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REVIEW OF CASE LAW 2TH CHAMBER OF THE SUPREME COURT

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1.- MURDER / REQUIREMENTS FOR CONSIDERING CONFESSION AS A MITIGATING CIRCUMSTANCE STS (Supreme Court Ruling) 44/2023, of 30 January[1].

1.1.- Factual background.

The Investigating Court Number 9 of Granada instructed jury case no. 2/2020 against Eulogio, for the crimes of murder and illegal possession of weapons and once concluded, referred it to the 2nd Section of the Provincial Court of Granada, which in jury case Number 1/2021, handed down sentence Number 400/2021 dated 26 October 2021, containing the following proven facts: At around 2:30 p.m. on 8 February 2020, the defendant Eulogio, of legal age, with a criminal record not computable for the purposes of recidivism, approached Héctor, aged 31, in the vicinity of the so-called Puente de la Virgen in the town of Pinos Puente. The two has previous disputes in the past. On that day, they started an argument over the parking of Héctor's vehicle in the aforementioned street, as Eulogio believed that it was obstructing the circulation of cars in the street, particularly his own. In the course of their argument, the defendant, surprisingly and with the intention of causing Héctor's death, with a previously modified shotgun, with the

[1] CENDOJ Database (Judicial Documentation Centre), STS 44/2023, Criminal Section 1 of 30 January 2023 (ROJ (Official Register of Jurisprudence): 254/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:254). Rapporteur H. E. Mr Juan Ramón Berdugo de la Torre.

barrels and stock cut down, 12 gauge, shot Héctor, resting its barrel at a very short distance in the area of the right ear, and slightly from the back towards the front, without the latter being able to react. The injuries described above resulted in Hector's immediate death. The accused then went to the Guardia Civil station and said to the officers present "Yes, I'm the one who fired the shots, he's lying there. I did it the way guys do things" and then handed over the shotgun used.

1.2.- Legal grounds.

This judgment analyses two substantive issues. On the one hand, the presence of treachery and, on the other, the absence of the mitigating circumstance of confession.

From such factual account presented, the presence of treachery cannot be questioned. With regard to its nature, although this Chamber has sometimes emphasised its subjective nature, which implies greater culpability, and at other times its objective nature, which implies greater unlawfulness, in recent times, while admitting its mixed nature, it has emphasised its predominantly objective aspect, but demanding a plus of culpability, as it requires a prior choice of available means, it being essential that the offender has represented an action that suppresses any possible risk and any possibility of defence on the part of the offended party and that the agent wishes to act in a way that is a consequence of what was planned and represented. As for the elimination of any possibility of defence by the victim, it must be considered from the perspective of actual effectiveness, being compatible with defensive attempts inherent in the instinct of self-preservation" (STS (Supreme Court Ruling) 13 March 2000).

For this reason, this Chamber, starting from the legal definition of treachery, invariably refers to the concurrence of the following elements (STS 155/2005 of 15 February and 375/2005 of 22 March): a) Firstly, a regulatory element. In the first place, treachery can only be projected onto crimes against persons. b) Secondly, an objective element that lies in the *modus operandi*, that the perpetrator uses means, ways, or forms that must be objectively adequate to ensure the elimination of defense possibilities, without the perpetrator's conviction regarding its suitability being sufficient. Thirdly, a subjective element, that the perpetrator's intent is not only directed towards the use of the means, ways, or forms employed, but also towards their tendency to ensure the execution and their orientation to prevent the defense of the victim, thus consciously eliminating the possible risk that a defensive reaction by the victim could pose for their person. That is to say, the agent must have intentionally sought to produce death through the means indicated, or at least to take advantage of the situation of ensuring the result, without risk and d) fourthly, a teleological element, which imposes the verification of whether in reality, in the specific case, a situation of total defencelessness was produced, it being necessary to appreciate a greater unlawfulness in the conduct derived precisely from the modus operandi, consciously oriented towards those ends (STS. 1866/2002 of 7 November 2002).

Among the different executive modalities of a treacherous nature, this Chamber, for example STS 49/2004 of 22 January, has been distinguishing: a) prodigious treachery, equivalent to treason and which includes lying in wait, insidiousness, ambush or trap, situations in which the aggressor hides and falls upon the victim at a time and place that the victim does not expect; b) sudden or unexpected treachery, also called "surprise", in which the active subject, even in sight or in the presence of the victim, does not discover

his intentions and taking advantage of the victim's trust, acts in an unforeseen, dazzling and sudden manner. In these cases, it is precisely the surprise nature of the aggression that eliminates the possibility of defence, because the person who does not expect the attack can hardly prepare for it and react accordingly, at least as far as possible. This type of treachery is appreciable in cases in which the attack is carried out without prior warning; c) treachery of helplessness, which consists of the utilisation of a special situation of helplessness of the victim, as in the case of young children, weakened elderly, seriously ill or disabled persons, or because they are accidentally deprived of the suitability to defend themselves (asleep, drugged or drunk in the lethargic or comatose phase) and d) As for sudden treachery, it occurs while it is not present at the beginning of the action, but after a temporary interruption, the attack is resumed, thus in a different form or manner, during which the utilisation of the defencelessness of the victim arises, favoured by the intervention of third parties or also by the agent himself (SSTS (Supreme Court Rulings) 1115/2004 of 11 November, 550/2008 of 18 September, 640/2008 of 8 October, 790/2008 of 18 November).

The second element to be studied in this judgment is the existence of the mitigating circumstance of confession.

Indeed, it is true that the accused, immediately after the incident, went to the premises of the Civil Guard of Pinos Puente and told the agents present there "Yes, I'm the one who fired the shots, he's lying there. I did it the way guys do things". What happens is that, from that moment on, his eagerness to collaborate with the authorities for an objective clarification of the facts lacks any probative support, because in various judicial proceedings, investigation and trial, the accused has been offering a version of events that is very different and completely distorted from what actually happened, and also in substantial aspects of it, which prevents the aforementioned mitigating circumstance of confession from being appreciated. Beginning with his statements in the plenary session, it is worth remembering that this intervention was described in the Jury's sentence as a "novel exculpatory version", and that the accused, at trial, offered a totally different version of the facts to the one he gave on the day of the events before the Civil Guard officers in Pinos Puente. Not on collateral aspects of it, but on substantial aspects which, according to him, had a bearing on the fortuitous or accidental nature of the result of the death of Héctor, the victim.

The accused claimed in the trial that Héctor had shot at him first, and that, for that reason and out of fear, he went into his house to get hold of two weapons, and that when he went out to the street again and found Héctor there, now disarmed, they struggled, and as a result of this last action, a shot was accidentally fired. The Jury's verdict decisively rejected this version of events, which was clearly exculpatory and contradicted what actually happened. It is also noted that during the investigation of the case and before the trial, the defendant's statements already substantially diverged from what was stated in the presence of the Civil Guard, even when he was examined by the forensic doctors assigned to the Institute of Legal Medicine of Granada, he claimed that he went to confront the victim to scare him and accidentally shot him during the struggle.

In short, the defendant's attitude during the trial, aside from the initial act of going to the Civil Guard station to briefly and without any sign of remorse describe the events, contrary to what the mitigating circumstance requires, has not contributed in any way to the objective clarification and determination of the events that occurred, but has also

somewhat hindered the investigations into them. Therefore, recognizing this mitigating circumstance goes against a consolidated and repeated jurisprudential doctrine that requires the confession to be truthful in substance and to be maintained throughout the different statements made during the trial, also in substance.

1.3.- Conclusions

1) In terms of the legal nature of treachery, although the Supreme Court has sometimes emphasized its subjective nature, which implies greater culpability, and other times its objective nature, which implies greater unlawfulness, in recent times, while admitting its mixed nature, it has highlighted its predominant objective aspect but requires the added element of culpability. It is essential that the offender has represented to himself that his action eliminates any possible risk and any possibility of defense from the victim and desires to act consistently with the projected and represented outcome.
2) In summary, with regard to the mitigating circumstance of confession, it is clear that, applying the consolidated jurisprudential doctrine on the truthfulness and persistence of the confession to the case under examination, the mitigating circumstance of confession under article 21.4 of the Criminal Code, included on appeal by the contested judgment, is not admissible and must be rejected because the defendant, in the different statements made both in the investigation phase and in the trial, has presented an absolutely untrue version of the facts in all substantial aspects in order to completely evade criminal responsibility, thus attempting to distort the reality of what happened and hinder the investigation of the facts.

2.- MAIN DIFFERENCE BETWEEN CRIMINAL GROUP AND CRIMINAL ORGANISATION. STS 130/2023, of 1 March[2].

2.1.- Factual background

The Investigating Court Number 2 of Algeciras initiated preliminary proceedings with number 1071/2015 for an alleged crime against public health, in the form of substances that cause serious harm to health, and another for participation in a criminal group involving several individuals, and once concluded, it was referred for trial to the Provincial Court of Cadiz, whose section in Algeciras issued a ruling on 11 December 2020 in the case file number 67/2018, which contains the following proven facts: "...in July 2015, as a result of the tasks of gathering, processing and analysing information received, the Judicial Police began an investigation into a group of people who were smuggling large quantities of cocaine through the Port of Algeciras. These persons had numerous police records and had been investigated in previous anti-drug operations. Numerous technological research measures have revealed the group's modus operandi. Mr Vidal, alias "Epifanio", was the main leader of the group. His mission was to contact drug suppliers and organise all stages of transport. Mr Jose Pablo was the person in charge of organising the reception of the drugs on Spanish territory, and acted as intermediary

[2] STS, Criminal Section 1 of 01 March 2023 (ROJ: 619/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:619). Ruling: 130/2023. Appeal: 4054/2021. Rapporteur H. E. Ms Carmen Lamela Díaz.

between Mr Vidal and the members of the group in charge of taking the drugs out. The last link was Mr Carlos María, who was responsible for providing the remaining members of the group with a place where they could store the narcotic substance. To this end, the accused owned two industrial warehouses located in Calle Miguel Servet and in the "La Gallarda" industrial estate in the town of Sanlúcar de Barrameda, which were to be used to hide the narcotic substance.

The group intended to organise the transport of cocaine in the following way: the narcotic substance was to be introduced into Spanish territory via shipping containers from South America, into which the drugs were placed concealed in sports bags. Once the container was deposited in the Port of Algeciras, normally as goods in transit, the cocaine would be extracted from the container by means of the "blind hook" or "rip-off" method, from where it was transported to one of the warehouses used by the group. Finally, the narcotic substance was distributed from there in smaller quantities to third parties hidden in trucks and other vehicles used by the group. During the months of September and October 2015, Mr Vidal and Mr José Pablo contacted Mr Carlos María so that he would prepare the industrial premises he owned in Sanlúcar de Barrameda to conceal the substance...".

2.2.- Legal grounds

Ruling Number 682/2019 of this Chamber, dated 28 January 2020, with express reference to ruling 576/2014, includes the doctrine established by this Court on what should be considered a criminal group, in similar terms to those expressed in the ruling of the lower court: "The doctrine of this Chamber, among the most recent, Judgment 426/2014, of 28 May, highlights that the new regulation of the Criminal Code after the reform operated by OL 5/2010, contemplates, as differentiated criminal offences, the criminal organisation and the criminal group.

Art. 570 bis defines a criminal organisation as a group formed by more than two persons on a stable or indefinite basis who, in a concerted and coordinated manner, divide up various tasks or functions in order to commit crimes, as well as to carry out the repeated commission of misdemeanours.

Cases of transience, previously included in the concept of Article 369 of the Criminal Code, are therefore excluded.

For its part, Article 570 ter in fine, describes a criminal group as the union of more than two persons who, without meeting any or some of the characteristics of the criminal organisation defined in the previous article, has as its aim or purpose the joint perpetration of crimes or the joint and repeated commission of misdemeanours.

Therefore, the organisation and the criminal group have in common the union or grouping of more than two persons and the purpose of committing crimes jointly. However, while a criminal organisation also requires stability or an indefinite existence, and that the tasks or functions are distributed in a coordinated and joint manner, necessarily both requirements together: stability and distribution of tasks, a criminal group may be considered while neither of these two requirements is met, or while only one of them is met. Therefore, the concept of criminal organisation is reserved for cases of greater complexity of the organisational structure, as it is precisely the temporal

stability and structural complexity that justifies a greater sanction in view of the significant increase in the capacity for harm.

Therefore, for the assessment of a criminal organisation, it is not enough to have just any distributive structure of functions among its members, which could naturally be found in any union or grouping of several persons for the commission of crimes, but it is necessary to assess a distribution of responsibilities and tasks with sufficient consistency and rigidity, even in time, to overcome the criminal possibilities and the consequent risks for the legal assets appreciable in cases of co-criminality or even criminal groups.

The distinction between organisation and group is therefore perfectly clear.

Post-reform case law has clarified the distinction between the two. Among others, STS 309/2013, of 1 April; STS 855/2013, of 11 November; STS 950/2013, of 5 December; STS 1035/2013, of 9 January 2014, STS 371/2014, of 7 May or STS 426/2014, of 28 May.

In STS 855/2013 and 950/2013, it was recalled that the legislator, with the reform, intended to provide useful instruments: 1) For the fight against transnational organised crime, characterised by its professionalisation, technification and integration into legal structures, whether economic, social or institutional, for which the specific figure of the criminal organisation is designed, from Art. 570 bis and 2) For small-scale organised crime with a more limited territorial scope and whose objective is to carry out smaller criminal activities, for which the criminal group, of Art. 570 ter, is designed as a specific figure, recognising, therefore, two levels of danger for protected legal assets, which determine a different severity in the criminal penalty.

Consequently, it must be avoided that, influenced by the inertia of the old jurisprudential doctrine referring to the old art. 369 1 2nd CC, one of the two errors beginning to be appreciated in the lesser jurisprudence is incurred: 1) to use an extensive interpretation of the concept of organisation, which leads to the inclusion in the organisation of cases that are more characteristic, in terms of their seriousness, of a criminal group. 2) to resort to an interpretation of the group concept that demands organisational requirements. In both cases, there is a risk of emptying the new concept of the criminal group of its content.

Just as the difference between a group and a criminal organisation is clear, in order to clarify the difference between a criminal group and cases of simple co-criminality or co-participation, it is useful to take into account what is expressed in the Palermo Convention when defining an organised group as a group not formed fortuitously for the immediate commission of an offence.

Both the organisation and the group are predetermined to commit a number of criminal acts. Therefore, when a group of persons is formed for the commission of a specific crime, we will be dealing with a case of co-criminality, in which neither the group nor the organisation concepts are applicable.

This has been recognised in case law subsequent to the reform, STS 544/2012, of 2 July and STS 719/2013, of 9 October, among others, which state that the ideation and combination of functions between several participants for the commission of a single

crime cannot be considered a criminal organisation or group, and therefore the purpose of the group or organisation must be assessed in each case. The inclusion in the Criminal Code of arts. 570 bis and ter, confirms this determination of the Legislator, as the legal types define criminal organisations and groups as potential agents of multiple crimes, and not only of one.

For these purposes, it should be understood that when the group or organisation has as its objective the coordinated carrying out of a drug trafficking activity made up of a number of trafficking actions, even when in these offences the whole of the trafficking activity can be punished as a single offence, due to their nature as types with global concepts, expressions that cover both a single prohibited action and several of the same tenor, so that with just one of them the crime is already consummated and its repetition does not imply another crime to be added, STS 487/2014, of 9 June, however for the purposes of the criminalisation of the group or organisation, repeated drug trafficking must be considered as a plural criminal activity.

This is understood from the very nature and purpose of the criminalisation of criminal organisations, which cannot exclude drug trafficking, and from the fact that what is relevant for the concurrence of these offences is the will to carry out a number of criminal acts, regardless of their classification as independent offences, continuous offences or offences punished as a single typical unit.

In short, as we pointed out in ruling 108/2019, of 5 March, "the criminal group only requires two elements: a.- Subjective plurality: union of more than two persons and b.- Criminal purpose: it must have as its purpose or objective the coordinated perpetration of crimes. The group must have a certain stability, even if it is less than that required for a criminal organisation, which would allow its existence to be assessed even when its formation is aimed at committing a single crime, provided that there is a certain degree of complexity and a requirement of relevant maintenance over time, which would allow new similar crimes to be committed".

In our case, analysing the facts declared proven by the Provincial Court, they describe the coordinated action of the defendants, with the distribution of functions to organise the transport of cocaine from South America, introducing the substance into Spanish territory through the port of Algeciras for storage in the warehouses fitted out for this purpose and its subsequent distribution to third parties, hidden in lorries and other vehicles used by the group. It was not a fortuitous venture for the immediate commission of a specific crime. There is evidence of the collection and use of suitable means to carry out a continuous activity of drug trafficking, with a certain permanence and a basic structure consisting of warehouses, telephones, vehicles of various types and containers, maintaining a situation of continuous unlawfulness throughout the time in which, by the will of those involved, the typical action of introduction into Spain and distribution of the drugs was continuously renewed.

We are, therefore, in the presence of three people with divided tasks, coordinated for the commission of crimes against public health, planned and coordinated, through the programming of a criminal plan over a prolonged period of time, consisting of the introduction of cocaine into Spanish territory and its subsequent distribution.

Such an act is undoubtedly typical of the offence of forming and joining a criminal group for which the appellant has been convicted.

2.3.- Conclusions.

Once again, the account of the proven facts obtained as a result of the oral trial and the previous pre-trial phase, delimit the qualification of criminal group or organisation.

In this ruling, which does no more than compile the line of jurisprudence followed since the introduction into the Criminal Code of Articles 570 bis and 570 ter, we see once again that it would not be unreasonable, taking into consideration the facts declared proven with all the interpretative nuances set out in numerous STS with respect to these precepts, that despite the classification and conviction as a criminal group, we have a criminal organisation or perhaps, as happens on many other occasions, a highly qualified group that exceeds this same classification, but does not reach the minimum threshold of a criminal organisation.

As this same STS pointed out, in both cases there is a risk of emptying the concept of the criminal group of its content.

3.- CRIMES AGAINST WORKERS' RIGHTS. STS 34/2023 of 25 January[3].

3.1.- Factual background

The Investigating Court Number 3 of Santander, instructed a case for an alleged offence against workers' rights, with respect to fourteen female workers who carried out hostess activities in a club, without being registered as such, in accordance with the requirements of employment law. The fact that these workers may also engage in prostitution on a self-employed basis does not make them unlawful and does not diminish the employer's obligation to register them with the social security system for the lawful activity actually carried out.

3.2.- Legal grounds

For the decision of this appeal, the Criminal Chamber takes into consideration the case law of the Social Chamber, which has not hesitated to affirm the labour nature of the hostessing activity whenever the external nature of the service provision and the dependence of such activity within a business organization are proven. The fundamental reason for this is that the hostessing activity generates economic income, as a result of the prior organisation of capital and labour, which must be subject to tax and labour conditions that protect the workers, and it should be remembered that the employment contract is presumed to exist as long as the paid work activity is carried out as an employee in the sphere of organisation and management of another -vid. Articles 1 and 8 of the WS (Workers' Statute)-.

[3]CENDOJ Database, STS, Criminal Section 1 of 25 January 2023 (ROJ: 253/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:253). Ruling: 34/2023. Appeal: 817/2021, Rapporteur H. E. Mr Javier Hernández García.

If these conditions are met, the hostessing activity is to be considered as work-related, vid. STS, Corporate Chamber, 18/2004, of 27 November, declaring the lawfulness of a business association whose corporate purpose is the ownership or management of public hotel establishments in which hostessing is practised, on the one hand, and prostitution on its own account outside the establishment, on the other; STS, Plenary, of the Corporate Chamber, 584/2021, of 1 July in which, although prostitution as an employee is excluded as an employment relationship, the constitution of the trade union Otras is declared legal, whose functional scope of representation and trade union activity refers to "activities related to sex work in all its aspects", among which can be found that of "hostessing"; STS, of the Corporate Chamber, of Unification of Doctrine, 1084/2016, of 21 December, which reaffirms the labour law status of the hostessing activity separated from the exercise of prostitution as an employee.

In our case, the court of first instance established as proven facts that prostitution activities were carried out in the ten rooms in the establishment and in the bar area, a hostess activity with intense labour-related features, a pre-set timetable, a pay system based on the number and type of drinks served and dress codes set by the establishment's managers.

At the same time, both the existence of criminally relevant local pimping was ruled out, since the activity of prostitution was carried out on the own account of the women who so decided, and any connection of continence or inherence between this activity on their own account and the activity of prostitution for hire or reward, and it should be remembered, in any case, that in accordance with the case law of the Court of Justice of the European Union -vid. CJEU (Court of Justice of the European Union), 20 November 2001, Jany and Others, Case C-268/99, (F.49); CJEU, 16 December 2010, Josemans, Case C-317/09, (F.77); CJEU, 1 October 2015, Harmsen v. Burgemeester van Amsterder (F.77); CJEU, 8 May 2019, PL v. Landespolizaidirektion Tirol, Case C-230/18 (F.37)- self-employed prostitution cannot be said to be prohibited by international or EU law provided that it is established that the service provider provides it under the following conditions: no subordination in the choice of that activity and in the conditions of work and remuneration; exercise of the service on his/her own responsibility; full and direct receipt by the service provider of the agreed remuneration.

Therefore, in full agreement with the arguments of the High Court of Justice, the fact that the persons who were engaged in the proven hostessing activity could, in addition, possibly engage in prostitution on their own account does not make the activity unlawful and, consequently, does not dilute the employer's obligations to register them with the Social Security for the lawful activity actually carried out. The conduct of non-compliance with that obligation, which is precisely described in the proven facts, leads to its subsumption under the criminal offence applied.

3.3.- Conclusions.

The SC (Supreme Court) clearly emphasises the existence of an employment relationship in the activity of a hostess for hire or reward in an establishment in which prostitution is carried out on a self-employed basis, with the employer's failure to comply with this obligation to register its fourteen workers with the Social Security being typical of an offence against workers' rights.

4.- FRAUD AND DUTY OF SELF-DEFENSE. STS 46/2023 of 1 February 2023[4].

4.1.- Factual background

The Investigating Court Number 2 of Manzanares, opened preliminary proceedings for an alleged offence of fraud, it being established that at around 11:30 am on 7 February 2011, the defendant Máximo, an adult with no criminal record, reached an agreement with a young woman who has not been identified, with the intention of unjust enrichment. Pretending to suffer from a disability, she approached 54-year-old Miriam, who was outside her home in the town of La Solana, and asked her for the location of a tobacconist's or lottery shop, at which point the defendant approached her and told her where it was. Thus the woman, with the intention of appearing to be solvent, said that she had won the lottery and that she had "estampas y papelitos" (collectible cards or stickers) in her handbag which she wanted to tear up because she wanted sweets, showing Ms Miriam a number of 50 euro notes inside. The defendant told the unidentified girl not to tear them up, that she should give them to Miriam and to him, and Miriam told him that she had to give him more "papelitos", showing him several notes, but she thought they were too few. In execution of the plan, the defendant proposed to Miriam that she go to his house to get more money, making her believe that in this way the woman would give him the bag containing many more notes than she had, dividing the money between them, knowing that she would not give him any money....

4.2.- Legal grounds

At the origin of scams such as the one in question, there may be a more than debatable and not very legitimate ambition, but this does not justify the actions of the person who stages the representation that induces the disbursement of wealth, in which the study and choice of the victim and their circumstances of all kinds, with a view to the fraud being consummated, is a fundamental factor, as, in short, the deceptive scheme that defines the crime of fraud does not cease to be there.

With this approach we have to analyse the question and for this purpose we find useful a settled case law, from which we take what we said in STS 852/2022, of 27 October 2022, "Regarding the argument that it cannot be said to be sufficiently deceitful as a minimum required self-protection of his interests by the injured party would have easily avoided the deception and therefore, the provision of assets, in recent judgments 210/2021, of 9-3; 744/2021, of 5 October; 111/2022, of 10 February, We have said that the qualifying concept of "sufficiently" that is predicated in the precept of deceit has traditionally been the subject of great doctrinal discussion, and in this sense it has been considered, on the one hand, that such an element must be interpreted in very strict terms, it being understood that the deceiver must represent a real "mise en scene" capable of causing error to the most "astute" persons, while, on the other hand, it is based on a looser concept, understanding that the deceived party may be the average citizen, with normal knowledge, intelligence and care, and it can even be sufficiently understood while the fraudster has chosen his victims precisely due to his weak personality and culture (STS. 1243/2000 of 11 July 2000).

[4]STS, Criminal Section 1 of 01 February 2023 (ROJ: 338/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:338). Ruling: 46/2023. Appeal: 2441/2021. Rapporteur H. E. Mr Ángel Luis Hurtado Adrián.

STS 1508/2005 of 13 December 2005, insists that scientific doctrine and case law coincide in affirming the difficulty in classifying misleading conduct as being quite misleading. It is often said that the quality of the deception has to be examined according to an objective and a subjective scale. The objective scale refers to an average man and to certain requirements of seriousness and sufficient entity to be able to affirm it. The subjective criterion takes into account the specific circumstances of the passive subject. In other words, the qualification of the deception as sufficient is subject to a double examination, the first from the perspective of a third party outside the relationship created and, the second, from the perspective of the passive subject, his specific circumstances and situations, always observing the necessary requirement of self-defence, in such a way that a certain objectivity will be required in the examination of the subjective criterion, from which a seriousness and entity of the deceptive conduct will result.

For this reason, we have said in the STS. 918/2008 of 31 December 2008, that there is a modern tendency to admit the use of a certain amount of "subjectivity" in the objective assessment of behaviour with the idea that it is not possible to extract the objective meaning of the behaviour without knowing the representation of the person executing the behaviour. The perpetrator's knowledge plays a fundamental role in the type of fraud, so if the perpetrator is aware of the victim's weakness and low level of education, deception which in terms of social normality appears objectively inidoneous, nevertheless, in view of the situation of the particular case, taken advantage of by the perpetrator, the type of fraud cannot be excluded. When the perpetrator purposefully seeks the weakness of the victim and his above-average credibility, if any, the criterion of the inadequacy of the deception according to his prognostic judgement based on the normality of social occurrence is insufficient, because the judgement of adequacy depends on the special knowledge of the perpetrator. This is why what has been called the objective-subjective module, which in reality is predominantly subjective, has come to prevail.

This means that only gross deception, i.e. deception that can be appreciated by anyone, prevents the offence of fraud, because in that case the deception is not "sufficient". In other words: deception cannot be neutralised by the diligent activity of the victim (STS 1036/2003, of 2 September), because deception is measured in terms of the deceptive activity activated by the active subject, not by the victim's perspicacity. If this argument is taken to an extreme, if the passive subjects were always capable of detecting the ruse of the perpetrator or agent of the crime, a swindle would never take place and those behaviours that take advantage of the weakness of conviction of certain victims (the most popular swindles in criminal history, the stamp, the "filo-mish", the "tocomocho", the "handkerchief scam", etc...) would remain outside the criminal law".

From the doctrine set out above, the final clause of this last paragraph seems to us to be significant, because, from it, we can conclude that, to the extent that the fraud was consummated, it is because a sufficiently convincing and effective ruse was put in place for the victim to be deceived, and this had to involve the choice of the person that the fraudster understood to be favourable, due to his circumstances, personality or personal characteristics, which the sentencing court was able to assess due to the immediacy with which his testimony and presence at trial was captured, as can be seen in the proven facts, which show how easy it was to manipulate and convince the victim until he gained her trust and the ability of the defendant to make her fall into the trap he had set for her. The very fact of handing over such a large sum of money to a stranger is an act which, if not

motivated by some legitimate circumstance, which in this case does not exist, can only be understood to be the product of some kind of trickery that vitiates the will of the person handing it over, which is what the crime of fraud consists of. If this is considered in relation to the fact that, when assessing the sufficiency of the deception, the general rule is that it only breaks down in very specific and exceptional situations, this particular ground must also be rejected.

4.3.- Conclusions

This STS emphasises that the crime of fraud requires the concurrence of a deception that must be qualified as sufficient, not just any deception, and furthermore from the perspective of the perpetrator who deploys all his skills to that end and not of the victim. Whoever deploys such a ruse, and does so in such a convincing manner, cannot impose on the affected party a barrier of self-protection that is disproportionate to the circumstances of the case.

5.- DISCLOSURE OF SECRETS. STS 112/2023, 20 February[5].

5.1.- Factual background.

In 2018, a Court of Violence Against Women in Elche instructed preliminary proceedings investigating the actions of a man who obtained, by deceiving a bank employee, the transactions of the current account of his ex-spouse, with the aim of filing a lawsuit. Everyone has the right to have information about the transactions of their current account, over a period of more than one year, protected from third parties and also, as in this case, from their former spouse. The information contained in these statements corresponds to the idea of reserved data of a personal nature, the seizure of which, in itself, constitutes the offence provided for in art. 197.2 of the CC.

5.2.- Legal grounds

The Provincial Court of Alicante acquitted the husband against the conviction handed down by the Criminal Court. The argument for acquittal that serves to deny the typical relevance of this information, obtained fraudulently by deceiving the bank employee to whom [the former spouse] said to be the holder of the account, focuses on the fact that "...such data are reserved, insofar as they are not public knowledge in general, but we understand that they do not affect the hard core, the sphere of privacy and personal intimacy, which the type is protecting. This is because the documents submitted to the civil lawsuit by the defendant do not provide any intimate information about the complainant, such as where, how or with whom she spends the money, but only reflect a few cash withdrawals".

However, the SC does not share the idea behind the acquittal handed down by the AP, but it does share the argument of the Criminal Court and thus maintains that the data reflecting the accounting transactions of a personal account falls squarely within the scope of protection of art. 197.2 of the CC. They benefit from the enhanced defence that the

[5]CENDOJ Database, STS, Criminal Section 1 of 20 February 2023 (ROJ: 498/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:498). Ruling 115/2023. Appeal: 3136/2020. Rapporteur H. E. Mr Manuel Marchena Gómez.

right to data protection grants in general against everyone and especially, in the present case, against the ex-husband who is trying to get hold of these data in order to bring a civil claim for payment. This idea is precisely stated in JR (Judicial Ruling) 2 of the ruling handed down by Criminal Court Number 1 of Elche, which was overturned on appeal by the Provincial Court, when it reasoned in the following terms: "...there is no doubt that, among the data that citizens seek to reserve with greater zeal from the knowledge of others are those corresponding to their economic situation, which can be directly deduced from the transactions of a bank account, such as the one held by the complainant, in which income and expenditure must appear, with their corresponding origins and destinations, which provides an x-ray of the state of the finances of the affected party, the disclosure of which would affect multiple aspects of her personality that the holder of the same would not reveal in any way voluntarily. This is precisely the reason why banking institutions try to preserve this privacy to the utmost, by establishing personal passwords that are the exclusive property of the person to whom the data refer...".

Furthermore, Art. 197.2 of the CC protects against the seizure of reserved data of a personal nature and by reserved we should understand those personal data that are of limited access or knowledge for third parties outside the file in which they are recorded and filed, although they are not intimate in the strict sense; that is to say, they are personal data that are not within the reach of third parties not involved in their processing or authorised access, which implies a functional and formal understanding of the term in relation to the greater or lesser accessibility of the data and not necessarily with their content or nature of greater vulnerability for the subject (sensitive) or their greater or lesser impact on privacy, although there is no doubt that the basis for confidentiality will normally be justified by some of these characteristics (cfr. ATS 1945/2014, 27 November). The criminal protection of what the Provincial Court describes as the "hard core of privacy" is not found in this precept, but in the aggravated type of art. 197.5, when the data reveal "...ideology, religion, beliefs, health, racial origin or sexual life".

5.3.- Conclusions.

The 2nd Chamber of the SC clearly delimits the incidence of the concept of personal data for the purposes of the application of the offence of disclosure of secrets. Precisely, reserved personal data is a regulatory concept that must be interpreted in accordance with the protective legislation of this new generation right consolidated under art. 18.4 of the SC (Spanish Constitution), that is, the right to informational self-determination, or in other words, the right to know and control what others know about oneself. From this, a distinction can and should be made as to what constitutes the hard core of privacy, which will consist of data revealing a person's ideology, religion, beliefs, health, racial origin or sex life.

6.- NEWLY COMMITTED CRIMES OF SEXUAL AGGRESSION AND RETROACTIVITY OF MORE FAVORABLE CRIMINAL LAWS FOR DEFENDANTS. STS 61/2023 of 7 February [6].

6.1.- Factual background.

The Court of First Instance and Preliminary Investigation Number 3 of Calahorra heard a complaint for the crimes of sexual assault and obstruction of justice. The facts investigated established that a man and a woman met on 4 October 2019 in a hotel. Days later, on 8 October 2019, and after continuous communications throughout the early hours of the morning of 7 to 8 October by Carlos Jesús from his phone to Frida's terminal, the two agreed to meet. Carlos Jesús picked up Frida, leaving in the vehicle driven by Carlos Jesús to an open field, where the two of them consumed speed. Later, while they were both inside the vehicle, Carlos Jesús in the driver's seat and Frida in the passenger seat, Carlos Jesús offered Frida 50 euros to have sex with him, which Frida refused. Faced with this refusal, Carlos Jesús took a knife from the driver's side of the car and put it to Frida's left side of her neck, ordering her to move to the back of the car, which Frida did because of the fear Carlos Jesús instilled in her by putting the knife to her neck. Once in the back of the vehicle, Carlos Jesús pulled down his trousers and told Frida to perform fellatio on him, which she refused. Carlos Jesús then told Frida to pull down her trousers, which Frida did, and Carlos Jesús put on a condom and penetrated her vaginally. Frida allowed herself to be vaginally penetrated by Carlos Jesús because of the fear he instilled in her by putting the knife to her neck, fearing for her life if she put up any resistance. When it was over, Carlos Jesús told Frida that if she said anything about what he had done to her, he would kill her, calling her on the phone days later to remind her.

6.2.- Legal grounds

The Provincial Court of Logroño convicted the man of two crimes, one of sexual assault with vaginal penetration with the aggravating circumstance of the use of weapons and one crime of obstruction of justice. For the first, he was sentenced to twelve years' imprisonment and legal accessories, and for the second, to one year's imprisonment and a six-month fine.

I have given a profuse account of the factual background in order to appreciate, on the one hand, the seriousness of the conduct and, on the other, the mandatory reduction of the sentence due to the entry into force of OL 10/2022 on the comprehensive guarantee of sexual freedom. The SC has no other way out because of the application of the principle of retroactivity of criminal laws that are more favourable to the defendant.

It points out in the 5th legal basis of this STS, that on the occasion of the entry into force of the reform of sexual offences, Organic Law 10/2022, an incident of hearing of the parties was opened in this court for the positioning of the parties in view of the appearance of legislation that could be favourable to the defendant.

[6]CENDOJ database. STS, Criminal Section 1 of 07 February 2023 (ROJ: 346/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:346). Ruling: 61/2023. Appeal: 10417/2022. Rapporteur H. E. Mr Antonio del Moral García.

The penalty set in the previous legislation for the offence of which he was convicted ranged from twelve to fifteen years' imprisonment. The Court opted for the minimum penalty of twelve years.

The reformed legislation (arts. 178, 179 and 180 PC) sets an average age range of seven to fifteen years. This is the same maximum, but the floor is significantly lower. This is the same maximum, but the minimum level is significantly lower. This equalisation does not fully explain the new minimum.

In this case, it is not simply the effect that the same criminality now also covers less serious acts. The use of a weapon is an element of the aggravated subtype. The use of violence or intimidation is, therefore, inseparable from the subtype and therefore, they are the same facts but now the legislator punishes them less severely.

This way, as it is a crime of sexual assault with vaginal penetration but with the concurrence of the aggravating circumstance of the use of weapons, the sentence for the first crime is now set at ten years in prison, compared to the twelve years in the sentence of the Logroño Provincial Court in accordance with the legislation prior to the entry into force of OL 10/2022, while the sentence for the crime of obstruction of justice is maintained in its entirety.

6.3.- Conclusions.

In a way that is hardly comprehensible with the purpose intended and detailed in the Explanatory Memorandum of the Law of Integral Guarantee of Sexual Freedom, with the entry into force of this OL 10/2022 of 6 September, the reviews of convictions are becoming more frequent every day, as well as sentence reductions. Serious legislative error. This situation is due to the legislator's voluntary and conscious decision to group together the conducts that were previously punished separately as abuse and sexual aggression, raising the maximum limit of punishment and lowering, in both cases, the minimum and thus, the floor, as this STS calls this lower limit, as it is less serious, will always benefit the offender by application of the principle of retroactivity of the criminal law most favourable to the offender, provided for in Article 2.2 of the Criminal Code.

7.- CRIMES AGAINST PROPERTY USING THE "HUG MUGGING" METHOD. STS 57/2023 of 6 February 2023[7].

7.1.- Factual background.

The Criminal Court Number 3 of Benidorm, handed down a sentence on 10 March 2020, declaring it proven that the defendant Paulina of Romanian nationality, with a criminal record not computable for the purposes of recidivism, on an unspecified date but between 23 January and 3 February 2017, in the morning, approached Mariano, aged 76, who was walking along the entrance to the Maryvilla Urbanisation in Calp, asking him if he knew a certain person and then asking him for a job and offering him sexual services. Meanwhile, she grabbed him by the neck using the so-called "hug mugging method" and,

[7]CENDOJ database. STS, Criminal Section 1 of 06 February 2023 (ROJ: 293/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:293). Ruling: 57/2023. Appeal: 1715/2021. Rapporteur H. E. Mr Manuel Marchena Gómez.

driven by the intention of taking possession of the gold cord with a crucifix and a blood group badge that he was wearing, all of this without Mariano being aware of the theft at the time, as he was trying to free himself from the defendant who was insistently hugging him, thus disturbing his peace and calm, to the point that he even used force against her to let go of him.

7.2.- Legal grounds

The Criminal Court sentenced the accused to one year's imprisonment as the perpetrator of a minor offence of robbery with violence and intimidation. The PC (Provincial Court) upholds the judgment and the classification. The defendant's lawyer appealed, among other reasons, arguing that the correct classification would be theft, and the Public Prosecutor's Office supported the defence's request.

The appellant pointed out that when the defendant embraces the complainant with both hands around his neck, she is performing the action of theft, since wrapping her hands around the complainant's neck is not an act of violence. As we have already mentioned, the appeal is supported by the Public Prosecutor's Office. In his report he reinforces the allegations of the defence by pointing out that "...the defendant's action is to approach the victim, and when offering sexual services to the victim, she gives him a hug. It is not a coercive or immobilising hug, typical of a wrestling hold, attack, or similar, which would undoubtedly involve violence. Rather, the goal of the simulated hug is to have their hands in the location of the cord closure in order to open it. This is not an immobilising hug, like a wrestling or grappling hold, but rather a hug where she wraps her arms around him in order to place her hands at the back of his neck where the clasp of the gold chain she intends to steal is located". The Prosecutor goes on to argue that a hug, in itself, is not by its very definition, a violent act and concludes that the duration or insistence of the hug, accompanied by the sexual offer and coming from an unknown woman may amount to a violent situation for the victim. However, not every violent situation, in the sense of being uncomfortable, unbearable, or upsetting, arises from a violent act Violent situation and violent act are not the same thing. They may overlap, but they may not; many violent situations do not require an act of violence.

However, the Supreme Court considers that the facts constitute a crime of robbery with violence and not theft, based on the proven factual account, and it is from this perspective that the historical narrative submitted for our consideration must be analysed. It describes that the accused approached Mariano, 76 years old, ".... asking him if he knew a certain person and then asking him for a job and offering him sexual services, while grabbing him by the neck, using the so-called "hug mugging method" and, driven by the intention of taking possession of the gold chain with a crucifix and a blood group badge that he was wearing, all of this without Mariano being aware of the theft at the time, as he was trying to free himself from the defendant who was insistently hugging him, thus disturbing his peace and calm, to the point that he even used force against her to let go of him".

Our examination cannot ignore a premise without which the structure of the offence of robbery would be undermined, and that is that only violence prior to the dispossession, instrumentally designed to take away the victim's power, can be of typical relevance to classify the facts as constituting the offence of robbery. Neither mere physical contact, nor even the skillful and strategic hug that allows the perpetrator of the

dispossession to momentarily surround the victim to reach the intended object, can be considered, by themselves, a violence with typological relevance. The literal wording of Art. 237 CC recalls that violence must be "employed" for dispossession. This reinforces the functional significance of violence as a materially directed instrument of dispossession.

It is true that the historical account describes, after a conversation initiated as a deceitful maneuver for approach, the hug that allows the accused to reach the gold chain with a cross and gold plate that the victim was wearing, but it describes something else. It declares as proven, Mariano's efforts to free himself from the stranger who persistently hugs him in order to reach the clasp of the jewel that she wanted to steal from the very beginning. The victim's resistance was not limited to just pushing away Paulina, who according to the facts was disturbing his peace and tranquility, but he even used force against her to make her let go, and those efforts to break free from his attacker were in response to the persistent hugs.

7.3.- Conclusions.

In this sentence, the SC not only notes the change in the prosecution's position, which initially classified the facts as robbery with violence before the lower court and later sided with the defense's appeal to classify them as theft, but also emphasizes the need for an adequate description of the facts that should be considered typical. The detailed and accurate explanation of the temporal sequence of the attack and theft is key to the classification and subsequent conviction for a crime of robbery with violence and not a simple theft.

8.- RIGHT TO FINANCIAL PRIVACY. ACCESS OF LAW ENFORCEMENT TO BANKING AND FINANCIAL DATA WITHOUT JUDICIAL AUTHORISATION. STS 434/2021 of 20 May[8].

8.1.- Factual background

In 2015, the Investigating Court Number 4 of Fuenlabrada initiated preliminary proceedings in relation to the investigation of crimes against the Public Treasury and money laundering, with a ruling handed down by the Provincial Court.

One of the convicted individuals' lawyers prepared a cassation appeal based on the alleged violation of the right to bank secrecy by the police, specifically, the infringement of their right to privacy. In their opinion, a significant part of the investigative actions carried out by the police were done without judicial authorisation, accessing banking data protected by secrecy, and personal data for which the agents were not authorised. Such investigative activity, in his opinion, represents a serious violation of the fundamental right to privacy and compromises the validity of the sources of evidence on which the *notitia criminis* transmitted to the judicial authority is based, affecting, due to unlawfulness, the rest of the evidence presented.

[8]CENDOJ database. STS, Criminal Section 1 of 20 May 2021 (ROJ: 2257/2021 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2021:2257). Ruling: 434/2021. Appeal: 2804/2019. Rapporteur, H. E. Mr Javier Hernández García.

8.2.- Legal grounds

The SC does not share the opinion of the appellant and explains the scope of the right to privacy in a very didactic way, both in general and related to the economic aspect, in particular.

The Constitution guarantees in Article 18. 1) The right to privacy, the objective content of which is a personal and reserved space that every person has against the action and knowledge of others in order to maintain, as the Constitutional Court has stated, a minimum quality of human life. This guarantees, therefore, the secrecy of one's own sphere of personal life and, therefore, prohibits third parties, private individuals or public authorities, from deciding on the contours of private life, vid. STC 83/2002, 22 April 2002, Judicial Ruling 5. However, like all fundamental rights, with the exception of the right to physical integrity, the right to privacy can be limited when overriding needs for the protection of other fundamental rights and constitutionally protected legal interests are identified, assessed on a case by case basis, and provided that the limitation is provided for by law and its practice responds to assumptions of proportionality and reasonableness.

However, what the Constitution does not always make clear is which public agent can order intrusions into the realm protected by the general right to privacy, although it reserves specific and exclusive areas of jurisdiction, such as entry into a domicile without the owner's consent under Article 18.2 SC, or the interception of communications under Article 18.3 SC.

The express silence of the Constitution therefore creates a regulatory space marked by uncertainty, which primarily burdens the Legislature with the difficult task of determining in cases of interference with the right to privacy provided for in Article 18.1 of the Spanish Constitution, when the authorising intervention of a judge can be dispensed with. One thing is that the Constitution does not specify other spaces of strict jurisdictional reserve, and another very different thing is that this could be interpreted to mean that any other limitation of the fundamental right could be ordered by any other public agent, such as the Public Prosecutor's Office or the Police, who does not possess the attribute of independence which ultimately grants the judge the privileged constitutional position as a guarantor of fundamental rights.

One of the implicit conditions that can be derived from the Constitution and the conventional system is the level of impact on the fundamental right. As the ECtHR (European Court of Human Rights) claims -vid. ECHR (Rulings of the European Court of Human Rights), Kruslig v. France, 24 February 1990; Halford v. United Kingdom, 25 June 1997; Trabajo Rueda v. Spain, 30 June 2017 - the greater the burden of injustice of a given investigative measure, the greater the clarity required of the enabling rule in determining the circumstances, conditions and qualifications required to adopt such measures. The above allows for a sort of formula or quotient in the sense that the greater the restrictive burden on the content of the affected fundamental right, the Legislator has a greater burden of precision in defining the intrusive mechanisms it implements, adequately fulfilling the objectives of predictability and accessibility, which are also objective guarantees of the fundamental rights at stake. The greater the burden of the investigative activity, the greater the demands of detail in the regulatory conditions of

practice, and among these, due to its relevance, the determination of the public agent who has the authority to order the interference with the fundamental right affected.

On the basis of the above, and without prejudice to the fact that banking data should indeed be considered as subject to constitutional protection under Article 18. 1 SC, access to them, *prima facie*, will not imply an intense affectation of the constitutionally protected core of the right to privacy when it does not allow for a predictive image of the way and conditions in which a particular person leads their private life. In this case, it will not require prior judicial authorisation.

Therefore, and specifically regarding banking data, the European Court of Human Rights distinguishes between pure financial information and those that also include data on how the investigated person's private life is carried out, which allows for different levels of protection to be established. In particular, where the bank data to be transferred do not involve significant personal aspects, the conditions of access can be much more flexible. In such cases, when access to bank account data could jeopardize, for example, a lawyer's professional secrecy by revealing the origin of their income and their relationship with professional services rendered, or when it is intended to analyse the private life of the person under investigation, the guarantee of judicial oversight is necessary for both its ordering and its execution control - vid. ECHR, Brito Ferrinha Bexiga Villa-Nueva v. Portugal, 1 December 2015 and Sommer v. Germany, 27 April 2017.

8.3.- Conclusions.

With the above background and the broad reasoning of the SC, our Constitutional Court also addresses the question of the level of protection of so-called "financial privacy" in terms that substantially coincide with the European Court of Human Rights, placing the emphasis of the levels of protection on the nature or content of the banking or financial data accessed, vid. SSTC 142/1993, 233/2005. Thus, when such data does not reveal, determine or infer any behaviour or lifestyle habits of the individual concerned, the need for enhanced protection of substantive rights is reduced -vid. STC 97/2019, so that the Judicial Police may obtain them without the need for prior judicial authorisation.

9.- CRIMES OF MONEY LAUNDERING. STS 52/2023 of 2 February.[9]

9.1.- Factual background

In 2014, in Las Palmas de Gran Canaria, the Court of First Instance Number 1 opened criminal proceedings against several persons for an alleged money laundering crime, some of whom had already been previously convicted for an offence against public health. In this activity of acquisition, concealment and transformation of assets, one of the defendants conspired with the others to conceal the ownership of assets acquired with the proceeds of crimes against public health.

[9]CENDOJ database. STS, Criminal Section 1 of 02 February 2023 (ROJ: 342/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:342). Ruling: 52/2023. Appeal: 1754/2021. Rapporteur H. E. Mr Andrés Martínez Arrieta.

9.2.- Legal grounds

The offense of money laundering does not require a specific amount of laundered funds. Without prejudice to the necessary corrections required by the principle of proportionality and from the theory of co-perpetrated acts, using proceeds from previous criminal acts is excluded, which allow us to understand that the penalty of the latter already provided for them, vid. STS 693/2019 of 29 April; laundering is punishable as a separate offence, on the one hand, the placement of the proceeds obtained from the prior criminal activity and diversification through acts aimed at concealing the sources of income for the acquisition of movable or immovable property, providing a cover of legality to these acquisitions, while at the same time reintegrating money of illicit origin into the legal and mercantile traffic, into the legal economic circuit, vid. SSTS 693/2019, 29 April, 434/2021, 20 May.

Ruling 608/2022, of 16 June, citing STS 895/2014, of 23 December, asserts that money laundering is considered a separate offense and does not rely on a previous conviction for the initial offense from which the laundered money came from. Based on this statement, STS 801/2010, of 23 September, summarises the evidential doctrine related to prosecuting crimes involving the laundering of illegally obtained assets. It emphasises that circumstantial evidence is often the most appropriate and, in many cases, the only way to prove that such crimes have been committed. As clarified in STS 91/2014 on February 7th, this does not imply a reduction in the standards of evidence required for criminal convictions. Instead, it presents an alternative form of evidence that can establish the essential level of objective certainty needed for a successful prosecution. It is thus linked to declarations in international texts (Article 3.3 of the 1988 Vienna Convention, Article 6.2.c) of the 1990 Strasbourg Convention or Article 6.2.f) of the New York Convention against Transnational Organised Crime) which stress that the fight against these criminological realities requires this evidentiary assessment tool, which, on the other hand, is classic and not exclusive to this type of crime.

The use of circumstantial evidence has been accepted both by the doctrine of the Constitutional Court, including SSTC 174/1985, 175/1985, and the case law of this Chamber, as suitable for disproving the presumption of innocence, subject to the concurrence of a series of conditions that are present in this case. For a formal ruling, one must have accredited evidence or basic facts that support the fact being considered. Additionally, the reasoning behind the ruling must be thoroughly explained. From a material point of view. In order to successfully pursue a cassation appeal, a thorough examination of all evidence must be conducted to determine if there are multiple clear indications or one powerful piece of evidence that directly points to guilt, without any possibility of contradictory evidence. The evidence must be mutually reinforcing and allowing a reasonable inference to be drawn, such reasonableness being understood as "a precise and direct link according to the rules of human judgement".

9.3.- Conclusions

In this ruling, the SC differentiates once again between what is to be understood as the profit from the crime, as an integral phase of the predicate offence and which is not punishable independently, and the crime of money laundering, as the placing on the market of the proceeds obtained from a previous criminal activity by means of acts aimed at concealing the true sources of income.

Money laundering can occur regardless of the amount of laundered proceeds involved.

10.- CONCEPT OF CONSENT IN CRIMES AGAINST SEXUAL FREEDOM FROM THE ENTRY INTO FORCE OF OL (ORGANIC LAW) 10/2022. STS 10/2023 of 19 January[10].

10.1.- Factual background

In 2021, the Provincial Court of Navarra convicted a group of people as perpetrators and accomplices of several crimes of group sexual assault, the victim being a woman with a high degree of mental disability. The account of the facts declared proven indicates that this woman made contact through a social network with a man with whom she would eventually have consensual sexual relations, but not with the other men who were present in the same place and who one after the other forcibly had vaginal intercourse with the victim.

10.2.- Legal grounds

Let us remember that the new OL 10/2022, of 6 September, Comprehensive Law on Crimes Against Sexual Freedom, includes in art. 178 of the CC, that consent shall only be understood to exist when it has been freely expressed through acts which, in view of the circumstances of the case, clearly express the will of the person.

In such situations, obtaining express consent may not be necessary but it could be implied based on the circumstances of the case. This is the crucial aspect to consider.

In this case, it is evident that the victim's consent was given to one of the parties involved, based on these circumstances. There is even evidence that there was an offer and a voluntary acceptance to carry out the sexual act, so that the sexual access, both oral and vaginal, was consensual, without there being any evidence in the proven facts of any kind of refusal or non-acceptance by the victim. This is because while this refusal is stated in the forced sexual acts of Baltasar and Constantino, nothing is said in those of Dámaso who was the first to have sexual intercourse with Lina and with her express willingness, so that the reference in the reform of the Criminal Code to the circumstances of the case can be applied here in its entirety, given that although express consent is not required, in this case, even the fact of Lina's willingness to accept Dámaso's offer is given.

It must be remembered that in relation to sexual acts performed by a person, in our case, a woman, there are several nuances to be set: 1) The fact that a woman wants to have sex with one person does not determine that she must have sex with other persons who appear on the scene; 2) Or that if a woman consents to one sexual act it means that she consents more times, even with the same person, or with others; 3) A woman has sexual freedom to consent to one sexual act and to refuse the next; 4) That she has consented to one sexual act with one person does not mean that she consents to further sexual acts with that person or with others; 5) There is no presumption of a woman's perpetual consent to sexual acts, but that each act must be renewed on a case-by-case

[10]CENDOJ database. STS, Criminal Section 1 of 19 January 2023 (ROJ: 188/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:188). Ruling: 10/2023. Appeal: 10196/2022. Rapporteur, H. E. Mr Vicente Magro Servet.

basis; 6) There is no subjectivism on the part of the perpetrator that the woman consents to the sexual act. It must be evidenced by the circumstances of the case, but in this specific case, the circumstances of the case show consent, and it is not possible to introduce criteria in this venue of re-evaluation of evidence that affect the proven facts that the appellant interprets in such a way that there was no consent, when it was an acceptance by Lina to the sexual acts she had with Dámaso as a whole and 7) The key points regarding consent in acts of sexual content are as follows: a) There are no extensions of specific consents requested by those who engage in sexual acts with a woman, pretending that if she has previously consented to an act with another person, there is a presumption of consent with others; b) A woman has the right to engage in sexual relations with one person and refuse it later with another. To claim otherwise would be to blame the victim and impose a kind of "sexual servitude" on her based on the fact that she had a sexual relationship before. The woman decides with whom she wants to have sexual relations, and these cannot be imposed on her; c) This would be an attack on the sexual freedom of women and would transfer the belief of consent to the man when the circumstances of the case do not clearly and specifically determine that consent clearly exists in the woman's will; d) Consent cannot be extended at the request and exclusive will of the man even if she has previously had sexual contact with the same or other men; e) It is absolutely inadmissible that the consent referred to in the wording of Article 178 paragraph 1 of the Criminal Code, after OL 10/2022, of 6 September, and prior to this reform, can be conceived from the subjective belief of the perpetrator, and not from the woman's decisive will; f) The subjective perspective of the belief that consent exists cannot be reinforced or admitted, except by virtue of the clear will, which can be express or tacit, of the woman, given the circumstances of the case. The law does not require an externally manifested expressiveness, as the criminal text allows for acceptance based on the circumstances of the case. However, in the present case, the circumstances were contrary to the existence of consent, quite the opposite; g) The criterion upheld by the appellants would involve transferring the existence of consent to the belief of the perpetrator that the woman consents, when there are no external aspects in the same to clearly transfer the certainty of consent to the performance of sexual acts. h) Consent can never be presumed, as it is always up to the victim to decide and express their consent in some way, taking into account the circumstances of the case, which must be reflected so that there is no doubt that the man knows with clarity the unequivocal expression of the woman's consent to the sexual acts. i) It should even be noted that the fact that the victim had a sexual relationship with another person in preceding moments in no way determines a kind of presumption of extension or prolongation of consent with other perpetrators, which is absolutely unacceptable, because the victim's consent is unique and with respect to a specific moment, as well as with relation to a person, without the possibility of an extension to others based on the woman's sexual freedom to consent to sexual acts with one person and deny them with another. j) The argument put forward by the appellants in this regard is completely unacceptable as a punctual consent cannot be interpreted in an extensive way that would allow for subsequent consent based on previous sexual relations, even with the same person. k) There is no such thing as perpetuation of a woman's consent to engage in sexual acts, as if it were a kind of "blank check" to engage in sexual activity simply because the woman has done so before with that person or another. Consent to sexual intercourse is renewable for each sexual act.

On the other hand, in view of the above general guidelines to be taken into account, it is also true that the victim may suffer a situation of fear or re-victimisation due to reliving what happened when recounting it again to the Court, and after having done

so in police stations and in the summary proceedings, which together with the factors mentioned below may be taken into account when carrying out the assessment process of this statement, such as the following: 1) In her statement, the victim may experience difficulties in court because of being in a setting that reminds her of the events of which she has been a victim and which may lead to signs or expressions of fear of what has occurred; 2) Evident fear towards the defendant due to the commission of the act depending on the severity of events; 3) Fear of retaliation by the family of the defendant, even if retaliation has not occurred or been objectified, but remains an obvious and acceptable fear of the victims; 4) Desire to finish the statement as soon as possible; 5) Desire to forget the facts; and 6) Possible external or environmental pressures regarding the statement".

10.3.- Conclusions

This STS includes the essential core of the reform introduced in the Criminal Code by the new OL 10/2022, of 6 September, Law on the comprehensive guarantee of crimes against sexual freedom, and that is consent. Article 178 of the Criminal Code states that consent is only understood to exist when it has been freely expressed through acts which, in view of the circumstances of the case, clearly express the will of the person, and therefore, in these situations, express consent is not required, but it can be tacit, and depending -and here is the key to the type of offence- on the circumstances of the case.

11.- OBJECTIVE EXPLANATION OF POLICE SURVEILLANCE ACTIVITIES IN A PUBLIC SPACE. STS (Supreme Court Ruling) 30/2023, of 25 January[11].

11.1.- Factual background

During 2018, the Investigating Court Number 8 of Alicante conducted extensive preliminary investigations regarding a serious public health crime involving harmful substances sold to retail customers. The investigation highlighted the diligent police work of surveillance, monitoring, and stakeouts, as well as the successive provision of evidence against the suspects' criminal activity.

11.2.- Legal grounds

In this case under review, the SC takes up the old Aristotelian axiom that the whole is always greater than the sum of its parts.

It indicated that the critical and isolated approach to each item of evidence can indeed reveal a lower level of probative consistency for some of them or even, occasionally, the insufficient reconstruction of one. However, this does not mean that the cumulative result of all those pieces of evidence, interacting, is not sufficiently solid to declare the prosecution's hypothesis proven.

In the present case, as the judgment under appeal rationally stated, this was not an isolated seizure, but a total of six interventions in which narcotic substances were seized from persons who had just entered the defendant's home and who told the officers when

[11]CENDOJ database. STS, Criminal Section 1 of 25 January 2023 (ROJ: 206/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:206). Ruling: 30/2023. Appeal: 1556/2021. Rapporteur, H. E. Mr Andrés Palomo del Arco.

the substance was seized that they had bought it from "Elisabeth, the wife of Cocacola, the name by which Nicolás is known", where specific or isolated moments in the entire course of surveillance have no evidentiary bearing whatsoever. Porfirio came down from the house where the illegal activity was taking place, to hand over a sum of money to Nicolás, an illogical activity, when his wife was upstairs with Porfirio, which had nothing to do with an alleged rent; it is even stated that the amount allegedly owed was €400, but €515 was handed over in coins, while the officers who witnessed it, during the two days of surveillance, also observed up to six persons who, after entering the house and then leaving, were seized with cocaine papers; the property, which had unreasonable security measures, had three reinforced, heavy metal gates with reinforced hinges, which were propped up to the structure of the house, which also had a video surveillance system on the balcony consisting of two high-resolution cameras that focused on the entrance to the street doorway, which was monitored from inside the house.

On the other hand, with regard to the location under surveillance, the ruling also explains that both agents indicated that, for security reasons and so as not to harm private individuals who had allowed the surveillance, they could not identify their exact location and that in this circumstance the position of the defence counsel was to state that they understood the reason, without objecting to the explanation of both agents; an explanation which, in addition to being reasonable, is seen as very detailed and even the group leader was recounting the result of the investigation with the photographs.

11.3.- Conclusions

The SC examines the incriminating elements set out in the conviction handed down by the Provincial Court, emphasising that this assessment must always be joint and not isolated and independent of the parts that make up the whole. It also highlights the appropriateness of police work and the objective explanation of the choice of location for surveillance.

12.- WITHDRAWAL OF PASSPORT AND SETTLEMENT OF CONVICTION. STS 129/2023 of 1 March[12].

12.1.- Factual background

The present cassation appeal is brought by the convicted defendant Mr Luis Antonio against the order dated 3 May 2022, issued by the Second Section of the Provincial Court of Almería in the individual case of the convicted defendant, by which it was agreed that there was no place for payment of compensation for the precautionary measure agreed on the convicted defendant and relating to the prohibition to leave the national territory. It is not stated in the Supreme Court judgment what crime the defendant was convicted of.

The procedural representation of the convict Luis Antonio, requested compensation, in the corresponding proportion, for the personal measure of obligation to

[12] STS, Criminal Section 1 of 01 March 2023 (ROJ: 575/2023 - ECLI (European Case Law Identifier) :ES (Spain):TS (Supreme Court):2023:575). Ruling: 129/2023. Appeal: 10471/2022. Rapporteur, H. E. Ms Carmen Lamela Díaz.

appear apud acta on days 1 and 15 during the time he was on probation for this offence, as well as for the prohibition to leave the national territory.

The Public Prosecutor's Office reported favourably on the compensation of the days of obligation apud acta in application of the provisions of article 59 of the Criminal Code, so that they would be compensated with respect to the sentence imposed, calculating them at the rate of one day for every ten appearances. With regard to compensation for imprisonment due to the prohibition of leaving the national territory, the Prosecutor's Office opposed it due to the lack of evidence or argumentation on the damages caused by the precautionary measure. The private prosecution had no comments.

12.2.- Legal grounds

The Provincial Court had denied compensation for the period of time during which the convict had been deprived of leaving Spanish territory by withdrawal of his passport, not only because no harm had been alleged or proven, but also because the decision granting the precautionary measure did not prohibit unconditional exit from the country, but made it subject to prior judicial authorisation, and during the period of validity of the measure, no request to that effect had been made by the convict.

The Court is right when it does not find that there is any concrete prejudice to the convict as a result of the imposition of the precautionary measure. In fact, the convict Luis Antonio has said nothing in this regard throughout the proceedings, nor has he requested judicial authorisation to travel outside Spain, and he has not done so until this appeal has been lodged, basing his harm on the fact that he has not been able to visit his parents and other family members. He also tries to justify the lack of a request to leave the country on the basis of the probable refusal by the judicial authority, a justification which lacks all sense, bearing in mind that the measure was not imposed in an absolute and unconditional manner, but subject to the corresponding judicial authorisation, which is why the decision itself provided for the possibility of allowing him to leave Spain.

Notwithstanding the above, the Court's decision is contrary to the provisions of Article 59 of the Criminal Code and the doctrine of this Chamber implementing it.

Thus, when the precautionary measure incurred and the penalty imposed is of a different nature, Art. 59 CC does not empower the Court, but imposes compensation, stating in this case that the Judge or Court "shall order" that the corresponding part be deemed to have been executed, but leaving it to the Court's discretion to determine which part of the penalty imposed is to be compensated.

As we recalled in ruling Number 484/2020, of 1 October that "The Constitutional Court, in its STC 169/2001, of 16 July, stated that the withdrawal of passports constitutes a restriction on personal liberty and is nothing other than conditional bail on remaining in Spain at the disposal of the judicial authority. The highest constitutional interpreter pointed out that the withholding of passports, as a precautionary measure as a substitute for conditional bail, implies an infringement of the right to personal liberty (Article 17.1 SC) which requires the corresponding legal authorisation (Article 53.1 SC), due to this reason, in that ruling, protection was granted on the grounds that, at that time, there was insufficient legal authority to withhold the passport.

It should be remembered that the restriction of fundamental rights necessarily requires legal authorisation (Article 53.1 SC). The legal deficiency noted by the Constitutional Court was solved by Organic Law 13/2003, of 24 October, which allowed the possibility of withholding the passport as a measure to guarantee conditional bail, by means of a reasoned judicial decision.

For its part, this Chamber already said in STS 154/2015, of 17 March that there was, in principle, no obstacle to projecting the doctrine on the compensation of the obligation to appear to passport retention, indicating that compensation required an equivalence ruling in which "the nature of the measure and the penalty, and the impact of each on the subject's sphere, assessing their degree of affliction" had to be taken into account, concluding that "there are no aprioristic rules of generalised application".

In that case, an equivalence module of one day for each month of deprivation of liberty was considered reasonable, although it was acknowledged in the ruling that the person concerned had a business abroad that he had to run through third parties.

This approach has been maintained subsequently and, thus, in STS 443/2019, of 2 October, we declared the obligation to compensate regardless of the intensity of the restriction for the person subject to it. In this ruling, it was agreed that compensation should be paid even for the time elapsed as a result of a request for a pardon, since this request was the legitimate exercise of legal power and during its processing, the precautionary measure was in force.

In STS 377/2019, of 23 July, we indicated that in order to establish compensation, it would not be required that the person requesting it justifies the extent to which the restriction has affected them, or that they have requested authorisation to leave Spain and it has been denied, since the withholding of the passport has in itself an unquestionable component of affliction and severity".

In accordance with the doctrine set out above, we must therefore start from the objective fact that the withholding of the passport has in itself an unquestionable component of affliction and severity, which must be reflected in the serving the imprisonment finally imposed. However, in our case, in the sense already explained, no particular harm to the appellant has been accredited, beyond the obvious generic limitation or restriction entailed by the precautionary measure, so that the conversion module of one day in prison for every six months of passport retention or prohibition to leave Spain must be accepted as a module of conversion.

12.3.- Conclusions

The duration of a personal precautionary measure ordered during the investigation of the case and depending on its nature, once a conviction has been handed down, must be paid as time spent in effective compliance. There is no problem for the settlement in cases of a previous pre-trial detention, if the penalty is imprisonment; nor is there a problem for the settlement of the periodical appearance days agreed as an apud acta obligation, if again the penalty is imprisonment. If the instrumental measure had been the withdrawal of the passport, it is clear that there has been a serious limitation on the freedom of movement of the addressee and again, if the penalty is imprisonment, the time that this

withdrawal would have been in force during the investigation of the case should also be calculated in favour of the defendant after verifying the real effect on his rights.