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Inconvenient Witnesses: Testimonies of Slaves in a Criminal Trial During the Republic and the Principate

Niewygodni świadkowie – zeznania niewolników w procesie karnym w okresie Republiki i Pryncypatu

ABSTRACT

In ancient Rome, slaves performed many different tasks. The fact that they often enjoyed the trust of their owners and knew their secrets made them very desirable witnesses in a criminal trial. The aim of the article is to show examples of situations in which the testimony of slaves in a criminal trial could be dangerous for their owners. Slaves were subject to obligatory torture, so they could reveal some secrets against their will. However, there was a ban on the use of slaves' testimonies against their owners. Roman law, still, knew a few exceptions to this, in matters justified by the interests of Rome. The article shows also the changes made during the Principate, when the statutory law regulating this issue appeared.

Keywords: Roman law; slaves; criminal trial

Many historical, sociological and legal publications have already been produced to discuss the legal situation of slaves in ancient times. They concern virtually all aspects of slavery.[1] Some attention has also been paid to the procedural position

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[1] Cf. W.L. Westermann, *Sklaverei*, "RE" 1935, Supplementband VI, col. 894–1068; idem, *The Slave Systems of Greek and Roman Antiquity*, Philadelphia 1955; W.W. Buckland, *The Roman Law of Slavery*, Cambridge 1908; B. Łapicki, *Poglądy prawne niewolników i proletariuszy rzymskich. Studium historyczne na tle bazy gospodarczej i antagonizmów klasowych*, Łódź 1955; O. Robleda,

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of this social group, both in civil and criminal proceedings.[2] Cases were taken into account in which the slave was the subject of a trial (the dispute concerned ownership, their involvement into a tort or a crime, or committing those in relation to them)[3] and when they were a witness in the proceedings.[4]

The purpose of this article is to show exemplary cases when the testimony of slaves in a criminal trial could be dangerous for their owners, also when and how they were customarily protected and when not.

The legal and social position of slaves in ancient Rome was, by definition, low. They performed many functions in Roman society. They worked on farms, were workers, servants, educators, actors, gladiators and did many other activities. However, sometimes they were also trustees and faithful companions of their owners. Slave owners often ran their businesses with their slaves' hands. Thanks to this, slaves were introduced to at least a part of financial matters of their *domini*. So they knew about their owners' lives, often more than anyone else, and that made them dangerous. If they decided to start talking, they would threaten those who entrusted their secrets to them; thus, they were inconvenient witnesses. In a trial, be it private or public, they could shed light on many issues their owners would

Il diritto degli schiavi nell'antica Roma, Roma 1976; *Società romana e produzione schiavistica*, eds. A. Giardina, A. Schiavone, vol. 1–2, Bari 1981; I. Bieżuńska-Małowist, M. Małowist, *Niewolnictwo*, Warszawa 1987; A. Watson, *Roman Slave Law*, Baltimore 1987; K. Bradley, *Slavery and Society at Rome*, Cambridge 1994; E. Loska, *Obowiązek niewolników obrony swojego właściciela*, „Zeszyty Prawnicze" 2004, vol. 4(1), pp. 45–56; L. Schumacher, *Niewolnictwo antyczne. Dzień powszedni i los niewolnych*, Poznań 2005; A. Jurewicz, *„Swoboda religijna" niewolników w Rzymie. Przegląd zagadnień i opinii*, [in:] *Cuius regio, eius religio?*, eds. G. Górski, L. Ćwikła, M. Lipska, Lublin 2008, pp. 7–29; A. Chmiel, *Przykład zastosowania s.c. Silanianum, czyli o tym, dlaczego rzymska iustitia stawała się niekiedy okrutna*, [in:] *Przemoc w świecie starożytnym. Źródła, struktura, interpretacje*, eds. D. Słapek, I. Łuć, Lublin 2017, pp. 299–310.

[2] See L. del Prete, *La responsabilità dello schiavo nel diritto romano*, Roma 1972; O. Robinson, *Slaves and the Criminal Law*, "ZSS" 1981, vol. 98(1), pp. 213–254.

[3] See M. Miglietta, *'Servus dolo occisus'. Contributo allo studio del concorso tra 'actio legis Aquiliae' e 'iudicium ex lege Cornelia de sicariis'*, Napoli 2001; K. Stolarski, *Prawnokarne regulacje dotyczące niewolników w 'Lex Iulia de adulteriis coërcendis' z 18 roku p.n.e.*, [in:] *Culpa et poena. Z dziejów prawa karnego*, eds. M. Mikuła, P. Suski, Kraków 2009, pp. 15–25; A. Chmiel, *Ochrona bezpieczeństwa właścicieli niewolników w świetle S.C. Silanianum – zagadnienia dowodowe*, [in:] *Ochrona bezpieczeństwa i porządku publicznego w prawie rzymskim*, eds. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2010, pp. 53–64.

[4] It the Polish literature, see i.a. B. Sitek, *Quaestionem intellegere debemus tormenta et corporis dolorem ad eruendam veritatem*, [in:] *Crimina et mores. Prawo karne i obyczaje w starożytnym Rzymie*, ed. M. Kuryłowicz, Lublin 2001, pp. 161–168; K. Amielańczyk, *'Quaestio per tormenta'. O wartości dowodowej zeznań uzyskanych za pomocą tortur w rzymskim procesie karnym okresu pryncypatu*, [in:] *O prawie i jego dziejach księgi dwie. Studia ofiarowane Prof. Adamowi Lityńskiemu w 45-lecie pracy naukowej i 70-lecie urodzin*, ed. M. Mikołajczyk, Białystok 2010, pp. 51–62; E. Loska, *Kilka uwag na temat zeznań niewolników w procesie karnym*, „Zeszyty Naukowe KUL" 2017, vol. 60(3), pp. 449–464.

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like to keep hidden.[5] Slaves had to be tortured during the interrogation.[6] So sometimes they could tell the secret even against their will.[7] Their testimony could have diminished the position of the owner in the trial. Therefore, the ban on using the testimony of slaves against their owner was generally respected.[8]

Many source texts indicate that this ban was rooted in the custom.[9] There is a report from Tacitus (Tac., *Ann*. 2.30) mentioning a resolution of the senate as its source, but this information is not confirmed elsewhere:

Tac., *Ann*. 2.30: *...negante reo adgnoscentis servos per tormenta interrogari placuit. et quia vetere senatus consulto quaestio in caput domini prohibebatur, callidus et novi iuris repertor Tiberius mancipari singulos actori publico iubet, scilicet ut in Libonem ex servis salvo senatus consulto quaereretur*.

Describing the story of the trial of Libo Drusus accused of a coup attempt, Tacitus mentioned that the accused pleaded not guilty. To obtain evidence against him, it was intended to question his slaves during torture. However, as the historian wrote, there was an old resolution of the senate that banned the use of one's own slaves against them. Therefore, Tiberius ordered that their property be transferred to the treasury agent so that they could be questioned and their testimony used against Libo, without prejudice to the provisions of the *senatus consultum*. Slaves were to be tortured in a conspiracy trial – and since the Republic, there had been in this case no ban on torturing slaves *in caput domini*.[10] Tacitus' message is thus not entirely credible.

Coming back to the times of the Republic: in his speeches, Cicero repeatedly referred to the inability to use the testimony of slaves *in caput domini.* During the trial in defence of Milo, who had been accused of the murder of Publius Clodius, he

[5] Cf. N.W. Bernstein, *'Torture Her until She Lies': Torture, Testimony, and Social Status in Roman Rhetorical Education*, "Greece & Rome" 2012, vol. 59(2), p. 169.

[6] D. 22.5.22.1; C. 9.41.12; C. 9.41.18. Cf. P.A. Brunt, *Evidence given under Torture in the Principate*, "ZSS" 1980, vol. 97(1), p. 256; O. Robinson, *op. cit.*, p. 223; A. Watson, *Legal Origins and Legal Change*, London 1991, p. 283; B. Santalucia, *Diritto e processo penale nell'antica Roma*, Milano 1998, p. 175; W. Litewski, *Rzymski proces karny*, Kraków 2003, p. 48; A. Triggiano, *Evidence Given under Torture in Aristotle and Cicero*, "TSDP" 2009, no. 2.

[7] On the subject of torture against slaves, see B. Sitek, *op. cit.*, p. 163 ff.

[8] See Th. Mommsen, *Römisches Strafrecht*, Leipzig 1899 (reprint Aalen 1990), p. 414; U. Vincenti, *'Duo genera sunt testium'. Contributo allo studio della prova testimoniale nel processo romano*, Padova 1989, p. 85 ff.

[9] It can be most clearly seen in Cic., *Dei*. 3.

[10] The existence of this possibility in the case of the the conspiracy (later the *maiestas* crime) was an exception to the ban on the use of the slaves' testimony *in caput domini*. Information about this was provided by Cicero in the fragment *de partitione oratoria* (Cic., *part. or*. 118). The seriousness of this crime justified the possibility of using all means of evidence to identify the perpetrators. Cf. D. Liebs, *Der Schutz der Privatsfäre in einer Sklavenhaltergesellschaft: Aussagen von Sklaven gegen ihre Herren nach römischem Recht*, „BIDR" 1980, vol. 83, p. 150 ff.; R.A. Bauman, *Crime and Punishment in Ancient Rome*, London 1996, p. 52; J. Misztal-Konecka, *'Incestum' w prawie rzymskim*, Lublin 2007, p. 152.

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also raised this argument. The orator refuted the attack of the prosecutors accusing Milo of manumitting all his slaves[11] who had participated in the incident ending with Clodius' death, solely because that made them unable to testify against him before the *quaestio*:

Cic., *Mil*. 57: *Cur igitur eos manu misit? Metuebat scilicet ne indicaretur, ne dolorem perferre non possent, ne tormentis cogerentur occisum esse a servis Milonis in Appia via P. Clodium confiteri. Quid opus est tortore? quid quaeris? Occideritne? occidit. Iure an iniuria? nihil ad tortorem: facti enim in eculeo quaestio est, iuris in iudicio. Quod igitur in causa quaerendum est, indagamus hic: quod tormentis invenire vis, id fatemur. Manu vero cur miserit, si id potius quaeris, quam cur partim amplis adfecerit praemiis, nescis inimici factum reprehendere*.

At first, Cicero showed that there had been no need to call Milo's slaves as witnesses. The tortured would only have to confirm the facts, namely indicate that the incident that led to Clodius' death had actually taken place. The accused did not deny it – there was therefore no need to prove this fact. Milo did not deny that he had killed Clodius either. On the other hand, the decision as to whether it had been lawful did not belong to the person conducting the questioning, as the *quaestio* was intended to establish the facts and these were already determined. The opinion of those questioned in this matter was even less important. The orator also reminded the prosecutor and the gathered audience that it was not allowed to interrogate slaves to the detriment of their owners, so the allegation of the opponents was completely unfounded – even if Milo had not freed the slaves and they would be questioned, their testimony could not have been used against him:

Cic., *Mil*. 59*: De servis nulla lege quaestio est in dominum nisi de incestu, ut fuit in Clodium*.

Cicero further emphasized that torturing slaves could be used against their owner in the event of an *incestum* trial, a crime that Clodius was once accused of, namely the very same man whose murder Milo defended by Cicero was charged with. Quoting this example in this trial was undoubtedly a rhetorical trick intended to remind everyone of what person the victim of the act committed by Milo was.

Publius Clodius was accused of *incestum* in 61 B.C. The basis of the accusation was his disruption of rites in honour of the Good Goddess (*Bona Dea*). Clodius appeared in a female disguise in the house of the then *pontifex maximus* Gaius Julius Caesar, where he arranged a tryst with Pompeia, the wife of the latter.[12] Caesar's

[11] The text Asc., *Mil*. 39C. suggests that none of the slaves whose testimony was sought by the prosecutors was now in Milo's power. After consulting the members of the tribunal, the person conducting the proceedings therefore suggested that they call any number of slaves of the party they represented as witnesses. Clodius' slaves were questioned – Cic., *Mil*. 59.

[12] Sch. Bob., *in Clodium et Curionem*, p. 20, l. 3 ff. (ed. Hildebrandt). On this event, see i.a. T. Łoposzko, *Trybunat Publiusza Klodiusza w świetle źródeł i historiografii*, Warszawa 1974, p. 195;

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slaves did not testify. This was because they were sent to various provinces, most likely just to prevent them from being found and brought to interrogation. The slaves of Caesar's wife were subjected to torture in order to be interrogated.[13] This is an important fact because, in the event of Clodius' conviction (which did not happen, most likely wrongly[14]), Pompeia would have been put on trial and the testimonies given by her slaves could have been used against her.

Finally, it is worth noting that the freeing of slaves participating in the incident on the Via Appia may also have had no implication: Milo might simply have rewarded the slaves for their help in the clash against Clodius.

The exception pointed out by Cicero explains the situation described by Valerius Maximus:

Val. Max. 6.8 pr.-1*: Restat ut servorum etiam erga dominos quo minus expectatam hoc laudabiliorem fidem referamus. 1. M. Antonius auorum nostrorum temporibus clarissimus orator incesti reus agebatur. cuius in iudicio accusatores servum in quaestionem perseverantissime postulabant, quod ab eo, cum ad stuprum irent, lanternam praelatam contenderent. erat autem is etiam tum inberbis et stabat <in> corona videbatque rem ad suos cruciatus pertinere, nec tamen eos fugitavit. ille vero, ut domum quoque ventum est, Antonium hoc nomine vehementius confusum et sollicitum ultro est hortatus ut se iudicibus torquendum traderet, adfirmans nullum ore suo verbum exiturum, quo causa eius laederetur, ac promissi fidem mira patientia praestitit: plurimis etenim laceratus verberibus eculeoque inpositus, candentibus etiam lamminis ustus omnem uim accusationis custodita rei salute subvertit. argui fortuna merito potest, quod tam pium et tam fortem spiritum servili nomine inclusit.*

The antiquarian described the case of a slave who was to testify in a *stuprum* trial against Mark Antony. The prosecutors claimed that this slave had been holding a lamp to guide the owner to a tryst. His testimony would have therefore been that of an eyewitness and constituted the crown evidence against Antony. The slave was tortured, as was customary. He said nothing, however, because he had promised it to his owner. This passage clearly indicates that there is an exception to the prohibition on torture of slaves to the detriment of their owners. Taking a slave to torture in this situation quite clearly indicates the character of the meeting Antony attended. Since the slave's testimony could only be used against the owner in the case of incest, the woman Antony was to meet might have been the Vestal virgin.

H.H.J. Brouwer, *Bona Dea: The Sources and a Description of the Cult*, Leiden 1989, p. 363 ff.; H.S. Versnel, *Inconsistencies in Greek and Roman Religion: Transition and Reversal in Myth and Ritual*, Leiden 1993, p. 229 ff.; R.A. Bauman, *Women and Politics in Ancient Rome*, London 2003, p. 62 ff.; C. Williamson, *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic*, Ann Arbor 2008, p. 380 ff.; M. Beard, J. North, S. Price, *Religions of Rome*, vol. 1: *A History*, New York 2009, p. 129 ff.

[13] Schol. Bob., *in Clodium et Curionem*, p. 28, l. 15 ff. (ed. Hildebrandt).

[14] On this subject, see E. Loska, *Zagadnienie obrony koniecznej w rzymskim prawie karnym*, Warszawa 2011, p. 67 ff. and the literature cited therein.

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Also J. Misztal-Konecka[15] believes that in Republican times the crime of *incestum*, which allowed torture of slaves *in caput domini*, and therefore the one that Cicero described as an exception to the adopted rule, is only the Vestal's sexual offence. Perhaps it was believed that the case of sexual relations with relatives did not threaten the public interest enough to break a fairly fundamental principle of social life.

This changed after the enacting of the *lex Iulia de adulteriis coërcendis*. It ordered that slaves interrogated in adultery cases become public property:

D. 48.5.28.11 (Ulp. 2 *de adult.*): *Iubet lex eos homines, de quibus quaestio ita habita est, publicos esse* […]. *Ratio autem publicandorum servorum ea est, ut sine ullo metu verum dicant et ne, dum timeant se in reorum potestatem regressuros, obdurent in quaestione. 12. Non tamen prius publicantur, quam quaestio de illis habita fuerit*.

Ulpian motivated this solution as follows: slaves confiscated from the current owner will not be afraid to return under the authority of the accused.[16] And this should make them speak the truth during the interrogation. According to the jurist, slaves became public property only after the interrogation. This would mean that the ban on using slaves' testimonies against their owners was practically lifted. However, it is possible that Ulpian knew such a regulation, because it was in force in his time,[17] and the *lex Iulia* itself allowed for purchasing slaves by the state before subjecting them to torture,[18] which made it possible to maintain a formal agreement with the rule binding since the times of the Republic.

Since the times of Trajan, slaves belonging to a husband could be tortured in a case involving his wife.[19] Technically speaking, this was not a violation of the principle of the inability to use the testimony of slaves against their owner, but this regulation appears to conflict with the spirit of this principle.

D. 48.5.28.6 (Ulp. 2 *de adult.*): *Haberi quaestionem lex iubet de servis ancillisve eius, de quo vel de qua quaereretur, parentisve utriusque eorum, si ea mancipia ad usum ei a parentibus data sint. Divus autem Hadrianus Cornelio Latiniano rescripsit et de exteris servis quaestionem haberi*.

Ulpian reported that, according to the *lex Iulia*, all male and female slaves of the person against whom adultery was pending should be heard, as well as slaves of both sexes owned by the parents of the accused if they served them. According to Ulpian, the law issued under Augustus mentioned only slaves owned by the accused person or their parents, while the emperor Hadrian's rescript expanded the

[15] J. Misztal-Konecka, *op. cit.*, p. 154 ff.

[16] Cf. L.F. Raditsa, *Augustus' Legislation Concerning Marriage, Procreation, Love Affairs and Adultery*, "ANRW" 1980, vol. 13, p. 311.

[17] Cf. P.A. Brunt, *op. cit.*, p. 256 ff.

[18] Cf. Dio Cass. 55.5.4 – this fragment relates to the *maiestas* trial.

[19] D. 48.18.1.11.

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circle of people whose slaves could also be tortured to people outside the family. From that moment on, potentially all slaves who could know anything about the case were witnesses in the adultery trial.

During the Principate period, there was a visible tendency to depart from the prohibition of torturing slaves to the detriment of their owners, justified by the gravity of the alleged crime of the person against whom the proceedings were pending.[20] In the light of the sources presented, it can be concluded that since the Empire the testimonies of slaves could harm their owners in trials regarding incest and *maiestas*, as it used to be, as well as those regarding *adulterium*. However, this only happened if they could get some testimony from them. Slaves who chose to remain loyal to their owners were still faithful guardians of their secrets.

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[20] This was confirmed by the imperial constitution preserved in C. 9.41.1

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ABSTRAKT

W starożytnym Rzymie niewolnicy wykonywali wiele różnych zadań. Fakt, że cieszyli się nieraz zaufaniem swoich właścicieli i znali ich sekrety, czynił z nich bardzo pożądanych świadków w procesie karnym. Celem artykułu jest pokazanie przykładowych sytuacji, w których zeznania niewolników w procesie karnym mogły być niebezpieczne dla ich właścicieli. Niewolnicy obligatoryjnie poddawani byli torturom, mogli zatem zdradzić tajemnice wbrew swojej woli. Mimo że obowiązywał zakaz wykorzystywania zeznań niewolników przeciw ich właścicielom, to prawo rzymskie znało jednak od niego kilka wyjątków, w sprawach uzasadnionych interesem Rzymu. Pokazano także zmiany dokonane w okresie pryncypatu, kiedy pojawiło się prawo stanowione regulujące tę kwestię.

Słowa kluczowe: prawo rzymskie; niewolnicy; proces karny