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Appeal No. 1979/2009

Judge Rapporteur: Miguel Colmenero Menendez de Luarca

Court Clerk: Honorable Maria Josefa Lobón del Rio

SUPREME COURT OF JUSTICE
Criminal Court

RULING

Honorable:
Juan Saavedra Ruiz
Andres Martinez Arrieta
Miguel Colmenero Menendez de Luarca

[coat-of-arms] HONORABLE BAR ASSOCIATION OF MADRID	
RECEPTION APR. 6, 2010	NOTIFICATION APR. 7, 2010
Article 151.2 L.E.C. 1/2000	

In Villa de Madrid, March fourth, two thousand ten.

I. FACTS

ONE. - On July 9, 2009 the Criminal Division of the Audiencia Nacional (National Criminal Court) (Section 2) issued a ruling in case number 118/2009, resulting from Summary Procedure 157/2008 of Central Court for Preliminary Criminal Proceedings no. 4, the ruling portion of which reads as follows:

“We find that the appeal filed by the Office of Public Prosecutor against the ruling issued May 4, 2009 by Central Court for Preliminary Criminal Proceedings No 4

in Preliminary Proceedings no. 157/08 disregards the petition of the Office of Public Prosecutor, filed April 2, 2009 on the incompetence of Spanish jurisdiction to hear the facts contained in the complaint filed June 24, 2008 by the common representation of the injured parties Raed Mohamed Ibrtahim Mattar, Mohamed Ibrahim Mohamed Mattar, Rami Ibrahim Mohamed Mattar, Khalil Khader Mohamed Al Seadi, Mahmoud Sobhi Mohamed El Houweit, and Mahassel Ali Hassan Al Sahwwa, against Dan Halutz, Benjamin Ben Eliezar, Doron Almog, Giora Eilan, Michael Herzog, Moshe Ya'alon, and Abraham Dichter.

Accordingly we revoke that resolution and instead decide to close definitively the proceedings with an official declaration as to court costs of this appeal.”

TWO . – Against that Ruling, an appeal for reversal was filed to the Supreme Court by the Committee of Solidarity with the Arab Cause, Raed Mohamed Ibrahim Mattar et al., by presentation of the corresponding writ by the attorney Javier Fernandez Estrada.

The petitioner, Committee of Solidarity with the Arab Cause, mentions as potential reasons for reversal the following: 1) under art. 5.4 of the LOPJ [Organic Law of the Judiciary] for violation of the right to a process with guarantees and 2) under art. 5.4 of the LOPJ for violation of the right to effective judicial protection.

The petitioners, Raed Mohamed Ibrahim Mattar mention as potential reasons for reversal the following: 1) under art. 5.4 of the LOPJ [Organic Law of the Judiciary] for violation of the right to a process with guarantees, and 2) under art. 5.4 of the LOPJ for violation of the right to effective judicial protection.

Acting in this procedure as petitioner is the United Left, represented by attorney-at-law

Javier Fernandez Estrada, in opposition to the appeal presented.

THREE - In the formal procedure for presenting the argument for the appeal, the Office of the Public Prosecutor was opposed.

FOUR. - In accordance with the case assignment rules approved by the Governing Body of this Supreme Court of Justice, the Rapporteur of this ruling is Judge Miguel Colmenero Menendez de Luarca.

II. LEGAL ARGUMENTS

ONE. - A first reason for the appeal is formulated by the court representation of both petitioners under art. 5.4 of the LOPJ for violation of a process with guarantees; because it is similar or practically identical, the complaint of both petitioner parties may be answered jointly.

A) It is claimed, essentially, that the use by the office of the Public Prosecutor of the appeal of the ruling issued by the Central Court for Preliminary Criminal Proceedings, which is the object of this appeal [to the Supreme Court] for reversal, has amounted to a fraud committed through the use of judicial procedure, because no appeal may be made of the decisions in the area of jurisdiction in the terms in which the initial request and the corresponding ruling was presented. Art. 676 of the Code of Criminal Procedure and related jurisprudence are invoked, on the understanding that by virtue of art. 11.2 of the LOPJ, the motion of the of the Office of Public Prosecutor should not have been admitted.

B) The right to a public trial with full guarantees – which is the infraction that is the object of this complaint - has a series of concrete manifestations: the right to the impartial judge

of first instance predetermined by the Law, the right to an attorney’s defense and assistance, the right to be informed of the accusation in a timely way, to a public adversarial trial, without undue delays, to equality of parties, to use pertinent means of evidence in one’s own defense, and to the presumption of innocence (which entails among other legal requirements, that the Judge form his conviction on the basis of discovery activity carried out with full respect for the corresponding legal and constitutional requirements). All these rights constitute the set of guarantees that must surround the activity of the courts under the rule of law (STS) [Supreme Court Rulings] 29-2-00).

C) The question posed on these grounds has been considered in the resolution being appealed, when the first-level trial court stated that formally there is no fraud by judicial procedure in the challenge by the Office of the Prosecutor, and hence there cannot be a declaration – by virtue of art. 11.2 of the LOPJ – that the subsequent court proceeding is null, inasmuch as it is a legitimate possibility of court procedure allowed under art. 766.1 of the Code of Criminal Procedure; neither art. 676 nor art. 678 of the Code of Criminal Procedure is applicable to the ruling appealed by the Office of Public Prosecutor because we are not at the summary stage, or, more specifically, are we at that of the articles of prior statement of plea as to jurisdiction of 666.1, which could possibly be used at a procedural moment far beyond the present one. Indeed, the matter is about making an appeal on a ruling issued in preliminary procedures filed in connection with a complaint raised against seven political and military officials in Israel, in which the Central Court for Preliminary Criminal Proceedings dismissed an attempt by the Office Public Prosecutor seeking to have Spanish jurisdiction declared incompetent for hearing the complaint and that the procedure be shelved provisionally. The argumentation of the appeal by a way that ultimately even allows this review for reversal in no way reduces the procedural guarantees or does away with legal defense.

Hence the reasoning is properly regarded as inadmissible pursuant to what is set forth

in art. 885.1 of the Code of Criminal Procedure.

TWO. - The second argument is formulated under art. 5.4 of the LOPJ for violation of the right to effective legal protection, in the sense of the right to obtain a ruling founded on law and of right of access to jurisdiction.

A) The petitioners say such is occurring inasmuch as the National Court* has made too rigoristic and restrictive an interpretation of what is set forth in art. 23.4 of the LOPJ; in their argumentation they present two aspects, that it goes into a kind of lack of definition about universal jurisdiction and that it has been mistaken in saying that there is a criminal procedure open by the facts that are the matter of the complaint and against those responsible who appear as accused. The argument states that access to the Courts has been blocked without sufficient reason, arbitrarily, quite unreasonably, and obviously mistakenly, and that the requirement of proportionality flowing from the pro-actione principle** has been neglected.

B) The fundamental right invoked has a complex content which includes the right to have access to judges and courts, the right to obtain from them a ruling based on law and to have it carried out, and the right that the claim filed be resolved in the procedure provided for in the law, although it cannot be understood to include a right to obtain a resolution in accordance with the claim (STS 23-12-04).

According to STC [Constitutional Court Ruling] 82/2001 “the court ruling challenged may only be regarded to violate the right to effective judicial protection when the reasoning sustaining it falls into such a degree of arbitrariness, irrationality or error, that by their evidence and content they are so manifest and serious that it is obvious to any observer that the ruling in deed Is lacking in any basis or reasoning” (STS 5-9-03).

* [Audiencia Nacional – division of the Supreme Court]

** [In doubt the inclination should be *pro actione*, that is, favoring legal action.]

C) Such is not the case; it must be said that no violation of the right to effective judicial protection may be observed, because the petitioner has encountered a reasoned response in terms of the basis of the matter posed, without detriment to his legitimate disagreement with the ruling. It suffices to read the ruling appealed to establish its careful and reasoned argumentation, based on the assumption of the event complained of – a military action carried out the night of July 22, 2002 against the house of Salah Shehadeh, leader of the terrorist organization Hamas – the National Court sets forth the [Spanish] state and international legality governing the matter, the jurisprudence of the National Court, of the Constitutional Court and this Supreme Court of Justice on the absolute absence of the principle of universal jurisdiction, on which the criterion of subsidiary generally has priority over that of concurrence and need for all of it to be modulated all in each concrete case. Hence it is said that there is an extensive and exhaustive documentation on criminal and civil procedures around the case in question; mention is made of the Selection of Terrorist Targets Case (TSJ 769/02), decision of the Supreme Court of Justice set forth in TSJ on December 14, 2006, mentioned because of its consequences here, as a judicial review of the legality of the policy of the Israeli government on selection of terrorist targets.

And on these premises it is found that there is a military investigation in the field, with results sent to the General Military Prosecutor, and complaints received by the Attorney General, an internal investigation which ended up being dismissed by the Office of the Attorney General of Israel. It is pointed out that currently there is a criminal case pending, Shehadeh Case (TSJ 8794/03) whose major procedural steps are described, stopping at the issuance of the foregoing decision; the parties agreed to the creation of an independent commission to investigate the facts, which is carrying out its task under judicial review of its decisions.

Finally in its analysis the National Court adds that there have been and are civil procedures for claiming economic compensations, some filed by complainants in this case. The ruling appealed concludes that there has been real and true action to prove possible commission of a crime, and that the matter is pending in the courts. Along these lines, it is said that placing in doubt the impartiality and organic separation and function of the Office of the Prosecutor and the Investigation Commission with respect to the Executive entails ignoring the evidence of a social and democratic rule of law, and hence no uncertainty may be harbored – as the appeal suggests –about the exercise of the proper criminal actions if criminally relevant conduct is uncovered. Likewise the theory of ubiquity* is invoked in relation to the competence of the Israeli judicial authorities to investigate and render judgment, if indicated, the facts as corroborated by the aforementioned fact that the complainants themselves initially filed their criminal and civil claims with agencies of the Israeli judiciary.

It is obvious that the ruling by which the National Court decided to dismiss the actions offers a well founded reasoned reply which in no way violates the fundamental right invoked by the petitioners.

Dismissal of the argument is in order pursuant to art. 885.1 of the Code of Criminal Procedure.

Consequently the following decision is properly adopted:

* [Theory in Spanish jurisprudence according to which a deed may be regarded as committed not only where the action took place but where the effect is produced.]

III. DECISION

THE COURT RULES: THERE ARE NO GROUNDS FOR ADMITTING the appeal for reversal presented by the petitioners against the ruling issued by the National Court, in the case listed in the heading of this resolution.

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

Thus ruled and signed by the Honorable Judges, who have convened in court to hear and decide this ruling.