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POLICE INTELLIGENCE AND ITS TRIPLE LEGAL DIMENSION: PREVENTIVE ACTIVITY, MEANS OF INVESTIGATION AND EXPERT EVIDENCE FOR THE PROSECUTION

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Abstract: Police intelligence is a powerful tool for the prevention, investigation and prosecution of serious crime such as organized crime and terrorism. This is recognized by the international community, led by the USA and the EU, which since the beginning of this century has been promoting a criminal policy model based on the collection, storage and analysis of information as a fundamental pillar for the early detection of security threats. However, despite its obvious practical importance, police intelligence work is difficult to categorize from a criminal law perspective. Spanish procedural legislation does not expressly provide for its validity as an element of conviction at the time of sentencing, nor does it contemplate specific ways for its use in the framework of criminal cases. Only case law has given procedural recognition to this type of analysis, incorporating it into the act of the oral trial and, therefore, into the body of evidence, as expert evidence. However, the jurisprudential construction of the so-called intelligence expert evidence, in addition to presenting an atypical character with respect to the classic conception of this means of evidence, leaves out the relevant effects that this police activity has in stages prior to the prosecution of the crimes. Therefore, in order to evaluate the true place of police intelligence in the criminal justice system, it is necessary to locate its origin and functions within the field of prevention, as an extra or pre-procedural action, and not only as prosecution evidence.

Resumen: La inteligencia policial es una potente herramienta para la prevención, investigación y enjuiciamiento de formas de delincuencia grave como la criminalidad organizada o el terrorismo. Así se reconoce por parte de la comunidad internacional, que con EEUU y la UE a la cabeza, viene potenciando desde principios del presente siglo un modelo político criminal basado en la obtención, conservación y análisis de información como pilar fundamental para la detección precoz de amenazas a la seguridad. Sin embargo y pese a su evidente importancia práctica, las labores de inteligencia policial son difíciles de categorizar desde una perspectiva jurídico penal. La legislación procesal española no prevé expresamente su validez como elemento de convicción a la hora de dictar sentencia, ni contempla vías específicas para su utilización en el marco de las causas penales. Solo la jurisprudencia ha dotado de reconocimiento procesal a este tipo de análisis, incorporándolos al acto del juicio oral y, por tanto, al acerbo probatorio, como prueba pericial. No obstante, la construcción jurisprudencial de la denominada *prueba pericial de inteligencia*, además de presentar un carácter atípico respecto de la concepción clásica de este medio de prueba, deja fuera los relevantes efectos que esta actividad policial desprende en estadios previos al enjuiciamiento de los delitos. Por eso, para evaluar el verdadero lugar que la inteligencia policial presenta en el sistema de justicia penal, es necesario ubicar también su origen y funciones dentro del campo de la prevención, en tanto actuación extra o preprocesal, y no solo como prueba de cargo.

Keywords: Police intelligence, criminal prosecution, intelligence evidence, terrorism, organized crime, criminal investigation.

Palabras clave: Inteligencia policial, proceso penal, prueba pericial de inteligencia, terrorismo, crimen organizado, investigación criminal.

ABBREVIATIONS

Art: Article

BOE: Official State Gazette

CC: Criminal Code.

CNI: National Intelligence Centre (*Centro Nacional de Inteligencia*)

DSN: Department of Homeland Security (*Departamento de Seguridad Nacional*)

USA: United States of America

ETA: Euskadi Ta Askatasuna

ESN: National Security Strategy

CITCO Centre for Intelligence against Terrorism and Organised Crime (*Centro de Inteligencia contra el Terrorismo y el Crimen Organizado*).

LECrim: Criminal Procedure Act.

SAN: Judgement of the National Court (*Audiencia Nacional*)

SAP: Judgement of the Provincial Court (*Audiencia Provincial*)

JECHR: Judgement of the European Court of Human Rights

STC: Judgement of the Constitutional Court (*Tribunal Constitucional*)

STS: Judgement of the Supreme Court (*Tribunal Supremo*)

EU: European Union

1. INTRODUCTION

Intelligence generation is an activity common to both the public and private sectors. Its impact on the decision-making processes of large companies and government institutions is growing, as are the resources invested in its production. However, without doubt, where this institution continues to be most relevant is in the fields of security and defence, currently understood as two branches of the same conceptual tree (Rosales Pardo, 2005).

Traditionally, the tasks of gathering information and analysing intelligence have traditionally fallen within the field of action reserved for secret services and armed forces (Prieto del Val, 2014). However, since the end of the last century, law enforcement agencies and police forces around the world have been progressively incorporating the structures and methodology of the intelligence community into their organisation and operational dynamics (Alcoceba Gil, 2023). The trend to expand police capabilities in this area will be strongly accentuated during the first decade of the 21st century, due to the rise of transnational criminal organisations and terrorist groups (Lopez Ortega and Alcoceba Gil, 2018). In the face of the emerging threat posed by organised crime to the stability of states in the post-Cold War scenario, the traditional distinction between internal security and defence functions has been diluted to the point of its almost disappearing (Rodríguez Basanta and Domínguez Figueirido, 2003). Today, both concepts tend to be presented as parts of the same strategic gear mechanism; consequently, their advocates have also come to share spaces, tools and purposes. Thus, as Bachmaier Winter (2012) points out, "the convergence between intelligence and criminal investigation in the field of counter-terrorism and organised crime occurs, in essence, because they are phenomena that affect both the sphere of intelligence services and the criminal process". Perhaps the most obvious example of this is the US counter-terrorism policy that emerged in reaction to the attacks on the World Trade Center on 11 September 2001. The military campaign known as the “War on Terror”, launched by the US executive at the beginning of this century, brought with it the implementation of a hybrid political-criminal model, based on the joint action of the armed forces, police forces and the criminal justice system[1]. It will be in the framework of this new scenario that police investigation will be reconfigured, adopting techniques and methodologies specific to the intelligence community, which until then focused its activity in the field of defence and external security. Along these lines, authors such as Sánchez Barrilao (2019) go so far as to point out that "intelligence on terrorism and organised crime, although it is the responsibility of the entire ‘intelligence community’ (which will require a high degree of collaboration, cooperation and coordination in this regard), is particularly important within public security and more strictly police intelligence".

Decades later, the central elements of this model have been consolidated, giving rise to a new National Security doctrine based on the coordination and transfer of intelligence between these three levels of the State. This is expressly reflected in the case of Spain through the different versions of the National Security Strategy drafted by the

[1] Particularly telling in this regard is Congressional Joint Resolution 107-40 of 18 September 2001, which authorised the use of military force to deter and prevent international terrorism within the United States, opening the door for terrorist groups located within the country to be investigated by the military and its intelligence services. This law was followed by the USA PATRIOT Act of 26 October 2001 and the Presidential Military Order of 13 November 2001.

DSN[2]. In fact, in its most recent version, approved by Royal Decree 1150/2021 of 28 December, the fundamental importance of coordinating "the actions of the Law Enforcement Forces and Agencies, the Intelligence Services and the Armed Forces" is expressly stated[3].

This doctrine is currently shared by the European Union, as demonstrated by the content of regulations such as *Framework Decision 2006/960/JHA of 18 December on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union*, also known as the "Swedish Initiative" and incorporated into Spanish law by *Law 31/2010 of 27 July*. Or, more recently, *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties*, transposed into domestic law by Organic Law 7/2021 of 26 May. In a similar vein, we also find *Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, the transposition of which resulted in *Organic Law 1/2020 of 16 September*. All these provisions share the same goal, already present in the 2005 *Hague Programme*: the construction of a common information and intelligence policy, ranging from the early detection of security threats to the prosecution of crimes and the execution of sentences[4].

However, the importance of police intelligence functions in the framework of internal security and in the repression of organised crime was well known in Spain even before it became apparent in the international sphere. Proof of this is the case law of our Supreme Court, which, since the end of the 1990s, has been highlighting the important role played by the information units of Guardia Civil and the National Police in the fight against the terrorist group "Euskadi Ta Askatasuna" (ETA). This is the conceptual and historical origin of the police intelligence brigades, created in the framework of the fight against terrorism to fulfil a prospective function not necessarily linked to criminal investigation in the strict sense[5]. On the basis of the work carried out by these units, the Supreme Court has established its doctrine of so-called *expert intelligence evidence*[6]. A doctrine which, although not without controversy, has allowed courts to take into consideration intelligence generated by security forces without the need to know the

[2] The Department of National Security is the permanent advisory and technical support body for the Presidency of the Government in matters of National Security. It was created by *Royal Decree 1119/2012 of 20 July, amending Royal Decree 83/2012 of 13 January, restructuring the Presidency of the Government*, and its legal status is regulated by *Law 36/2015 of 28 September on National Security*. Article 9 of the law establishes that the fundamental components of National Security are National Defence, Public Security and Foreign Action, for the implementation of which it will be supported by the State Intelligence and Information Services. These will provide it with the necessary elements of judgement, information, analysis, studies and proposals to prevent and detect risks and threats and contribute to neutralising them.

[3] DSN. National Security Strategy 2021. Madrid: Presidency of the Government, 2021.

[4] Communication from the Commission to the Council and the European Parliament. The Hague Programme: Ten priorities for the next five years A partnership for European renewal in the area of freedom, security and justice. 5 October 2005, p. 23.

[5] See the Agreements of the Council of Ministers of 28 November 1986 and 16 February 1996.

[6] Examples of which are Judgements of the Supreme Court (SSTS) 1215/2006 of 4 December; 1025/2007 of 19 January; 585/2007 of 20 June; 783/2007 of 1 October; 124/2009 of 13 February, 985/2009 of 13 October; 480/2009 of 22 May; 209/2010 of 31 March and 197/2011 of 25 October.

sources on which their analysis is based. However, a broad debate has arisen around this doctrine centred on the true nature of this means of evidence (Castillejo Manzanares, 2011; Guerrero Palomares, 2011; Gudín Rodríguez-Magariños, 2009), as well as on the possible weakening of the principles of contradiction and defence that incorporating information obtained opaquely or by reference into the procedure entails (López Ortega, 2013).

Thus, the gathering and analysis of information for intelligence purposes is nowadays a common and relevant practice within the functioning of the State Law Enforcement Forces and Agencies; it constitutes a structural element of the criminal policy of our times in terms of organised crime. Its results, increasingly complete and refined, are used in general to guarantee public safety. However, the secrecy surrounding its gathering and the indeterminate aims it pursues continue to make it difficult to include this policy within classic criminal procedure. Here, the principles of accusation and lawfulness, together with the right to a defence, make investigations contingent on the clarification of specific criminal acts, as well as the existence of evidence of their commission by specific persons. Furthermore, in the liberal model of criminal justice that the Constitution enshrines, every person under investigation is protected by a series of guarantees, including the right to know what proceedings are being taken against them, even when the accusation has not yet been formalised. This is also in conflict with the secretive nature of these police activities.

Given the impossibility of overcoming the contradictions described above, the legislator seems to have opted, until now, not to expressly establish the place that police intelligence work should occupy within the criminal justice system, and only jurisprudence has validated its direct inclusion in the trial through the medium of expert evidence. However, although the jurisprudential construction of so-called *expert intelligence evidence* grants legal status to the use of intelligence material as prosecution evidence that can be taken into account to undermine the presumption of innocence, it is insufficient to cover the relevant effects that this police activity has in the stages prior to the prosecution of the crimes. In order to understand the real place of police intelligence in our criminal justice system, it is necessary to consider its origins and the functions it is called upon to fulfil in the field of prevention. That is to say, we must consider its legal regime as an extra or pre-procedural action, and not only as evidence for the prosecution.

2. POLICE INTELLIGENCE AND CRIME PREVENTION

Some academics, such as Castillejo Manzanares, have considered police intelligence to have a purely preventive purpose, placing it on the same level as the other preventive actions entrusted to the State Law Enforcement Forces and Agencies (Castillejo Manzanares, 2011). From this perspective, also held by members of the judiciary such as López Ortega (2018) or Sáez Valcárcel (2017), intelligence work would not so much pursue the discovery of the crime or its subsequent prosecution as the identification of present and future security risks. Therefore, the gathering of information aimed at feeding the intelligence cycle carried out by the police forces would in any case take place independently of the existence of a criminal case or a specific criminal act. Along these lines, it would be a constant activity over time that is not aimed at producing procedural effects, regardless of the fact that, on certain occasions, it may be useful in the framework of a certain process, either as a trigger for the process or as evidence on which to support the accusation.

However, other academics have classified police intelligence purely as part of the realm of evidence gathering, arguing that its promoters ultimately seek to dismantle the threat previously identified through court intervention. Therefore, for these authors, police intelligence will always be aimed at providing the most reliable evidence to obtain convictions of those who have taken part in the criminal activities concerning which the work of obtaining and analysing information is being carried out (Sacristán Paris, 2011). This second approach fits in with the view adopted by the Supreme Court in various judgements on *expert intelligence evidence,* which are discussed below.

In any case, irrespective of which position is chosen, it is clear that the timing of intelligence activities does not necessarily coincide with the initiation of specific court proceedings. In fact, it requires a series of resources and sources that go beyond those usually used in classical criminal investigation. Reality shows that much, if not all, of the police intelligence cycle is nurtured or developed through preventive action, and this is expressly recognised in our legislation. The phases of management, obtaining sources of information, elaboration or analysis and dissemination are all covered by administrative regulations, which have nothing to do with the regime applicable to the proceedings carried out in the framework of a specific criminal case.

The management phase, consisting of determining government priorities and the object on which intelligence work is to be carried out, is the responsibility of the State Secretariat for Security, which, according to Royal Decree 734/2020 of 4 August, which develops the basic organic structure of the Ministry of the Interior, is the highest body of this Ministry, the functions of which include the promotion of the conditions for the exercise of fundamental rights, especially in relation to personal freedom and security, the inviolability of the home and communications and freedom of residence and movement; the exercise of command of the State Law Enforcement Forces and Agencies, and the coordination and supervision of the services and missions that pertain thereto; powers relating to private security; the direction and coordination of international police cooperation, especially with EUROPOL, INTERPOL, SIRENE, the Schengen Information Systems and the Centres of Police and Customs Cooperation. Reporting to this governmental management body, the Centre for Intelligence against Terrorism and Organised Crime (CITCO) also performs management functions. As a coordinating body, it is responsible for "the reception, integration and analysis of strategic information available in the fight against all types of organised or serious crime, terrorism and violent radicalism", as well as "the design of specific strategies against these threats and their financing and, where appropriate, the establishment of criteria for action and operational coordination of the agencies involved in cases of coincidence or concurrence in the investigations"[7].

Regarding the second and third phases of the intelligence cycle: obtaining sources of information and analysing it, Article 11 of Organic Law 2/1986 of 13 March on Law Enforcement Forces and Agencies stipulates that they are responsible for "gathering, receiving and analysing all data of interest for public order and security, and studying, planning and implementing methods and techniques for crime prevention". Therefore, in

[7] The structure of CITCO is secret under the protection of the Agreements of the Council of Ministers classifying certain matters in accordance with Law 9/1068 of 16 February 1996 by which the Government granted, on a generic basis, the classification of secrecy to the structure, organisation, means and operational techniques used in the fight against terrorism of 6 June 2014.

compliance with the aforementioned legislative mandate, both Guardia Civil and National Police have various information units with the capacity to carry out intelligence functions (Bachmaier Winter, 2012). Specifically, Guardia Civil's Operations Command includes the Information Headquarters, responsible for "obtaining, receiving, processing, analysing and disseminating information of interest to public order and security at the national and international level", to which should be added the general competences of the Judicial Police Technical Unit (UTPJ). For its part, the National Police Force has a General Information Commissariat, which has similar powers to those previously described in relation to Guardia Civil's Information Headquarters, as determined in Article 5 of *Order INT/859/2023, of 21 July, which develops the organisational structure and functions of the central and territorial services of the General Directorate of the Police*. In addition, it has a Central Criminal Intelligence Unit, which reports to the General Commissariat of the Judicial Police, which, according to Art. 5 of the aforementioned Order, "is responsible for the collection, reception, processing, coordination, analysis, exchange and development of information relating to organised crime and criminality in general, as a body for the development of the criminal intelligence function and support for the functions of management, planning and decision-making", and, therefore, "carries out prospective activity in its sphere of competence. It is also responsible for the elaboration, development and monitoring of strategic planning".

In addition to the state police intelligence community, the regional police also have a role to play in this area. Thus, the *Ertzaintza* has a Central Intelligence Office, reporting directly to its Headquarters, which, the main function of which, according to the Order of 20 November 2013, of the Regional Minister for Security, which approves the structure of the *Ertzaintza*, is to "integrate police intelligence into the general mission of the Ertzaintza, becoming the backbone and proactive axis of strategic and tactical decision-making in the prevention and reduction of crime, as well as the risks that could alter the perception of security among citizens", for which purpose it will proceed to the "systematic collection, processing and analysis of criminal and incidental information, and of the conditions that contribute to its development, offering intelligence products that allow tactical responses to existing risks, as well as strategic planning related to emerging and changing threats". The *Mossos D'Escuadra* also have their own General Information Commissariat, which is responsible for gathering intelligence on "criminal organisations whose activities pose a threat to the individual or collective exercise of liberties, personal safety, peace or social cohesion", for which purpose it will obtain "all information of an operational nature relating to criminal organisations [...] labour and social conflict and institutional activity"[8]. Even the Foral Police of Navarre, within its Criminal Investigation Area, has an Information Division, which, as established in the Foral Decree 72/2016, of 21 September, approving the regulations on the organisation and functioning of the Foral Police of Navarre, is responsible for "organising and managing the collection, processing and use of information of general interest for the prevention, maintenance of order and security, as well as the prevention and investigation of criminal gangs and groups operating in the territory under its jurisdiction".

[8] Decree 415/2011 of 13 December, on the structure of the police function of the Directorate General of the Police.

As can be seen, the legal empowerment granted to police forces to obtain information for intelligence purposes is not rooted in procedural or criminal law, nor does it appear to be dependent on any judicial activity. On the contrary, it is linked to the normal functioning of these bodies in their functions of prevention and maintenance of public order, being considered, in conjunction with this, within the body of administrative law that regulates these functions. It can be concluded, therefore, that the normative basis of police intelligence shows its original preventive and extra-procedural nature, which does not exclude its subsequent use in the framework of a specific case, but it does disassociate its production from the criminal investigation in the strict sense of the word.

The divergence between classic criminal law approaches to criminal investigation and the nature of police intelligence, in terms of its origin and goals, leads precisely to the lack of a procedural legal provision that would allow its results to be used in court. We are faced with the paradox that a series of actions carried out by the Law Enforcement Forces and Agencies with an autonomous character to the process and a different purpose, can be useful on certain occasions for the achievement of its aims, which is why it has an increasing influence on the process. But not exactly as evidence for the prosecution or investigative proceedings, but as a source of general knowledge emanating from state activity parallel to the jurisdiction, which, unlike the latter, seeks to determine and anticipate certain forms of criminality.

3. POLICE INTELLIGENCE AND CRIMINAL INVESTIGATION

As has been pointed out, the fact that police intelligence is generated at an earlier point in time and for a purpose other than those pursued by the judicial process does not exclude the possibility that it may have further effects within the framework of the judicial process. In fact, it is relatively common for this to happen, either as a means of facilitating its initiation or after it has been initiated.

The first and perhaps most obvious procedural utility of police intelligence work is to operate as *notitia criminis*. In other words, the intelligence analysis carried out by the State Law Enforcement Forces and Agencies can be used to inform the competent investigative body of the existence of an apparently criminal act so that, on the basis of this, the investigating judge (Art. 308 LECrim) or the European Public Prosecutor's Office (Art. 18 LO 9/2021) can proceed to initiate criminal proceedings ex officio[9].

In order to act as a trigger for a criminal case, intelligence information must be incorporated into the police report along with the rest of the documentation that may have been collected during the preliminary investigation (Gómez Colomer, 2019). This, regardless of whether or not it is the product of the proceedings carried out during this pre-procedural phase, which, due to its own extrajudicial nature, has a very limited material scope (Nieva Fenoll, 2008). Provided that the information on which the specific intelligence analysis is based has been obtained without restriction of fundamental rights, or such restriction has been duly authorised within the framework of other judicial proceedings, its incorporation into the statement would be possible and desirable insofar

[9] STS of 28 February 2007.

as it serves to contextualise the facts that are reported to the judicial authority (Hernández Domínguez, 2013).

However, what happens in cases where the intelligence gathered in police reports is based on secret sources of information, against which defendants cannot defend themselves, nor can their legality be established? A preliminary examination of the question would lead to the conclusion that such defects would not necessarily vitiate the validity of the police report as a means or act of initiation of criminal proceedings, in the terms set out in the Judgement of the Constitutional Court (STC) 131/1981 of 20 July. But it would make it impossible to use it later as evidence during the investigation phase, or as pre-constituted or documentary evidence on which to base a judgement. This, even when the content of the document can be confirmed in all its points through the witness statement of the person who signs it, as required by STC 173/1985, of 16 December.

The idea that intelligence material should not be subjected to the same examination when it is contained in the police report as when it is intended to be introduced in the process as an element of conviction, is supported by the fact that, if the police reports, as established in Art. 297 LECrim, "shall be considered criminal complaints for legal purposes", that is, simple communications to the judge of the *notitia criminis* with the aim of the latter carrying out an investigation aimed at verifying whether or not they are well-founded, it is not necessary to apply greater restrictions with regard to them than those that must operate with regard to a criminal complaint. In other words, the investigating body may only disregard the facts described in the police report when they are not criminal in nature or when they are manifestly unlawful *ex* Art. 269 LECrim. In other cases, as in the case of the criminal complaint, when the police report contains credible and well-founded indications of criminality, the court must proceed to verify the facts it describes (SSTS of 24 July 2000 and 2 December 2003). It is during such verification that all the guarantees and rights set out in procedural law must be applied.

The problem arises when the police report is not limited to recording previously verified facts, but in reality reflects the existence of an exhaustive out-of-court investigation of specific individuals, within the framework of which the intelligence material incorporated has a clearly incriminating character. Whenever there is an investigation prior to the initiation of the case, carried out without the knowledge of those under investigation, there is a clearly unequal starting point in the criminal proceedings, which would be dramatically and irreconcilably accentuated with the principles of defence and *audi alteram partem* in the event that this investigation were also based on secret sources of information. If, prior to the initiation of proceedings, inquiries have been carried out against certain persons and these have been successful, it is necessary for such persons to be served notice thereof once the criminal proceedings to which they are passive parties have been initiated. Only then will they be able to defend themselves in the context thereof. If, on the contrary, the authority in charge of the pre-trial investigation were to reserve information or select which information obtained is provided, this would seriously affect the principles of *audi alteram partem* and defence understood as the guiding principle of the process, as stated in the recent STEDH (Judgement of the European Court of Human Rights) Yüksel Yalçinkaya v. Turkey of 26 September 2023.

For all these reasons, Hernández Domínguez is correct when he points out that the first natural space for police intelligence is probably the police report, insofar as the expert knowledge of the State Law Enforcement Forces and Agencies on a specific criminal

phenomenon is especially useful when providing the background for the facts revealed by the preliminary investigation (Hernández Domínguez, 2013). However, it is also necessary to distinguish between purely contextual intelligence material, drawn from information sources that are open or independent of the specific facts detailed in the police report, and cases in which intelligence is presented as a means of initiating a criminal case against a specific individual who has previously been the object of a police investigation. In the latter case, such intelligence should never be used to incorporate incriminating information from opaque sources into the proceedings, as this would not allow the persons under investigation to defend themselves.

4. EXPERT INTELLIGENCE EVIDENCE

Having analysed the effects of police intelligence outside the process and in the initial stages thereof, we shall now refer to its use within the courtroom. The incorporation of intelligence material into the trial proceedings is now possible thanks to so-called "*expert intelligence evidence*". A controversial jurisprudential construction that is not expressly enshrined in legislation, but which has been widely developed in the jurisprudence of the Supreme Court. However, the Supreme Court has treated this construction in various ways, recognising it unreservedly in some cases and denying its expert nature in others.

In any case, its definition and basic characteristics were not coined by the Supreme Court, but rather by the Criminal Division of the National High Court, which used it as evidence in Judgement 3/2000 of 20 January. Within the framework of this decision, the sentencing court will accept the "intelligence reports" issued by Guardia Civil officers as the main evidence that the accused was a "liaison" for a commando belonging to the ETA terrorist group. However, the court itself warns that the value assigned to the intelligence reports issued by Guardia Civil is "*probably the most debated issue in this case*". The debate to which the court alludes is echoed by the defence when it questions the expert value assigned to the evidence. The defence holds that a statement made by a member of Guardia Civil constitutes mere witness testimony to be used for reference purposes. The prosecution, however, believes that "*the legal categorisation of this evidence should be no different from that of expert evidence, since, in short, it is a question of considering a variety of information, based on knowledge possessed by certain Guardia Civil experts, in order to draw conclusions*". The Chamber settles the dispute by acknowledging that it constitutes an expert witness report that provides information from which certain conclusions can be drawn*; "under no circumstances should it be considered witness testimony, but rather an expert witness report from which certain conclusions can be drawn, based on a profound knowledge of the way certain ETA commandos act, how they are organised and even, as was brilliantly demonstrated during the trial, the Basque language itself*". However, the most revealing aspect of the judgement is the definition it provides of intelligence expertise, explaining what its defining features, methodology and sources should be:

> "*The authors of the above-mentioned reports carried out their work on the basis of an inductive and later deductive method.* Firstly*, through all the information available to them (not only in this case, but also that derived from a myriad of proceedings and police documentation), they were able to draw certain conclusions, which were subsequently, in turn, applied to the specific proceedings* [...]. *The report demonstrates the solid basis on which, through the analysis of a vast amount of material, the conclusion is reached*

> *that the charge against* [the accused] *is founded* [...]. *From where have these conclusions been drawn, one might ask? From the material and information handled by the experts, which has been analysed and examined until a clear explanation of the logistics necessary to commit the crime now being judged can be reached*".

In cassation, the Supreme Court will endorse the opinion of the AN in its Judgement 2084/2001 of 13 December, extending the grounds provided by the lower court for its use by considering that, "*to the extent that the Court cannot directly verify the reality or the conclusions that constitute the content of the expert evidence, it will be necessary to resort thereto as a means of assistance or collaboration with the Judge*". But it will also clarify that the aforementioned reports can only be understood to amount to true expert evidence if the object thereof, the documentation, has been incorporated into the proceedings, *"that is to say, the object of the expert evidence (seized documents) must be available to the parties*". It thus establishes the condition that the sources on which the intelligence analysis is based, provided that they are directly related to the prosecuted facts, must be brought to the trial so that they can be known by the sentencing body. In all other cases, however, when the elements taken into consideration are of a general nature or come from sources independent of the subject matter of the case, such as the knowledge or experience of the analysts as police officers or investigators, it would not be necessary to incorporate the documentation on which they are based into the process. This is so, in the Court's view, because it is precisely this intimate knowledge, applied to the circumstances of the case, that gives the evidence its expert character. In the words of the Chamber: "A *different matter is the information of the experts as experts in the field obtained on the basis of the study and analysis of all the documentation involved independently of that of the present trial, which is precisely why they are experts*".

As for the nature of this evidence, the Second Chamber does not initially hesitate to consider it inferential or circumstantial, and therefore, in line with the doctrine of the Constitutional Court[10], it establishes that it must be assessed together with other evidence in order to undermine the presumption of innocence. Thus, in the specific case, the court establishes that the role of the convicted person "*within the terrorist organisation,* [is] *deduced by the Court not only from the expert evidence but also directly from the documentary evidence examined, relevant notes in his diary, and also the Judgement issued by the Paris Court, constitute undisputed facts that allow the conclusion reached by the Court to be inferred without violating the rules of logic or experience*".

STS 786/2003 of 29 May, however, will broaden the Court's consideration of this evidence by considering it capable of accrediting by itself a typical element of the crime, such as the subjective element. In other words, it will give it the nature of full and direct evidence. It is in a different trial involving Basque terrorism, in this case of low intensity, where there is no evidence that the accused is related to the structure of ETA or the *kale borroka*. Nor is there any record that instructions were communicated or received from the group. Even so, it is understood that the "expert analysis of information" carried out on a huge amount of documents seized from ETA members in various proceedings other than this one, in which the goals, actions to be carried out and strategies to be followed by the organisation are set out, is sufficient to establish that the aims and modus operandi

[10] Along these lines, SSTC 174/1985, 175/1985 and 137/2002.

of the accused and those of the group are the same. Thus, the Chamber infers from the intelligence expert's report a "*fascination for terrorist activity that captivated the appellant and moved him to act in a group with no organic link to ETA, but in communion with its pathogenic ideology and with its terrorist activity, of which they were the architects in the terms described in the factum, acting as a cohesive factor with an identity of means and strategies*". In fact, the Supreme Court accepted the facts constituting the crime, in this case the link with the armed group, through the analysis carried out by the experts, from which it can be deduced that:

> "*This is a typical case of identification with diffuse and uncritically accepted political aims, in pursuit of which typical acts of sabotage are carried out in complete harmony with the directives of the ETA group, which obviously acts clandestinely, so there is nothing special about the absence of documentation accrediting obedience, since the "culture of the destruction of evidence" is a characteristic feature of its activity. However, the harmony and communion of activity and ideas with ETA is clearly proclaimed by the nature of the facts analysed, fully masked in the strategy of the armed group disseminated through notes or in its bulletins. This is a fact that emerges from even a superficial analysis of the situation in the Basque Country. There is no room for ambiguity or ignorance in this regard.*

But the Supreme Court has not always been so accommodating to this peculiar means of evidence. In its Judgment 1029/2005 of 26 September, only two years after having validated its use as the main evidence of the connection between the accused and the terrorist organisation of which he is alleged to be a member, it disavowed the expert nature of the intelligence analysis carried out by the police. The judgement harshly points out that "*the alleged expert report is nothing more than a police analysis of statements made by the accused, which is based on an opinion that has not convinced the court and which cannot replace the court's judgement, nor can it serve as a means of corroboration, given the source of this knowledge"*. The Second Chamber thus understands, in this case, that the assessment carried out by the police experts on the material provided to the case is unnecessary insofar as the judicial body itself can carry it out by itself. If the analysis simply involves drawing inferences from elements that are already available to the Court, it is understood that rather than providing expert knowledge, the analysis is actually providing an ersatz judgement. Based on this approach, the judgement not only strips the evidence of its expert nature, but also calls into question whether it is needed, concluding that "*police officers who specialise exclusively in investigating specific types of crime may know more about them than courts trying specific cases related thereto. However, this extra global knowledge does not determine, in and of itself, a qualitatively different knowledge, nor a specialised knowledge in its own sense*". According to the aforementioned decision, this is no obstacle, in those specific aspects that might possibly require a precise technical mediation, as is the case, for example, when it is a question of examining fingerprints, to recourse to expert evidence. But it would be, in any case, for the determination of that particular point and not for the establishment of general inferences based on all or most of the evidence.

The same line is followed by the Court in its STS 556/2006 of 31 May, which limits the evidential effectiveness of police reports to mere documents and the statement of their authors to that of ordinary testimony. This means that its content "*will continue to belong to the genre of common knowledge, susceptible of entering the area of*

prosecution through the channel of testimonial evidence, apt to be assessed by the judge or court, directly and in and of itself". Both in this judgement and in the aforementioned 1029/2005, not only is the expert nature of the intelligence analysis questioned, but also its suitability or usefulness; firstly, because it is deemed questionable that the assessments made by the officers introduce new or different knowledge to that known by the court or which can be deduced from the evidence; secondly, because if this were the case, the elements necessary to assess the reliability of this knowledge should also be provided in the trial, as occurs with other expert opinions. These two arguments will be taken up by SAN l36/2005 and SAN 31/2006, respectively.

The Supreme Court's criterion will change again following STS 783/2007 of 1 October, which once again establishes the full expert nature of intelligence analyses provided that they take the form of a report and are ratified in the act of trial. For this purpose, notions expressed by the same chamber in its judgements 2084/2001 and 786/2003 are reiterated. However, the court also expands on its own jurisprudence by establishing, in descriptive terms, the main characteristics of expert intelligence evidence, which can be summarised as follows:

1. Unique evidence that is used in some complex proceedings, where special expertise is required, which does not fall within the usual parameters of conventional expert evidence. The authors contribute their own specialised knowledge to the assessment of specific documents or strategies.

2. It is not expressly reflected in the LECrim, but this does not prevent its use when it is necessary to make use of such special knowledge.

3. Intelligence reports are subject to the court's discretion and cannot be considered as documents for the purposes of appeal. The court may deviate from their meaning.

4. It is evidence of a dual nature, testimonial and expert, but it is closer to expert evidence. These reports are not, therefore, documentary evidence, unless they come from official bodies, have not been challenged by the parties, are the only evidence on a factual point and have been unjustifiably ignored or disregarded by the court of first instance (it is understood that these requirements are cumulative).

These characteristics were established by STS 124/2009 of 13 February as necessary requirements for considering valid any intelligence expert evidence that is intended to be used in a trial, and its scope was also circumscribed to that of counter-terrorism. Along the same lines, although extending the scope to organised crime in general, STS 134/2016 of 24 February recognises that "*it is not easy, of course, to classify as expert evidence, without other nuances, the explanations offered by police officers about the way in which certain criminal organisations or groups act",* but also confirms that they have an "atypical" expert nature. This is based on two fundamental arguments: 1. The original scope of expertise has grown with technological development, also incorporating "*technical and practical knowledge*" into the scope of this means of evidence; 2. The sophistication of the means used by criminal groups and organisations, the usual encryption techniques and the constant clandestine tendency of such groups, make it necessary to admit expert evidence aimed at providing a detailed explanation of the "practice" of their criminal activities.

Finally, we should mention STS 1466/2017 of 4 April, which refers to expert intelligence evidence in the framework of proceedings before the Jury Court. By means of this decision, the Supreme Court reaffirms the doctrine set out above, referring to the criteria maintained in STS 2084/2001; 786/2003; 783/2007 and 352/2009. However, it also adds a series of considerations made with respect to the scope of jury trials, which, nevertheless, can be extrapolated to the rest of the procedures and are the most representative definition of what expert intelligence evidence means for our judiciary.

> *"They are actions that clearly assist the Court, allowing it to determine and assess general or specific forms of criminal behaviour that may be being carried out and which require not only knowledge of the existence of certain criminal morphologies, but also – from the study of criminalistics and from the experience gained from various other actions – of the form of organisation required to carry them out or that usually accompanies them, their goals, their operational methodology or even the points of connection that the acts under investigation may have with other crimes already committed and subject to police investigation, as well as any other element that may be considered necessary for a better understanding or clarification of criminal behaviour, provided that its extraction is facilitated by dedicated, continuous and specialised police action".*

An analysis of the doctrine of our Supreme Court shows that expert intelligence evidence, despite not being expressly provided for by law, enjoys broad recognition in case law. However, its consideration has swung from uncritical approval as expertise to outright denial of its nature. In the context of these contradictions, several poles of debate are evident. These can be summarised as follows: a) the inadequacy of expert evidence in relation to the work carried out by the agents; b) the lack of necessity of the evidence, as it does not provide knowledge other than that which the sentencing court itself may acquire from its assessment of the rest of the evidence.

5. CONCLUSIONS

In light of the above, it can be concluded that police intelligence is a concept that is as broad as it is legally indeterminate, concealing different police practices and political-criminal aims. Some of these, such as the analysis of very different types of information on certain places, expressions or social processes, are clearly connected with the preventive actions that the Law Enforcement Forces and Agencies carry out when exercising their powers in the area of public order and public safety. Others, however, are aimed at generating knowledge about certain criminal phenomena, generally of an associative nature, such as terrorism or organised crime; they seek to understand aspects such as the structure, functioning, composition, goals or financing of these organisations.

The first mentioned actions differ from the second in their object and purpose, as they are usually associated with ensuring public order in the first case and discovery in the second. They also differ in the sources of information they draw on and the legal effects they produce. Intelligence aimed at ensuring public order has its material and temporal framework determined by the specific object of protection that justifies its implementation and, therefore, once its function has been fulfilled, its effects cease. Intelligence aimed at achieving a better understanding of criminal networks is, however,

a *continuum* over time, as it is governed by cumulative logics of information without a clear material limit.

However, despite the aforementioned differences, both forms of intelligence are, a priori, in the field of *ante-delictum* prevention. In other words, they aim to prevent crime through police intervention rather than to punish it. Consequently, the normative basis that enables the practice of both is shared, and it is administrative and not procedural in nature. The legal difficulty arises when the fruit of intelligence aimed at detecting and investigating criminal organisations is intended to be introduced into criminal proceedings, which happens regularly and will happen more and more given its growing scope and usefulness. This difficulty does not lie in delimiting whether the appropriate means of evidence is expert or witness evidence, as current case law suggests, but in the fact that intelligence analyses, by their very nature and original purpose, can hide or dilute their sources, which would turn them into a way of vitiating the process with secret information, against which it is impossible to defend oneself and the legality of which is impossible to verify. Therefore, when it comes to the procedural use of this powerful law enforcement tool, it is necessary that the sources used for the construction of the analysis are also brought to the case, together with the conclusions of the analysis. Otherwise, we would be forced to choose between the valuable contribution this tool can make to criminal justice and the fundamental principles on which it is based.

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