ADMINISTRATION OF JUSTICE

UNOFFICIAL TRANSLATION

NATIONAL COURT
CRIMINAL DIVISION
SECTION TWO

N.I.G.: 28079 27 2 2009 0002067

CASE FILE NUMBER: APPEAL AGAINST RULING 321/2015
PROCEDURE OF ORIGIN: CASE (ORDINARY PROC.) 2/2014
BODY OF ORIGIN: CENTRAL COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS NO. 5

RULING

MAGISTRATES
THE HONORABLE
Ms. Concepción Espejel Jorquera
Mr. Ángel Hurtado Adrián
Mr. Julio de Diego López

In Madrid, November 17, 2015

FINDINGS OF FACT

ONE. - A ruling was issued in Case 2/2004 of Central Court for Preliminary Criminal Proceedings No. 5 on July 17, 2015, in which it was decided that no investigation is to be made into the procedures requested by the legal representation of JAMIEL ABDUF LATIF AL BANNA, OMAR DEGHAYES, the CENTER FOR CONSTITUTION RIGHTS OF NEW YORK, and the EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS OF BERLIN, which would consist of checking the identity of the CNP police agents who went to the Detention Center at Guantanamo in order to interrogate several of those held during July 22 and 23 of 2002, and that they be immediately ordered to appear as accused.

ADMINISTRATION OF JUSTICE

TWO. Attorney Javier Fernández Estrada, on behalf of the aforementioned JAMIEL ABDUF LATIF AL BANNA, OMAR DEGHAYES, the CENTER FOR CONSTITUTION RIGHTS OF NEW YORK, and the EUROPEAN CENTER FOR CONSTITUTIONAL RIGHTS OF BERLIN filed an appeal for amendment against that ruling; a ruling was issued on September 2, 2015 by the Examining Magistrate's Court dismissing the appeal filed.

THREE. The aforementioned legal representation filed an appeal against that ruling, and the legal representation of the UNITED LEFT, FREE ASSOCIATION OF ATTORNEYS, AND THE ASSOCIATION FOR HUMAN RIGHTS OF SPAIN joined that appeal.

FOUR. The Office of Public Prosecutor sought dismissal of the appeal presented.

FIVE. Upon filing of the appeal, Hon. Concepción Espejel Jorquera was designated as Rapporteur; the hearing was set for November 10, 2015, in which the appellants and the Office of Public Prosecutor stated their respective claims.

LEGAL REASONING

ONE. – The appealing parties repeat the arguments on which they based their initial petition and the appeal for amendment filed against the dismissal of the investigatory procedures sought, to which the Investigating Magistrate replied in detail. This Court fully shares that reasoning; the appellants merely state their disagreement with regard to those considerations, and indicate that the challenged rulings are based on false premises, but they do not offer

Any evidence to prove the claimed error of the Investigating Magistrate. It is not enough to merely mention generically the duty to investigate, on which they seek to base calling as defendants the officials who in 2002 took some statements from those who are now petitioners, even while recognizing, as they do in the appeal filed, that there is no evidence that would make it possible to infer, even circumstantially, that they may have participated in the torture by the officials who acted in accordance with the orders received from their superiors and who stated repeatedly before the competent jurisdictional bodies, which, had they found any active conduct or omission that could bring those agents into the criminal realm, would have drawn suitable testimony from individuals to be investigated.

As noted by the Examining Magistrate, neither the Central Court, nor the Criminal Division of the National Court, nor the Criminal Division of the Supreme Court, nor the Office of Public Prosecutor, nor any of the legal representatives of the then defendants and plaintiffs in this case, detected any responsibility as perpetrators, participation, collaboration, or support on the part of the UCIE agents with regard to the situation existing in Guantánamo, nor did they claim that they could provide any eyewitness knowledge on such circumstances.

In this situation, we must state that the refusal to call into court as accused officials on whom there is no evidence to support that decision can in no way violate the right to effective legal protection of the accusing parties, which does not include that of obtaining a decision in accordance with the claims formulated, nor does it support a particular interpretation of the law applicable to the case, but only that of receiving a judicial response to their claims, argued and based on Law, S.T.C. 11-11-1996, which cites S.s. T.C. 9/1981,

33/1988, 133/1989, 18/1990, 52/1992 and 111/1995, and analogously Ss.T.C. 15-1-1998, 20-9-1993. Likewise ATC 246/2007 (May 22), which cites SSTC 106/2005 (May 9) and 196/2005 (June 18), a reply with reasons which has been given by the lower court judge, both in the ruling rejecting the procedure, and in the dismissal of the appeal for amendment, the arguments for which we consider to be reproduced in full herein.

TWO. Furthermore, it should be noted that the TS and the TC have provided abundant legal doctrine declaring that the right to evidence is not absolute or unconditional, nor does it deprive judges of their powers to assess the relevance, necessity, and possibility of gathering the evidence proposed, and hence of proceeding to admit or reject it (SSTS January 27, 2014, March 7, 2013, and October 21 2008). Accordingly, the judiciary does not have to admit all the evidence requested by the parties, nor is it obligated to fully process what is admitted, inasmuch as, with regard to the former, the means proposed must be relevant, that is, apt for providing useful, opportune, and suitable results, and with regard to the latter, it must be necessary, that is, mandatory, obligatory, the processing of which is obligatory in order to avoid producing denial of due process (STS June 4, 2014). Ruling along this same line are ATC 228/2008 (July 21) and STC 208/2007 (September 24), which add that it falls to the courts to examine the necessity and relevance of the evidence requested, and that not every irregularity or procedural omission with regard to evidence (having to do with admitting, processing, and assessing it, etc.) in itself is ground for constitutionally relevant denial of due process, inasmuch as the constitutional guarantee contained in art. 24.2 CE solely covers those situations in which the evidence is decisive in terms of defense, in the sense that that, had the evidence omitted been processed, or had the evidence admitted been processed properly, the final ruling of the case might have

been different; and hence the appellant must argue convincingly that the final ruling of the case could have been favorable to it had the disputed evidence been accepted and processed, STS April 28, 2014, and STC 142/2012 (July 2), which cites STC 14/2001 (February 28). Requirement of material lack of due process and need for the activity not carried out and requested in due time and properly to be potentially important for the ruling of the dispute, which reiterates ATS of September 13, 2012, which cites SsTS September 24, 2004, and June 23, 2003, and SsTS May 12, 2015, June 19, 2012. Requirement of material lack of due process and need for the activity not carried out and requested in due time and properly to be potentially important for resolution of the dispute, which reiterates ATS of September 13, 2012, which cites SsTS September 24, 2004, and June 23, 2003.*

In the matter before us, as stated by both the Investigating Magistrate and the Office of Public Prosecutor, the aforementioned requirements of relevance and utter necessity, are not present. Those requirements must be examined in light of the purpose of the Procedures and of the scope of the subjects against whom the procedure is directed, which was defined as, "the persons who had under their protection and custody those detained, those who authorized or carried out the acts described, all of them members of the American Army or Military Intelligence, and all those who carried out and/or designed a systematic plan of torture or inhumane or degrading abuse against the prisoners that they had under their custody, who had been captured within the armed conflict declared in Afghanistan, and who were accused of being terrorists."

Contrary to what is claimed by the appellants, the officials who are being accused did not personally have under

* [sic; this sentence textually repeats the previous sentence, except that the latter has two more citations]

their protection and custody the detainees whom they questioned; 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 inhumane or degrading abuse against the prisoners; they had no responsibility whatsoever over the custody of all the prisoners who were at the Detention Center; nor did they take part in their capture, detention, and transfer to that Center.

Nor has any objective indication whatsoever been put forward that during the two days when the UCIE agents were at the Guantanamo Military base, they cooperated, supported, assisted, aided, or collaborated in any form with those who had custody of these persons, or with those who may have been involved in performing acts of torture, in carrying out torture or inhumane abuse, in the design of systematic plans for that purpose, or in the capture, arrest and transfer to that Center.

Nor is any information whatsoever offered to support the mere presumption made by those objecting that the agents assisted in any fashion the commission of acts of torture or mistreatment. Indeed, nothing supports the gratuitous claim that the Spanish officials were aware of the concrete circumstances in which the arrest of the complainants and their transfer to Guantanamo took place, nor of the deeds that may have taken place while they were at the naval base. Such knowledge does not derive from the single objective fact established, namely that on July 22 and 23, 2002, they subjected the complainants to a freely accepted interrogation, on very specific matters for which they were commissioned.

The fact that the interrogations carried out by two Spanish police officials were declared null and void by the

TS, which argued that the statement "lacks evidentiary value in itself" because "it took place outside the already existing criminal process and that he was not informed of his rights as accused and was prevented from being assisted by an attorney"* does not entail the participation by act or omission of the officials in the crimes of torture, especially when, as stated in the Ruling itself, the detainees freely offered to answer the questions of the police agents, as declared not only by the police but the individual in question, when a preliminary statement was received from him at Central Court for Preliminary Criminal Proceedings number 5.

As has been stated, the only thing established is that the agents went to Guantánamo to take particular statements on very specific questions, in the context of the Treaties of Criminal Assistance signed with the United States. Furthermore, they questioned the detained in the presence of a Spanish diplomatic representative and when they returned to Spain they immediately reported on the result of their mission and presented ample repeated court statements on those facts; they related what had happened and they answered all the questions presented to them by those taking part in those statements.

Accordingly it is clear, that not only are there no indications that the officials against whom culpability is being sought actively took part in the torture being denounced, but likewise there is no evidence whatsoever being presented that would allow for posing the modality of commission by omission as set forth in art. 176 of the C.P., which legal definition requires knowledge of the conduct that produces the duty to act, the possibility of acting, and omission of the proper conduct.

* [sic- subject changes to singular]

ADMINISTRATION OF JUSTICE

As the Office of Public Prosecutor stated in its reports, the agents who merely went to take some statements made freely by the detainees at the military base did not violate a presumed duty of vigilance which is proper to higher-ranking superiors of those engaging in abuse; they were not charged with any position of being protectors of those detained, which was the case with respect to the American military forces; they were being held at a facility under the custody of those forces, over which they had no power of decision. No evidence is put forward to support some "consent or acquiescence" on the part of the Spanish officials, who, in fact, had no organic and functional relationship with the military personnel who made the arrests and were charged with custody of the detainees. Hence, they had no specific duty to act by actively opposing the confinement of the complainants; they were not even in a position where they could really prevent it or not allow it, as stated by the Investigating Magistrate.

It should be kept in mind as stated by the ruling deciding the appeal for amendment that there is no evidence whatsoever that the requirements necessary for commission of the crime indicated by the STS 19/25 (January 22) are present.

Nor does it follow from the mere circumstance of having taken specific declarations for two days in June 3, 2002 from persons held at Guantanamo that there was knowledge of the criminal activity that took place there, nor of the special malice demanded by the criminal definition in art 408 CP, which requires that the public official be aware of the commission of a criminal act, and who nevertheless, and with bad faith, abstains from doing what the Law requires that he do, i.e., pursue it.

Nothing indicates that such can be asserted with regard to two agents who obtained the statements under the mechanisms of international cooperation provided for in the Treaties of Criminal Assistance signed with the United States and by virtue of the decision made by their superiors, which excludes awareness of the unlawfulness of the conduct of the custodians of the complainants at the Guantánamo base.

As stated by the Investigating Magistrate, the tasks of the agents in no way included inspecting, checking, or evaluating the conditions which led to the internment of the prisoners at the American military base; there is no indication that they performed such activities directly or indirectly; that they interrogated the complainants about those circumstances or that the complainants informed them about the conditions in which their internment was taking place.

This court also holds that, as indicated in the ruling being appealed, it is highly relevant that the agents provided all the information obtained in a timely way, and submitted repeatedly to "lengthy statements in court" on everything they were able to observe during their stay in Guantanamo, and, what is essential, that neither then nor during the next thirteen years, was any further information sought of them about what happened during those days by any authority or official or by the complainants themselves. That rules out the slightest indication that the agents were guilty of obvious, manifest and complete dereliction of duty, or that they had the malicious intention of twisting the law, neglecting the obligation to pursue a crime.

ADMINISTRATION OF JUSTICE

THREE. - Finally, it should be recalled that from art. 622 LECR it is clear that when sufficient elements have been gathered to legally classify the events and to enter into the oral trial procedure "with no further delay" the proceedings shall be sent to the proper Court. That requirement also indicates that the appraisal about that procedure falls to the Investigatory Magistrate, and it notes that if the Investigating Magistrate regards the Inquiry as closed, he shall so declare, and send the rulings and the evidence to the Court competent for trying the crime.

Consequently, after the essential procedures sufficient for the purposes indicated have been carried out, the investigatory phase should be concluded, avoiding undue delay, which will be to the benefit of all parties.

Given the purpose of these procedures it should not be admitted that in the case before us the procedures requested are necessary or essential for continuing the case. That conclusion stands even though no reply has been received from the Letters Rogatory sent to the United States; that situation is not sufficient to call into court as suspect persons against whom no proof of criminality is provided, unless new data should arise from these or other proceedings, which, as required by the Criminal Law are not based on mere conjectures.

Consequently, the appeal for amendment must be dismissed, thereby fully confirming the ruling appealed.

THE COURT RULES: To dismiss the appeal filed against the ruling as referenced above and the adhesion of other parties; confirming fully the ruling challenged, with no imposition of costs since none have been incurred.

ADMINISTRATION OF JUSTICE

Let the parties be notified of this ruling; informing them that there is no appeal of this ruling, and a notarized copy shall be made so that it can be sent to the court from which it came.

Thus by this our ruling, we so decide, we so order, and we sign.

PROCEEDING. – What is decided takes immediate effect. In witness whereof.