In Madrid, June 2 2011.

Roj: STS 3527/2011

Id Cendoj: 28079120012011100467

Headquarters: Madrid

Section: 1

Appeal No.: 1938/2010

Resolution No.:

Proceedings: CASSATION APPEAL

Reporting Judge: OSE MANUEL MAZA MARTIN

Resolution type: Ruling

DECISION

In the appeal for violation of law and breach of form that we have before us, the appeal filed by the Private Prosecution, Araceli, against decision of the Provincial Court of Madrid (First Section) that found Gerardo not guilty of the offence causing injury/offence causing bodily harm, the members of the Second Chamber of Supreme Court who have signed in the margin are present for the voting and ruling under the Presidence of the Provincial Court of Madrid and under the President Mr. Jose Manuel Maza Martin, member of the Public Prosecutor and being represented by the Prosecutor Mrs. Uroz Moreno. Gerardo is represented by the Prosecutor Mrs. Sánchez Jiménez.

I. FACTUAL BACKGROUND

FIRST.- The Court of Instance no 21 of Madrid initiated a prosecution, number 18/2008 and, once it was finalized, it was then redirected to the Public Hearing in Madrid and, in June 7 2010, the Public Hearing passed a sentence which includes the following PROVEN FACTS: "FIRST: the defendant Gerardo, born on June 27 1977, who has criminal records not taken into account for recidivism purposes, had sexual relations and a relationship with Araceli, born on January 12, 1977, since the year 1996, when Aracely was 19 years old. During this relationship, and with the defendant fully aware–since the year 1994– of his infection with the Human Immunodeficiency Virus (HIV), and with the defendant fully aware that he carried the HIV antibodies and that he was HIV-positive, and having been informed of the risks and methods of infecting other people with this virus, he had sexual relations with Araceli without informing her about his infection, using the condom as a safe sex method in their sexual relations. Despite this, however, on several occasions the condom broke and in August of that same year, Araceli became pregnant. On May 21, 1997 Araceli gave birth to their daughter, Macarena, who on August 1997 became seriously ill. Macarena was taken to the

Gregorio Marañón Hospital where it was found she was HIV-positive, caused by the Human Immunodeficiency Virus, and that she was categorized as a C3-phase patient. Macarena was infected by her mother while giving birth – vertical transmission. When Macarena was taken to the Hospital, the diagnosis revealed HIV infection, a Pneumocytis carinii pneumonia-associated infection that required her hospitalization in the Intensive Care Unit. Since then, Macarena has undertaken a certain treatment in the Gregorio Marañón Hospital under which she got better, showing no later imbalances, and being at the moment in the A1 phase.

As a result of this, it a family background medical study was carried out. The results showed that Aracely had been infected with the HIV virus on September 17 1997, and that she was, starting from that moment, undergoing a medical treatment and the subsequent monitoring in the Department of Clinical Microbiology and Infectious Diseases in the Gregorio Marañón Hospital. As a result of the treatment, Araceli got better with no HIV-related imbalances. Araceli was infected by the defendant when having sexual relations.

Since Macarena was born, Araceli and Gerardo continued their relationship and on July 3, 1999, the defendant and Araceli got married. As Gerardo in prison, he received ordinary and conjugal visits from Araceli. The Court of Instance no. 21 of Madrid ruled a divorce settlement dated on November 27, 2003 and on January 5, 2004 the defendant obtained recognition of paternity and asked for visiting arrangements with his daughter.

On March 17, 2006 Araceli lodged a complaint against Gerardo arguing an offence causing injury/offence causing bodily harm, leading to the present prosecution as a result which led to this lawsuit. [sic].

SECOND.- The holding of such decision was: “WE DECIDE: we must and therefore we acquit Gerardo from the offences he was prosecuted against in this claim, with every pronouncement being favorable, and ruling the costs ex officio.”[sic]

THIRD.- Once both parties were informed about the decision, a cassation appeal was prepared on the grounds of lawbreaking. It was then presented and the notices and registrations needed for the ruling of a decision were referred to this Second Chamber of the Supreme Court for the creation of the roll of appeal and the execution of it.

FOURTH.- The appeal lodged by the Private Prosecutor, Araceli, was based on the following GROUNDS OF APPEAL:

First and single/sole: an infraction of the legal protection, Art. 849.1 of the Criminal Procedure Law, because of the failure to implement the Art. 149. 1 of the Criminal Code, with regards to/when it comes to the Art. 23 of the same law, passed by Constitutional Act 10/95 on November 23 1995 and issued as case-law in this point.

FIFTH.- Being both parties aware of the appeal lodged, the attorney Mrs. Sánchez Jiménez and the Office of Public Prosecutor, by letters dated on October 2 2010 and October 15 2010

respectively, contested the appeal. The Chamber admitted the appeal, bringing the decision to an end whose turn it is in the ruling. Finally, after proper notification, on May 25, 2011 the voting and ruling of this court came out.

I. FACTS AND LEGAL ARGUMENTS/LEGAL RATIONALE

FIRST.- The matter of substance raised by the appeal of the Private Prosecution against the Lower Court Ruling which acquitted the accused/defendant from the offences for which he was prosecuted in this claim insists in a single plea on the application of the penalty because of both offences of Art. 149. 1st of the Criminal Code-causing severe disease-, with basis on the Art. 849.1st of the Criminal Procedure Law, because of the failure to implement the provision referred to.

In view of thereof it would be appropriate to start by stating that this cassation review, in accordance with a great number of pronouncements/judgments emanating from this Chamber, involves only the determination of this Court of Cassation for checking the correct classification of the proven and declared facts found in the precepts of fundamental character included in the Criminal Law.

In any case, this determination must rest on a most essential principle, which is the intangibility of the factual narration conducted by the lower court that believed in the veracity of it, as a result of the assessment of the evidentiary material available, which it is its own.

To this refererence, this Chamber does not dispute the validity of the sole plea in law raised by the applicant, but with an important nuance that will be set forth below, since the narrative description of the episode on which this Chamber based its decision is, in our view, is plenty and enough to affirm the existence of criminal offences.

Indeed, the Court, in an extensive exhibition of dogmatic knowledge and on the basis of the unquestionable absence of intention from the defendant to injure the appellant and their daughter –specific intent–, infected them both with the HIV virus he suffered from some time ago, also concluded on the absence not only of a possible willful blindness but eventually even of negligent behavior. The Court affirms the absence of real risk deserving of its disapproval, since Gerardo followed in a strict and rigorous way the medical indications on having sexual relations with Araceli; these medical indications consisted of the use of a condom during these sexual relations and were considered to comply enough with protocol.

And since these medical indications –the use of a condom during sexual relations– were followed in each of these relations, the judges *a quibus* consider, as it have already been said, that the risk taken and assumed by the defendant was so minimal that reckless behavior must not be considered as a criminal offence.

We must begin by stating that the failure of Gerardo to communicate his serious and contagious disease to his partner, although it may be subject to condemnation from an ethical point of view, does not add anything to the criminal wrongfulness of his behavior, which shall only consist of the fact that he

accidentally infected Araceli and their daughter, with the intention of causing such infection or omitting the required duties of care.

In this regard, it can only affirmed *obiter dicta* that, in the case Gerardo had communicated his circumstances and, the woman had nonetheless consented to continue to have such sexual relations, this consent would have meant the exclusion of Gerardo´s full responsibility.

But since this is not the case, the aforementioned lack of communication cannot be considered by itself, as the appellant understands at some points, as an efficient cause of the serious results that have occurred.

Focusing only, therefore, in the analysis of the defendant´s behavior as an action causing the infection, that is, having sexual intercourse various times even if he knew he suffered a contagious disease, it remains clear that the use of condoms, as a medical indication, not only eliminates the existence of a specific intent, in such case unthinkable even for the appellant, but also eliminates the possibility of a willful blindness, whichever is the doctrinal approach we assume. The fact is that this excludes both the hypothesis of a closer representation of the causation of an unwanted result and the acceptance of it as a result of the action taken, as could be also said about the consequences that this assumption of the risk entails.

However it is not the case in the classification of such conduct as reckless, which has to be considered as serious to all intents and purposes for inclusion under the provisions of Art. 152.1 2 of the Criminal Code because of the importance of the risks caused and the potential result that derived from such risks –the spread of AID–, according to the conduct described in the affidavit of the appellant, as the results, even with the use of a condom, causally linked with Gerardo´s acts, were not only avoidable but also predictable.

Based on a similar statement in the literal nature of *de factum* of the lower court´s judgment when it states that "…at certain times, the condom broke…", which seems obvious given the results, contagion and pregnancy must be complemented with the statement included in the appellant´s First Legal Basis which affirmed the condom had broken "…four or five times…". This conclusion was logically supported by the evidence provided to the Hearing.

And all this because such data is enlightening enough, for whatever the reasons might be – failure in the use of condom, inadequate use of the condom, inadequate preservation of the condom, the way in which the sexual relations between the couple take place, anatomic reasons of either Gerardo or Araceli, etc. – the truth is that such a thing which is to be so exceptional in the majority of the cases, to the extent that even the doctors do not consider it when they authorize an infected person to have sexual relations on the sole condition of using this prophylactic method, has often occurred during Gerardo and Araceli´s sexual relations, but by no means a negligible amount. Finding ourselves before careless behavior, in the sense of not adopting the necessary care to prevent such breakage or, in any event, behavior capable of producing a real and genuine risk, no matter the origin of it, which culminated in the harmful outcomes – considered "serious somatic disease", Art. 149.1 of the Criminal Code- affecting first Araceli and then their daughter, results which meet the requirements of

predictability and preventability to fulfill the fault settings sanctioned course in the criminal provision being referenced. All this along with the obvious causal link between such negligent acts and its results, which are direct results in the case of infection of Araceli and indirect results in the case of Macarena, because of the pregnancy and then in the birth –vertical transmission- but in any case also causally link Gerardo to his daughter.

SECOND.- Having said this and, therefore, undertaking an review of the resources, not even partially by failing to consider the acts as an intentional crime, it is now the time for the correct classification of them, deciding whether we are dealing with a single offence, with twofold result, or two reckless injury offences and, in this case, if it is a real offence or not.

Thus, we must reject from the beginning the existence of a real offence, since at the moment the child was infected throughout her mother, who was pregnant with her, it is obvious that we are dealing with a sole and singular action which had two separate results.

And to this respect, the STS dated on April 16 2001 states:

"It is true that the *culpae* criminal system, that kept the Criminal Code repealed, considers that there is a singular reckless neglect and that the effect is only a consideration for the purposes of penalty. Among the imprudence of the defendant and the effects that stemmed from it, there should exist a causal connection. Therefore, for this system the fact that the result is singular (i.e., a death) or multiple (i.e., several deaths, injuries, damages, etc.) is of small significance, as all constitutes an entire "result" that will be treated as a singular one. In this system, the reckless offences are *numerous apertus.*

Instead, the system of *criminal culposa*, which still exists in the Criminal Code, considers the reckless offences similarly to premeditated-nature offences. It assumes that there must not be general clauses and that only particular cases should be punished. Not every reckless offence is relevant from a criminal approach. Instead, the legislator has selected those reckless offences that must be included in the criminal field. Now, the result is not treated as a unitary whole but it will be considered in its individuality, and the connection between the act and the result will be treated according to a very rigorous and high criteria of objective imputation. The legislator will follow a numerous clauses system in order specify the reckless offences.

The current Criminal Code provides in Art. 12 that "reckless acts or omissions will be only punished when expressly provided by law". So, the Code includes a numerous clauses system so there will only exist reckless offences in those cases in which the law itself indicates.

Among the differences between one system and another, those cases in which multiple effects take place are particularly important.

When, as a result of an infringement of the duty of care, various results derive, with the system of *criminal culpae* such results were considered as a whole and, consequently, there existed a singular offence in which the plurality of results was only taken into account in order to quantify the compensation.

With current code, these cases result in the application of the theory of overlapping offences and, if there exists any unity of action, that is, if from the same behavior there stem various results qualified individually, a constructive/technical overlapping of offences foreseen in the Art. 77 of the Criminal Code will exist, as this Chamber contemplates –please see Judgment 1550/2000, dated on October 10.

"In the case we are dealing with, a plurality of results occurred because of the death of one of the passengers in the vehicle and the serious injury of the other passenger, as a result of the accident caused by the reckless driving of the defendant, we find an overlapping of reckless offences, and having them presented as a unity of action, it emerges a constructive/technical overlapping of offences which must be punished according to the Criminal Code, that is, the corresponding penalty will be imposed according to the more serious infringement on its upper half".

So, we must conclude that we are before two different reckless offences of the Art. 152.1 2 of the Criminal Code, in constructive/technical overlapping of offences, with the punitive consequences that this classification carries and to which we will refer on later, with the corresponding compensation, in the Second Decision that, after this, will be ruled/passed.

THIRD.- In view of the contents of this Resolution, the decision proceeds on costs *ex officio* originated by the Appeal partially estimated in accordance with Art. 901 of the Criminal Procedural Law.

Consequently, given the above and other legal rules generally applicable to this case,

II. JUDGMENT

We must and therefore we consider, partially, the Cassation Appeal lodged by the Representation of the Private Prosecutor, exerted by Araceli, against the Decision ruled by the First Section, Provincial Court of Madrid on June 17, 2010, because of an injury offence, and that we quash and we repeal partially leading to the ruling of a second judgment.

We declare ex officio the procedural costs incurred by the Appeal partially upheld.

Please inform the original Court, for the corresponding legal purposes, about this judgment and the one which will be adjudicated, with the remembrance of the Appeal that it once forwarded to us.

Thus, by this our sentence, that will be published in the Textbooks on Law we pass it, we order it and we, Juan Saavedra Ruiz, Jose Ramon Soriano Soriano, Jose Manuel Maza Martin, Francisco Monterde Ferrer, Alberto Jorge Barreiro, sign it.

SECOND JUDGMENT

In Madrid, on June 6 2011.

In the case of a prosecution brought by Court of First Instance number 21, in Madrid, with number 18/08 and followed by the Provincial Court of Madrid because of the offence causing bodily harm against Gerardo, with ID 000, born on June 27 1972, in Madrid, son of José and María de Tiscar,

and in whose lawsuit the aforementioned Court passed a sentence dated on June 17 2010, and which has been quashed and repealed partially because of the ruling of today´s judgment by this Second Chamber of the Supreme Court, composed by the Sirs who have signed in the margin and under the supervision oj the Judge-Rapporteur Mr. Jose Manuel Maza Martin, states that:

I. FACTUAL BACKGROUND UNIQUE.-

The facts and factual background of the judgment passed by the Provincial Court of Madrid are accepted and reproduced.

II. LEGAL RATIONALE

FIRST- Here, we found the foundations of our previous Cassation Appeal, as well as those included in the Appealed, provided they are not contrary to the first ones.

SECOND.- As stated in the Second Legal Rationale of the previous Decision, we found the defendant guilty as the author of two resckless offences in constructive overlapping of offences, according to Art. 77.1 and 152.2, with regards to/when it comes to the Art. 149.1sr of the Criminal Code.

As a standard for determining the penalty or punishment to be imposed , as it refers to the aforementioned kind of concurrence, the Art. 77, sections 2 and 3, provides that such unlawful acts must be punished with the penalty contemplated for the gravest of such acts in the upper half of the range, with the exception of where it is more favorable for the offender to be consider both wrongs separately.

In this case, therefore, and being both similar offences and, consequently, the penalties provided by law for them are also the same and consist of one to three years imprisonment, the upper half would extend for two years and one day to three years, while it would be possible to separate both punishments, at the rate of one year of imprisonment for each offence committed. This Chamber considers these penalties appropriate and proportionate to the gravity of the committed acts by Gerardo within legally established criteria for their individualization.

Likewise, the fact of kinship circumstances is irrelevant for these purposes. Art. 23 of the Criminal Code, also revoked by the Private Prosecution, since Art. 66.2 of the Criminal Code, provides that “in reckless offences, the judges and courts will apply penalties at their discretion, without being influenced by the regulations provided in the aforementioned paragraph” and that these penalties refer to the different cases which include circumstances which modify the criminal responsibility.

THIRD.-On the other hand, as Art- 116 of the Criminal Code provides that “every person criminally liable for an offence or misdemeanor is also civilly liable if, from that act, any loss or injury results”, and in this situation, the Private Prosecution requests for herself, and on behalf of her daughter, the financial compensation for the damages they suffered. We consider reasonable the compensation of moral damages suffered by the victims since, according to the account of the proven facts before the Court, it has not been questioned. We state that, the disease of both, mother and daughter, is fully compensated. We consider reasonable to grant the amounts of 30,000 Euros, in the

case of Macarena, and 20,000 Euros in the case of Araceli, instead the amounts of 180,000 Euros and 150,000 Euros requested by the Private Prosecution. Consequently, given the above and other provisions of general application to the case,

III. JUDGMENT

We must and therefore we consider Gerardo guilty of the offence causing bodily harm and we sentenced Gerardo to one year imprisonment. We disqualify Gerardo to stand as a candidate during the time of imprisonment, because of each of these offences, and having to award Araceli with 20,000 euros compensation and Macarena with 30,000 euros compensation, as compensation because of the respective damages caused. Gerardo is also obligated to pay the legal costs of the procedure.

Thus, by this our sentence, that will be published in the Textbooks on Law we pass it, we order it and we, Juan Saavedra Ruiz, Jose Ramon Soriano Soriano, Jose Manuel Maza Martin, Francisco Monterde Ferrer, Alberto Jorge Barreiro, sign it.

PUBLICATION.-In the same day that was read and published the herein decision, I Mr. Jose Manuel Maza Martin, after public audience of the Second Chamber of the Supreme Court, and as of Secretary of the same, herein I certify.