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ABSTRACT: The purpose of this doctrinal article is to analyse the latest trends regarding the concept of the place of residence in the field of investigative measures, specifically search warrants, and the specific comparison of the legal framework between the current Code of Criminal Procedure and the preliminary draft of the Code of Criminal Procedure. We will also analyse the peripheral security measures, the so-called "security fence" prior to the execution of a search warrant, and finally, a number of simultaneous measures in relation to the police video documentation of this procedure, in which spontaneous statements by suspects can be captured.

KEYWORDS: Home, seizure, search, spontaneous statements, recording.

INVIOLABILITY OF THE HOME.

The home of any citizen is constitutionally protected under Article 18.2 of the Constitution, which provides that "the home is inviolable and that no entry into or search of the home may be performed without the consent of the owner or a court order, except in cases of flagrante delicto".

Developing this protection, Article 550 of the Code of Criminal Procedure, authorises the examining magistrate to order, in the cases indicated in Article 546, the execution of search warrants, during the day or at night, when the urgent nature of the case so requires, in any building or enclosed place or part thereof, in which any Spaniard or foreigner resident in Spain resides.

In turn, Article 408.1 of the Preliminary Draft of the Code of Criminal Procedure[169]

[169] Draft of the Preliminary Draft of the Code of Criminal Procedure, published at www.mjusticia.gob.es in November 2020. I have taken the text from ALECRIM, bearing in mind the latest legislative proposals of the

(ALECRIM), indicates that "for the sole purposes of this chapter, residence shall be understood as the enclosed place that serves as the occasional or permanent dwelling of natural persons. Any of its dwellers shall be deemed to be the owner for the purpose of permitting entry".

The current Code of Criminal Procedure and in the Preliminary Draft of the Code of Criminal Procedure both develop Article 18.2 of the Constitution based on the double condition of residence being a closed place and also used as a person's dwelling. There are references in the ALECRIM,[170] to search warrants in closed places, which do not constitute a place of residence and require, at least, a certain degree of judicial control.

Now would be a good time to look at the definition of the constitutional concept of residence based on the analysis of this action in the framework of proceedings against public health, as set out in Supreme Court Ruling 69/2021 of 28 January.

The Constitution requires that the restriction of this right be carried out by means of a reasoned order, Article 558 of the Code of Criminal Procedure, and "when there are indications that the accused or effects or instruments of the crime, or books or papers that could be used for their discovery and verification could be found there[171]", Article 546 of the Code of Criminal Procedure.

The duty to provide justification consists of externalising the concurrence of the requirements required by the intervention and in expressing the assessment and weighing[172] that must necessarily be made between the fundamental right affected and the constitutionally protected and pursued interest, in such a way that the need for the measure can be understood (Constitutional Court Ruling 37/1989 of 15 February and 7/1994 of 17 January).

As recalled in the recent Supreme Court Ruling 167/2020 of 19 May, the doctrine of the Constitutional Court has been outlining what the content of a judicial decision authorising the entry and search of a home should be, when this is adopted in criminal proceedings for the investigation of facts of a criminal nature. In Supreme Court Rulings

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Ministry of Justice that have recently appeared, such as the Preliminary Draft for the reform of the Organic Law on the Judiciary, Code of Criminal Procedure and Law 23/2014 of 20 November on the mutual recognition of European Union resolutions, which involves, among others, the comprehensive modification of the figure of the undercover agent, a number of technological investigation measures and joint police and judicial investigation teams. This last Preliminary Draft was published at www.lamoncloa.gob.eson 20 December 2022. We are already aware that the reform of the Code of Criminal Procedure is one of the objectives of the current Government, as is marked among the aims of the Justice 2030 Programme, Preliminary Draft of the Ministry of Justice of December 2020, and it would not be surprising if in the coming months we were to find out about this complete ALECRIM, the third in the last few decades.

[170] Article 422.1. Search warrants in closed places that, under this law, are not considered as a residence shall be carried out by the Public Prosecutor's Office or by the Judicial Police and shall always require the prior authorisation of the Public Prosecutor's Office.

[171] Article 407 of the Preliminary Draft of the Code of Criminal Procedure indicates that the purpose of the search warrant may be to arrest the suspect, the person under investigation or to carry out a search, when sources of evidence, the corpus delicti or other relevant elements for the investigation have to be collected and secured.

[172] Once again, Article 406 of the Preliminary Draft of the Code of Criminal Procedure, in this regard, states that the search of a home shall be authorised, subject to the principle of proportionality and provided that there is no other measure less burdensome for the rights of the person under investigation or third parties affected by the measure.

239/1999 of 20 December 1999, Consideration 4; 136/2000 of 29 May 2000, Consideration 4 and 14/2001 of 29 January 2001, Consideration 8, the essential requirements have been set out: to be sufficient, this statement of reasons must express in detail the judgement of proportionality[173] between the limitation imposed on the restricted fundamental right and the limit thereof, arguing the suitability of the measure, its necessity and the due balance between the damage suffered by the limited fundamental right and the advantage to be obtained.

The judicial body must provide specific details of the spatial circumstances, location of the residence and set out the time and period of the search warrant, and if possible, the personal circumstances of the owner or occupants of the residence in question.

This initial information[174], which is essential to specify the purpose of the search warrant, must be accompanied by the reasons for the judicial decision in a proper and substantial sense, with an indication of the reasons for which such a measure has been agreed upon and a judgement in relation to the seriousness of the alleged facts under investigation. It must also be taken into account whether this is an investigative measure within the framework of a judicial investigation launched beforehand, or a mere police activity that represents the origin of the criminal investigation.

Simple suspicion is not enough to approve such an intervention; evidence is required. In further elaborating on this distinction, in line with the rulings of the Constitutional Court, the suspicions that may serve as a basis for such an intervention are not mere subjective hypotheses, but must be supported by objective data, in a twofold sense. Firstly, in that they must be accessible to third parties, without which they would not be susceptible to control and secondly, in that they must provide a factual basis from which it can be inferred that the offence has been or will be committed, without this resorting to subjective assessments about the person. We have also said, in specifying the foregoing, that it is not necessary to provide comprehensive evidence, since in such a case the action would not be necessary, but rather objective suspicions, which need to be confirmed through the intervention. Prospective interventions, based on mere suspicions and not on prior investigation with duly verified data, are therefore not permitted. Although we have said that such a technique would not be acceptable, when motivated by reference to the police official document in which the measure is requested is admissible.

The suitability of the measure with regard to the purpose pursued is also necessary,

[173] In this sense, the most recent Supreme Court Ruling 935/2022, of 1 December, is worth particular mention, specifically consideration 1. The principle of proportionality offers another legitimising filter, the undermining of which can render evidence unlawful (Art. 11 Organic Law on the Judiciary)), as, in essence, it represents a mention of the principle of prohibition in excess, always adapted to the diligence of investigation in the case in hand.

[174] Article 412.1 of the Draft includes an open catalogue on the minimum content of the search warrant, which extends the current system under the Code of Criminal Procedure and follows the trend introduced by Organic Law 13/2015 to establish the content of court decisions limiting fundamental rights based on police orders, which are also predetermined, and is as follows: a) identify as precisely as possible the place where the search warrant is to be executed; b) determine, in as much detail as possible, its purpose and scope, based on the circumstances known; c) provide details of the Judicial Police officers authorised to enter the home, identifying them by their positions and professional identity numbers; d) if necessary, designate the experts authorised to attend and assist in the carrying out of the search; e) indicate the day and times when it is to take place and whether it is to take place during the day or at night, stating, in the latter case, the reasons justifying this.

i.e. there must be a well-founded suspicion in the sense set out above that evidence may be found as part of the search or that it may be destroyed, together with the non-existence or difficulty of obtaining such evidence by other less onerous alternative means. Finally, there must also be a certain and real risk of damage to legal assets of a constitutional rank if the search warrant is not executed.

PERIPHERAL SECURITY MEASURES. THE SO-CALLED SECURITY FENCE.

On 5 April 2021, the Centre for Legal Documentation (CENDOJ) published the Constitutional Court Ruling 271/2021 of 24 March[175], on the evidentiary value of executing search warrants as a security measure and with the aim of checking that there was no one inside, before obtaining the court warrant for executing the search. It also examines the scope of peripheral security measures, which it describes as the security fence.

Article 567 of the Code of Criminal Procedure indicates that from the moment at which the judge approves the execution of a search warrant in any building or closed place, the appropriate surveillance measures shall be adopted to prevent the accused from escaping or instruments, effects of the offence, books, papers or any other things that are to be the object of the search from being stolen.

It is worth bearing in mind, as stated in Supreme Court Ruling 18/2021 of 15 January, citing Supreme Court Ruling 1021/2012 of 28 December, that the constitutional protection of the home in Article 18.2 of the Spanish Constitution is specified in two different rules. The first refers to the protection of its inviolability as a guarantee that this spatial sphere of privacy, chosen by the person, is exempt from, or immune to, any type of invasion or external aggression by other persons or the public authority, including those that may be carried out without physical entry, but by means of mechanical, electronic or other similar devices, Constitutional Court Ruling 22/1984 of 17 February. The second, as a specification of the first, prohibits two possible forms of intervention in the home, i.e., entry and search, stipulating that, except in cases of flagrante delicto, only entries or searches carried out with the consent of the owner or subject to a court ruling are constitutionally legitimate, Constitutional Court Ruling 22/1984, 17 February.

It is now time to look at the factual basis, the legal reasoning and the conclusions reached by Supreme Court Ruling 271/2021 of 24 March.

The Examining Magistrates' Court no. 2 of Barcelona opened preliminary proceedings for a crime against public health against Mr Carmelo and Mr Cipriano, and once concluded, referred them to the 21st Section of the Court of Appeal of Barcelona, which on 25 June 2018 handed down Ruling 187/2018, setting out the following proven facts: "The premises located in Calle Vistalegre, 9 in Barcelona at least between September and November 2017 was a point of storage and distribution of narcotic substances to other flats or premises in the area by its dwellers, including the accused, Mr Cipriano and at least since 25 October 2017 the accused, Mr Carmelo, together with other individuals who are

[175] Supreme Court Ruling 272/2021, of 24 March 2021, in relation to case no. 2124/2019, handed down by Judge Julián Sánchez Melgar, published in CENDOJ.

not affected by this ruling. Both defendants were involved in the sale of these substances. As part of an investigation into the sale of narcotic substances in the Ciutat Vella neighbourhood of Barcelona, the Guardia Urbana of Barcelona became aware that the premises in question were being used for the distribution of narcotic substances to other flats or premises in the area.

To confirm this information, surveillance was set up on various days between 14 September 2017 and 25 October 2017. As a result, it was found that several individuals were entering and leaving the premises on a regular basis, and control and surveillance measures were adopted at all times in the vicinity of the premises. The accused, Mr Cipriano was identified on several occasions as having a key to the premises which he used to enter and leave or to open the door for visitors, always remaining extremely vigilant. Also, on 25 October 2017, the defendant Mr Carmelo was seen leaving and entering the premises. On 9 November 2017, at around 2 p.m., the accused, Mr Cipriano, again left the premises, carrying a package containing 32.962 grams of heroin, with a heroin base content of 14.6%, i.e. a total amount of heroin base of 4.8 grams, which he intended to distribute to third parties. He was followed discreetly by Guardia Urbana officers. At one point, in the vicinity of the Portal de la Pau, the accused received a phone call and, after becoming nervous, he took a bicycle and discreetly threw the wrapping on the ground, which was picked up by the Guardia Urbana officers who were following him and who subsequently arrested him. Other officers then went to the premises at Calle Vistalegre 9, knocked on the door and the door was opened with keys by the accused, Mr Carmelo. After being asked to leave the premises, he was arrested. After authorisation to enter and search the premises was received by order of Examining Magistrates' Court 31 of Barcelona, the following substances were found inside the premises, specifically on the upper floor, all of which were intended for distribution and sale to third parties: cocaine, ketamine, MDMA, amphetamine and cutting substances as well as drug paraphernalia.

In light of the foregoing, the Court of Appeal of Barcelona sentenced the defendants, Mr Cipriano and Mr Carmelo as perpetrators of a crime against public health relating to substances that cause serious damage to health, as already defined, without there being any aggravating or mitigating circumstances, to a prison sentence of four years and six months, with legal accessories.

Claiming that the ruling was unlawful, under article 849-1 of the Code of Criminal Procedure, the appellant raised several issues in the appeal, some of which are constitutional in content, which we will now analyse.

The offender, Mr Carmelo argued that his fundamental right to the inviolability of the home, as enshrined in Article 18.2 of the Spanish Constitution, had been breached by the entry of police officers into the home, before obtaining the corresponding search warrant and citation in support of Article 567 of the Code of Criminal Procedure that allows the adoption of surveillance measures to prevent the theft of instruments, objects and effects of the crime, but does not allow prior entry for these purposes, and cited precedent where it was maintained that such measures are of a peripheral nature, i.e., carried out outside the building or property to be searched and that the entry into the home of police officers or agents of the authority cannot be legitimised, even when preventive in nature, without presenting a court order or showing such an order to the affected party, expressly citing Supreme Court Ruling 227/2000, of 22 February.

The proven facts of the ruling appealed stated that both the appellant and Mr Cipriano were under surveillance as alleged perpetrators of a crime against public health, as they were engaged in the sale of narcotic substances. The investigation was carried out by the Guardia Urbana of Barcelona. Both were investigated, initially Mr Cipriano and subsequently Mr Carmelo. The operation was brought forward on 9 November 2017 when Mr Cipriano was caught carrying a package containing 32.962 grams of heroin, with an active ingredient of 14.6 percent, and therefore 4.8 net grams of the substance, which he threw to the ground while riding a bicycle, after receiving a call and becoming visibly nervous in the presence of the police. The officers then proceeded to arrest him.

The officers then knocked on the door of the house-premises they were guarding, and after Mr Carmelo opened it with his keys, he was asked to leave and was arrested at that moment. After the arrest, the officers entered the interior "to check that there was no one inside, exited and locked the door and left the surveillance to a uniformed patrol". Indeed, the police entered the property at 3:12 pm, to check whether there was anybody inside, before re-entering the property to search it once they had requested and obtained the warrant, at around 8:00 pm, in the presence of the detainees and the officers of the court.

Based on the application for the warrant signed by the police officers involved, it is clear that the officers knew that the premises to be searched were being used as the residence of both investigated persons. Thus, it is stated that there is a "premises used as a place of residence".[176]

Having determined the facts of the case and considering the arguments put forward by the appellant, the Supreme Court's decision remains to be analysed.

The precedent set by the Court, with some exceptions, considers that the prior entry of the police officers involved cannot be admitted, except in the case of flagrante delicto[177],

[176] It is here, in my opinion, where the crux of this ruling lies. What are commercial premises used for residential purposes, which a person decides to use for free? Here I refer to the recent ruling of the Supreme Court, No. 420/2020, of 22 July about the scope of the constitutional concept of residence with respect to a boat, and which, due to the express reference to the purpose desired and chosen by the interested party, can serve as a starting point for this reflection, noting that "...In the same line, at the time, in Supreme Court Ruling 1534/1999, 16 December, it was argued that given the characteristics of the boat and its exclusive use for fishing, it could not in any way be what the constitutional precept considers to be a residence, its nature being comparable to that of a simple car which, based on the precedent, does not require a warrant for it to be searched as it is not subject to the principle of personal or family privacy". In Supreme Court Ruling 1200/1998, of 9 October, it was stated that in the boat, there are areas reserved for the exercise of personal privacy, which are the only areas protected by the fundamental right enshrined in Article 18.2 of the Constitution. The other areas of the vessel, which are used for other purposes, do not enjoy the protection afforded by the Constitution to the residence, even if these are places in respect of which the owner can validly exclude the presence of third parties". Possibly, in the case in question in Supreme Court Ruling 271/2021 of 24 March, the Guardia Urbana doubted whether the premises or the home were considered premises or a home, and applied for the warrant, when perhaps if the spatial and other circumstances had allowed so, they could have secured the premises and applied for the search warrant specific to the part destined for residential purposes.

[177] Supreme Court Ruling 6/2021 of 13 January indicates, "...that the idea of flagrancy is associated with the perception of the commission of the crime that is being committed, is going to be committed or has just been committed, together with the urgency of the action, generally by the police, although it is clear that this, in itself, does not determine flagrancy. As recalled in Supreme Court Ruling No. 758/2010, of June 30, bearing in mind the legal definition of flagrante delicto enshrined in Article 795.1.1 of the Code of Criminal Procedure, case law has been demanding the following notes to consider the necessary circumstances as having been satisfied: first, the immediacy of the action being undertaken or having been undertaken moments prior, i.e. the face that the offence was being committed at the time or was to be committed in the

which in this case has not been shown by the police officers, nor were there factual elements for this to be deduced. These were, as they indicated, protective measures for the search that was to be subsequently requested from the duty judge.

Therefore, in the case at hand, it is clear that the police officers had no search warrant.

Court authorisation for entry has been taken by the precedent of this Court as a safeguard for verifying this type of precautionary measures, for example, in Supreme Court Ruling 58/2010 of 10 February; however, in the case in question, the agents did not have any authorisation to either enter or search the property.

Supreme Court Ruling 264/2013 of 20 March, sets out that there is plenty of precedent established by this Court that confirm the unlawfulness of entering a property without a warrant. This is the case of Supreme Court Ruling 227/2000 of 22 February, where it is reasoned that the unauthorised entry of police officers or agents of the authority into the home cannot be legitimised, even when preventive in nature, without presenting a warrant and therefore without showing it to the interested party or the person representing them, as the truth is that this constitutes a break-in, without legal justification, with the added impact on the freedom of movement of those inside the home. If, during this situation and until the arrival of the officers of the court, coercive immobilisation measures are adopted or objects seized, this constitutes an exclusive intervention by the police that does not comply with the legal provisions.

The adoption of surveillance measures, as the law calls them, does not permit entry into the home without a warrant.

This is clear from Article 568 of the Code of Criminal Procedure, which states that, once the procedures established in the previous article, i.e. surveillance measures, have been performed, the entry and search shall be performed using force, if necessary. It is therefore only after these measures have been taken that the property can be entered, but not before. In this precedent, it is argued that the eviction of the inhabitant of the property, even when disguised as a precautionary measure for the practice of a subsequent search,

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near future, equivalent to the fact that the offender was surprised at the moment of perpetrating the crime, although this requirement has also been considered fulfilled when the offender is surprised at the time of going to commit the crime or having just committed it; secondly, personal immediacy, which is equivalent to the presence of an offender in relation to the object or instrument of the crime, which represents evidence of this and that the surprised subject has participated in the crime, meaning that the former can result from the direct presence of the offender at the scene of the crime or through the appreciations of other people who warn the police that the crime is being committed. In any case, the evidence can only be affirmed when the trial allows the perceptions of the agents to be connected to the commission of the crime and/or the participation of a determined subject at practically the same time, and if it were necessary to elaborate a more or less complex deductive process to establish the reality of the crime and the offender's participation in it, it cannot be considered an assumption of flagrante delicto; and thirdly, the urgent need for police intervention, in such a way that due to the circumstances at the time, the police are impelled to intervene immediately to prevent the crime from being committed or the consequences of the offence, the arrest of the offender and/or or obtaining evidence that would disappear if court authorisation were requested (recent Supreme Court rulings, in addition to the precedents cited therein, 181/07 or111/10)". In a similar sense, it also indicated, for example, in Ruling No. 423/2016 of 18 May, that there are three elements which, according to the precedent set by this Court, form the backbone of flagrante delicto: the immediacy of the criminal action, the immediacy of the personal activity, and the need for urgent police intervention due to the risk of the disappearance of the effects of the crime.

still constitutes a real de facto violation, as the court authorisation that would have authorised such an intervention had not been issued at that time. And, of course, the presence of a female officer inside the home, called upon to ensure that no effects of the crime under investigation were destroyed while the defendant's partner was changing clothes, lacked constitutional cover. At that time, the examining magistrate had not authorised the entry and search. The mere confidence of the officers that this authorisation will be obtained hours later does not provide any guarantee when it comes to justifying the undermining of the inviolability of the home.

Supreme Court Ruling 925/2007 of 15 November 2007 emphasises, along the same lines, that if this abnormal way of proceeding is given a legal status, this would be tantamount to amending the Code of Criminal Procedure. This is a wholly unlawful way of proceeding, contrary to the constitutional mandate that requires not only court authorisation but also the exclusive role of the court delegates or officers, without ruling out the presence of the authorising judge himself, emphasising that this is a bad precedent that must clearly and unequivocally be stopped by pointing out its absolute incompatibility with constitutional guarantees. The law, even in cases where there is a danger of escape, only authorises fencing operations to control access to and departure from the home in serious cases of urgency and unavoidable necessity.

Supreme Court Ruling 460/2005 of 12 April, furthering this idea, points out that it is precisely the law itself that establishes the exceptions when actions by police officers "on their own authority" (Article 553 Code of Criminal Procedure), are permitted, in violation of the right to the inviolability of the home, restricted to the need to arrest people to prevent their escape or those allegedly responsible for crimes related to armed gangs or terrorism, as well as in cases of flagrante delicto. These exceptions, as is logical in matters of interference with a fundamental right like the one in question, shall always have be given a restrictive interpretation and the requirements are not met here, especially when, as in this case, an attempt is made to justify exceptional action based on the need to adopt measures to ensure the success of the subsequent practice of the evidentiary procedure, which the Law itself expressly reserves to the decision of the judge authorising entry into the home by stipulating that "from the moment the judge approves the entry and search of any building or closed place" (Article 567 Code of Criminal Procedure), therefore, the police officers involved cannot be attributed, beyond what is authorised by the procedural norm, the power to decide to break into the house without having the appropriate court order, at their sole discretion, for the sake of mere investigative efficiency, restricting or breaching a fundamental constitutional right.

We have also cited Supreme Court Ruling 227/2000 of 22 February, where it is held that the prior entry into the home by police officers or agents of the authority cannot be legitimised, even when preventive in nature, without presenting a warrant and therefore without showing it to the interested party or the person representing them, as in reality this is tantamount to a search being carried out, without legal cover, with added effects on the freedom of movement of those inside the home. If, while this situation persists and until the arrival of the officers of the court, coercive immobilisation measures are taken or objects are seized, this would constitute an intervention performed at the exclusive discretion of the police that does not comply with the legal provisions.

This ruling states that the adoption of surveillance measures, as the law calls them, does not allow officers or agents to enter a home without a warrant. This is made clear in

Article 568 of the Code of Criminal Procedure, which stipulates that, once the surveillance measures have been carried out, officers and agents may enter the property using force, if necessary. It is, therefore, only once these measures have been taken that officers and agents can enter and search the property, but not before, since this would not only mean that they are entering the residence without a warrant, but, also, in the event that the interested or affected party opposes such measures, we would be faced with an unlawful situation as provided for in the Criminal Code.

The subsequent arrival of the officers of the court and the production of the warrant cannot remedy the insurmountable defects arising from the unlawful entry without a warrant, meaning that the evidence collected during the search would be rendered ineffective.

Playing down the importance of this by saying that it is common practice is insufficient. The case in hand in Supreme Court Ruling 775/2002 of 17 June referred to the entry of the police into the home to be searched before the Secretary of the Examining Magistrate's Court arrived. If the intervention mandatorily begins by notifying the owner of the property or any of the persons mentioned in Article 566 Code of Criminal Procedure and the notification must logically be made by the Secretary of the Court, there is no doubt that the latter must be present not only during the search but when entering the residence. It may be the case that, once the search warrant has been approved, measures have to be adopted to prevent the escape of the accused or the disappearance of the effects of the offence as provided for in Article 567 of the Code of Criminal Procedure, one of which measures could be, in exceptional cases, the prior entry of the police; however, in these cases it must be the judge who decides on the adoption of these measures[178], with no record in the proceedings subject to appeal that the Examining Magistrate authorised the entry of the police prior to the arrival of the officers of the court.

This precedent is uniform and constant, and when reviewing the Preliminary Draft amending the Code of Criminal Procedure, Article 417 partially reproduces[179] the current wording of Article 567, under the heading of Surveillance measures prior and simultaneous to the entry and search[180] in the following terms: “Surveillance measures may be taken

[178] Do judicial police officers usually request a copy of the order authorising an entry and search? I believe this should be a line to follow for several reasons. First of all, to ascertain the exact and complete scope of the court authorisation, not only the location of the residence, the name of the interested party and the purpose of the search; secondly, the examining magistrate may have agreed on more extensive measures than those requested, such as authorising the police to record the search without the police having made this request; thirdly, the specific security measures prior to the use of force; fourthly, from the moment the agents obtain the warrant, there is safe conduct, as the Supreme Court calls for the adoption of urgent and extraordinary security measures, which could include entering the home to avoid the disappearance of sources of evidence and instruments of the crime, prior to the search. It would be necessary for court decisions authorising a house search to respond to each and every one of the police requests, which should also have, at least, a minimum framework as we have already pointed out with the citation of Article 412.1 of the ALECRIM and which reminds us by analogy and as a limitation of other fundamental rights included in Article 18 of the Spanish Constitution, of the correlation that was established by the legislator in the chapter on technological investigation measures in Article 588 bis b) on the police official report and Article 588 bis c), in the contents of the court decision.

[179] The current wording of Article 567 of the Code of Criminal Procedure is based on a premise that is not reproduced in Article 417 of the ALECRIM, which is that, "as soon as the judge agrees to the entry and search of any building or enclosed space, the appropriate surveillance measures will be adopted". Who adopts the measures under ALECRIM: the Public Prosecutor's Office, the Judicial Police or the Magistrate?

[180] Nothing would prevent ALECRIM from including measures subsequent to the execution of the search, even if they were for a specified period. Consider the not so infrequent situation of a search involving an

prior to and during the entry and search of the property to prevent the escape of the person under investigation or the disappearance, manipulation or concealment of sources of evidence".

Such surveillance measures, therefore, cannot consist of prior entry without a warrant, but rather of peripheral measures, surveillance measures, although the Preliminary Draft could have specified whether these can be ordered by the judge, as is obvious, or also by the judicial police.

Consequently, and as concluded in Supreme Court Ruling 271/2021 of 24 March, as in this case there is an unauthorised event, the evidence becomes null and void, Article 11 Organic Law on the Judiciary, meaning that the evidence obtained during the search is ineffective, resulting in the acquittal of the appellant, Mr Carmelo and although the results of the search are also null and void for Mr Cipriano, this will not affect him as his situation differs from the appellant, as valid evidence was obtained in relation to him, such as the seizure of 32 grams of heroin in his possession to be distributed to third parties. This evidence is not considered unlawful with respect to the above-mentioned search. Furthermore, the accused was seen on several occasions opening the door to those who came to the place where they resided, adopting a variety of security measures; these aspects were correctly evaluated by the Court, together with the drugs in his possession that were seized.

Now, based on the foregoing and in conclusion, as regards the validity and scope of the assurance measures, we can draw the following conclusions: a) the police cannot enter a home before obtaining a court order, except in case of flagrante delicto; b) court authorisation of the entry has been taken by case law of the Supreme Court as safe conduct when it comes to verifying this type of precautionary measures; c) the Law, even in cases where there is a risk of flight, only authorises fencing operations to control exits and entrances to the residence in serious cases of urgency and unavoidable necessity and d) it will therefore only be after taking these measures, when it will be possible to proceed with the entry and carry out the search, but not before, as not only would this entail entering the residence without a court order, but also, in the event that the interested party or affected party were opposed to such measures, they would be considered unlawful, as set out in the Criminal Code.

POLICE VIDEO DOCUMENTATION OF THE EXECUTION OF A SEARCH WARRANT AND ASSUMPTIONS IN RELATION TO THE VALIDITY OF POSSIBLE SPONTANEOUS STATEMENTS.

In the first quarter of 2020, CENDOJ published two rulings of the Criminal Chamber of the Supreme Court, No. 87/2020 of 3 March and No. 679/2019 of 20 January, in which it analysed the validity of the spontaneous statements of the persons subject to investigation. Ruling No. 679/2019 describes the classic position of the Supreme Court, reflected, inter alia, in Supreme Court Ruling 229/2014 of 25 March.

Recently, the Supreme Court Ruling 903/2022 of 17 November, returned to this issue.

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indoor marijuana plantation and subsequent to the seizure of the narcotic substance, the illegal connections for electricity, electrical panels, ventilation systems, halogen lights, radiators or transformers have yet to be safely removed...

This section connects to the above section, in relation to certain police practices that may have be significant in the investigation of offences and that, either prior to or during the execution of a search warrant, could put an end to habits that, due to the negligence of the legislator, have not been addressed in Law beyond commendable precedents set on actual daily circumstances. Where previously we haven spoken of security measures before entering and searching a property, there are other measures that are coterminous with this procedure and guarantee due compliance with the judicial order.

The only mention in the Code of Criminal Procedure as to the documentation of entry and search proceedings appears in Article 569, which states that the search will always be carried out in the presence of the lawyer of the authorising Court or the lawyer of the duty service substituting the former, who will draw up minutes, the procedure followed and any incidents, to be signed by all those present.

Nothing is said about the possibility of the use of audiovisual recording devices by the law enforcement agencies, an almost recurrent action in all search and entry procedures given the frequent use of this procedure.

Article 420 of the ALECRIM, states that 1. A record of the search shall be drawn up by the lawyer of the Administration of Justice, identifying the place and date on which it was carried out, the time it began and ended, stating the reasons justifying the search, the corresponding description and the outcome, in the order in which it was carried out, the persons who took part in it and any incidents that occurred, listing in sufficient detail the effects and objects seized. The minutes shall be signed by all those present and adds, 2. The search may be documented by means of audiovisual recording systems and, where appropriate, by taking photographs.

Looking at these two provisions and with knowledge of daily practices, two questions arise. The first, whether the Judicial Police usually request judicial authorisation to use audiovisual recording mechanisms for entry and search proceedings, without prejudice to the minutes taken by the lawyer of the Administration of Justice, and the second, if a criminal participates or spontaneously communicates a vital piece of information to the investigation at the time of the search, even should they later retract this in court, and this statement is not included in the minutes of the lawyer of the Administration of Justice but is included in the police recording authorised by the courts, what validity would this have?

This is not a question of replacing the role of the lawyer of the Administration of Justice, obviously, but of standardising a police action that is increasingly used and whose scope may be much more extensive than we might apparently think. Evidently, public faith and police action are categories of actions that orbit on qualitatively and legally different planes. Nor are we talking about sound recording as a technological measure, this has nothing to do with the matter as they are two totally different tools and with a different purpose, and what we are proposing here is rather an investigative additive to the lawyer of the Administration of Justice's minutes because the Judicial Police will already know first hand and with more certainty when carrying out the search and within the limits of the judicial authorisation, what may be of greater relevance to the investigation and on what to focus the recording and when a spontaneous statement by the affected party may occur, although this leads to another question: when are we in the presence of a true spontaneous statement and what is its scope?

Ruling No. 229/2014 of 25 March, established when we were dealing with a spontaneous statement and how it was assessed as evidence. It stated in its 8th court consideration that "...The statement of the accused to the police that has not been ratified by the court cannot serve as evidence for the prosecution." The spontaneous statements made a suspect may be used as evidence when they were made pursuant to the formalities and guarantees established by the procedural order and the Constitution, and were also reproduced at the oral trial in such a way that the defence could exercise its right to contradict them. The following cases are spontaneous statements: 1) Voluntary appearance before the officers, who were unaware of the person's involvement in a criminal act; 2) A statement that occurs spontaneously, without any interrogation, when the police officers approach a suspect at the place where they are caught, immediately next to the scene of the crime; 3) An unprovoked statement followed by the provision of an essential piece of factual information unknown by force, which is then verified as valid; and 4) Responses to specific questions about the facts under investigation, made by the police officers responsible for the investigation, at the police station itself and after the suspect has been taken to the police station by the officers in charge of the investigation are not considered spontaneous.

The assumption of fact analysed in this section, the police video documentation of an entry and search procedure, corresponds to sections two and three previously cited in the Supreme Court Ruling, spontaneous statement without interrogation and unprovoked statement with the provision of essential factual information.

Ruling No. 229/2014 goes on to say in its 8th court conclusion that "...The sentencing Chamber considers that spontaneous statements by a detainee to police officers, either at police stations or during their transfer, have been considered sufficient to undermine the presumption of innocence when they were made pursuant to the formalities and guarantees that the procedural order and the Constitution establish, and were also reproduced at the oral trial in such a way that the defence could exercise its power to contradict them, constituting one more type of evidence that the Court could take into consideration, in relation to the other means of evidence in the exercise of the power to assess said evidence that corresponds to the ordinary jurisdiction...".

The problem posed by the case in hand involves determining whether the statements made by the accused in the presence of the police prior to his formal statement with a lawyer present can be considered, based on established case law, asspontaneous statements that can be used as evidence against him.

And the answer has to be a resounding "no".

In this case, we are not dealing with a spontaneous declaration, rather an interrogation without a lawyer present. The accused was under investigation for a specific act, namely the robbery to which these proceedings refer. The Guardia Civil went to look for him at the Rehabilitation Centre for Drug Addicts where he had been detained, and took him to the police station. Once there, a preliminary interrogation began, without a lawyer as there was still no formal police charge against the appellant, in which he was asked specifically about the day of the robbery, and specifically about what he had done on that day. It was at this point that the appellant, a drug addict who was being interrogated without legal assistance at a police station, allegedly burst into tears and stated that he had participated in the robbery in question. The police then

informed him of his rights and called the lawyer, and the statement was subsequently repeated in the presence of the appointed lawyer. It is clear that these statements cannot be qualified as spontaneous statements that could be validly considered as evidence for the prosecution if they are reproduced during the oral trial as part of referential testimony.

Responses to specific questions about the facts under investigation, asked by the police officers in charge of the investigation, at the police station itself and after the suspect has been taken to the police station by the officers in charge of the investigation cannot be considered spontaneous.

This does not constitute a voluntary appearance before the officers, nor is it a statement that occurs spontaneously, without any interrogation, when the police officers approach a suspect at the place where they are caught, immediately at the scene of the crime, or an unprovoked statement followed by the provision of an essential factual piece of information unknown by force, which is then verified as valid, such as, for example, when the suspect spontaneously states that they have committed a crime and that they have disposed of the weapon nearby, with the weapon consequently being found there.

It would be considered real procedural fraud if, while self-incrimination with the assistance of a lawyer, not ratified in court, does not constitute evidence against the accused, the same self-incrimination as part of a preliminary interrogation, without a lawyer present and without the accused having been informed of their rights, to be admitted as valid evidence against the accused.

These statements, made during a preliminary interrogation at police headquarters, which have not been ratified either during the oral trial or before the examining magistrate, must also be excluded from the body of evidence.

The second Supreme Court ruling that provides even greater clarity on the assessment of spontaneous statements is No. 679/2020 of 23 January.

The 5th court consideration, which sets the precedent regarding the validity of spontaneous statements, citing numerous decisions, states that the Supreme Court has granted value to spontaneous statements made by the detainee before being assisted by a lawyer under certain conditions.

Thus, the Supreme Court Ruling of 7 February 1996, appeal number 623/1995, in view of the statements of the person arrested, having been informed of his rights, without any lawyer being present, and which facilitated the arrest of the couriers, indicates: "There is no obstacle whatsoever for those arrested at a police action to provide information in the heat of the moment, spontaneously, freely and directly, which allows the investigation to continue or be completed and preliminary arrests to be made, provided that this information is later incorporated into the police report with all the legal guarantees and is verified throughout the proceedings and at the time of the oral trial".

The validity of this type of spontaneous statement is reiterated by Supreme Court Ruling 795/1995 of 2 November, especially "if it is not directly incriminating for the person who makes it and provides information that was corroborated by the accused himself at the time of the oral trial"; and Supreme Court Ruling 1571/2000 of 17

October, which states that the witness statements made during the oral trial by the police officers who received the spontaneous statements made by the accused, after their arrest and once they had been verbally informed of his rights, to the effect that they did not find anything in the search of their vehicle because the drugs were being transported by the other co-defendants, which was later verified, constitute valid evidence.

Supreme Court Ruling 156/2000 of February 7, indicates that no law prohibits detainees from making, voluntarily and spontaneously, certain statements to the authority or its agents, confessing their guilt and even offering to collaborate with them, whatever the motives may be for their conduct or the purpose pursued, whether to avoid the exhaustion of the criminal action, consider the possibility of reporting the location of explosives placed somewhere, the intention of those involved to kill a certain person, etc., whether to avoid the disappearance of the tools, effects or instruments of crime, consider cases involving the deposit of weapons or explosives, the body of the crime, etc., either to avoid causing damage to third parties or to try to reduce the effects of criminal action, since this type of conduct, the effectiveness of which may depend in many cases on the urgent intervention of law enforcement agents authority, are expressly provided for in the law itself as circumstances that can mitigate the responsibility of criminals and that, in any case, should be strengthened as confluent for the purpose of justice and, ultimately, the social interest. From this perspective, it must be emphasised that, in the case in question, the statements made by Abdelazid to the Guardia Civil, after being arrested and before being informed of his rights, were made voluntarily and spontaneously, together with his decision to collaborate with the agents of the authorities in the search for the boat used and the drugs transported on it. Such conduct, for the reasons indicated above, cannot be considered to be contrary to the legal order. It is a different matter, however, for these statements to be recorded in writing in the police report drawn up in connection with these events and signed by the detainee. The investigators cannot formalise this type of statement in writing without first informing the detainee of his or her rights. However, this unlawful status is not considered a constitutional infringement in relation to the application of Article 11.1 of the Organic Law on the Judiciary, rather it must be classified as a simple infringement of ordinary legality, Article 238.3 Organic Law on the Judiciary, with the impact that the proceedings carried out as a result must be considered null and void and, therefore, totally ineffective from the perspective of their possible evidential effectiveness, which, furthermore, cannot be corrected; however, this does not affect the validity and possible evidential effectiveness of subsequent proceedings carried out in full compliance with legal and constitutional requirements, Article 242.1 Organic Law on the Judiciary.

Supreme Court Ruling 426/2006 of 12 April also considers these spontaneous statements before the police to be lawful and, therefore, usable. The detainee, who had stated that he would exercise his right to remain silent, commented to the officers on the involvement of another person in the events while he was being transferred. The right to remain silent, according to the aforementioned resolution, does not extend to the free and spontaneous statements that the detainee wishes to make. What is prohibited is the interrogation of the detainee, before they are informed of their rights or when the right to remain silent has already been exercised; this does not apply to statements heard by police officers.

Although this is a mere *obiter dicta* and not the decisive cause for the appeal to be upheld, the Supreme Court Ruling 1030/2009 hints at a dissenting criterion. “Statements

made spontaneously to police officers by an accused person, who has already been arrested, cannot be considered as evidence for the prosecution if they are not reiterated before the court authority in a statement made with all the guarantees of the law. Constitutional Court Rulings 51/1995 and 206/2003, inter alia. Firstly, because the statement of the accused, and even more so if they have been detained, is only valid, to any effect, when subject to the guarantees imposed by the Constitution and the law, when they have been informed of their rights and have adequate legal assistance; these provisions are aimed at ensuring that the statement is given voluntarily and freely. Secondly, because only before the judge is it possible to pre-constitute evidence, leading to the rejection of any statement made before agents of the authority having proper and autonomous evidential value, when they are not later ratified before the court authority with all the necessary guarantees". However, it should be noted that what cannot be assessed is the initial statement, not its subsequent reiteration.

Supreme Court Ruling 655/2014 of 7 October, similarly warns of the validity of this evidence, notwithstanding the exercise of caution: "We are dealing with spontaneous statements by the accused, which he has not ratified in the presence of the court. This is evidentiary material that has to be assessed with caution, so that it cannot be refuted that it has been obtained without infringing the rights of the accused". Supreme Court Ruling 637/2014 of 13 March, prohibits any interrogation being made before the accused being informed of their rights or when the right to remain silent has already been exercised; although this does not extend to police officers hearing statements.

Supreme Court Order 1117/2014 of 26 June, states in this regard that "this type of statement, which is effectively spontaneous and not provoked by a formal interrogation by the police forces, are accepted by this Chamber to be assessed as evidence, if it is established that they were made respecting all the formalities and guarantees that the procedural system and the Constitution establish, in an absolutely voluntary and spontaneous manner, without any coercion whatsoever".

In turn, Supreme Court Rulings 365/2013 of 20 March, 229/2014 of 25 March, 534/2014 of 27 June and 721/2014 of 15 October, state that "when the police officers approach a suspect at the place where they are caught, immediately at the scene of the crime, or an unprovoked statement followed by the provision of an essential factual piece of information unknown by force, which is then verified as valid, such as, for example, when the suspect spontaneously states that they have committed a crime and that they have disposed of the weapon nearby, with the weapon consequently being found there. This type of statement, which is effectively spontaneous and not provoked by a formal interrogation by the police forces, are accepted by this Chamber to be assessed as evidence, if it is established that they were made respecting all the formalities and guarantees that the procedural system and the Constitution establish, in an absolutely voluntary and spontaneous manner, without any coercion whatsoever and when they are duly included in the oral trial as part of a statement, subject to cross examination, by the agents who witnessed it, but in no case did they provoke it.

This Supreme Court Ruling ends with the citation of Supreme Court Ruling 229/2014 of 29 March, which we have seen previously and which endorses its assessments years later.

The third ruling is No. 87/2020 of 3 March, handed down in a case in relation to an offence against public health.

The assumption of fact represents solid evidence, along with many others of an incriminating nature such as wire tapping, monitoring, witness statements and statements by co-defendants, inter alia, as to the specific behaviour of the defendant, who spontaneously, the day after the proceedings, appeared at the Barbate barracks of the Guardia Civil, indicating that he had learned that he was being sought by the Guardia Civil, and later, at 1:50 p.m., without being detained, as reflected by the record that he himself signed, stating that he "acknowledges being involved, although he claims to be a mere mediator between them and that he wants to state who the perpetrators of the crime are," and it is not treated, as the appellant claims, as a confession without any effect made without a lawyer for which he asked for a reduction in the sentence, which was not granted, but for a spontaneous statement of his client before the agents of the authority that reinforce his unlawful conduct, given that the evidence is objective, solid, plural and must be valued as a whole, not each one separately.

Citing this Supreme Court Ruling No. 87/2020, the Supreme Court Ruling No. 376/2017 of 24 May, when stating that the Supreme Court accepts an unprovoked statement followed by the provision of an essential factual piece of information unknown by force, which is then verified as valid, such as, for example, when the suspect spontaneously states that they have committed a crime and that they have disposed of the weapon nearby, with the weapon consequently being found there as spontaneous statements. This type of statement, which is effectively spontaneous and not provoked by a formal interrogation by the police forces, are accepted by this Chamber to be assessed as evidence, if it is established that they were made respecting all the formalities and guarantees that the procedural system and the Constitution establish, in an absolutely voluntary and spontaneous manner, without any coercion whatsoever and when they are duly included in the oral trial as part of a statement, subject to cross examination, by the agents who witnessed it, but in no case did they provoke it.

Supreme Court Ruling no. 89/2020 concluded by stating that, although thespontaneous statements of the appellant cannot be considered as a confession given with all the guarantees, it can be considered as additional evidence, as the Court of First Instance did, given that he appeared at the police station, he was not in custody, nor was he interrogated in any way, as the agents in the oral trial highlighted, and as can be seen from page 56 of the proceedings, and thus the interpretation made by the Court is supported by objective and fully accredited evidence or basic facts that allow the version of the accused to be refuted and corroborate the consequent facts and the incriminating conclusion reached in the judgement. There are several pieces of evidence analysed by the Court, which are solid and convergent, that make it possible to confirm the appellant's authorship beyond any reasonable doubt, which have been proven and which are assessed as a whole, not individually as the appellant does, interrelated with each other, and which lead to the necessary outcome maintained by the Court of First Instance.

The fourth and final Supreme Court Ruling is the recent No. 903/2022 of 17 November, which studies the cassation appeal filed for an alleged constitutional violation, under Article 852 of the Code of Criminal Procedure and 5.4 of the Organic Law on the Judiciary, of Article 24 of the Spanish Constitution, in relation to the

presumption of innocence and the assessment of the spontaneous statements made by the accused to the police and the lawfulness and sufficiency of evidence and the right to a procedure with all the necessary guarantees.

The alleged offence involves a crime against public health in relation to substances that cause serious damage to health, investigated by the 17th Magistrates' Court of Madrid and once it was brought before the Court of Appeal, a sentence was handed down on 15 September 2020, sentencing the accused to three and a half years' imprisonment together with accrued and past due interest, court costs and legal expenses. In its assessment of the witness evidence, it emphasised that when the agents proceeded to arrest the accused, the latter, in a clear intention to collaborate with the police, acknowledged the sale and the activities they had been carrying out at the time, claiming to have been going through a bad patch.

The Supreme Court of Justice upheld the sentence handed down by the Court of Appeal on appeal, as the incriminating evidence was direct and consisted of the statements made by the three Madrid municipal police officers and the fact that the substance was found to be cocaine, with the weight and purity reflected in the statement of proven facts, having also assessed the rest of the evidence to base a conviction on all this, which, even if the defence does not logically agree with it, they understand the criteria employed by the Magistrates' Court to hand down said sentence. It added that the defence makes a blatant error in classifying the witnesses, police officers, simply as reference witnesses, ignoring the fact that they do not testify only in that capacity, but are also direct witnesses, who report what they saw and the result of their actions, the essential part of their testimony, combined with the involvement of drugs, being the substantive and sufficient basis to undermine the principle of the presumption of innocence of the accused and to hand down a guilty verdict. What matters, in reality, are the facts conveyed to the court a quo, not the assessments or conclusions made, notwithstanding their value, as an explanation of the perceived facts themselves".

In its cassation appeal, the defendant's defence once again provided a lengthy account of the fact that their client did not recognise the facts, although it is irrelevant that the appellant then denied the facts did does not recognise their responsibility when the events were witnessed by the officers involved and after the intervention there is a conversation between the officers and the appellant, who, not as part of a technical interrogation, recognised that he had the drugs in their possession, as reflected in the proven facts with the description of the wrappers that were seized and the scales. The appellant denies that it was a case of self-incrimination and rules out the existence of evidence for conviction, refuting the agents' claims, as well as the fact that the witness they requested was not brought to trial, notwithstanding which, it is a question of assessing the sufficiency of the evidence for the prosecution and this has been expressed by the magistrates' court and by the Supreme Court of Justice and we have already stated that the Court of Appeal cannot become a third forum for the re-evaluation of evidence, which is what is sought with the content of the first two grounds, giving a different version of the existing evidence and questioning the content of the assessment of the evidence.

As a result, in this case, although disputed by the appellant, the appellant's statement was not even made at the police station, rather as part of a conversation with the officers and it is there that the drugs with the cocaine wrappers were collected and then taken to the oral hearing by the officers regarding how they found the drugs and the

appellant's statement. There is no evidence that is considered null and void, or that cannot be taken into account when the precedent applicable in these cases has been complied with through the agents' statement of what happened, what they saw as part of the transaction of drugs for money, the immediate apprehension of both, and the appellant's expression with respect to what appears in the proven facts set out by the agents at the plenary session and correctly assessed by the magistrates' court and validated by the Supreme Court of Justice as sufficient evidence for conviction.

Having analysed all the above, we can reach the following conclusions: a) The spontaneous statements of those under investigation can be taken as further incriminating evidence, when they are included in the process with all the guarantees, which will generally be the ratification in police and court proceedings, with legal assistance. We are in the first phase of the process, in the investigation, as part of which we assess indications that allow us to advance in the investigation; b) No law prohibits detainees from making, voluntarily and spontaneously, certain statements to the authorities or their agents, confessing their guilt and even offering to collaborate with them, either to avoid exhausting the criminal action, or to avoid the disappearance of the tools, effects or instruments of crime, or to avoid causing damage to third parties; c) It would be very appropriate, if not mandatory, for the Judicial Police to include an express request for authorisation to use audiovisual recording mechanisms of the aforementioned procedure as part of police applications for search warrants, which will generally refer to the filming of objects and not people, but that nothing prevents them from capturing these spontaneous statements made by suspects; d) The way of incorporating the statement captured by the Judicial Police, sometimes also by the lawyer of the Administration of Justice, into the criminal process, would be the contribution of video support as legal evidence together with the identification of the agents who captured the aforementioned statements and, where appropriate, also, those of anybody who heard them. The lawyer of the Administration of Justice's minutes has the value of a documentary evidence of the search and of what was seized during the search and the police recording, of a mere indication and never proof; e) If a suspect spontaneously stated, without any interrogation and without any type of coercion, who had participated in a criminal act and that statement had been recorded on video, the use of which was requested by the police and authorised by the court, it would be perfectly valid to initiate a line of investigation based on that information, taken by the Judicial Police with other evidence that complements that statement.

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