SUPREME COURT OF JUSTICE
Criminal Division

RULING 1916 / 2012

APPEAL TO OVERTURN[1] ***No.:*** 1133/2012

Judgment/Ruling: NON-ADMISSION

Coming from: Criminal Division of the National Court

Ruling Date: December 20, 2012[2]

Rapporteur* : *Honorable Juan Saavedra Ruiz

Office of the Court: María Josefa Lobon del Rio

Written by: *MVG/IDB*

CRIME: JURISDICTION OF SPANISH COURTS

REASONS: VIOLATION OF CONSTITUTIONAL NORM. Effective Judicial protection.

[1] Translator's note: *recurso de casación* = is an appeal to overturn a decision made to a high court on the grounds of an incorrect interpretation of the law or the constitution.
[2] The decision was transmitted to the appellants on January 21, 2013.

Appeal No.: 1133 / 2012
Rapporteur Hon. Juan Saavedra Ruiz
Secretariat of the Chamber: María Josefa Lobon del Río

SUPREME COURT OF JUSTICE
Criminal Division

RULING

Honorable:
Juan Saavedra Ruiz
Andres Martinez Arrieta
Luciano Varela Castro

In Madrid, December 20, 2012

I. FACTS

ONE: The Criminal Division of the National Court in plenary session issued a ruling dated March 23, 2012, in the court records with court record reference no. 148/2011, the ruling portion of which read as follows:

The DECISION IS TO DISMISS the appeal filed by the ASSOCIATION FOR THE DIGNITY OF MALE AND FEMALE PRISONERS OF SPAIN, which was joined by the UNITED LEFT and by the FREE ASSOCIATION OF ATTORNEYS against the ruling issued by Central Court for Preliminary Criminal Investigation num. 6 of the National Court on April 13, 2011, ordering the provisional staying of this case, not allowing the complaint filed by the former, denying standing in the court of the other parties, and against the ruling of that court on May 10, 2011, which dismissed the charges filed against the previous one, which we must UPHOLD and which we do fully UPHOLD.

TWO: Attorney Javier Fernandez Estrada filed an appeal to overturn against the decision on behalf of the ASSOCIATION FOR THE DIGNITY OF MALE AND FEMALE PRISONERS OF SPAIN, based in a single reason: violation of constitutional precept, Article 5.4 of the LOPJ,[3] for violation of the right to effective judicial protection, due to failure to apply article 23.4 of the LOPJ**.**

Attorney Roberto Granizo Palomeque likewise filed an appeal to overturn on behalf of the UNITED LEFT based on a single reason: violation of constitutional precept, Article 5.4 of the LOPJ, for violation of the right to effective judicial protection, in relation to failure to apply article 23.4 of the LOPJ.

Attorney Roberto Granizo Palomeque, also filed an appeal to overturn on behalf of THE ASSOCIATION FOR HUMAN RIGHTS OF SPAIN based on a single reason: violation of constitutional precept, Article 5.4 of the LOPJ, for violation of the right to effective judicial protection, in relation failure to apply article 23.4 of the LOPJ.

THREE: The proceedings were forwarded to the Office of Public Prosecutor, which urged that non-admission of all of them.

FOUR: Pursuant to rules of assignment adopted by the Chamber of Government of this Supreme Court, Judge Juan Saavedra Ruiz is the Rapporteur for this ruling.

[3] Translator's Note: Organic Law of the Judiciary.

II. LEGAL REASONING

ONE.- These proceedings have to do with the appeal of the ruling issued on appeal by the Criminal Division of the National Court in which the latter body confirms the ruling issued by Central Court for Preliminary Criminal Proceedings No. 6 in preliminary proceedings no. 134/2009. Therein the provisional staying of these proceedings was ordered, dismissing the complaint presented, and transferring it, duly translated, to the United States Department of Justice for it to be continued, requesting that it in due course it indicate the steps finally taken by virtue of this transfer of the procedure.

Such being the nature of the decision appealed, the first question that arises is whether it can be appealed. That answer to that question must be yes, inasmuch as in accordance with the legal doctrine established by this court in STS 323/2003 (February 23), when a ruling has been issued, even when a provisional stay has been ordered in these procedures, the lack of jurisdiction of the Spanish courts to investigate the facts is obvious, and there is no possibility of a subsequent presentation of a negative conflict that would allow for a final decision by some other higher body. Therefore, the decision made is comparable to the positive decision to the plea as set forth in article 676 of the Law of Criminal Procedure, which, as interpreted by this Court, since the ruling made in non-jurisdictional plenary on May 8, 1998, is subject to appeal to overturn, except in cases pursuant to the Organic Law of Jury Trial.

There are three motions filed against this ruling, by the Association For the Dignity of Male and Female Prisoners of Spain, the United Left, and the Free Association of Attorneys, and the Association for Human Rights of Spain. All of them revolve around a single reason, with the claim that the ruling issued has violated their right to effective judicial protection enshrined in article 24 of the Constitution, in relation to article 23.4 of the LOPJ. They make similar claims intended to support the jurisdiction of the Spanish courts to investigate and prosecute the events previously described in the complaint filed. We will analyze them together.

The aforementioned lawsuit was filed against David Addington, Jay Bybee, Douglas Feith, William Haynes, John Yoo and Alberto Gonzalez, who were accused of crimes against persons and objects protected in the event of armed conflict, set forth and sanctioned in chapter III of title XXIV of the Criminal Code, for having devised the binding legal basis necessary for setting up a systematic plan of torture and abuse of detainees held at the detention center at Guantánamo.

TWO. - As we have indicated, the appellants complain of violation of their right to effective judicial protection in their respective appeals, a violation that they connect to the interpretation made of article 23.4 of the LOPJ by the ruling being appealed.

A) They claim, in short, that the Spanish courts, and specifically the National Court, are competent to investigate and, where appropriate, prosecute the facts described above, because that is the conclusion to be derived from the provisions of the Geneva Conventions on treatment of prisoners in the event of armed conflict, and that there is, on the other hand, a clear connecting link to Spain, because several Spaniards were held at that detention center. In particular, with regard to the considerations of the ruling being appealed, the appellants hold that the principle of subsidiarity is not applicable. First, because the international conventions cited do not envision that principle; and second, because, in any case, no criminal proceedings have been initiated in the United States for the investigation of the facts under complaint that could be regarded as effective and sufficient. Among other matters, they stress that neither the deeds nor those responsible have been identified in that country for the facts under investigation, that some of the cased filed are merely disciplinary, or that U.S. Prosecutor's Office does not intend to initiate criminal proceedings against any person in relation to the torture and abuse at the detention center at Guantánamo.

B) Article 23.4 of the LOPJ says: Spanish jurisdiction shall likewise be competent to examine deeds committed by Spaniards or foreigners abroad that can be characterized, according to Spanish law, as any of the following offenses:

a) Genocide and crimes against humanity.

b) Terrorism.

c) Piracy and unlawful seizure of aircraft.

d) Offences relating to prostitution and corruption of minors and those not legally competent.

e) Illegal traffic of psychotropic, toxic, and narcotic drugs.

f) Illegal trafficking or clandestine immigration of persons, whether or not they are workers.

g) Those relating to female genital mutilation, provided that those responsible are in Spain.

h) Any other offense which, according to the treaties and international conventions, in particular conventions of international humanitarian law and protection of human rights, ought to be prosecuted in Spain.

Without detriment to what might be provided for in treaties and international agreements signed by Spain, in order for the Spanish courts to hear the aforementioned offences it must be established that the alleged perpetrators are in Spain or that there are victims of Spanish nationality, or that some significant link is established with Spain, and no procedure entailing an investigation and effective prosecution of such sanctionable deeds, where appropriate, has been initiated in another competent country or in an international court.

The criminal proceedings initiated before the Spanish Court shall be stayed provisionally when there is evidence of the beginning of another court process on the deeds presented in complaint in the country or by the Court mentioned in the preceding paragraph.

C) On the basis of the aforementioned legal norm, the claims of the appellants must be dismissed.

First, we must reject the claim that the ruling issued violates the right to the effective judicial protection of the appellants. Through it, they have obviously obtained a response to their claims, based on law, and properly argued, even if they do not agree with it. The legal doctrine of this court, and the Constitutional Court, has held repeatedly that mere disagreement with the ruling issued and with the criterion stated therein does not mean that it has violated the fundamental right invoked.

Second, the application made therein of the principle of subsidiarity set forth in article 23 of the LOPJ is in accordance with the law.

On the one hand, we must confirm that that principle is applicable. Indeed, according to that legal norm, in order for the Spanish courts to be able to try the offences set forth there, including those mentioned in the complaint, it must be established that the alleged perpetrators are in Spain, or that there are victims of Spanish nationality, or some significant link with Spain must be established, and, in any case, states the legal norm, that no procedure has been initiated in another competent country or in an international tribunal entailing an investigation and effective prosecution, if indicated, of such sanctionable deeds. As we said in the ruling of this same court on October 6, 2011, the current paragraph 4 of article 23 of the LOPJ, in the area of the extension of Spanish jurisdiction, written in accordance with the modification made by Organic Law 1/09 of (November 3), as stated in the presentation of the reasons of the law introducing it, has made "*a change in the treatment of what has come to be called 'universal jurisdiction,' by modifying article 23 of the Organic Law of the Judiciary in order to incorporate types of offences that were not included, the prosecution of which is covered in the conventions and practice of international law, such as those that are crimes against humanity and war crimes. In addition, the modification makes it possible to adapt and clarify the legal norm in accordance with the principle of subsidiarity and the legal doctrine produced by the Constitutional Court and the precedent of the Supreme Court."*

Specifically, this legal doctrine had been holding that the principle of universal jurisdiction is not absolute, generally considering the criterion of subsidiarity to have higher priority than that of concurrency, and that it must all be modulated in each concrete case.

Certainly, as the legal norm states, should it be established that the sanctionable deeds presented in the complaint were being investigated in another competent country or in an international tribunal, the Spanish judicial bodies would not be competent to prosecute them.

Indeed, the existence or not of such an investigation in another competent country, particularly in the United States, is precisely the issue that is contested by the appellants, who believe, as we have already said, that the investigations and judicial processes instituted by the authorities of that country, to which the decision being appealed refers, do not really constitute an effective investigation of the facts that are object of the complaint in terms of article 23.4 of the LOPJ; some appellants argue in detail on the content and result of each one of them and hold that these were neither sufficient, nor, as we have said, effective.

These arguments however should not be admitted.

As set forth in the ruling issued by the Criminal Division of the National Court, the United States authorities, as the latter reported in replying to the letters rogatory sent in due course to Central Court for Preliminary Criminal Proceedings No. 6, have investigated or are investigating the events at the Guantánamo detention center. They have carried out the administrative procedures listed there and have also initiated the criminal investigations which are also listed therein.

These include an administrative procedure carried out by the Office of Professional Responsibility of the U.S. Department of Justice, in which the activity of two of the defendants - Jay Bybee and John Yoo - was investigated for their involvement in the preparation of memoranda on norms of conduct and interrogation techniques on alleged terrorists (these latter are acts of which they are also charged in the complaint). As recognized by the appellants themselves, that investigation lasted some five years, and concluded with a 261-page report. It is true that it was an administrative procedure, as we have said, clarifying whether they might have incurred some type of disciplinary responsibility in their professional activity by their relationship with such documents; but its outcome, and in particular its final report, as the appellants themselves explain, was sent in due course to be studied by the then deputy attorney general, David Margolis. As noted, he dismissed the case, and did not initiate any administrative or criminal action whatsoever against these people or against anyone else involved in the aforementioned memoranda. The fact that the investigation began in the administrative realm, as we understand it, would not have prevented criminal actions from being carried out, had there been indications of criminal actions by the persons under investigation.

Second, it should be noted that, as it can be inferred from the documentation submitted by the US authorities, and explained by the appellants themselves, in 2009, the Attorney General, Mr. Holder, agreed to initiate a preliminary investigation on the treatment of some of the detainees at the detention center at Guantánamo. That investigation is still ongoing, according to the United States Department of Justice. It was entrusted to the Deputy Attorney General, John Dirham, who previously, as is clear from the public statement made by Mr. Holder, which is included in the claims made by the appellants, had specifically investigated the alleged destruction by the Central Intelligence Agency (CIA) of videotapes containing some interrogations of detainees.

Certainly neither this latter investigation nor that initiated at the request of Attorney General Holder is centered on the defendants, or on the specific activity of which each of them is accused in the complaint. What it does, as we have said, is investigate the treatment to which some of the people held at the Guantánamo center were subjected, but it is obvious that the possible liability of the former would derive from the proof that that treatment constituted torture and inhuman and degrading treatment as claimed by the appellants. Precisely what the defendants are accused of, as we have said, is that it was they who created the "legal architecture" needed to establish a systematic plan of torture and cruel treatment of the detainees, by preparing the various documents described in the complaint.

Third, and finally, according to the information provided by the United States Department of Justice, the Attorney's Office for the Eastern District of Virginia is also investigating complaints of abuse against detainees held at Guantánamo.

Likewise it should be noted that in 2006, as also shown in the information sent by the American authorities, the United States Supreme Court issued a ruling in Hamdan v. Rumsfeld, 548 US.557 (2006) declaring, against the criteria maintained by the defendants in the documents that they are accused of preparing, that article 3 of the Geneva Convention of 1949 was applicable to persons detained in the aforementioned detention center at Guantánamo.

In short, to greater or lesser extent, the United States has investigated the events at Guantánamo; in fact the preliminary investigation on treatment of detainees there ordered by Attorney General Holder in 2009 is still is ongoing.

It is true that there is no record that criminal charges were made as a result of those investigations, and that Attorney General Holder himself announced in the aforementioned statement, that the office of attorney general would not bring charges against those who had acted in good faith within the legal framework established at the time by the Office of Legal Counsel regarding the interrogation of detainees; but that does not simply mean, as claimed, that the investigations carried out so far have not been effective, so that the criterion of subsidiarity provided for in section four of article 23 of the LOPJ would not apply, or that the investigation now underway, has been fruitless.

This same Court took a similar stand in its March 4, 2010 ruling, when it confirmed the lack of jurisdiction of the Spanish courts to investigate particular deeds attributed to certain political and military commands of the state of Israel. Likewise in that instance the complaints received by the attorney general of that state, related to the actions that were the object of the complaint, had led to an internal investigation that in the end was filed away, as the proceeding in that country was assessed, in relation to such deeds, not only of proceedings of criminal nature, but also military, and even civil proceedings.

Moreover, we must insist, in line with the claims made by the appellants, that the applicability of the principle of discretional prosecution[4] in the American criminal justice system, as in other legal systems, a discretionary opportunity moreover, where the Prosecutor indeed decides whom to accuse and for which crimes, does not mean that such a decision is exercised arbitrarily, or that it is made, as stated by the appellants, on the basis of purely political considerations, or that the principle of legality is not respected in that system. It is a system that follows a different conception about what the role of the public prosecutor's office is, what the purpose of criminal proceedings is, and what the involvement of the victims should be; it is not for us to judge that conception, nor does it in itself call into question the impartiality and the organic and functional separation of the office of prosecutor from the executive.

[4] Translator's Note: lit. "principle of opportunity," i.e., prosecutors have some leeway for determining which cases it is opportune to prosecute.

Finally, it is essential to point out that the ruling issued in due course by the examining magistrate's court, and confirmed by the Criminal Division of the National Court, precisely in view of the facts set forth, in addition to not admitting the complaint, agrees that it be transferred to the Department of Justice of the United States, asking the latter to report to it on measures ultimately adopted. That ruling thus applies article 19 of the integrated text of the provisions of the Treaty on Mutual Legal Assistance of 20 November 1990, signed between Spain and United States, and the EU-US Agreement on Legal Assistance of June 25, 2003, according to which any of the contracting states may file a request in order to initiate criminal proceedings before the competent authorities of the other contracting state in the event that both states enjoy jurisdiction to investigate or take legal action. If such be the case, according to that legal norm, the petitioned State will evaluate initiation of some proceedings or a criminal procedure insofar as it is appropriate according to its legislation, its practices, and its procedural rules.

Clearly, the ruling issued does not violate any fundamental right of the appellants, particularly, as we have already stated, since the motivation contained therein for the decision made may in no way be considered arbitrary, illogical, or irrational.

Therefore, the proper conclusion is dismissal of the three appeals filed in accordance with article 885.1 of the Criminal Code.

Hence, the following ruling is to be adopted:

III. RULING

THE COURT AGREES: that the appeals filed by the appellants, against a ruling issued by the National Court, in the case listed in the heading of this decision, **ARE NOT TO BE ADMITTED.**

The costs of the appeal are imposed on the appellant party.

The deposit of the appellant, as private prosecutor, if there is any, is declared to be lost.

Thus the honorable judges who have come together in the court to examine and decide upon this ruling agreed and do sign.