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REVIEW OF CASE LAW 2TH CHAMBER OF THE SUPREME COURT

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Summary: 1. Supreme Court Ruling 5/2024, of 10 January 2024. Offence of attacking an officer of the authority and reckless driving, in a case also being prosecuted for an offence against public health and a criminal group. 2. Supreme Court Ruling 125/2024, of 08 February 2024. The crime of robbery with violence and injury. Participation: co-authorship. Possibility of assessing the use of a dangerous instrument in both offences. 3. Supreme Court Ruling 99/2024 of 01 February 2024. Offence of serious disobedience of art. 556 of the Penal Code. What is fundamental for integrating the offence is the obstructive attitude and its seriousness, not the injunction to the person under investigation, which is not a required element in the offence, although it may be another element in assessing whether the offence is committed. 4. Supreme Court Ruling 84/2024, of 26 January 2024. Forgery in official documents. Completely false material support of a Colombian driving licence in which both the photograph and all the circumstances and identity data shown on it are true. 5. Supreme Court Ruling 138/2024, of 15 February 2024. Criteria for the validity of the victim's statement. Persistence of incrimination and assessment of personal circumstances. 6. Supreme Court Ruling 873/2023, of 24 November 2023. The uniqueness of electronic evidence. Collection, custody and traceability. 7. Supreme Court Ruling 140/2024, of 15 February 2024. Police action recording a spontaneous demonstration by a murder suspect. Testimony of reference. Evidentiary assessment. 8. Supreme Court Ruling 153/2024, of 21 February 2024. Assessment of expert evidence. Scope and content. Are the findings of the opinions binding on the Courts? 9. Supreme Court Ruling 183/2024, of 29 February 2024. Computer damage. Art. 264(2) 1a) and c) and 2 in relation to art. 264.5 and 264(3) a) Penal Code. Concept of data and software. 10. Supreme Court Ruling 156/2024, of 22 February 2024. Difference between the concepts of minor significance and minor importance in crimes against public health. 11. Supreme Court Ruling 186/2024, of 29 February 2024. Crime of child abduction. Who can be the active subjects of this offence? 12. Supreme Court Ruling 241/2024, of 13 March 2024. Offence of assault and battery on a police officer. Evidentiary value of images obtained from images recorded by the media.

1. Supreme Court Ruling 5/2024, of 10 January 2024. Offence of attacking an officer of the authority and reckless driving, in a case also being prosecuted for an offence against public health and a criminal group[1].

Factual background

The Examining Magistrate's Court No. 3 of Almería investigated a case for serious and less serious crimes which, once concluded, was sent to the Provincial Court of Almería, Section 2, which on 13 October 2020, handed down a conviction for Santos and Valle, as perpetrators of a crime of money laundering, a crime against public health and a crime of belonging to a criminal organisation; Silvio as perpetrator of a crime against public health,

[1] Criminal Supreme Court Ruling on Criminal Section 1 no. 5/2024 of 10 January 2024, published on the website of the Judicial Documentation Centre, CENDOJ, ROJ: Supreme Court Ruling 122/2024 - ECLI:ES:TS:2024:12, appeal: 6854/2021. Rapporteur: H. E. Mr Ángel Luis Hurtado Adrián.

a crime of belonging to a criminal organisation, a crime of assault and a crime against road safety, which partially contains the following Proven Facts: At around 00:45 hours on 10 December, Valle with his own vehicle ....HQR went out to meet the vehicles coming from direction 001 to carry out counter-surveillance and security work on the arrival of the shipment of hashish to direction 0000, the initial destination of the cargo.

At the roundabout of the industrial estate at address 0002, uniformed Guardia Civil officers, as part of a prepared operation, proceeded to signal the vehicle with registration ....RXN to stop. The vehicle was driven by Silvio and occupied by Isabel. The driver did not obey the order and performed a sudden evasive manoeuvre, first in reverse and then forward, endangering the integrity of the Guardia Civil officer with T.I.P number 002. The vehicle struck the officer's hand and the flashlight he was holding, forcing him to move to avoid being run over. The vehicle continued at high speed, creating a dangerous situation for public road users, including driving through a roundabout in the wrong direction, causing two oncoming vehicles to brake. The vehicle was finally stopped in a dead-end street after colliding with the vehicle with registration ....GHN, owned by Rogelio, causing damages that have been valued at €776.82.

The bundles in the intercepted vehicle were found to contain cannabis resin with a net weight of two hundred ninety-six thousand one hundred sixty grams (296,160 grams) and a THC content of 26.87%. The cannabis was intended for distribution to third parties.

Legal grounds

We will focus on the sections of this judgement that analyse and describe the qualification of assault in the crime of attacking a police officer.

The appeal of the defence counsel is based on an alleged infringement of constitutional precept, presumption of innocence, art. 24 of the Spanish Constitution relating to the crime of attacking the authority of article 550 and 551.3 of the Penal Code.

The citation of such different articles as those mentioned in the statement makes it difficult to know the chosen grounds; we cannot understand it to be due to a violation of the right to the presumption of innocence, because there is evidence; it is another matter to disagree with the assessment made by the sentencing court, in which case it would be necessary to speak of grounds due to an *error facti* under art. 849.2 of the Spanish Criminal Procedure Act (LECrim). It seems, however, that it is more likely to go through the route of *error iuris* of art. 849.1 of the Spanish Criminal Procedure Act (LECrim), which requires the most scrupulous respect for the proven facts, and this is because, to the extent that it is questioning the intention of the convicted person, the debate is focused on the trial of subsumption, which is typical of this plea, and this is how we will deal with it, because the factual questions raised that could be related to evidential aspects, have been reviewed by the appeal court.

Focusing the grounds in this manner, we observe that the argument is a reiteration of the appeal submission. In its development, as was done previously, it is maintained that the convicted individual's conduct did not constitute the act of assault characteristic of the crime of attack, but rather a clear evasive manoeuvre, with the intention being to flee.

Various considerations are made, in line with those presented in the appeal, in an attempt to convince again that there was no assaultive manoeuvre.

The contested judgement addresses the issue precisely, summarising succinctly at the beginning of its reasoning: "Firstly, playing with words is not acceptable. To abruptly direct a car towards a position occupied by a Guardia Civil officer is objectively to attack him, as 'to attack' is defined by the academic dictionary as charging with impetus and ardour, and that is what the appellant did, regardless of his ultimate purpose or his hopes that the attacked person would move out of the way to avoid being run over and thus clear the path."

Indeed, if we say that the contested judgement accurately summarises the reason for rejecting the grounds, it is because it perfectly distinguishes the author's intent, that is, the conscious and voluntary execution of the typical conduct, such as abruptly directing the vehicle at an officer, from the motive or purpose guiding that action, which is irrelevant for its classification under Article 550, as it does not require any other element beyond that intent, whether direct or eventual.

This should be the terms of the debate; even if we accept the thesis maintained in the grounds when, among other considerations, it argues that the manoeuvre's purpose was not to attack any officer, because even so, the manoeuvre was performed consciously and voluntarily knowing that the officer was in his path, and this, as we insist, is an assaultive act defining the crime of attack.

And if this crime is defined in this manner, there can be no doubt following the description of the assaultive act as reflected in the proven facts, particularly in the passage where it is stated: "At the roundabout of the industrial estate at address 002, uniformed Guardia Civil officers, as part of a prepared operation, proceeded to signal the vehicle with registration ....RXN to stop. The vehicle was driven by Silvio and occupied by Isabel. The driver did not obey the order and performed a sudden evasive manoeuvre, first in reverse and then forward, endangering the integrity of the Guardia Civil officer with T.I.P number 002. The vehicle struck the officer's hand and the flashlight he was holding, forcing him to move to avoid being run over. The vehicle continued at high speed [...]".

Finally, we echo the words of the Public Prosecutor, who states, "we can conclude that the vehicle charges, whether they cause damage or not, or whether they result in a collision or not, are acts of assault, of intimidation, sufficient to constitute the crime of attack, as was the case analysed."

Conclusions

This judgement is striking due to the scrupulous wording of the proven facts. It gradually constructs the sequence of the unexpected encounter of the suspect vehicle with the police checkpoint and the driver's reaction, who, realizing the not very remote possibility of causing harm to an officer, attacks with premeditation. It is a full-fledged crime of assault on a law enforcement officer, which is further compounded by the description of the reckless escape manoeuvre that also deserves criminal reproach.

We cannot ignore the overall disvalue of such criminally relevant conduct, often occurring against the backdrop of public health offences. The principle of authority will

break and fracture in the face of such crimes if they are not punished with significantly higher penalties than those currently in place.

2. Supreme Court Ruling 125/2024, of 08 February 2024. The crime of robbery with violence and injury. Possibility of assessing the use of a dangerous instrument in both offences, without violating the principle of double criminality, *non bis in idem*.[2].

Factual background

The Examining Magistrate's Court No. 3 The Examining Magistrate's Court No. 3 of Arenys de Mar initiated preliminary proceedings No. 451/2019 for the crimes of robbery with violence using dangerous instruments, assault with a dangerous instrument, unauthorised use of a motor vehicle, and money laundering against Mr Leoncio, Mr Landelino, Mr Onesimo, Mr Marcial, Mr Lucas, and Mr José. Once concluded, the case was referred for trial to the Provincial Court of Barcelona, whose Seventh Section issued Judgement No. 23/2022 on 21 October 2022, which includes the following proven facts: "One. It is declared proven that Rubén runs a jewellery store located at 1 Camprodón Street in Santa Coloma de Gramanet. Leoncio, Landelino, Marcial, Lucas, and José conspired and devised a plan to violently steal the merchandise Rubén carried during his visits to clients. On 21 and 22 October 2019, they monitored him. On 23 October 2019, they observed him leaving his workshop at 1 Camprodón Street, Santa Coloma de Gramanet, around 00:90 hours, and followed him to the town of Calella, using two vehicles: a Toyota Aygo with the license plate ....-ZDT and a Lexus with the license plate ....-XTZ. Around 09:30 hours, Rubén parked his vehicle at 237 Bruguera Street in Calella. While he was opening the trunk of his Mercedes, he was attacked from behind by three individuals who got out of the Lexus with the license plate ....-XTZ, which was parked nearby. These individuals were armed with knives and what appeared to be a firearm. The attackers stabbed Rubén in the back, near the ribs. Simultaneously, one of them took three bags filled with jewellery from the Mercedes and transferred them to the Lexus with the license plate ...-XTZ. After seizing the keys to the Mercedes with the license plate ...-TBW, two of the attackers got into the vehicle, started it, and fled the scene at high speed. The third attacker ran away, abandoning the Lexus with the license plate ...-XTZ.

The appellants, Mr Marcial, Mr Lucas, Mr Leoncio, Mr Landelino, and Mr José, were convicted in a judgement upheld on appeal by the Civil and Criminal Chamber of the High Court of Justice of Catalonia. They were found guilty of robbery with violence using a dangerous instrument and assault with a dangerous instrument, with the aggravating circumstance of abuse of superiority in the assault, and were sentenced to the following penalties: a) for the crime of robbery with violence, four years of imprisonment and the accessory penalty of special disqualification from the right to passive suffrage for the duration of the sentence; and b) for the crime of assault, three years and six months of imprisonment and the accessory penalty of special disqualification from the right to passive suffrage for the duration of the sentence. They were also sentenced to pay ten twenty-thirds of the incurred procedural costs, including those of the private prosecution.

[2] Criminal Supreme Court Ruling on Criminal Section 1 no. 125/2024 of 08 February 2024, published on the website of the Judicial Documentation Centre, CENDOJ, ROJ: Supreme Court Ruling 592/2024 - ECLI:EN:TS:2024:592. Appeal: 10646/2023. Rapporteur: Honourable Ms Carmen Lamela Díaz.

As civil liability, Leoncio, Landelino, Marcial, Lucas, and José shall jointly and severally pay Rubén the amount of €116,138.04 as compensation for damages.

The judgement concluded with the acquittal of Onésimo of the crimes of robbery with violence, assault, unauthorised use of a motor vehicle, and money laundering for which he had been accused. Furthermore, it acquits Leoncio, Marcial, Lucas, and José of the crimes of unauthorised use of a motor vehicle and money laundering for which they had been accused and also acquits Landelino of the crime of unauthorised use of a motor vehicle for which he had been accused.

Legal grounds

There are several grounds for appeal against the judgement issued by the High Court of Justice (TSJ), but we will focus particularly on the alleged violation of the principle of *non bis in idem,* due to the double aggravation in two offences for the use of a dangerous instrument.

The third legal grounds states that, "...the second ground of the appeal is formulated for infringement of constitutional precept, under art. 849.1 in relation to art. 852 Spanish Criminal Procedure Act (LECrim) for violation of art. 25.1 of the Spanish Constitution (CE), as well as for infringement of the law of art. 67 in relation to arts. 242.3, 22.2and 148.1 Penal Code, as the principle *non bis in idem* has been violated. It considers that the principle of *non (2) in idem*has been violated, as they have been convicted of the crime of robbery with violence with the use of a dangerous instrument of art. 242.3 Penal Code, as well as of the crime of injury with the use of a dangerous instrument of art. 148.1 Penal Code, having applied the aggravation of the use of a dangerous instrument to both criminal offences. For this reason, it understands that art. 67 Penal Code has been infringed and that the aforementioned aggravation should only have been applied to the crime of robbery...".

In contrast to judgement no. 568/2009, of 28 May,which is reproduced by some of the appellants who invoke the same plea in their appeals and who consider that there has been a breach of the principle of *non bis in idem*, the majority of the rulings of this Court have ruled in the opposite direction to that claimed by the appellants. In that judgement, it was a very specific case, in which the knife was used to intimidate the victim. It was later, when the latter, resisting, confronted her assailant and struggled with him to prevent him from seizing the bag she was carrying, that her attacker stabbed her in the finger.

However, in other previous and subsequent judgements, this Chamber has held that there is no such violation.

Such is the case of judgement no. 213/2000, of 18 February, in which it was decided to consider that "the content of both types of criminal offence does not result in a unitary offence that has been contemplated twice, as in robbery the aggravation is integrated by the exhibition, while injury requires the causing of an injury whose result, due to the means used, could be greater than that included in the basic type; so that they are, in short, two different actions that are integrated in the respective aggravations, one the exhibition and the other the use of the offence".

Thus, in judgement no. 799/2010, of 21 September, we referred to the exceptional nature of what was resolved in the aforementioned judgement, no. 568/2009, of 28 May, and set out the majority doctrine of this Chamber: "Certainly, some isolated judgements have considered that when two crimes are charged in which a weapon was used, the aggravation of one of those crimes for this use prevents the same aggravation in the other.

This was the decision adopted in Judgement No. 568/2009 of 28 May, taking care to warn that this decision was made 'for this specific case' being judged, which was otherwise of sensitive similarity in terms of the behaviour imputed, to the one at hand. The historical characteristic valued was the simultaneity of the use of the knife for the theft, as the victim was holding the bag trying to prevent the theft, and for the injuries.

However, the doctrine of this Chamber has always been the double consideration of the aggravated subtypes, even if the same weapon is used in close time and space.

Thus, more recently in the case resolved in Judgement No. 948/2009 of 6 October, where the robbery aggravated by the weapon coincided with a sexual assault crime, also aggravated by the use of the same weapon. Even highlighting that the weapon is used successively, first for the robbery and then to sexually assault the same victim. (...) In any case, we must continue to uphold the constant doctrine according to which there is no identity of fact between two behaviours - theft and assault - that attack different legal interests because the same instrument is used in both. The valuation of such use leads to subsume the different behaviours in respective subtypes, qualified by the means used, does not imply double valuation of the same thing. It is sufficient to note that what is valued is the use and not the means regardless of said use. The object of the valuation is the behaviour, and this is different when it consists of stealing and when it consists of assaulting. On the other hand, the use of the same weapon for one action was not essential for the execution of the other action. If despite this, the weapon continues to be used in both actions, they must be valued taking into consideration all the elements that configure it, including the use of the weapon."

Similarly, in order no. 581/2013, of 14 March, citing judgements no. 968/2012 of 30 November and 506/2008, of 17 July, we considered it necessary to continue to uphold "the constant doctrine according to which there is no factual identity between two behaviours -subversion and assault- that attack different legal assets because the same instrument is used in both. The fact that the assessment of such use leads to subsuming the different behaviours into two sub-types, qualified by the means used, does not imply a double assessment of the same thing. It is sufficient to note that what is valued is the use and not the means regardless of said use. The object of the valuation is the behaviour, and this is different when it consists of stealing and when it consists of assaulting. On the other hand, the use of the same weapon for one action was not essential for the execution of the other action. If despite this, the weapon continues to be used in both actions, they must be valued taking into consideration all the elements that configure it, including the use of the weapon."

The same happens in judgement no. 687/2017, of 19 October, in which we also admitted the compatibility of art. 242.2 Penal Code with art. 148.1 Penal Code. In it we pointed out, with reference to the Supreme Court Ruling 1045/2012, of 27 December, that in the judgement 2.044/2002, after stating that the *non bis in idem* principle prohibits

applying the same aggravation twice based on the same act, it added that this does not prevent punishing two acts that give rise to two different crimes, with all their circumstances of execution, highlighting that, with the disappearance from our system of the complex crime of robbery with violence and use of weapons provided for in article 501 of the previous Penal Code, the current one punishes robbery committed with violence without prejudice to the penalty that may correspond to the acts of physical violence committed (article 242.2 Penal Code). This means that, if in addition to a robbery there are also injuries, there will be two independent crimes with their own substantive nature, and each of them must be punished with the qualifying circumstances that apply (a stance also supported in Supreme Court Judgements 213/2000 and 392/2001)".

Conclusions.

In our case, like those that were the subject of the previous judgements, a situation is described in which the weapon is used, first with merely intimidating effects to achieve the robbery and subsequently to assault and battery, i.e., they were used in both acts, so that the principle of proscription of double taxation is not violated and the classification of both crimes is not only compatible, but necessary to understand the lack of value of the action carried out.

3. Supreme Court Ruling No. 99/2024 of 01 February 2024. Offence of serious disobedience of art. 556 of the Penal Code. What is fundamental for integrating the offence is the obstructive attitude and its seriousness, not the injunction to the person under investigation, which is not a required element in the offence, although it may be another element in assessing whether the offence is committed[3].

Factual background.

The Criminal Court No. 20 of Madrid, on February 11, 2021, issued a guilty verdict against Marí Trini for the crime of serious disobedience to authority, which contains the following proven facts: "One. By virtue of a judgement dated 23 March 2017, issued by the Family Court, First Instance No. 6, of Alcalá de Henares, the divorce between the now accused Marí Trini, an adult without a criminal record, and Ricardo was decreed. A visitation regime was established for their two daughters, Adoración, born in 2011, and Alicia, born in 2014. The judgement was notified to the accused's representation on March 24, 2017, as well as the clarification order dated 29 May 2017, which was notified on 2 June 2017, becoming final. The visitation regime included different periods of time, to be carried out under the supervision of the social services of the Madrid City Council, through a meeting point, and while their intervention was pending, visits were set for alternate Tuesdays and Sundays, with the presence of a family member designated by the now accused.

The narrative of proven facts continued, detailing numerous and specific incidents and difficulties for the father to comply with the visitation regime. This was further complicated by a complaint from the mother for an alleged crime of sexual abuse towards

[3] Criminal Supreme Court Ruling on Criminal Section 1 no. 99/2024 of 01 February 2024, published on the website of the Judicial Documentation Centre, CENDOJ, ROJ: Supreme Court Ruling 635/2024 - ECLI:ES:TS:2024:635, appeal: 6433/2021. Rapporteur H. E. Mr Ángel Luis Hurtado Adrián.

one of the minors and a harassment complaint. The resolution that ended the latter procedure highlighted that, "... it can only be inferred that the complainant has conceived and devised a plan aimed solely and exclusively at persistently, obstinately, and stubbornly preventing Eugenio from seeing, being with, and staying with his daughters...". This resolution was confirmed by an order dated 269-18, issued by the 26th Section of the Provincial Court of Madrid, which in its fourth legal grounds, stated literally: "... that the complainant ... has filed the complaint ... in order to make it impossible for the father to communicate with the minors, causing evident harm to them and to him, without allowing him to exercise the right of visitation or make decisions on important aspects of the minors' lives, behaving as if she were their sole parent. And all of this by making use of the criminal procedure in a tortious, fraudulent, abusive manner, constituting bad faith and procedural abuse...".

Upon appeal against the conviction handed down by the Criminal Court, the Second Section of the Madrid Provincial Court upheld the appeal in judgement no. 538/2021, dated 17 September 2021, acquitting Marí Trini of the crime of serious disobedience for which she had been convicted.

The SC upheld and annulled the sentence on appeal and upheld in full the conviction handed down by the Criminal Court.

Legal grounds.

To resolve this fundamental question, we will bring up the Chamber's doctrine on the crime of disobedience of art. 556 Penal Code, which we take from Supreme Court Ruling 801/2022, of 5 October 2022, dictated in a special case and single instance, by this Court, in which we said that this Court has had the opportunity to outline the elements that make up the crime of serious disobedience referred to in article 556 of the Penal Code. For example, our recent judgement number 560/2020, 29 October, can be found at : "With regard to the crime of disobedience foreseen in art. 556 Penal Code, it involves conduct, which is decisive and categorical, aimed at preventing compliance with what is clearly and categorically ordered by the competent authority (Supreme Court Judgements 1095/2009, of 6-11; 138/2010, of 2-2). These are, therefore, its requirements:

a) an express, concrete and definite command to do or not to do a specific conduct, issued by the authority and its agents within the framework of their legal powers.

b) that the order, with all the legal formalities, has been clearly notified to the person obliged to comply with it, in such a way that the latter has been able to become fully aware of its content, without it being necessary in all cases to include the express warning of incurring the offence of disobedience in the event of non-compliance.

c) Resistance, refusal, or opposition to comply with what is ordered, which implies that in the face of a persistent and repeated mandate, the obligated person rises against it with a frank, clear, evident, undeniable, undisguised, or unequivocal refusal (Supreme Court Ruling 263/2001, of 24-2), although clarifying that this ... can also exist when a repeated and evident passivity is adopted over time without fulfilling the mandate, that is, when without opposing or denying it, the person also does not perform the minimum necessary activity to carry it out, especially when the order is reiterated by the competent authority for it, or in other words, when the persistent passive stance necessarily translates

into a palpable and repeated refusal to obey (Supreme Court Ruling 485/2002, of 14-6). In other words, this offence is characterised not only by the fact that the disobedience is apparently open, categorical and clear, but also punishable "that which results from repeated passivity or the presentation of difficulties and obstacles that basically demonstrate their rebellious will" (Supreme Court Ruling 459/2019, of 14 October, citing Supreme Court Ruling 1203/97, of 11-10).

It should be borne in mind - as we specified in Supreme Court Ruling 54/2008, 8-7 "that a non-express refusal, whether tacit or by means of conclusive acts, can be as unlawful as one that the court *a quo* calls express and direct. The openness or otherwise of a refusal is not identified with the defendant's express proclamation of his or her continued refusal to comply with the court's order. This will can be deduced from both active and omissive behaviour, express or tacit".

Therefore, according to this doctrine, not only does it not require the presence of such a demand, but it also explains that, even if it is not explicitly made, the crime can still be recognised. The fundamental point is that, on the part of the person obligated to comply with the order, there is a palpable and repeated attitude of refusal to comply, whether actively or passively, through a persistent obstructive attitude to such compliance, shown even tacitly or through conclusive acts. This is what we consider to have happened in the case at hand, and this doctrine merely develops the content of art. 556.1 Penal Code, which punishes "those who, without being included in art. 550, resist or disobey authority or its agents seriously in the exercise of their functions, or private security personnel, duly identified, who carry out private security activities in cooperation with and under the command of the Security Forces and Corps." We see that this article does not include the aforementioned demand as an element of the crime.

Notwithstanding this background and the fact that the judgement under appeal handed down by the Provincial Court itself admits the defendant's obstructive conduct and recognises its seriousness, or that the family conflict has been chronified thanks to the defendant's continued attitude, it does not, however, consider that there are sufficient elements to establish the crime of disobedience.

The argument he uses for this is that "the only injunction - that is, the only judicial order - that was made to the mother was none other than the warning to apply in civil proceedings, the penalty regime established by the legislator in art. 776 Civil Procedure Act (LEC)", a warning that he says cannot be equivalent to the judicial warning "with which the criminal legislator has demanded to classify the conduct of the accused as a crime under the protection of art. 556 Penal Code", to which he adds, "but precisely this stubbornness would have required, for logical reasons, that the injunction was appropriate, which in no way can be identified with the warning to apply a civil penalty regime [...]".

We do not agree with the argument; first of all, because, as we have said, the legislator has not demanded any warning or requirement to classify the crime of disobedience, as can be seen from the mere reading of art. 556 Penal Code, transcribed above, and in the cases in which it has been mentioned in case law it has been with the aim of leaving no doubt on the part of the person who disobeys that they are aware of the order they are failing to comply with; for this reason, we agree with the Public Prosecutor when he says: "It is neither a requirement, nor has it ever been, for the crime of

disobedience to have a prior warning of incurring such a crime if one does not behave in a certain manner. This represents only a method to preconstitute the proof of intent and demonstrate the author's knowledge, and, if applicable, to give greater coercive effectiveness to the order. But the intent or knowledge of the order, if present and proven, must lead to a conviction for the crime of disobedience, even if there was no prior personal demand. Conversely, even if there is a demand and/or warning, if the facts do not constitute the crime of disobedience, it will not be punishable."

Conclusions.

To establish the occurrence of a serious disobedience offence, the fundamental requirement is the existence of an explicit, specific, and unequivocal mandate to perform or refrain from a specific action, issued by the authority and its agents within the scope of their legal competencies, and that the recipient is aware of this explicit order or mandate and resists, refuses, or opposes complying with it.

Therefore, a personal demand is not required. This is not a prerequisite for the crime of disobedience but rather a means to ensure awareness of the mandate.

4. Supreme Court Ruling 84/2024, of 26 January 2024. Forgery in official documents. Completely false material support of a Colombian driving licence in which both the photograph and all the circumstances and identity data shown on it are true[4].

Factual background.

The Examining Magistrate's Court No. 13 of Barcelona opened preliminary proceedings under number 1728/2019 for the crime of false documentation against Mr Roque and, once concluded, referred it for trial to the 18th Criminal Court of Barcelona, which issued, in summary proceedings number 315/2020, a sentence on 12 February 2021 containing the following proven facts: "Single Fact: The accused, Roque, of Colombian nationality and legally residing in Spain, of legal age and with no prior criminal record, on 17 December 2019, at around 16:50, was driving the Mazda vehicle with registration number ....-YTM when he was stopped at a traffic checkpoint near number 19 Paseo de Vall d'Hebron in Barcelona. After being asked for his documentation, he presented the officers of the Barcelona Urban Guard with a driver's license bearing his photo and name, which was completely fake. The accused either directly or through third parties, created this document, and he participated by providing at least his identity details and photograph."

The Criminal Court issued a guilty verdict against Mr Roque as the responsible author of a crime of forgery of an official document, as stipulated and penalised in 390.1.1 and 2 and 2 and 392.1 of the Penal Code, without any modifying circumstances of criminal liability. He was sentenced to six months of imprisonment, special disqualification from exercising the right to passive suffrage, and six months of a fine at

[4] Supreme Court Ruling Penal section no. 84/2024 of 26 January 2024, published on the website of the Judicial Documentation Centre, CENDOJ; (ROJ: Supreme Court Ruling 472/2024 - ECLI:ES:TS:2024:472), appeal: 6731/2021. Rapporteur H. E. Ms Carmen Lamela Díaz.

the rate of €6 per day, with the corresponding subsidiary personal liability in case of non-payment, as per article 53 of the Penal Code.

Against this sentence, the defence of the convicted filed an appeal, which was upheld by the judgement issued by the Third Section of the Provincial Court of Barcelona on 5 May 2021, in appeal judgement number 32/2021.

Legal grounds.

As explained in Supreme Court Ruling 165/2010, of 18 February, doctrine and jurisprudence have understood that it is not enough to appreciate the offences of falsehood that the constituent elements of the type concur, but that it is also required that the action deserves to be considered anti-juridical when viewed from a material perspective. This means that the punitive framework should not apply to those counterfeit acts that do not undermine the legal good protected by the criminal law.

The Court of Cassation has established in repeated decisions that the incrimination of false conduct is based on the need to protect public faith and security in legal transactions, preventing access to civil and commercial life by false evidential elements that could alter the legal reality in a way that is harmful to the affected parties (Supreme Court Judgements 349/2003, of 3-3; 845/2007, of 31-10; 1028/2007, of 11-12; and 377/2009, of 24-2, among others). This is an attack on public faith and, ultimately, on the trust that society has in the value of documents (Supreme Court Ruling. 13-9-2002).

And it has also been argued that only by placing it in the legal traffic is it possible to fully grasp the meaning of this type of forgery offence, because only to the extent that a document enters into that traffic or is destined for it, does its adulteration become criminally relevant. For this reason, this Court has declared that the offence of document forgery is not committed when, despite the existence of the typical objective element, the agent's conduct has a purpose that is innocuous or has no harmful potential. However, in order to clarify which are the essential elements or requirements, attention must be focused on the functions that constitute the raison d'être of a document and whether the absence, modification or variation of one of these elements has a substantial impact on these functions, which are: perpetuating, insofar as it is a material fixation of some manifestations of thought; evidential, insofar as the document has been created to accredit or prove something; and guaranteeing function, insofar as it serves to ensure that the person identified in the document is the same person who has made the manifestations attributed to him in the document itself (Supreme Court Judgements 1561/2002, 24-9; and 845/2007, 31-10).

It has also been particularly emphasised that mere "formal falsity" is not sufficient, but that a "particular material unlawfulness" is required, involving at least a danger to the legal assets underlying the document protected by public faith. Both the essential nature of the element on which the falsehood must be based and the special material content of the unlawfulness must be deduced from the object of protection of the offences of false documentation. In this sense, it must be emphasised that documents are protected as a means of proof, that is, as a means of imputation of a declaration of intent and that, therefore, only to the extent that one of their functions is affected can it be admitted that an essential element has been altered or that a special material unlawfulness harmful to

the legal assets underlying the document has been established (Supreme Court Judgements 21-11-1995 and 247/1996, of 3-4).

The jurisprudence of this Chamber has assiduously declared that the crime of document forgery is not committed when, although the typical objective element is present, the agent's conduct has a purpose that is innocuous or has no potential for harm, but the offence is committed when it causes real or potential harm to the legal interests protected by the punitive rule (Supreme Court Judgements 1561/2002, 24-9; 394/2007, 4-5; 626/2007, 5-7; and 845/2007, 31-10). And here, of course, the counterfeit acts undoubtedly had the potential to cause harm, so that if they did not ultimately cause actual damage to legal transactions, there is at least potential damage.

In the same sense, judgement no. 227/2019, of 29 April, and those to which it refers (Supreme Court Judgement no. 520/2016, of 16 June; 432/2013; 309/2012, of 12 April or 331/2013, of 25 April) also express this view.

More recently, in judgement no. 402/2022, of 22 April, we recalled that "The doctrine of this Court, from a decidedly functionalist perspective, has insisted that it is not sufficient for the existence of the offence of false documentation that there is an objectively typical conduct of mutation of the documented contents or alteration of the conditions of authenticity. In addition, the latter must jeopardise the assets or interests protected by the offence of false documentation, which is why its existence should be denied when there is evidence that such interests have not suffered a significant risk of harm -vid. Supreme Court Ruling 318/2017 of 1 February; 138/2022, of 17 February.

Essentiality must therefore be measured in terms of the capacity of the mutation to overcome the permitted risk by altering the meaning and the very functions of the document in legal transactions. As we stated in Supreme Court Ruling 279/2010, of 22 March, "for the existence of false documentation, it is not enough to be objectively typical conduct, but it is also necessary that the *mutatio veritatis*, in which the type of falsehood in a public or official document consists, alters the essence, the substance or the authenticity of the document in its essential aspects as a means of proof, as it is a necessary condition for this type of crime to cause real or merely potential damage to the life of the law for which the document is intended, with a certain change in the effectiveness that the document was intended to fulfil in legal transactions".

Thus, the falsehood may be considered innocuous when the absence of offensiveness derives from the concrete assessment of its effectiveness in relation to the situation to be decided. Thus, the suitability to affect the evidentiary function must be ruled out when the falsified document, by its nature, is not teleologically oriented to prove what is stated in it contrary to the truth or when it lacks the potential attitude to produce a legally assessable result.

In the case under consideration, we are faced with a document whose material support is completely false, but the data it contains correspond entirely to the reality it reflects. The photograph on the document was that of the accused Mr Roque, the identity data corresponded fully with his personal data, and he was indeed the holder in Colombia of the driving licence that the document reflects.

Therefore, it is not a false document in itself in the sense that it falsely asserts something inconsistent with reality. There is no pretence that the defendant was pretending to have identity details other than his own, nor was the appearance created that he was in possession of a licence to drive vehicles that he did not have. In short, the falsity of the material support of the document does not affect the veracity of the data and information it contains.

Conclusions.

We have seen in the case at hand a driver's license that is false in form but true in terms of the data it contains and presents, resulting in a merely formal falsification without any significance for legal transactions.

The document was not intended to verify a factual or legal situation concerning the accused that did not correspond to reality. On the contrary, all the data and circumstances stated in the document fully matched reality, so the conduct attributed to the appellant excludes the impairment of public trust and the security of legal transactions.

Consequently, the evidentiary function of the document has not been altered, as the document found in the accused's possession was not created to prove or verify any circumstance different from reality. Nor were its other functions affected, as the person identified in the document was the accused himself. For this reason, the act is not subsumed under the type contemplated in arts. 390.1. 1 and 2 and 392.1 Penal Code and the sentence is acquittal.

5. Supreme Court Ruling 138/2024, of 15 February 2024. Criteria for the validity of the victim's statement. Persistence of incrimination and assessment of personal circumstances[5].

Factual background

Examining Magistrate's Court No. 2 of Murcia, processed summary proceedings no. 3/2021 for the continuous offence of sexual abuse, against Mr Manuel. Once the case was concluded, it was referred to the 2nd Section of the Murcia Provincial Court, case number 25/2021, and a judgement was handed down on 21 March 2023, which contains the following proven facts: "Sole: It is proven and thus declared that in the first months of 2019, Marisa, born in 2009, and on the occasion of the celebration of her Baptism and First Communion, chose Porfirio and his wife as godparents for the ceremony.

For this reason, the minor began to spend some days at the home of the aforementioned couple, located in ooo street, building ooo, number ooo, in the municipality of Murcia.

Taking advantage of this circumstance, on an occasion when Porfirio was alone with the minor at her home, without being able to specify the date but in any case after the minor had taken her First Communion, Porfirio put his hand under her underwear,

[5] Supreme Court Ruling, Penal section 1 no. 794/2024 of 15 February 2024 published on the website of the Judicial Documentation Centre, CENDOJ, (ROJ: Supreme Court Ruling 794/2024 - ECLI:ES:TS:2024:794), appeal: 10832/2023. Rapporteur H. E. Mr Manuel Marchena Gómez.

touching her genital area and even inserting his fingers into her vagina. On a different occasion, also on an unknown date but after the above-mentioned ceremony, Porfirio again touched the minor, even trying to kiss her on the mouth despite the minor's resistance. Despite Marisa's pleas for Porfirio to stop, Porfirio not only ignored her pleas, but told the girl that she must not tell anyone.

The Provincial Court convicted the accused as perpetrator of a continuous crime of sexual abuse with prevalence of art 183.1, 3and 4d) of the Penal Code, to a prison sentence of eleven years, among other pronouncements, a sentence that was appealed before the High Court of Justice (TSJ), which rejected the appeal, confirming the contested decision in its entirety.

Legal grounds

This judgement analyses the assessment of the testimony of a minor victim in a case of sexual assault and rejects the contested decision's concerns about the reliability of the minor's testimony, attributing it to a lack of persistence and the presence of ulterior motives that might have influenced her statement.

Marisa's testimony has never been inconsistent. Beyond minor details that do not affect the core fact of the sexual assault she suffered, her testimony has remained intact in its essential elements. These variations are justified—reasoned the appellate body—by her young age, between 9 and 10 years old when the events occurred and when she first reported them.

This reasoning aligns with the jurisprudence of this Chamber. The need for persistence in incrimination should not be confused with a mimetic repetition, where the victim, far from naturally recounting the painful experience of such a crime, insists with artificial fidelity on the narrative given in the initial statements. Those who demand a repetitive imitation of what was narrated in the initial appearance—typically before police officers—are disregarding the differences between that first scenario and one that is more relaxed, for example, in an explanation before psychology professionals or judicial authorities. Dismissing the probative value of the victim's testimony due to the lack of complete consistency between the initial report and subsequent statements overlooks the influence that the proximity of the reported event can have on that first testimony and disregards the impact of the passage of time on the emotional impact that typically accompanies this type of crime. Therefore, attributing probative value to the victim's statement, which is enriched with details not included in the initial narrative, does not imply a violation of the constitutional right to the presumption of innocence. What is decisive is the consistency in the core aspects of the narration, without which the incriminating significance of the victim's declaration vanishes. It is evident that relevant doubts conveyed by the witness cannot be resolved by the court through factual proclamations lacking essential support. However, the details that enrich the initial explanation, as long as they do not alter the coherence of the victim's narrative, cannot be considered as expressions of a dubious testimony and, as such, insufficient to support the judgement of authorship (cfr. Supreme Court Judgement 467/2020, 21 September; 636/2015, 27 October).

The contested resolution has also not detected any special animosity on the part of Marisa or her family towards the accused: "...the good relations existing between the

minor's family and the accused's family, as well as the appreciation the former had for the latter and his wife, to the point of choosing them as godparents for baptism and communion…".

Particularly significant is the value attributed at the instance, recognised as such in the contested judgement, to the emotion experienced by Marisa when recounting the events before the psychologists that violated her sexual integrity: "...to the point of becoming emotional and having to interrupt her discourse, in a manner described by the experts as distressing, which implies nothing more than being worthy of compassion and cannot be interpreted as untruthful. And it is emphasised once again the minor's age, making it incredible for this Court to believe that the degree of emotion she reaches when narrating the most specific episodes could have been feigned, which also aligns with what the professionals involved have explicitly stated".

Conclusions.

This Supreme Court Ruling 138/2024 of 15 February describes the requirements that victims' statements must meet in order for their testimony to be able to support a conviction and highlights the difference between the persistence, uniformity and forcefulness of a statement, as opposed to other considerations such as mimicry, similarity or identity of their assertion.

It also clarifies the scope and relevance of the explanation of the core and accessory elements of such statements, from the first statement in police headquarters and very close to the commission of the crime, to the last one in the oral trial.

6. Supreme Court Ruling 873/2023, of 24 November 2023. The uniqueness of electronic evidence. Collection, custody and traceability[6].

Factual background

Appeal brought against judgement no. 9/2022 of 13 July 2022 delivered by the Appeal Chamber of the judgement no. 9/2022 dated 13 July 2022 handed down by the Appeals Chamber of the National High Court, ruling on the appeal lodged against Judgement no. 15/2021 dated 27 May 2021 handed down by the Criminal Chamber of the National High Court, 3rd Section, in the case of Chamber Judgement 10/2018, originating from the Central Examining Magistrate's Court No. 4 of the National Court of Spain and followed for the crime of terrorism.

This very extensive Supreme Court Ruling introduces, in several of the 307 sections of its grounds, an express reference to digital data and the reliability of its collection, custody and traceability.

[6] Supreme Court Ruling Penal section 1, no. 873/2023 of 24 November 2023, published on the website of the Judicial Documentation Centre, Cendoj, (ROJ: Supreme Court Ruling 5196/2023 - ECLI:ES:TS:2023:5196), appeal: 10645/2022. Rapporteur: H.E. Javier Hernández García.

Legal grounds

There is no doubt that electronic evidence presents singularities with respect to other types of evidence that could be called conventional. In addition to the need to use special technologies or methods to obtain, secure, process and analyse the digital data stored in the hardware, the most outstanding uniqueness is due to its alphanumeric nature, which allows digital data to be replicated and duplicated without limit. Digital data is volatile, deletable, mutable, and can be destroyed, even remotely, without destroying the computer medium that stores it.

As a logical consequence, digital evidence is more susceptible than physical evidence to alteration or tampering, which can make it very difficult for the court to assess its authenticity, accuracy and completeness.

To this we must add the technical difficulties in accessing the data, in particular when they are encrypted, or the logistical inconveniences for their handling and analysis when they are very voluminous or of great importance both in the investigation stage and in the trial stage -vid. ECHR, Rook v. Germany, 25 October 2019; STSS 507/2020, 14 October; 86/2022, 31 January; 106/2023, 16 February. Hence, the need to activate specific safeguards in terms of collection and processing -vid. Supreme Court Ruling 425/2016, 4 February; Circular of the State Attorney General's Office 5/2019 - but also to the proper assessment of its reliability. In particular, in cases where digital data have been obtained without subsequent judicial control or are not accompanied by other evidentiary information with corroborative potential - see on the evidentiary use of content sent via messaging services, STEDH Yüksel Yalçinkaya v. Turkey, 26 September 2023.

Precisely on this issue relating to the standard of accreditation of the genuineness of digital information obtained from communicative processes through messaging platforms, this Chamber has developed a doctrine with a component necessarily adapted to technological evolutions.

Indeed, and with specific reference to records or files provided by one of the interlocutors, we warned in Supreme Court Ruling 300/2015 of 19 May, of the need to approach it with all due caution precisely because "the possibility of manipulation is part of the reality of things", adding "that the anonymity that such systems authorise and the free creation of accounts with a false identity make it perfectly possible to pretend to be a communication in which a single user relates to himself or herself. Hence, challenging the authenticity of any of these conversations, when they are brought to the case by means of print files, shifts the burden of proof to the party seeking to exploit their evidentiary value. In such a case, expert evidence will be indispensable in order to identify the true origin of the communication, the identity of the interlocutors and, finally, the integrity of its content.

However, from the affirmed need to apply demanding standards of accreditation of authenticity, it is not possible to decant a sort of formula of accreditation that is taxed or reduced exclusively to expert evidence.

As we have pointed out subsequently, the court may rely on other evidence to establish that communication and rule out any doubt as to the integrity and genuineness of what was communicated - see the most recent, Supreme Court Ruling 777/2022, of 22

September, which invokes Supreme Court Ruling 375/2018, of 19 June, which modifies the previous doctrine -. Thus, if one of the interlocutors denies being the author of the messages sent through a electronic communication system, any reasonable doubt as to the origin of the information must be ruled out. But such a result may be obtained either by means of an expert opinion on authenticity or by other evidence, duly assessed by the decision-making body, which shows, beyond reasonable doubt, the origin and authorship of such content.

In the light of the foregoing, the appellant questions, on the one hand, whether the physical equipment seized in the course of the arrest and the subsequent entry and search of the home where he lived, telephone and computers, respectively, genuinely corresponds to that which was the subject of various expert tests, since the respective chains of custody were not respected. On the other hand, it fights to ensure that the communicative content identified and attributed to it corresponds to reality and has not been manipulated.

With regard to the objection of correspondence between the telephone tapped during the arrest and the one that was subsequently analysed by the Judicial Police experts, the appellant focuses his complaint on the fact that during the three days that it was kept at the Mossos d'Esquadra police station and until it was handed over to the Guardia Civil agents, there is no record of who guarded it, where or how it was guarded. It is claimed that the chain of custody was not documented, and that this shortcoming cannot be made up for by the statements of the officers who tapped the telephone and carried out the initial investigations. In the appellant's view, the court of first instance attributed a kind of presumption of veracity to the statements made by the police witnesses when it is obvious that what they were seeking to do was to try to endorse their irregular conduct, but we do not consider that there is no gravamen because, in the light of the evidential information available, there is no reasonable doubt that the telephone tapped during the arrest and the one analysed subsequently were not the same. It is true that, without prejudice to the original record of the telephone tapping, the different sequences that make up the custody mechanism activated at the police station were not documented in writing. However, it is no less important that five officers specified these conditions in the oral proceedings, all of them affirming that the telephone tapped on 17 August was the same as the one referred to in the handing over and receipt report drawn up on 20 August, also signed by the lawyer appointed by the court and the one subsequently handed over to the Guardia Civil officers for forensic analysis.

In this respect, and as stated in the above-mentioned STEDH, Yüksel Yalçinkaya v. Turkey, 26 September 2023, in evidence-gathering activity "the whole structure of the Convention is based on the general premise that the public authorities of the Contracting States act in good faith (see, for example, Kavala v. Türkiye (infringement proceedings) [GC], No 28749/18, § 169, 11 July 2022, and Khodorkovskiy v. Russia, No 5829/04, § 255, 31 May 2011)". This entails the need to identify some minimally consistent data or reason that would allow this presumption to be questioned, and in this case, it is not identified. It is noteworthy that, as we have seen when examining the preliminary proceedings, in the course of the statement made by the appellant, in the presence of the public defender, on 19 August, he was questioned by the officers interrogating him as to whether he authorised the examination of the intercepted telephone terminal, to which he agreed by providing the passwords that allowed this. It is obvious that the appellant

himself confirmed the correspondence of the telephone deposited at the police station with the one seized 48 hours earlier when he was arrested.

The second objection concerns the computer equipment seized during the search of the appellant's home.

The argumentative discourse that supports it is confused. If we have not misunderstood, the chain of custody is again being questioned, this time emphasising that although the objects seized in the home search were sealed by the Justice Administration Lawyer under a registration number - 00031175 -, it has not been accredited that those taken to the Court were not previously manipulated, nor when, how, where and under what circumstances the unsealing was carried out, as there is no evidence that those unsealed in court coincide with those sealed at the time, as the corresponding number is not reflected in the record.

The objection does not allow reasonable doubt to be cast on the correspondence and completeness between the computer equipment seized and that analysed. As stated in the judgement under appeal, the evidence obtained was identified during the search and sealed with a registration number. On 28 August 2017, the cloning of the information stored in the computers was ordered by order, with a copy given to the lawyer for the administration of justice, protected by fingerprint, for her custody, extending the order for access to the information that could be found on the SIM and SD cards intercepted and stored in the cloud or virtual environment, with an outline of the physical terminals. The respective clonings were carried out in the presence of the lawyers of the Administration of Justice of each of the Courts where they were carried out, and the corresponding certificates of delivery and transfer of the CDs from the Courts where they were carried out to the Central Examining Court in charge of the investigation are on record. There is also a record dated 14 July 2019 of the unsealing and collation of the evidence C17, C18, C29, C36.1 found at the appellant's home. Additionally, the plenary declarations of all the agents who participated in the intervention of the objects during the home search, the practice of data dumps, the cloning procedures, the receipt of the obtained information, and the various transfers between the concerned judicial bodies provide precise information that allows concluding that the evidence obtained from the home search was always under judicial authority control.

As the Court of Appeal argues, in terms we adopt as our own, "the mere conjecture of the appellant that the lack of reference to the seal number at the time of opening the bags leads to the presumption that it no longer had it, and that such breakage or disappearance of the seal constitutes a breach of the chain of custody with infringement of the right to the presumption of innocence and violation of Article 24 of the Constitution, is not sufficient to uphold this ground of appeal when, as has been stated, there has been control of the seized effects under the public faith of the lawyers of the Administration of Justice, and constant monitoring of them by the intervening agents, with the sealing and, moreover, the exact reference at the moment of unsealing to the seal number, having relative value as indicated by the Supreme Court Ruling of 17 December 2021, or the Supreme Court Order of November 18, 2021, which references the Supreme Court Ruling of 27 July 2019, when it affirms that an erroneous numbering of the sources of evidence does not affect the identity of what was seized and analysed, as long as the path followed after seizure, control, and delivery of the effects can be confirmed, clearing any doubt about their integrity."

Conclusions.

Not every allegation by the defence regarding possible irregularities or manipulations of evidence sources should lead to a declaration of nullity and the acquittal of the accused. For such a complaint to succeed, it must not be generic or imprecise.

However, attributing probative value to an element of evidence to support a conviction, when there are reasonable doubts or it is unknown how, where, and by whom it was found, or whether it may have suffered any significant deterioration or contamination that alters its genuineness, would be too risky. This would jeopardise the accused's rights to a fair trial with all guarantees and to the presumption of innocence.

The criminal process, given the high stakes and the principles that unalterably determine the activity aimed at discovering the truth—integrity, contradiction, equality of arms, judicial impartiality, presumption of innocence—must be nourished by reasonable logic.

No one is obliged to believe that a fact exists simply because one party in the process asserts its existence.

Each and every allegation about a legally relevant fact must be corroborated with evidence that sufficiently establishes its origin and accuracy, thus allowing the courts to assess reliable probative information. Logic that does not admit a reasonable and well-founded doubt, that reduces the risks of judicial error, and that initial mistrust can be overcome when the results of the evidence allow the court, applying socially shared valuation rules, to construct the proven fact that supports a conviction immune to reasonable doubt.

7. Supreme Court Ruling 140/2024, of 15 February 2024. Police action recording a spontaneous demonstration by a murder suspect. Testimony of reference. Evidentiary assessment[7].

Factual background

Examining Magistrate's Court No. 1 of Calatayud opened Jury Court proceedings under number 51/2015 for the crimes of murder and illegal possession of weapons against Ms. Zaida, and once concluded, it was referred for trial to the Provincial Court of Zaragoza, whose First Section issued judgement No. 230/2019 on 2 February 2023, in which the Jury Tribunal declared the following facts proven: The accused, Zaida, born on num000 May 1959, with no prior criminal record, was married to Jesús Manuel, born on num001 1945. Jesús Manuel and Zaida lived alone in a cave-house and had three grown children, Aurelia, Agustín, and Beatriz, who did not live in that town. Jesús Manuel, at least since 2013 when he was examined by the hospital's Ophthalmology service, had corneal

[7] Supreme Court Ruling, Penal section 1, no. 140/2024 of 15 February 2024, published on the website of the Judicial Documentation Centre, Cendol, (ROJ: Supreme Court Ruling 937/2024 - ECLI:ES:TS:2024:937), appeal: 11014/2023. Rapporteur H. E. Ms Carmen Lamela Díaz.

opacity in both eyes, which practically caused blindness as he could only distinguish light from darkness and could not discern shapes or hands, making him highly dependent.

On the night of 4 to 5 January, at an undetermined time but before 09:00 on 5 January, the accused, Zaida, with a semiautomatic Astra pistol, model 400, entered the bedroom of their home, pointed at Jesús Manuel's head while he was in bed, and fired a point-blank shot from right to left, top to bottom, and back to front, causing his instant death.

When Zaida shot her husband with the pistol, he had no chance to defend himself, either because he was asleep, because he could not see due to his near-total blindness, or because the attack with a firearm was so sudden. After causing her husband's death, the accused, either by her own strength or with the help of other unidentified persons, dragged her husband's body with the bedding from the bedroom to the patio of their home. There, on the morning of 5 January 2015, she doused his body with gasoline that she had bought that morning and set it on fire.

On 6 January 2015, around 15:29, the accused, accompanied by her daughter Aurelia, went to the police to report her husband Jesús Manuel's disappearance, claiming it occurred between 07:45 and 10:30 on 5 January. She stated, among other things, that her husband was blind or nearly blind, used a cane, never went out alone, and took medication. At around 17:00 on 7 January 2015, a call was received from phone number num005 at the Operations Room of the Local Police Station, where a female voice, identified as Aurelia, Zaida's daughter, said: "Mama, but what have you done?" Subsequently, another call from the same phone said, "My mother has killed him."

After this call, the police arrived at Zaida's residence to arrest her. She spontaneously confessed to having killed her husband with a pistol and attempting to burn the body in the patio of the house. She then accompanied the police to the location of the pistol, which was on a mantelpiece in the kitchen, as well as to the location of Jesús Manuel's lifeless body, which was in the woodpile connected to the bedroom.

Legal grounds

This section of the legal basis connects with the last paragraph of the proven facts previously transcribed and the evaluation of the spontaneous statements.

Regarding the officers' presence at the accused's residence and her statement to them that she had killed her husband with a pistol, attempted to burn the body in the patio, and showed them the location of the pistol in the kitchen on a mantelpiece, as well as the location of Jesús Manuel's lifeless body, it is noted that this does not prove she killed her husband. These are spontaneous statements for which the officers are merely hearsay witnesses.

According to the reiterated doctrine of this Chamber, there is no objection to admitting the hearsay testimony of third parties or police officers who receive such spontaneous comments, provided they are not induced. No law prohibits detainees from making voluntary and spontaneous statements.

There is no doubt that this is hearsay testimony (*auditio alieno*) and should be treated as such concerning the content of the statement. It does not provide certainty regarding the reality or truthfulness of what was stated, which is beyond the witness's knowledge. It is direct (*auditio propio*) concerning the fact of the statement and the circumstances surrounding it.

The right of the accused to remain silent does not prevent them from making free and spontaneous statements. What is prohibited is the questioning before the advisement of rights or when the right to remain silent has already been exercised, but not the listening to the detainee's statements. Statements made by the detainee, voluntarily and spontaneously, outside the official record cannot be considered contrary to the legal order (Supreme Court Ruling 25/2005, 21 January). Therefore, they are fit to be evaluated and serve the purposes of justice and, ultimately, the public interest.

In this case, the officers reported these statements during the oral trial. These did not result from an interrogation of the appellant, as understood by the Court.

In any case, as the High Court of Justice recalls, the appellant not only self-incriminated before the police but also in two summary declarations before the judge and the lawyers of the parties, although she later recanted in other statements, including during the trial. Such declarations have been considered by the members of the Jury and have served as probative support for the conviction, as already expressed in previous sections.

Conclusions.

I wanted to extensively develop the factual background of this Supreme Court Ruling 140/2024 of 15 February, in order to fully understand the requirements for considering the spontaneous statement of an investigated person as a source of knowledge of what happened, corroborated by other incriminating elements obtained by the police at first, provided and collected during the investigation and exposed with full contradiction and publicity in the oral trial.

This has been the uniform and constant jurisprudential line of the SC for many years.

8. Supreme Court Ruling 153/2024, of 21 February 2024. Assessment of expert evidence. Scope and content. Are the findings of the opinions binding on the Courts?[8]

Factual background

The Examining Magistrate's Court No. 2 of Salamanca opened Jury Court proceedings under number 1/2021 for the crimes of murder and illegal possession of weapons against Mr Juan María and once concluded, referred it for trial to the Provincial Court of Salamanca whose First Section dictated, in the Jury Court Judgement No. 3/2022,

[8] Supreme Court Ruling, Penal section 1, no. 153/2024 of 21 February 2024, published on the website of the Judicial Documentation Centre, Cendoj, (ROJ: Supreme Court Ruling 929/2024 - ECLI:ES:TS:2024:929), appeal: 11102/2023. Rapporteur H. E. Ms Carmen Lamela Díaz.

sentence on 20 December 2022, which contains, in part, the following proven facts: "On the evening of 27 August 2021, Elvira was celebrating her birthday with some friends, Aureliano and Esperanza, and together they went to various bars in the Barrio Garrido area of Salamanca. At around midnight on 28 August 2021, they were sitting at a table on the terrace of Bar Ciclón, located at 8 Juan de Villoria Street in Salamanca. The accused, Juan María, that same night of 27 August 2021, wearing jeans and a short-sleeved black T-shirt with a light-coloured design on the chest, was at the Balabushka bar, located at Gargabete Street in Salamanca, from around 23:40 on 27 August until midnight on 28 August 2021. He then, wearing the same clothes, moved to Bar Ciclón and, after consuming several beers, sat at a table on the terrace of said bar, near the table where Elvira and her friends, Aureliano and Esperanza, were already seated. While sitting at the terrace table, the accused got up and approached the table where Elvira and her friends were sitting. He offered Elvira and her friend Esperanza a drink, and despite them rejecting the offer, the accused shortly thereafter returned with two drinks which he gave to each of the women, sitting at their table and conversing for a few minutes. During that conversation, the accused persistently and annoyingly directed his attention towards Elvira, prompting a waiter from the establishment to ask him to behave or leave the premises.

At around 02:00 on 28 August 2021, Elvira and her friends, Aureliano and Esperanza, left the terrace of Bar Ciclón, while the accused remained seated on the bar's terrace for a brief time, before following Elvira and her friends immediately after they left. The accused, Juan María, followed Elvira and her friends as they walked together on Miguel de Unamuno Street in Salamanca, keeping a certain distance behind them and carrying an object at his waist that could not be identified. Once Esperanza separated from the group, the accused continued following Elvira and Aureliano, and at around 02:00 on 28 August 2021, when they reached 10 Isaac Peral Street in Salamanca, the accused sped up to approach them from behind. Without saying a word, and using the pistol he carried, he first shot Aureliano, who was facing away, and then Elvira, who turned upon hearing the shots. After both fell to the ground, the accused, Juan María, continued shooting at each of them several times, then walked away in the direction of Avenida Federico Anaya in Salamanca.

After his arrest and on 31 August 2021, the accused Juan María showed no signs or symptoms of intoxication or withdrawal from toxic substances, nor any acute psychiatric pathology. The accused retains his capacities to understand and will, without any alteration due to psychiatric pathology or consumption of toxic substances."

Legal grounds

The consistent jurisprudence of this Chamber has proclaimed that courts are not bound by the conclusions of experts, except when these conclusions are based on incontrovertible laws or scientific rules. Therefore, any allegation that seeks to base the error of the trial court on the conclusions of the expert reports cannot succeed.

In other words, expert evidence is never binding on the judge.

Experts—using the term in a general sense to include both qualified and unqualified individuals—evaluate, through specialized experience and their specific training, some fact or circumstance that the expert has acquired through study, practice,

or both methods of acquiring knowledge, which the judge may not possess due to their specific legal training. Therefore, the expert must describe the person or thing that is the object of the expertise, explain the operations or examinations carried out and establish his or her conclusions (art. 478 Spanish Criminal Procedure Act (LECrim)), which are addressed to the judge. In this regard, the judge examines the content of the report and, if applicable, the oral explanations, reflects on the questions and follow-up questions posed, and ultimately either adopts the report in whole or in part, or rejects it. It is not, therefore, a judgement of experts, but a source of scientific, technical, or practical knowledge that aids the judge in discovering the truth.

The non-binding nature of the judge to the expert report allows the judge to assess certain circumstances differently from those examined by the expert.

This is what has occurred in the present case. The trial court, with the evidence presented in its presence, subjected to the principles of publicity, immediacy, and proper contradiction, has reasonably reached the conclusions reflected in the judgement, which have in turn been confirmed by the High Court of Justice.

In response, the appellant questions the qualifications of the experts, perhaps because they reached conclusions with which the appellant does not agree.

The disagreements with such a report are based solely on personal, non-scientific opinions and a reference to the DSM-V diagnostic criteria by someone who is not a specialist, forgetting that Forensic Doctors, in addition to being medical doctors, are public officials specialized in Forensic Medicine. They are tasked, among other things, with providing technical assistance to judicial bodies in matters of their professional discipline, issuing reports and opinions within the framework of judicial processes or in criminal investigations as requested by the courts.

They act with full capacity and objectivity. There is nothing in the proceedings, nor is it alleged by the appellant, that could compromise the impartiality of these professionals, nor that their conduct deviated from their assigned role. There is also no evidence of their lack of qualification to issue the report beyond the appellant's opinion.

Quite the contrary, according to the role assigned to them by the investigating judge, and as noted in the trial court's judgement, they examined the accused after his arrest for an hour and a half, thoroughly reviewing his entire life. In that initial examination, he denied cocaine use. They conducted a second examination, during which he admitted to using cocaine. They also studied the reports available in the proceedings. Hair samples were collected. These were logically not collected during the first examination, consistent with the statements made by the Forensic Doctors.

With all this information they drew up their report, the conclusions of which are consistent with what was stated by the witnesses who saw him on the night of the events.

As noted by the High Court of Justice, the report "is clear, categorical, and unequivocal in stating that the accused does not show signs or symptoms of acute psychiatric pathology, nor of acute intoxication or withdrawal syndrome from toxic substances. The accused does not have limitations in the psychobiological bases of imputability, cognitive and volitional capacity. Although hair samples show cocaine use,

it cannot be extrapolated to determine whether the subject was in a state of full intoxication or under the influence of withdrawal syndrome at a specific time. They added that although the accused is diagnosed with mixed personality disorder, dissocial and borderline, this pathology has no relation to the committed acts, and they assert this based on the examination conducted in the morning after the arrest, around 09:00 on 31 August 2021, when the accused claimed not to remember the events, although he did remember what happened before and after, indicating a lack of selective memory. No symptoms of mental illness or acute withdrawal were observed in this interview, and his intellectual and volitional faculties were intact. A second examination was conducted on 17 November 2021, where, with the knowledge of the accused's diagnosis, they again ruled out any mental illness outbreak and reaffirmed that the diagnosis had no relation to the events. They also noted that regarding substance use, it is not possible to link it to the events."

These conclusions coincide, as we mentioned, with the statements of witnesses who testified during the trial and who saw the accused on the night of the events. The High Court of Justice states that "witness Esperanza said the accused was neither drunk nor on drugs and seemed normal. Witness Mr Jesús, who works in hospitality, saw a normal guy and didn't notice anything unusual. Witness Mr Genaro, owner of Bar Ciclón, said the guy was a bit drunk. Witness Mr Lucio, an employee at Bar Ciclón, said he wasn't drunk. Witness Mr Maximiliano, an employee at Bar Ciclón, said he was a bit agitated but seemed normal with nothing remarkable. Bar Ciclón customer Mr Onésimo said he wasn't under the influence of alcohol, wasn't stumbling, and may have had a little to drink but nothing more. Witness to the shootings Mr Rodrigo said he saw a dark-haired man walking with a long stride who seemed normal, not drunk, and walked straight and upright." It was also confirmed that these conclusions align with the statements of police officers num005, num006, num007, and num008, "who handled the initial report and agreed that the accused's state that night was compatible with the preservation of his volitional and intellectual faculties.” Finally, it is considered, as the Jury Tribunal did, that only one witness, Mr Genaro, thought the accused was quite drunk. However, this is an isolated opinion that could be a subjective assessment and contradicts the rest of the testimonies and expert evidence presented during the trial.

In contrast, no report has been submitted, nor has any expert evidence or any other type of evidence been presented, not even the expert evidence announced by the defence in its provisional indictment, to contradict even minimally the conclusions reached, not by the experts, but by the Court, in light of the evidence presented before it.

These conclusions are none other than those stated in the proven facts section: "The accused, Juan María, did not exhibit signs or symptoms of intoxication or withdrawal syndrome from toxic substances, nor acute psychiatric pathology, after his arrest on 31 August 2021. The accused retains his capacities to understand and will, without any alteration due to psychiatric pathology or toxic substance use."

The account of proven facts does not allow for the conclusion that the diminished culpability of the accused should warrant the recognition of a complete or partial exoneration, or a mitigating circumstance, as argued by the appellant.

Conclusions.

In response to the often-repeated demand by the defence for an expert opinion on the imputability of the investigated individuals—whether through obtaining a urine sample to detect toxins, analysing hair samples to prove continued drug use, or conducting a forensic examination to determine if an individual suffers from any mental pathology affecting their volitional or cognitive capacity—the Supreme Court Ruling 153/2024 of 21 February points out three very important elements to consider for its assessment. First, the need to carry out certain investigative procedures very close to the time of arrest and possibly also close to the time of the commission of the criminal act. Second, the courts are not bound by the conclusions of the experts, except when these are based on incontrovertible laws or scientific rules. Third, the mere appearance in a medical report or expert opinion of drug use or mental pathology does not automatically entail a reduction in criminal responsibility by recognising an exoneration or mitigating factor. What is relevant is the verification and correspondence to the time of the events, providing a specific response rather than an abstract one concerning imputability.

9. Supreme Court Ruling 183/2024, of 29 February 2024. Computer damage. Art. 264(2) 1a) and c) and 2 in relation to art. 264.5 and 264(3) a) Penal Code. Concept of data and software[9].

Factual background.

The Examining Magistrate's Court No. 1 of Móstoles opened preliminary proceedings under number 1387/2018 for crimes of computer damage against Mr Sixto and, once concluded, referred it for trial to the Provincial Court of Madrid, whose Section Twenty-nine handed down, in summary proceedings No. 1125/2020, a sentence on 22 April 2021, which contains the following proven facts: The defendant, Mr Sixto, was an employee of the company Norma 4 Servicios Informáticos SA, through which he provided his services to Produban until 3 March 2017, performing the role of a network administrator at the Banco Santander Financial City in Boadilla del Monte. With the intention of undermining the property of others, he created a "logic bomb," an application or software embedded in various codes, designed to launch a malicious attack on the logical part of a computer to delete files, alter the system, or even completely disable the operating system of a Penal Code. This logic bomb had the capacity to remain suspended or inactive until the time period set by the defendant was reached, at which point it would execute the malicious action created by Mr Sixto, which he programmed to activate on 20 March 2017. As a result, on 21 March 2017, 3168 computer systems of Banco Santander across Spain were simultaneously disabled and rendered inoperative, affecting the operational capability of the impacted systems from 21 March 2017 to 27 March 2017. This caused problems for the activities of 839 offices, resulting in expert-assessed damages amounting to €292,237.86.

The company decided to terminate his services in March 2017, and Mr Sixto ceased providing services to Produban. Consequently, on 2 March 2017 at 17:27:43, he introduced the malicious code into the "RF.BOOT.VTS" script using the credentials of

[9] Supreme Court Ruling, Penal section 1, no. 183/2024 of 29 February 2024, published on the website of the Judicial Documentation Centre, Cendoj, (ROJ: Supreme Court Ruling 1008/2024 - ECLI:ES:TS:2024:1008), appeal: 462/2022. Rapporteur H. E. Ms Carmen Lamela Díaz.

user num000. However, the attack's propagation was actually planned from the computer of user num0001, which Produban used daily for the administrative task of rebooting Banco Santander Spain's Windows 7 client workstations. He programmed the execution of this code to start on 20 March 2017 to delete the boot configuration of the Windows 7 machines in Banco Santander's offices. To achieve this, the defendant accessed the jump server through his user num001 to verify the successful installation of the malicious software. At 18:03:23 on the same day, 3 March, the defendant updated his laptop, attempting unsuccessfully to modify his IP address to conceal his tracks.

At 09:11 on 21 March 2017, Produban's managers became aware of a malfunction affecting multiple computer systems in the network. Specifically, 3178 computer systems were simultaneously disabled and rendered inoperative. This operational disruption lasted six days, from 21 to 27 March 2017. During this period, 839 branches of the entity experienced severe difficulties in their usual activities, unable to perform tasks involving computer use. Consequently, 21 commercial offices and more than a hundred cashier positions became inoperative.

The creation and propagation of the logic bomb resulted in significant material costs for the complainant, given the substantial resources—both internal and external—required for detecting, containing, and investigating the origin of the malfunction in multiple systems, as well as for their repair. The Legal Representative of Produban claims compensation for the damages suffered.

Legal grounds

The appellant, Mr Sixto, was sentenced in judgement no. 221/2021, of 22 April, clarified by order issued on 27 July 2021, handed down by the 21st Section of the Madrid Provincial Court, in Judgement no. 1125/2020 arising from the abbreviated procedure no. 1387/2018 of the Móstoles Examining Court no. 1, as the author of a crime of damage to computer systems, of art. 264(2), 1, a and c) of the Criminal Code in relation to art. 264(3) of the Criminal Code, without any modifying circumstances of criminal liability, to the penalty of one year, nine months and one day of imprisonment, with additional penalties. For civil liability, Mr Sixto was ordered to pay compensation to Produban in the amount of €33,184, with subsidiary personal liability of Norma 4, plus the corresponding interest.

In the same sentence, he was acquitted of the aggravated offence of computer damage under art. 264.2 section 2 and 5 Penal Code for which he had been charged, and fifty percent of the costs of the proceedings were declared ex officio.

After the aforementioned judgement was appealed by Mr Sixto, by Santander Global SL and by the Public Prosecutor's Office, the Civil and Criminal Division of the High Court of Justice of Madrid handed down judgement no. 395/2021, of 24 November, in Appeal 425/2021, by which it rejected the appeals lodged by the legal representatives of Mr Sixto and Santander Global and partially upheld the appeal lodged by the Public Prosecutor's Office, convicting Mr Sixto for the aggravated nature of art. 264(2). 2 Penal Code in relation to art. 264. 2.5 Penal Code to three years' imprisonment, an additional sentence of special disqualification from exercising the right to vote for the duration of the sentence and a fine of three times the damage caused, €99,552, with subsidiary personal liability of one month in the event of non-payment, with the costs of the proceedings being declared ex officio.

Art. 264(3) a) Penal Code refers to the use of a computer program designed or adapted principally for the purpose of committing the offence. It thus describes not only the creation of a computer programme, but also its adaptation to commit the crime.

In our case, the proven fact refers to the use of a logic bomb or malicious code that was introduced by the accused in the script "RF.BOOT.VBS", which consisted of an application or software that is embedded in various codes and whose main objective was to carry out a malicious attack on the logical part of the computer.

The accused wrote new lines of code in the trips "RF.BOOT.VBS" (visual basic script), thereby proceeding to modify it, programming the execution of said code as of 20 March 2017 to achieve the modification of the boot configuration of the OS of the Windows 7 machines in the offices of the Banco de Santander.

In order to provide a concept of software, the Provincial Court referred to the definitions contained in the various European instruments to combat cybercrime (Instrument of Ratification of the Convention on Cybercrime, done in Budapest on 23 November 2001; Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA) as well as to the Intellectual Property Act. We refer to them at this point in order to avoid repetition.

It is only worth recalling now that recital 16 of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, states that "Given the different ways in which attacks can be carried out and the rapid evolution of software and hardware, this Directive addresses the tools that can be used to commit the offences listed in this Directive. Such instruments can be malicious software, including those that allow the creation of infected networks, which are used to carry out cyberattacks.

In line with this, Article 2(b) defines computer data as any representation of facts, information, or concepts in a form that allows their processing by an information system, including programs designed to enable an information system to perform a function.

Similarly, Article 1 of the Convention on Cybercrime, made in Budapest on 23 November 2001, defines a computer system as any isolated device or group of interconnected or related devices, one or more of which allows the automated processing of data according to a program. Computer data is understood to be any representation of facts, information, or concepts in a form that allows computer processing, including a program designed to make a computer system execute a function.

Based on this, a software program is included within the concept of computer data, and it can be defined as a set of lines of code, or in other words, a set of instructions written in a programming language. The program tells a computer what to do. These instructions are written in a programming language but must be compiled or interpreted to run and perform the required tasks.

This is precisely what is described in the proven facts. The accused introduced into the "RF.BOOT.VBS" script used by the bank for scheduled computer reboots a logic bomb (an application or software embedded in various codes) to carry out a malicious

attack on the logical part of a computer and cause the disabling or incapacitation of Banco Santander's systems, which is what happened.

The term logic bomb comes from the English term "Logic Bomb," and it is a software program, a set of lines of code, that is installed on a computer and remains hidden until one or more preprogrammed conditions are met, at which point it executes an action. It is malicious software activated by performing an action, sending an email, accessing an application, etc.

This set of lines of code, and thus the software program, with the aforementioned purpose and result, was inserted into the "REBOOT.VBS" script of the bank's central machine, which managed the configuration of the user workstations, and which was accessed via the jump server.

Finally, the report issued by Deloitte, which the appellant precisely refers to in support of his claim, confirms the installation of the malicious program by the appellant. The report states that during the investigation, it was found that the incident was caused by a logic bomb installed on the affected computer systems as described later in this section.

The logic bomb was a modified version of the "Reboot.vbs" program used by the bank for scheduled computer reboots. The harmful version corrupted the boot system of the computers, preventing them from rebooting correctly and rendering them inoperative. Additionally, the harmful version deleted itself once it had completed its task to avoid detection, replacing itself with a legitimate version of the program. (...)

Conclusions

This Supreme Court Ruling delimits with impeccable technical precision, using the rules stemming from international conventions, the basic type of computer-related damage and the aggravated subtypes. However, the abstract penalty applicable to a crime that paralysed the banking activity of a major entity for several days and indirectly affected thousands of users is surprising. The limited civil liability set as compensation for the damage caused is also puzzling.

Once again, we must consider the minimal criminal reproach for this type of conduct. For instance, the detention of a person during a routine road check with 50 grams of cocaine hidden in the trunk of a car, distributed in small bags along with a quantity of loose change, could result in a prison sentence equal to or similar to the one imposed in this case.

10. Supreme Court Ruling 156/2024, of 22 February 2024. Difference between the concepts of minor significance and minor importance in crimes against public health[10].

Factual background

The Examining Magistrate's Court No. 11 opened criminal proceedings for a crime against public health, and on 3 May 2021, the Malaga Provincial Court, 8th Section, handed down a conviction for Cirilo, as criminally responsible, as perpetrator, for a crime against public health with the aggravating circumstance of recidivism, which contains the following proven facts: "The accused, Cirilo, along with another individual not being prosecuted here, was involved in the trafficking of narcotic substances in the vicinity of Plaza de la Merced in the city of Málaga. When National Police agents set up a surveillance operation in the area on 27 November 2019, around 15:00, near the Celtic Druids bar, they observed the accused, Cirilo, sell to the Dutch national, Eleuterio, for 10€, a bag containing a vegetable substance that was found, after being weighed and analysed, to be 1.73 grams of cannabis sativa with 8.77% THC and a market value of about €9, and a package with a vegetable substance that was found, after weighing and proper analysis, to be 0.14 grams of cannabis resin with 27.47% THC and a market value of €1.

Additionally, the companion of the accused was found with €95.25 and a package of white powder that was determined to be 0.24 grams of cocaine with a purity of 47.93%, two plastic bags containing 7.71 grams of granulated substance, ketamine, with a purity of 11.10%, and amphetamine, with a purity of 20.02%, four MDMA tablets with a purity of 26.56%, another seven tablets and two fragments of MDMA tablets, weighing 3.20 grams with a purity of 32.09%, another package with 11.96 grams of MDMA with a purity of 78.81%, four units of mephedrone, a narcotic substance that causes serious health damage like all the others mentioned, and a bag with 9.56 grams of cannabis sativa with a purity of 13.56%.

The market value of all the seized drugs amounts to about €1,600.

The accused, Cirilo, has previous convictions: a sentence dated 2 July 2014 for a public health offence committed on 22 January 2013, with a penalty of 9 months in prison, completed on 27 October 2014; and a sentence dated 16 February 2012 for a public health offence committed on 26 February 2010, with a penalty of 2 years in prison, completed on 5 July 2018."

The Provincial Court of Málaga sentenced Cirilo as the perpetrator of a public health offence, with the aggravating factor of recidivism, to a penalty of two years and one day in prison and a fine of €20, with a subsidiary personal responsibility in case of non-payment of fifteen days, including the accessory of special disqualification from the right to passive suffrage during the term of the sentence, and with the imposition of the

[10] Supreme Court Ruling, Penal section 1, no. 156/2024 of 22 February, published on the website of the Judicial Documentation Centre, Cendoj, (ROJ: Supreme Court Ruling 1033/2024 - ECLI:ES:TS:2024:1033), appeal: 1003/2022. Rapporteur H. E. Mr Ángel Hurtado Adrián.

procedural costs corresponding to said offence, confiscation of the drugs, money, instruments, and effects of the offence.

Legal grounds

The defence of the convicted challenges the legal classification of the facts and the corresponding penalty, arguing that the attenuated type of the public health offence should apply.

The jurisprudence developed around this circumstance leads us to dismiss their argument. For example, the Supreme Court Judgement 228/2022 of 10 March 2022, which reiterates previous decisions, emphasises the exceptional nature of this attenuation with the following words: "The attenuated subtype is extraordinary. It would be contrary to the intent of the law to invert the terms so that Article 368.2 becomes the ordinary figure and Article 368.1 becomes the residual one." Without prejudice to referring to this decision, we will extract what we consider of interest.

It mentions the Non-Jurisdictional Agreement of the Chamber of 25 October 2005, concerning the basic type of the sole paragraph of Article 368 of the Penal Code, as it then existed, and proposed as an alternative to add a second paragraph with the following text: "Notwithstanding the provisions of the previous paragraph, the Courts may impose the lower degree penalty, considering the seriousness of the act and the personal circumstances of the offender," which was adopted by the legislator in the reform of the Penal Code by Organic Act 5/2010 of 22 June, which introduced this second paragraph. Section XXIV of its Preamble provides an explanation in this regard: "Furthermore, the provision contained in the Non-Jurisdictional Agreement of the Plenary of the Second Chamber of the Supreme Court of 25 October 2005 is adopted, concerning the possibility of reducing the penalty in cases of minor significance, provided that none of the circumstances set out in Articles 369(2), 370, and following apply."

In this Supreme Court Ruling 228/2022, among the considerations it makes to answer the question, it mentions the need to motivate the use of the discretion left to the judge, and indicates that the expression used in the precept, "personal circumstances of the offender", is not limited to previous convictions, which are relevant to the aggravating circumstance of recidivism in the sense of art. 20 Penal Code, but also includes those features of their criminal personality that also make up those differential elements to make such a penal individualisation, typical of the circumstances referred to in art. 66.6 Penal Code; therefore, although such an aggravating circumstance exists, as the Public Prosecutor says, it does not constitute an insuperable obstacle for the application of the attenuated subtype, which does not mean it should not be another factor to be assessed.

The considerations regarding the objective element used in the article, "minor significance of the act," are interesting. As cited in STS 652/2012 of 27 June, it states that this should relate to the lesser gravity of the typical offence, due to its minimal impact or capacity to harm or endanger the protected legal good, collective public health, to distinguish it from "small quantity." Although it is true that one of the main factors that may lead to the assessment of "minor significance" is the small amount of the drug, in principle, the subtype is not ruled out regardless of the quantity. This is explained with examples, which are not exhaustive but indicative, as follows: The legal possibility, introduced during the parliamentary processing of the bill, demonstrates this by allowing

its application to cases under art. 369, including at least in principle, scenarios where the quantity is notably significant. The discussion is about "minor significance," not "small quantity." There are reasons beyond the reduced weight that can lead to the act being considered of "minor significance." Without aiming to draw any definitive conclusions, one might consider secondary roles; facilitating consumption simply by providing information about places of sale; performing simple surveillance by someone external to the commercial enterprise; supplying drugs due to misguided compassionate motivations; sporadic actions that do not indicate dedication or profit-driven motives...

There are also considerations regarding the appreciation, or not, of the subtype concerning trafficking acts related to the lowest tier of criminal typology. Examples include cases where the conduct in question pertains to a seller of small packets, constituting the last link in retail sales, possessing a small amount of narcotics under personal circumstances that do not support greater significance in that drug trafficking activity, and, importantly, where the sale indicates a one-time action that does not reveal a habitual lifestyle.

In the case at hand, we do not consider that circumstances exist to appreciate the subtype contemplated in art. 368, second paragraph, of the Penal Code. Adhering to the facts declared proven by the lower court's sentence, which is the basis for considering any attenuation.

In fact, in these facts it is stated that the convicted person had been dealing in narcotic substances; It is also stated that he was in the company of another person and that they had also seized €95.25 and several wrappers containing various narcotic substances from his companion, and the two previous convictions, which he has for two offences against public health, are also mentioned, circumstances which clash with the restrictive conditions which, in accordance with the aforementioned doctrine, would make the application of what, we insist, is the exception provided by the second paragraph of art. 368, as opposed to the general rule of its first paragraph.

Conclusions

The consistent jurisprudential line emphasises the exceptional nature of the attenuated subtype for acts of minor significance, which cannot be confused with the small quantity of narcotics. For its consideration, factors beyond the quantity of the seized drug must be taken into account, such as the circumstances of the seizure or the previous convictions of the accused.

It is surprising to note the explicit citation and mention of the variety of narcotics in the possession of the companion, who was not accused by the Public Prosecutor of any crime since he was not caught *in flagrante delicto*, unlike the convicted individual, who was engaged in an act of retail drug trafficking.

11. Supreme Court Ruling 186/2024, of 29 February 2024. Crime of child abduction. Who can be the active subjects of this offence?[11]

Factual background

In the summary proceedings 131/2020, stemming from Summary Proceedings 2302/2017 of the Examining Magistrate's Court No. 53 de Madrid, followed before the Criminal Court No. 11 of Madrid, on 11 June 2021, a conviction was handed down for Zaida as responsible for a crime of child abduction, containing the following proven facts: "It is proven and expressly declared that Zaida, of legal age, of Spanish nationality, and with no criminal record, during her marriage to Santos, had a daughter, Elisabeth, born in 2008. On 25 May 2011, the Court of First Instance No. 27 of Madrid issued a final divorce decree by mutual agreement between the accused and Santos, in which it was agreed that parental authority would be shared between the parents, attributing the custody of the minor to the accused, and establishing a visitation regime for the minor with the father, alternating weekends with overnight stays and holiday periods divided equally.

Despite this judicial resolution, the accused, on an undetermined date but in any case since October 2017, with the intent to remove the minor from her father and completely sever her ties with the paternal parent and to definitively separate her from him and his family environment, took the minor from the residence they lived in Madrid, as well as from the school she attended. She kept the minor hidden from her father in a residence in another town, without schooling, to prevent her from being located, until 11 May 2019, when she was found in that town by agents of the National Police Unit Assigned to the Courts of Instruction of Madrid.

Therefore, from October 2017 until 11 May 2019, the date on which the minor Elisabeth was found, the accused kept the minor completely apart from her family environment and surroundings, without any contact or relationship with her father.

On 12 May 2019, the Examining Magistrate's Court No. 38 of Madrid issued an order prohibiting the accused from communicating with or approaching the minor Elisabeth until a final decision was handed down to end the present proceedings. Said precautionary measure was ratified by the Examining Magistrate's Court No. 53 de Madrid on 13 May 2019.

The Criminal Court issued the following pronouncement: I must condemn and do condemn Zaida as the author of a child abduction offence as defined, without the concurrence of any modifying circumstances of criminal responsibility, to a penalty of two years in prison, special disqualification from the right to passive suffrage during the term of the sentence, as well as special disqualification from exercising parental authority for a period of four years, and the costs incurred in this procedure, including those of the private prosecution.

[11] Supreme Court Ruling, Penal section 1, no. 186/2024 of 29 February 2024, published on the website of the Judicial Documentation Centre, CENDOJ, (ROJ: Supreme Court Ruling 1190/2024 - ECLI:ES:TS:2024:1190), appeal: 1138/2022. Rapporteur Mr Ángel Luis Hurtado Adrián.

Legal grounds

The basis of the defence's argument can be summarised as follows: the defendant, as the mother of the minor, had sole custody and guardianship of the child, and therefore considers that the parent who has sole custody and guardianship cannot commit the offence contemplated in art. 225 (2) Penal Code for which she has been convicted, as she considers that only the non-custodial spouse can be the active subject of this offence.

In an initial approach, the premise upon which the appellant builds her argument does not exactly align with what the lower court's judgement declares proven, which is that in the divorce decree "it was agreed that parental authority would be shared between the parents, attributing custody of the minor to the accused, and establishing a visitation regime for the minor with the father, alternating weekends with overnight stays and half of the vacation periods." We say it does not exactly align because, if the father is granted a visitation right over his daughter with overnight stays and half of the vacation periods, it is evident that the time she spends in his company he will have to exercise custody, with the rights and duties inherent to it. Therefore, it is difficult to maintain that custody is exclusively the mother's right.

Furthermore, we have read the regulatory agreement, dated 18 February 2011, accompanying the divorce decree of 25 May 2011, and we find that it establishes a custody arrangement over the common daughter, not exclusively for the mother, but shared with the father, as specified in the custody stipulation, which states: "The minor will be under the custody of her mother, with whom she will live, without prejudice to the right of communication, visits, and stays with the other parent, which is established in the following section," where indeed the stays with the father are detailed.

That being said, it is true that the position of various Provincial Courts has not been uniform when addressing the offence contemplated in Article 225(2), and some have maintained that only the non-custodial parent can be the active subject of this offence, and never the custodial parent, which is what is asserted in the appellant's argument.

In the appellate judgement dated 30 November 2021, which is therefore subsequent to the Plenary of this Court's judgement 339/2021 of 23 April, cited by the defence in support of their thesis, there is a passage in its first reasoning where the court explains that "the Public Prosecutor opposed the appeal because, contrary to what is asserted in the appeal response, the possibility of applying Article 225-2(2) to the custodial parent has not yet been studied. However, there are decisions applying it in cases of shared custody, or regarding the parent granted visitation rights, making it reasonable to apply it to the custodial parent."

Since then, time has passed for this Court to pronounce on the matter, and it did so in STS 156/2023 of 8 March, by upholding the appeal filed by the Public Prosecutor, in the same way that the lower and appellate courts have done. The doctrine established is applicable to the present case, where we consider that the custodial parent can be the active subject of the offence under Article(2) bis. It is true that in that judgement, it concerned a crime of child abduction under Article 225(2), paragraphs 1 and 2.1, which deals with the removal of a minor from their habitual place of residence without the consent of the other parent or the persons or institutions to whom their custody is entrusted. In the case before us, it involves the second modality under paragraph 2. 2,

namely, the retention of the minor in severe breach of the duty established by judicial or administrative resolution. However, since the issue is whether this crime, in any of its alternatives, can be committed by the custodial parent, what we said then applies to this case.

Therefore, we consider that the best solution to address this case is to refer to the arguments presented in that judgement, not only because of the similarity but also because it included assessments relevant to the case from the Plenary Judgement 339/2021, of 23 April, which both the appealed judgement and the cassation appeal referenced, each defending their position.

In the appealed judgement, we find a phrase that holds the key to resolving this case, such as when it says, "the applied type does not refer to who has custody but rather that there exists a judicial resolution imposing certain duties related to a right of communication and the relationship between father and daughter." Therefore, we agree with the solution given in the lower court and upheld on appeal because the focus should not be on which parent is the custodian but on the violation of the custodial right, which either parent can commit.

In this regard, in the mentioned Supreme Court Ruling 156/2023, of 8 March, after the passages we transcribed from STS 339/2021, we pointed out fundamental ideas, stating, "the emphasis to respond to the debate before us should not be on whether the custodial or non-custodial parent can be the active subject of the crime, but on the custodial right itself. It is the violation of this right, in principle shared by both parents, that is determinative in assessing the conduct. This was understood in the Order of 2 February 2012, concerning the crime of child abduction and its interpretation according to the Hague Convention of 25 October 1980, where, citing Article 5(a) and relating to the right of custody, we stated that it “includes the right relating to the care of the person of the minor and, in particular, the right to decide on their place of residence. There is no differentiation between custodial and non-custodial parents. Hence, a wrongful removal - Article 3(a) of the Convention - is one that occurs in breach of the right of custody attributed, separately or jointly, to one person"; a right which, consequently, may be considered to be infringed for one parent if the other parent, by de facto means, deprives him or her of it, and a right which extends to the child, in so far as he or she should not be deprived of regular relations with both parents, also in situations of family crisis, including when it is clear that these arise in everyday reality".

The reform that takes place in art. 225 (2) Penal Code by Organic Act 8/2021, of 4 June, therefore subsequent to Plenary Ruling 339/2021, of 23 April, in addition to being coherent with the jurisprudence of the Chamber, aims to contribute to elucidating the existing debate in the minor jurisprudence, with the following words that we take from its Preamble: "The criminal type of child abduction under Article 225(2) is modified, allowing both the parent who habitually lives with the minor and the parent who only has visitation rights to be considered as the active subject of the crime."

Referring now to the proven facts, we have seen that in the divorce decree it is stated, on one hand, that it was agreed that parental authority would be shared between the parents, attributing custody of the minor to the accused, and establishing a visitation regime for the minor with the father, consisting of alternating weekends with overnight stays and divided holiday periods.

Continuing with the reading, we can appreciate that the behaviour described by the convicted individual is subsumable under the two variables contemplated in the mixed alternative type set out in Article 225(2), namely, both the abduction and the retention of the minor, which are described as a continuous act.

The abduction is established by stating that, despite the judicial divorce decree, the accused "with the intent to distance the minor from her father and completely sever her ties with the paternal parent, and to permanently separate her from him and his family environment, took the minor from the residence they lived in the town of Madrid, as well as from the school Ceip dirección0001, which she attended." The retention, once she abducted the minor from that environment, is described as follows, "and kept the minor hidden from her father in a residence in the town of dirección001 and without schooling, to avoid being located."

This describes a unilateral relocation of the minor by the mother to another town, without the father's knowledge, with the intent of permanence, evidenced by the fact that she kept the minor hidden from him. This inherently deprived the father of enjoying his custodial rights over his daughter, as well as affecting the daughter's right to maintain a relationship with her father, thereby impacting the established regular custody regime in a judicial resolution.

Conclusions

This Supreme Court Ruling clears up doubts about the possibility of attributing the condition of active subject of the crime of child abduction to the custodial parent, in the affirmative. Faced with the doubt raised by some judgements that interpreted the criminal offence restrictively, in this latest judgement, the Supreme Court clears up any uncertainty and considers that both parents, whether custodial or not, can be criminally liable for the aforementioned offence.

12. Supreme Court Ruling 241/2024, of 13 March 2024. Offence of assault and battery on a police officer. Evidentiary value of images obtained from images recorded by the media[12].

Factual background

The Examining Magistrate's Court No. 27 of Barcelona opened preliminary proceedings under number 15/2019, for crimes of public disorder, assault and battery, against Mr Carlos Jesús, and once concluded, referred it for trial to the Provincial Court of Barcelona, whose Fifth Section issued, in summary proceedings number 103/2019, sentence on 24 November 2020, which contains, in part, the following proven facts: On 1 October 2018, around 8:00 PM, the accused, Mr Carlos Jesús, was in front of the Parliament of Catalonia, in the Parc de la Ciutadella, Barcelona, where a group of people had gathered to protest. Some demonstrators threw objects, shook, and moved the barriers that the Mossos d'Esquadra had placed in that location. The accused, who was wearing a red scarf

[12] Supreme Court Ruling Penal section 1, no. 241/2024 of 13 March 2024, published on the website of the Judicial Documentation Centre, Cendoj, (ROJ: Supreme Court Ruling 1342/2024 - ECLI:ES:TS:2024:1342), appeal: 1262/2022. Rapporteur H. E. Ms Carmen Lamela Díaz.

covering the lower part of his face, was carrying a rigid wooden stick, more than a metre in length and several centimetres thick, with a cloth attached like a flag. With this stick, he struck the Mosso d'Esquadra with T.I.P. number num000 on the chin when the officer tried to prevent the barriers from being dismantled. In a subsequent action, the Mosso d'Esquadra with T.I.P. number num000 fell to the ground, and the accused hit him on the right hand. Later, the accused struck the Mosso d'Esquadra number num001 on the helmet with the same stick, which the officer was wearing on his head. Both officers were in uniform and were part of the preventive device established in anticipation of a demonstration taking place at that location.

The Provincial Court sentenced Mr Carlos Jesús as the perpetrator of an assault against a law enforcement officer, as defined in arts. 550.1 and 551.1 of the Penal Code, to a prison term of three years and one day, along with other accessory penalties. He was also convicted as the perpetrator of a lesser offence of injury and acquitted of the charge of public disorder.

Legal grounds

Facing the conviction handed down by the Provincial Court, the representation of the convicted individual filed an appeal, which was dismissed by the TSJ (High Court of Justice) and then filed a cassation appeal before the Supreme Court.

The appellant claims that certain images and recordings of dubious authenticity have been used as the *ratio decidendi*, and the manner in which they were incorporated into the proceedings is unknown, clearly violating the chain of custody rules. They argue that all the recordings used contain jumps in the images and some even bear the logo of a media outlet, indicating an edited version where an unknown third party has selected segments of the images, without any expert analysis being necessary to determine such manipulation. During the trial, these recordings were partially viewed after the court had previously requested the Public Prosecutor to outline the moments in the recordings they intended to use as evidence without notifying the private prosecution or the defence. The appellant reminded the court during the trial that the images had been contested and that their viewing had been requested in the defence's brief.

In conclusion, they state that we know absolutely nothing about these images beyond the empirical evidence that they have been edited.

As expressed in the judgement number 180/2012, of 14 March, "The jurisprudence of this Court has indicated (Cfr. Supreme Court Ruling 4/2005, of 19 May) that it is obvious that the journalistic recording of an incident occurring in a public place cannot be subject to judicial control in its execution, as it occurs, in any case, extrajudicially. However, for this reason, it cannot be considered a medium of proof affected by vices derived from the violation of any fundamental right, specifically and especially the right to privacy in its various aspects, since, as mentioned, the recording captures events that happened in a public sphere.

From the aforementioned assertion, it must therefore be recognised as valid material capable of providing the judge with knowledge of what really happened, with no appreciable reason for its rejection. Especially when this type of evidence is not only expressly contemplated in the civil procedural rules, with its general supplementary

nature, but also, in our Criminal process specifically, imbued with principles such as officiality and the search for material truth, it cannot be said that there is *a priori* exclusion of any type of evidence or activity that could provide data to assist the Court in discovering what really happened.

A different matter is the evaluation that such evidence may later deserve and, specifically, the reliability that the judge may grant it. In this regard, the submission of video documentation is no different from the testimonial declaration of someone who directly witnessed the event, where there may also be reasons to doubt its credibility or the integrity and reliability of the perception of the event and its subsequent narration.

On other occasions, we have accepted (Cfr. Supreme Court Ruling 23-9-2008, no. 539/2008) the evidential viewing of the video content during the trial sessions, during which the court could observe the perfect concordance between the video recording and the content of the police report.

In our case, as stated by both Courts, the origin of these recordings is documented in the police report and the recordings themselves. These are recordings that, as stated, have been obtained from images taken by various media outlets (BTV, Antena 3, Reuters Agency, and Lavinia). It is also reflected in the police report, from the very beginning of the proceedings, that the original material provided by the media outlets was included in police proceedings num002, with copies of the images documenting the investigated events included in these proceedings and described in the police reports.

Thus, the Defence was aware, from the initial moment of the investigation, of the existence of the images, their origin, and the copies that had been extracted and incorporated into the current proceedings. Nonetheless, no objection was raised during the investigation phase.

Additionally, from the beginning of the case, the identity of the person (Mosso D'Esquadra with TIP num003) who had compiled the images deemed useful for the investigation and had prepared the corresponding report was known. This officer appeared at the oral trial, where he confirmed his report and was questioned by all parties, thus subjecting it to cross-examination. There is no infringement of art. 382 Civil Procedure Act (LEC), invoked by the appellant. Far from it, the police provided the images they deemed relevant to the case. According to the aforementioned provision, the other parties, and in this case the defence, could have submitted expert opinions and means of evidence if they questioned the authenticity and accuracy of the reproduced material.

Furthermore, regarding the authenticity and integrity of the recordings, their content has been verified and assessed, in any case, as consistent with testimonial evidence. Finally, there is no evidence that there has been a break in the chain of custody as thoroughly documented in the police report on the matter.

Conclusions.

An interesting Supreme Court Ruling on the use and assessment of journalistic images of an incident in a public space, which is important for the conviction for a crime of assault against a law enforcement officer and injuries.

Every day we encounter numerous criminal cases with recordings in these public spaces, including those made by individuals, which are very useful for understanding what actually happened, as long as they can be cross-referenced with other means of evidence.

These probative assertions will not be affected by the hypothetical review judgement following the possible application of the much-discussed Amnesty Act.