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Articles

Studia Iuridica Lublinensia vol. 32, 2, 2023
DOI: 10.17951/sil.2023.32.2.91-101

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The Institution of the Crown Witness in the Light of the Directive Prohibiting the Exchange of Procedural Roles and Selected Evidentiary Prohibitions of the Polish Criminal Procedure

Instytucja świadka koronnego w świetle dyrektywy zakazu zamiany ról procesowych i wybranych zakazów dowodowych polskiej procedury karnej

ABSTRACT

The institution of the crown witness in Poland was introduced into the legal order in 1997 and its aim was to effectively counteract organized crime, which at that time was experiencing its heyday. Being very controversial from the very beginning, with numerous voices of criticism and approval at the same time, over the years it has consolidated its position and for 25 years has continuously contributed to breaking the conspiracy of silence of the perpetrators of crimes of the greatest severity. The subject of the article is the analysis of the institution of the crown witness in the context of the element of the procedural role of the perpetrator and selected evidentiary prohibitions of the Polish criminal procedure. The author confronts the eponymous institution with the prohibition of changing procedural roles, the prohibition of excluding the freedom of expression of the person being questioned, and the prohibition related to obtaining an evidentiary statement that cannot constitute evidence. The role of these prohibitions is to shape truthful findings in the criminal process and to guarantee its fairness. The procedure for granting the status of a crown witness, which is a kind of compromise between the fairness of the trial and the purpose of the institution, carries the risk of abuse in this area. The

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threat concerns the violation of the principle of material truth and the protection of the procedural position of the accused who has not obtained the status of a crown witness.

Keywords: crown witness; prohibition of changing procedural roles; evidentiary prohibition; criminal process; accused

INTRODUCTION

The procedural institution of the crown witness was implemented into the legal order in Poland by the Act of 25 June 1997 on the crown witness.[1] Its prototype was a model functioning in 18th-century England, according to which the perpetrator of prohibited acts, in exchange for a pardon, was ready to admit to the crimes accused of him and identify other perpetrators. The condition for pardon was the conviction of all persons accused by him.[2] The idea of the institution of the crown witness is to obtain reliable information that will enable people operating in organized criminal groups to be held accountable.[3]

In accordance with Article 2 CWA, a crown witness is a suspect who has been admitted to testify as a witness, in accordance with the rules and procedures laid down in this Act. Until the mid-19th century, the continental criminal trial was a sphere in which two opposing evidentiary principles competed. The principle of the free assessment of evidence and the lawful assessment of evidence, according to which the resolution of legal issues is to be made on the basis of evidence assessed in accordance with the criteria set out in the Crown Witness Act.[4] In the Polish criminal procedure, in which there is a legally defined directive of the free assessment of evidence, Article 7 of the Criminal Procedure Code[5] clearly states that the authorities of the proceedings form their conviction on the basis of all the evidence taken, assessed freely taking into account the principles of correct reasoning and indications of knowledge and life experience. Therefore, only figuratively and in large quotation marks can we conclude that the crown witness in criminal trials with his participation is the main, most important witness.

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[1] Journal of Laws 1997, no. 114, item 738, hereinafter: CWA.

[2] B. Kurzępa, *Świadek koronny. Geneza instytucji. Komentarz do ustawy*, Toruń 2005, pp. 13–14. See also K. Wojtaszyn, A. Kacperczyk, *Świadek koronny. 15 lat doświadczeń*, "Przegląd Bezpieczeństwa Wewnętrznego" 2011, vol. 5(3).

[3] D. Zarzycka, *Analiza instytucji świadka koronnego w Polsce*, "Kortowski Przegląd Prawniczy" 2021, no. 3, p. 5. See also K. Bajda, *Criminological and Forensic Aspects of Selected Areas of Organized Crime in Poland*, "Studia Iuridica Lublinensia" 2021, vol. 30(4), pp. 33–47.

[4] S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2005, p. 254.

[5] Act of 6 June 1997 – Criminal Procedure Code (consolidated text, Journal of Laws 2021, item 534, as amended), hereinafter: CPC. See also *Ciężar dowodu i obowiązek dowodzenia w procesie karnym*, eds. W. Jasiński, J. Skorupka, Warszawa 2017; M. Warchoł, *Ciężar dowodu w procesie karnym. Studium prawnoporównawcze*, Warszawa 2017.

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The presence and role of the crown witness boil down to his duties in the criminal trial.[6] Article 3 (1) CWA treats about it, according to which evidence from his testimony may be admitted if until the indictment is filed with the court as a suspect in his explanations: he provided the authority conducting the proceedings with information that may contribute to revealing the circumstances of the crime, detecting other perpetrators, revealing further crimes or preventing them, he disclosed his property and the assets of other perpetrators of the crime or tax crime known to him, referred to in Article 1.[7] It is also the duty of the suspect to undertake to give comprehensive testimony before the court concerning persons involved in the offence or fiscal offence and the other circumstances referred to in Article 3 (1) (1) (a), the commission of the offence or the fiscal offence referred to in Article 1.[8] Its role, therefore, is to break the conspiracy of silence prevailing in an organized group or union aimed at committing crimes. The information provided to law enforcement by the crown witness leads to the prosecution and punishment of the perpetrators of crimes and to the prevention of further crimes. His procedural situation is determined by what he says, what facts he will reveal.[9]

The subject of this article is a list of procedural prohibitions: the change of procedural roles, the exclusion of the freedom of expression of the person being questioned, and the prohibition related to obtaining a statement of evidence, which cannot constitute evidence with the functioning of the institution of the crown witness. The role of these prohibitions is to protect the procedural position of the accused who has not obtained the status of a crown witness, as well as to shape lawful findings of fact. Compliance with procedural prohibitions on evidence is crucial for the fairness of criminal proceedings. Their importance is also particularly important for the extraordinary procedural institution which is the crown witness, and in fact for a repentant criminal who is applying for such a status. Prohibitions of evidence are an expression of the preference of other goods over the real value of evidence in certain circumstances or are a manifestation of disapproval of certain methods of obtaining evidence.[10]

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[6] See A. Pikulski, M. Adamczyk, *Aspekty wykrywcze świadka koronnego*, [in:] *Doctrina multiplex veritas una. Księga jubileuszowa ofiarowana Profesorowi Mariuszowi Kulickiemu, twórcy Katedry Kryminalistyki, z okazji 35-lecia powołania Katedry na Wydziale Prawa i Administracji UMK*, eds. A. Bulsiewicz, A. Marek, V. Kwiatkowska-Darul, Toruń 2004, pp. 656–373; G. Ocieczek, *Świadek koronny. Ocena wiarygodności*, Warszawa 2016.

[7] Consolidated text, Journal of Laws 2016, item 1197.

[8] *Ibidem*.

[9] See K. Bajda, *The Institution of Crown Witness in the Light of Selected Rules of the Polish Criminal Procedure*, "Roczniki Nauk Społecznych" 2022, vol. 14(1).

[10] S. Waltoś, *Proces karny…*, p. 256. See also T. Biernat, *On the Lawmaking Policy, Discretion and Importance of the Rule of Law Standards*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), pp. 67–85.

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PROHIBITION OF CHANGING PROCEDURAL ROLES

A directive prohibiting the change of procedural roles prohibits acting as a witness and a defendant in the same trial.[11] This means that one of the co-defendants cannot become a witness in the same trial.[12] This is the quasi-situation we are dealing with in the case of the institution of the crown witness. The prohibition on the conversion of procedural roles is linked to the principle of the rights of the defense. The reason for this is that the rights and obligations of the witness and the accused in the trial are different and it is not possible to defend oneself effectively by combining these two procedural roles. There is no effective defense in the situation of conversion of procedural roles.[13]

It should be noted that it is possible to hear a co-accused as a witness. This may be the case if the main hearing against him has not yet begun, his case has been excluded for separate proceedings; the criminal trial against him has already been finally concluded; the criminal trial against him was unconditionally discontinued.[14] If evidence from the testimony of a crown witness is admitted, the first situation applies – his case has been excluded for separate proceedings. Article 7 CWA states that if the court issues a decision on the admission of evidence from the testimony of a crown witness, the prosecutor shall draw up copies of materials concerning the person indicated in the court's decision and exclude them from separate proceedings, which he then suspends. In this way, the legislator[15] bypassed the ban on changing procedural roles. Thanks to this procedure, the crown witness, i.e. *de facto* an accomplice, can act as a witness in a criminal trial in the majesty of the law.

A characteristic feature of this particular type of suspension is that it can only take place in preparatory proceedings. The reason for the suspension is of a legal nature because the law itself requires this suspension in the event of the admission of evidence from the testimony of the crown witness. The impossibility of its rebuttal excludes the possibility of a paradoxical situation in which the investigation against the crown witness continues and the interested party himself, despite statutory guarantees, is brought to court.[16]

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[11] Cf. W. Wassermann, *Zakaz kumulacji ról pokrzywdzonego i oskarżonego w postępowaniu karnym*, "Prokuratura i Prawo" 2014, no. 1.

[12] See M. Błoński, *Zmiana ról procesowych a możliwość wykorzystania protokołów wyjaśnień oskarżonego i zeznań świadka*, "Palestra" 2018, no. 5.

[13] See R. Olszewski, *Kumulacja procesowych ról uczestników polskiego postępowania karnego*, Łódź 2013.

[14] E. Kowalewska-Borys, *Świadek koronny w ujęciu dogmatycznym*, Kraków 2004, p. 126.

[15] Consolidated text, Journal of Laws 2016, item 1197.

[16] *Ustawa o świadku koronnym. Komentarz*, ed. A. Ważny, LEX/el. 2013.

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Not without significance is also the sphere of procedural security of a repentant offender just before the change of his procedural position. It is obvious that it is the criminal who is trying to obtain the status of a crown witness who first reveals his cards. In a straight line, he incriminates himself and the other suspects. If he does not obtain the status of a crown witness, the evidence provided to law enforcement authorities, and these will be procedural materials in the form of interrogation minutes, but not only, will be destroyed.[17] However, some information has been provided. Law enforcement's thought process has been geared toward what is likely to be the right track. The knowledge provided by the would-be crown witness cannot be used directly, but can indicate to the police and the prosecutor's office where to look for evidence. In this sense, the issue of the change of procedural roles undermines the right of defense of a defendant who has not obtained the status of a crown witness.

In conclusion, it should be stated that the institution of the crown witness does not violate the prohibition of changing procedural roles.[18] The procedural conversion of a suspect into a witness is an inseparable element of the functioning of the institution of the crown witness, and this procedure is in accordance with the code standards. However, it may pose a threat to the suspect himself, who has not obtained the status of a crown witness.

PROHIBITION OF EXCLUSION OF THE FREEDOM OF EXPRESSION OF THE PERSON BEING QUESTIONED

"Explanations, testimonies, and statements made under conditions which preclude freedom of expression or obtained contrary to the prohibitions set out in the fifth paragraph shall not constitute evidence". Considering the cited Article 171 (7) CPC against the background of the entire criminal procedure, it should be noted that this is not only a simple violation of freedom of expression, in the form of, e.g., interrupting the argument of the person questioned by the authority conducting this activity, or designing the conditions of interrogation so that noise hinders free speech. The meaning of the provision also focuses or primarily on the decision-making process of the person being questioned. Freedom of expression is, at the beginning, a thought process that results in speech or lack thereof. Therefore, the exclusion of freedom of expression is also the conduct of the procedural authorities that affects the existence of the speech itself. This prohibition also applies to the modelling by the procedural authorities of the statements of the person being questioned. To conduct the hearing

[17] Article 6 CWA (consolidated text, Journal of Laws 2016, item 1197).

[18] Cf. W. Jasiński, *Kumulacja ról oskarżonego i pokrzywdzonego w polskim procesie karnym*, "Państwo i Prawo" 2008, no. 1.

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in such a way as to obtain information which, under conditions of free speech, would not have seen the light of day.[19]

The principle of the prohibition of the exclusion of freedom of expression is "a salt in the eye" of the institution of the crown witness. It seems that only a far-reaching compromise is able to justify the practice of functioning of this institution (in the context of the analyzed principle) at the stage of the preparatory proceedings and during the main hearing.

At the stage of preparatory proceedings, at the moment when law enforcement agencies realize that the evidence gathered in the case is "of a small caliber", and the conviction of the criminal activity of the suspects and determination is high, the search for a person who could help in unraveling the case begins, in effect leading to the punishment of the guilty. During the interrogation of suspects, often someone gives a signal or a signal is directed at him, this is a stimulus that is to break the conspiracy of silence. Then there is a discreet "picking up" of the suspect. This is a semi-official bargain between the criminal and law enforcement. It is at this point that there is a risk of breaking the prohibition on the exclusion of free speech. The most dangerous for the suspect is the use of deception by law enforcement. A legally permissible ruse is ethically questionable.[20] It seems, however, that when a suspect expresses a willingness to cooperate – "he takes the first step", law enforcement agencies will have to discuss with him the appropriate gratification.[21] It cannot be ruled out that the police and later the prosecutor promise to obtain the status of a crown witness for a suspect who decides to provide information about the criminal activities of his environment. It should be assumed that the suspect, who is in a very difficult situation, does not have a command of the Criminal Procedure Code and the Crown Witness Act. He does not know, therefore, that the granting of the status of a crown witness is not decided by the police and the prosecutor's office, but by an impartial and independent court. Of course, the criminal procedure and the Crown Witness Act allow for the possibility of a lawyer present at the interrogation. This is indicated by Article 84 (1) CPC and Article 5 (3) CWA. On the other hand, the absence of a lawyer cannot be ruled out. The claim that the suspect does not have adequate knowledge may prove to be justified. Therefore, if he trusts law enforcement and decides to cooperate, he can in effect contribute to the aggravation of his procedural situation. Without forgetting here the absolute

[19] E. Kowalewska-Borys, *op. cit.*, pp. 139–140. See also D. Kala, *Problematyka swobody wypowiedzi osoby przesłuchiwanej w procesie karnym. Uwagi de lege lata i de lege ferenda*, "Palestra" 1994, no. 7–8.

[20] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 1998, p. 437. Cf. S. Waltoś, *Proces karny…*, p. 358.

[21] E. Kowalewska-Borys, *op. cit.*, p. 141. See also S. Waltoś, *Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym*, "Państwo i Prawo" 1975, no. 10.

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prohibition[22] of obtaining a statement of evidence which cannot constitute evidence, it cannot be ruled out in practice that the information which he provided as a suspect may not directly but indirectly affect his subsequent procedural position (that of a defendant who has not obtained the status of a crown witness). It must be stated without a doubt that the principle of freedom of expression in this respect is undermined.[23] Colloquially speaking, in the clash of the suspect with law enforcement agencies, actions are determined by the goal. The purpose of the police and the prosecutor's office is the indictment, in order for the suspect to obtain the status of a crown witness. The actions of law enforcement agencies may be associated with deception,[24] and thus the exclusion of freedom of expression. The result for the suspect was a fateful decision to cooperate.

The condition for obtaining the status of a crown witness is to provide full and comprehensive explanations and undertake to repeat them before the court already as a witness.[25] A crown witness may not refuse to testify or evade an answer to a question. It is obvious that the crown witness is aware that by not performing the duties about which he was already informed in the preparatory proceedings, he exposes himself to one hundred percent certainty of resuming the proceedings suspended against him. The question must be asked whether this awareness does not affect his freedom of expression? Certainly not. The crown witness will do everything to first obtain and then maintain his status. His "full" statement may therefore have an impact on the knowledge of material truth in a criminal trial. For the sake of his own interests, a repentant criminal can distort or enrich the actual course of criminal events.

The arguments cited do not preclude the functioning of the principle of the prohibition of excluding the freedom of expression of the person questioned in the light of the institution of the crown witness, but they certainly strain it. The consequence of its violation in accordance with Article 171 (7) CPC would be the lack of evidence, i.e. the lack of testimony of the crown witness in the trial. All procedural authorities that come into contact with the institution of the crown witness at every stage of the proceedings should take this into account and approach it with the utmost care and caution to guarantee the lawful conduct of the criminal process and to make truthful findings of fact.

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[22] E. Kowalewska-Borys, *op. cit.*, p. 141. See also A. Baj, *Zakazy dowodowe dotyczące świadka koronnego*, "Prokuratura i Prawo" 2007, no. 1.

[23] E. Kowalewska-Borys, *op. cit.*, p. 141.

[24] See R. Koper, *Problem dopuszczalności stosowania podstępu wobec świadka w procesie karnym*, "Prokuratura i Prawo" 2018, no. 7–8.

[25] Article 3 (1) and (2) CWA (consolidated text, Journal of Laws 2016, item 1197).

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PROHIBITION ON OBTAINING A STATEMENT OF EVIDENCE WHICH CANNOT CONSTITUTE EVIDENCE

This directive consists in proving the content of the explanations that were submitted by the suspect in the process of applying for the status of a crown witness. This prohibition is expressed in conjunction with Article 5a, and its content is contained in Article 6 CWA. These provisions accordingly state: "If the prosecutor conducting or supervising the investigation does not make the request referred to in Article 5 (1), he shall issue a decision on this subject and acquaint the suspect with its content"; "If the public prosecutor has made the decision referred to in Article 5a or the court has ordered a refusal to admit evidence from the testimony of a crown witness, the explanations of the suspect referred to in Article 3 (1) (1) and Article 5 (3) shall not constitute evidence; in such a case, the activities carried out on the terms and in accordance with the procedures set out in this Act shall be deemed not to have been carried out and the following documents shall be destroyed: 1. Decisions on the statement of objections issued on the basis of the explanations referred to in Article 3 (1) (1); 2. The minutes containing the explanations and statements of the suspect referred to in point (1) of Article 3 (1) and Article 5 (3); 3. Requests from the public prosecutor pursuant to Article 5 (1)".[26] It is clear from the provisions cited that in the absence of the status of a crown witness, the information provided by the suspect in the form of protocols is destroyed. This is a guarantee of the exercise of the rights of the defense. This relatively new institution for the Criminal Procedure Code prohibiting the use of certain evidence complies with the guiding principles of the criminal trial.

The *ratio legis* of the analyzed prohibition is primarily not the protection of a suspect in the trial, who aspires to the position of a crown witness, but procedural pragmatism. Comprehensive and honest explanations are desirable for the procedural authorities, which include information that may contribute to revealing the circumstances of the crime, detecting other perpetrators, revealing other crimes or preventing them. In opposition to the desired behaviour, the suspect, in line with his tactic, could remain silent or give false explanations with impunity. Guarantees are needed to tell the truth. They are the ones that make the candidate for the crown witness cooperate.[27] The Crown Witness Act minimizes the risk associated with giving honest explanations to a criminal aspiring to the role of a crown witness, which helps him to make a decision on the issue in question.[28]

The prohibition related to obtaining a statement of evidence is a guarantee of the rights of the suspect and means that by definition his tactics of defense in the

[26] Consolidated text, Journal of Laws 2016, item 1197.
[27] M. Rusinek, *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa 2019.
[28] A. Baj, *op. cit.*, p. 115.

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event of not obtaining the status of a crown witness will be implemented from the starting position. Is this really the case? Procedural practice remains ambiguous. It is worth emphasizing, however, that its functioning has a significant impact on the position of the suspect in the criminal trial. A dispute arose in the literature as to whether it was possible to use it for operational purposes, especially to search for other evidence, information that resulted from the explanations of the would-be crown witness, which was subject to destruction.[29] It is necessary to share the thesis according to which "an attempt to derive an absolute ban on the use of information included in the protocols of explanations of a candidate for a crown witness is doomed to failure in the face of the realities of life. It is difficult to require a law enforcement officer whose consciousness has received certain data not to use them informally to carry out the statutory tasks set before him".[30]

CONCLUSIONS

The institution of the crown witness is one of the most controversial in the sphere of command, legal methods used in criminal procedure. Remaining lawful, it is a kind of compromise between the fairness of the criminal process and the purpose of the institution.

The directive prohibiting the conversion of procedural roles is a consequence of the different rights and obligations of the accused and the witness in a criminal trial. The lack of the indicated solution would make it impossible to defend it effectively. The replacement of roles in the trial is the essence of the institution of the crown witness. He is the perpetrator who committed crimes with the persons against whom he is to testify as a witness.[31] Evidence collections, which are a set of norms prohibiting the taking of evidence under certain conditions or introducing a restriction on their obtaining, are necessary to effectively protect the goods guarded by the legal order. As a rule, the prohibition of evidence reduces the chances of detecting evidence by being a deviation from the material truth, therefore the binding rule is that they apply only to the extent specified by law and in its force.[32] Paradoxically, in relation to the institution of the crown witness, they constitute an incentive for the perpetrator to convey the truthful content.

The role of the analyzed prohibitions in the context of the institution of the crown witness is shaped in two ways. They provide security for the accused who

[29] See *Ustawa o świadku koronnym…*

[30] M. Gabriel-Węglowski, *Ustawa o świadku koronnym. Komentarz. Zarys instytucji w Europie*, Warszawa 2011, pp. 133–134.

[31] E. Kowalewska-Borys, *op. cit.*, p. 126.

[32] S. Waltoś, *Proces karny…*, p. 353.

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has not obtained the status of a crown witness, while at the same time being a guarantee of the implementation of the material truth. Their observance is crucial for the conduct of the criminal trial and respect for legally protected goods, which has a full impact on building trust in the justice system.

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Act of 25 June 1997 on the crown witness (Journal of Laws 1997, no. 114, item 738; consolidated text, Journal of Laws 2016, item 1197).

ABSTRAKT

Instytucja świadka koronnego w Polsce została wprowadzona do porządku prawnego w 1997 r. Jej celem było skuteczne przeciwdziałanie przestępczości zorganizowanej, która w tym okresie przeżywała swój rozkwit. Będąc od samego początku bardzo kontrowersyjną, przy licznych głosach krytyki i aprobaty jednocześnie, z biegiem lat ugruntowała swoją pozycję i od 25 lat nieprzerwanie przyczynia się do przełamywania zmowy milczenia sprawców przestępstw o największym ciężarze gatunkowym. Przedmiotem artykułu jest analiza instytucji świadka koronnego w kontekście elementu procesowej roli sprawcy i wybranych zakazów dowodowych polskiej procedury karnej. Autor konfrontuje tytułową instytucję z zakazem zamiany ról procesowych, zakazem wyłączenia swobody wypowiedzi osoby przesłuchiwanej i zakazem związanym z uzyskaniem oświadczenia dowodowego, które nie może stanowić dowodu. Rolą omawianych zakazów jest kształtowanie zgodnych z prawdą ustaleń faktycznych w procesie karnym i gwarancja jego uczciwości. Procedura przyznawania statusu świadka koronnego, będącego swego rodzaju kompromisem między rzetelnością procesu a celem instytucji, niesie ryzyko nadużyć w omawianej sferze. Zagrożenie dotyczy naruszenia zasady prawdy materialnej i ochrony pozycji procesowej oskarżonego, który nie uzyskał statusu świadka koronnego.

Słowa kluczowe: świadek koronny; zakaz zamiany ról procesowych; zakaz dowodowy; proces karny; oskarżony