[Seals of the Justice Administrations]

PROVINCIAL COURT, SECTION NO. 2
A CORUÑA

ORDER: 00126/2021

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RT APPEAL PROCEEDINGS 0000072 /2021

Court of origin: NO. 2 COURT OF FIRST INSTANCE AND INSTRUCTION OF NOIA
Proceedings of origin: PRELIMINARY INVESTIGATION IN SUMMARY (CRIMINAL) PROCEEDINGS NO. 0000223/2017

Offence: FALSEHOOD IN PUBLIC DOCUMENTS

Complainant: ASOCIACIÓN VERDEGAIA
Attorney: [REDACTED]
Lawyer: [REDACTED]
Against: LAWYER OF THE [AUTONOMOUS] COMMUNITY [OF GALICIA], [REDACTED], PUBLIC PROSECUTOR'S OFFICE

ORDER

ILLUSTRIOUS PRESIDENT MS.
[REDACTED]
ILLUSTRIOUS MAGISTRATES
[REDACTED]

Given in A Coruña, on the fourth day of February in the year two thousand and twenty-one.

THE SECOND SECTION OF THE PROVINCIAL COURT OF A CORUÑA, made up of the distinguished **MAGISTRATES** listed at the margin, has handed down the present decision on the basis of the following

FACTS

FIRST.- In the Court of First Instance and Preliminary Investigation No. 2 of Noia, Preliminary Proceedings No. 370/2019, for an alleged offence of forgery of public documents, are ongoing.

SECOND.- The Investigating Court, by Order dated 10/07/2020, dismissed the appeal for reform lodged against the Order of 27/01/2020, and an appeal was lodged by the procedural

representation of Asociación Verdegaia, which was sent to the registry and distribution office of the Provincial Court of A Coruña, and was passed on to this Second Section and registered as appeal (RT) No. 72/2021.

The **Reporting Magistrate is the Illustrious** [REDACTED].

LAW

FIRST.- The request set out in the appeal, moreover, given the approach taken, must be understood, from a procedural point of view, to be unprecedented.

The order issued on 27 January 2020 limited the subject matter of the proceedings, after obtaining a report from the Public Prosecutor's Office, to a possible offence of falsehood in public documents, on the understanding that the other facts reproached in the complaint had been assessed, or were being assessed at that time, in another proceeding.

The complainant, now the appellant, constituted as private prosecution (and did it have standing to do so, or could it only have exercised as popular prosecution?), disputed the decision by lodging an appeal for reform, later dismissed, giving rise to this appeal, on the basis of an essential argument, it identified a series of specific facts which it is explained would not have been the object of that previous procedure, in such a way that a parallel course of action would be conceivable.

However, in order to present the argument, the appellant, as far as the facts are concerned, carries out a dissection work that is typical of sciences of a very different nature. For, as argued in the various challenges to the appeal, what cannot be sought, in order for the current application to be viable, is to separate the different aspects of the same problem, the different irregularities that would have been projected on the same essential issue, analysing the hypothetical responsibilities of each of them in isolation.

In any case, the party's own actions provide the key to this resolution, since, first, it defended the different nature of the different facts in order to enable the assessments of each procedure to be carried out, so that each of them would be successful. But then, with its pleading filed on 5 February 2020, having frustrated the progress of the first, it sought to have its object incorporated into the second due to the intimate connection.

That is, one thing and the opposite, and that cannot be.

The truth is that, as is also analysed in detail in the challenges, and apart from the fact that there are even coincidences in the content of the allegations that determine one and the other proceedings, the problem is essentially the same: the facts that are intended to be introduced in the current proceedings, beyond the alleged falsehood, should have been assessed, due to their intimate connection, together with those of the first proceedings, and therefore in the first proceedings.

SECOND.- And then it only remains to say, forgetting the initial reproach contained in the appeal relating to the lack of a report that we do not know what procedural regulations requires it, that, in the sense in which the challenges are again presented, especially the one formulated by the Legal Counsel of the Xunta de Galicia, which includes a precise case-law citation, that the path that is sought to be followed is not possible.

We also make a case-law citation, reproducing some paragraphs of the Judgement of the Supreme Court of 11 February 2014, ROJ STS 482/2014, although previous in time to others that are mentioned, which contains some significant statements, which we highlight graphically.

It states,

"... Our jurisprudence has indicated that the provisional dismissal of criminal investigation proceedings may be subject to reopening of the proceedings when new data or elements, acquired subsequently, make it advisable or necessary. Judgement of the Supreme Court of 19 February 2013. In the Judgment of 10 October 2012, we recalled that the reopening of proceedings that have been dismissed is appropriate as the dismissal order does not produce the effects of res judicata and can be reopened by the same body. The reopening of the proceedings once the order for provisional dismissal has become final depends on new evidence not already in the case being produced. In this way, as we said in the Judgement of the Supreme Court 189/2012 of 21 March, the provisional dismissal has two aspects. One that cannot simply be modified when the order has become final, which is the one referring to the insufficiency of the evidence in the case to allow the prosecution to proceed. The most traditional of our procedural doctrines has understood the concept of dismissal in this sense, defining it as "the fact of ceasing the procedure or course of the case because there is insufficient merit to go to trial". The order also contains another aspect that authorises its modification subject to a condition: the provision of new evidence. In other words, the final order of provisional dismissal closes the proceedings, although it can be rescinded if certain conditions are met.

The question raised by the Public Prosecutor's Office in its challenge is to decide whether the provisional stay of proceedings can be annulled once the decision has become final and what is required for the proceedings to be reopened.

It is clear that **this provisional dismissal of the proceedings may give rise to problems of legal uncertainty for the person affected by the initial investigation**, who may be faced with the possibility of a reopening of the proceedings. **This limitation of their expectations of security is compensated by the requirements of new information that can be considered as elements not previously taken into account in the decision to close the proceedings. Failure to understand it in this way could mean that a prosecution's negligence or error, by not assessing pre-existing data, allows it to reconsider it later in order to request, and adopt its reopening, to the detriment of the safety of the person under investigation**. It is for this reason that in our case law we have stated that the provisional dismissal allows the proceedings to be reopened "when new information subsequently acquired makes it advisable or necessary". This means that the reopening of the proceedings once the order for provisional dismissal has become final depends on new evidence not already in the case being produced.

As we said in the Judgement of the Supreme Court of 30 June 1997: "It is also clear that the Prosecutor's error in the study of the case cannot be grounds for depriving the accused of the procedural right to have the proceedings reopened only when new elements of proof are presented. In effect, the order whose validity is questioned, rather than reopening the proceedings in the implicit sense of art. 641 Criminal Procedure Act., what it does is to grant the prosecution a new right to formalise the accusation after its explicit renunciation to do so at the appropriate procedural moment. Such a duplication of opportunities in favour of the prosecution is incompatible with the interdiction of subjecting the accused to a double jeopardy, given that it allows the Prosecutor to have passed up the possibility of accusing and then, for no other reason than his own error, to reopen the proceedings without new evidence. If the

provisional dismissal raises doubts from the point of view of the right to the presumption of innocence, these doubts are multiplied to the maximum if it is understood as a judicial decision that allows the proceedings to be reopened against the accused, as if it were an appeal for review to the detriment of the accused. In this sense, the Judgement of the Constitutional Court 41/97, of 10-3-9, has pointed out that "the Criminal Procedure Act., in arts. 954 and following, only admits the appeal for review in favour of the accused, as in other continental systems."

That this legislative decision is the result of constitutional considerations, deeply rooted in respect for fundamental rights and the superior value of freedom, is shown by the simple fact that the 5th amendment to the American Constitution includes the prohibition of subjecting the defendant to a "double jeopardy". Likewise, in the Judgement of the Supreme Court 35/96, of 27-1-96, it was held that "it is clear that, given the lack of protest by the Public Prosecutor's Office to comply with the principle of publicity, it is not possible now to retry the accused to give the prosecution a procedural opportunity which it had and, nevertheless, did not exercise in time and form. The prohibition of "double jeopardy", i.e. the double jeopardy of conviction (...) is not expressly stated in the Spanish Constitution, but it is undoubtedly implicit in the idea and tradition of a trial with all the guarantees of Art. 24.2 of the Constitution, therefore, as a fundamental right".

In other words, the failure of a procedure, which could be reopened if the conditions were met, does not justify the fact that a subsequent procedure deals with closely related facts, if they are in any way different. (The mention of the criminal group is also significant in this respect, in the sense that we have mentioned earlier; first it was argued that separate proceedings were possible due to the different object, but then it was claimed, once the first proceeding was dismissed, to bring the person under investigation to this second one, accusing him of the same crime as in the first one and for forming part of a criminal group with those investigated in the second, in other words, facts that were first unconnected but then carried out by a criminal group).

The claim that has been formulated, and independently of the issue of falsehood, in relation to which the controversy has not arisen, should have been channelled, as is also reasoned in the challenges the appeal, especially in that of the Xunta de Galicia legal counsel, again, in the first procedure, extending the complaint at the time, then requesting its reopening, if, as we have already said, its conditions could be met.

The appeal will be dismissed, although the resulting costs will be declared ex officio.

In short,

OPERATIVE PART

We dismiss the appeal lodged by the Attorney [REDACTED], on behalf of Asociación Verdegaia, against the order of the Court of First Instance and Preliminary Investigations Nº2 of Noia of 10 July 2020.

We declare ex officio the costs arising therefrom.

No ordinary appeal may be lodged against this decision.

Thus by this Order, it is agreed and signed by the aforementioned Magistrates, to which I, Legal Advisor of the Administration of Justice, attest.