

CASE No. APNSD-267-14

Facts

The defendant was deemed to be involved in the smuggling of a woman from El Salvador to Denver, Colorado (United States) via Guatemala. Specifically, the migrant contacted a local man, who put her in contact with other individuals that could assist in her journey. With one of these men – so-called Don Pancho – she agreed a price of 7000 USD, of which 3500 USD were paid in advance. Don Pancho informed that on the day of the journey, another man – the defendant – would pick her up at her residence, guide and accompany her to the border of Las Chinamas (El Salvador). Other individuals would be awaiting for her in Guatemala so as to proceed with the smuggling venture. On the agreed date of 12 June 2013, the migrant and the defendant travelled by bus from San Salvador (El Salvador) to Las Chinamas. The border control officers became suspicious of the situation and, upon further inquiry, detained the defendant.

The Investigative Judge dismissed the accusation for migrant smuggling presented by the Public Prosecutor against the defendant. An appeal followed.

Elements of success

- Contextual assessment of migrants' testimony
- Corroborating evidence

Challenges

- Assistance and support to smuggled migrants
- Fragmented interpretation national law

Background

In dismissing the accusation lodged by the Prosecutor, the Investigative Judge considered that the main witness (the smuggled migrant) had initially implicated the defendant as the person that would guide her in the smuggling venture (at least into Guatemala). However, at a later hearing she changed her statement. Furthermore, the witness could no longer be located (despite the initiatives of the Public Prosecutor to that effect), which would make presume she did not wish to cooperate with justice. The reason thereof remained unknown. Against this background, it was not possible to sustain the likelihood of the defendant's criminal responsibility.

Key issues

- ❖ Evidence
- ❖ Migrants as witnesses

Investigation

During questioning, the migrant stated the facts as exposed above. However, during the initial hearing before the Investigative Judge, she reversed her statement implicating the defendant. Notably, she declared not to know why she had been called to testify or made off the bus because she had had no relation to the defendant, except for the fact that

she had made acquaintance with him during the bus trip.

In ascertaining the facts, authorities relied much on testimonial evidence given by the migrant, as well as police and border control officers.

Reasoning

The Prosecution appealed against the dismissal of the accusation, arguing that the Investigative Judge had overlooked the fact that external factors could justify the change in the statements of the witness (e.g. coercion, promise of financial compensation). In addition, the value of testimonial evidence should and would be assessed at trial. Likewise, the Investigative Judge would have failed to duly consider other relevant evidence, such as the testimony of police and border control officers involved in the detention of the defendant. Finally, the fact that the witness could not be located at the time may not per se ground the assumption that she did not wish to collaborate as the Investigative Judge could not evaluate external factors and or personal circumstances that may have affected her will and or availability.

On appeal, the Court held that the last statement of the migrant in the pre-trial hearing at stake was not a legally admitted proof; rather, it was an “*intervention*” acknowledged to the victim as per Article 106 Code Criminal Procedure (in the context of victims’ participation in criminal proceedings). It could not be valued as evidence since it is not an investigative act.

The reasons for which the migrant may retract her statement with the purpose of

protecting the alleged perpetrator are multiple: e.g. belief that the defendant made him or her a favour, fear, wish to reach a settlement.

There was additional evidence supporting the initial version of events submitted by the migrant, notably the statement of border control officers and law enforcement agents involved in the detection of the crime and detention of the defendant. Even if this were not the case – and the Court had to rely exclusively on the statements of the witness –, her contradictions would give rise to doubt. Doubt is not a reason to dismiss the accusation lodged by the Prosecution against an alleged perpetrator. It is for the court of first instance (in trial proceedings) to decide the value to afford to the statement of the victim/witness in view of her contradicting declarations during the pre-trial phase. The Investigative Judge may not conclude from the impossibility to locate the witness that she is unwilling to cooperate or that this is cause to liberate the defendant from further criminal proceedings. It is for the trial judge to make such an evaluation.

Verdict/Decision

The Prosecution’s appeal was granted. The decision of the Investigative Judge was revoked. The Investigative Judge was thus ordered to admit the accusation lodged by the Prosecutor against the defendant.

Opinion

In the instant case, the evaluation of contradicting declarations made by the smuggled migrants regarding the defendant is in line with the precarious

conditions faced by migrants and the overall scenario that underpins migrant smuggling. Fears of retaliation, sentiments of gratitude, desire to maintain low profile vis-à-vis authorities, among other factors, may likely lead migrants not to testify against smugglers.

In such circumstances, the need of duly weighing additional corroborating evidence – rather than relying exclusively on migrants' testimony - is obvious. The methodology of the Court in deciding the appeal mirrors this approach.