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Case law review

REVIEW OF JURISPRUDENCE 2ND CHAMBER SUPREME COURT

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REVIEW OF CASE LAW 2ND CHAMBER SUPREME COURT

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1.- STS 350/2025, of 10 April. Concept of interested party in a home search .[1]

Factual background.

The Juzgado de Instrucción nº 5 of Marbella opened abbreviated proceedings nº 104/2018 for an alleged crime against public health against Noelia, among others, which, once concluded, was referred for trial to the 1st Section of the Provincial Court of Malaga. The abbreviated procedure nº 1004/2019 was opened on 17 May 2021, and the Court handed down sentence nº 233/2021, in which it declared as proven that, "....Taking into account the evidence, it is expressly and categorically declared as proven that the Urban Crime Group of the CNP Marbella Police Station carried out a surveillance operation in order to detect the sale of substances in area xx of Marbella, which is located between the Ermita Industrial Estate and the Boulevard of Avenida José Manuel Valles and next to a school, a frequent and well-known point for its conflict and for being a point for the sale and consumption of drugs. They became aware of the existence of the "Chatos" clan dedicated to the sale of narcotic substances through properties located in this shantytown, as they were aware that their residents could be involved in the sale of narcotic substances, as there was a daily flow of people making short visits. As a result of the surveillance, exhaustive observation, interception and successive seizure, by means of reports of drugs from people who had specifically come to buy in the homes under investigation, the following reports are collected...and subsequently, based on the police request, by the Court of Instruction no. 5 of Marbella, an order was issued on 4 June 2018 authorising the entry and search, among others, in the various homes in which narcotic substances were seized and the investigated persons were arrested...".

Legal basis.

An appeal in cassation is being lodged with the Supreme Court against judgment number 197/2022, of 14 July 2022, handed down by the Civil and Criminal Division of the High

[1] STS 350/2025, Penal section 1 of 10 April. Published on the website of the Judicial Documentation Centre, CENDOJ, (ROJ: STS 1701/2025 - ECLI:ES:TS:2025:1701), appeal no. 7569/2022. Rapporteur, Mr Eduardo de Porres Ortiz de Urbina.

Court of Justice of Andalusia, Ceuta and Melilla, which rejected the appeal lodged against judgment number 233/2021, of 17/05/2021, of the 1st Section of the Provincial Court of Malaga, convicting of an offence against public health. Of the four persons convicted, only one has lodged an appeal.

The first ground of appeal alleges that the contested judgment violated the right to privacy in the home of Article 18.2 EC and the right to a trial with all the guarantees recognised in Article 24.2 of the Constitution.

She claims that she was in custody at the time of the house searches and could only be present at one of them (the house from which she was leaving when she was arrested) and not at the other houses, in respect of which a criminal connection was attributed to her.

The defence understands that the presence of the interested party is an inexcusable requirement for a home search in accordance with art. 569 LECrim, being null and void any home searches that do not comply with this requirement when the interested party is detained and there is no other reason that makes this impossible, and therefore it is not admissible as evidence for the prosecution, nor are the statements of the police officers who intervened in the searches admissible as evidence for the prosecution.

It considers that, in the present case, the invalidity of the search leads to the impossibility of legally affirming the discovery of the substance and objects from the possession of which the conviction for the crimes against public health and illegal possession of weapons stems, and that this seizure cannot be sanctioned by means of the testimony of the officers present at the search, as their respective testimonies are directly linked to the unlawful action.

This issue was raised in the previous appeal and the arguments for its rejection are ours.

In this procedure, seven simultaneous searches were carried out and in five of them, the search was carried out in the presence of the persons concerned in each of the properties, except in two of them, where no one was found and the search was carried out, as in the others, under the supervision of the Legal Advisor for the Administration of Justice.

The appellant was present at the search of her home and could not have been present at the other homes because the searches were simultaneous and because, in principle, she was not a resident of the other homes and was neither located nor arrested. Her arrest took place precisely at the time of the search.

The article 569 of the LECrim stipulates that the search of a private home will be carried out in the presence of the interested party or the person who legitimately represents them. The case law of this Chamber has been hesitant when it comes to specifying what should be understood by "interested party", since in some judgments this has been taken to mean the person who owns the affected home, as the holder of the right to privacy affected by the interference (SSTS. 18.7.98, 16.7.2004, and 3.4.2009), while other rulings have considered that the person who is the object of the police investigation has this character, insofar as they have a direct interest in the result of the search due to

the procedural and criminal repercussions that may derive from its development (SSTS 27.10.99, 30.1.2001 and 26.9.2006). This last position is the majority one, so that the presence of the interested party is required in the proceedings, even if they are not the owner of the home in the event that the interested party is detained. In STS 771/2010, of 23 September, followed by many others, it was stated that case law is certainly uniform in requiring the presence of the interested party - the person under investigation - in the search in those cases in which they are detained and even in the event that they are different from the owner of the home or the latter is present or refuses to be present at the search. Such presence, if possible, is required due to the contradictory requirements that must surround any evidentiary procedure and even more so due to the characteristics of home searches in which the absence of contradiction in the act of the search itself cannot be fulfilled due to the contradictory activity that makes the debate of the oral trial possible. Therefore, if the interested party is detained, his presence in the search is obligatory, and the exceptions established in paragraphs 2 and 3 of art. 569 LECrim do not apply (SSTS. 833/97 of 20.6, 40/99 of 19.1, 163/2000 of 11.2, 1944/2002 of 9.4.2003).

However, there are cases in which this presence is not possible and there are various circumstances that may make this presence impossible: that the person under investigation cannot be located, that they do not want to attend if they are not detained and that they are physically unable to do so, as occurs in cases of simultaneous searches. In the latter case, this has been recognised by this Chamber in numerous rulings, such as SSTS 947/2006, of 26 September, 771/2010, of 23 September and 199/2011, of 30 March.

In this case the appellant was present at the search of her home and was not present at the other searches because they were carried out simultaneously.

The plea is therefore dismissed and the judgment under appeal is upheld in its entirety.

Conclusions.

On few occasions has the SC maintained such a uniform line on who should be considered to be interested in an entry and search, being the person who, regardless of the formal title held with respect to the home, may be legally affected by its result in the crime under investigation. The practical problems between successive and simultaneous searches are also described, so that the interested party can attend this procedure, unless for exceptional reasons or force majeure it is not feasible to do so.

2.- STS 358/2025, of 10 April 2025. Criminal news transferred to Spain by a foreign judicial authority and continuation of the investigation in our country with new police investigations .[2]

Factual background

In case no. 33/2021 (stemming from PA 25/2021 of the Juzgado de Instrucción nº 3 de Talavera), followed before the Audiencia Provincial de Toledo, Sección 1ª, on 5 May 2022, Evelio was convicted as the author of a crime against public health for drug trafficking, which contains the following proven facts:"...As a result of a communication sent by the Public Prosecutor's Office in Portugal, it became known that there could be an organised group that from South America was responsible for sending cocaine to Europe, at least to Spain and Portugal, and that for this purpose they used boats that called at the port of Oporto. And from that town, at least in part, the cocaine was transported by lorry to the town of Talavera La Nueva, where it was unloaded in an industrial warehouse bearing the Puertas Artevi label. As a result of this information, the Udyco began an investigation which resulted in verifying that the information regarding the arrival of lorries at the warehouse was true, so they began a series of surveillance and monitoring which allowed them to discover that the warehouse was rented by the accused Evelio, born in 1984, with no criminal record, who had also rented a warehouse in the town of Ventas de Retamosa and a storage room, with the number, owned by the company Blue Space, from Leganés. By order of 22 December 2020, the Court of First Instance and Preliminary Investigation number three of Talavera authorised the entry and search of the aforementioned warehouses and the storage room. Seven rectangular packages were found in the storage room, containing a white substance, to which the appropriate reagent was applied, testing positive for cocaine. After the corresponding analysis, the substance turned out to be cocaine, with a total weight of six thousand ninety-six grams and an average richness of 77.88%, and whose value on the illicit market would amount to the sum of two hundred and thirty-eight thousand three hundred and sixty-nine and thirty-one euros, which the accused possessed for distribution among third parties. It has not been proven that the other defendants, Gaspar, born on NUM002 1969, with no criminal record, and Jacinta, born in 1991, who was convicted in the sentence of 16 June 2020 for an offence against public health, were related to the substance seized...".

Legal basis

The appellant seeks the annulment of the order ordering the tapping of the defendant's telephones, and of the order of 29 July 2020, by which it was extended, as well as further tapping, requests which were made for the first time as a preliminary question to the start of the trial, and which were already rejected by the court of first instance on the basis of correct arguments.

The plea, as we have said, coincides with that raised on appeal with the sole difference that it transcribes a paragraph of the STSJ, but with which it does not debate, repeats that the nullity of the aforementioned orders is based on the lack of reasoning and

[2] STS 35872025, of 10 April 2025, published on the CGPJ website by the Judicial Documentation Centre, CENDOJ, (ROJ: STS 1628/2025 - ECLI:ES:TS:2025:1628). appeal: 8375/2022. Speaker: Mr. Ángel Luis Hurtado Adrián.

justification, as they lack purpose and go beyond the provisions contained in the framework of collaboration between the Spanish authorities and the Portuguese authorities, and the irregularity attributed to those orders is because the persons where the drugs were to be stored and hidden were already identified by means of police surveillance carried out on 14, 15, 17 and 19 May, so that, in the appellant's opinion, there is no basis and no legal basis for the request by the police to authorise telephone tapping 25 days later.

It is alleged that the object of the surveillance was the arrival from Portugal of a lorry with a shipment to be deposited in the warehouse on 14 May 2020, and that, having the arrival and unloading under surveillance, it is logical that the police intervention should have been carried out on that day or the following days, and that if it is not carried out, it is because there is no certainty that the drugs came there, If this is the case and 25 days later the telephone tapping is agreed, the signatory of the appeal considers that this is a prospective investigation, because at that time there is no evidence that any crime is being committed or is going to be committed, and repeats once again that, when the order in question was issued, there was no "good reason" or "strong presumption" to justify this intervention, and does so without putting forward any argument to the considerations that, in order to reject such an approach, the first instance judgement and then the appeal judgement gave him, when he is reiterating, once again, a claim with such traumatic consequences as a nullity for considering the investigation prospective, to which he should have given considerably more extension after having rejected it on two previous occasions.

The appellant's approach is based on linking the police action which took place from the 14th, as a result of information received from the Portuguese authorities, with the investigation which is the subject of the present case, and this is apparent from a reading of the proven facts, which refers to the communication sent by the Portuguese Public Prosecutor's Office, which revealed the existence of an organised group responsible for sending cocaine to Europe, which arrived via the port of Oporto and from there was transferred, at least in part, to the industrial building with the label Puertas Artevi in the town of Talavera de la Reina, rented by Evelio, around which an investigation was being carried out in Portugal, which led to the issuing of a European Investigation Order by the Public Prosecutor's Office of Oporto, requesting certain proceedings in our country, and which, as stated in order of 22 December 2020, by order of 29 June 2020, it was agreed to recognise and execute, Among the measures taken was the interception of certain telephones, including that of the aforementioned Evelio, which was extended by the order of 29 July 2020 and was annulled by the order of 18 September 2020, a Portuguese investigation in which there is no record that he had ever been charged.

The police investigations continued in our country, through the Udyco, by means of surveillance and monitoring, establishing that, among other things, the aforementioned Evelio was carrying out security measures, as stated in the order, indicative of a presumed criminal activity related to a drug trafficking offence, different and subsequent to that which could be the subject of investigation in Portugal, since, as the lower court's judgment explains, "there is no evidence that the defendants were prosecuted in the neighbouring country, so that the investigation could not be limited solely to the identification of the possible perpetrators who in Spain committed the acts which are the subject of criminal proceedings in Portugal".

In any case, the initial information, even if it came from Portugal, provided elements which justified the adoption of measures taken by the examining magistrate, including the one limiting fundamental rights, such as the agreed telephone tapping, which therefore cannot be considered to have been given in the course of a prospective investigation, but at the same time it was useful in order to investigate the presumed criminal activity being committed in Spain, and to maintain the contrary, as argued by the M.F., is "reasoning which is difficult to maintain, insofar as the appellant seems to claim that in the investigation of a crime of which there is prior knowledge, one has to renounce investigating the existence of other possible participants in a crime, is "difficult reasoning to maintain, as the appellant seems to claim that in the investigation of a crime of which there is prior knowledge, it is necessary to renounce investigating the existence of other possible participants in a crime as serious as in the present case".

This is precisely explained in the judgment under appeal, which sets out the reasons why the facts investigated in Portugal must be disassociated from those which were to be investigated in our country, even though in both cases they were related to drug trafficking offences, because the rupture between the two is evident, and each one, making our own the words we have just transcribed from the M.F., should give rise to its own investigation, The judgment under appeal also explains this, which differentiates between the Portuguese and Spanish investigations, when it says that "the investigation did not have to be limited only to the identification of the persons and the place where they were hiding drugs, because it was not a matter of collaboration with the Portuguese authorities with regard to facts that were the subject of criminal proceedings in Portugal, nor is there any record of criminal proceedings against the accused in that country, but rather it was a question of information sent by the Portuguese Public Prosecutor's Office to the Spanish police on facts from which the possible commission of a crime in Spain could be deduced, incorporating objective data indicative of criminal activity in our country, such as the arrival of a ship, the loading of coils, the transport companies and, above all, the destination in Spain of the material loaded in Portugal".

In short, given that the examining magistrate had sufficiently plausible indications to assess the presumed commission of a drug trafficking offence in our country, even if they were provided by information from Portugal, it is not possible to speak of a prospective investigation, because this information is what provided him with these elements, in line with which he adopted the investigative measures he considered appropriate, including the tapping of the telephone of one of those presumably involved in it, which he justified at sufficient length in his order of 29 June 2020 and also in the extension order of 29 July 2020.

The appeal is dismissed in its entirety and the appellant's conviction is upheld.

Conclusions.

The SC assesses the scope of an OEI formally sent from the Portuguese judicial authority to the national judicial authority, as an instrument of cooperation that entailed some measures restricting fundamental rights. When that line of investigation did not prosper and was not completed, nor was an independent criminal procedure followed in Portugal on the same facts, the Spanish Judicial Police added to that information new data on the persons under investigation and possible criminal acts committed in Spain, and initiated

a procedure which, on the basis of the first, made it possible to dismantle a criminal group dedicated to the commission of serious crimes.

3.- STS 324/2025, Penal section 1 of 07 April 2025. Retention of communications data .[3]

Factual background

The Provincial Court of Barcelona, 7th Section handed down sentence no. 173/2023 of 3 March, arising from summary proceedings no. 1/2021 of the Sant Boi de Llobregat Court of Instruction no. 1, followed for a crime against public health, which contains among others the following proven facts:"...they are proven facts, and it is thus declared, that since at least in the month of August 2018 the defendants Jenaro, Humberto, Fermín, Lucas and Emiliano formed a personal, material, corporate and logistical framework placed at the service of a common plan which was to get hold of cocaine hidden in a container from Brazil that would arrive at the port of Barcelona in mid-December, to proceed to its distribution in the latter province. Jenaro was at the top of the network, providing it with financial cover and contacts to obtain the drugs; Humberto was in charge of management and coordination. Fermín was in charge of the corporate and business structure capable of getting hold of the shipment by passing it off as a legal purchase and sale of Din-A4 sheets of paper, Lucas was in charge of the logistics, especially the organisation of the transport of the substance, which Emiliano would be in charge of, delegating it to third parties.

In execution of this criminal plan, the company Campderros Salvans S.L., acquired, through Fermín, 1.600 boxes of DIN-A4 sheets of paper from the company Precisión Comercio Internacional LTDA, based in Pinheiro-Maceió (Brazil), which was scheduled to arrive at the Port of Barcelona in December 2018; goods that were distributed in two containers with 800 boxes of DIN-A4 sheets each, containers numbered APZU3035695 and APZU3807079 chartered on board the ship of the shipping company CMA-CGM RIO GRANDE, sailing from the Port of ltaguaí (Rio de Janeiro-Brazil) bound for the Port of Barcelona, on 21 November 2018...." The account of proven facts continues saying that, "...At 13:40 hours on the aforementioned date, during the work of loading and redistribution of the packages of folios in the truck that Herminio was driving, accidentally fell from the mechanical forklift employed by one of the workers of Campderros Salvans S.L., Nemesio, a box of foil coming out of the container with number APZU 3035695, which, when broken, revealed several rectangular packages that turned out to contain the aforementioned narcotic substance. When police presence was requested, a team of Mossos d'Esquadra officers arrived on the scene and, after duly inspecting all the boxes of foil, located inside them 1,410 rectangular packages with the following identifying characteristics...".

Legal basis

In a long judgement, the SC goes through the numerous challenges made by the defendants' defence lawyers in an attempt to dismantle the correctness of the conviction,

[3] STS 324/2025, Penal section 1ª of 07 April 2025, published on the CGPJ website by the Centro de Documentación Judicial, CENDOJ, (ROJ: STS 1487/2025 - ECLI:ES:TS:2025:1487). Appeal: 10408/2024. Speaker: Mr Manuel Marchena Gómez.

even highlighting that one of the appellants criticises the investigating judge for not having added to the interference that the telephone tapping represents other measures that reinforce the State's intrusion into the circle of exclusion defined by the right to privacy. It makes no sense to claim the invalidity of a judicial act of interference in the private life of a suspect by reproaching the judge for not having authorised even more severe restrictions than those which were considered necessary and proportionate.

Rarely, as in the present case, any complaint of a possible prospective investigation or contrary to the principles of proportionality, necessity or exceptionality - Art. 588 bis a - must necessarily be dismissed.

From the moment the drug was found by chance due to an accident during unloading, the work of the State Security Forces and Corps aimed at finding out who had acquired this extraordinary shipment of cocaine for clandestine distribution was fully justified. This work, moreover, was subject to the restrictive control of the examining magistrate no. 1 of Sant Boi de Llobregat and the supervisory intervention of the Public Prosecutor (art. 306 of the LECrim).

We now turn to the challenge to the retention of communications data.

The plea incorporates an allegation concerning the Mossos' request to telephone operators to retain data beyond the 1-year expiry period imposed by Law 25/2007 of 18 October 2007 on data retention, with a marginal reference to the judgment of the Court of Justice of the European Union of 8 April 2014, which declared the nullity of the directive 2006/24/EC.

The defence argues that the request for the preservation of this data - which was not formally incorporated into the case - was not authorised in advance by the examining magistrate.

The judgment under appeal criticises the appellant for seeking that nullity by means of a generic allegation in which it is not stated which of the intercepted orders or lines would be affected". And it reasons that judicial authorisation is implicit in the enabling decisions which imply, by their very nature, the need for the data linked to those communication processes to be retained.

In any event, the Chamber considers that such judicial authorisation to require operators or any other natural or legal person to retain the data is not mandatory.

This can be deduced from the provisions of art. 5 of Law 25/2007, 18 October, on the conservation of data relating to electronic communications and public communications networks. And this is also inferred from art. 588 *octies* of the LECrim, which regulates the advance order for the conservation of data as a security measure.

The first of these provisions is addressed to operators that provide electronic communications services available to the public or operate public communications networks, under the terms established in Law 32/2003, of 3 November, General Telecommunications Law", a criterion reiterated in art. 1 of the current Law 9/2014, 9 May, General Telecommunications Law.

The second - art. 588 octies of the LECrim - incorporates the same duty to secure and preserve data when the depositary is a natural or legal person and explicitly excludes the need for judicial authorisation: "the Public Prosecutor's Office or the Judicial Police may require any natural or legal person to conserve and protect specific data or information included in a computer storage system at their disposal until the corresponding judicial authorisation is obtained for its transfer in accordance with the provisions of the preceding articles".

Therefore, both the Public Prosecutor and the State Security Forces and Corps are empowered to issue, without the need for judicial authorisation, such a preservation order, which, logically, only makes sense in the framework of an investigation in which the subsequent need to incorporate these data into the criminal proceedings initiated is foreseeable.

The non-requirement of judicial authorisation is clear not only from the wording of this precept, but also from the explanatory memorandum of LO 13/2015, 5 October, which introduced art. 588 octies, when it said that, finally, and with regard to technological investigation proceedings, the reform contemplates as a security measure the data preservation order, the purpose of which is to guarantee the preservation of specific data and information of all kinds that are stored in a computer system until the corresponding judicial authorisation is obtained.

Conclusions

This STS clearly distinguishes between a data conservation measure and other technological measures, distinguishing between when judicial authorisation is required and when the FCSE can act directly. Technological measures provided for in art. 588 bis and subsequent articles of the LECrim, which in some cases have not been updated, such as the use of drones, the use of AI...

4.- STS 294/2025, of 28 March 2025. Scope of the principle of insignificance and toxicity in crimes against public health .[4]

Factual background.

The Court of Instruction nº 11 of Palma de Mallorca, opened preliminary proceedings nº 649/2020, once concluded it was sent to the Criminal Court nº 2 of Palma de Mallorca, for trial in the abbreviated procedure nº 11/2022, who dictated Sentence nº 111/2022, dated 28 March 2022, which contains the following proven facts: "...SOLE. It is hereby proven and declared that the accused Lázaro, of legal age, with no criminal record and deprived of liberty for this cause on 9 July 2020, at around 00:15 on 9 July 2020, at around 00:15 on 9 July 2020:15 hours on the 9th of July 2020 he was in Calle General García Ruiz in Magalluf, contacting a British tourist to whom he offered cocaine in exchange for 50€ , handing him a wrapper with said substance, receiving the amount of 50€, a fact which was observed by a local police force of Calviá who stopped their vehicle and went to where the British subject had gone together with a friend, They found them sitting there

[4] STS 294/2025, Penal section 1ª of 28 March 2025, published on the website of the CGPJ, Centro de Documentación Judicial, CENDOJ, (ROJ: STS 1335/2025 - ECLI:ES:TS:2025:1335), appeal: 6755/2022. Speaker Excma. Ms. Susana Polo García.

sniffing the substance and told them that they had just bought cocaine from a young man of colour and that they had paid 50€, trying to hide the cocaine that was left in the wrapper with their feet. They then went in the opposite direction and proceeded to intercept Lázaro, intercepting 50€ in his wallet and 50€ more in the fabric of his trousers where he was wearing a drawstring as a belt. The substance that remained in the wrapping, once analysed, turned out to be cocaine with a purity of 19.15% and a retail value of €4.83...".

The judgment of the Criminal Court was appealed on appeal to the Provincial Court, which dismissed the appeal. The SC upheld the appeal and handed down a judgement of acquittal.

Legal basis.

Case law admits the atypical nature of trafficking conduct when, due to its absolute insignificance, the substance no longer constitutes, due to its effects, a toxic drug or narcotic substance, but a harmless product due to its precarious toxicity (SSTS 527/1998, of 15 April; 985/1998, of 20 July; 789/99, of 14 April; 1453/2001, of 16 July; 1081/2003, of 21 July; and 14/2005, of 12 February). The principle of insignificance would call for impunity when the quantity of the drug is so small that it is incapable of producing any harmful effect on health. There is a lack of material unlawfulness due to the absence of a real risk for the protected legal right (SSTS 1441/2000, 22 September; 1889/2000, 11 December; 1591/2001, 10 December; 1439/2001, 18 July; and 216/2002, 11 May).

On the other hand, it should be pointed out that our most recent case law has qualified the use of the term "insignificance", preferring to speak of "toxicity". What does not fall within the scope of the offence is the transmission of substances which, due to their lack of harmfulness, would not entail a risk.

This doctrine must be applied exceptionally and restrictively, but with certainty. In this context, this Chamber continues to operate with the criteria established in the Plenary Session of 24 January 2003. This is confirmed by numerous precedents (SSTS 936/2007, of 21 November; 1110/2007, of 19 December; 183/2008, of 29 April; and 1168/2009, of 16 November) (see STS 587/2017, of 20 July).

Now, with regard to the concept of psychoactive minimum, and its penal repercussions in the subjective element of the offence, STS 1982/2002, of 28 January 2004, tells us that the psychoactive minimums are those parameters offered by an official body of recognised scientific solvency, such as the National Institute of Toxicology, which suppose a degree of affectation in the central nervous system, determining a series of effects on people's health, These are, of course, harmful, as they contain a minimum level of toxicity, and also produce an addictive component, which means that their lack of consumption leads to compulsion. These are therefore drugs that cause harm to public health, understood as the health of the individual members of the community, and whose penalties are designed by the criminal legislator, depending on whether or not the harm is serious. These minimums assume that the quantity transmitted is some type of narcotic, toxic or psychotropic substance included in the international conventions on the matter, by means of the lists to that effect. They therefore fulfil the objective nature of the offence, and affect both formal and material unlawfulness. Such minimums have been offered by the report of the National Institute of Toxicology, and within the margins allowed by such

expertise, they can be interpreted, without necessarily requiring any judicial automatism (STS 580/2017, of 20 July).

In other words, any narcotic substance that exceeds the minimum psychoactive dose, generates the damage to health that the typical rule sanctions and, consequently, if it is seriously harmful to health due to its nature and classification, it continues to be so, whatever the quantity and purity (or degree of adulteration, if preferred), once the minimum psychoactive dose has been exceeded (STS 723/2017, 7 November).

In any case, because on this matter we must remember our jurisprudential doctrine, which originated in the Non-Jurisdictional Plenary Session of 24 January 2003 which, in relation to cocaine, established that its active ingredient operates from 50 milligrams (0.05 grams); This criterion was accepted by the Chamber and taken up in the Non-Jurisdictional Plenary Session of 3 February 2005, in which it was agreed to "continue to maintain the criterion of the National Institute of Toxicology regarding minimum psychoactive doses, until such time as a legal reform is produced or another criterion or alternative is adopted".

Indeed, as the appellant points out, the factual account does not include the quantity of cocaine seized, moreover, according to the report of the Health Department of the Government Delegation of the Balearic Islands, the substance seized by the police was 0.093 grams of cocaine. Therefore, if, as stated in the proven facts, the purity is 19.15%, we have a total of 0.017 grams of net cocaine, i.e. 17 milligrams, which is clearly less than the 50 milligrams above which there is a risk to public health.

Although it is true that the factual account incompletely relates an event which could constitute, as a whole, an act of trafficking, the fact is that in the end only the occupation of the alleged buyer - unidentified, although the police say they spoke to him - of an infinitesimal quantity of drugs, 0.093 grams, with a purity of 19.15%, is declared proven, therefore, We therefore find ourselves with a total of 0.017 grams of net cocaine -17 milligrams-, an amount lower than the minimum psychoactive dose, without expressly considering the occupation of other narcotic substances by the accused to be accredited, so that it cannot reasonably be inferred, from this minimal amount, that he was involved in trafficking and, above all, it must be considered that it lacks criminal relevance due to its harmlessness for public health.

Conclusions.

Despite the clarity of the account of the proven facts, an act of retail drug trafficking in which the role of the buyer and seller is detailed, this STS adds nothing new to the line of jurisprudence already followed for years and which remains unchanged, on the principle of insignificance which is now extended with the qualifier of toxicity, when it comes to applying the INTCF criterion on the minimum psychoactive doses to assess the criminal nature of the offence.

5.- SAN 8/2025 of 2 April 2025. Criminal offence of terrorist-related havoc . [5]

Factual background.

The present judicial proceedings were initiated by virtue of communication via fax from the Secretary of State for the Interior, TEPOL, informing of the explosion of a controlled explosive device at the "El Altet" Airport in Alicante, with the Central Court of Instruction number 2 of Madrid issuing an order to initiate preliminary proceedings on 31 July 1995, and after the corresponding investigation, an indictment was issued on 19 May 2010 against Melisa for the crimes of terrorist destruction in the degree of frustration.

Legal basis.

This judgement of the National High Court states that in the body of evidence in the proceedings we find, firstly, a report from the Guipúzcoa Civil Guard Headquarters of 10 May 2001, folio 294 et seq. of volume I of the proceedings, which informs the Central Preliminary Investigation Court that the defendant, in other proceedings (26/01), also acknowledges expressly that she had placed the device at Alicante Airport, in which the Central Investigating Court is informed that the defendant, in other proceedings (26/01) also from the said Command, expressly acknowledges that she had placed the device at Alicante Airport together with another person (who is not being tried) inside a bag and inside a wastepaper basket. These statements are contained in his second statement made at the Guardia Civil on 31 March 2001 (folio 163 of volume I of the proceedings), also stating that it was on the same day that he placed another device in the tourist office in Denia....

At the trial, and after commendable work by the Guardia Civil, there is an incomprehensible evidential vacuum which the members of the Court themselves denounce and which reads as follows, "...Notwithstanding the above, and despite the efforts made by the Public Prosecutor's Office, we understand that there is an important evidential vacuum which means that we must declare the acquittal of the defendant. An evidentiary vacuum that stems from the lack and absence of proof of a transcendental piece of information, such as the authorship of the handwritten letter that the Public Prosecutor's Office attributes to Melisa, and for which no evidence has been produced. This evidentiary vacuum is due to the failure of the police officers who issued the handwriting expert report, which is included in the proceedings in the so-called "Documentation Annex", and where the documents found in France, including the "kantada" attributed to the defendant, are analysed in detail. This handwriting expert report dated 20 May 2008 and drawn up by police officers with professional licence numbers NUM005 and NUM006, was ratified in the investigation phase before the Central Investigation Court, but subsequently the Public Prosecutor's Office did not propose them as expert evidence, and therefore, as they had not been "brought" to trial, and not having been subjected to contradiction between the parties, it cannot be taken as evidence against the defendant, having been expressly challenged by her defence, a defendant who, on the other hand, in the plenary session clearly and patently stated that she did not recognise the document in question as hers and that she had not written it. On the other hand, report 7/2015, a report that could be called an "intelligence report" which

[5] SAN 8/2025, Penal section 3ª of 02 April 2025, published on the website of the CGPJ, Centro de Documentación Judicial, CENDOJ, (ROJ: SAN 1662/2025 - ECLI:ES:AN:2025:1662). Appeal: 132/2010. Speaker: Mr Jesús Eduardo Gutiérrez Gómez.

analyses the existence and components of the ETA commando known as Ibarla, its activity, and data on the attacks committed by this terrorist commando, and its comparison with the documents found in France, This report, which could have shed light on the possible authorship of the placement of the explosive at Alicante Airport, as opposed to the defendant's denial of the facts, has not been the subject of evidence in the plenary session either, as the authors of the report were not proposed as experts. Therefore, the statements of the witnesses who appeared at the trial have no probative value as evidence for the prosecution and as proof of the defendant's authorship, since it has been wrongly "presumed" and assumed that the "kantada" was the only solid evidence for the prosecution (the statement of the accused), (the police statement has no value as evidence for the prosecution as it has not been verified or ratified by the defendant in the Central Preliminary Investigation Court) had been written by the defendant, so that proving the possible discrepancies between this document and the police statement is of little use to us, as the requirement or precondition, that the authorship of this document has been accredited, is lacking.

Consequently, and without assessing the other evidence, the defendant should be acquitted with all the necessary conditions for acquittal...".

Conclusions.

This is a shocking testimony in this SAN nº 8/2025 Section 3, when the police work is impeccable and the work in the pre-trial phase was more than complete. The Public Prosecutor's Office made a serious mistake by not proposing in the plenary session the testimony of the agents who analysed the defendant's documentation and of the authors of the intelligence expert's report. There was no other option but acquittal.

6.- STS 308/2025, of 2 April 2025. Police investigation in Spain arising from knowledge of an EPO issued by the judicial authorities of another country for another criminal offence. Presence of the detainees in a house search . [6]

Factual background.

Coín Examining Court no. 1 opened abbreviated proceedings 22/2022 for offences against public health and illegal possession of weapons against, among others, Clemente, David and Eliseo, which, once concluded, was referred for trial to the Malaga Provincial Court, 3rd Section. Having initiated abbreviated proceedings 54/2022, on 23 November 2022, it handed down Judgement no. 362/22, which contains, among others, the following proven facts: "...It is proven and thus declared that the police authorities in Malaga were aware that Clemente, of legal age, with no computable criminal record, of British nationality and subject to an international arrest warrant issued by the United Kingdom authorities, might be residing in this province, specifically somewhere in the Guadalhorce Valley or Coín. Following the appropriate investigations, the investigating officers came to the conclusion that he may be residing at address xxx in the town of Coín. For this reason, police surveillance was carried out on 3, 4 and 5 May 2022, on the aforementioned property at address xxx in Coín, where police officers finally learned with certainty that Clemente was living together with other men. Specifically, on the days indicated, the

[6] STS 308/2025, Penal section 1ª of 02 April 2025, published on the website of the CGPJ, Centro de Documentación Judicial, CENDOJ, (ROJ: STS 1482/2025 - ECLI:ES:TS:2025:1482), appeal: 11312/2023. Speaker: Mr. Pablo Llarena Conde.

aforementioned Clemente, of legal age and without a criminal record, together with David and Eliseo, all of them of legal age and without a criminal record, and Fidel, of legal age and without a computable criminal record, who entered the aforementioned property at some point between the night of 3 May, when he was released from prison, and 20.35 hours on 5 May, when he was seen leaving the property to go to a sports centre, were inside the property. Of all of them, it was David and Eliseo who left the property to make the necessary purchases, and they did so using a Volkswagen Polo vehicle with English number plates, adopting security measures when driving to check if they were being followed, such as driving around roundabouts or not parking the vehicle at the door of the property but in the immediate vicinity of the house.

On 5 May at around 20:35 hours, Clemente, Fidel, David and Eliseo left the house together, Fidel locking the door of the house, who at the time was carrying a black rucksack on his back, which he handed to Clemente on the way. The four aforementioned persons went to the BlueLife Sportclub and Spa Gymnasium, located in the La Trocha Shopping Centre in Coín, at which point the police officers intervened to arrest the four aforementioned men. At the time of the arrest, the black rucksack that Fidel was carrying on his back at the exit of the house was placed at the feet of Fidel and Clemente. Inside the backpack, upon inspection, a 9mm Parabellum calibre Ruger P89 pistol, model P89, with ammunition and without safety catch, with the serial number removed, was found. After the pertinent analysis, it was in a correct state of conservation and its mechanical and operational functioning was also correct in both single and double action, being suitable for firing. Neither Fidel, Clemente, David nor Eliseo were in possession of a licence for this weapon.

On 6 May 2022, the Coín court issued an order authorising the entry and search of the house at address xxx in Coín by order of 6 May 2022, in which a large quantity of narcotics was found...".

Legal basis

It is surprising that the defendants' defence did not raise the possible nullity of the actions carried out by the Judicial Police, when, knowing of the existence of a European arrest warrant, they initiated an investigation and did not proceed to the immediate arrest of the requested person. Nothing is said in the judgement, and better, because it endorses all the police work, which is immediately reported to the examining magistrate, who even agrees to the entry and search of the home for the act carried out in Spain. As we shall see, the ruling of the Malaga Provincial Court was condemnatory and the Supreme Court dismissed the appeal in cassation.

This is the information from the case that is transferred to the Coín Court and which we see so often in practice, for example, the existence not only of OEDE but of searches and seizures at national level, which would make us think of the immediate need to arrest when this is not always the case, as we see in this STS.

The appellants claim that the search and entry procedure carried out on 6 May 2022 at the house located at address xxx in the town of Coín is null and void as a matter of law, because being the habitual residence of the four accused and all of them being in custody, the police officers only took Fidel to be present at the search and entry procedure. They therefore consider that the results of this investigation are null and void and that they

cannot be used as legitimate prosecution evidence, and that they must be acquitted because there is no other evidence to establish the appellants' responsibility.

In the judgments handed down by this Chamber 420/2014, of 2 June, or 508/2015, of 27 July (Malaya case), citing other precedents, we summarised our doctrine on the requirement of the presence of the interested party in the practice of the entry and search of the home.

We said in them that the basis for the requirement of the presence of the interested party or his representative at the entry and search of the home ordered by the judicial authority in criminal proceedings lies, firstly, in the fact that this procedure affects a personal right, of a constitutional nature, which is the right to personal privacy, since the constitutionally protected home, as a person's dwelling or habitation, is closely linked to their sphere of intimacy, since what is protected is not only a physical space but also the emanation of a physical person and their private sphere (STC 188/2013, of 4 November, in relation to art. 18 2nd EC and art. 8 ECHR). Secondly, it affects the right to a fair trial, because the result of this procedure will constitute evidence in the trial against the accused whose home has been searched, which means that the search must be conducted in such a way as to ensure the validity of the search as pre-constituted evidence.

The procedural law therefore foresees, as a requirement for the practice of the search, the presence of the interested party or person legally representing them (art. 569 LECrim). And the interested party referred to in article 569 of the LECrim is not necessarily the owner, in the sense of owner or tenant of the property. What is decisive is not who the owner is, who may be unknown, not reside in the home, or even be a legal person, but who is the resident in the home, as it is their privacy that is going to be affected.

Ordinarily, the person interested in the search is the defendant, as the outcome of the search will affect his or her defence, although it does not always necessarily have to be the defendant who is present at the legally authorised search. The accused or the person against whom the proceedings are directed may be unaccounted for or simply outside the home and untraceable at the time of the search. The entry and search of a home authorised in the course of legal proceedings for a criminal offence is, by its very nature, an urgent procedure that cannot be delayed while waiting for the accused to return home or to be located by the police. For this reason, the law authorises the interested party to be dispensed with "when he is not present", which clearly refers to the accused, and in these cases the search can be carried out in the presence of any of his family members of legal age, with the jurisprudential doctrine considering, taking into account a social reality in which groupings of homes are no longer necessarily carried out by families in the strict sense, that this rule is applicable to all the inhabitants of the home, of legal age, even if they are not family members in the strict sense of the term.

However, what is required is the presence of the accused in the search when he or she is detained or under police or judicial custody, as in these cases there is no justification for prejudicing his or her right to contradict, which is better guaranteed by the effective presence of the accused in the search.

In any case, we also recalled in these judgments that this rule is not applicable to cases of force majeure, in which the absence of the accused, despite being at the disposal

of the police, is justified. We cited as an example cases of hospitalisation of the accused, or arrest in a place far away from the home, or in the case of searches carried out simultaneously in several homes. And also when the impossibility of their presence is of a legal nature, for example when the investigation has been declared secret (STS 143/2013, 28 February).

And when there are several residents in the residence, in our SSTS 336/2017, of 11 May or 913/2023, of 13 December, recalling SSTS 698/2002, of 17 April, 1108/2005, of 22 September, 352/2006, of 15 March, 684/2014, of 2 October or 79/2015, of 13 February, we emphasise that the validity and effectiveness of the entry and search procedure is not affected when one of the residents is present, provided that the attendee does not have interests that conflict with those of the other defendants. Without prejudice to the fact that, in these cases, despite the validity of the search and in order to guarantee respect for the right to contradiction, which is part of the broadest right of defence, the search cannot be considered as pre-constituted evidence and it will be necessary that, beyond the mere reading of the record drawn up during its execution, the witnesses who approached or witnessed its practice appear to give evidence in the oral trial.

The pleas in law are therefore dismissed.

Without prejudice to the fact that in the present case the driving and custody of all those deprived of their liberty would have affected the availability of the police personnel assigned to the small town where the appellants carried out their criminal activities and where they were detained, as a large number of officers would have been required for the transfer and surveillance of the four defendants and for carrying out the investigation, an objective analysis of the concurrent circumstances provided the investigators with the basis that there was no contradiction of interests between the persons under investigation. Specifically, the police surveillance system, set up over three days to monitor the inhabitants of the house for a long period of time, made it possible to establish that they were all residents of the house and that they were all acting in concert. In particular, David and Eliseo, when they left the house by car, took security measures to check if they were being followed. And both they and the other detainees sometimes acted in concert and even exchanged objects such as a rucksack. And this presumed absence of conflicting interests was confirmed by the significant quantities of narcotic substances seized and the number and location of the weapons seized, as the witness evidence, which was contradicted in the plenary session, shows that the drugs were visible to all the inhabitants of the house and were not hidden in any room intended for the exclusive use of any of them, thus ruling out the possibility of one person responsible trying to shift sole responsibility to the other residents. And so the three pistols were also seized, which led to their conviction as perpetrators of the offence of illegal possession of weapons.

Conclusions.

After endorsing the investigation in a case that was based on police knowledge of an EPO issued by the judicial authorities of the United Kingdom for a different criminal act, and without the Defence having challenged the possible omission of the duty to prosecute crimes by the FCSE by not immediately arresting the person covered by the EPO in force, and thus avoiding the investigation initiated in the Court of Coín, this STS 308/2025 makes a phenomenal and didactic description of who has the concept of interested party in an entry and search of the home of a person who is the subject of an entry and search

of a person's home, and thus avoiding the investigation initiated in the Court of Coín, this STS 308/2025 provides a phenomenal and didactic description of who enjoys the concept of interested party in an entry and search of a home, whether or not the person is detained, establishing a general rule and the exceptions in extraordinary cases. It also delimits the possible conflict of interests between those affected.

7- STS 295/2025, Penal section 1ª of 28 March 2025, crime of harassment, "stalking".[7]

Factual background.

The Court of Violence against Women nº 1 of Medio Cudeyo, opened urgent proceedings nº 36/2021, once concluded it was sent to the Criminal Court nº 5 of Santander, for trial in the fast track trial procedure nº 125/2021, who issued Sentence nº 285/2021, dated 25 November 2021, which contains the following proven facts: "..."It has been proven that the accused Basilio, of legal age, and without a criminal record computable for the purposes of recidivism, who maintained a sentimental relationship for a year with Concepción, with address in Iruz (Santiurde de Toranzo), which ceased in July 2020, since October of that year called her on the phone, sent WhatsApp messages and letters insistently, asking for her forgiveness and asking her to resume the relationship, saying "my life has no meaning, that I was thinking about the best way to disappear, what am I going to do now, that life has no meaning for me", having been found at 09:00 on 15 December.00 hours on the 15th of December he was found sitting on a chair in his garden semi-conscious with his eyes rolled back in his head and had to be evacuated to hospital, coming on the 1st of January 2021 to his home knocking on the door, and then constantly calling him and sending him a letter a month, all with the intention of seriously altering his life, despite having knowledge that Concepción does not want to maintain any kind of relationship with him...".

The 3rd Section of the Provincial Court of Santander upheld the appeal of the convicted person and acquitted him, and the victim's representative lodged an appeal in cassation, which was upheld, again convicting the accused.

Legal basis.

Given the striking nature of judicial pronouncements, conviction at first instance, acquittal on appeal and conviction again on appeal, the case law of the ECtHR allows for the review of acquittals when the Supreme Court acts within the margins of the infringement of the law, reviewing purely legal issues. In other words, when this Chamber limits itself to correcting errors of subsumption and to establishing uniform interpretative criteria to guarantee legal certainty, the predictability of judicial decisions, the equality of citizens before the criminal law, and the unity of the criminal and criminal procedure system, without altering any factual assumptions.

Article 172.3 of the Penal Code, in force at the time of the commission of the acts - since the precept has been reformed by LO 1/2023 of 28 February - expressly punishes

[7] STS 295/2025, Penal section 1ª of 28 March 2025, delito de acoso, "stalking", published on the website of the CGPJ, Centro de Documentación Judicial, CENDOJ, (ROJ: STS 1348/2025 - ECLI:ES:TS:2025:1348), appeal: 7251/2022. Speaker Excma. Ms. Susana Polo García.

anyone "who harasses a person by insistently and repeatedly carrying out, without being legitimately authorised to do so, any of the following conducts and, in this way, seriously alters the development of their daily life". The aforementioned article, which defines the offence of harassment, was introduced into the Criminal Code in O.L. 1/2015 of 30 March 2015. 1/2015, of 30 March, whose Explanatory Memorandum states that "it deals with "all those cases in which, without necessarily involving the explicit or non-explicit announcement of the intention to cause harm (threats) or the direct use of violence to restrict the victim's freedom (coercion), there are repeated conducts by means of which the victim's freedom and sense of security is seriously undermined, who is subjected to constant persecution or surveillance, repeated calls or other continuous acts of harassment".

In such terms, the Jurisprudence has been pronounced since the Judgment of the Plenary 324/2017, of 8 May, and 554/2017, of 12 July, the latter with express reference to the previous one, where it is stated, among other things, that, therefore, it can be said that in an insistent and repeated manner it is equivalent to saying that there is a repetition of actions of the same nature - a continuum - which is repeated over time, in a period not specified in the type, it can be affirmed that in an insistent and reiterative manner it is equivalent to saying that we are faced with a reiteration of actions of the same nature - a continuum - which is repeated over time, in a period not specified in the criminal type, and that we are in the presence of a criminal type that is very "attached" to the specific profiles and circumstances of the case being prosecuted. In other words, the analysis of each specific case, in view of the actions carried out by the agent with insistence and reiteration, and on the other hand, in view of the suitability of such actions to seriously alter the life and peace of mind of the victim, will lead us to the existence or not of the crime of harassment, and it is up to this Court of Cassation, as the appeal is based on the double instance - sentence of the Criminal Judge and the appeal sentence issued by the Provincial Court - to determine whether or not, given the proven facts, the elements that form the backbone of the crime exist.

On the other hand, apart from the legal definition, there are definitions of the phenomenon in the scientific community, basically in the field of psychology and psychiatry, which as a general rule define it as behaviours that one individual inflicts on another by means of intrusions or unwanted communications, identifying intrusion with the fact of persecuting, prowling, hovering, watching, approaching, and communicating with behaviours such as sending letters, making phone calls, sending e-mails, graffiti or notes on the car, or associated behaviours such as ordering services in the name of the victim, making false accusations etc., always requiring that these behaviours be repetitive or reiterative.

Article 172 ter describes the criminal offence, in general terms, using the verb "to harass", a term on which there is no consensus in our legal system regarding its definition, especially in terms of the need for as many acts as are necessary, but we cannot ignore the fact that sexual harassment and harassment on grounds of sex do not require repetition or persistence, according to the concept of the same in the article. 7.1 and 7.2 of the Organic Law 3/2007, of 22 March, for the effective equality of women and men, and the introduction in our criminal law of the crime of stalking, is a further response to the fight against gender violence and compliance with international regulations and more specifically with the Istanbul Convention.

It should also be borne in mind that the legislator, rightly, in our view, does not determine the number of occasions on which the harassing conduct should take place, nor the time frame in which it should take place, and as for the serious alteration of daily life, we have said that the offence does not require planning, but does require a methodical sequence of actions that force the victim, as the only way out, to change their daily habits. In order to assess the suitability of the sequenced action to alter the victim's daily habits, the standard of the "average man" must be taken into account, although this is qualified by the specific circumstances of the victim (vulnerability, psychological fragility, etc.) which cannot be completely ignored (STS 639/2022, of 23 June).

We anticipate that the appeal will be upheld, with the consequent annulment of the acquittal and its replacement by a conviction.

The account of proven facts describes the conduct of the accused, who over a period of at least three months, repeatedly phoned his ex-partner, sent her WhatsApp messages and letters, insistently according to the account, in all of them asking for forgiveness and asking his former partner to resume the relationship that had ceased months earlier, saying "my life has no meaning, that I was thinking about the best way to disappear, what am I going to do now, that life has no meaning for me", one day the victim even found him sitting on a chair in his garden "semi-conscious, with his eyes rolled back in his head and he had to be evacuated to hospital", going to Concepción's home 15 days later, knocking on the door, and then constantly phoning her again and sending her a letter a month, with the aforementioned intention of resuming the relationship despite knowing that Concepción did not want to maintain any kind of relationship with him.

The offence of stalking protects individual freedom and the right to live in peace and without anxiety. The messages, appearance at the victim's home showing her suicide attempt in order to make her responsible for it, together with the calls and messages sent, are in themselves capable of disturbing the habits, customs, routines or way of life of any person, taking into account the standard of the "average man/woman", the Criminal Court reflecting in its reasoning that the above obliged the victim to receive psychological support, a fact that is not disputed. The same acts of the proven facts, -cover the requirements that this Chamber has been demanding of the type of art. 172 ter CP, namely, insistence, reiteration, repetition, reflection of the same pattern or systematic model, existence of a will to persevere in these intrusive actions, far exceeding the purely episodic or circumstantial and lack of legitimisation, or authorisation to act in this way. Because of the period of time during which they are sent and their content, the disvalue they contain is of a very high level, sufficient to trigger a criminal reaction.

In this case, we are not dealing with a simple annoying behaviour, the actions described in the factual account are capable of altering the victim's life and peace of mind in any way, affecting or altering the victim's future in any way in her private life, work or relations with third parties. In short, Concepción was subjected to emotional blackmail, understood as a form of communication that seeks to manipulate one person over another by using fear, obligation and especially, in this case, guilt.

We are dealing with facts that imply a clear psychological submission, in which the accused psychologically subjugates his ex-partner with the idea that he will not stop until he returns to him, even making him responsible for his own life with the self-harming attempt in the garden of the victim's home, which provokes fear in the victim, seriously

altering her daily life, which is subject to psychological treatment, without it being necessary to provide expert psychological evidence at the trial to prove that the victim's psyche has been affected by this situation of harassment or stalking, and that this determines an alteration in her life, when, as in this case, it is clear from the factual account itself, as the events necessarily generated an emotional impact on the victim - fear for her safety and that of her surroundings - and an impact on the normal development of her daily life, with the need to undergo psychological treatment.

As we have said in STS 843/2021, of 4 November, the essence of the criminal type, and above all, related to acts of gender violence, such as harassment in the situation of a former partner, must be contemplated with a gender perspective, as a situation of harassment between strangers or acquaintances is not the same as in the relationship of a partner or former partner, where the interpersonal ties that have been created intensify the harasser's demands for domination or humiliation of the victim who is, or has been, his or her partner in order to create physical and psychological ties that demonstrate the submission that the harasser wants to transfer to his or her victim so that she does not resist the harassment and returns to him or her.

Consequently, the facts described are suitable for forcing the victim to change her way of life, with sufficient force to constitute a crime of harassment as defined in Article 172 ter of the Criminal Code, therefore, the appeal should be upheld and the accused should be sentenced as the perpetrator of the aforementioned crime, to the same penalties imposed by the Criminal Court, and the aforementioned sentence should be reinstated.

Conclusions.

Important terminological and factual precision of this type of crime, which as STS 295/2025 rightly states, does not quantify the number of acts of harassment necessary to integrate the criminal offence, but which environmentally and evaluating all the evidence as a whole, not in isolation, does allow its appreciation because the victim's way of life was altered, and more so in cases of violence against women.

8.- STS 284/2025, of 27 March. Sexual abuse of a 17 year old with borderline intelligence. Moral damage.[8]

Factual background.

Criminal Court no. 6 of Las Palmas de Gran Canaria in the case coming from the PA with the number 247/2020, instructed by the Court of Instruction no. 1 of Telde, for a crime of sexual abuse against Maximino issued a sentence that contains the following Proven Facts: "...SOLE. It is hereby proven and declared that the accused, Maximino, born xx1984, on 1 May 2017 in the afternoon, without being able to specify the time, guided by the desire to satisfy his sexual instincts, persuaded the 17 year old minor, Socorro, to accompany him to the building located at the address xxx, and once there, he touched her buttocks and thigh, taking advantage of her, knowing that she was a minor and that her level of intellectual functioning was on the borderline of normal intelligence, making her

[8] STS 284/2025, Penal Sección 1ª, of 27 March published on the website of the CGPJ, Centro de Documentación Judicial, CENDOJ. (ROJ: STS 1469/2025 - ECLI:ES:TS:2025:1469), appeal: 7022/2022. Speaker: Mr. Antonio del Moral García.

highly vulnerable to becoming a victim. The legitimate representative of the minor claims...".

On appeal, the Provincial Court partially upheld the appeal for undue delay and the Supreme Court upheld the Provincial Court's conviction.

Legal basis.

On the one hand, the appellant argues that the facts are atypical on the basis of the victim's consent. The description of the act does not allow for a finding of mental disorder. The judgment speaks of a level of intellectual functioning on the borderline of normal intelligence. Being on the borderline and not below the borderline - it is typographically emphasised - it would not be possible to speak of abuse of disorder.

The reasoning is not clear. On the one hand, it seems to be reasoning that the accused was not aware of this circumstance. This contradicts the proven fact that he took advantage of this characteristic, which implies knowledge. This renders the claim unviable.

It could also mean that, being at the limit of normality, one could speak of normality, which would deprive the absence of consent of support.

This second possible argument plays with language, ignoring the fact that the locutions, borderline intelligence or borderline intellectual functioning, are well-coined concepts that express something more than what would be derived from their strict literal meaning. People with these characteristics lack what is considered to be an average intellectual level. They are - and this belongs to the common cultural heritage: this is not psychiatric, let alone legal technicalities - people who are able to develop life processes, to function and to understand the world, but they need appropriate support, as their low IQ requires it. They have difficulties in decision-making and conflict resolution; their social skills are diminished. The World Health Organisation establishes that the average intelligence is between 85 and 115. People with borderline intelligence are those who are just below these figures: between 70 and 85. Nor can one speak of intellectual normality. From a criminal law perspective, they are covered by the normative concept of art. 25.1 CP.

The proven facts, moreover, as is made even clearer in some parts of the factual reasoning, do not mention any consent of the minor to the touching with sexual implications. It is not said that she consented to them. They were imposed on her until she managed to escape, but without the use of violence or intimidation. In fact, the judgement does not cite Art. 181.2 (abuse of mental disorder).

The performance of sexual acts without the consent of the other person is typical in itself, regardless of the intellectual level of the victim. If, in addition, the victim has intellectual deficits that make him/her particularly vulnerable, the act will be aggravated.

The second line of appeal seeks to expel this aggravation by considering it to be inherent to the abuse of a mental disorder or beyond the defendant's knowledge.

Only by twisting the proven facts can it be argued that the accused was unaware of the special vulnerability arising from the borderline intelligence he exploited. For the rest, the sequence of the facts and the way in which they are recreated in the legal grounds are extremely expressive.

If it were a case in which the consent, express or externalised by conclusive acts, of the victim is obtained, and the typical nature is based on dealing with a non-free consent due to the absence of capacity to give it and with the perpetrator taking advantage of the cognitive deficit to obtain it, the problem of the compatibility of art. 181.2 above (abuse of mental disorder) or art. 178.2 in force (abuse of a situation of vulnerability of the victim) with the specific aggravation (especially vulnerable due to... age, illness, disability or situation: art. 180.1.3º and 181.5 in the legislation applied; or special vulnerability due to... disability or any other circumstance: art. 180.1.3º after LO 10/2022). But this is not the case.

On the one hand, there is an absence of consent. We are not dealing with a consent that is not free because it was obtained abusively. On the other hand, it appears that the victim has a diminished intellectual capacity that makes her particularly vulnerable.

The criminalisation has therefore been correct.

And what stands out from the STS is the concept and scope of non-pecuniary damage, which is so difficult to see in the daily practice of our courts.

So much so that art. 193 CP contains a prescription, in convictions for crimes against sexual freedom, in addition to the pronouncement corresponding to civil liability, there will be, where appropriate, those corresponding to filiation and maintenance, which represents a legal presumption (based on a maxim of shared and undoubted experience) of moral damages in this type of crime (vid SSTS 327/2013, of 4 March; 1033/2013, of 26 October; 733/2016, of 5 October; 812/2017, of 11 December; 393/2020, of 15 July; 1040/2021, of 26 October or 1209/2021, of 2 December).

The appellant is in no doubt that compensation would also be awarded in the civil courts if the action had been reserved for that area.

Although it is not applicable as it was not in force at the time of the facts, it is relevant to refer to the regulation of this issue in Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual, as it endorses, with novel additions, the inexcusability of this compensation by breaking down concepts in which moral damage and damage to dignity are highlighted.

This is stated in art. 53 of the aforementioned Law, under the heading Indemnification.

"1. Compensation for material and non-material damages corresponding to the victims of sexual violence in accordance with the criminal laws on civil liability derived from the crime shall guarantee the economically assessable satisfaction of at least the following concepts:

(a) physical and psychological harm, including moral harm and harm to dignity.

(b) Loss of opportunities, including opportunities for education, employment and social benefits.

(c) property damage and loss of income, including loss of profit.

d) Social damage, understood as damage to the life project.

e) Therapeutic, social and sexual and reproductive health treatment.

2. The compensation shall be paid by the person or persons civilly or criminally liable, in accordance with the regulations in force".

Conclusions.

This STS 284/2025 deals with two questions of interest. On the one hand, the perfect fit of an aggravated figure in crimes against sexual liberty, when there has been a lack of value in the aggressor's action which is not only objective, acts of touching, but also has a relevant subjective perspective, knowingly taking advantage of the victim's vulnerability. On the other hand, the almost forgotten concept of moral damage, which although existing previously in numerous judicial pronouncements, has had its express recognition in the controversial LO 10/2022 of integral guarantee of sexual freedom.