



TRIBUNAL CONSTITUCIONAL
Gabinete del Presidente
Oficina de Prensa

NOTA INFORMATIVA Nº 87/2013

THE CONSTITUTIONAL COURT HAS DISMISSED AN APPEAL FOR CONSTITUTIONAL PROTECTION REQUESTED BY ATUTXA, KNÖRR AND BILBAO.

The Plenary Commission of the Constitutional Court has dismissed the appeals for constitutional protection filed by the former president of the Basque Parliament, Juan María Atuxta and the members of the Basque Parliament, Gorka Knörr and Concepción Bilbao against a sentence given by the Supreme Court for an offence of contempt. They had been previously acquitted by the High Court of Justice of the Basque Country (TSJPV). The Senior Judge, Enrique López acted as the rapporteur. The Vicepresident of the Constitutional Court, Adela Asúa and the Constitutional Court judges Juan Antonio Xiol, Fernando Valdés and Luis Ignacio Ortega issued a dissenting vote.

In their appeal, the appellants claimed that a number of fundamental rights had been breached, such as the right to equal treatment of all citizens by the Courts on the grounds that the rapporteur judge of the Supreme Court had forfeited his "*objective impartiality*" considering that the Supreme Court had upheld a criminal complaint filed by a number of citizens at their own initiative, contradicting the decision reached by the Second Division of the Criminal Court in another case; and finally the right to a fair trial with all guarantees and the presumption of innocence had been breached, because the accused parties had been convicted without having been heard.

The Plenary Commission of the Constitutional Court has dismissed as untimely the plea moving for the removal of the rapporteur judge who convicted them. The Court considers that the fact that rapporteur judge had formerly been the Head Prosecutor of the Technical Secretariat of the State Prosecutor does not imply that his impartiality may be questioned because his appointment to such position took place one month after the Prosecution had filed a writ of indictment against the appellants and also because this judge was not involved in the proceedings arising from such indictment.

The ruling also dismisses the claim that the right to equal treatment by the Courts has been breached because according to the doctrine of the Constitutional Court, "*what the principle of equality forbids when applying the law is any arbitrary or irrational change*". And in this case, the Court adds, "*it may not be said that the challenged sentence was delivered on an arbitrary or irrational basis regarding an identical precedent, or that the ratio decidendi was only valid for this specific case, without aiming for a standard of permanency and general application*".

In third place, the Plenary Committee examined if the right to a fair trial with all legal guarantees had been breached as a consequence of the conviction imposed by the Supreme Court in second instance without having heard the accused

parties. The ruling by the Constitutional Court quotes the "*consolidated doctrine*" of the Court whereby "*no constitutional reproach attaches to a conviction given on appeal*" when it does not amend the facts as found of the sentence delivered in first instance but simply judges them under a different light.

In this case, the Constitutional Court adds, the challenged sentence "*did not alter the factual support which was the basis for the judgment delivered by the competent court and it did not review or amend such facts, it simply considered that the legal consequence arising from them was different*". In light of the facts as found in the absolute sentence issued by the High Court of Justice of the Basque Country, the Supreme Court considered that the appellants for constitutional relief were not exempt from criminal liability. In other words, "*all the elements required from the actus reus of the offence*" construed as contempt effectively concurred. "*The reasoning of the Supreme Court - adds the ruling - is limited to legal issues, i.e., the construction of a criminal provision and the circumstances required to exclude a breach of the law, without altering the facts as proven of the case, and therefore the right to a fair trial with all guarantees was not breached*".

The Constitutional Court dismissed the view that the Supreme Court when revoking an absolute sentence is obliged to hear the appellants. According to the legal doctrine of the Constitutional Court "*when from the facts as proven in the first instance court, the core of the dispute between the absolute and condemnatory sentence lies in a strictly legal matter, it is not necessary to hear the accused party in a public hearing in order to deliver a sentence*". The Plenary Commission also cites case law supporting this view from the European Court of Human Rights.

In conclusion, in its ruling the Constitutional Court considers "*that it was not constitutionally required that the appellants should have been heard in the cassation hearing, and such omission, in view of the matters filed by the prosecution and which were to be decided on appeal did not entail any exclusion or limitation of the right of self-defence, because even if a hearing had taken place, it would have not had any impact on the decision adopted*". "*Or as may be gathered from the judgment delivered by the European Court of Human Rights on October 22, 2013 - Naranjo Acevedo v. Spain case -, the testimony of the appellant in a public hearing was not essential*".

Finally, the Constitutional Court does not consider that the legal presumption of innocence has been breached because the facts as proven considered by the High Court of Justice of the Basque Country were not modified.

The dissenting judges, in their turn, consider that constitutional relief should be granted to the appellants because after being acquired by the High Court of Justice of the Basque Country, the Supreme Court convicted them without immediacy and amending in second instance the interpretation of the facts related to the subjective element (*mens rea*) of the offence.

Madrid. December 5, 2013.