

Communication concerning the decision of the Curia of Hungary  
in criminal case n° Bfv.I.1.537/2017

Being a defence attorney does not exempt one from the legal consequences of perjury. The exemption from criminal responsibility in case of the giving of false testimony applies only to accused persons who are charged with a criminal offense in the course of criminal court proceedings, and it cannot be granted to defence attorneys. The crime of legal malpractice, as defined in section 247, subsection (1) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code), is a criminal offense committed by an attorney by way of breaching his professional duty with the aim of causing unlawful wrong to his client.

The district court found the sixth accused guilty of the crime of perjury [section 238, subsection (2), point c) and subsection (4), subparagraph I of the Criminal Code] and the crime of legal malpractice [section 247, subsections (1) and (2) of the Criminal Code], consequently, it sentenced him to a one year imprisonment the implementation of which was suspended for a two-year long probation period, in addition, it allocated the burden of the costs of criminal proceedings and made provisions on the pieces of evidence.

Proceeding upon the parties' appeals, the high court modified the first instance judgement in respect of the sixth accused by increasing his term of imprisonment to one year and ten months and his probation period to five years and by prohibiting him from exercising the profession of attorney for a period of five years. The high court upheld the remainder of the first instance judgement.

The defence attorney of the sixth accused submitted a petition for judicial review against the final court decision to the Curia on the basis of section 416, subsection (1), points a), b) and c) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure). The petitioner argued that the sixth accused could not have been found guilty of the crime of perjury, since the sanctioning of the giving of false testimony, *i.e.* the submission of false documents to the investigating authority by the accused, acting as a defence attorney, had violated the latter's constitutional rights and had been contrary to common sense and the general principles of law.

Section 416, subsection (1), point b) of the Code of Criminal Procedure stipulates that a petition for judicial review may be submitted if an unlawful sentence has been imposed or an unlawful criminal measure has been applied due to the unlawful qualification of the criminal offense prosecuted or to the violation of any other provisions of criminal law.

By virtue of section 238, subsection (1) and subsection (2), point c) of the Criminal Code, any person who presents a false document or manipulated physical evidence in criminal or civil proceedings is guilty of perjury. Subsection (3) provides that the accused person in criminal proceedings shall not be liable for prosecution on the basis of section 238, subsection (2), point c) of the Criminal Code. The petitioner claimed that the sixth accused had acted as the defence attorney of the first accused in the criminal proceedings, which had excluded the former's criminal liability, as the Code of Criminal Procedure did not allow for his hearing as a witness. He emphasised that the sanctioning of the defence attorney in relation to the exercise of the right to be defended, a constitutional right enshrined in the Fundamental Law of Hungary, was unconstitutional.

The Curia agreed with the viewpoint of the Office of the Prosecutor General according to

which the sixth accused's status as a defence attorney could not lead to the application of the exemption from criminal responsibility in his respect on the basis of section 238, subsection (3) of the Criminal Code, because the defence attorney was not an accused person in the case and therefore could not be exempted from criminal responsibility for the commission of the crime of perjury.

The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Code of Criminal Procedure [section 5, subsection (3) of the Code of Criminal Procedure]. Article XXVIII, paragraph (3) of the Fundamental Law of Hungary stipulates that anyone indicted in criminal proceedings shall be entitled to defence at all stages of such proceedings. Defence attorneys shall not be held accountable for their opinions expressed in defence arguments.

Section 50, subsection (3) of the Code of Criminal Procedure provides that with the exception of the rights attached exclusively to the person of the accused, the rights of the accused may also be exercised by his defence attorney independently. The accused person's rights of defence, however, does not entitle him to commit a criminal offense or falsely accuse another person of the commission of a criminal offense. Section 50, subsection (1), points b) and c) of the Code of Criminal Procedure clearly state that the defence attorney is entitled and obliged to use all legal means of defence in the interest of the accused in due time, in addition, it is also evident that the legal restrictions on the accused person's rights of defence equally apply to defence attorneys, which means that such rights do not entitle them either to perpetrate a criminal offense.

It also follows from the accused person's right not to tell the truth that he cannot be held criminally liable for the provision of false evidence, therefore section 238, subsection (3) of the Criminal Code exempts the accused from criminal responsibility in such cases. The rights of defence, on the other hand, do not entitle the accused or his defence attorney to incite another person to commit a criminal offense or to falsely accuse any other person of the perpetration of a criminal offense. The above exemption from criminal responsibility may be granted only to the person against whom criminal charges have been brought, while his defence attorney is not entitled to be given such impunity.

Based on the case's factual background, the sixth accused drafted, contrary to the victim's intention, a document that contained a false statement and submitted it to the investigating authority, which exceeded the limits of lawful defence and could be qualified as perjury as defined in section 238, subsection (2), point c) of the Criminal Code. The fact that defence attorneys cannot be heard as witnesses in relation to the exercise of their defence activities in criminal proceedings does not justify the argument according to which they may insert the false statement of the threatened victim into a document to be submitted to the judicial authorities.

With regard to the above, the Curia found that the guilt of the sixth accused in respect of the commission of the crime of perjury had been lawfully established in conformity with the relevant substantive pieces of legislation.

Budapest, the 14<sup>th</sup> of June 2018

Criminal Department of the Curia of Hungary