Restriction of Witnesses and Written Testimonies: Simplification and Limitation

A Brief Overview of Portuguese Criminal Procedure

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I. Introduction

It is understood that, despite the well-known fallibility of testimonial evidence, as Germano Marques da Silva states, it remains today [quote:] "in the vast majority of cases the dominant and most often unique means of evidence ..." [end quote] [1] and that [quote:] "the evidence which the court may obtain through written documents, material things and traces, in most cases gives a very fragmentary and incomplete picture of the facts under investigation in the case. Hence the growing importance of personal evidence in the formation of judicial conviction, at least as an adjunct to the decision on guilt and subjective-type illicit circumstances". [2] [end quote]

Therefore, because it is the most frequently used kind of evidence, it demands careful reflection on how testimony is given (oral or written) and on the limitation of the number of testimonies as a means of reducing procedural time, obtaining efficiency gains as regards the response of the criminal system.

The brief reflection that I propose here today will have as a starting point the Portuguese criminal procedure and its main stages: the inquiry, a pre-trial stage, directed by a Public Prosecutor, and the trial, directed by a judge.[3]

II. Restriction of Witnesses

II.i. Portuguese Legal Framework

The Code of Criminal Procedure limits the number of witnesses that the prosecutor and the defendant can present as evidence on the hearings of ordinary and special or simplified proceedings.

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[1] Germano Marques da Silva, Curso de Processo Penal, vol. II, 5ª ed., Lisboa 2011, Verbo, pág. 201. [My translation]

[2] Nuno Castro Luís, "Das testemunhas", *in* Manuel Monteiro Guedes Valente (coord.), Memórias do I Congresso de Processo Penal, Coimbra, 2005, Almedina, 2005, pág.291). [My translation]

[3] I will not refer here to the preliminary judicial stage (*instrução*), which is not compulsory nor the appeal stage.

II.ii. Ordinary proceeding

Under article 283, paragraph 3, sub-paragraph d), of the Code of Criminal Procedure (in the wording of Law 27/2015, 14 April) the bill of indictment must contain a list of 20 witnesses maximum and their particulars, with specification of those witnesses – in a number not exceeding five – who are to give evidence regarding the facts related to the defendant's personality and character, as well as regarding their personal conditions and previous conduct, otherwise it shall be deemed null and void.

Nevertheless, this limit of witnesses may be surpassed if deemed necessary for purposes of ascertaining the truth, in particular whenever a major offence (e.g. terrorism, corruption, money laundering) has been committed or the proceedings prove to be exceptionally complex due to the number of defendants and victims involved or due to the highly organized nature of the criminal offence (paragraph 7 of the same article).

In the request submitted, mention must be made to the facts about which witnesses shall testify and the reason why such witnesses have a direct knowledge of those facts.

This request referred to above shall be rejected by the trial judge if it is found to be irrelevant, inappropriate or merely dilatory (paragraph 8, and article 340, paragraph a), b) c)

The same limitations of restriction of witnesses are applicable to the bill of indictment produced by the party assisting the public prosecutor (articles 284, paragraph 2, and 285, paragraph 3).

II.iii. Special or simplified proceeding

On abbreviate proceeding[4] the same limitations of the restriction of witnesses are applicable to the bill of indictment (article 391.º- B, paragraph 1).

However in this special procedure the limit cannot be surpassed.

On the other hand, as per article 383, on **summary proceeding**[5] no more than seven witnesses plus the victim may come forward.[6]

All these limitations are applicable to the defendant.

On **very summary proceeding** (*processo sumaríssimo*) the law does not define limitations on the number of witnesses, for the reason that in this proceeding there is no viva voce trial.

Likewise on **special or simplified proceeding,** to balance the principle of discovery of the material truth which may be affected with the limitations of the number of the witnesses,

[4] For simple and straightforward cases.
[5] Usually taking place immediately after arrest and detention by the police in flagrante delicto.
[6] In the previous version of Law 20/2013, de 21/02, the limit was 5 witnesses.

the trial judge may decide the examination of all witnesses' above the legal limit if they deem it useful for the discovery of the truth.

III - WRITTEN TESTIMONIES

Portuguese Legal framework

According to the Criminal Portuguese Procedure Law, the testimony is a personal act that may never be given through a representative and generally takes place viva voce on pre-trial and on trial stages.

However, there are exceptions:

III.i. The first regards to all **prerogatives** provided for by law regarding the duty to testify and how testimony should be given that shall apply in criminal proceedings (e.g. article 503 of the Portuguese Civil Procedure Law allows some authorities to give written testimonies, if they wish, such as the President of the Republic, the Judges of the High Courts; the General Attorney, the President of the Bar Association).

III.ii. The second refers **to the statement of the witnesses' before the trial by an examining judge** (*declarações para memória futura*) and the possibility if necessary to use them as evidence in trial (article 356).

This statement must observe the requisites established by article 271 (or 294), such as:

- That the witness to be inquired is affected by a serious illness or has to travel abroad
- That it is foreseeable, either because of the illness or because of the travel, that the witness is prevented from testifying on trial

Such requisites apply to all offenses, with the exception of sex offenses, human trafficking offenses, and domestic violence offenses, in which cases victims can be heard without requiring verification of those requisites.

III.iii And finally the possibility of reading **the statement of the witnesses' before the trial by an examining judge or the prosecutor** (wording of Law 20/2013, 21.2).

In this case the reading in trial must have the scope of:

- Memory revival; or,
- When there are contradictions or discrepancies between the statement made before trial and those rendered at the due process hearing; or,
- If the declarants were not able to attend due to death, psychic anomaly or lasting impossibility, in particular if, after exhausting the steps to determine their whereabouts, it was not possible to notify them for attendance.

It should be noted that in these last two cases the criminal legislator gives preference to the audiovisual register.

On the other hand, contrary to civil procedure (articles 518 and 519 of Portuguese Civil Procedure Law), it is not admissible in criminal proceedings as evidence the out-of-criminal procedure oral testimony of a witness that is reduced by the parties to written for later use in trial – called deposition in United States law.

All the possibilities of use as evidence of the written testimonies in criminal trial are exceptional and an exception to the right to examine a witness based on the principle that, before a defendant can be convicted, all the evidence must normally be produced in their presence at a public hearing so that it can be cross examined[7].

So the evidence based on written testimonies must be always justified and balanced with the possibility of adversarial procedure as legally allowed in each case is ensured.

For that purpose as a general rule the written testimonies have to be read at the trial.

Exceptionally, and that is the major advantage we see for the scope of timeliness in criminal procedure of the written testimonies, it is worth mentioning that in case of the **statement of the witnesses before the trial by an examining judge** (*declarações para memória futura*) the Portuguese constitutional court and the appeal court have considered that it is not mandatory, for use those statements as evidence, to be read at the trial (ac. n. 367/2014).

[7] For development of the principle and exceptions see the ECHR decision **Al-Khawaja and Tahery v. United Kingdom (15 December 2011)**