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PAWEŁ DZIEKAŃSKI[1]

False Statement and the Strategy of Defence

Abstract

This article discusses the issue of explanations given by an accused person, showing their dual nature – that of evidence and that of a measure used for the purpose of defence. The author raises a question if the scope of the right to defence granted to the accused encompasses the right to lie, and takes a stand on the limits to the accused making false statements. This is followed by comments on the practice of defence counsels making use of falsehood as part of their defence strategies. The reflection has been based on the author's own studies involving in-depth interviews made with barristers working as defence counsels.

Keywords: statements made by the accused, explanations given by the accused, right to defence, limits of the right to defence, false accusation

[1] MA Paweł Dziekański – Department of Criminal Law, Institute of Law Studies, Polish Academy of Sciences; e-mail: p.dziekanski@inp.pan.pl; ORCID: 0000-0003-4999-0327.

Ministry of Science and Higher Education Republic of Poland

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The accused's statements play a dual role in a criminal proceedings. They are both evidence[2] and a means to exercise the accused's right to defence.[3] Both of these functions play a significant part in a criminal proceedings. The accused is a keeper of many important facts regarding the justifiability of the charges they are presented with, but the disclosure of such facts depends entirely on their will,[4] with no external pressure imposed on them whatsoever (Article 74 § 1 of the Code of Criminal proceedings, hereinafter referred to as CCP). The judgements of the European Court Of Human Rights have come to feature a concept of improper compulsion, which leads – directly or even indirectly – to obtaining incriminating evidence from the accused, which is against the principle of the right not to self-incriminate, being an element of the right to a fair trial (Article 6 of the European Convention on Human Rights).[5] Pursuant to Article 175 § 1 of the Polish Code of Criminal proceedings, the accused is entitled to make statements and to refuse to give explanations (the so-called right to silence). These are rights granted within the principle of the right to defence, resulting from both national regulations (Article 42, section 2 of the Constitution of the Republic of Poland, Article 6 CCP) and acts of international law (apart from the said Article 6 ECHR, also: Article 14, section 3, letter d ICCPR, Article 48, section 2 CFREU). The objective area of the right to defence includes also no obligation to plead guilty, to self-incriminate, or to provide evidence against oneself (*nemo se ipsum accusare tenetur*).

The most important guarantee from the point of view of the right to defence is the privilege of impunity for making false statements. Its existence is unquestionable, but there is a question of whether it sanctions the accused's right to tell falsehoods in the proceedings[6] and whether this guaranteed impunity should not

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2 P. Hofmański, E. Sadzik, K. Zgryzek, [in:] P. Hofmański (ed.), *Kodeks postępowania karnego. Tom I. Komentarz do artykułów 1–296*, Warszawa 2011, p. 956.

3 M. Klejnowska, *Oskarżony jako osobowe źródło informacji o przestępstwie*, Kraków 2004, p. 12.

4 M. Lipczyńska, R. Ponikowski, *Granice prawa oskarżonego do obrony*, "Palestra" 1978, 4, p. 1.

5 ECHR's judgement of 8 February 1996, John Murray v. the United Kingdom, appeal no. 18731/91; ECHR's judgement of 21 December 2000, Quinn v. Ireland, appeal no. 368887/97. Downloaded from: www.echr.coe.int

6 Z. Sobolewski, *Samooskarżenie w świetle prawa karnego (nemo se ipsum accusare tenetur)*, Warszawa 1982, p. 79 and sources cited therein.

be limited.[7] This issue – discussed in relation to selected aspects of the strategy of defence – will be covered in this article. To illustrate certain theoretical problems, this paper makes use of the author's own research involving interviews made with barristers acting as defence counsels in criminal proceedings.

The essence of a falsehood is to intentionally mislead another person by consciously passing over the facts, with the person resorting to falsehood making an impression of telling the truth. As for the problem of criminal proceedings, it seems reasonable to use the notion of falsehood in court, which shall be understood as leading the judge (court) to wrong conclusions drawn in the case in question. This definition can be also applied to preparatory proceedings and to misleading the authority handling such proceedings. This paper does not cover cases where the accused describes the circumstances of their case in a reliable and truthful manner, based on a subjective opinion at least, but on account of many different mechanisms affecting their memory or their health or mental predisposition, the factual evidence given includes gaps, inconsistencies, or distortions. Such a phenomenon shall be considered separately from making false statements intentionally or deliberately fabricating versions of events that have nothing to do with the truth. Given the limitations of this format, the issues related to psychopathology of explanations will be left outside the subject matter in question.

Source literature and judicial decisions sometimes stress that the guarantee of impunity for making false statements may not be defined as "the right to lie".[8] These theses are based on an assumption of that the Code of Criminal Procedure grants no such right explicitly in any of its parts. The claim is true. It is also understandable that it is hard to admit that codified norms accept something morally wrong, something that may significantly compromise the interest of proceedings and arriving at the truth. That is why making false statements is treated as a circumstance eliminating the illegality of an act, an extra-statutory justification of the

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7 For instance, it is suggested that making false statements be considered in the context of penalty. But it is impossible to accept that there such an option currently exists based on Article 53 § 2 of the Criminal Code: cf. Ł. Pohl, *Składanie nieprawdziwych wyjaśnień przez oskarżonego w polskim postępowaniu karnym – szkic teoretycznoprawny*, "Prokuratura i Prawo" 2006, 6, p. 44. This type of the accused's attitude is exercising of the right they are granted, and may not be considered an incriminating circumstance as it would be against Article 74 § 1 CCP and Article 175 § 1 CCP. See also: A. Bojańczyk, *Uprawnienie do składania fałszywych wyjaśnień – jak długo jeszcze*, "Palestra" 2014, 9, p. 143. The author suggests extending the criminalisation of making false statements by including explanations given by the accused therein.

8 P. Wiliński, P. Górecki, *Zasada prawdy a zasada prawa do obrony*, [in:] Z. Sobolewski, G. Artymiak (eds.), *Zasada prawdy materialnej: materiały z konferencji Krasiczyn 15–16 października 2005 r.*, Zakamycze 2006, p. 49. See also: Court of Appeal in Wrocław's judgement of 4 May 2017, ref no. II AKa 73/17, Legalis 1636788.

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right to defence on account of the entitlements granted under the right to defence.[9] In the case of the accused, there is no need – and reason – to apply such a construct because the chance that they provide false statements results from the right to defence they are granted. Moreover, the legislator does not provide for an instrument of liability for making false statements – which is an intentional solution in this case. But the circumstances abolishing the criminal liability are an exception to the statutorily-defined punishability of acts of a given type.[10]

Article 175 § 1 CCP gives the accused a choice between giving an explanation and taking advantage of the right to silence. At the same time, if the accused opts for the first option, they may decide – using the granted freedom of expression – to either tell the truth or lie.[11] The accused may also conceal facts, question evidence they may find working to their disadvantage, or deny circumstances they may find just as disadvantageous. All this is granted in the content of a right the accused is granted – the right to defence, materialised, for example, in the form of Article 175 § 1 CCP.

Defence shall be generally understood as the accused's right to oppose the thesis of charges, civil claims, and any trial-related nuisances they may face.[12] The accused may take any action that is not explicitly prohibited by the law.[13] Which is why looking for an answer to the question of whether the area of the right to defence covers the possibility to make false statements may not adopt a reversed perspective, i.e. manifested in a conviction that the accused is granted only such rights that have been explicitly given to them under the relevant act.[14] A view claiming that the accused is, in fact, not granted the right to lie, but it is only their untrue explanations that is acceptable[15] and thus they are granted the right to impunity for making false

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9 P. Wiliński, *Składanie nieprawdziwych wyjaśnień w postępowaniu karnym – artykuł polemiczny*, "Prokuratura i Prawo" 2007, 2, pp. 72–74.

10 A. Zoll, [in:] idem (ed.), *Kodeks karny. Komentarz. Część ogólna. Tom I Komentarz do art. 1–116 k.k.*, 2012, p. 441. This is probably why M. Błoński used the notion of a quasi-substantiation – see: M. Błoński, *Odpowiedzialność oskarżonego za pomówienie a prawo do obrony*, "Studia Prawno-Ekonomiczne" 2018, 106, p. 17.

11 The right to lie (entitlement to lie) has been supported by: A. Wąsek, *Z problematyki odpowiedzialności karnej obrońcy w sprawach karnych*, [in:] Z. Ćwiąkalski, M. Szewczyk, S. Waltoś, A. Zoll (eds.), *Problemy odpowiedzialności karnej. Księga ku czci profesora Kazimierza Buchały*, Kraków 1994, pp. 287, 298; P. Kruszyński, *Granice legalności działania obrońcy w procesie karnym*, "Państwo i Prawo" 1989, 4, p. 71.

12 T. Grzegorczyk, *Obrońca w postępowaniu przygotowawczym*, Łódź 1988, p. 9.

13 P. Kardas, *Problem granic legalności czynności uczestników postępowania karnego i konsekwencji ich przekroczenia*, [in:] D. Gruszecka, J. Skorupka (eds.), *Granice procesu karnego. Legalność działań uczestników postępowania*, Warszawa 2015, p. 67.

14 Likewise: Ł. Pohl, op. cit., pp. 39–41.

15 J. Matan, *Zasada prawa do obrony w polskim procesie karnym oraz formy jej realizacji*, "Rocznik Administracji i Prawa" 2009, 9, p. 94.

statements is not supported by any provisions of procedural or substantive law. Such a thesis may be explained by a just conviction of the state's inability to affirm the right to lie. But tolerating untrue statements, refraining from imposing punishment for giving false explanations is something very much different than an opportunity, or even a right to give false explanations. Which is why it is hard to accept claims that the accused is actually not granted the right to lie, that they cannot lie since the scope of the right to defence has not been limited in this regard. Legal regulations do not deprive the accused of a possibility to adopt such a strategy although – as will be shown further – their right to lie is not absolute. It is, in fact, limited.

The legislator's choice in this area is fully conscious. It is manifested not only in that the accused remains outside the normative scope of Article 233 § 1 of the Criminal Code (hereinafter the CC) but also in the principle of presumed innocence (Article 5 CCP) and the principle of *nemo se ipsum accusare tenetur* (Article 74 § 1 CCP). Furthermore, the adopted solution solves the conflict between the interest of the proceedings (discovering the truth, collecting evidence) and the interest of the individual (avoiding/mitigating the liability to be borne). It has been rightly raised that forcing a man to break their natural defence mechanism and act to their own disadvantage is against the principle of respect for human dignity.[16] The legislator's decision to maintain a behaviour involving making false statements outside criminal liability is a sign of understanding that a man in a situation of being accused (suspected) may resort to falsehood because of the sense of threat.[17] Eliminating the option to make false statements would lead to a situation in which the accused would be forced to tell the truth or remain silent. In such a setting, the latter would, in fact, mean (it could be interpreted by court authorities in such a way) that since the accused does not deny the charges, they are guilty. The right to silence would then mean a passive plea of guilty,[18] it would undermine the distribution of the weight of evidence existing in criminal proceedings, and thus question the principle of presumed innocence. The principle of *nemo se ipsum accusare tenetur* would become significantly weakened.

The possibility to give false explanations is a counterpoise to the measures available to the state in criminal proceedings. It lets the accused behave as an innocent person, so they can maintain the appearance of being innocent, which is

16 Z. Sobolewski, op. cit., p. 13.

17 Studies carried out by R. Makarowski have shown that when it comes to "important matters" (punishable by imprisonment), 64% of people (a sample of 516 people aged 17–65, different education and professional status) would lie before the court – R. Makarowski, *Manipulacje w postępowaniu karnym*, Kraków 2006, pp. 84–87.

18 M. Rusinek, *O "prawie do kłamstwa" (artykuł polemiczny)*, "Prokuratura i Prawo" 2008, 4, p. 90.

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obviously a manifestation of the principles referred to above, finding application in practice.[19] It would be wrong to amend Article 233 § 1 CC in a way that giving false explanations would be criminalised. It seems that the normative form of Article 233 § 1 CC would not fulfil the condition of proportionality. The right to defence would be highly limited, making the guarantees granted thereunder become illusory. It is also important to stress that the right to defence is to serve not only those who are innocent (who are to be acquitted), but mainly those who are to be found guilty and convicted. We shall not lose this obvious perspective in relation to the problem at issue.

The right to defence is not absolute.[20] It applies only on the grounds of a given legal system, only within the limits and in the forms defined in the regulations of that system.[21] This means that the right to defence and the guarantees thereunder will be subject to limitations. The legislator does not determine the possible scope thereof, nor do they point to a general option of adopting limitations or exceptions to the principle of the right to defence.[22] Written sources offer formulations of conditions on which the right to defence may be limited. The criteria may be used to verify whether a norm prohibiting the accused from telling falsehoods (imposing consequences of giving false explanations) would meet the said conditions. These criteria are as follows: 1) the right to defence has to be limited by a clear regulation of the act, 2) the limitation shall concern the rights subject to limitation by their very nature, 3) imposing the limitation is justified by a conflict with a selected legal interest (the interest of the proceedings, the interest of other participants of the proceedings), 4) the scope of limitation does not violate the essence of the limited right, the scope of limitation is as small as possible and takes the principle of proportionality into account.[23] It is beyond any doubt that these conditions have to be met jointly.

It is necessary to oppose the view according to which the axiological interpretation of Article 175 § 1 CCP, by referring to the principle of objective truth, (Article 2 § 2 CCP), could determine the existence of a prohibition that would force the accused not to lie.[24] Yet, it shall be stressed that the provisions of the substantive

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19 Ibidem, see also: Supreme Court in its resolution of 11 January 2006, ref no. I KZP 49/05, Legalis no. 72107.

20 Otherwise: W. Depa, *Prawo oskarżonego do obrony de lege lata*, Kraków 2004, p. 38.

21 M. Cieślak, [in:] S. Waltoś (ed.), *Marian Cieślak. Dzieła wybrane. Tom II. Polska procedura karna. Podstawowe założenia teoretyczne*, Kraków 2011, p. 217.

22 P. Wiliński, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego. Tom III. Zasady Procesu Karnego*, Vol. 2, Warszawa 2014, p. 1547.

23 Ibidem, p. 1541.

24 As suggested by: Ł. Pohl, op. cit., pp. 39–41.

law need to be analysed as well. Both these systems, i.e. that of the substantive law and that of the procedural law, will set the limits to the accused's right to defence. The issue of Article 233 § 1 CC has already been covered and does not require a further discussion as made clear in relation to the status of the accused.[25] None of the quoted regimes includes an explicit regulation forbidding the accused resorting to lies. It seems therefore that the accused is granted a right to make false statements (the so-called right to lie), functioning within their right to defence. It is necessary to add that we should exclude an option to prosecute the accused on account of committing an act of criminal protection after a crime (Article 239 § 1 CC). The subjective scope of this regulation does not cover self-protection after a crime, which also concerns offenders committing crimes in all causative forms.[26]

I believe that the limits to the accused's 'freedom to lie' are set by the provisions of Article 234 CC. The accused – exercising their right to defence – may not falsely accuse someone else of committing a crime. Source literature[27] and judicial decisions[28] offer a predominantly different view. In a resolution passed on 11 January 2006,[29] the Supreme Court acknowledged that the accused giving explanations in relation to criminal proceedings instituted against them falsely accused another person of complicity to conceal the identity of the actual accessories to the crime at issue, and not to defend themselves, crossed the limits of the right to defence they were granted and could bear criminal liability under Article 234 CC. This means that if the accused falsely accuses another person to defend themselves,

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25 An important issue, also after the introduction of the provisions of Article 233 § 1a CC, is the matter of liability of a person making false statements, who has not been presented with charges but the collected evidence made it legitimate to do so, or liability in the case when false statements have been made for self-defence purposes. I shall not discuss this issue in more detail as it lies outside the framework of this paper and would require an extensive reflection.

26 M. Szewczyk, [in:] A. Zoll, *Kodeks karny. Komentarz. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Warszawa 2013, p. 1263; W. Wróbel, A. Wojtaszczyk, W. Zontek, [in:] L. Gardocki (ed.), *System Prawa Karnego. Przestępstwa przeciwko państwu i dobrom zbiorowym*, Vol. 8, 2013, p. 649; Supreme Court's judgement of 7 June 1979, ref. no. II KR 99/79, Legalis no. 21519; Supreme Court's judgement of 19 May 2010, ref. no. V KK 122/09, Legalis no. 385398.

27 M. Cieślak, *Glosa do uchwały SN z dnia 29 czerwca 1972 r., VI KZP 67/71*, "Państwo i Prawo" 1973, 11, p. 186; B. Kunicka-Michalska, *Prawo oskarżonego do obrony a fałszywe oskarżenie*, "Palestra" 1968, 12, p. 49. The author has offered some interesting remarks concerning the practice of prosecuting acts committed by an accused as a result of the explanations provided. See also: M. Błoński, op. cit., p. 18.

28 Supreme Court's judgement of 22 October 2013, ref. no. V KK 233/13, Legalis no. 739783; Supreme Court's judgement of 11 January 2006, ref. no. I KZP 49/05, Legalis 72102; Court of Appeal in Wrocław's judgement of 6 December 2012, ref. no. II AKa 351/12, Legalis no. 746877; Court of Appeal in Katowice's judgement of 17 October 2014, ref. no. II AKa 2/14, Legalis no. 1186610.

29 Ref. no. I KZP 49/05, LEX no. 167797. The view expressed in the resolution was approved by e.g.: M. Derlatka, *Glosa do uchwały Sądu Najwyższego z dnia 11 stycznia 2006 r.*, "Palestra" 2007, 11–12, p. 299.

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they will not be prosecuted for committing a crime under Article 243 CC. The quoted decision assumes that non-punishability is a consequence of the possibility of making false statements (impunity for crime under Article 233 § 1 CC), clearly stressing that there is no statutory limitation to making false statements in certain situations, and that there is no mechanism of notification of the possibility of being held liable provided for. As for the case in which the said decision of the Supreme Court was made, it was possible to identify circumstances proving that the accused did not act in self-defence. It seems, however, that revealing such a motivation of the offender may be highly difficult in most cases because it is quite common that accusing others is inspired by both self-defence and other circumstances alike, such as settling the score with fellow criminals, retaliation. In such situations, in the light of the standpoint adopted by the Supreme Court in the resolution of 11 January 2006, it should be acknowledged that the accused shall not be held liable for false accusations.

The views adopted in both literature and judicial decisions regarding slander are highly inconsistent and lead to misunderstanding. On the one hand, there is a denial of the accused's right to lie,[30] and on the other, as a form of a justification of the right to defence, there is a trend to exempt the accused from the liability for making false accusations. It does not match the construct of jurisdictional justification, especially one related to acting within the limits of special rights and obligations, as these have to be expressed explicitly and may not be presumed, subject to a broad interpretation.[31]

The content of the provisions of Article 234 CC is clear and unambiguous. It is a common crime, which may be committed by anyone capable of being held criminally liable, and so also by the accused. The exemption of such a liability therefore requires an interference at the statutory level. In the case of the law as it exists, the Criminal Code shall be supplemented with a regulation that shapes the situation of the accused making false accusations as part of giving explanations. It seems that a desirable solution would be to consider such a circumstance as a facultative basis for the extraordinary mitigation of criminal liability, or even for refraining from imposing a punishment. For reasons described above, it is not advisable for the accused, accusing other parties of committing acts referred to in Article 234 CC, to remain unpunished.

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30 Court of Appeal in Wrocław's judgement of 4 May 2017, ref no. 73/17, Legalis no. 1636788.

31 Z. Wiernikowski, *Działanie w granicach uprawnienia lub obowiązku prawnego jako okoliczność wyłączająca bezprawność czynu*, "Państwo i Prawo" 1987, 3, 82–83. The construct of *quasi*-justifications is not understandable either – cf. M. Błoński, op. cit., p. 17.

There is a clash of values in the case of false accusations. It is typical of jurisdictional justifications, so if we were to accept the scope of rights of the accused, or even to express it clearly, it would be possible to consider the matter of false accusations in the context of circumstances precluding illegality. The said clash takes the following form. On the one hand, there is the accused's right to defence. On the other, there is the personal interest of an individual (moving to the foreground in the context of the raised issue), and the correct functioning of the system of justice. The said interest, as the object of protection of crime under Article 234 CC, will give precedence to the right to defence in the event of a clash. Incidentally, the clash in question has a deeper dimension, meaning that the interest of the system of justice is to make the procedural principles, especially as fundamental as the right to defence, work in reality. And as for the clash between the accused's right to defence and an individual's personal interest, there are serious doubts as to whether it may be decided in favour of the accused. As already said, the right to defence is not absolute, and the accused is not exempt from respecting the legal order in place on account of the procedural situation they are in. In particular, their rights may not compromise or limit the rights of third parties. Source literature argues that the accused defend themselves against criminal liability, which may result in many years of imprisonment, which justifies the necessity to tolerate their lies. On the other hand, there is a threat that false statements may lead to an innocent person becoming imprisoned, having their dignity and good name harmed, and result in an unfair judgement. There have been cases where false accusations have led to unjustified apprehension, temporary custody, pressing charges against someone, which are all instances of occurrence of irreversible changes in the life of a person other than the accused. The usual initial intentions of offenders making false accusations have been to distract the attention of law enforcement authorities from the actual circumstances, to make securing evidence difficult, to protect other persons (usually accessories) or to make it possible to take advantage of the institution referred to in Article 60 § 3 CC. This type of motivation shall be considered acting in self-defence. However, such acts are reprehensible on account of taking advantage of another person; they are a threat to such a person's good and interest and to the correct functioning of the system of justice. In consequence, it shall be claimed that it is the need to protect the interest of an individual that should demarcate the limits of the accused's right to lie, in that despite the general possibility of making false statements, they should have no right to falsely accuse another person of committing acts referred to in Article 234 CC. If such a solution were adopted, the accused should be also notified of the scope of rights to give false explanations they are granted.

It seems that the suggested determination of the limit of the right to lie does not breach the essence of the right do defence. The need to make a decision regarding

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this matter has emerged most definitely as a result of the conflicts between the right to defence and the interest of individuals and the system of justice occurring in practice. The scope of limitation is not significant. The lack of possibility to falsely accuse a third party of committing a crime attributed to the accused does not significantly compromise the latter's right to defence. The accused has still a broad range of options at their disposal, including the right to deny the charges pressed against them, a possibility to give a different version of events, which may suggest that the crime was committed by someone else. We should bear in mind that it is necessary, for the crime at issue, that the perpetrator of an act defined in Article 234 CC be clearly identified (without the need for law enforcement authorities to take additional measures to determine their identity) and that the circumstances of the act the said person is supposed to have committed be precisely described.[32] The accused is left thus with a choice to make their explanations include general slandering of another person, implying e.g. that this person has been involved in an illegal practice. Moreover, a crime under Article 234 § 1 CC may be committed only with a direct intent,[33] which means that the accused's will has to be clearly oriented on accusing another person of committing a crime or another act referred to in Article 234 CC. The quoted decision is an example where slander resulted in identifying and apprehending a person who had nothing to do with the case even though the statements made by the accused (still acting as a witness at that point) were quite vague. The perfunctoriness of those statements, the fact that the accused responded to the questions asked by the officers handling the case, and that she did not give explanations in a spontaneous manner led the court to think that there was only a conditional intent, which made it impossible to hold her liable for committing an act under Article 234 CC.

To summarise the discussion so far, it appears reasonable to refer to the criteria of limitation of the right to defence as cited earlier. The analysis thereof was to produce an answer to the question about the existence of a right to lie on the grounds of Polish criminal proceedings and whether the limits to the accused's lies are demarcated by the provisions of Article 234 CC. Giving false explanations has not been explicitly forbidden by any provision of the act. The condition not being met leads to a conclusion that the right to defence is not effectively limited in this scope. The opposite situation would be an excessive interference with the right to defence,

32 W. Wróbel, A. Wojtaszczyk, W. Zontek, [in:] L. Gardocki (ed.), op. cit., p. 698.

33 Court of Appeal in Katowice's judgement of 17 October 2014, ref. no. II Aka 2/14, Legalis no. 1186610. The court also made a statement on the scope of application of the justification of the right to defence, arguing that it applied in relation to crimes under Articles 235 and 238 of the CC as those acts were strictly related to the later imputed offence, and served to move suspicion away from the accused.

a compromise to the principle of *nemo se ipsum accusare tenetur,* an imbalance in the principle of evidence weight, and could even pose a problem on the grounds of respect for human dignity. Thus, it would make this limitation disproportionate to the expected outcome. Yet, the same criteria applied to the problem of false accusations make it possible to claim that it should be acknowledged that giving false explanations exceeds the limits of defence and is prohibited. This is what the provisions of Article 234 CC expressly provide for. The standpoint is motivated by the need to protect the legal interest of other persons. Also, a limit set this way does not violate the essence of the right to defence and the right to make statements included therein. It is to eliminate threats related to turning criminal proceedings against an innocent person – and to the serious consequences resulting therefrom.

Looking at the problem of falsehood from the perspective of a defence counsel and their strategy is completely different from the case of the accused lying. The accused may make false statements. A defence counsel has no right to take advantage of falsehood in court (§ 11 AEC[34], Article 38, section 3 CEAL[35]). Although the scope of a defence counsel's rights has to result from the rights granted to the accused, it does not fully correspond to the rights granted to the latter. A defence counsel and the accused are on different positions in court. Each of them is attributed autonomy. A defence counsel is bound not only by norms under substantive and procedural law, but also by deontological principles (currently applicable to the profession of a barrister or an attorney-at-law). The quoted provisions of the Advocate's Ethical Code and of the Code of Ethics of Attorneys-at-Law are clear in prohibiting the conscious provision of false information. It is therefore obvious that a defence counsel may not lie, even if their client expects them to do so. The High Disciplinary Court of the Polish Bar appears to be right in claiming that the principle of not providing the court false information shall take precedence over the principle of acting to the client's advantage.[36]

But questions appear whether the defence may assume that the accused gives false explanations or encourages the accused to make false statements. Taking the discussion so far into account, it is easy to think of a situation where a lie becomes

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34 Advocate's Ethical Code, Polish Bar Council's resolution no. 52/2011 of 19 November 2011 announcing the uniform text of the Advocate's Ethical Code (Polish: Kodeks Etyki Adwokackiej) adopted by the Polish Bar Council on 10 October 1998 (resolution no. 2/XVIII/98) including amendments introduced by way of the Polish Bar Council's resolution no. 32/2005 of 19 November 2005 and the Polish Bar Council's resolutions no. 33/2011–54/2011 of 19 November 2011.

35 The Code of Ethics of Attorneys-at-Law, adopted by way of resolution no. 3/2014 of the Extraordinary National Congress of Attorneys-at-Law on the Code of Ethics of Attorneys-at-Law.

36 High Disciplinary Court of the Polish Bar's decision of 19 June 2010, ref. no. WSD 5/10, Legalis no. 1522167.

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injected into proceedings regardless of the will and actions of the defence. It may appear that the accused gave explanations, but their defence counsel, not being assigned yet at that point, did not have a way to advise the accused on their actions and on the manner of conduct that would be best from the perspective of their procedural interest. Such situations happen often, especially at the early stage of proceedings (preparatory proceedings in particular), when the accused is not represented by counsel. Then, the accused often decide to make false statements. The most frequent piece of advice given by a counsel (if one is assigned or asked for such a piece of advice) is, in turn, to adopt a passive strategy – i.e. not to plead guilty and refuse to give explanations. This is justified by the prospective development of the stage of the proceedings, the incompleteness of evidence against the accused, and sometimes by the inability to become familiar with the collected evidence. And although the accused may withdraw or change their explanations at a later stage, such a move may not be advantageous from a tactical point of view. Regardless of the above, it may happen that the accused will not wish to back out of the presented untrue version of events or will not confide in counsel of having committed the crime, thus revealing the actual course of events. There are cases where the accused keeps on claiming their own version of the events to be true despite the determined facts and collected evidence. In such situations, the counsel may invoke the accused's false explanations and other evidence (e.g. witness' testimony) they have not requested to be examined but knows to be false. Moreover, the counsel may seek evidence to prove the falsehood of the version of events presented in the explanations.[37] Such activity has to be undertaken to the accused's advantage, of course.

A solution to attempt invoking apparently favourable evidence may be wrong. It may point to circumstances of advantage to the accused, but if a more comprehensive analysis of the entire case evidence shows quite clearly that this apparently favourable evidence is hardly reliable, easy to question or even compromise by the prosecution, it is not worth taking advantage of it when building the strategy of defence. A defence counsel shall make an appropriate appraisal, taking all the circumstances of the case into consideration, and decide on the most effective solution. A counsel's decision to adduce evidence with the aim of verifying untrue explanations of the accused will not be justified because it poses a threat of compromising the latter's version. In such a case, it is necessary to adopt a passive strategy, act based on the available evidence, refrain from asking ordinary or expert witnesses questions in that area. It is possible then to request examining only the evidence that does not question the accused's explanations, and which somewhat corresponds to the

[37] T. Gardocka, *Z problematyki granic legalnego działania obrońcy w procesie karnym*, "Palestra" 1987, 3–4, p. 70.

statements made by the accused (even if it concerns auxiliary circumstances). The counsel needs to make a very careful assessment of utility of the evidence submitted or the question asked. It is important to stress that a counsel may not make a request to examine evidence they know to be false (except for the accused's explanations), e.g. they know that the potential witnesses (usually persons linked in some way with the accused) will provide the court with untrue information, they know that an expert witness is unreliable, etc. A defence counsel shall not pass over the prohibition either, encouraging the accused to make a request to examine such evidence. Actually, if the accused wishes to present such evidence, the counsel should advise them not to do it, especially if there is a risk of revealing or discovering that such evidence is false. Cases where the defence counsel brings false evidence into the proceedings, encourages the accused to falsify evidence, interferes with the witnesses' testimony by encouraging them to give false testimony, or devises the content of the testimony are surely punishable. It is clear that a potential authentication of an untrue version as presented by the accused in their explanations may not cause the defence counsel to deliberately 'import' untrue information and false evidence into the ongoing proceedings.

Moving back to a situation which involves making a decision (very significant for the defence) on the conduct of the accused when examined, it is necessary to stress that the defence counsel has a full right to inform the accused of the rights they are granted – also of the right to make false statements. The problem of advising the accused to make false statements, and – in consequence – suggesting or designing the explanations the accused is to give in the proceedings may appear controversial. From the point of view of professional ethics, the defence counsel may not develop the content of false statements made by the accused. It does not matter that it is the accused who makes such statements in court. What matters is who the source of untrue information is. Impelling the accused to accuse another person of committing a crime or another act referred to in Article 234 CC shall be considered especially reprehensible. But it is necessary to say that such a defence counsel's decision to encourage the accused to give false explanations or to devise the content of such explanations for the benefit of the accused will remain outside the sphere of criminal liability.[38] In source literature, the thesis is substantiated by means of two arguments. First, by referring to the limits of legality of the defence's activity, it is argued that a defence counsel may not be granted narrower rights than the accused because it would make the assistance they provide illusory and impracti-

[38] Ibidem. The situation could change, however, if the accused were responsible for making false accusations. Then the defence counsel could be held liable for abetting them to do it.

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cable.[39] It is impossible to agree with the thesis, though, because the scopes of rights granted to the accused and the defence counsel differ, which also results from the Code of Criminal Procedure (rights reserved only for the accused, rights granted only to the defence counsel). Furthermore, the scope of legitimate activity of the defence counsel is additionally determined by the norms of professional deontology. Second, a substantive law analysis of the behaviour of the defence counsel shows that it is impossible to attribute crime in any causative form to them – indirect perpetration, directing perpetration, aiding or abetting have all been excluded mainly due to the fact that the accused does not commit a crime when making false statements, and the structure of indirect perpetration is not known in the Polish Criminal Code. These views are convincing. As for the problem of encouraging to making false accusations, the issue depends on whether the accused may be held liable under Article 234 of the Criminal Code. As shown earlier, source literature is dominated by a negative standpoint on the matter, but it seems that it could be reasonable to reflect on the limitation of the right to defence in this area.

The responsibility to search for the truth does not lie with the defence counsel. The counsel shall base their acts on the evidence available to them, presenting a perspective to look at it in a way that is most advantageous to the accused.[40] The Supreme Court seems to be right in offering a statement, which can be treated as a tactical tip, that it is a good right of defence to multiply or even exaggerate facts and opinions on these facts to question the accused's guilt at every stage of the proceedings, provided that facts are not distorted (loyalty to facts).[41] The counsel's behaviour may not, however, take a form of falsehood in court – a conscious misleading of the court, using untrue claims regarding the facts, and presenting untrue facts in a way inconsistent with the reality.[42]

Falsehood in court shall be considered a negative phenomenon, posing a major threat to the success of criminal proceedings – especially to discovering the truth. But it does not mean that the right way to eliminate the problem is to limit the scope of the right to defence at issue and to make the accused bear the consequence of making false statements (by e.g. toughening the punishment, making false statements punishable), although – as shown earlier – the possibility to make use of false accusations causes certain concern and should give rise to further analyses of the area of limitation of the right to defence.

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39 P. Kruszyński, op. cit., pp. 70–72.

40 T. Gardocka, op. cit., 4, p. 72.

41 Supreme Court's judgement of 14 May 1999, ref. no. IV KKN 714/98, Legalis no. 46878.

42 Court of Appeal in Wrocław's judgement of 6 October 2005, ref. no. II Aka 195/05, Legalis no. 72619.

In legal practice, it is important to pay very much attention to the assessment of credibility of the accused's explanations and put an emphasis on departing from simple, common patterns that assume, for instance, that the accused's interest is each time to justify their behaviour and that the statements made at the initial stage of proceedings are more credible (due to the short time passing from the event, no consultation with the defence counsel, no consideration of the procedural interest yet).[43] The defence counsel, planning the defence strategy that takes the accused's explanations into account to a great extent, has to bear the specificity of the evidence provided by the accused's statements in mind, meaning the way in which it is judged in judicial practice. Most of all, when appraising the accused's statements it is necessary to first remember that they are subject to the same judgement as any other piece of evidence. That is why they are fully subject to the principle of discretionary appraisal of evidence (Article 7 CCP).[44] We cannot thus acknowledge that such evidence – by its nature – is less valuable evidence. The accused's right to lie (no punishment for giving false explanations) is not itself a reason to diminish the significance of their explanations. However, I believe that we need to consider the scepticism related to the credibility of the evidence in question. Which is why it is so important – from the tactical point of view – that the accused's statements correspond to other evidence submitted in the case as much as possible. Further, it is necessary to prove that even a prior punishability itself does not deprecate the explanations given.[45] Acknowledging the accused's statements as a credible piece of evidence or otherwise may not be a result of a discretionary act of the court or fall under any other subjective category (e.g. a sense of liking or antipathy towards the accused). Each time it has to be a logically grounded outcome of reasoning, based on results of an analysis of objectively determined circumstances.[46] An important – but not decisive – factor shaping the court's opinion on the value of personal sources of evidence (meaning the accused's explanations) is the observations made by the court in the course of direct examination at the trial.[47] However, the court should not be driven too much by its direct impression of the personal source of evidence as a result of belittling the significance of other objectively verifiable

43 Rightly so: Court of Appeal in Białystok in its judgement of 29 September 2016, ref. no. II Aka 97/16, Legalis no. 1564494.

44 Supreme Court's judgement of 12 January 2006, ref. no. II KK 29/05, Legalis no. 73839.

45 Supreme Court's judgement of 6 May 1977, ref. no. V KR 63/77, Legalis no. 20071; Court of Appeal in Szczecin's judgement of 3 March 2016, ref. no. 10/16, Legalis no. 1445853.

46 Supreme Court's judgement of 29 January 1976, ref. no. Rw 684/75, Legalis no. 19239.

47 Supreme Court's judgement of 13 January 1975, ref. no. II KR 323/74, Legalis no. 18494; Supreme Court's decision of 18 October 2002, ref. no. II KK 174/02, Legalis no. 310867; Court of Appeal in Szczecin's judgement of 22 June 2016, ref. no. II Aka 52/16, Legalis no. 1543836.

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circumstances.[48] The assessment of the mental processes displayed by the accused is also significant. In principle, consulting an expert psychologist – also to support oneself in the assessment of the credibility of the accused's or witness' statements – is a called for solution. It is necessary to appraise the statements where the accused pleads guilty or accuses other persons of committing a crime (or other acts under Article 234 CC) with particular care and in particular detail. It is common for the case law to assume that acknowledging slander as a basis for determining facts requires the statements to be logical, consistent, and supported by other evidence.[49] However, there is another view in this area, stressing the necessity to appraise such evidence in detail, but arguing that it may be the only piece of evidence in the case.[50] The view shall be rejected.

The effects of making use of falsehood as a defence strategy in criminal proceedings are questionable. A defence strategy shall be, among others, effective and credible. Effectiveness should not be understood, though, as achieving the intended goal regardless of the measures applied. Effectiveness so construed may not serve as a criterion for the positive appraisal of a defence counsel's activity. Actually, a defence counsel striving to achieve their goal disregarding the framework of their professional activity set by the provisions of the substantive and procedural laws and the principles of their professional deontology is counter-effective and acts against the accused's interest. But it has to be admitted that it will not always result in negative consequences for the accused, especially on the grounds of the conducted proceedings in the light of the principle under Article 86 § 1 CCP. An effective defence counsel is one who is able to achieve the intended goals acting as professionally as possible. A vast number of cases sees the accused's explanations confronted with a range of other evidence – with the latter often gaining the upper hand. A defence strategy requires credibility. Credibility is, in fact, an attribute of the defence counsel, built through ethical conduct, abiding by the law, and rendering defence services in a professional manner. A defence counsel making use of falsehood will lose their credibility and trust really quickly. Which is why, despite the available broad spectrum of the possibilities for the accused to make false statements and for a defence counsel to use such statements in the adopted defence strategy, it is necessary to be highly cautious with taking advantage of falsehood as an element of a defence strategy.

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48 Supreme Court's judgement of 18 January 1974, ref. no. III KR 360/73, Legalis no. 17684.

49 Supreme Court's judgement of 12 July 1979, ref. no. IV KR 136/79, Legalis no. 21567.

50 Supreme Court's judgement of 11 October 1977, ref. no. VI KRN 235/77, Legalis no. 20419; Court of Appeal in Białystok's judgement of 28 February 2013, ref. no. II Aka 12/13, Legalis no. 719367.