards, the witness protection regulations of preventive law, i.e. of police law, also apply.

Such measures may be, for instance:

- (i) Psychological care of the witnesses and advice on conduct;
- (ii) The witness is provided with police protection for a longer period, in

¹² Renzikowsky JZ 1999 , 605.

¹³ Perhaps where the evidence is doubtful and where the defence's chances of examining the sources of evidence and the evidence itself, eg by conducting their own enquiries, have been restricted because of the need to protect witnesses.

other words monitoring and escort by police officers working openly or under cover;

- (iii) The witness is given a new identity, in other words a new name and new identity documents, a new home, a new job, perhaps in another state or abroad;
- (iv) He/she receives assistance and money for a temporary period to build a new life, in particular a new profession.

The regulations contained in police law supplement criminal procedure law during the criminal proceedings; the police must also respect the control of the proceedings to be exercised by the public prosecution office and the court. Such police law protection arrangements are important, for instance, in the case of organized crime in the shape of trafficking in human beings and prostitution.

In Germany at present, studies are in progress to determine whether a statute is necessary to govern this and similar measures in greater detail than was previously the case and to supplement them. The police laws¹⁴ have as yet frequently only contained general clauses on which measures can be based in individual cases when the time comes.

IV. PRACTICE

The police and judiciary have built up a "witness protection programme" which is applied to endangered witnesses. Accordingly, there are special witness protection agencies with experience in witness protection, as well as joint guidelines¹⁵ by the Ministers of Justice and the Interior which provide greater detail for and govern the application of the statutory provisions. In Germany, roughly 650 witnesses per year are provided for by

the witness protection programme. As far as is known, there have as yet not been any serious problems, neither was the ascertainment of the truth or the defence of the accused seriously affected, nor were the witness protection measures insufficient.

V. FINAL REMARKS

Effective witness protection is indispensable to detect and suppress organized crime, but must not lead to serious difficulties in ascertaining the truth, or pose a detriment to the possibility of defence of the accused to a degree which is objectionable or indeed unjustifiable in terms of the rule of law. On the other hand, it is not a matter of ascertaining the truth at any price, and especially not at the expense of endangering the life or limb of a witness. In this difficult area, criminal prosecution authorities, courts and the preventive police, if possible in cooperation with counsel for the defence, must find viable compromises which are justifiable for all interests.

Witness protection is a task not solely for the judiciary and the police, but for society as a whole, in particular for all state bodies, which need to accept and support the witness protection measures implemented by the judiciary and the police.

In practice, effective witness protection requires from all involved a high degree of sensitivity, mutual consideration and understanding for the interests of the state and of all concerned, as well as courage and, in particular, trust in the state measures on the part of witnesses, as well as imagination and discernment in selecting the right measures; money should not play a major role here!

¹⁴ See §§ 6 , 26 BKAG.

¹⁵ Griesbaum NSTZ 1988 , 433.

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The statutory provisions in Germany may be in need of improvement, but they are currently sufficient if properly applied to meet all the interests which need to be taken into account.