

TRANSLATION

FIRST-INSTANCE CRIMINAL COURT NUMBER FIVE NATIONAL ADMINISTRATIVE COURT

PROCEEDING Previous D. 161/00-D

WRIT

In MADRID, on the twenty fourth of May of two thousand two.

FACTS

FIRST.- On 25.04.02 writ is issued whose resolutive part, among other decision reads as follows:

1. **NOT CHARGE** Mr. Estanislao Rodríguez Ponga.
2. **NOT CHARGE**, for the time being and at the expense of the pending processes in the operation identified by the Public Prosecutor's Office as "**PERU**", Mr. Emilio Ibarra y Churuga, Mr. Pedro Luis Uriarte Santamarina, Mr. José Ignacio Goirigolzarri Tellaeché, Mr. Mario Fernández Peláz, Mr. Luis Francisco Bastida Ibarguén and Mr. Rodolfo Estenba Molinuevo Orue.

SECOND.- In time and form the District Attorney's Office, appeals said resolution requesting that "appeal for reform against writ 25.04.02 be considered as filed and that such decision be partly revoked by adapting it to what was provided on 22.04.02".

THIRD.- The parties representing Mr. Carlos Declaux, from BBVA, Mr. Pedro Luis Uriarte and the Counsel for the State have objected the appeal made by the District Attorney's Office according to the arguments recorded in the May 12 and successive writs.

LEGAL REASONING

FIRST.- First of all, each and every one of the issues and arguments set in the writ and of course, the resolutive part of the resolution now being objected must be ratified.

The District Attorney's Office, without entering into the assessments, certainly not adapted to the appropriate procedural hermeneutics, made with respect to the instructor's decision, arrogates itself the exclusiveness of determining who should and who should not be summoned as accused in this case, alleging therefore the requirement and need of the guarantees of art. 118 of the LECrim, for those who have not been, but, nevertheless, does not describe the detriment and encumbrance which such summons implies, when the accusation or reference on which the request is based and which would

have to be made by the decision, is false, inaccurate or inconsistent, either because of the untruthfulness of the witness, or lack of coherence and definition of the depositions, or the inaccuracy of the data, or else because other elements distort what has been declared. When it does occur, in any of the cases – to base oneself on the sole deposition of a witness may be arbitrary, or at least, risky.

The Examining Magistrate is the guarantor of the legality of the process and that it be carried out through the processes determined by the law (art.299 and subsequent ones and 784 and subsequent ones of the LECrim), and in such position and with a strictly temporary scope, must assess the evidence, data, elements, depositions, documents, etc., and apply it, in his resolutions to those points that are the subject of investigation and to the individuals involved. None other is the sense of the Writ of the Criminal Court of the Supreme Court of November 14, 1996, special case 2530/95, mentioned by one of the counsels for the defense.

SECOND.- In this initial assessment whose result is recorded in the writ of April 25, one has taken into account the level of reliability of the protected witness, the coherence of his depositions and the fact that these be supported or not by other elements of evidence, such as documents, analyses, banking information or the like, given the complex nature of the allegedly criminal facts being investigated.

Thus, the depositions of the protected witness of November 14-16, 2001, in Madrid, before the examining Magistrate, and of March 25 and 26, 2002 in San Juan, Puerto Rico, in Letter Rogatory should be separately analyzed and therefore, assessed, for the purpose intended.

A) with respect to the “charges” to Mr. Rodríguez Ponga:

This section of the appeal practically constitutes the entire argument of the District Attorney. Thus, the references made to this alleged accused in those depositions by the witness, appear on Pages 150 to 153, starting on line 14; pages 169 to 170, lines 169 and 170 of the deposition in Puerto Rico, and pages 650 and 651, lines ...last and 7 first ones of the deposition made in Madrid.

This being the contents of the deposition, it would be necessary to confer, on the basis thereof, the capacity of accused to any person, whether public or private, with or without accusation, which would simply be mentioned in a case. That is, it would be arbitrary to charge a person, with respect to which the witness makes some generic, inconsistent and unreliable statements, compared to this point, as has been subsequently proven, not only as a result of the deposition by the witness, Mr. Rodríguez Ponga, but also the documents contributed by the bank, along with the date on which Mr. Rodríguez Ponga left the bank in February 1997 and the date (December 1997) of the so-called Manual of Fiduciary Products, in addition to the deposition made today in this respect by Manuel López López.

Precisely, because the examining magistrate has been present in the depositions of the witness and has carefully and strictly examined them, he has made the decision now being contended by the District Attorney.

At this time of the process, only on the basis of working hypothesis or game of probabilities in which this examining magistrate will not participate, one could charge a person that apparently has not relationship with the process.

It is true that the judge should not delay recognition of the status of accused, but it is well understood that this is applicable when there is an objective and minimum base for such decision, which is not the case here, unless it be on the basis of granting the gift of infallibility to a witness whose deposition does not now appear as consistent as it was initially shown, at least and for the time being, in this aspect.

THIRD.- In no way is the decision of the Examining Magistrate of conferring initial credibility to a witness on certain aspects and not on others contradictory and in this respect, the issue raised by the District Attorney in the appeal, does not correspond to the procedural reality of the case.

The release of the letters rogatory, including the one made in Puerto Rico, has been precisely carried out to verify the veracity or lack of veracity of the witness's deposition and, in this sense, given the accusation he makes, the Examining Magistrate's obligation is to verify the details to which it refers, as well as to analyze and assess the documents provided, inasmuch as those facilitated are mere photocopies which, at present, have not been compared to their original or registry wherein they are found. Therefore, it appears that the only way for achieving this is through the Letters Rogatory which is currently being translated.

However, what does seem clear in the witness's deposition is the lack of consistency of the accusation, done merely in a self-willed manner, by reference or by conviction, with respect to an alleged special participation of Mr. Rodríguez Ponga in the events, which is not sustained.

As for the statement made by the District Attorney with respect to the sending of a letter to the Honorable Secretariat of Justice, informing it that the Governor of Puerto Rico is not subject to investigation, it is neither understood nor the District Attorney explains why such circumstance is brought to bear, when the District Attorney himself has reported in that respect (p. 953). As for the rest, one should not lose sight of the fact that it is the obligation of the Judge not to allow a criminal case to be used for achieving spurious purposes, unrelated, of course, to the District Attorney's Office-, by disseminating the notion that there are persons being investigated when it is actually not so. The protected witness's deposition has nothing to do with the true, evident and verified fact that the Honorable Governor Mrs. M. Calderón is not the subject of investigation. To this end, one cannot nor should give coverage to the insinuations which the protected witness slips at this point, with which detail the District Attorney appears to be in agreement with the Examining Magistrate on

not requesting the accusation of the latter and of other persons that appear in the aforementioned deposition.

Concluding this section and by way of summary:

- a) From the analysis of the depositions of the protected witness,
- b) From the analysis of the documents provided by BBVA,
- c) From the separation of dates between the departure from the Bank of Mr. Rodríguez Ponga and that of the so-called Manual of Fiduciary Products, and,
- d) From the analysis of the latter's deposition, **it is inferred, that at this moment of the process, there is not, although this does not necessarily mean that there might be in the future, a single rationally reliable data for the accusation requested by the District Attorney and that, regardless of the nature and position held by the person affected, which in any case cannot tacitly constitute, as the District Attorney claims, an argument that may lead to his accusation.**

FOURTH.- Lastly, a brief comment on the District Attorney's mention of the writ 26.06.2001 of case 5/001 of this Court, known as the "Asunto del Lino" (Linen Affair) where a specific person was accused.

The mere mention made of the assumption shows the weakness of the arguments of the District Attorney's Office to uphold its position, inasmuch as one should begin by saying that the District Attorney neither objected, or resorted or adhered to the appeal vis-à-vis said accusation; one should continue with the affirmation of something evident, that said case has nothing to do with this one, neither in the objective or subjective part; and it should be concluded by manifesting that the Judge in said case, and in the light of the petition and concurrent circumstances, considered the need to call a person as the accused; as is the case now, and for the aforementioned reasons, does not consider it legal or necessary to call someone as accused, given the lack of a factual and legal basis for doing so.

FIFTH.- With respect to the second petition which the District Attorney calls "postponement of specific accusations", the District Attorney's Office does not reasonably explain the objection, beyond generically referring to the first section of its writ, for which reason it is to be inferred that it is referring to the decision, according to it, contradictory, of this Court, to compile facts in order to send Letters Rogatory and not do so for accusing the persons as requested by the District Attorney. And, in the second place, the request is based on the alleged lack of application of art. 24 of the Spanish Constitution, so as not to generate lack of proper defense from non-accusation.

Again, the District Attorney's Office, disregards what constitutes the very essence of the proceedings, in the light of articles 13, 299, 300, 311, 784 and subsequent ones of LECrim., that is, verify the data of the accusation made by the protected witness, and to compare the photocopies on which his deposition is based with the originals.

In fact, the Court, compiles an incriminating account that precisely originates from those accusations and what it should do is to expand the investigation as it has done through writ of March 5, 2002, with respect to facts appearing therein, or to transmit the facts to another jurisdiction as that of Peru, through writ of April 16, 2002. Then, on the basis thereof, try to verify their veracity or falsehood, before addressing the action against persons who might not be responsible; or, in any case, verify through evidence and not only by means of photocopies; bear in mind that we are faced with misdeeds of economic contents, wherein the documents, accounting notes, accounts, etc., are essential-, the events that have been denounced.

Precisely in these dynamics, the court has agreed to request data, documents and elements proving the illegalities denounced through Letters Rogatory and the bank's documentation (report 25.4.02). The latter shows a factual reality that may be different to the account given by the witness and which cannot be analyzed in a manner unrelated to that described in the appeal's objection writ filed by BBVA's court representation.

The lack of specification in the witness's depositions, the lack of original or attested documents; the documents provided by BBVA; the documents provided by Marco Royo Anaya, and the lack of momentaneous reply to the Letters Rogatory sent to Peru, renders the current accusation of specific persons, for specific offenses, in this section neither viable or feasible, or procedurally correct in the light of articles 118 LECrim, and 24 of the C.E.

In view of the above and considering the aforementioned articles and others of pertinent and general application.

I DETERMINE:

TO DISMISS the appeal for Reform filed by the Most Illustrious District Attorney, against the resolution of April 25, 2002, which is maintained in all its terms.

Let this resolution be notified to the parties involved, as well as to the District Attorney's Office.

It is thus agreed, ordered and signed by Mr. BALTASAR GARZON REAL, SENIOR JUDGE.of the First-Instance Criminal Course No. 5 of Madrid. I attest.

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ACTION.- That which has been agreed is immediately fulfilled; I attest.