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REVIEW OF CASE LAW 5TH CHAMBER OF THE SUPREME COURT

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1. THE POSSIBILITY OF ATTENDING AND INTERVENING IN THE STATEMENTS OF THE OTHER PARTY, AS THERE ARE TWO DEFENDANTS AND THEY ARE CONSIDERED AS OPPOSING PARTIES (CO-PARTIES). Supreme Court Ruling 5th Chamber, 22 March 2023.

1.1. Factual background.

Possible infringement of Article 24 of the constitution, as the interested party understands that there has been a lack of defence as he has not been given the opportunity to intervene in the statement of the other co-defendant, thereby infringing Article 38 and 46.4 LORDGC.

1.2. Legal basis.

The rights of defence invoked are the same as those of the other co-defendant. If a co-defendant had the right to appear at the other's deposition, the latter would have the right not to answer the questions asked by the former, since it is clear that as part of this act the principal is that of the declaring defendant, who may not only remain silent but may even lie in certain circumstances and of course refuse to answer certain questions.

1.3. Conclusions

The failure to issue a summons in the case in question is irrelevant for practical purposes and of a strictly formal nature, with nothing that materially affects the rights of the defence.

2. MINOR OFFENCE PROVIDED FOR IN ARTICLE 9.4 OF THE LORDGC, CONSISTING OF "INFRINGEMENT OF THE RULES ON THE DUTY OF RESIDENCE". Supreme Court Ruling 5th Chamber, 22 March 2023.

2.1. Factual background.

Leaving the place that the defendant had established as his place of residence when on sick leave for health reasons, without requesting the necessary authorisation to do so.

2.2. Legal basis.

The following are requisites: the defendant's status as a member of the Guardia Civil and the fact that the defendant, being aware (or should have been aware) of the rules governing the duty of residence of those who belong to the Armed Forces, insofar as they form part of the basic legal framework for the Guardia Civil, since they form part of the essential core of the legal relationship that binds its members (and it must be presumed that they are perfectly well known to all members of the Guardia Civil), he fails to comply with them.

2.3. Conclusions

It will not be necessary to supplement the blank provision in which the minor infringement in question is consistent with the specific provision of the legal provisions

imposing the obligation in relation to which non-compliance is alleged, since the addressees of that provision are fully aware of the scope of the prohibition.

3. THE SUSPENSION APPROVED TO PROVIDE NOTICE OF THE AGREEMENT TO INITIATE SANCTIONING PROCEEDINGS AND TO HOLD A HEARING. Supreme Court Ruling 5th Chamber, 14 February 2023.

3.1. Factual background.

In light of the impossibility of notifying the defendant of the summons to appear, the attempts made by telephone and the two attempts made visiting the address provided by the defendant having been unsuccessful, it was decided to cancel the hearing and statement-taking procedures and to request the disciplinary authority to suspend the calculation of the time limits.

3.2. Legal basis.

Having carried out these attempts at providing notification at the defendant's place of residence, the notification had to be considered as having been made, continuing with the proceedings as provided for in Article 44.3 of the LORDGC; these proceedings could be practised validly without the presence of the defendant.

3.3. Conclusions

Following the two attempts to provide notification at home at different times, the interested party should be considered as having been notified of the order to initiate the disciplinary proceedings and the summons to attend a hearing, and the proceedings should continue and the disciplinary case should not be suspended.

4. REQUEST FOR REPORTS BY A SUPERIOR TO A SUBORDINATE, IN RELATION TO THE FUNDAMENTAL RIGHT NOT TO TESTIFY AGAINST ONESELF AND NOT TO CONFESS GUILT. Supreme Court Ruling 5th Chamber, 09 February 2023.

4.1. Factual background.

The superior asked the person in question about a number of facts that the officer considered to be relevant to disciplinary proceedings, issuing the report the following day, obtaining a confession as a result, with the hierarchical relationship prevailing.

4.2. Legal basis.

When the person who launched the disciplinary report considers that, before submitting the report to the command or competent authority giving an account of the facts or initiating the corresponding disciplinary proceedings, it is necessary to question or request explanations from the person concerned; the latter shall, in any case, be informed of the reason and of their right not to testify against themselves and not to confess guilt.

4.3. Conclusions

The statement made by the accused party to a superior, set out in the disciplinary report, lacks evidentiary effectiveness in the disciplinary proceedings that may subsequently be initiated, as it was obtained in breach of the aforementioned fundamental rights.

5. ROLE OF THE INSTRUCTOR IN CASES INVOLVING MINOR OFFENCES. Supreme Court Ruling 5th Chamber, 26 January 2023.

5.1. Factual background.

As part of a minor offence, the disciplinary authority, rather than the designated investigator, decided on the admission and refusal of the proposed evidence.

5.2. Legal basis.

Unlike the disciplinary procedure for serious and very serious offences, the instructor is a contingent, non-prescriptive figure, with actions such as: ordering the start of proceedings, admitting or not admitting evidence, assessing this evidence, pursuing and controlling the proceedings and deciding on the sanctions coming under the responsibility of the sanctioning authority.

5.3. Conclusions

In the case of minor offences, both the law and case law attribute the power to decide on the evidence to the sanctioning authority and not to the instructor.

6. EXPIRATION OF PROCEEDINGS FOR MINOR OFFENCES. Supreme Court Ruling 5th Chamber, 18 January 2023.

6.1. Factual background.

The question focuses on the coordination or how Articles 43.4 and 44 of the LORDGC are compatible with one another.

6.2. Legal basis.

If service has been attempted at home, two attempts must be made at different times within a period of three days for service to be deemed as having been made. And, if the person is not located at their address, the decision by means shall be published of the edicts, i.e. this is the responsibility of the sanctioning authority.

6.3. Conclusions

The time limits may only be suspended when the cause for which it is not possible to carry out a procedure or notification is attributable to the interested party. Therefore, for the suspension of the time limits to be in accordance with the law, the examiner must state the reasons for the suspension and why it is attributable to the interested party.

7. SERIOUS OFFENCE CONSISTING OF "SERIOUS DISRESPECT TOWARDS SUPERIORS, COLLEAGUES, SUBORDINATES OR CITIZENS IN THE EXERCISE OF THEIR DUTIES, AS PART OF THEIR DUTIES OR WHILE IN UNIFORM", PROVIDED FOR IN ARTICLE 8.6 OF THE LORDGC. Supreme Court Ruling 5th Chamber, 30 December 2022.

7.1. Factual background.

Having noted, on 19 May 2017, in the SIGO application, under the category corresponding to "Other facts of legal or administrative interest", that the previous day "he had gone to the medical centre because of constant out-of-tone comments and harassment to which he had been subjected by the interim Commanding Guard of the Post since the previous November; without finding any help".

7.2. Legal basis.

The expressing of intimate, very personal feelings, such as noting that the person is "*suffering*" harassment, can never be described as untrue or false, as it only expresses the subjective state of the person making such a statement.

7.3. Conclusions

The statements of the person affected by harassment, which consist of a personal, real and true perception, may not be considered untrue, false or mendacious, merely because the reality of the harassment has not been corroborated by any of the accused's colleagues.

8. "GROSS NEGLIGENCE IN THE FULFILMENT OF PROFESSIONAL OBLIGATIONS OR ORDERS RECEIVED", PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC. Supreme Court Ruling 5th Chamber, 30 December 2022.

8.1. Factual background.

The conduct for which the defendant was sanctioned was failing to appear on two occasions for the appointments scheduled at the Psychology Office of the Health Service at Command Headquarters to be examined and for not having answered the repeated calls made to the contact telephone number provided.

8.2. Legal basis.

The defendant's failure to attend a number of the necessary medical check-ups cannot be attributed to a lack of care in the strictest sense of the word, but to the very nature of the illness in question, a severe mental disorder.

8.3. Conclusions

To attribute a lack of care in the strictest sense of the word to the defendant, the very nature of his illness must be taken into account, a relevant mental disorder, given its effect on the defendant's consciousness, this can exclude his liability for negligence.

9. "SERIOUS OFFENCE AS PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC "SERIOUS NEGLIGENCE IN THE FULFILMENT OF PROFESSIONAL OBLIGATIONS OR ORDERS RECEIVED". Supreme Court Ruling 5th Chamber, 21 December 2022.

9.1. Factual background.

While on duty, the defendant received a call from the Central COS to go to a petrol station in response to a possible case of gender violence and, subsequently, he did not record any of the facts referring to the alleged aggression in the corresponding service ticket, nor in any other document or recording in the database, nor did he relay any developments to any of his commanders, apart from the COS.

9.2. Legal basis.

The appropriate classification of the negligence or inaccuracy in question must be based on the nature of the duty or obligation breached and the circumstances of the case; only that which corresponds to a breach of the most elementary duty of care, which is to be expected in the behaviour of a professional who is cautious when it comes to fulfilling their obligations, deserves to be considered serious.

9.3. Conclusions

The sanctioning decision must specify, in a precise and evident manner, that as part of the behaviour in question, there is a lack of application or care that the fulfilment of the legal duty requires.

10. SERIOUS OFFENCE OF "ANY REQUEST BASED ON FALSE ASSERTIONS", PROVIDED FOR IN ARTICLE 8.21 OF LORDGC. Supreme Court Ruling 5th Chamber, 21 December 2022.

10.1. Factual background.

The defendant, who did not have the required diving certificate, applied for a secondment. In the curriculum vitae submitted, in an attempt to be considered as a candidate even though he did not hold a diving qualification, he stated that he had a "Civil Guard boat handling qualification" which, in reality, he had not obtained and therefore did not possess.

10.2. Legal basis.

False statements i.e. untruthful (objective element) must be made, and the falsehood committed must have been made intentionally, as well as being relevant.

10.3. Conclusions

The subtype in question requires a mendacity that favours the claim, application or request in question, which will have to be analysed on a case-by-case basis.

11. ARTICLE 7.18 OF LORDGC, CONSISTING OF “CARRYING OUT ANY ACTIVITY THAT BREACHES THE RULES ON INCOMPATIBILITIES”. Supreme Court Ruling 5th Chamber, 21 December 2022.

11.1. Factual background.

The Instructing Committee agreed that the secretary should contact the defendant by telephone, at the number provided by the legal adviser, and send the documentation relating to the resolution of the case to the e-mail address provided by the defendant. As no notification could be made, under Article 43.4 of the LORDGC, an agreement was reached to suspend the calculation of the deadline for processing the case until the defendant appeared before the Committee to notify him of the sanction.

11.2. Legal basis.

Telephone calls, especially when they are unsuccessful, do not serve to demonstrate receipt by the person concerned of the date, identity and content of the instrument in question, and are useless for the purposes intended here. On the other hand, an administrative decision or instrument can only be notified by telematic means (not by telephone) such as e-mail, only as part of the procedures expressly indicated by the interested party, when this has been expressly stated by the latter.

11.3. Conclusions

The inadmissibility of providing telephone notification to the defendant for the purposes of suspending the time limits for the processing of the proceedings.

12. OFFENCE PROVIDED FOR IN ARTICLE 8.27 OF THE LORDGC, CONSISTING OF "EXCEEDING, AT THE BEGINNING OR DURING THE PROVISION OF THE SERVICE, A BLOOD ALCOHOL LEVEL OF MORE THAN 0.3 GRAMS PER LITRE OR ALCOHOL IN EXHALED AIR OF MORE THAN 0.15 MILLIGRAMS PER LITRE". Supreme Court Ruling 5th Chamber, 20 December 2022.

12.1. Factual background.

At an initial stage of the provision of services, the commanding officers noticed that the defendant might be showing external signs of having consumed alcohol, thus launching the procedure to verify this circumstance by means of a breathalyser test, remaining in the recreation room and on duty for two hours, until, following the positive results, he was relieved of duty by his superior.

12.2. Legal basis.

The standard does not only require that the service has started in order for it to be fulfilled, but also provides for the determination of the appropriate capacities (that there is no prior alcohol intake) of the person concerned when he or she is going to provide services because he or she has been appointed to do so. This stems from the practical logic of avoiding starting a service in cases in which the persons required to do so are not in optimal conditions to avoid possible dysfunctions or damage.

12.3. Conclusions

The standard is fulfilled by placing the defendant in a situation in which he cannot perform his service with the knowledge that he had been appointed to it.

13. OFFENCE PROVIDED FOR IN ARTICLE 7.23 OF THE LORDGC, CONSISTING OF “PROVIDING SERVICE UNDER THE INFLUENCE OF NARCOTICS OR TOXIC OR PSYCHOTROPIC SUBSTANCES”. Supreme Court Ruling 5th Chamber, 24 November 2022.

13.1. Factual background.

A urine sample was taken from the person concerned and they were notified and expressly informed of his right to have a counter-analysis of the second sample taken; however, he did not request this within the prescribed time limit. A blood test was not offered, rather a urine counter-analysis was offered.

13.2. Legal basis.

A blood test was not offered, rather a urine counter-analysis was offered; however, such an offer of a blood counter-analysis is not the one established in the Technical Instruction 01/2017, of the General Inspectorate of Defence Health. If the drug can be detected in a urine test and it was found, then retesting the urine is the correct solution, as it is a way of verifying that the first test was correct.

13.3. Conclusions

What is important is that the test performed detects the drug and an offer is made to repeat the test. This is sufficient to prove the results of the analysis carried out. The type of sanction is particularly dangerous, as it does not require anything more than the accreditation of the provision of the service when drugs had been consumed, either before or during the service.

14. MINOR OFFENCE PROVIDED FOR IN ARTICLE 9.18 OF THE LORDGC, CONSISTING OF "DISRESPECT OR INATTENTIVE ANSWERS TO A SUPERIOR". Supreme Court Ruling 5th Chamber, 17 November 2022.

14.1. Factual background.

The Sub-Lieutenant made a telephone call to the defendant to notify him of a certain administrative procedure. When there was no response to this call, the Sub-Lieutenant told the Sergeant to make another call, which was also unsuccessful. The defendant then called his Sub-Lieutenant, with whom he had a conversation, in the course of which the Guardia Civil officer addressed the Sub-Lieutenant using a raised and tense tone and told him to let him rest.

14.2. Legal basis.

The raised and unpleasant tone and saying that he should be left alone is a clear example of an unacceptable response to a superior, which affects - even if only slightly - the discipline that should exist in the Corps.

14.3. Conclusions

Verbal violence, however mild, constitutes disrespect and inattentive retaliation to a superior.

15. OFFENCE PROVIDED FOR IN ARTICLE 8.8 OF LORDGC, CONSISTING OF “BREACH OF PROFESSIONAL SECRECY”. Supreme Court Ruling 5th Chamber, 19 October 2022.

15.1. Factual background.

The defendant consulted the SIGO portal (Integrated Operational Management System), entering the name of a private individual as search parameters and then consulted the arrest details of the person, passing them on to the mother of the detainee.

15.2. Legal basis.

There is no breach of professional secrecy when the person to whom the information is given is entitled to receive it. Therefore, *"even if the defendant had informed the mother of her son's detention, such a transfer of information is permissible"*.

15.3. Conclusions

For the serious offence provided for in Article 8.8 of the Guardia Civil Disciplinary Law to be considered as having been committed, the information must be disclosed to a third party who is not entitled to receive the information.

16. OFFENCE PROVIDED FOR IN ARTICLE 7.26 OF THE LORDGC, CONSISTING OF "COMMITTING A SERIOUS OFFENCE, HAVING A SERIOUS OFFENCE AND A VERY SERIOUS OFFENCE IN ONE'S RECORDS, WITHOUT IT BEING CANCELLED". Supreme Court Ruling 5th Chamber, 05 October 2022.

16.1. Factual background.

Decision of the Director General annulled on the grounds that it is impossible to take into account, “either to increase or to decrease the sanction, any objective or subjective elements that form an essential part of the description of the offence itself (the type) or that are so inherent that without them the offence would simply not exist”.

16.2. Legal basis.

Recurrence is an integral part of the objective element of the sanctions, and given that this fact has already been assessed, it should not be assessed again as an aggravating element when making the ruling as regards the individualisation of the sanction.

16.3. Conclusions

Impossibility of assessing objective or subjective elements inherent to the type.

17. OFFENCE PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC, CONSISTING OF A “SERIOUS OFFENCE IN THE FULFILMENT OF PROFESSIONAL OBLIGATIONS”. Supreme Court Ruling 5th Chamber, 05 October 2022.

17.1. Factual background.

The Health Service of the Command contacted the defendant by telephone to summon them to be assessed in person by the Command's doctor the following day. The defendant informed the court by telephone the same day that he was unable to attend the hearing because he was ill. The Health Service instructed him to call back when he had recovered, for the appointment to be rescheduled. A few days later, the defendant made another telephone call to the Health Service of the Command to state that he could not appear before the Health Service because he was in Morocco.

17.2. Legal basis.

The lack of activity and of the necessary care in a matter by someone who is not incapable of doing so and should do so, constitutes one of the essential factors of the offence, the nature of which is simple or mere activity, with the outcome being immaterial. It is required that the sanctioning decision specifies, in a precise and evident manner, that the behaviour in question involves the lack of application or care that compliance with the legal duty demands.

17.3. Conclusions

The Administration must specify the rule that it claims has been breached, as it is faced with a “blank” disciplinary provision that requires complementary information.

18. OFFENCE PROVIDED FOR IN ARTICLE 7.13 OF THE LORDGC, CONSISTING OF “COMMITTING A FRAUDULENT OFFENCE AS RECOGNISED IN A FINAL RULING, RELATED TO THE SERVICE, OR ANY OTHER OFFENCE THAT CAUSES SERIOUS DAMAGE TO THE ADMINISTRATION, CITIZENS OR LEGAL ENTITIES”. Supreme Court Ruling 5th Chamber, 21 September 2022.

18.1. Factual background.

Removal from service following the defendant being convicted as having committed regular domestic abuse, the penalties included but were not limited to, two years and three

months of prison and three years of being deprived of the right to possess and carry weapons and as the perpetrator of a crime of harm in the context of gender violence, one year of prison and three years of being deprived of the right to possess and carry weapons.

18.2. Legal basis.

The facts leading to the criminal conviction reflect particularly condemnable action on the part of the defendant, and as a result, his conviction was incompatible with him remaining in the Guardia Civil Corps, as it is clear that the Security Forces in general, and the Guardia Civil in particular, have, pursuant to their corresponding particular regulations, a leading role in the eradication of a particular scourge of our times: gender violence or domestic abuse.

18.3. Conclusions

The offences committed, particularly that of regular physical or psychological abuse, reveal behaviour that is totally incompatible with the functions entrusted to the Guardia Civil by law and justifies the disciplinary sanction of being removed from service.

19. OFFENCE PROVIDED FOR IN ARTICLE 7.18 OF THE LORDGC, CONSISTING OF “CARRYING OUT ANY ACTIVITY THAT BREACHES THE RULES ON INCOMPATIBILITIES”. Supreme Court Ruling 5th Chamber, 21 September 2022.

19.1. Factual background.

The defendant, who was on medical leave, was recorded by members of the security forces carrying out professional gardening, horticultural and clearing work for third parties.

19.2. Legal basis.

The fundamental right to one's own image cannot be considered as having been violated when, as in this case, no images are captured, rather the subject was merely observed in an open space, such as rural properties, gardens, the public highway, etc. - by members of the State Security Forces and Corps who were asked to officially monitor the subject in order to investigate the possible commission of acts in violation of the legal system.

19.3. Conclusions

Checks carried out or ordered by commanders that are conducted through virtual or physically present access to spaces for public use and intended for the public, whether these are social networks or other cyberspaces freely accessible online or physical spaces open to the public, in no way infringe the right to personal and family privacy.

20. OFFENCE PROVIDED FOR IN ARTICLE 8.29 OF THE LORDGC, CONSISTING OF “CONVICTION IN A FINAL RULING OF AN INTENTIONAL CRIME, PROVIDED THAT IT DOES NOT CONSTITUTE A VERY SERIOUS CRIME”. Supreme Court Ruling 5th Chamber, 21 September 2022.

20.1. Factual background.

Minor intentional crime (injury) pursuant to the first paragraph of article 8.29 of Organic Law 12/2007.

20.2. Legal basis.

A distinction must be made between the cases in which the offence is removed from the Criminal Code by virtue of the principle of minimum intervention on the understanding that administrative or civil sanctions are more effective than criminal sanctions in these cases, and those other cases in which the offences remain within the Criminal Code, in Book II. Following the reform of Organic Law 1/2015, the commission of a minor intentional crime is reflected in the first paragraph of Article 8.29 of Organic Law 12/2007, in such a way that in these cases, the commission of the offence is sufficient to understand that this serious crime has been committed.

20.3. Conclusions

In these cases, there is no need to prove that the conduct is related to the service, or that it causes damage to the Administration or to the public.

21. OFFENCE PROVIDED FOR IN ARTICLE 8.21 OF THE LORDGC, CONSISTING OF “ANY CLAIM, REQUEST OR MANIFESTATION BASED ON FALSE ASSERTIONS”. Supreme Court Ruling 5th Chamber, 19 July 2022.

21.1. Factual background.

The instructor of the disciplinary proceedings took the statement of the defendant without Civil Guard appointed for his defence being present, resulting in the former refusing to testify and presenting a letter of the same date in which he opposed the fact that he had to face the situation with no defence, as he had not been provided with the advice and assistance of the Civil Guard chosen to this end.

21.2. Legal basis.

The fact that the right of the defendant to having the civil guard appointed to this end present as they were unable to attend during the hearing and statement-taking procedure before the examining magistrate cannot, without further consideration, lead to the absolute revocation of the decision to impose a penalty.

21.3. Conclusions

The sanction should not be annulled on the grounds of the rights to a defence being breached, if the defendant was able to put forward and prove in the course of the

investigation what was in his interests, and was able, if he considered so relevant and decisive, to ask the investigator to hear his evidence with his adviser present.

22. OFFENCE PROVIDED FOR IN ARTICLE 8.10 OF THE LORDGC, CONSISTING OF “FAILING TO APPEAR TO PROVIDE A SERVICE”. Supreme Court Ruling 5th Chamber, 14 July 2022.

22.1. Factual background.

Failure to appear to provide the service assigned to perform at his unit, from 06:00 a.m. to 2:00 p.m., which, as the accused did not appear, had to be provided by a single person.

22.2. Legal basis.

The disciplinary offence was completed as soon as the person concerned, having been appointed, did not appear on duty without first informing his superiors, who must be informed of the circumstances and determine who is to take charge of the affected service and how it is to be carried out.

22.3. Conclusions

The non-appearance does not necessarily have to cause damage to the service, a circumstance that, if present, would be taken into account when determining the extent of the sanction to be imposed.

23. OFFENCE PROVIDED FOR IN ARTICLE 7.18 OF THE LORDGC, CONSISTING OF “CARRYING OUT ANY ACTIVITY THAT BREACHES THE RULES ON INCOMPATIBILITIES”. Supreme Court Ruling 5th Chamber, 13 July 2022.

23.1. Factual background.

The defendant offered and sold wine to different hotel and catering establishments located in towns and cities included, for the most part, in the area of the operational nucleus in which the defendant provided their services. The order to proceed is based solely and exclusively on the alleged existence of a report made by the Information Service of the Guardia Civil Command.

23.2. Legal basis.

There is no irregularity in the order to proceed, and even less cause for it to be considered null and void, since the investigation carried out by the Information Group into the alleged activities of the defendant was entrusted thereto by the superior - specifically, by the Commanding Colonel of the Command -, in case any criminal offence was being committed, and this duty formed part of his functions.

23.3. Conclusions

The preliminary enquiries performed by the person issuing the disciplinary report, in compliance with the requirements of Article 40.2 of the Guardia Civil disciplinary law,

do not require the report or, even less so, the subsequent disciplinary file, to be declared null and the evidence obtained by the Information Group can in no way be considered to have been obtained illegally.

24. OFFENCE PROVIDED FOR IN ARTICLE 7.13 OF THE LORDGC, CONSISTING OF “COMMITTING A FRAUDULENT OFFENCE REFLECTED IN A FINAL RULING, RELATED TO THE SERVICE, OR ANY OTHER OFFENCE THAT CAUSES SERIOUS DAMAGE TO THE ADMINISTRATION, CITIZENS OR LEGAL ENTITIES”. Supreme Court Ruling 5th Chamber, 13 July 2022.

24.1. Factual background.

As a result of the ruling, the civil guard was convicted as an accomplice to a public health offence (drug trafficking without causing serious damage to health), under Articles 368 and 369.1.5 of the Criminal Code and sentenced to ONE YEAR AND THREE MONTHS IN PRISON.

24.2. Legal basis.

The case provided for in Article 7.13 of Organic Law 12/2007 is a final conviction by the ordinary courts. In other words, the provision must be disassociated from the factual evidence leading to a conviction which, precisely, constitutes the objective data that justified the initiation of the corresponding disciplinary proceedings.

24.3. Conclusions

The facts proven in the ruling must be assessed and weighed up to ensure that they are properly included in the disciplinary provision in question.

25. OFFENCE PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC, CONSISTING OF A “SERIOUS OFFENCE IN THE FULFILMENT OF PROFESSIONAL OBLIGATIONS”. Supreme Court Ruling 5th Chamber, 13 July 2022.

25.1. Factual background.

The facts in question include allowing oneself to be filmed in a video (later uploaded to a social media platform) and for not having informed the command that this recording had been made, nor including this on the service note they filled out at the end of their shift. All of this despite the order given by the Lieutenant Commander reminding officers of the general ban of recording images or videos during services or inside the Guardia Civil barracks.

25.2. Legal basis.

The scope of application of the fundamental rights not to testify against oneself and not to confess guilt has not been breached, as when the Lieutenant Commander issued the order offering a reminder of the ban of capturing images and videos in relation to the handling of marijuana and its transfer to the pavilion, as well as the obligation to

immediately report any incident and when the accused participated in the video and omitted any reference to this in the service note, not only was there no procedure or investigation against them, but the Lieutenant was unaware that they had participated or were about to participate in the recording of a video.

25.3. Conclusions

It is the duty of all military personnel, whether members of the Armed Forces or of the Guardia Civil, to be loyal and to report on service matters objectively, clearly and concisely. Therefore, reporting a fact that involves the breach of an order given by a superior does not conflict with the right not to confess guilt, nor does it imply a breach of the right to due process.

26. OFFENCE PROVIDED FOR IN ARTICLE 7.7 OF THE LORDGC, IN RELATION TO AN “ABUSE OF POWERS THAT CAUSES SERIOUS DAMAGE TO THE ADMINISTRATION”. Supreme Court Ruling 5th Chamber, 06 July 2022.

26.1. Factual background.

The defendant had access, using a personal username and password, to the computer files of the Guardia Civil INTPOL-SIGO. While on sick leave, he logged in several times to this computer system to consult data on the ownership of up to 125 vehicles; once he had obtained the data associated with the number plates of these vehicles, he accessed the personal data of 15 owners, including police records.

26.2. Legal basis.

The disciplinary offence does not cease to exist because no outsider is aware of it or because it goes *"unnoticed [the conduct] by everyone"*. In crime theory, applicable in relation to disciplinary offences, the result is not necessarily an external result, but rather the carrying out of the action is already a result, as this implies the carrying out of the offence; for example, in offences involving a breach of duty, the result is precisely the breach of duty”, after which it is stated that the disciplinary offence of Article 7.7 of Organic Law 12/2007, revolves around the *"abuse of powers"*, which implies a breach of duty.

26.3. Conclusions

The creation of a risk in the abstract that can potentially materialise in a concrete reality is enough to understand the crime as having been committed; in such a way that the damage is the generation of the risk in which the Administration and the citizens are exposed to the conduct in question.

27. OFFENCE PROVIDED FOR IN ARTICLE 8.6 OF THE LORDGC, IN THE FORM OF “SERIOUS DISRESPECT TOWARDS SUPERIORS, COLLEAGUES, SUBORDINATES OR CITIZENS IN THE EXERCISE OF THEIR DUTIES, ON THE OCCASION OF THEIR DUTIES OR WHILE IN UNIFORM”. Supreme Court Ruling 5th Chamber, 06 July 2022.

27.1. Factual background.

The defendant, without the authorisation or knowledge of any of the officers who were holding a meeting on official premises, was recording the conversation, which was taking place normally and cordially and dealt exclusively with service matters, on a recording device that he was carrying in his left shirt pocket.

27.2. Legal basis.

The offence requires serious disregard for superiors, it must be an action that involves disregard, i.e. a lack of respect or consideration. Recording a conversation, being one of the participants, is not something that can be considered disrespectful, as it is possible to respect the participant and still record the conversation. This does not diminish him or her, nor is it a serious breach of courtesy towards the participant.

27.3. Conclusions

The recording of a conversation by one of the participants in the conversation cannot in itself be considered an unlawful act.

28. OFFENCE PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC, IN THE FORM OF “SERIOUS NEGLIGENCE IN THE FULFILMENT OF PROFESSIONALS OBLIGATIONS AND ORDERS RECEIVED”. Supreme Court Ruling 5th Chamber, 06 July 2022.

28.1. Factual background.

The repeated refusal by the defendant, Post Commander (up to three times) to meet with a complainant, having previously been her VIOGEN evaluator, a complaint that was directed against another civil guard stationed at the Post for allegedly breaching the court ordered protection order.

28.2. Legal basis.

This is an *“open type”* case, which implies that the administration must specify the rule with which it claims there has been non-compliance, since we are dealing with a *“blank”* disciplinary provision that requires complementary information. Only a breach of the most elementary duty of care, which is to be expected in the behaviour expected of a professional who is cautious in the performance of their duties, deserves to be considered serious.

28.3. Conclusions

The appropriate qualification of the negligence or inaccuracy committed must be made on the basis of the nature of the duty or obligation breached and the circumstances of the case.

29. OFFENCE PROVIDED FOR IN ARTICLE 7.7 OF THE LORDGC, IN RELATION TO AN “ABUSE OF POWERS THAT CAUSES SERIOUS DAMAGE TO THE ADMINISTRATION”. Supreme Court Ruling 5th Chamber, 20 June 2022.

29.1. Factual background.

The defendant used to frequent a local bar-restaurant owned by an Ecuadorian citizen at which his sister, also of Ecuadorian nationality, worked as a waitress, before whom he publicly stated his status as a member of the Guardia Civil; he regularly addressed the siblings with offensive and denigrating expressions, because of their nationality and immigrant status. Thus, on numerous unspecified occasions, he addressed the owner of the bar before witnesses with expressions such as “*he came out of the jungle*”; that “*he climbed a coconut tree*”, “*Ecuadorian, you came on a boat and you're a starving man*” and that “*he was on a boat and he was a bastard*”. Similarly, on two or three occasions, he directed phrases to his sister like “*Ecuadorian woman, you are good for nothing, you only work when you feel like it*”.

29.2. Legal basis.

Boasting being a Guardia Civil officer or flaunting that status and the badge that identifies the bearer as a member of the State Security Forces and Corps does not, in itself, constitute the very serious disciplinary offence contemplated in Article 7.7 l; however, it is no less true that, when (as in this case), boasting about being a member of the Guardia Civil is accompanied by insulting and threatening expressions directed at two Ecuadorian workers such as those indicated above, does constitute a considerable abuse of powers.

29.3. Conclusions

Expressions such as those reflected in the ruling constitute a considerable abuse of powers, causing serious harm both to the citizens who are offended and to the Administration which, illegitimately, the offender appears to represent.

30. OFFENCE PROVIDED FOR IN ARTICLE 8.9 OF THE LORDGC, IN THE FORM OF “ISSUING SERVICE REPORTS THAT DO NOT CONFORM TO REALITY OR DISTORT IT”. Supreme Court Ruling 5th Chamber, 15 June 2022.

30.1. Factual background.

The defendant is alleged to have hand written on the duty roster and recorded in SIGO, that he had told his Captain that the reason for his delay arriving for his shift and his inappropriate attire was because he had come from a Medical Centre; while the Captain and another witness present asserted that at no time did he give any justification for his delay nor for being dressed in civilian clothes.

30.2. Legal basis.

The disciplinary offence does not require that *"the information transmitted must be of relevance to the service"*. It is clear that, like any criminal or disciplinary offence, there is a limit to the permitted risk, meaning that the circumstances in question must be taken into account or, otherwise, how they have been distorted.

30.3. Conclusions

Like any criminal or disciplinary offence, there is a limit to the permitted risk, so that the concrete reality in question or, otherwise, how it has been distorted, must be taken into account.

31. OFFENCE PROVIDED FOR IN ARTICLE 8.5 OF THE LORDGC, IN THE FORM OF "LACK OF SUBORDINATION". Supreme Court Ruling 5th Chamber, 09 June 2022.

31.1. Factual background.

The civilian guard in question was asked by the guard in charge of material, on instruction from the unit's lieutenant commander, to take hand of an individual bullet-proof waistcoat, appropriate for him. The defendant refused to do so on the grounds that it did not correspond to his size.

31.2. Legal basis.

Conduct as reflected in the provisions is based on the following circumstances: a) a legitimate order from a superior (a lieutenant) and, consequently, to whom respect and compliance is required; b) full knowledge of that order by the recipient thereof (a guard); and c) failure or reluctance to partake in said conduct on the part of the recipient of the order (use of a regulation bullet-proof waistcoat).

31.3. Conclusions

It is contrary to an elementary conception of what discipline should be when it is understood that carrying out the legitimate orders of superiors is subject to the judgement or agreement of subordinates, thus departing from the principles that all civil guard officers, as a member of an armed military institute, must abide by and be aware of.

32. OFFENCE PROVIDED FOR IN ARTICLE 7.4 OF THE LORDGC, IN THE FORM OF "ANY ACTION THAT INVOLVES GENDER-BASED HARASSMENT". Supreme Court Ruling 5th Chamber, 08 June 2022.

32.1. Factual background.

Between January and June 2018, without being able to specify the exact dates, the defendant addressed, during the services they shared, expressions and comments of a sexual nature, of a lewd or degrading nature, to a female guard. These comments distributed over time were met with the repeated and firm disagreement and opposition from the female officer.

32.2. Legal basis.

The plausibility of the victim's testimony is used in the sense that it is consistent with what may be consistent with the way things are. There are no reasons to indicate that such testimony was in error or intended to mislead; and, the content of the testimony is plausible, as it does not depart from the facts of the case, and is consistent with the circumstances.

32.3. Conclusions

Problems with the credibility of the victim's testimony stem either from error or deception. The single witness statement is valid for the purpose of overriding the presumption of innocence, requiring, if appropriate to the facts, some external corroboration.

33. OFFENCE PROVIDED FOR IN ARTICLE 8.6 OF THE LORDGC, IN THE FORM OF “SERIOUS DISREGARD FOR SUBORDINATES IN THE EXERCISE OF THEIR FUNCTIONS”. Supreme Court Ruling 5th Chamber, 08 June 2022.

33.1. Factual background.

When the lance corporal was walking in the direction of the barracks, he came across the defendant, who was a few metres ahead of him on the public road, stopped until the lance corporal came alongside him and said “*asshole, now go and write that down on the service note too!*”

33.2. Legal basis.

The legal precept requires that the active subject be a hierarchical superior of the passive subject, and that the inconsiderate action or omission be carried out by the former, among other modalities, in the performance of the duties either of the agent or of the victim or of both, and what it does not require is that the duties must be being exercised at the time the action is performed, since the expression “in the exercise of their functions” introduces an occasional or contextual element that has a teleological not strictly temporal content.

33.3. Conclusions

The inconsiderate act or omission must be committed because of or as a consequence of the functions or duties that the perpetrator or victim performs, has performed, will perform in the future, or was or has been entrusted with in the past.

34. OFFENCE PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC, IN THE FORM OF “SERIOUS NEGLIGENCE IN THE FULFILMENT OF ORDERS RECEIVED”. Supreme Court Ruling 5th Chamber, 08 June 2022.

34.1. Factual background.

At the start of the service, the leader of the outgoing team informed the defendant that he had been informed from one of the patrols that at around 06:00 a.m. a citizen would come

to give a witness statement in relation to an alleged crime that had taken place during the night. When this person appeared in person, the defendant, despite there being no reason to prevent him from doing so, told him that he was not going to collect any evidence from him.

34.2. Legal basis.

The appellant breached his professional obligations by openly refusing to take the statement of the sworn security guard who had witnessed the commission of a theft for which a person had been arrested and who had been expressly instructed by the defendant's colleagues to appear at the SATE to give evidence. This was in breach of his duty "*to investigate crimes and assist citizens, preserving their welfare*".

34.3. Conclusions

The misconduct was confirmed by the omission of an elementary professional obligation, by someone who, having the knowledge, training and, rank should have been fully aware of the correct way to proceed and the consequences of non-compliance.

35. OFFENCE PROVIDED FOR IN ARTICLE 8.6 OF THE LORDGC, IN THE FORM OF "SERIOUS DISRESPECT TOWARDS SUPERIORS, IN THE EXERCISE OF THEIR DUTIES, AS PART OF THEIR DUTIES OR WHILE IN UNIFORM". Supreme Court Ruling 5th Chamber, 19 May 2022.

35.1. Factual background.

The defendant was not informed that an authorised secretary was going to be involved when he was informed that the witness would provide a statement by videoconference, with the possibility of appearing with his lawyer; this omission was recorded in the minutes of the hearing.

35.2. Legal basis.

This procedural error did not deprive him of the possibility of challenging the authorised secretary once his identity was known, since, if there had been any cause of incompatibility, he could have done so from the moment he became aware of it.

35.3. Conclusions

There is no breach of fundamental rights by the failure to provide notice, prior to the hearing, the identity of the secretary authorised to assist the examiner in taking the statement by videoconference.

36. OFFENCE PROVIDED FOR IN ARTICLE 9.1 OF THE LORDGC, IN THE FORM OF "DISREGARD FOR SUPERIORS IN THE EXERCISE OF THEIR FUNCTIONS OR ON THE OCCASION THEREOF". Supreme Court Ruling 5th Chamber, 18 May 2022.

36.1. Factual background.

The civil guard in question, who was suspended from work, was in the distribution room of the post using a high tone of voice and was evidently nervous, used the following expressions with a colleague: *"I'm being persecuted for saying that the commander stinks. They are looking to put me in prison for six months"*, before adding *"If the commander is a pig and doesn't wash himself, it's normal that he stinks, what do you want me to say? It's the truth!"*

36.2. Legal basis.

The disciplinary proceedings in question mean the action can be directed not only against superiors, colleagues or subordinates, but also against citizens. It is obvious that the latter could not conceivably be *"in the exercise of their duties, on the occasion of their duties or in uniform"* This requirement refers to the agent or perpetrator of the conduct in question.

36.3. Conclusions

When the active subject does not act *"in the exercise of their functions, on the occasion of their functions or while in uniform"*, the holder of the disciplinary power must resort to another offence included in the disciplinary legal system, such as *"disrespect"*, as provided for in Article 9.18 of the Organic Law 12/2007.

37. OFFENCE PROVIDED FOR IN ARTICLE 7.23 OF THE LORDGC, IN THE FORM OF "RENDERING SERVICE IN A STATE OF DRUNKENNESS OR UNDER THE EFFECTS OF NARCOTICS OR TOXIC OR PSYCHOTROPIC SUBSTANCES OR THE CONSUMPTION THEREOF DURING THE SERVICE". Supreme Court Ruling 5th Chamber, 11 May 2022.

37.1. Factual background.

An incident occurred between the defendant, who was on vehicle control duties, on foot, and the driver of a lorry, with the two becoming involved in a loud argument. This situation resulted in approximately seven or eight people trying to break up the argument. Once the defendant was at the Station, he was asked by the officer to accompany him to perform an alcohol and drug tests; he voluntarily agreed and gave a positive result for THC (cannabis and cocaine). Sanction of 7 months seven months suspended from work.

37.2. Legal basis.

The use of drugs by members of the *Benemérita* constitutes a serious offence, as it affects the duty of exemplarity and the requirements of integrity and dignity provided for in Article 5.1 of Organic Law 2/1986, of 13 March, on State Security Forces and Corps. It should be added that it is common knowledge that the defendant was on duty.

37.3. Conclusions

The criteria for aggravation are the intentionality of consumption and transcendence to the outside world, as well as the consumption of substances such as cocaine, which is a particularly dangerous substance.

38. MINOR OFFENCE PROVIDED FOR IN ARTICLE 9.3 OF THE LORDGC, CONSISTING OF “NEGLIGENCE OR INACCURACY IN THE FULFILMENT OF ORDERS RECEIVED”. Supreme Court Ruling 5th Chamber, 04 May 2022.

38.1. Factual background.

The Deputy Chief Lieutenant, appointed by the Captain to lead the disciplinary proceedings, had been directly involved in the facts under investigation, as he was the one who issued, in his capacity as "*Acting Chief Lieutenant*", the provisional document containing the alleged order that the defendant had failed to comply with.

38.2. Legal basis.

The fact that the Deputy Lieutenant had issued the documents that allegedly contained the order that the defendant allegedly failed to comply with, resulting in the disciplinary proceedings being initiated, prevented the Lieutenant from being considered as lacking the personal interest, objectivity, impartiality or neutrality required of him as the lead of the disciplinary proceedings.

38.3. Conclusions

The link between the investigator and the facts under investigation, depending on the severity thereof, may mean it is not possible to detect, a priori, the absence of any prejudice or predetermination in the performance of their duties as the person leading the proceedings.

39. MINOR OFFENCE PROVIDED FOR IN ARTICLE 9.3 OF THE LORDGC, CONSISTING OF “INACCURACY IN THE FULFILMENT OF ORDERS RECEIVED”. Supreme Court Ruling 5th Chamber, 31 March 2022.

39.1. Factual background.

Failure to inform the superior (who had expressly ordered them to do so) that the offer to send a worker from a company dedicated to unblocking sewers and authorised to carry out disinfection work had been accepted, to disinfect the barracks free of charge, and that the disinfection with sodium hypochlorite of the barracks' premises and official vehicles had been carried out.

39.2. Legal basis.

Once the work had been carried out, the obligation arose to report this to the superior, as he had expressly instructed. Failure to do so meant that the non-compliance with the order was obvious and the elements of a minor disciplinary offence were met.

39.3. Conclusions

This is a case of a partially blank disciplinary proceeding that needs to be completed.

40. OFFENCE PROVIDED FOR IN ARTICLE 8.33 OF THE LORDGC, CONSISTING OF A “SERIOUS OFFENCE IN THE FULFILMENT OF PROFESSIONAL OBLIGATIONS”. Supreme Court Ruling 5th Chamber, 17 February 2022.

40.1. Factual background.

Plain-clothed officers had an accident on the resulting in the death of a roe deer; they called the defendant, who was off duty, who, without contacting any superior and without authorisation from the Guardia Civil, went to the scene. He transported one of the persons involved to a health centre. Subsequently, while on duty, he modified both a Service Sheet and the SIGO programme, so that apparently his presence at the place where the roe deer was run over would have been covered as part of a service action, when in fact everything had happened hours before and under the circumstances indicated above. Likewise, the defendant sent a report card to the Traffic Detachment, directly and without the knowledge of the Post Commander, in relation to the roe deer having been run over.

40.2. Legal basis.

The behaviour displayed by the Guardia Civil Ruperto was in breach not only of the general obligations of his position as a Guardia Civil, but also the specific regulations governing the behaviour of members of the *Benemérita* in the event of a “*traffic accident caused by the running over of game species*”, and specifically the instructions for the Province.

40.3. Conclusions

Members of the Security Forces and Corps must adapt their behaviour to the legal system and are personally and directly responsible for any acts that they carry out in their professional activities, infringing or violating the legal standards, as well as the regulations that govern their profession.

