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REVIEW OF CASE LAW 2TH CHAMBER OF THE SUPREME COURT

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Summary: 1. Supreme Court Ruling 653/2023, of 20 September 2023. Attempted murder. Civil Guard officers injured. Difference between *animus necandi* and *leadendi*. 2. Supreme Court Ruling 685/2023, of September 2023. Perpetration of and complicity in crimes against public health. Completion and attempt. 3. Supreme Court Ruling 648/2023, of 27 July 2023. Dissemination of child pornography with particularly degrading facts. 4. Supreme Court Ruling 614/2023, of 14 July. Validity of direct police surveillance and the use of photographs in private spaces. 5. Supreme Court Ruling 576/2023, of 10 July. Police intervention without a qualified interpreter for emergency reasons. Evidentiary validity. 6. Supreme Court Ruling 628/2023, of 19 July. Damage caused by graffiti on a railway. 7. STS 693/2023, of 27 September. Offence of disclosure of secrets. Disclosure of images without the victim's consent. 8. Supreme Court Ruling 647/2023, of 27 July. Offence against sexual indemnity committed by a physiotherapist. Interpretation of the victim's consent. Effectiveness of reporting and willingness to report. 9. Supreme Court Ruling 624/2023 of 18 July 2023. Thwarted malice aforethought and cohabitative malice aforethought. 10. Constitutional Court Ruling 92/2023, of 11 September. Police capture of images in communal garages without judicial authorisation. 11. Supreme Court Ruling 750/2023, of 11 October. Cultivation of marijuana. Forms of participation. Commission by omission does not apply. 12. Constitutional Court Ruling 68/2023 of 19 June. Infringement of the right of the person under investigation to information on the facts with which he is charged and access to the proceedings, as statements of the right of defence, when the case is under investigation secrecy.

1. Supreme Court Ruling 653/2023 of 20 September 2023. Attempted murder. Civil Guard officers injured. Difference between *animus necandi* and *leadendi*[1].

Factual background.

The Court of First Instance and Preliminary Investigation of Calamocha, instructed a criminal case that was subsequently referred to the Single Section of the Provincial Court of Teruel, Ordinary Summary Proceedings no. 211/2021 against Jaime, for two crimes of attempted murder, two crimes of robbery with force, two crimes of theft of use of a motor vehicle, a crime of coercion and another against traffic safety.

In the part that interests us and to which we are referring, concerning the shots fired by the Civil Guard officers who were following the accused, it is proven that the accused was at the top of the slope that forms an alleyway, in a situation of superiority over the officers who were in a lower position, a few metres away from him. They saw him manipulating an object that he had placed on the front seat of his vehicle. The officer got out of the passenger seat and when the officer driving the police vehicle got out with one leg out and half of his body inside the vehicle, the accused got out of the vehicle next to him and immediately pointed a gun at the latter's head, fired a shot and raised his

[1] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. ROJ: STS 3630/2023 - ECLI:ES:TS:2023:3630. Body: Supreme Court. Criminal Chamber. Seat: Madrid. Section: 1. Appeal No.: 10653/2022. Resolution No.: 653/2023. Date of Resolution: 20 September 2023. Procedure: Criminal appeal. Rapporteur H. E. Mr Andrés Martínez Arrieta.

weapon, the shot did not reach the officer due to the trajectory of the bullet and the fact that he had fled, although it was fired with disregard and disrespect for the life and physical integrity of the officer and the authority he represented. In response, Officer NUM000 fired his service weapon at the accused without hitting him. The officer attempted to fire a second shot, but his weapon jammed. The assailant then moved from the back of the police vehicle, taking cover in the door of the vehicle, managed to get within two and a half metres of him and fired another shot, which struck the officer as he stood facing his assailant.

As a result of the shooting, Officer NUM000 suffered a gunshot wound to the forearm and abdomen with a comminuted fracture of the ulna and radius, paralysis of the posterior interosseous nerve and a subsequent diagnosis of acute stress. The wounds were life-threatening, requiring urgent treatment, multiple surgical operations, hospitalisation, intensive care and subsequent prolonged rehabilitation, with both physical and psychological sequelae.

Legal grounds

The appeal submitted by the representative of the convicted person is developed in barely half a page, in which he confines himself to stating the grounds of appeal, without expressing a minimum of development that would allow him to question the contested ruling, which, it must be remembered, is the ruling of the Supreme Court, which, on appeal, confirmed the conviction for the above-mentioned offences, and in which the proven facts are included in the factual expression for their subsumption in the grounds of the ruling.

The first ground of appeal merely states that Article 852 of the Criminal Procedure Act has been infringed due to “the lack of a statement of reasons in the ruling under appeal”, without specifying which ruling it refers to, since our task on appeal is to examine the subject of the appeal, which is none other than the ruling under appeal. In any case, both the ruling of the first instance and the ruling of the appeal contain the precise reasoning on the assessment of the evidence that made it possible to establish the proven fact and the legal subsumption of the various offences that were the subject of the conviction. An appeal in cassation may not be challenged on the sole ground of inadequate reasoning. The reason for the appeal cannot be understood.

The second ground of appeal alleges error of law on the grounds of misapplication of Article 138 of the Criminal Code instead of applying Article 147 of the Criminal Code. It takes the view, and this is reflected in its sole argument, that the appropriate subsumption is Article 147 of the Criminal Code, the offence of causing bodily harm. The ground of appeal is unfounded and should have been rejected, given that the grounds of the ruling of the High Court of Justice of Aragon include the reasoning on the intention to kill, based on the case-law of this Court on the criteria for distinguishing *animus necandi* from *animus laedendi*, based on the weapon used in the act; the manipulations carried out on the weapon itself, which distort the ejection of the ammunition; the distance from which the shots were fired, two and a half metres; and the reason why the first shot did not reach the victim in the case of one of the officers and in the case of the second officer against whom the shot was directed when he was hiding behind the door of the police vehicle, and at a distance of two metres, suffering injuries to his arm and abdomen,

which required numerous surgical interventions and which have required a year of basic personal injury for the stabilisation of his wounds.

In its ruling, the High Court of Justice found that there was a concurrence of intent to kill, based on the use of a lethal weapon, modified in its physical configuration to increase its capacity to cause death, and the firing of two consecutive shots in the direction of the officers, hitting one of them in the arm and abdomen. The court justifies the existence of a precise intent to kill with an argument that is not contested on appeal.

Conclusions.

This decision of the Supreme Court is remarkable for the meticulousness with which it describes the situation in which two Civil Guard officers were involved in an attempt to arrest a dangerous criminal, who was finally subdued after shots were fired by other officers to prevent his escape.

It is also surprising because of the criticism of the way in which the appeal for cassation was formalised by the convicted's defence, which, according to him, should not have been accepted for processing.

Finally, with the support of objective elements presented by the officers in the police report, the distinction is made between the intention to kill and the intention to injure, with very different parameters of recognition and legal consequences.

2. Supreme Court Ruling No. 685/2023 of September 2023. Perpetration of and complicity in crimes against public health. Completion and attempt[2].

Factual background

The Court of Preliminary Investigation No. 1 of Cangas, instructed the preliminary proceedings No. 718/2019, for crimes against public health and once the oral trial was opened, referred it to the Second Section of the Provincial Court of Pontevedra, in Ordinary Summary Proceedings No. 72/2020, which issued sentence No. 18/2022, dated 26 January 2022, which contains the following proven facts: "Calixto, Cayetano and Celestino, whose personal circumstances are already known and who have no previous criminal records, acted at the service of an international criminal structure for the supply of drugs, between September and November 2019, to transport a consignment of cocaine by sea from Brazil to Spain, using a semi-submersible vessel of which they were members of the crew and from which they were to take aliquots of the drugs. This consignment of cocaine transported in the semi-submersible vessel consisted of 152 bundles containing 3030 packages of the same substance, with a net weight of 3047.907 kilograms and a purity of 80.35%, and another bundle containing 20 packages of cocaine, also with a net weight of 20.148 kilograms and a purity of 79.32%. This totalled 3068.055 kilograms of cocaine, with an estimated street value of 123,244,573 euros. The accused Ángel, Augusto, Pedro Jesús and Alexander actively collaborated with the accused Celestino in

[2] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 21 September 2023 - ROJ: STS 3637/2023. ECLI:ES:TS:2023:3637. Criminal Chamber. Resolution No.: 685/2023. Appeal No.: 10287/2023. Section: 1. Rapporteur H. E. Ms Susana Polo García.

bringing this consignment of cocaine to the province of Pontevedra, knowing that it was approaching the Galician coast on board the vessel carrying the consignment and knowing its purpose, which they shared. The accused, Ángel and Augusto, while still in their respective cities of residence - Palma and Lleida - contacted each other to see if they had a lorry, an off-road vehicle or something similar with which they could unload the cargo brought by the boat in which Celestino was sailing. To this end, Augusto called Pelayo, an acquaintance, but the call was not successful...

Initially, the AP sentenced all the accused as perpetrators of an offence against public health in the modality of substances causing serious damage to health, consumed, and with several aggravating circumstances, to sentences that for Pedro Jesús and Alexander amounted to around seven years in prison and a very heavy fine.

On appeal against the sentence imposed by the AP, the SCJ upheld the appeals of the defence and convicted Pedro Jesús as a perpetrator of an offence against public health in the category of substances that do not cause serious damage to health, for the hashish found in his home, not for the cocaine stockpile, and acquitted Alexander.

Legal grounds

Let us focus on the appeal that analyses the conduct of the accused, Alexander and Pedro Jesús.

It is difficult to see how any action aimed at bringing narcotic substances to the consumer could not be subsumed under one of the core verbs of "promoting", "facilitating" or "favouring" the illegal consumption of toxic substances, as provided for in the offence, the Court having understood that, even without material possession of the drug, actions may be carried out to facilitate the aforementioned consumption.

From the above description of the facts, it is undoubtedly clear, with regard to the accused Alexander, that the conduct he carried out is typical, we are dealing with the facilitation of a drug trafficking offence, since the Court of First Instance forgets that the accused's activity consisted not only in delivering what the other accused had bought, but also in parking the vehicle with the drugs, but that he parked the vehicle with the lights on, as Angel had instructed him to do at the request of Celestino, who told him that he was nearby and that he should flash the lights so that he could find his way at night, after sinking the boat to hide it and secure the cocaine shipment with the intention of disposing of it later, and to get hold of the bags.

On the other hand, in relation to Pedro Jesús, although in conversations with his son he tells him that he does not want to go to the place, he accepts, with knowledge of what he was doing, to take to Alexander, as his son asked him to do, all the items that they had bought in Decathlon City, Ángel and Augusto, for the crew members of the semi-submersible boat, an act that, although it does not fit into authorship, does fit into complicity. As we said in our ruling 478/2020 of 28 September, the jurisprudence of this Court has highlighted the difficulty of assessing complicity in the offence of drug trafficking under Article 368 of the Criminal Code, given the breadth with which the offence is described, in which a broad concept of perpetrator is practically used. In this way, complicity is reduced to cases of second-order contribution, which are not included in any of the forms of behaviour described in Article 368, and are generally included in

the cases of what has been called “favouring the facilitator”, which refers to behaviour that, without directly promoting, favouring or facilitating illegal consumption, helps the person who carries out the actual typical acts referred to in the aforementioned Article 368 (Supreme Court Rulings no. 93/2005, of 31-1; 115/010, of 18-2; 473/2010, of 27-4; 1115/2011, of 17-11; and 207/2012, of 12-3).

Thus, with regard to complicity in the strict sense of the term, the Court has opted, in cases of minimal assistance in acts related to drug trafficking, which are included in the graphic expression of "favouring the facilitator", to admit cases of cooperation of little relevance, such as, for example, the possession of the drug kept for another on an occasional basis and for a momentary or almost momentary duration, or the fact of simply indicating the place where the drug is to be sold, or simply accompanying the person to that place (Supreme Court Ruling 1276/2009, 21-12).

Consequently, given the broad concept of perpetrator mentioned above, Alexander's conduct must be classified as such, and Pedro Jesús's conduct as an accessory to an attempted offence, since, as we have said, according to the jurisprudence, the assessment of an attempt requires that one has not participated in the operations prior to the transport or had actual access to the drugs. This is therefore the case of the person or persons who, unconnected with the initial agreement to transport, later intervene through a clearly differentiated activity, which is what happens in the present case.

The jurisprudence confirms that, in the case of crimes committed by means of the long-distance transport of drugs, persons who arrive to collaborate or carry out their criminal activity after the drug has already been transported, and who therefore do not take part in any agreement prior to the transport, cannot be considered as perpetrators of a consummated crime if they neither contribute to the acts of transport nor subsequently dispose of the narcotic substance”. (Supreme Court Rulings 774/2022, of 21 September, citing Ruling 313/2017 of 3 May 2017).

We consider that the facts constitute a crime against public health in the degree of attempt, not completed, because there is no evidence that the accused participated in the acquisition and transfer of the drug in a boat, it was not addressed to them, nor did they have the slightest disposition of the narcotic substance.

Conclusions.

A dangerous path has been opened by the SC in this ruling, since the rigorous condemnation of the AP is neutralised by that of the SCJ, which upholds the appeal of the defence and modifies the proven facts. Not only that, the Supreme Court Ruling is a far cry from the first sentence handed down by the AP, in that it not only distinguishes with some difficulty and more rhetorically than correctly between perpetration and complicity, but also overly broadens the interpretation of attempt in crimes against public health, which leads to an extremely derisory sentence for the last link in this criminal organisation, with sentences ranging from nine months to a year and a half in prison.

3. Supreme Court Ruling No. 648/2023 of 27 July 2023. Dissemination of child pornography with particularly degrading facts[3].

Factual background

The Court of Preliminary Investigation No. 3 of Valladolid initiated Preliminary Investigations (AP No. 1584/2016) against Jesús María. Once concluded, it referred them to the Fourth Section of the Provincial Court of Valladolid, which issued a ruling on 29 March 2021, in which the following facts were established: "ONE. The accused, Jesús María, who is of legal age and has no criminal record, from at least 1 January 2016 and until 14 November 2016, knowingly downloaded and shared photo and video files containing explicit child pornography of minors up to 14 years of age, using the peer-to-peer (P2P) file-sharing program eMule, through the ADDRESS000 and ADDRESS001 networks, using the telephone line NUM000, associated with IP NUM001, installed at his home address at CALLE000, No. NUM002, in ADDRESS002 (Valladolid), with connection login ADDRESS003. TWO. Given that up to 95 downloads were detected, an entry and search warrant was requested and authorised by the order of the Court of Preliminary Investigation No. 3 of Valladolid dated 7 November 2016, in which several hard disks were seized, two of them corresponding to the computers used and several pen drives…

Legal grounds

Our jurisprudence has evolved from the understanding that the mere use of a program of this class 2P2 presupposes, at the level of the user, the knowledge that the distribution to third parties of all the downloaded material stored in the aforementioned folders is facilitated, to the finding that this subjective element cannot be presumed on the basis of this single piece of information, which means that, in each case, it will be necessary to expressly assess the evidence that accredits such knowledge. To this end, we have stated that, as far as malice is concerned, it is sufficient that it is possible, i.e. that the agent acts with the foreseeable knowledge that the use of the program allows third parties to access the material thus obtained (Supreme Court Ruling 680/2010). However, we have also pointed out that it is not correct to infer such knowledge from the mere use of the program, but that it is necessary to establish its existence in each case on the basis of an analysis of the proven circumstances. In this sense, the non-jurisdictional plenary session of the Second Chamber, held on 27 October 2009, agreed that: "the existence of the objective offence of facilitating the dissemination of child pornography in Article 189.1.b) CC having been established, as for the subjective offence, the verification of the existence of intent must be carried out without falling into automatisms derived from the mere use of the program". This agreement was later included in some rulings such as Supreme Court Ruling 340/2010.

It is clear, therefore, that proving malice requires more than proof of the mere use of the program. In this regard, this Court has pointed out that the number of elements that are placed on the network at the disposal of third parties must be taken into account, for

[3] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 27 July 2023 - ROJ: STS 3550/2023. ECLI:ES:TS:2023:3550. Criminal Chamber. Resolution No.: 648/2023. Appeal No.: 4819/2021. Section: 1. Rapporteur H. E. Mr Antonio del Moral García.

which purpose the structure found on the terminal, files stored on the hard disk or disks, or other storage devices, and the number of times they are shared, since this parameter leaves a trace in the computer system, the receipt by other users of such images or videos as coming from the perpetrator's terminal, will be taken into consideration. And whatever external circumstances are determined to reach the conviction that the perpetrator is aware of their activity of facilitating the dissemination of child pornography, among which the degree of knowledge of the use of computer systems that the perpetrator has (Supreme Court Ruling 340/2010) will be taken into account".

We have already said that the statements made by the accused and his professional knowledge cast no doubt on the possibility of malice, at least not as an eventuality.

Conclusions.

This Supreme Court Ruling incorporates an interesting nuance, citing a uniform, established and consolidated line of jurisprudence, whereby the mere use of file sharing programs such as 2P2 should not automatically be classified as dissemination, if there is no reliable proof of that knowledge and of the will to do so.

4. **Supreme Court Ruling 614/2023, of 14 July. Validity of direct police surveillance and the use of photographs in private spaces[4].**

Factual background.

The Court of Preliminary Investigation number 6 of Castellón opened preliminary proceedings of abbreviated procedure 644/2019 for crimes against public health, against several people and once the opening of the oral trial was decreed, it was sent for trial to the Provincial Court of Castellón, Second Section, with a sentence being handed down on 8 July 2021 containing the following proven facts: "SOLE. As a result of the investigations carried out by officers of the National Police Force of the Castellón Police Station, UDYCO Group, it came to light that, at least since March 2019, the home located in the ADDRESS000 area, specifically at ADDRESS001 NUM000 in the town of Grao de Castellón, was a point of sale of narcotic substances by its residents, the accused Severino, of legal age and with a criminal record not computable for the purpose of recidivism, Zaida, presumed sister of the former, of legal age and with a criminal record that could be cancelled, Adelina, the former's partner, of legal age and without a criminal record, and Victorino, of legal age and with a criminal record not computable for the purpose of recidivism, and surveillance was carried out in the place which corroborated these extremes...

Legal grounds

In a first appeal, which is poorly structured, in that the grounds of appeal are not clearly separated, two separate grounds of appeal are put forward. In the first of these, citing

[4] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 14 July 2023 - ROJ: STS 3487/2023. ECLI:ES:TS:2023:3487. Criminal Chamber. Resolution No.: 614/2023. Appeal No.: 6438/2021. Section: 1. Rapporteur H. E. Mr Eduardo de Porres Ortiz de Urbina.

Article 588 quinquies a) of the Lecrim, the nullity of both the photographs taken by the police of the garden of the appellant's home and the police surveillance of that garden, which did not have the required judicial authorisation, is asserted. In the appellant's view, the interference with the home can be physical or virtual, and the latter occurs when there is clandestine observation of what goes on inside the home. In the second, he maintains that the nullity of the images obtained and the surveillance carried out in the home should be extended to the evidence derived from them, although the brief in the appeal does not specify what this reflected or derived evidence might be. Article 18.2 EC stipulates that the home is inviolable and that no entry or search may be made without the consent of the owner or without judicial authorisation and in Constitutional Court Ruling 22/1984, of 17 February, it was specified that "this precept contains two different rules: one has a generic or principal character, while the other is a concrete application of the first, and its content is therefore more reduced. Rule 1 defines the inviolability of the home, which constitutes an authentic fundamental right of the individual, established, as we have said, to guarantee the individual's sphere of privacy, within the limited space chosen by the individual themselves and which must be characterised precisely by being exempt or immune from outside invasion or aggression, from other people or from the public authority. As has been rightly said, the inviolable home is a space in which the individual lives without necessarily being subject to social customs and conventions and exercises their most intimate freedom. Therefore, through this right, it is not only the physical space itself that is the object of protection, but also the emanation and private sphere of the individual. Interpreted in this sense, the rule of the inviolability of the home is broad in content and imposes an extensive series of guarantees and powers, which include prohibiting all kinds of invasions, including those which can be carried out without direct penetration by means of mechanical, electronic or other similar devices".

On the basis of this constitutional doctrine, the appeal ruling, that of the TSJ, applying Article 588 quinquies a) of the Lecrim, declared the nullity of the photographs obtained by the police of the garden of the home of the investigated persons. The aforementioned precept authorises police officers to capture and record images of the person under investigation "when they are in a public place or space" and the garden of the home is not considered as such but as an annexe of the home itself, protected from external invasion or interference.

The contested ruling provides an answer to a question that is susceptible to many nuances, depending on the specific action to be analysed, but, in accordance with the precept just cited and as a general rule, the recording of images from the outside in a home that, as in this case, was protected from the outside by a fence, judicial authorisation is required, because constitutional rights such as the privacy of the home and one's own image may be affected, all without prejudice to exceptional situations which are not relevant to analyse at this point, because the declaration of nullity of the contested ruling has not been challenged by any of the parties.

What is sought, however, is for the nullity to be extended to the police surveillance carried out on the same premises, a claim with which we do not identify.

In the Supreme Court Ruling 329/2016, of 20 April, we argued that "no fundamental right is infringed by the agent who perceives with their eyes what is within the reach of anyone. The police officer can narrate as a witness what they saw and observed while carrying out surveillance and monitoring duties. Our constitutional

system does not raise any obstacle to carrying out observations and monitoring in public premises as part of a criminal investigation. In the opinion of the Chamber, however, the scope of the constitutional protection afforded by Art. 18.2 of the EC can only be properly determined on the basis of the idea that the act of interference in the home can be of a physical or virtual nature. In effect, the constitutional protection of the right proclaimed in Art. 18(2) of the EC protects against both the unwitting intrusion of the intruder into the domestic scene, and against the clandestine observation of what is happening inside, if it is necessary to use a technical device for recording or approximating images for this purpose. The State cannot enter without judicial authorisation into the space of exclusion that each citizen draws vis-à-vis third parties. Art. 18.2 of the EC prohibits it, and this prohibition is violated when, without judicial authorisation and in order to circumvent the obstacles inherent to the task of inspection, an optical device is used to magnify the images and bridge the distance between the observer and the observed".

The 329/2016 ruling just cited mentions two precedents of this Chamber that illustrate our criterion. The Supreme Court Ruling of 15 April 1997 (rec. 397/1996), in response to a case with significant similarities to the one in question, stated that "... as to whether observation through a window requires judicial authorisation, the Court considers that the answer must also be negative. Indeed, in principle, judicial authorisation will always be necessary when it is essential to overcome an obstacle that has been predisposed to safeguard privacy. When, on the contrary, such an obstacle does not exist, as in the case of a window that allows a view of the life that goes on inside a home, there is no need for judicial authorisation to see what the owner of the home does not wish to hide from others...".

And in Supreme Court Ruling of 18 February 1999 (rec. 17/1998) it was reasoned as follows: "... in the present case it is a courtyard that can be seen directly from the outside, according to the ruling under appeal, and which, even though it is considered to be a home in its own right, is permanently exposed to the public. In these circumstances, and in accordance with the above, we cannot share the Court's opinion that there has been a violation of the right to inviolability of the accused's home or of her intimacy or privacy. The police officers who directly viewed the repeated courtyard and observed those who were in it coming from the street were doing no more than what anyone could do; they were contemplating and looking at what anyone could look at and observe in the absence of obstacles that would disturb, impede or - quite simply - hinder the curiosity of others. There has therefore been no infringement of privacy or intimacy and, as such, the evidence obtained from these observations is perfectly lawful and valid from a constitutional perspective".

Finally, we consider that the police surveillance is not vitiated by the alleged invalidity.

Conclusions.

The principle of nullity of evidence obtained directly or indirectly in violation of fundamental rights, which is known as the theory of the fruit of the poisonous tree, is very extensive and has been subject to various restrictions in order to place it in a reasonable dimension and one of these restrictions is the so-called inevitable discovery exception which excludes the nullity of reflexive evidence when the circumstances would have led to the practice of the same.

Inevitable discovery is a refined formulation or assumption of the theory of independent evidence and was also formulated for the first time in American jurisprudence in the case (Nix vs Williams-1984) and has been applied by the SC on numerous occasions. An example of this was Supreme Court Ruling 974/1997, of 4 July, which rejected a petition for the nullity of a drug seizure, which was preceded by an insufficiently motivated telephone interception, because, apart from the interception and before it, the accused was the object of surveillance and monitoring that would also have led to the discovery of the meeting in which the delivery of the stash took place.

Thus, the capture of images by the use of any technical means by the police inside a home or in one of its annexes, such as a courtyard, would require judicial authorisation, because Art. 588 quinquies a) of the Lecrim only foresees the possible capture of images by the police without judicial authorisation, if it is a question of public spaces. The Lecrim does not foresee the capture of images in private spaces as an independent technological measure, but overlaps with sound recording. Once the evidence obtained through the use of these devices has been eliminated, the observation carried out directly by the agents is fully valid.

This decision by the SC gives me food for thought in the realm of conjecture, chimeras and hypotheses, on another technological measure such as beaconing and with regard to the nullity of the geolocation of a motor vehicle and the validity of the monitoring of the operation carried out on the same car and its occupants. With surgical precision, the first line of investigation could be eliminated if it were null and void and the other maintained for incriminating purposes.

5. Supreme Court Ruling 576/2023, of 10 July. Police intervention without a qualified interpreter for emergency reasons. Evidentiary validity.[5]

Factual background

The Court of Preliminary Investigation number 14 of Barcelona opened preliminary proceedings number 209/2018, for crimes against public health, against Secundino and Serafín, which, once the opening of the oral trial was decreed, was sent for trial to the Provincial Court of Barcelona, Ninth Section, which issued a sentence on 13/01/2020 with the following account of proven facts: "SOLE: It is proved and thus expressly declared that Secundino, of legal age, of Pakistani nationality, previously mentioned, with no criminal record, and Serafin, of legal age, of Indian nationality, previously mentioned, and with no criminal record, who between the days to be stated below, resided in the house located at CALLE000, NUM000, in Barcelona, which they used for the sale and distribution of narcotic substances to third parties in exchange for money. The accused recruited buyers in the tourist areas of the city of Barcelona, to whom they offered the purchase of all types of narcotic substances, such as marijuana, MDMA, heroin or cocaine in exchange for money. Once they accepted the exchange, the buyers were accompanied

[5] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 10 July 2023 - ROJ: STS 3080/2023. ECLI:ES:TS:2023:3080. Criminal Chamber. Resolution No.: 576/2023. Appeal No.: 5091/2021. Section: 1. Rapporteur H. E. Mr Eduardo de Porres Ortiz de Urbina.

to the aforementioned flat where the narcotic substances were delivered and the price was paid by the buyers.

During the police surveillance carried out in February 2018, the following interventions were carried out: On 8 February 2018 at around 23.37 hours, the accused Secundino contacted the British tourist Luis Pablo to whom he offered the purchase of narcotic substance...At around 22.25 hours on 9 February 2018, the accused Secundino contacted the Algerian tourist Abelardo to whom after offering him the purchase of narcotic substance, he accompanied him to the flat indicated above where he purchased a plastic wrapper with a powdery substance and after the relevant analysis it turned out to be cocaine... On the same day 9 February 2018, at around 23.00 hours, the accused Secundino contacted Anton, a Swedish tourist, whom he accompanied to the flat to purchase a self-sealing bag containing marijuana... At around 23.00 hours on 15 February 2018, the accused Secundino recruited the American tourist Carmelo to whom he offered the purchase of the substance. He accompanied him to the indicated flat, where the latter, in exchange for 80€ acquired a ziplock bag containing cocaine...

Legal grounds

One of the questions raised by the appellant is the validity of the records of the substance searches carried out on the alleged purchasers, given that they were foreigners and the records were drawn up without the intervention of an interpreter, which, according to the appeal, casts a shadow of doubt over the testimony of the police officers.

No one disputes that the use of interpreters is essential when those involved in the proceedings, whether they are under investigation, accused, witnesses or experts, do not know the language of the court or are unable to express themselves in that language, but as a constitutional right it is only recognised in relation to the accused.

This Chamber has proclaimed the right of the accused to use an interpreter, when he does not know the Spanish language, as one of the elements that make up the right to a trial with all guarantees, which derives directly from the Constitution, insofar as it recognises and guarantees the right not to suffer defencelessness (Supreme Court Rulings 70/2019, of 7 February and Constitutional Court Ruling 188/1991, of 3 October).

The same is expressed in Art. 6.3 c) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in Art. 14.3 f) of the International Covenant on Civil and Political Rights, which guarantee the right of every person to be assisted free of charge by an interpreter if they do not understand or do not speak the language used in the hearing or in court. Also, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 provides in Article 2 that the right to interpretation and translation in criminal proceedings "shall apply to any person from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings".

Both this Directive and Directive 2012/13/EU, on the right to information in criminal proceedings, have been transposed into Spanish law by Organic Law 5/2015, of 27 April, which has redrafted Articles 123 to 127 of the Criminal Procedure Act. These precepts regulate in detail the right of the accused who do not know Spanish or the

language in which the proceedings are conducted to the intervention of an interpreter, as well as to the translation of the proceedings. Article 520 h) of the same legal text also expressly recognises the detainee's right to an interpreter.

In this case, however, the absence of an interpreter is not complained of in relation to statements made by persons under investigation, but rather in relation to the records of the interception of substances, drawn up by police officers in the context of police investigations prior to the initiation of criminal proceedings.

The Lecrim makes no specific reference to the requirement of an interpreter in the attestation when proceedings are carried out with citizens who do not understand Spanish (Articles 769 to 772), but states that the attestation "shall be drawn up in accordance with the general rules of this law", which allows us to affirm that, as a general rule, the taking of witness statements must be carried out by means of an interpreter, under the conditions required by Articles 441 and following of the Lecrim. However, it cannot be inferred from this precept that in urgent proceedings such as the one being analysed here, it is reasonable and appropriate to demand that the police be accompanied by interpreters to translate what a witness may say, since when carrying out this type of proceedings, surveillance, it is not possible to know whether the person with whom the action is to be carried out does not speak Spanish and, in the case of a foreigner, what language they use. Nor would it be justified and illegal for the witness to be taken to the police station for this reason alone and detained until an interpreter can be found.

In this type of situation, in which the information sought from the witness is very simple, the identification of the place where the seized drug comes from, it is admissible for police officers to interrogate the witness *in situ* and communicate with him, translating his statements if they have the linguistic resources to do so, or even through gestural language. What is decisive is not so much what the witness may say as the occupation of the substance and the subsequent statement of the police officer at the trial describing the details of the event, the place where the transaction took place, details of the transaction, where the witness came from and where he acquired the substance, etc., since it is often the case, on the other hand, that the witness either does not appear at the trial or states the opposite of what he told the police officer.

In Supreme Court Ruling 51/2020, of 17 February, we were faced with a case that bears similarities to the present one. The regularity of an entry and search of a person who did not know Spanish was analysed and we said that "it is clear that as a procedure that affects the fundamental rights of a person suspected of having committed a criminal offence and the result of which may be used as evidence against them, the right of the accused to interpretation as part of their right of defence makes it advisable that it be carried out with an interpreter, if it is previously known that the accused does not speak Spanish, and provided that this is not prevented for reasons of urgency, given the special nature of the procedure or the impossibility of having an interpreter for the language of the accused". Therefore, reasons of urgency may be sufficient justification for dispensing with the interpreter, and if this is the case in a judicial proceeding with the intervention of the person under investigation, it is all the more reason to follow the same criteria in urgent police proceedings with witnesses.

The recent Supreme Court Ruling 266/2023, of 19 April, analysed a case very similar to the one we are now considering. The case involved a police officer who, in the

course of an investigation on a boat with migrants, questioned those on board because he knew the Arabic language, obtaining relevant information to continue with the investigations. This Chamber argued that "there can be no reasonable objection to a police officer, who knows the language used by the witnesses or victims of a particular event, using their particular knowledge of that language to interview them at the outset, thus being able to take the first steps to protect them and identify those possibly responsible for the events with the necessary speed. This does not overlap with the provisions contained in Articles 440 and 441 of the Criminal Procedure Act, already in the context of judicial proceedings, concerning the testimony of witnesses who do not understand or do not speak the Spanish language. In such cases, and certainly also when it is the person under investigation who is in this situation, it is necessary to have an interpreter appointed in the legally stipulated manner. Of course, even in the context of police proceedings, the statement of a detainee or a person suspected of committing a criminal offence will be worthless if the person asking the questions and receiving the answers also acts as an interpreter in the statement. However, it is quite different in the case of these first interventions in relation to those who may have been the victim of a criminal offence. There is nothing to prevent the officer who receives the complaint from translating it, where possible, and no interest worthy of protection would be served by this; nor would this procedure be used to obtain information necessary for the assistance of possible victims or the identification of possible perpetrators. It is easy to understand that no taint of unlawfulness could be identified in the interlocution of a police officer with the possible victim of any criminal act, taking advantage of his knowledge of a foreign language, to listen to and understand his account, to provide them with initial assistance and to come to know any relevant information about the identity of the alleged aggressor. And this is what happened here.

In the first investigative steps, where urgency is a determining factor, it is not unlawful for the police officer to use their knowledge of a foreign language to address witnesses and obtain the information necessary for the continuation of his enquiries, This is without prejudice to the police officer appearing at the trial to ratify the content of the investigation, submitting themselves to the contradiction of the plenary, giving the appropriate explanations on the circumstances in which the investigation was carried out and the result of the interrogation.

In this respect, it should be remembered that the Lecrim is very flexible with regard to the professional qualifications of the interpreter, which may be different depending on the availability of the interpreter at the time of the interrogation. As recalled in Supreme Court Ruling 51/2020, of 17 February, which makes a detailed study of the right to the interpreter in our criminal proceedings, the Lecrim does not require the interpreter to have an official qualification (Articles 441 and 762.8) and the qualification of the translators cannot be considered a *sine qua non* to ensure the constitutional legitimacy of the procedural act of interrogation. What is decisive is to rule out any risk that, as a result of the appointed interpreter's lack of expertise, doubts may arise as to the accuracy of their translation of what the defendant or witness really wanted to express, a question that will have to be assessed not only in relation to the interpreter's qualifications but also to the type of conversation taking place, which may be more or less elementary, and the time at which it takes place, which may be conditioned by the urgency of its practice.

Although these precepts refer to interrogations carried out in court proceedings and are not designed for a case such as the one analysed here, they allow us to deduce a useful principle or rule for this case: The qualification of the interpreter is not a prerequisite for the legality of the translation to the extent that, depending on the circumstances and in the absence of the availability of an interpreter, the translation can be carried out by any person who knows the foreign language, and therefore the translation carried out by the police officer in emergency situations such as the one analysed in this case is not tainted by any illegality whatsoever.

That said, the police officers involved in the seizure proceedings appeared at the trial and testified about what they personally saw, which was that the various buyers entered the guarded home and left with the drugs that were subsequently seized. Regardless of what the buyers said, the officers related facts of which they were eyewitnesses, hence the statements of the buyers which were reflected in the arrest reports were not decisive evidence for the decision to convict. Therefore, the lack of an interpreter is neither a procedural irregularity nor a deficiency that is relevant to the information provided by the police officers which, together with the other evidence, forms a sufficient and solid body of evidence for the decision to convict.

Conclusions.

Interesting assessment by the SC on police action in an emergency situation, when the first enquiries may be decisive for the development of the subsequent investigation. Validity of the police translation carried out *in situ* by agents who have their own knowledge of the foreign language, on essential and accessory elements in the investigation of criminal acts.

As Supreme Court Ruling No. 576/2023 points out, if reasons of urgency can be sufficient justification for dispensing with the interpreter, and if this is the case in a judicial proceeding with the intervention of the person under investigation, there is all the more reason to follow the same criteria in urgent police actions with witnesses.

6. Supreme Court Ruling 628/2023, of 19 July. Damage caused by graffiti on a railway[6].

Factual background

Criminal Court No. 23 of Barcelona in AP with No. 442/2019, against Armando, Arturo, Aurelio, Bernardino, Blas and Casimiro, which on 1 February 2021 handed down Ruling containing the following proven facts: SOLE. The accused, Armando, Aurelio, Bernardino, Blas and Casimiro, all of whom are of legal age and have no criminal record except for Blas, who has a criminal record but cannot be counted, at around 02:30 hours on 23/12/17, by mutual agreement, stopped the metro train on line 1 at Baró de Viver station in this city by pressing the emergency button, and then spray-painted on both sides

[6] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 19 July 2023 - ROJ: STS 3485/2023. ECLI:ES:TS:2023:3485. Criminal Chamber. Resolution No.: 628/2023. Appeal No.: 4062/2021. Section: 1. Rapporteur H. E. Mr Antonio del Moral García.

of the metro carriages with spray paint, the cost of cleaning and tidying up having been estimated at 4175.31 euros". The Criminal Court handed down a ruling of acquittal which the Provincial Court upheld, with the Public Prosecutor's Office appealing in cassation.

Legal grounds

The Supreme Court Ruling upheld the Public Prosecutor's Office's appeal and convicted the accused initially acquitted, as perpetrators of a lesser offence of misdemeanour.

The SC affirms that the lower case law was, in fact, divided. Some Courts held that when the action aimed at restoring the state of the property on which the drawings or graffiti were made did not go beyond mere cleaning, we would be dealing with a mere tarnishing, atypical after the decriminalisation of the specific offence (former Art. 626 CC). On the other hand, if the removal of the paintings generates a real damage or deterioration of the object that requires its replacement, Art. 263 CC would apply. The amount of the impairment would determine whether it was a minor or less serious offence. The criminal offence of criminal damage requires a harmful result in the form of the destruction or rendering useless of the property on which the action is taken.

Other provincial courts and tribunals, on the other hand, affirmed the inadmissibility of the conduct analysed in the crime of damage. To damage means to cause harm. He who tarnishes provokes it, all the more so when the modification of the external appearance differentiates the object from other identical objects, making it difficult or impossible to achieve an aesthetic uniformity suitable for a given function.

The criminal offence of Art. 263 CC, -crime of damage- describes as a typical conduct the causing of damage to other people's property. The objective aspect consists of causing damage, not covered by other titles, to another's property. The concept of damage usually includes the destruction, rendering useless, deterioration or impairment of a thing. Destruction is equivalent to the total loss of its value; uselessness is the disappearance of its qualities and utilities; deterioration is the loss of its functionality; the impairment of the thing itself is its partial destruction, a reduction of its integrity, or a loss of value.

Since it is a property crime, the result should include its economic evaluation, duly assessed and thus,

a) From a grammatical perspective, the offence of criminal damage covers destruction, deterioration, rendering useless and impairment. According to the dictionary of the Spanish language, menoscabar "means to diminish something, taking away a part of it, shortening it, reducing it; to deteriorate and tarnish something, taking away part of the allocation or lustre it used to have". On the other hand, to deteriorate means "to spoil, impair, bring something into inferior condition or to worsen, degenerate". It follows from these definitions that there are areas in which, while there is no physical destruction or damage to the material object, there is nevertheless deterioration, linked to a significant alteration of its external appearance. The conduct described in the *factum* caused damage to the property. Its reparation required action to restore it to its previous state, which is economically assessable and has been quantified.

b) From a logical interpretation, graffiti causes damage to property: this can be subsumed under the offence of damage insofar as the repair requires a financial outlay. The property has been damaged in its physical, aesthetic and functional configuration. It would be difficult to claim that the carriages have not been damaged and/or deteriorated, when a repair, which can be evaluated economically, is necessary to restore them to the state in which their owner had them.

c) From an interpretation derived from the evolution of legislation, it should be noted that the 1995 Code decided to differentiate the crime of damage from that of tarnishment of property (Art. 626 CC). The former covered damaging results with loss of substance; tarnishment, on the other hand, included acts of defacing the property, without physically damaging it, or damaging it in a way that could be repaired, i.e. without affecting the substance, without causing damage because it is easily repairable. It was not an action that could be subsumed under the damages of Art. 263, but rather under the tarnishment typified in the misdemeanour of Art. 626 CC repealed by the reform of the 2015 Code. The typical nature of the damage included the destruction of the thing, or the total loss of its value, or its rendering useless, which means the disappearance of its qualities or utilities, as well as the impairment of the thing itself, partial destruction, the cutting off of its integrity or the partial loss of its value. It was outside the scope of the offence, as it reserved a novel figure in Art. 626, the so-called "tarnishment". In its grammatical meaning it is "the action of removing grace, attractiveness or lustre from a thing"; it does not affect the substance of the thing, which continues to exist as such, although tarnished. Functionally, it continues to serve its purpose. Therefore, if the result entailed the loss of aesthetic conditions that could be repaired, it found its typical place in the misdemeanour of Article 626 of the Criminal Code and, after its repeal, in the administrative sanctioning area of the Public Safety Act (Art. 37).

The interpretation according to which the conduct which in 1995 was subsumed under the disappeared misdemeanour of Art. 626 CC, does not, however, lead us, without further ado, to the decriminalisation of the conduct due to the disappearance of the offence. The tarnishing of a property that implies a loss of its value or involves a need for reparation that can be economically evaluated, must be re-conducted to the offence of damage. The repeal of this provision does not lead to the decriminalisation of the conduct it contemplated. This can be deduced from the Explanatory Memorandum of the 2015 reform and some incidents in the processing that the appellant highlights in its arguments and which illustrate what the legislator's intention was. Decriminalisation of the misdemeanour of Art. 626 CC, which constituted a special precept (Art. 8 CC) by contemplating cases in which the basic result only required cleaning work, the conduct will find a place in the offence of damage if the result is property damage. The amount would determine the rank of the offence as minor or less serious.

If when Art. 626 CC was in force, the discussion was between the crime of damage and the misdemeanour of defacement, now the discussion is between the crime and the misdemeanour and the administrative offence of Art. 37.13 of the Public Safety Act, which has to be resolved according to the classic criteria of differentiating between criminal and administrative offences depending on the seriousness of the conduct and the result. Proportionality will need to be applied on a case-by-case basis.

Consequently, the damage that is declared proven is the result of an action aimed at its production. The need for reparation, -everything is ultimately susceptible of being

repaired-, entails an injury to the assets of others, consisting of a loss caused by the harm produced.

Conclusions.

This Supreme Court Ruling unifies the criterion of the crime of damage in order to distinguish it from other related offences, such as tarnishment, which could distort its application. The repeal of the misdemeanour of tarnishment does not entail the disappearance of the misdemeanour of damage.

When the property has been damaged in its physical, aesthetic and functional configuration and requires an economically assessable repair to restore it to the state in which its owner had it, the concurrence of the typical and unlawful action of the crime of damage is unquestionable.

7. STS 693/2023, of 27 September. Offence of disclosure of secrets. Disclosure of images without the victim's consent[7].

Factual background.

The Mixed Court No. 7 of Parla, opened the proceedings 683/2018 for crimes of threats and discovery of secrets, against Cecilia; once concluded it referred it to the Criminal Court No. 1 of Getafe, (AP No. 118/2020) who issued sentence No. 132/2021 on 27 May 2021, which contains the following proven facts: "Conscientiously assessing the evidence, it is proven and thus declared that the accused Cecilia, with ID number NUM000, of legal age as she was born on NUM001 of 1989 and with no criminal record, with the intention of violating the privacy of Ms Elsa, posted on an unspecified date and time in August 2018 in the statuses of the WhatsApp application of her mobile phone two photographs of intimate parts of her, which she had obtained and whose origin was unknown, in which she included: "Elsa in Sardina's wife pose" and "OK Elsa".

Legal grounds

The legal representation of Ms Cecilia, Sentence number 445/2021, 14 September, issued by the Provincial Court of Madrid, Section 30, which resolves the appeal lodged against sentence number 132/2021 of 27 May, issued by Criminal Court number 1 of Getafe, in which she was convicted as the criminally responsible author of the crime against privacy provided for and punished in Article 197.1 of the Criminal Code, to a sentence of one year and one month in prison, with the corresponding accessory and thirteen months of fine.

It is argued that the criminal offence requires an act of seizure, without knowing whether the perpetrator managed to discover the secrets or violated them in the privacy and mere access to the protected data, which was not the case. On the other hand, there is

[7] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 27 September 2023 - ROJ: STS 3727/2023. ECLI:EN:TS:2023:3727, Criminal Chamber, Resolution No: 693/2023, Appeal No.: 6019/2021, Section: 1. Rapporteur H. E. Mr Andrés Palomo del Arco.

also no "malice", i.e. the subjective type which, however, requires that purpose, together with malice in the act of seizure or access.

Certainly the proven facts indicate that it is unknown how the photographs came into the possession of the accused, although she certainly has the photographs of the victim's intimate parts, without her consent, and her disclosure is obvious when she incorporates them into the "status" section of her WhatsApp; the proven facts add "with the intention of violating the privacy of Ms Elsa", as they unmistakably identify her with both expressions: “Elsa in Sardina's wife pose" and "OK Elsa".

In short, only the conduct of disclosure is described, but not that of appropriation, and therefore it cannot be criminalised through the first or second paragraphs of Art. 197; nor through the third, as the proven fact does not describe an unconsented seizure. But even if they had been voluntarily sent by Elsa to her partner or any other person who in turn sent them to the accused, this would not prevent, in the hypothesis most favourable to the accused, their full compliance with the typical conduct contemplated in the seventh paragraph, which states that anyone who, without the authorisation of the person concerned, disseminates, discloses or transfers to third parties images or audio-visual recordings of that person obtained with their consent in a home or any other place beyond the reach of the gaze of third parties, when the disclosure seriously undermines the personal privacy of that person, shall be punished with a prison sentence of three months to one year or a fine of six to twelve months. A fine of between one and three months shall be imposed on anyone who, having received the images or audiovisual recordings referred to in the previous paragraph, disseminates, discloses or transfers them to third parties without the consent of the person concerned.

Conclusions.

This Supreme Court Ruling describes the scope of Art. 197 of the Criminal Code in its different sections, which include each and every one of the imaginable criminal modalities that affect the disclosure of secrets and clearly attack people's privacy. In this typical range, punishments range from simple disclosure, to seizure and further dissemination. It is also a warning to surfers of the digital footprint or trail left by the use of social networks or messaging applications of all kinds for illicit activities.

A different matter is the lightness of the penalties assigned by the legislator.

8. Supreme Court Ruling 647/2023, of 27 July. Offence against sexual indemnity committed by a physiotherapist. Interpretation of the victim's consent. Effectiveness of reporting and willingness to report[8].

Factual background

The Provincial Court of Barcelona, Sect. 6, in the summary proceedings No. 6/2018 from the Court of Preliminary Investigation No. 15 of Barcelona handed down Ruling dated 7 September 2020 which includes the following proven facts: "1. The defendant Rodolfo had been providing his services as a physiotherapist and osteopath of the Barcelona Football Club for 30 years, having developed functions of coordinator of physiotherapists of the aforementioned Club and the first division football team, In 2016, when the events occurred, he worked as a physiotherapist for the Club's employees, his practice being located in the FCB facilities in Les Corts, in a mezzanine of the premises that Asistencia Sanitaria, FCB's sponsor, has in the Les Corts facilities. 2. Enma worked as an administrative assistant at the FCB facilities in Les Corts in Barcelona. As she had a blockage in her head and neck caused by the cervical pathology she suffered from, she was visited in November 2016 by Dr Torcuato, the club doctor responsible for the health of its employees, at his office in the FCB Ciutat Esportiva in Sant Joan Despí. The aforementioned doctor, after confirming the treatment with the traumatologist, considered that the physiotherapy treatment to be provided by the defendant in the office designated for this purpose and for the FCB employees at the Les Corts facilities would be beneficial. 3. The defendant's physiotherapy sessions with Enma began in the month of December 2016; during the third session, the defendant tried to massage her abdominal area, going down until he reached the complainant's pubic area. She advised him that she had her period, and the defendant then stopped massaging the area; finally, in the fourth session, which took place on 19 December 2016, at a certain moment the defendant lifted Enma's left leg, which caused pain in her groin, and the defendant began to work on it until he reached her vagina, all without gloves and guided by a libidinous spirit, he began to touch the inner labia and put his fingers in and out of her vagina, touching her clitoris. She could hear the defendant spitting saliva on his fingers as he carried out this action of putting his fingers in and out of her vagina, and then went on to touch her breasts, massaging them and stretching her nipples, being asked by the defendant if she was all right, and the complainant replied in the affirmative, all with the intention of putting an end to the situation and leaving the place.

In neither case did the defendant indicate that he would perform an intracavitary treatment involving the insertion of his fingers into the patient's vaginal cavity, nor did he ask for her consent to do so.

Legal grounds

The appeal considers that the requirements of the fundamental right to the presumption of innocence have not been respected by not considering it proven that the manoeuvres

[8] This Supreme Court Ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 27 July 2023 - ROJ: STS 3488/2023ECLI:ES:TS:2023:3488, Criminal Chamber, Resolution No: 647/2023, Appeal No.: 5045/2021, Section: 1. Rapporteur H. E. Mr Antonio del Moral García.

carried out by the defendant with his fingers in the patient's vaginal cavity were part of the physiotherapy treatment he was carrying out. At the same time, the victim's statements, which differ from the facts acknowledged by the appellant, would be insufficient to consider both the touching of the victim's nipples and the absence of verbal consent on her part as proven. There would be no evidentiary basis for presuming libidinous intent in these manoeuvres.

The plea, which is extensive, well prepared, systematised and constructed, like the entire appeal, and which is well constructed, with all the defensive loopholes being closed and a good number of decisions from both minor and ordinary case law being cited which could be favourable to the defence's argument, is not, however, successful.

We must situate the scope of the challenge. It is threefold:

a) Touching of the nipples could not be considered as proven. The victim's statement would provide little basis for such a conviction.

b) The conclusion on the absence of consent of the victim deserves the same assessment; the exculpatory version of the accused (there was verbal consent) could not be rejected on the basis of the patient's statement alone.

c) Finally, and here lies the main thrust of the plea, it would also be an attack on the presumption of innocence to reject the hypothesis of being faced with an action justified in terms of health, as the Provincial Court admitted, although without drawing from this possibility, which was well supported by evidence, its ultimate consequences, which would lead to acquittal.

We reverse the order of analysis chosen by the appellant in his presentation. It is not neutral from the point of view of the argumentative *iter*. From the moment it is realised that the first of the premises, which the resource skilfully tiptoes around, is not acceptable, the others lose much of their argumentative potential.

In fact, the victim's statements referring to touching her breasts and stretching her nipples, with movements that can in no way be justified from a therapeutic perspective, to a large extent deprive the defendant's other defensive allegations of credibility. If the breasts had not been massaged, the argument aimed at at least casting doubt on the circular movements of a finger on the clitoris might have a chance - a slim one at any rate - but if these other rubbings are taken as true, the hypothesis that the insertion of fingers, in a manner incompatible with medical practice, without gloves, into the vaginal cavity, with the circular movements described by the victim, was part of the treatment applied, loses credibility.

In this first approach, there is no reason to imagine that the victim would have fabricated, from the first moments, non-existent touching of the nipples; or that she would have embellished her story with this secondary addendum to give greater force to an action that in itself had an undoubted expressive potential: direct contact of the fingers with the inner part of the vaginal cavity, in a manoeuvre that no layman would imagine compatible with therapeutic massages. These facts are accepted by the appellant: he tries to explain them with a professional justification. He does not have a professional justification for the other touching, and therefore has no choice but to call them untrue.

But it is totally implausible that they have been maliciously - or unconsciously - invented and exposed by the complainant, departing from reality, with an unjustified and impossible to explain eagerness to reinforce the veracity of what the appellant has not denied.

The defence hypothesis fits very poorly with the testimonies of the people the victim spoke to after the events. Nor is it congruent with her subsequent psychological state as described by those who saw her in the moments following the episode, and which later led to her need for psychiatric treatment.

It cannot be said that the assertion that nipple touching took place is without proof; not at all. Nor that the evidence is fragile because it derives from someone interested in harming the accused. Speculation about a conspiracy by the company or some of its employees using the victim to get him fired is as far-fetched as it is unsustainable. It is an insult to the average intelligence, over and above certain internal tensions with other professionals at the Club.

The fact that the victim was encouraged to report by Club staff does not diminish the credibility of her account, nor does it deprive the report of its effectiveness as a condition for prosecution. Whistleblowing must be voluntary, free, but not entirely spontaneous or uninfluenced or unadvised. The appearance in the case supporting the accusation endorses the personal decision to denounce; personal, even if prompted or advised by third parties. Nor can a subsequent waiver, with an express protest of non-consent, be effective. Pardon ceased to be a ground for extinction of criminal liability in these crimes years ago.

The complaint cannot be revoked. This pardon, externalised in a carefully and thoughtfully written document that combines the defendant's version with that of the victim, not saying that the conduct was in accordance with the *lex artis*, but that this is what the appellant maintains, cannot have any effect at this point, without prejudice to the value that may be given to it in a possible request for a pardon.

Conclusions.

Once again, in crimes against sexual freedom, we find ourselves with the victim's version, uniform, constant and prolonged over time, in order to undermine the presumption of innocence of the person under investigation, emphasising the core and accessory elements of her statement as opposed to other less credible, implausible or captious statements by the accused. It is also worth highlighting the validity given by this Supreme Court Ruling to the immediate communication of these events by the victim to third parties, who are subsequently called to the process as witnesses, giving an account of what happened and who are finally the ones who insist that the victim denounce, without there being a spurious motive for this reason.

9. Supreme Court Ruling 624/2023, of 18 July. Thwarted malice aforethought and cohabitative malice aforethought[9].

Factual background

In a case followed before the Provincial Court of Alicante Jury Procedure No. 284/2020 from the Court of Violence against Women No. 1 of Denia, a sentence was passed on 4 April 2022 which includes the following proven facts: "ONE. The accused Alberto, of legal age, with Foreigner ID NUM000, a native of Holland, and with no criminal record, on the night of 15 February 2020 went out to various leisure establishments in the town of ADDRESS000, coinciding in the ADDRESS001 Bar with his sentimental partner, Amelia, who went to said establishment at around 22:00 hours accompanied by another unidentified man, leaving the place a few minutes later. Subsequently, at around 01: 00 hours on 16 February 2020, the accused, suspecting that Amelia was with another man, went to look for her at the ADDRESS002 Pub in the aforementioned locality, seeing her there accompanied by another man, after which the accused went to the ADDRESS003 Bar and, after 20 minutes, returned to the ADDRESS002 Pub to check what Amelia was doing and, once there, had an argument with her because the accused began to reproach her for kissing another man. Between 02:00 and 03:00 hours on the same day, 16 February 2020, the accused left the ADDRESS002 Pub together with his partner Amelia, and they both went to the property ADDRESS004 run by the former, located at AVENIDA000, NUM001 in ADDRESS000. Once inside the establishment, Amelia went to the toilet, and the accused took advantage of the opportunity to take a large knife, with a blade of about 15 centimetres, which he had on a wooden desk table, and, carrying the weapon in his hand, he went to the bathroom, where Amelia was washing her hands, at which point the accused, with the intention of ending the life of his romantic partner, stabbed her in the back and when she turned to face the accused, he stabbed her again in the chest, left thigh, left elbow, right forearm and right hand, stabbed her in the back and when she turned to face the accused, he stabbed her again in the chest, left thigh, left elbow, right forearm and left hand, Amelia fell to the ground and he lunged at her and finally cut her neck with the knife, causing a total of 16 incised and puncture wounds, leaving Amelia's lifeless body lying on the floor of the bathroom of the real estate agency and left the place.

Legal grounds

The appellant alludes to the possibility of assessing thwarted malice aforethought, citing Supreme Court Ruling no. 790/21 of 18/10/2021, and therefore, at least, he also acknowledges that the assault began as aggravated.

In any case, we would say that this Supreme Court Ruling (we have not had the opportunity to find, nor are there any other Supreme Court Rulings cited), cites cases that involve a qualitative alteration or a certain rebalancing of the initial situation that in no way occurs in the present case, thus mentioning as a paradigmatic example when the lethal result is achieved despite the victim discovering the aggressor who was lying in wait to surprise him, and although the latter manages to end her life, this takes place after a hard-fought fight that was intended to be avoided by means of the failed ambush, and

[9] This Supreme Court ruling has been published in the database of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling 624/2023, Criminal Section 1 of 18 July 2023 (ROJ: STS 3399/2023 - ECLI:ES:TS:2023:3399). Appeal: 10744/2022. Rapporteur H. E. Mr Antonio del Moral García.

so, he adds, the would-be assassin sets up the ambush and manages to surprise his enemy, but the latter reacts, gets rid of her assailant and undertakes an active and powerful defence that will finally prove to be useless. Death only occurs after a balanced fight of variable and uncertain course, although the aggressor finally achieves his initial purpose -death-, although not with malice aforethought, and in fact this Supreme Court Ruling warns that "...not every case in which there is a defensive reaction -already useless- by the victim, because he becomes aware of the attack, breaks the principle of malice aforethought. The problem will only arise when the decisive initial advantage sought, which constitutes premeditation, does not decisively condition the whole aggressive sequence that continues beyond the initial blow; when there is a certain cut, fissure or substantial change of scene in which a certain balance of forces that the aggressor intended to avoid is recomposed".

In the present case, due to the circumstances already indicated, the mere twisting of the victim upon receiving the brutal stab in the back, which the appellant himself indicates affected the right lung, with a 15 cm knife, which is not followed by any rebalancing of the situation or genuine struggle or fight, the defensive wounds are compatible with the aggravating circumstance as expressed in the case law and indicated by the lower court ruling, but rather what occurs is a brutal aggressive continuation with the knife that continues even with the victim on the ground, cutting her neck, making it unfeasible to degrade the aggravation to the abuse of superiority.

Whether or not the first stab was necessary to kill, it is sufficiently powerful and surprising, it is produced from behind, to prevent a defence against the aggressor who, thanks to this first stabbing and the stun it causes, facilitates the rest of the following multiple and consecutive stab wounds received without the possibility of any real defence whatsoever".

Conclusions.

Once again we find ourselves with extravagant categories of malice aforethought in the study within the framework of crimes against persons, as is the case with this modality referred to as thwarted malice aforethought which, despite the appellant's citation, is not reflected in the previous jurisprudence of the SC. It is really a type of prevalence whose appreciation runs through the factual terrain of the explanation of what is proven.

It also includes cohabitative malice aforethought, the configuration of which is based on an environmental situation inherent to the cohabitation between the parties involved, nothing more.

10. Constitutional Court Ruling 92/2023, of 11 September. Police capture of images in communal garages without judicial authorisation.[10]

Factual background.

In this Constitutional Court Ruling we analyse an amparo appeal no. 3456-2021, brought by Mr Abderrahman against the ruling of 22 May 2020 handed down by Criminal Court no. 4 of Barcelona in the abbreviated procedure no. 129-2020; against the ruling of 26 August 2020 of the Tenth Section of the Barcelona Provincial Court, dismissing appeal no. 131-2020, filed against the previous ruling; and against the order of the Criminal Division of the Supreme Court of 8 April 2021, refusing to admit cassation appeal no. 4479-2020. The Public Prosecutor's Office has intervened.

We can already anticipate that the Constitutional Court Ruling upholds the appeal for protection, declaring the nullity of the installation of cameras to record images by the Guardia Urbana of Barcelona in the garage of a residents' association, without judicial authorisation.

Legal grounds

We are focusing on the analysis of the fundamental rights affected, that of privacy and the right to one's own image.

As has been indicated, the appellant alleges infringement of the right to privacy and to one's own image, as if they were the same right, in relation to the principle of criminal legality, because he understands that in the police investigation that ultimately led to his conviction for a drug trafficking offence, the installation of cameras to record images by the Guardia Urbana of Barcelona in the garage of a residents' association, without judicial authorisation or permission from the association or communication to the competent authority, played a decisive role.

The appellant's approach makes it necessary to first determine which of the fundamental rights guaranteed by Art. 18.1 CE, to privacy and to one's own image, is the one affected in the present case by the actions of the officers of the Guardia Urbana de Barcelona in the exercise of their investigative functions as judicial police (Art. 126 CE). Because it is necessary to remember that, in accordance with consolidated constitutional doctrine, the rights to honour, to personal privacy and to one's own image, despite their close relationship with each other, as rights of the personality, derived from human dignity (Art. 10.1 CE) and aimed at protecting the moral heritage of individuals, nevertheless have their own specific content. In other words, they are autonomous rights, so that as each of them has its own substantive nature, the assessment of the infringement of one does not necessarily entail the infringement of the others (among others, Constitutional Court Rulings 81/2001, of 26 March, LG 2; 156/2001, of 2 July, LG 3; and 14/2003, 28 January, LG 4). In the present case, in accordance with the account of the facts declared proven in the judgments challenged in the amparo proceedings, it

[10] This Constitutional Court Ruling has been published on the website of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 11 September 2023 - ROJ: Constitutional Court Ruling 92/2023. ECLI:ES:TC:2023:92. Resolution No.: 92/2023. Appeal No.: 3456/2021. Section: 1. Rapporteur H. E. Mr Enrique Arnaldo Alcubilla.

must be understood that the fundamental right affected by the disputed action of the Barcelona City Police officers, installation of an image recording system in a garage of a residents' association, is the right to personal privacy. As this court has repeatedly stated, the right to personal privacy implies the existence of a sphere of one's own, reserved from the action and knowledge of others, which is necessary, according to the standards of our culture, to maintain a minimum quality of human life. In one way or another, constitutional doctrine insists that the right to privacy attributes to its holder the power to reserve a space protected from the curiosity of others, from unwanted publicity and, consequently, the legal power to impose on third parties, whether private individuals or public authorities, the duty to refrain from any intrusion into the intimate sphere and the prohibition to make use of what is thus known.

The privacy protected by Art. 18.1 EC is not necessarily limited to that which takes place in a domestic or private sphere. In particular, as we have highlighted in Constitutional Court Ruling 12/2012, of 30 January, LG 5, it is relevant, as a criterion that must be taken into account to determine when we are faced with manifestations of privacy that can be protected against unlawful intrusions, that of the reasonable expectations that the person himself, or any other person in his place in that circumstance, may have of being protected from the observation or scrutiny of others. Thus, for example, when in an inaccessible spot or in a solitary place due to the time of day, he can conduct himself with complete spontaneity in the well-founded confidence of the absence of observers. On the contrary, there can be no reasonable expectation in this respect when one intentionally, or at least consciously, engages in activities which, because of the circumstances surrounding them, are clearly capable of being recorded or made public.

For its part, the right to one's own image is, according to our doctrine, the "right to determine the graphic information generated by the holder's personal physical features that can be publicly disseminated. Its scope of protection includes, in essence, the power to prevent the acquisition, reproduction or publication of one's own image by an unauthorised third party, whatever the purpose pursued by the person who captures or disseminates it", and therefore covers "the defence against non-consensual uses of the public representation of the person that are not protected by any other fundamental right, particularly against the use of the image for purely lucrative purposes".

Without going into the question of whether that garage has the status of a home for the purposes of Art. 18.2 EC, since the right to inviolability of the home is not invoked in the present application for amparo, it is clear that, in accordance with the aforementioned criterion of reasonable expectation of privacy, that space belongs to the sphere of privacy protected by Art. 18. 1 EC, as it is an enclosed space which is, moreover, private property with access restricted to the owners of the parking spaces and to third parties to whom they allow entry, and it is therefore clear that it is a place where the appellant had a reasonable expectation of not being surreptitiously listened to or observed by third parties. In short, it must be concluded that it is the right to personal privacy that is affected in the present case by the fact that the officers of the Guardia Urbana of Barcelona, in the course of an investigation into a drug trafficking offence, installed an image capture system inside a garage belonging to a residents' association. The appellant himself acknowledged at the trial that he had gone there with his brother and co-accused to help him load and unload packages from a vehicle parked there, although he denied that those packages contained hashish.

It will therefore be necessary to examine whether the police action at issue in the present case infringed the appellant's right to personal privacy..

What Art. 18.1 CE guarantees is a right to secrecy, to be unknown, for others not to know what we are or what we do, preventing third parties, whether private individuals or public authorities, from deciding what the boundaries of our private life are, each person being able to reserve a space protected from the curiosity of others, regardless of what is contained in that space.. However, the right to personal privacy is not an absolute right and therefore does not confer on its holder an all-encompassing power of exclusion, since, like any fundamental right, it can yield to other constitutionally relevant rights and assets, provided that the limitation that it has to undergo is based on a legal provision that has constitutional justification, is necessary to achieve a legitimate aim, is proportionate to achieve it and, furthermore, is respectful of the essential content of the right and therefore, it cannot be denied that in certain circumstances, certainly exceptional, there may be constitutional rights or assets that legitimise the capture and even the dissemination of images that entail an intrusion into the personal or family privacy of a person. In this regard, it should be recalled that constitutional jurisprudence has recognised that the public interest in the investigation of a crime, and more specifically, the determination of facts relevant to criminal proceedings, is a constitutionally legitimate aim that may permit interference with the right to privacy, since, in effect, "the prosecution and punishment of crime constitutes a good worthy of constitutional protection, through which others such as social peace and public safety are defended, goods that are also recognised in Arts. 10.1 and 104.1 CE".

It follows from the above that the Legislator must enable the appropriate legal powers or instruments so that, with due respect for constitutional rights, principles and values, the State security forces and corps can carry out the crime investigation function that legitimately corresponds to them. In other words, there must be express legal authorisation for the judicial police to interfere with a person's right to privacy or personal image, in the framework of an investigation aimed at clarifying the authorship, causes and circumstances of a crime. For any interference in the sphere of fundamental rights and public freedoms, which directly affects their development, or limits or conditions their exercise, requires legal authorisation This reservation of law is the only effective way of guaranteeing the requirements of legal certainty in the field of fundamental rights and civil liberties. Therefore, the law authorising interference with fundamental rights must clearly indicate the scope of the discretion conferred on the competent authorities, as well as the manner of its exercise, and analogical interpretations are not admissible.

It is the ruling of the Barcelona Provincial Court which identifies Art. 588 quinquies a) Lecrim, introduced by Organic Law 13/2015, of 5 October, as the precept in which this police action would find legal authorisation. It provides as follows: "1. The judicial police may obtain and record by any technical means images of the person under investigation when they are in a public place or space, if this is necessary to facilitate their identification, to locate the instruments or effects of the offence or to obtain relevant data for the clarification of the facts. 2. The measure may be carried out when it concerns persons other than the person under investigation, provided that the usefulness of the surveillance would otherwise be significantly reduced or there are well-founded indications of the relationship of such persons with the person under investigation and the facts under investigation. One of the measures that can be adopted by the judicial police in the framework of a specific criminal investigation, without the need to request judicial

authorisation, is precisely that which has just been transcribed, consisting of the use of technical devices for capturing images in public places or spaces. It is, therefore, Art. 588 quinquies a) Lecrim the provision which, where appropriate, could provide legal cover for police interference with the right to personal privacy which is at issue in this appeal for amparo, and other rules cited by the appellant, which refer to other cases, must be disregarded.

In the contested ruling, the Barcelona Provincial Court has interpreted the clause "public place or space" contained in the first section of Art. 588 quinquies a) Lecrim, in the sense of considering that it also includes all those places or spaces which, even though they are not strictly speaking public spaces, do not constitute a domicile in accordance with the provisions of Art. 18.2 CE. Therefore, it is understood that Art. 588 quinquies a) Lecrim empowers the judicial police in the framework of a criminal investigation, without the need for judicial authorisation, to install video cameras and record images in any space, even if it is closed and privately owned, as long as it does not deserve to be classified as a home for constitutional purposes. This would be the case, as in the present case, when the police capture the images inside a garage of a residents' association, a space that the judicial body considers to be an enclosed place or space of private ownership, but public in terms of its use, although with restricted access. Such reasoning cannot be shared, because it implies an extensive interpretation of the legal provision which is not consistent with the requirements of legal certainty in the field of fundamental rights and public freedoms referred to in the aforementioned constitutional case-law.

Indeed, although there is a legislative provision that allows the judicial police to record images in the framework of a criminal investigation without judicial authorisation, this legal authorisation is limited to public places and spaces, a notion that has an unequivocal meaning, referring to spatial areas of use by the entire public, without restrictions. This is considered to be the case, as the Public Prosecutor's Office points out in its allegations, in Circular 4/2019, of 6 March, of the Public Prosecutor's Office, which, citing constitutional doctrine (Constitutional Court Rulings 134/1999, of 15 July; 144/1999, of 22 July, and 236/2007, of 7 November), points out that when Art. 588 quinquies a) Lecrim refers to "public places or spaces" it must be understood as referring to "those in which the person under investigation cannot exercise their right to privacy, where they cannot keep what is happening from the knowledge of others, as they have no right of exclusion over that place. This concept is contrasted with that of private places, which are those [...] where the individual can limit the access of third parties, thus exercising areas of privacy excluded from the knowledge of others".

The interpretation that the ruling of the Barcelona Provincial Court gives to Art. 588 quinquies a) Lecrim, by understanding that a garage belonging to a residents association: is a public space for these purposes, departs from the premises established by the legislator that authorise the interference of the judicial police in the fundamental right to personal privacy. Through this interpretation, the citizen's reasonably well-founded expectation as to how the authorities should act in the application of the law is broken, and thus the requirements of legal certainty and legal certainty demanded by the principle of legality in the area of interference with fundamental rights and public freedoms are not met. We are not, therefore, faced with a defect due to the inadequacy of the law, with a judgement on the quality of the law, but rather what is at issue in this case is the effect associated with a complete absence of legal authorisation for the interference of the judicial police in the right to one's own image, as a consequence of the recording

of images without judicial authorisation inside the garage of a residents' association. Section one of Art. 588 quinquies a) Lecrim refers incontrovertibly to the capture of images in public places or spaces, not in places or spaces of a different nature, such as private garages, even if these are used by a number of people. The exegesis of the precept carried out by the Barcelona Provincial Court implies a reductive interpretation of Art. 18.1 CE, in violation of constitutional doctrine in this respect. There is no harm in recalling that "effectiveness in the prosecution of crime, the legitimacy of which is unquestionable, cannot, however, be imposed at the expense of fundamental rights and freedoms" (Constitutional Court Ruling 341/1993, of 18 November, LG 8).

Conclusions.

After this long dissertation by the Constitutional Court on the fundamental right affected by the police use of a camera inside a communal garage, the right to privacy or the right to one's own image, it concludes by saying that the police recording of images of the appellant in amparo inside the private garage in which the car in which a cache of 44 kilos of hashish was finally seized was parked lacked legal authorisation, and therefore violated the appellant's right to personal privacy, rendering the prosecution evidence obtained by this means null and void.

I do not agree at all with the Constitutional Court’s conclusion on the evidence in question, precisely because of the reasoning used and because of its own reasons and arguments. I agree with the categorical affirmation that the right affected is that of privacy and not the right to one's own image, whose scope, outline and characteristics are not identical, but far from achieving the same annulling result, I disagree completely because in my opinion Art. 588 quinquies a) of the Lecrim is crystal clear. You do not need a warrant to take pictures in a public place, but you do need a warrant to take pictures in a private place. The Constitutional Court wanders in a grey area of what is neither totally public nor totally private and assimilates the protection afforded to the latter to the grey area, when in reality a garage such as the one analysed is an enclosed space of private ownership but of public use and, in my opinion, the reasonable expectation of privacy is so relative, diffuse and illusory that it should hardly require prior judicial authorisation.

I reproduce below the explanation of a dissenting opinion against the criterion of the majority of the Constitutional Court, "...it cannot be affirmed that a community garage is protected by the right to privacy, unless the content of this right is distorted and the right to personal and family privacy, which is dealt with in Art. 18.1 EC is transformed into a sort of non-existent right to neighbourhood or community privacy, ontologically contrary to the very essence of the concept of privacy, as it is detached from the sphere of the personality and dignity of the individual with which the rights of Art. Art. 18.1 EC are connected. It is therefore notorious - at the risk of diluting the concept of privacy - that in this space, accessible at all times to third parties, not only the owners of the parking spaces, whether they own or rent them, but also their companions and other persons authorised to access them, such as cleaning or repair workers, among others, no one can expect to be protected from the scrutiny of others. In other words, there is no expectation of privacy in a communal garage that can be accessed by a plurality of people...".

11. Supreme Court Ruling 750/2023, of 11 October. Cultivation of marijuana. Forms of participation. Commission by omission does not apply[11].

Factual background

The Court of Preliminary Investigation no. 5 of Castellón, opened Abbreviated Proceedings 1224/17 for an offence against public health, against Fermina and Gracia; once concluded, it was referred to Criminal Court no. 2 of Castellón, criminal case no. 403/2019, who issued Ruling no. 201/2021 of 4 June, which contains the following proven facts: "The accused Gracia and Fermina, both of legal age and with criminal records not computable for the purposes of recidivism, acting by prior and mutual agreement, were engaged in the cultivation of marijuana plants in the house located at CAMINO000 No. NUM000 in the town of Castellón, to be sold or distributed to third parties.

After receiving information from the theft group of the National Police that numerous marijuana plants could be seen from outside the house, the agents of the UDYCO went to check the veracity of the information on 5/07/2017, seizing 236 marijuana plants of about 50 cm planted in pots, 11 marijuana plants planted in the ground of about 120 cm, a large quantity of marijuana buds and a digital scale.

The plants seized were analysed and found to have a total net weight of 18,315.86 grams of usable dry weight of the narcotic substance cannabis sativa.

The narcotic substance marijuana seized fetches an approximate price on the illicit market of €25,622.68, sold per kg and/or €100,004.58 sold in grams, according to the expert appraisal carried out.

Legal grounds

The appellant's main argument is that mere cohabitation in a home where the commission of a crime has been discovered, without other incriminating circumstances, is not a sufficient basis to rebut her presumption of innocence.

If one were to use a strict conception of a result, it could be understood that "acts of cultivation" are already a result; but knowing that one cultivates is in no way "equivalent", in the sense of the rule, or in any other sense, to cultivating. Owning or managing a villa where a third party resides does not entail a duty to prevent the cultivation of marijuana there; and even if it does entitle the owner to cease such residence, it does not identify an obligation to cease cultivation. Without any concrete act of favouring such cultivation, no participation is predictable.

Moreover, even if the appellant also resided in the house, this circumstance alone would not be sufficient to establish her criminal participation.

[11] Ruling of the Supreme Court published on the website of the Judicial Documentation Centre, CENDOJ. Supreme Court Ruling of 11 October 2023 (ROJ: STS 4182/2023 - ECLI:ES:TS:2023:4182). Ruling: 750/2023. Appeal: 7079/2021. Rapporteur: H. E. Mr Andrés Palomo del Arco.

Supreme Court Ruling 935/2022 of 1 December insists that it is true that when it comes to crimes against public health due to drug trafficking, case law (vid. Supreme Court Rulings 1280/2005, of 7-11; 1322/2011, of 7-12; 296/2016, of 11-4) has established that the mere knowledge on the part of the spouse or similar persons of the perpetrator's activity is not sufficient to give rise to criminal liability. Thus, it has been pointed out that "knowing that the person with whom one lives with has drugs with the intention of trafficking them does not in itself imply participation in the crime of drug trafficking or the obligation to report such a fact, nor does it allow one to affirm the existence of a position of guarantor that the trafficking will not take place". Therefore, knowledge does not provide a basis for co-perpetration. It is of course possible to share possession in this offence, but to the extent that criminal liability for the acts of others must be excluded. In such cases, additional circumstances beyond mere family cohabitation will be required to establish that co-perpetration in the sense of actual co-possession of the drug can be inferred.

There are multiple manifestations of this jurisprudential criterion, such as Supreme Court Ruling 1001/2021, of 16 December and those cited therein, and the case law of this Court has repeatedly affirmed that the mere fact of cohabiting in the home where an activity aimed at the storage and distribution of drugs is carried out is not sufficient to attribute punishable participation in it, even when there is knowledge of it. It is also required to be involved in an activity which by its tendency can be qualified as facilitating trafficking. The appeal invokes this doctrine, citing Supreme Court Ruling 858/2016, of 14 November, and those condensed therein.

In the same sense, we explained in Supreme Court Ruling 270/2018, of 5 June, that "among the fundamental principles of Criminal Law is, without exception, that of personal liability, according to which the basis of criminal liability requires, as a minimum, the commission of a culpable action, in such a way that no one can be held liable for the actions of another. The Constitutional Court has held that this principle makes it necessary to establish clear objective delimitations in cases where the external aspect of the conduct is described in the law in such an ambiguous manner that its literal application is not possible, as in the case of possession of drugs for the purpose of trafficking. Mere knowledge of the existence of the drug does not imply participation in the crime (among others, Supreme Court Ruling 3/2008 of 26 December)". And we highlighted in the aforementioned Supreme Court Ruling 270/2018, that this Court has ruled on the issue in cases of family cohabitation, to point out that access to drugs by the spouse or cohabitant, the parent or the child, cannot in itself entail the realisation of the criminal offence. It is necessary to exclude criminal liability for other people's acts, which requires additional circumstances to be accredited that go beyond mere family cohabitation and that allow the deduction of co-perpetration in the sense of real co-prosecution of drugs (among others Supreme Court Rulings 4 December 1991, 196/2000 of 4 April, 1888/2001 of 4 February 2002, Supreme Court Rulings 415/2006 of 18 April, 771/2010 of 23 September, 1322/2011 of 7 December).

Conclusions

In a uniform and constant manner, the SC has maintained the thesis in matters of co-perpetration and participation of excluding criminal liability for the acts of others, which requires that, where appropriate, additional circumstances beyond mere family or

domicile cohabitation be accredited and that the active involvement of the suspect can be deduced from other incriminating elements.

12. Constitutional Court Ruling 68/2023 of 19 June. Infringement of the right of the person under investigation to information on the facts with which he is charged and access to the proceedings, as statements of the right of defence, when the case is under investigation secrecy[12].

Factual background

At the time the application for amparo was filed, the appellant was under investigation in preliminary proceedings no. 9-2016, which were being heard by Preliminary Investigation Court no. 2 of Terrassa, in which the procedural secrecy of the proceedings had been ordered. On 26 June 2018, in the course of the investigation in the said criminal case, the appellant was arrested following a search of his home, where €18, 000 in cash was found, along with documentation on the sale of jewellery and documentation relating to a third person, also under investigation in the criminal case. Once he was brought before the court on 27 June, after informing him of his rights as a detainee - among which he did not mention the right of access to the essential elements of the proceedings necessary to challenge his detention - the investigating judge questioned him after indicating that the case had been declared secret and that he was being investigated for the crimes of belonging to a criminal organisation, drug trafficking, money laundering, fraud and forgery. When questioned about this, the detainee stated that he had not done anything and that he had not been specifically informed of anything, and that, faced with such global accusations, without being told exactly what he had done, he could not answer what he had or had not done. The investigator then agreed to hold the hearing provided for in Art. 505 of the Lecrim Act, in order to make a decision on what his personal situation would be during the investigation. The Public Prosecutor's Office requested his pre-trial detention on the grounds that he was the perpetrator of the offences under investigation. The detainee's lawyer opposed the requested precautionary measure on the grounds that she was unaware of the facts on which the prosecutor based his claim, that the detainee could explain the origin of the objects seized in the house search and that there was no reason to deprive him of his liberty. She reiterated that with the little she knew of the case, due to the previous declaration of procedural secrecy, there was no basis for remanding him in custody. Following the appearance, the examining magistrate issued an order ordering the appellant to be remanded in custody, without bail, on 27 June 2018. In the copy of the order that was notified to the appellant, the considerations of the decision that referred to the evidence of criminality that supported the indictment (LG 2 b]), or its origin, were omitted, justifying such reserve on the grounds of the secret nature of the investigation.

[12] This Constitutional Court Ruling has been published on the website of the Judicial Documentation Centre, CENDOJ; Constitutional Court Ruling of 19 June 2023 - ROJ: Constitutional Court Ruling 68/2023, ECLI:ES:TC:2023:68, Resolution No.: 68/2023, Appeal No.: 159/2019, Section: 1. Rapporteur H. E. Mr Juan Carlos Campo Moreno.

Legal grounds.

Analysing Constitutional Court Ruling 68/2023, the constitutional doctrine on the right of access to the essential elements of the proceedings related to the deprivation of liberty. The Court has had occasion to examine various aspects of the right of access to the elements of the proceedings that are essential to challenge the deprivation of liberty in numerous judgments, all of them referring to the situation of police custody and also in those referring to the precautionary deprivation of liberty judicially agreed in cases in which the secrecy of the proceedings has been decreed (Art. 302 Lecrim).

With regard to what is relevant for the resolution of the present amparo action, following the summary set out in Constitutional Court Ruling 30/2023, the doctrine established by this Court can be summarised as follows: a) The starting point of the constitutional doctrine is the realisation that, together with the right to information and access to the investigation which, in general, corresponds to any person under investigation or accused (Art. 118.1 Lecrim), the procedural law establishes specific requirements in the case of a detainee or prisoner (Art. 520.2 Lecrim). b) The catalogue of rights of the detainee or remand prisoner establishes a special informative rigour, since, in accordance with Art. 520.2 Lecrim, "[e]very detained or imprisoned person shall be informed in writing, in simple and accessible language, in a language they understand and immediately, of the facts attributed to them and the reasons for their deprivation of liberty, as well as the rights to which they are entitled". Among these rights is the right of access to the elements of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty [Art. 520.2 d) Lecrim], which acts as an instrumental guarantee of the right to information. Both aspects, information and access, are intertwined as guarantees of the right of defence against precautionary deprivations of liberty and serve the ultimate purpose of protecting against arbitrary deprivations of liberty, where judicial control of the measure is essential. c) The full enjoyment of the rights of information and access may be temporarily compromised by virtue of the secrecy of the proceedings. In these cases, the defendant's rights and guarantees are limited in order to preserve other interests worthy of protection, such as the success of the investigation or trial, or even the life, liberty or physical integrity of another person. However, we have noted that, when it is a case of an investigated or accused person in an effective or potential situation of deprivation of liberty, the Law excludes from this possibility of temporary restriction of rights the specific knowledge of the facts with which the investigated person is charged and the reasons for the deprivation of liberty, as well as access to the essential elements of the proceedings to question and challenge the legality of the deprivation of liberty. In particular, "the secrecy of the investigation will have to coexist in these cases with accessibility to the case file that restricts the level of knowledge by the person under investigation of the result of the investigation to that which is essential - in the sense of substantial, fundamental or elementary - for an adequate exercise of his defence against deprivation of liberty".

Having said this, and trying to apply this doctrine to the specific case, we can observe how in the context of preliminary proceedings opened and declared secret prior to the appellant's arrest, the investigating judge agreed, at the request of the Public Prosecutor's Office, to remand the appellant in custody, without bail, at the adversarial hearing held after he was brought before the court as a detainee (Art. 505 Lecrim). During the hearing, when he was given a statement and when questioning the Prosecutor's cautionary proposal, both the detainee and his lawyer stated that he did not know what

specific acts he was accused of and that, given such global accusations as those made against him, he could not answer about what he had or had not done. The detainee's lawyer opposed the precautionary measure requested by the public prosecution on the grounds that she was unaware of the facts on which such a request was based, reiterating that with the little she knew of the case, due to the previous declaration of secrecy in the preliminary investigation, there was no basis for remanding the detainee in custody. The same or similar arguments, with express mention of the right of access to the proceedings, were made in the appeal against the order ordering pre-trial detention, and in the subsequent hearing of the appeal. Thus, it was argued that the secrecy of the proceedings made it extremely difficult for the party to make allegations about the existence of sufficient evidence of criminality and the alleged relationship with other criminal organisations of which he was accused, without even knowing to which organisation he allegedly belonged. The appeal court ruled out that the alleged injury had occurred, stating that in the part of the appealed order not notified to the appellant or to his defence because the case was declared secret, specifically in its second legal basis, sufficient prima facie evidence of criminality against the accused is described, adding the following: "There is no doubt [that] when the secrecy is lifted, he will be able to fully exercise the right of defence and challenge those jurisdictional decisions that he understands to be unfounded or not in accordance with the law. In any case, it can be deduced from the testimony submitted that the content of the telephone tapping, the surveillance carried out and the bank documents substantiate the evidence of the two offences with which he is charged, the appellant being a person of great importance within the criminal organisation, which is attributed to him and whose activity is specified in the second legal reasoning - burglary, smuggling, forgery, money laundering".

In view of the circumstances of the case and in accordance with the constitutional doctrine already expressed, we find that the appellant's rights to personal liberty (Art. 17.1 CE) and the right to a defence (Art. 24.2 CE), inasmuch as he has been absolutely denied access to the essential elements of the case file that allow him to effectively oppose and challenge the precautionary deprivation of liberty.

With the declaration of nullity of the court decisions by which the defendant was deprived of his liberty, the Constitutional Court understands that his affected right has been remedied, without any other scope for the main proceedings.

Conclusions

The always difficult balance between the secrecy agreed for the continuation of the investigation of a case when there is a person deprived of liberty, is resolved by the Constitutional Court in favour of the right to information on the facts and access to the proceedings, as a guarantee of the right of defence of the person under investigation.

In these cases, it would always have been better to declare partial secrecy of the proceedings and the appropriate publicity of those parts of the proceedings of which the person under investigation could have knowledge, without compromising the reason for the secrecy of the investigation. Let us consider that the person under investigation has been present at an entry and search procedure in which material elements of the crime have been found; a priori, there would be no point in hiding what he already knows. Let us consider a surveillance report that places several suspects in a compromised location; perhaps disclosing its existence would not compromise the investigation either.

Let us not forget either that this situation, so compromised with fundamental rights, has already happened to the Judicial Police when they have read the rights of a suspect and have not known which parts of the whole could really be revealed without affecting the judicially declared pretrial secrecy, from which it is clear, and more so in these cases, that the necessary coordination of the Judicial Police with the Investigating Judge is vital to overcome this obstacle of lack of information and access to the proceedings for the investigated person and his procedural representation, without compromising the procedure declared secret in whole or in part.