Revista Brasileira de Direito Processual Penal

Volume 8 - Nº 03 - set./dez. 2022
ISSN 2525-510X
https://doi.org/10.22197/rbdpp.v8i3

Dossiê
"Prova testemunhal no processo penal, entre o direito interno e supranacional: testemunhas protegidas, interferência midiática, direito ao contraditório"

Publicação fomentada pelo CNPq
(Chamada 15/2021 Programa Editorial)

IBRASPP

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"Prova testemunhal no processo penal, entre o direito interno e supranacional"

"Testimonial evidence in criminal procedure, between domestic and supranational law"

Editorial – An overview on the "crisis" of testimonial evidence as a judicial decision making tool, between ECHR and Italian Criminal Proceeding: protected witnesses, media interference, principle of immediacy and right to cross-examination.

Editorial – *Uma visão geral sobre a "crise" da prova testemunhal como um instrumento de decisão judicial, entre o TEDH e o processo penal italiano: testemunhas protegidas, interferência da mídia, princípio da imediação e direito ao exame cruzado*

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Abstract: We know that science is a precious ally for the judge in the search for truth. But we also know that every coin has its flipside. Science can in fact constitute a false ally for the judge, dangerously channeling the process towards judicial error. The matter is well known. Criminal justice now draws heavily on the results of science, but has to deal with its overt fallibility. Often the process becomes the place where experts and consultants reveal the gaps in those same disciplines that should instead correctly orientate the decisions of criminal judges. Therefore, the Criminal trial always needs witnesses. Especially witnesses against the accused, of course. However testimonial evidence as a fundamental judicial decision making tool is in crisis today. A crisis that has come about as a result of the downsizing of the right of the accused to effectively cross-examine the witnesses testifying against him (or her), thereby reducing the chances for the judge to perceive the witness's story in the best possible way. Hence the risk of significantly lowering the quality standard of criminal sentences. The crisis of testimony in the criminal trial can be attributed to two factors. The first reason. The multiplication of protected witnesses on the trial scene. Figures

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who, as a sort of counterpart for their contribution to the assessment, require high, constant and diversified levels of protection: “fragile” and vulnerable people, minors, the mentally ill, witnesses of justice, or “anonymous” witnesses” (undercover agents). As we can see, as a rule, we are dealing with persons who usually testify against the accused. At the level of European and Italian law and jurisprudence the trend is clear. The needs of protection for these categories of witnesses result in a reduction in the number of hearings, and therefore the opportunities for dialectical confrontation between the accused and the witness. The may also result in the push to “personalization” of the methods used for that confrontation, by adapting it to the protection needs to be met. In some cases those forms of protection could be used to get more genuine information from the witness, but we also cannot underestimate the opposite risk of obtaining qualitatively less reliable statements: because they might too conditioned by those protection needs, precluding the defender of the accused the possibility of deepening some controversial points. The second reason. At the national and European political level, the idea now prevails that the speed of Criminal justice is the primary instrument by which to calibrate the standard of reliability and solidity of an economically advanced State. This mainstream perspective is the fruit of an exasperated and erroneous conception of the principle of the reasonable duration of the trial (Art. 6 par. 1 ECHR and Art. 111 par. 2 Italian Constitution). The *time factor* is now an absolute, apical and absorbing value in the Criminal trial, which seems capable of negatively impacting the quality of the witness evidence as well: we refer, in particular, to the recent so-called Cartabia Reform of the Italian Code of Criminal Procedure, where a weakening of the fundamental principle of immediacy is clearly perceptible. That is, the judge attending the construction of the oral evidence and the judge who must adopt the judgment must be the same. When the trial judge changes, the idea is that immediacy can be easily replaced by technology (the audiovisual recording of the testimony before the first judge and subsequent viewing of the recording by the new judge).

Keywords: Criminal Trial; Adversarial system; Judicial efficiency and procedural speed; Testimonial Evidence; The right of the accused to examine the witnesses against him; Protected victims; Anonimous witnesses; Media witnesses; Contradictory; orality; immediacy; Appeal judgement and testimonial evidence.

Resumo: *Sabemos que a ciência é uma preciosa aliada do juiz na busca pela verdade. Mas também sabemos que toda moeda tem a sua outra cara. A ciência*

pode, de fato, ser uma falsa aliada do juiz, potencializando perigosamente o erro judicial no processo. O assunto é bem conhecido. A justiça criminal agora se fundamenta fortemente nos resultados da ciência, mas tem que lidar com sua sabida falibilidade. Muitas vezes, o processo torna-se o lugar onde peritos e pareceristas revelam as lacunas nessas mesmas disciplinas que deveriam orientar corretamente as decisões dos juízes criminais. Portanto, o juízo criminal sempre precisa de testemunhas. Especialmente testemunhas contra o acusado, é claro. No entanto, atualmente a prova testemunhal como instrumento essencial de tomada de decisão judicial está em crise. Uma crise que surgiu como resultado da redução do direito do acusado de efetivamente questionar as testemunhas que depõem contra ele (ou ela), restringindo as chances de o juiz perceber a versão da testemunha da melhor maneira possível. Esse é o risco de baixar significativamente o standard de qualidade das sentenças criminais. A crise da prova testemunhal no processo penal pode ser atribuída a dois fatores. A primeira razão. A multiplicação de testemunhas protegidas no processo. Figuras que, como uma espécie de contrapartida à sua contribuição para o julgamento, requerem níveis de proteção elevados, constantes e diversificados: pessoas "frágeis" e vulneráveis, menores, pessoas com transtornos mentais, delatores ou testemunhas "anônimas". Como podemos ver, em regra, trata-se de pessoas que costumam testemunhar contra os arguidos. Em relação ao direito e à jurisprudência europeia e italiana a tendência é clara. As necessidades de proteção dessas categorias de testemunhas resultam em redução do número de audiências e, portanto, das oportunidades de confronto dialético entre acusado e testemunha. Isso pode resultar também no impulso para a "personalização" dos métodos utilizados para esse exame cruzado, adaptando-o às necessidades de proteção a serem cumpridas. Em alguns casos, essas formas de proteção podem ser usadas para obter informações mais genuínas da testemunha, mas também não podemos subestimar o risco oposto, de obter declarações qualitativamente menos confiáveis: porque podem estar muito condicionadas por essas necessidades de proteção, impossibilitando ao defensor do acusado a possibilidade de aprofundar alguns pontos controversos. A segunda razão. Em nível político nacional e europeu, prevalece agora a ideia de que a celeridade da Justiça Criminal é o critério primordial para definir o padrão de fiabilidade e solidez de um Estado economicamente avançado. Esta perspectiva dominante é fruto de uma concepção exasperada e errônea do princípio da duração razoável do julgamento (art. 6, par. 1, CEDH e art. 111, par. 2, Constituição Italiana). O fator tempo passa a ser um valor absoluto, apical e atraente no processo penal, o que parece capaz de impactar negativamente também a qualidade da prova testemunhal: nos referimos, em particular, à recente denominada Reforma da Cartabia ao Código de Processo Penal italiano, onde é claramente perceptível um enfraquecimento do princípio fundamental da imediação. Ou seja, o juiz que assiste à produção da prova oral

e o juiz que deve proferir a sentença devem ser o mesmo. Quando o juiz de primeira instância muda, a ideia é que a imediação pode ser facilmente substituída pela tecnologia (a gravação audiovisual do depoimento perante o primeiro juiz e posterior visualização da gravação pelo novo juiz).

Palavras-chave: *processo penal; sistema adversarial; eficiência judicial e celeridade procedimental; prova testemunhal; direito do acusado ao exame cruzado; vítimas protegias; testemunhas anônimas; testemunhas midiáticas; contraditório; oralidade; imediação; julgamento em apelação e prova testemunhal.*

1. *Introductory remarks. The "crisis" of witness evidence as a judicial decision making tool, balancing the needs of protection of the declarant and requests for procedural speed.*

That the testimonial evidence today presents new and higher levels of difficulty than in the past is evident. For at least two reasons. The first. The well-known "structural" problems linked to the peculiar nature of testimony as a representative / evocative instrument of facts through language (questions, perceptions, memories, silences, lies, discrepancies, blandishments, pressures, threats, partisan checks and judicial checks) are increasingly complex due to the multiplication of witnesses on the trial scene. Figures who, as a sort of counterpart for their contribution to the assessment, require high, constant and diversified levels of protection: "fragile" and vulnerable people, minors, mentally ill, witnesses assisted, witnesses of justice, "anonymous" witnesses ". Hence the strenuous search for a balance point between opposing and difficult to reconcile needs: ensuring the value and quality of the contradictory, understood here above all as the accused's right to effectively counter-examine the accused; protect

the declarant from the prejudicial effects that dialectical confrontation in the trial is capable of producing. Moreover, from a strictly logical point of view, those who intend to test the credibility of a registrant would not want there to be too many obstacles to the possibility of examining it, even several times, and in a strategically effective way, that is, by submitting it to the questions it deems useful in the specific case. Unfortunately, however, this instance clashes with the current trend aimed at reducing the number of hearings (and therefore the opportunities for dialectical confrontation with the witness), and at the same time, at "personalizing" more and more the methods of carrying out the hearing by adapting it to the protection needs to be met. Instances of protection on which the European Court of Human Rights has been insisting for some time now, as we will have the opportunity to underline further, focusing in particular on two figures of protected witnesses: particularly vulnerable victims and undercover agents. This problematic conflict between the right to defend oneself by asking the accused and the duty of the State to protect the declarant from the potential harmful effects attributable to those questions obviously also impacts on the type of questions that can be proposed to the witness, which must be adapted from time to time to the particular position of declarant. This results in a greater commitment in terms of preparation for the cross-examination by the prosecutors and (above all) by the defenders, on the one hand, and the equally demanding activity of control and selection of admissible questions entrusted to the judge, on the other hand. Thus, for example, let us think of the prohibition of formulating harmful (for the sincerity of the answers) or leading questions provided for by the Italian criminal procedure code (Article 499): while with reference to the ordinary witness the admissibility of those questions is essentially measured on the typology of the historical fact and on its perception by the declarant, in the presence of a protected subject (victim, particularly vulnerable victim, undercover agent), further limits arise on the questions that can be proposed, to be calibrated also on the specific and diversified protection needs required. With a clear increase in the level of complexity of the exam. And at the same time with the risk of obtaining qualitatively less reliable statements, because they might be too conditioned by those protection needs, precluding the defender of the accused the possibility of deepening some controversial points. On this topic, however, it is necessary to avoid

misunderstandings. Some witnesses deserve to be adequately protected in the trial and because of the trial. But it is necessary to be convinced that the trial cannot constitute the privileged place of protection for those types of declarants: because there is a reasonable threshold of protection beyond which one cannot go without compromising the cognitive function of the criminal proceeding, which in the testimony and in the dialectical method with which it is formed in the trial (questions of the parties and controls by the judge) finds its highest and most powerful expression. Here then is the duty of the State to protect those who make a contribution to the assessment (witnessing, we know, is an easement of justice, because the law obliges the witness to present himself and respond truthfully, under the threat of criminal sanctions) it must find its reasonable limit in the right of the accused to refute its credibility in an equally effective manner. If we agree on this point, it would perhaps be necessary to cultivate a different perspective: identifying and strengthening forms of protection parallel and external to the trial, acting on an administrative level.

The second reason is of a very different and broader nature and to understand it clearly it is necessary to start from a premise. There is a sort of symbiosis between testimonial evidence and the principles of contradictory, orality and immediacy[2]. Contradictory understood here as a dialectic between the parties, and between the parties and the third and impartial judge. Orality understood as the system's preference for the communicative tool of the word spoken out loud and heard at the hearing by the protagonists of the trial. Immediacy understood as the identity between the trial judge who assists in the construction of the evidence (thus gaining genuine impressions thanks to the contact with the persons subjected to the examination: hence his ability to grasp every nuance of the deposition, in particular the non-verbal language of the declarant[3]), and the judge who is called to evaluate the results in a decision-making key. A logical consequence derives from that symbiosis: the persuasive force of a testimony is directly proportional to the effectiveness of the three fundamental principles in question.

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[2] See P. P. Paulesu, *Giudice e parti nella "dialettica" della prova testimoniale*, Giappichelli. Turin, 2002, p. 5 s.

[3] See P. Ferrua, *Contraddittorio e verità nel processo* penale, in *Studi sul processo penale*, vol. II, Giappichelli, Turin, 1992, p. 80; R. Casiraghi, *La prova dichiarativa: testimonianza ed esame delle parti eventuali,* Giuffrè, Milan, 2011, p. 12 s.

We know that the construction of the testimonial evidence is often a long and complex operation. Hence a fundamental question: how to reconcile that complexity with the modern needs of simplification and speeding up of criminal proceedings? Is there really a risk that the search for the quality of the contributions offered by witnesses (which would often require the simultaneous presence on the scene of witnesses, judges, prosecutors, defenders, to create an effective contextual dialectic among the protagonists of the trial) could be partly sacrificed on the altar of simplifying and speeding up the criminal trials? At the political level (National and European), the idea now prevails that the efficiency of criminal justice is the primary purpose on which to calibrate the level of reliability and solidity of an economically advanced State. This mainstream perspective is the fruit of an exasperated and erroneous conception of the principle of the reasonable duration of the trial (Art. 6 par. 1 ECHR and Art. 111 par. 2 of Italian Constitution). The *time factor* is now an absolute, absorbing value in the criminal trial, which seems capable of negatively impacting the quality of the witness evidence as well. We think of the remote examination provided for in the Italian procedural system (art. 147 implementing provisions of Italian Code of Criminal Procedure). The declarative evidence is taken through the audiovisual link between the courtroom and the seat where the witness is located[4]. The questions and answers are filtered by tools for the contextual reproduction of sounds and images. In short, the construction of witness evidence takes place even if the witness does not physically participate in the trial. Sure, the audiovisual link saves time and resources. But the mediation of the technological apparatus between the person conducting the examination and the declarant could make the cross examination less fluid, less effective, weakening the principle of orality, immediacy, contradictory. As we will see later, Similar perplexities also emerge in the light of recent Italian Law n. 134 of 2021 (so-called Cartabia Reform), with specific reference to the hypothesis of change of the trial judge[5]. Also in this case, the risk of a loss of quality of witness evidence

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[4] See D. Curtotti Nappi, *I collegamenti audiovisivi nel processo penale*, Giuffrè, Milan, 2006, p. 305 s; M. Daniele, *La formazione digitale delle prove dichiarative*, Giappichelli, Turin, 2012, p. 62.

[5] Art. 525 par. 2th of Italian code of criminal procedure: "Under penality of absolute nullity, the same judges who partecipated in the trial shall be present

and of the value of immediacy is serious and cannot be underestimated. Of course, it could be argued that technological progress must lead to a new concept of immediacy and orality in a modern criminal trial, appropriate to the time. But where technological progress ends and where the risk of weakening testimonial evidence begins? And in a broader perspective: where technological progress ends and where the risk of wrong judgments begins?

2. *Protected witnesses and the right to cross examination.*

a) The testimony of the victim, between lights and shadows.

The difficulty of reconciling the protection needs of the witness with the need to ensure effective control of his statements through cross-examination emerge today especially with reference to the testimony of the victim. We know that the criminal trial increasingly needs the testimony of the victim, especially when the latter is the only witness available at the trial scene (crimes committed within the family, assaults in isolated places, sex crimes, etc.). The system therefore needs the testimony of the victim, but must take charge of the need to protect it.

The problem of protecting the victim as a witness emerges above all with reference to a particular category of subjects, defined as "particularly vulnerable". This is the area where the widest experimentation of the protection of fragile subjects in the process is carried out, both in Europe and, in cascade, at the level of national legal systems. Particular attention is paid to vulnerable victims through forms of differentiated and strengthened safeguards with respect to other victims (considered) less fragile. The primary objective is to ensure to those subjects the widest protection from certain procedural activities that could trigger situations of "secondary victimization": an expression which, as is well known, alludes to the possible re-emergence of a psychological trauma during the reconstruction of the historical fact in the judicial context.

On the European legislative level, the steps towards the goal of protecting fragile victims can be summarized as follows: first, attention

at the deliberation". On this topic see then par. 4.

to the victim's testimony; then the sensitivity for the testimony of the minor (victim or not), a fragile subject par excellence; finally, with the well-known directive 2012/29 / EU, the arrival of a broader protection dimension (i.e. not restricted to the witness context only and released from specific crimes), focused on the "particularly vulnerable" victim To the minor victim, certainly vulnerable, then there are other victims, including adults, potentially vulnerable. Precisely in compliance with the aforementioned Directive 2012/29 / EU, the criteria for identifying the vulnerable victim are today analytically codified in the Italian system (Article 90-*bis* of the Italian code of criminal procedure). The method is based on individual assessment, that is, on the analysis of the peculiarities of each individual victim[6]. Hence a fixed point: no presumption of the vulnerability of the subject involved from time to time but checks carried out case by case. The condition of particular vulnerability is obtained from the following data: age and state of infirmity or mental problems of the victim; criminal type; modalities and circumstances of the fact for which you proceed; it is then necessary to verify whether the fact was committed with violence to the person or with racial hatred, whether it is the result of organized crime or terrorism (internal or international) or trafficking in human beings; if it is characterized for purposes of discrimination; if there is a relationship of emotional, psychological or economic dependence between the (alleged) victim and the (alleged) perpetrator of the crime. However, it is not clear how the state of particular vulnerability should be ascertained in practice. That there is a strong accountability of the judicial authority (police, prosecutor, judge) who from time to time comes into contact with the victim is evident. Just as it is plausible to believe that the individual assessment should usually take place in the early stages of the investigation, to immediately ensure timely and effective protection for the victim. However, some unresolved issues remain. For example, what happens if doubts arise about the victim's real state of vulnerability or if there are errors of assessment about her real psychophysical state? If the minor age is uncertain, the judge orders an expert opinion and, if the uncertainty persists, the minor age is presumed (but only for procedural purposes: it is

[6] See S. Quattrocolo, *Vulnerabilità ed individual assessment: l'evoluzione dei parametri di identificazione*, in *Vittime di reato e sistema penale. Alla ricerca di nuovi equilibri*, edited by M. Bargis.H. Belluta, Giappichelli, Torino, 2017, p. 311.

therefore forbidden to use this presumption for the purpose of configuring aggravating circumstances based on the minor. age of the victim). However, this mechanism is not extended to other vulnerable victims. In general, the Italian legislation today appears to be deficient in terms of controls on the activity of those who intervene to test the vulnerability of a given subject, also taking into account that it is a verification that implies a high degree of discretion. Perhaps the Italian legislator intends to promote "informal", agile and timely solutions; with the risk, however, of leaving room, in doubtful cases, for the presumptive evaluations that one would rather avoid.

The idea of protecting some victims more than others may appear progressive, modern, sensitive to individual needs, but it poses two main problems that, at the moment, do not find truly effective solutions. Neither on a European level nor on an Italian level.

The first problem. As mentioned, the criteria for the identification (individual assessment) of particularly vulnerable victims provided at European level (and implemented by the Italian legislator) are generic, and leave too much discretion to the judges (and, in investigations, to the judicial police and the prosecutor). Hence the risk of errors, inequities and above all discrimination among the victims. What happens if a guy is assessed as "particularly vulnerable" but in reality it is not. Or viceversa. In these cases, would there not perhaps be a blatant violation of the fundamental principle of equality, understood here as equal treatment in the trial of victims? Due to a mere misjudgment, one victim may be unreasonably more protected in the process than others. More. The wide discretion of the judge in assessing the status of a vulnerable person risks favoring too much the use of forms of taking testimony that significantly reduce the right to be heard. It should be borne in mind that, when dealing with vulnerable persons, the Italian code of criminal procedure considerably restricts the right to listen to the witness already heard elsewhere in the trial (Article 190 bis paragraph 1 bis, final period of Italian Code of Criminal Procedure)[7].

The second problem, even more delicate. The recalled need to prevent vulnerable victims, when called to testify as witnesses, from undergoing secondary victimization phenomena, has prompted the Italian legislator to

[7] See D. Negri, *cit*. p. 580.

place the fragile witness under a sort of "glass bell"[8], severely limiting the right of 'accused of confronting the subject who accuses him (Article 6 letter *d* of the ECHR and Article 111 paragraph 3 of the Italian Constitution). So, for instance, if it is a minor witness, the defender must submit the questions to the judge, who filters them. More. There is the highly protective mechanism of the "shielded" hearing, designed specifically for all victims who are in particularly vulnerable conditions: in that case the examination is carried out through a glass mirror (the witness is in a separate room and connected via intercom) (Article 498 paragraph 4 *quater* of the Italian code of criminal procedure)[9]. As has rightly been observed, the witness's response and the paralinguistic features that accompany it come in turn mediated and from afar, making it impossible to grasp the nuances of the speech. So, it is doubtful whether in these cases the evidence is really formed in the cross-examination (art. 111 paragraph 4 of the Italian Constitution)[10].

This unresolved knot that concerns the phase of construction of the testimony of the victim is then joined with that relating to the evaluation of that same testimony. We start from a logical premise even before a juridical one. Premise that may seem obvious, but we will see that it is not so obvious. The statements of the victim who testifies should be carefully considered. For a very simple reason. This is a person involved in the crime (as the alleged recipient of the criminal action) and therefore directly interested only in a specific procedural outcome: the conviction of the accused. Aware of this problem, in the past the Italian Constitutional Court had stressed the need for a scrupulous examination of the testimony of the victim[11]. Recently the European Court of Human Rights has also reiterated the need to evaluate with particular attention the statements of weak witnesses, because they are made in contexts and in ways that do not ensure defensive rights the possibility of manifesting themselves at

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[8] C. Cesari, *"La campana di vetro": protezione della personalità e rispetto del contraddittorio nell'esame dibattimentale del teste minorenne*, in *Il minorenne fonte di prova nel processo penale,* edited by C. Cesari, 2 th ed., Giuffrè, Milan, 2015, p. 296 s.

[9] A. Presutti, *Le audizioni protette*, in *Vittime di reato e sistema penale*, cit. p. 378 s.

[10] O. Mazza, *Il Contraddittorio attutito di fronte ai testimoni vulnerabili,* in *Le erosioni silenziose del contraddittorio*, edited by D. Negri- R. Orlandi, Giappichelli, Turin, 2017, p. 130; D. Negri, *Il dibattimento*, cit., p. 576.

[11] Corte cost. 19 Th March 1992 n. 115.

the levels usually imposed by the ECHR[12]. As can be seen, the European judges are aware of the crucial problem already highlighted above. In other words: the protection needs of the victim must be properly met within a solid framework for the protection of the accused and his right to effectively refute the statements of the witness. However, it is enough to take a quick look at the Italian jurisprudence of legitimacy to realize how much the risk of unreliable or slanderous declarations by victims is underestimated. Recently, the Italian Court of Cassation has argued that the testimony of the injured person can be taken, *even alone*, as proof of the accused's responsibility, provided that it is subjected to a positive scrutiny as to its reliability, *but without the need to apply the evidential rules pursuant to art. 192 par. 3 and 4 of the Italian code of criminal procedure, which require the presence of external feedback*[13]. As we can see, there is an almost fideistic attitude towards the victim's statements. An attitude that can be strongly criticized, especially when there are statements from particularly vulnerable victims. The psychological fragility of these subjects should instead impose even more rigorous assessments. Too many variables are involved: the greater risk of perception errors; the lesser ability to recall previous experience; the recalled limitations for the defense in conducting an effective cross-examination. It is not meant to say that the state of particular fragility and vulnerability of the victim-witness implies a lower reliability in the abstract. But, in practice, the risk of obtaining non-genuine declarations is really too high. Faced with the testimony of the vulnerable victim, the accused is in a vice. On the one hand, the protection mechanisms in place for the victim make it more difficult for the defender to carry out a full cross examination. On the other hand, the accused is constantly exposed to the risk that the victim's statements may have a decisive and decisive weight for the purposes of the sentence. Hence a proposal. Introduce a rule that extends the assessment rules for witnesses to the testimony of all vulnerable victims. We refer to the discipline of the findings referred to in Article 192 paragraph 3 of the Italian code of criminal procedure. So as to strongly empower the judge during the evaluation, forcing him to provide an explicit and timely motivation on those findings. With a

[12] ECtHR,16Th December 2003, *Magnusson c. Svezia*.

[13] Cass. 13 Th February 2020, Ciotti, *CED* 279070.

further regulatory clarification. The guilt of the accused cannot be based solely on the victim's declaration. Once the path of procedural specificity (greater safeguards) of victims with weak procedural dynamics has been undertaken, it would seem reasonable to really follow it to the end, that is, up to the crucial evaluation context.

b) "Anonymous" witnesses, between the European Court of Human Rights and Judicial Cooperation

When it comes to "protected witnesses", the delicate profile of the procedural contribution of undercover agents comes to the fore. It is well known that the use of covert investigations is now widespread internationally. It is a very profitable investigative tool but also potentially damaging to some individual guarantees[14]. There is no information to be communicated to the suspect or minutes documenting the proper conduct of the activities, as happens for the ordinary judicial police activity: we rely above all on the "protected" testimony of the agents during the trial. Moreover, it is hardly necessary to observe that, in the face of the challenges posed by modern forms of crime, the very word intelligence, with which we often generically allude to the complex of proactive police activities (including undercover operations) today it is colored with a plurality of meanings. It no longer refers only to administrative/preventive investigations that anticipate the judicial moment, but to operations interpenetrated with the criminal investigation. Apparatus of the executive and judicial police bodies act in constant synergy, in the context of a sort of "parallel criminal law", where the substantive principle of strict legality and the procedural values of the presumption of innocence, of cross-examination, of the right to defense can be severely weakened.

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[14] Moreover, undercover operations have a peculiar border line physiognomy, because they are suspended between prevention and repression. It is often difficult to concretely understand to what extent the undercover agent seeks evidence on the basis of an already acquired *notitia criminis*, or rather acts in order to find it. In fact, in the context of such investigations, the (casual?) discovery of crime reports other than those for which it is investigated incognito is frequent. As it is highly probable, in such contexts, the emergence of evidence relating to crimes other than those covered by the concealed investigation.

Having said this, it must immediately be said that the European Court of Human Rights has often intervened in the matter of the procedural contribution of undercover agents as "anonymous witnesses"[15]. In this case, the European judges consider anonymity functional to the protection of agents, but they are also aware of the objective difficulties faced by the defense that intends to refute its credibility during cross examination. Hence the need to provide adequate defensive guarantees in the evidentiary procedure. In terms of admission of the anonymous witness, the fundamental principle of proportionality is appropriately recalled. And in this perspective, the anonymity of members of the police forces and security services should be limited to exceptional cases (it is still a "not disinterested" testimony, given by subjects linked to the executive power and the public prosecutor), that is, when it is essential to protect agents, also in order not to compromise their use in similar future operations[16]. With specific regard, then, to the assumption of anonymous testimony, the Court considers it essential to ensure the effective possibility of the defender to formulate questions in the hearing in the presence of the judge (who should always know the true identity of the witness, to verify their reliability)[17].

The profile of the evaluation of the undercover agent's testimony is also controversial. The thesis of the sole and decisive rule[18],, that is the prohibition to found an exclusive or decisive conviction on the declaration of the anonymous witness, which was initially considered a sort of "closing rule", was then in part significantly reduced: anonymous testimony can, by itself, legitimately support a conviction, even if the Court

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[15] ECtHR, 23th April 1997, *Van Mechelen, v. Netherlands*. On this topic, see A. Balsamo, *Operazioni sotto copertura e giusto processo: la valenza innovativa della giurisprudenza della Corte europea dei diritti dell'uomo*, in *Cass. pen.* 2008, p, 2641.

[16] ECtHR, 23th April 1997, *Van Mechelen,* cit.

[17] See again ECtHR 23 th April 1997, *Van Mechelen*, cit. In that case, the undercover agents had been heard by the judge in a separate place without the presence of the accused and his lawyer. Not only the details of these subjects were unknown to the defense, but the latter had not even had the opportunity to observe the behavior of the agents in the face of questions. See also ECtHR 10Th April 2012, *Ellis, Simms v Martin v.UK*.

[18] ECtHR 28 th February 2006, *Krasniki v. Czech Republic*.

reserves the power to verify, from time to time, the possible presence of situations capable of ensuring a fair judgment pursuant to art. 6 ECHR, and, in particular, the concrete possibility of the guy accused to contest the statements against him[19].

It is almost obvious to point out that the undercover agent is not just any witness. He is no stranger to the facts. He acquires data undercover for repressive purposes. It reports the outcome of activities carried out on the basis of the directives of others. For the reasons already stated, it requires particular forms of protection, before, during and after the enforcement. The testimony of the infiltrator is now expressly contemplated in the trial systems of various countries. In the Italian legal system, in particular, it is envisaged that the officers and agents of the judicial police, also belonging to foreign police bodies, the employees of the security information services, the auxiliaries and the interposed persons, called to testify in any status and grade of the proceedings regarding the undercover activities carried out pursuant to art. 9 of Law no. 146 of 2006, can provide on that occasion the fictitious details used in the investigation (Article 497 paragraph 2-*bis* of the Italian code of criminal procedure). And to this end, the use of "precautions necessary for the protection and confidentiality of the person to be examined" is envisaged, with "modalities" (identified by the judge or, in urgent cases, by the president of the Court) such as to prevent the face of the depositor from being visible. The witness examination of the undercover agent takes place remotely (audiovisual link), unless the judge considers the presence of the declarant to be necessary (Article 147-*bis* implementing provisions of Italian code of criminal procedure). As you can see, this is an anonymous testimony in all respects. In the proceedings there is no trace of the real identity of the agents. They are unknown to the accused, to his lawyer, to the judge himself. Instead, they can be known by the prosecutor: the latter can in fact ask the body that ordered the undercover investigations for the names of the subjects who carry them out pursuant to art. 9 paragraph 4 L. n. 146 of 2006. The failure to provide a selective filter by the judge aimed at verifying, from time to time, in the specific

[19] ECtHR 10 th April 2012, *Ellis, Simms, Martin v. UK*; ECtHR 15 th December 2011, *Al Khawaja and Tahery v. UK*.

case, the absolute need to preserve the anonymity of the undercover agent is criticizable. This gap, in addition to sacrificing the accused's right to confrontation, significantly alters the level playing field, because the prosecutor knows the true identity of the infiltrator, the defender does not. There are, however, criminal offenses where the risk of retaliation against agents would seem very limited (this is the case of computerized child pornography[20]); in this case, the use of fictitious identities during the enforcement would seem really excessive. Another decisive problematic aspect is constituted by the lack of knowledge of the true identity of the witness by the judge, who can neither test the credibility of the infiltrator (Article 194, paragraph 2 of the Italian code of criminal procedure), nor verify *a posteriori* the presence of investigative abuses, violation of rights, induction of crime. In short, the need to preserve and crystallize the "investigative knowledge" of the investigators prevails. With the obvious negative repercussions in terms of correctness and completeness of the decision. This risk can perhaps be partially mitigated through a non-decisive and careful use of anonymous testimony in a decision-making key, in line with what was established by the Strasbourg Court. The unreasonable automatism of undercover investigations - anonymous testimony, present in the phase of taking the evidence, would thus find a reasonable reconciliation on a strictly evaluation level.

Looking at the field of judicial cooperation, the European Criminal Investigation Order obviously takes on importance for our purposes. In this regard, it must immediately be said that, in the context of the passive procedure, the undercover agent who is on Italian territory can be heard as a witness, by videoconference, subject to agreement with the issuing authority on the modalities of the hearing and on the protective measures to be taken[21]. The contextual cross-examination is thus safeguarded during the formation of the evidence. But the most interesting fact, in light of the strong internal criticalities already reported, lies in the presence of a consensual space that should be widely exploited by the authorities involved to assess the actual need to examine the undercover agent

[20] On this topic see G. Barrocu, *Le indagini sotto copertura,* Iovene, Naples, 2011, p. 133.

[21] Art. 18 D.lgs. n. 108/ 2017.

anonymously, and to agree possibly, alternative forms of protection to the use of fictitious identity. The hearing of the undercover agent is conducted directly by the authority that issued the investigation order (and in any case under his direction), to which the relative report must be sent. The audiovisual link mechanism allows the authority issuing the order and the parties to the internal procedure to exercise the right to be heard, understood as the possibility to speak directly with the declarant. The enforcement can also take place via telephone conference, in the event that the declarant cannot appear before the authority that issued the order or when his presence is inappropriate[22]. This technical expedient may perhaps contribute to solving the problem of the protection of the registrant, but it risks significantly worsening the quality of the hearing. As for the active procedure, the prosecuting authorities (public prosecutor or judge) can issue an investigation order to request the remote hearing of witnesses in the cases provided for by art. 147-bis of implementing provisions of italian code of criminal procedure (therefore also officers and judicial police officers who have carried out undercover activities), when their presence on the national territory is not appropriate (Article 39 of Legislative Decree No. 108 of 2017). The methods of the hearing must be agreed between the authorities involved, and it is the duty of the Italian judicial authority to verify that the declarant is provided with all the information about the rights and guarantees provided for by our legal system. Only under these conditions can the minutes of the hearing be legitimately merged into the file for the hearing (Article 36 paragraph 1 letter *b* of Legislative Decree no. 108 of 2017) and be used for the decision.

3. "*Media*" *witnesses and possible judicial relapses*

For our purposes it may be interesting to briefly mention the figure of the "media witness". Alongside the real trial, which takes place in the courtrooms, in some cases there is also a parallel, virtual trial, which is celebrated in the media: a trial based above all on testimony. Well, if we observe the rules on testimony in the Italian criminal procedure

[22] Art. 19 D.lgl. n. 108/ 2017.

code, there are clear differences between the trial witness and the media witness[23]. In the criminal trial, as a rule, the witness cannot testify on the morality of the accused. He cannot testify on current rumors in the public (in that environment it is said that, it is well known that). He cannot express personal appreciation (value judgments on the accused) (Article 194 of Italian code of criminal procedure). In the media process, however, what is forbidden by the code almost always happens. Yet. In the criminal trial, the declarant must be warned of the duty to tell the truth, and of the criminal consequences for false or reticent witnesses (Article 497 of Italian code of criminal procedure). In the criminal trial, therefore, the witness has the obligation to answer truthfully to the questions that are asked (Article 198 of the Italian code of criminal procedure). In the media trial, nothing like this happens (indeed, people are often rewarded for their willingness to be interviewed and to issue coached statements that satisfy the demands of journalists television programs). For example, obtaining a statement from the witness that is effective, even ambiguous, but that can arouse the attention of the public. Or leave room for implications. In the criminal trial, questions that may harm the sincerity of the answers and suggestive questions are prohibited. In the media no. Because in the media the validity of a question is measured according to the type of response that the questioner expects (also here: often in line with a pre-established thesis). In the criminal trial there are some incompatibilities to testify in relation to some subjects (Article 197 of Italian code of criminal procedure). In the media, everyone can make statements. In the criminal trial, the next of kin of the accused are advised that they can refrain from testifying (Article 199 of the italian code of criminal procedure). This rule does not apply in the media. In the criminal trial, the witnesses are examined one after the other, and cannot communicate with each other before the deposition, nor attend what happens at the hearing (Article 149 of implementing provisions of Italian code of criminal procedure). In the media, the witnesses are even confronted with each other. In the criminal trial there is a judge who checks the relevance of the questions and the fairness of the exam.

[23] See G. Giostra, *Processo mediatico¸in Enc. Dir. Agg.* Giuffré, Milan, 2017, p. 656.

In the media trial, the witness's statement is beyond any control. On this basis, the following question arises: can the statements made by witnesses to the media have an impact on the criminal trial, and in particular, on the conviction of the judge? It could be answered that, after all, it is a false problem, because the judge should absolutely not be conditioned by what happens outside the courtrooms, thus proving not to be impartial. The point is that an external psychological conditioning of the judge capable of compromising his impartiality is not visible, measurable and controllable. That a problem of this type exists is moreover demonstrated, for example, by the care with which the Italian legislator takes care to prohibit the publication of documents contained in party files, when there is certainty that the hearing will proceed (art. 114 of Italian code of criminal procedure). To mitigate the risk that statements made by witnesses to the media could have some impact on the trial, we could perhaps begin to reflect on the possibility of introducing, in the hands of journalists, the prohibition (controlled by disciplinary sanctions) to contact and receive statements from witnesses indicated in some particular acts of the parties (requests for evidence, the witnesses lists) but also witnesses introduced *ex officio* by the judge during the trial pursuant to art. 507 of Italian code of criminal procedure. This prohibition would cease only after the examination of the witness or when the latter does not take place (because, for example, one party renounces to examine him). In this perspective, the witness could make statements to the media only after having made his testimony in the trial, or in the event that he was not examined (for example, as a result of a renunciation of evidence pursuant to Article 495 of Italian code of criminal procedure).

4. *Change of the trial judge and testimonial evidence: short remarks*

What is the fate of witness evidence, correctly forged in cross-examination, when the judge who has to adopt the sentence is different from the judge who attended the formation of that evidence?

It is clear that the choice to give priority to the reading, in front of the new judge, of the minutes of evidence carried out previously, if on the one hand it could speed up the criminal trial, on the other hand

it would weaken the principles of orality and immediacy (the judge must form his own conviction on the immediate perception of what happened before him in the judgment). Given that the Italian code of criminal procedure safeguards those two principles through the rule of the immutability of the trial judge (under penality of absolute nullity, the same judges who participated in the trial shall be present at the deliberation: Article 525 par. 2 Italian code of criminal procedure), the problem of the fate of witness evidence following the change of the trial judge was originally resolved by Italian jurisprudence in the following way. The parties were granted the right to witness evidence, understood as the right to examine the declarant before the new judge. The reading of the minutes of evidence was considered legitimate only after the new examination of the declarant or when none of the parties had requested it[24]. As can be seen, the principles of orality and immediacy were all in all sufficiently safeguarded.

But then this scenario changed. To achieve goals of efficiency and procedural speed, the Italian Constitutional Court[25],, but above all the Italian Court of Cassation[26] (both relying on some judgments of the Strasbourg Court inclined to tolerate exceptions to the principle of immediacy when the accused has benefited from procedural guarantees capable of balancing the failure to renew the cross examination in front of the new judge[27]) have greatly reduced the right to renewal of witness

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[24] Cass., Sez. un., 15 Th January1999, Iannasso, in *Dir. pen. proc*., 1999, p. 480; Corte cost., 9 thMarch 2007, n. 67.

[25] Corte cost., 29th May 2019, n. 132; see P. Ferrua, *Il sacrificio dell'oralità nel nome della ragionevole durata: i gratuiti suggerimenti della Corte costituzionale al legislatore, in Arch. pen. (web)*, 2019, n. 2; M. Daniele, *Le "ragionevoli deroghe" all'oralità nel caso di mutamento del collegio giudicante: l'arduo compito assegnato dalla Corte costituzionale al legislatore*, in *Giur. cost*., 2019, p. 1551; O. Mazza, *Il sarto costituzionale e la veste stracciata del codice di procedura penale, in Arch. pen. (web)*, 2019, n. 2.; D. Negri, *La Corte costituzionale mira a squilibrare il "giusto processo" sulla giostra dei bilanciamenti*, in *Arch. pen. (web)*, 2019, n. 2.

[26] Cass., Sez. un., 30th May 2019, Bajrami, in *Proc. pen. giust*., 2020, p. 136. A. Mangiaracina, *Immutabilità del giudice* versus *inefficienza del sistema: il* dictum *delle Sezioni Unite*, in *Proc. pen. giust*., 2020, p. 166.

[27] ECtHR 2th December 2014, Cutean v. Romania; ECtHR 6 th December 2016, Škaro v.Croatia.

evidence in front of the new judge, thus weakening the values of immediacy and orality. On the one hand, it was stated that the parties must indicate the reasons that make it necessary to examine the witness before the new judge. On the other hand, the new judge was given a wide discretion in rejecting the party's request. The message of the Court of Cassation was clear: the renewal of the examination of the witness is always an exception; renewal becomes superfluous in two cases: a) if the party who asks to hear the witness again does not demonstrate that this activity is decisive for the fate of the trial (it is a very difficult operation for the defense, almost a *probatio diabolica*) b) if the first audition is verbalized by means of stenotyping and contextual phonographic recording (the technical support becomes the alibi for dismantling the principle of immediacy). As can be seen, in the name of a misunderstood and exasperated conception of the principle of the reasonable duration of the trial, the defense is penalized due to an event, the change of the trial judge, linked to the organization and structure of the judicial offices[28].

Let's investigate the latest reforms. As already mentioned, the so called Cartabia reform (L. n. 134 of 2021 and implementing decrees) tries to solve the problem with a compromise solution that enhances the instrument of audiovisual reproduction of the testimonial evidence (art 510 par. 2 *bis* and 3 *bis* and 498 par 4 *ter* Italian code of criminal procedure).

If the trial judge changes, the interested party has the *right to obtain* an examination of the persons who have already made statements in the same debate in the cross-examination with the subject against whom the same declarations will be used. So far the right of proof seems to be sufficiently protected. The *right of proof* must be correctly understood as *to ask* but also as *to obtain*: a request by the party must correspond to a duty of performance of the judge (to decide on the request) anchored to clear and predefined criteria[29]. And here is a duty of performance that falls on the judge.

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[28] On this topic see recently O. Mazza, *Il processo che verrà: dal cognitivismo garantista al decisionismo efficientista,* in *Arch. pen.*2022, p. 19.

[29] See P.P. Paulesu, *Giudice e parti nella "dialettica" della prova testimoniale*, cit. p. 30.

But there is also an important exception to ensure the judicial efficiency. The right to examine the witness before the new judge is no longer recognized if previously, the examination has been fully documented by means of audiovisual reproduction. The technological tool therefore serves to compensate for the evident downsizing of orality and immediacy to speed up the proceedings. Of course, the judge can always order the renewal of the exam if he deems it necessary on the basis of specific needs. But we have to point out that in this case we are *outside the area of the right to proof*: because the new face to face hearing of the witness depends on a discretionary choice of the new judge.

Many doubts remain. The videotaped evidence cannot be assimilated to the evidence gathered in presence of the first judge. The perception of the witness's story by the new judge who watches the video recording may be completely different. For this reason, the methods by which the new judge must take cognizance of the videotaped evidence must be analytically regulated to ensure maximum transparency of activities of the judge and the parties (prosecutor and defendant). And in this perspective it is necessary a dedicated and public hearing[30].

5. *Testimonial evidence and appeal judgment*

In the civil law systems, the hearing instruction on appeal usually reflects the strong tension between two opposing needs. The first. Preserve the function of the appeal intended as a control tool, that is, as a mere critical reassessment of the results obtained in the first instance; prevailing, in this perspective, is the idea of the completeness of the evidence taken at first instance: the appeal only serves to verify their consistency. As you can see, in this case, the idea of efficiency, speed and simplification prevails. The second need. Protect the right to proof and to be heard: here the appeal judgment opens up to new probative activities and maintains its own peculiar and autonomous cognitive dimension with respect to the first instance judgment. Well, in the Italian criminal trial the tension between these two instances is resolved with a compromise

[30] See O. Mazza, *Il processo che verrà: dal cognitivismo garantista al decisionismo efficientista,* cit., p. 19.

choice: the renewal of the probative instruction constitutes an exception, because it is limited to some strictly provided cases (Article 603 of Italian code of criminal procedure). As is known, the boundaries set by the Italian code of criminal procedure *to the renewal of* testimonial *evidence on appeal* have been the subject of some significant interventions by the European Court of Human Rights which concerned the witness evidence itself. In particular, the Strasbourg judges found a violation of art. 6 par. 1 ECHR (right to a fair trial) and 3 par. *d* ECHR (right to examine and have examined witnesses against him and to obtain the convocation and examination of witnesses on his behalf under the same conditions as witnesses against him), when the judge of appeal replaces the sentence of acquittal with the conviction on the basis a mere rereading of the minutes of the testimonies collected in the first instance, without proceeding with the (new) examination of the testimonial evidence available against the accused. The reliability of the statements made by the witnesses against him can in fact be concretely verified only if the appellate judge has the direct perception (not filtered and mediated by the minutes), and can therefore listen and correctly evaluate the narrative contribution of the witness. The value of immediacy and contradictory must prevail over instances of speed and simplification of the appeal. Hence the prospect of reforming an acquittal sentence on appeal (challenged by the public prosecutor) without the scrutiny of the guilt of the accused beyond any reasonable doubt based on evidence examined in the cross-examination between the parties is therefore in open conflict with the ECHR. Hence the changes introduced in Italy by L. n. 103 of 2017, aimed at enhancing the testimonial evidence on appeal. In summary. If the appeal of the public prosecutor against the acquittal sentence is based on reasons relating to witness evidence (but the discourse applies to all declaratory evidence), the judge is obliged to order the renewal of the hearing instruction, to allow that same evidence in the cross-examination between the parties (Article 603 paragraph 3 bis of the Italian code of criminal procedure). In this case, the need to examine the witness again is presumed by law. It can be argued that acquittal at first instance strengthens the presumption of innocence on appeal. A presumption that can be overcome in the second level of judgment only through the establishment of a cross-examination as a method of constructing the

declaratory evidence (Article 27, paragraph 2 and 11, paragraph 4 of the italian Constitution). However, some doubts remain. The art. 603 paragraph 3 *bis* of italian code of criminal procedure obliges the judge to order the renewal of the hearing instruction not only when, in the light of the documents, it is oriented towards conviction, but in all cases in which the public prosecutor has appealed the acquittal for reasons relating to the evaluation of the declaratory evidence: public prosecutor would be enough to adduce those reasons (even in a pretext way), to win a full right to proof even in the second degree. An arrangement of this type creates an asymmetry with respect to the accused, who does not see a similar right expressly recognized. What happens, in fact, if the accused appeals against the sentence? In the silence of the law, the conditions provided for by art. 603 paragraph 1 of the Italian code of criminal procedure: therefore the judge would be required to renew the witness evidence only if it were impossible to decide on the state of the documents. A solution of this type, however, seems to conflict with the principle of equality of the parties referred to in art. 111 paragraph 2 of the Italian Constitution: because the right to witness evidence on appeal seems to have been granted to the public prosecutor, and instead denied to the accused. According to the jurisprudence it is still possible to reform the sentence in acquittal, even without taking the witness evidence already evaluated at first instance, but in this case the appellate judge is obliged to draft a reinforced motivation. To conclude on this point, it should be noted that the Law n. 134 of 2021 (the so-called Cartabia Reform) seems in part to deviate from the path traced by the European Court, favoring the requests for simplification and speed of the second instance judgment: the possibility of taking a testimony in the event of an appeal against an acquittal sentence for reasons relating to the evaluation of this declaratory evidence is limited to the sole case in which the latter was taken at the hearing during the first instance trial proceedings.

6. *Final remarks*

In the light of the reflections made, the following conclusions can be drawn. The first conclusion. The protection of some witnesses

in the trial and from the trial, while sometimes necessary, must always take place within a legislative and jurisprudential framework of effective protection of the accused. In fact, a fair balance must be ensured between the need to protect witnesses (victims of crime, fragile and particularly vulnerable persons, underage, undercover agents) and the right of the accused to examine them effectively to refute the statements against him (or her). The second conclusion. The principle of immediacy (understood as the identity between the trial judge who assists in the construction of the testimonial evidence and the judge who is called to decide, evaluating the risults of that same evidence) can be adapted to the needs for simplification and speed of a modern criminal trial, which must in any case have a reasonable duration. Therefore, if the trial judge changes, the principle of immediacy can also be ensured by exploiting modern technological resources, and in particular audiovisual tools. The testimony given before the first judge must be videotaped and the second judge can view it. Provided, however, that the modalities with which this vision is achieved are well defined and made transparent (possibly in a public hearing?) so as to ensure an effective cross-examination among the parties, and between the parties and the new judge. Third conclusion. The particular structure of the testimony (perceptions, memories, language) exposes it to an inevitable qualitative decay due to the passage of time. Hence the need to enhance the principle of immediacy in the appeal judgment, through a new cross-examination of the witness in that context.

All these conclusions seem to be in line with the jurisprudence of the European Court of Human Rights, which in the matter of witnesses does not seem to tolerate excessive restrictions on cross-examination.

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How to cite (ABNT Brazil):

PAULESU, Pier Paolo. Editorial – An overview on the "crisis" of testimonial evidence as a judicial decision making tool, between ECHR and Italian Criminal Proceeding: protected witnesses, media interference, principle of immediacy and right to cross-examination. *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 3, p. 1066-1092, set./dez. 2022. https://doi.org/10.22197/rbdpp.v7i3.757