

RESOLUCIÓN 12/2003

Facts

In October 2002, the defendant was intercepted by law enforcement agents (*Guardia Civil*) at the port of the Autonomous City of Ceuta (Spain). He was driving a vehicle with French license plates and attempting to board the ferry in direction to Algeciras (mainland Spain). Upon inspection, law enforcement agents realised the defendant was transporting two irregular migrants, hidden under the seats of the vehicle. Later the same day, law enforcement agents further discovered – under several bags, covers and other items – a third irregular migrant inside an open suitcase. He was immobile, sweating, and presented signs of disorientation and asphyxia. The defendant was attempting to facilitate the illegal entry of the migrants in Spain upon payment of a monetary fee.

The defendant was charged of migrant smuggling and attempted murder by omission.

Elements of success

- Contextual assessment of migrants' testimony
- Circumstantial evaluation of law enforcement agents' statements
- Interpretation of 'financial or other material benefit' according to rules of logic and common sense

Challenges

- Assistance and support to smuggled migrants

Background

The defendant had no prior criminal record. He remained in custody since 27 October 2002 (date of events) for reasons related to the instant case. The migrants were adult males.

The migrant hidden in the suitcase was especially submitted to risk to life or safety. The fact that he had to be taken out of the luggage, with difficulty, by a law enforcement agent, with symptoms of disorientation, asphyxia and severe sweating, attest to the effective risk to health.

Key issues

- ❖ Evidence
- ❖ Migrants as witnesses
- ❖ Financial or other material benefit

Investigation

In ascertaining the facts, authorities relied much on testimonial evidence, including from the defendant who, at a certain point, confessed to be aware of the fact that three individuals were hiding in his van. The migrants declared the defendant did not know they had surreptitiously hidden in his vehicle. Authorities further considered documentary evidence, notably photo documentation of the crime scene.

Reasoning

The Defence argued the defendant had acted upon humanitarian concerns.

Those smuggling migrants with whom they do not hold a relationship of

acquaintance, friendship or family do so for profit. This is all more so the case in a geographical zone known for the prolific smuggling of migrants and the particular attention authorities address to it. No one would risk being arrested in such circumstances if not for obtaining a financial or other material benefit. The purpose of obtaining a financial or other material benefit excludes the claim of acting upon humanitarian concerns. The evidence adduced does not allow the application of the 'state of necessity' doctrine since it was not proved that the migrants faced an imminent and serious danger, which could not be prevented otherwise than by the conduct carried out by the defendant.

The declarations of the migrants according to which they would have hidden in the defendant's vehicle without his knowledge are not to be taken as truthful or pertinent. It is understandable that migrants might wish to protect the person who tried to smuggle them into the desired country of destination. Given the flagrante circumstances of the case, the erroneous nature of the migrants' statements is blatant.

The testimony of law enforcement agents involved in the search of the defendant's vehicle is of particular relevance, given they had (i) no reason to seek the conviction of an innocent man, and (ii) gathered considerable and precious experience in the realm of migrant smuggling in the last years, in view of the dramatic increase in this type of criminality, in circumstances similar to the instant case.

Transporting migrants under bags, covers and inside an open suitcase is not

a causally appropriate conduct to lead to death. The intent to kill was not proved. In addition, to ground a conviction for attempted murder by omission, the law would have to impose on the defendant a duty to act, from the omission of which would result the risk of death. This requirement is not verified *in casu*.

Verdict/Decision

The defendant was convicted of migrant smuggling. He was sentenced to a penalty lower than that requested by the Prosecution. The defendant was acquitted of attempted murder by omission.

Opinion

In the instant case, the evaluation of exculpatory declarations made by 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 for striving to acquire additional corroborating evidence – rather than relying exclusively on migrants' testimony - is obvious.