



SUBJECT: SUMMARY PROCEEDING
Number: 2/2014

**CENTRAL COURT FOR PRELIMINARY CRIMINAL
PROCEEDINGS NUMBER 5
NATIONAL COURT
MADRID**

RULING

In Villa de Madrid, July 17, 2015

FINDINGS OF FACT

ONE. In this case, here before the Central Court for Preliminary Criminal Proceedings, under Summary Proceeding number 2/2015, of July 7, 2014, a brief was presented in court on July 6, 2015, on behalf of the procedural representation of Jamiel **ABDUL LATIF EL BANNA**, Omar **DEGHAYES**, the **CENTER FOR CONSTITUTIONAL RIGHTS IN NEW YORK**, and the **EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS OF BERLIN**, in order to request that investigatory procedures be carried out in order to determine the identity of the CNP police officers who to from the Detention Center in Guantánamo to question several of those detained there during the July 22 and 23, 2002, and that they then be summoned as accused; that condition would serve to better guarantee their rights without prejudice to the responsibilities that their presence and activity at that naval base may be drawn from their statements as well as the contrast with the statements already given by Lahcen **IKASSRIEN**, and Ahmed **ABDERAHMAN HAMED**, in this procedure. They claim that the importance of this evidence lies in the fact that that these agents, besides traveling to the Guantanamo Detention Center, interrogated detainees in the manner found in these proceedings and they were at least participants in a situation that they not only did not denounce, but supported, and subsequently offered themselves to testify as witnesses against them in the procedures that have been pursued against them in Spain.

TWO. - Upon being passed to the **PROSECUTOR**, a report was issued on July 16, 2015, in opposition to carrying out the proposed proceedings.



The Prosecutor argues that it is the alleged torture suffered by the complainants during their detention at the military base of Guantanamo that is being investigated in this proceeding. Therefore, ascertaining the identity of the agents of the National Police who took the statement from the complainants cannot contribute anything to the investigation, inasmuch as they are not being accused by the private prosecution for their involvement in the behavior under accusation, nor is it even speculated that they might have observed the alleged mistreatment.

LEGAL REASONING

ONE. Article 311 of the LECrim states that "the judge who performs the preliminary investigation in the case shall carry out the proceedings proposed to him or her by the Office of Public Prosecutor or any of the parties with standing, if he/she does not regard them as useless or harmful."

That is, the right to evidence is not absolute or unconditional, nor does it deprive judges of their powers to judge the relevance of what is sought, and hence not everything that is sought by the parties need be admitted. Likewise in this phase the procedures must be relevant by their relationship to the object of the case, and in addition they have to be suitable for providing useful results, which means that they must be adequate (STS 12.06.2005)

In this sense, the Constitutional Court has declared that "the fundamental right to avail oneself of the relevant means of proof does not mean, in any way, that the complainant or the respondent may require the Court of Preliminary Criminal Proceedings to seek all the evidence sought (SSTC 150/88, July 15, and 33/89, February 2) because as established in articles 777.1 and 779.1 LECrim, investigatory activity must be limited to those procedures that are relevant and necessary, including at this phase those that are absolutely necessary for formulating the accusation, if indicated, without prejudice to those that may be able to be proposed during the actual trial, because expedited procedure is based on the principle of speed."

In order for the investigation or evidence procedures to be regarded as legitimate, without prejudice to the analysis of relevance provided for in article 311 LECrim, the jurisdictional assessment must also be made in this regard, and it must be suited to the investigatory activity in terms of object and purpose, and the proportionality between the measure proposed and the result sought. All this in the light of the established jurisprudential legal doctrine, as in STS, September 9, 2006, (with citation of previous rulings as well as the STEDH of July 7, and November 20, 1989, and September 27, and December 19, 1990), which specifies that in ruling on the admission or non-admission of evidentiary procedures sought from the judge, it must be considered whether the evidence requested



is: a) relevant , in the sense of concerning or pertaining to what is being sought in the specific case at hand, that is, that it "bears on the purpose" of the object of the trial, that it is genuinely related to it; b) necessary, because from carrying it out the Judge may draw information that must be on hand for the decision on some essential aspect and therefore it must be not only relevant but also influential in the ultimate decision of the Court); and c) possible, inasmuch as the Judge may not be required to perform a proceeding that goes beyond reasonable exhaustion of the possibilities for presenting the evidence, which sometimes is proven to be not at all feasible from the outset.

For its part, article 777 of the LECrim states that "the Judge shall order the Judicial Police or shall perform by himself all the procedures aimed at determining the nature and circumstances of the deed, the persons participating in it, and the competent authority for trying it (...)."

TWO - In assessing the relevance and need for the investigation procedures proposed by the private prosecution, two elements must be kept in mind: first, the circumstances in which the detention of the those affected in this case at the Guantanamo Detention Center took place, and secondly, the circumstances and legal characterization of the action performed by the police officers whom the private prosecutors wish have testify as accused.

With regard to the first point, it should be kept in mind that, as STS 829/200 indicated,

["The detention of hundreds of people, including the appellant, without charges, without guarantee, and therefore without control and without limits, at the Guantánamo base, guarded by the United States Army, is inexplicable and even more unjustifiable out of the legal and political reality in which it is set.

Guantanamo could certainly be said to be a true "limbo" in the legal community which is defined by a multitude of treaties and conventions signed by the international community, constituting a thorough example of what a scholarly legal doctrine has defined as " Criminal Law of the Enemy." This criminal law of the enemy, contrary to the criminal law of citizens, would be reserved for those would be considered to be responsible for attacking or endangering the foundations of coexistence and the rule of law.

...



It is a legal construction whose starting point is a contradiction in its arguments which contaminates even the very name of the doctrine. The values of freedom, coexistence, pluralism, and human rights cannot be defended with initiatives characterized by the violation of the values that are said to be defended.

This court in STS 1179/2001, July 20, already warned of the perversion entailed in legitimizing means based on ends .". .from the legitimacy of society defending itself from terror, such defense only can be made out of respect of the values that define the rule of law, and therefore without violating what is supposedly being defended"

Therefore, the criminal law of the enemy, would more properly become the negation of criminal law to the extent that it tries to dispossess its possible recipients of something that is their own, and is irrevocable: their status as citizens of the 'polis.'"]

Moreover, now in relation to related to activity performed by the UCIE police officers whom the prosecution is requested that they be summoned as accused, the STS likewise states that:

["Any procedure or activity carried out under these circumstances, must be declared completely null and void, and accordingly, non-existent. This means holding to be non-existent, what the sentencing court euphemistically called a "police interview," which was actually an interrogation because the latter produces situation of inequality: one party ask questions and the other responds, and in this case, the one responding was, moreover, deprived of liberty. 'Interview' suggests a situation of equality of fellow discussants, which, obviously, did not exist in this case. That is why the statement in the plenary of the two members of the UCIE who questioned the appellant should be declared null and non-existent"].

For its part, SAN 43/2005, October 4, prior to the foregoing, having to do with the same events, states that what it calls "statements of the accused to the Spanish police officers" were made "without the assistance of counsel, without prior information on constitutional rights, outside the mechanisms of international judicial assistance, without the authorization of the examining magistrate who was hearing the case, and deprived of liberty, and in a situation of at least psychological pressure that prevented it from being voluntary."



The conclusion reached by the AN in relation to this "interview," subsequently described as police interrogation by the TS, is that "it has no probative value in itself" because "it was conducted outside the scope of the existing criminal proceedings and he was not informed of his rights as accused and was deprived of the assistance of counsel."

Finally, it adds something more: the detainee voluntarily offered to answer questions from the police officers. This is what police officers stated and what the detainee acknowledged upon receiving the on receipt of the investigative statement in Central Court for Preliminary Criminal Proceedings number 5.

The foregoing makes it clear that there were indeed two police officers who went to the Guantánamo Detention Center on the island of Cuba on July 22 and 23, 2002 and they interrogated one or more people detained, who voluntarily agreed to submit to this police questioning. This interrogation is totally null and void and as such does not exist, given the unjustifiable situation of detention without charges, with no guarantees, and therefore out-of-control and without limits, which was that of the detainees at the Guantanamo naval base.

THREE.- Furthermore it is well to keep in mind the events of this case, so as to evaluate the desirability, necessity, and appropriateness of the proceedings requested.

In this regard, the Ruling on April 15, 2014 stated that this case is about the detention, transfer, and situation of the complainants during the time spent at in U.S. naval base at Guantánamo Bay (Cuba), whether they could constitute the crimes in articles 608, 609 and 611, in relation to articles 607 bis and article 173, all CP. And it is aimed at the possible perpetrators and abettors, necessary cooperators and accomplices of those acts.

Thus the events that are the object of the procedure are limited to acts committed against the victims **ABDUL LATIF AI BANNA, OMAR DEGHAYES HAMED ABDERRAHMAN AHMED,** and **LAHCEN IKASSRIEN,** during the time of their arrests in different countries, always under the authority of the American army, to which they were handed over in the various places where this happened (Afghanistan, Pakistan, or Gambia) and their subsequent transfer to the Guantánamo (Cuba) U.S. military base. Moreover, in terms of the subjects, i.e. with regard to scope of the subjects against whom the procedure is addressed, it has always been confined to "the persons who had the detainees under their guard and custody,



those who authorized or performed the acts described, all of whom were members of the American army or military intelligence, and all those who carried out or designed a systematic plan of torture or inhuman or degrading mistreatment against the prisoners whom they had in their custody and who had been captured in the context of the declared conflict in Afghanistan and whom it accused of being terrorists.”

FOUR.— Accordingly, the private prosecution requests that the UCIE police officers who performed those interrogations testify because " they were at least participants in a situation that far from denouncing they supported."

However, even though the classification of the interrogations carried out by the UCIE agents at the Guantanamo base is absolute (radically null and void, and nonexistent for the legal world), the following is true:

- First, it is obvious that these people did not have the detainees whom they interrogated personally under their custody; they did not authorize or carry out the acts of torture described in the complaint; they did not design or carry out a systematic plan of torture or inhuman or degrading abuse against the prisoners; they did not have any responsibility for the custody of all the prisoners who were in the detention Center; they were not involved in their capture, detention, and transfer to that Center.

- Second, there is no evidence that during the two days when they were at this base, the UCIE agents were involved in this situation. That is, there is no indication that they cooperated, supported, helped, assisted, or cooperated in any way with those who had these persons in custody, with those who may have been involved in the practice of acts of torture, in carrying out torture or inhuman abuse, in the design of systematic plans for such purpose, or in the capture, detention, and transfer to that Center.

- Third, neither is there any evidence whatsoever that UCIE agents have supported this situation, that is, that that have supported the commission of acts of torture or ill-treatment. Certainly, it does not follow from the circumstance that they were officially summoned by the Central Court of Preliminary Criminal Proceedings, or by the Criminal Division of the National Court to appear as witnesses in the investigation and then the oral proceedings held on these facts.



Therefore, it cannot be admitted, as the petitioning prosecution maintains in its brief, in reference to the UCIE agents, the acts of torture and inhuman and degrading treatment that they allegedly may have incurred at Guantánamo "Spanish officials have also likewise been involved."

Finally, there is no evidence whatsoever that would lead to the consideration that these agents, now as witnesses, would have had knowledge of the specific circumstances in which the detention of the complainants and their transfer to Guantanamo took place, or that they would have had knowledge of the events that may have occurred while they were at the naval base, beyond the objective fact that during July 22 and 23, 2002 they subjected the complainants to a voluntarily accepted interrogation.

Moreover, it should be kept in mind that neither the Central Investigating Magistrate, nor the Criminal Division of the National Court, nor the Criminal Division of the Supreme Court, nor the Office of Public Prosecutor, nor, even more revealing, none of the procedural representations of those accused in court cases as of that time, and those claiming status as victims in this case detected in relation to these UCIE officers any indication of such possible perpetration, participation, collaboration, or assistance, even in relation to the situation at Guantanamo, or that they might contribute any knowledge as witnesses about such circumstances.

For all these reasons, in view of the legal and jurisprudential framework previously set forth, and in view of the status of this investigation, the proper course is to refuse to the proceedings proposed by the petitioning prosecution for the same reasons cited by the **PROSECUTOR** which the Investigating Magistrate shares and endorses.

In view of the above-mentioned legal provisions and other general and relevant application, the following

RULING

is issued.

I ORDER

That the proceedings of investigation requested by the procedural representation of Jamiel **ABDUL LATIF EL BANNA**, Omar **DEGHAYES**, the **CENTER FOR CONSTITUTIONAL RIGHTS IN NEW YORK**, and the **EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS in BERLIN**, in their petition of July 6, 2015 not be admitted.

Let notice be given to the parties with standing and the Office of Public Prosecutor.

UNOFFICIAL TRANSLATION



An appeal for amendment may be sought within a three-day period, before this Central Court for Preliminary Criminal Proceedings and/or where appropriate, appeal, with devolutive effect before the Criminal Division of the National Court.

Decided, ordered and signed by Don José de la Mata Amaya, Magistrate of Central Court for Preliminary Criminal Proceedings Number 5.

PROCEDURE. Record to assure that what is ordered is carried out at once. In witness whereof.