

NATIONAL COURT  
CRIMINAL COURT  
SECTION FOUR

APPEAL ROLL 47/07  
ABRIDGED PROCEEDINGS 52/06  
SOURCE ORGANISM: CENTRAL CRIMINAL COURT

JUDGES:  
MR. FERNANDO BERMÚDEZ DE LA FUENTE  
MS. TERESA PALACIOS CRIADO (DEPONENT)  
MR. JUAN FRANCISCO MARTEL RIVERO

PROCEEDINGS No. 56

Madrid, March 15, 2007

FACTUAL ANTECEDENTS

ONE. On January 25 this year, the Judge in charge of Central Criminal Courts passed a sentence whose provisions resolve:

*“that considering the prior matter proposed by the defences of FELIPE BENJUMEA LLORENTE, MIGUEL ÁNGEL JIMÉNEZ VELASCO MAZARIO, FRANCISCO J. BENJUMEA LLORENTE, JOSÉ J. ABAURRE LLORENTE, JOSÉ L. AYA ABAURRE, AND MANUEL SÁNCHEZ ORTEGA, specified in the antecedents of this resolution, I must declare and declare null and void the proceedings at the Central Instruction Court No. 4 under number 305/03 against the aforementioned, for an alleged corporate offence and, therefore, file the abridged proceedings 52/06 opened at this Central Court for judgement and ruling as required.*

*This resolution is NOT DEFINITIVE. An appeal may be presented to the Criminal Court of this High Court within FIVE DAYS, in the form provided in section 766.3 of the Criminal Proceedings Act.*

*Notify of this resolution to the Prosecutor’s Office and the parties appearing.*

*This is agreed to, ordered and signed by Mr. JOSÉ MARÍA VÁZQUEZ HONRUBIA, JUDGE of the Central Criminal Courts of the National Court, of this I bear witness.*

*FORMALITIES. The instructions are fulfilled, I hereby certify this.”*

TWO. On February 6, the Prosecutor lodged an appeal against this ruling and after its processing, a hearing was held on March 9 in which the said Ministry requested the repeal of the resolution being appealed and the defence of the defendants, now being appealed, confirmation was requested and the corresponding resolution remained pending judgement.

LEGAL REASONS

ONE. During the hearing, the appellant and the appellee practically reproduced their respective pretensions, contained, in the appeal presented and the allegations on explaining the transfer conferred by this appeal.

Hence, the Prosecutor sustained that in the initial claim it formally and expressly invoked section 296 (2º) of Criminal Code, that is:

*“the report required in the previous section shall not be required when the commission of the offence affects the general interest or a number of persons”*

adding that, the judicial authority has unduly and incorrectly prejudged by anticipating incorrect evaluations, and, it has been prevented from examining the evidence to accredit the company offence and

the circumstances in section 296 (2º) of the Criminal Code, and it is not advisable to anticipate the resolution of the matter proposed, which should have been resolved after the Plenary discussion and in the light of all the evidence examined.

TWO.- Under the provisions in Criminal Procedure Act section 786 (2), by which the previous matters that were presented on behalf of the defendant MIGUEL ÁNGEL JIMÉNEZ VELASCO, it is understood that article 24 (2º) and article 25 (1º) of the Spanish Constitution had been infringed due to breaching the principle of legality as the objective condition for the prosecution in section 296 (2º) of the Criminal Code for the prosecution of company offences, hence there are no affects, but on the contrary, the proceedings should enable its execution, the intervention of the other parties and the subsequent resolution; therefore, the legislator has provided the mechanism for introducing the presumed infringement of fundamental rights as regards prior matters, which shows that these should not derive towards or postpone what was resolved in the Decision when its solution is provided in the previous proceedings.

THREE. The mere invocation of the lawsuit presented by the Prosecutor, should it be the promoter in accordance with Criminal Code section 296 (2º), in principle indicates that what has not occurred is the provision from the first paragraph of the precept, as an explanation of the action that resulted in the proceedings and presents before the Court the inexistence of those legitimately offended, nor to act on behalf of an under age or person with disabilities if the entry in the proceedings is attributed by re-channelling its legitimacy through “general interest” or a “plurality of persons”.

Next, the elementary fundamental right of effective judicial tutoring as regards access to the Courts gave provisional cover to the alleged pretension, and represents a flexible and generous interpretation of that constitutional right which has allowed, as per the proceedings, to hold, with regards to the intermediate phase and the start of hearing, the condition of party to the initiation dated October 1, 2003, to the date of resolution January 25, 2007, without having resolved the flaw in the proceedings, that is, its lack of legitimacy, which is the consideration reached by the decision and, that this Court shares with the rightful and detailed arguments provided therein, with an abundance of case law decisions that affect the aforementioned question.

FOUR. Both in the lawsuit paper and the provisional conclusions paper, with regards to the fact it states that “*in open breach with the loyalty due to the company ABENGOA S.A., in order to obtain profits for the company INVERSIÓN CORPORATIVA IC S.A., the defendants committed itself to certain legal ties, aside from the knowledge, control and supervision of the principal parties, fundamentally the minority shareholders and the National Securities Exchange Commission, legal which have caused ABENGOA, S.A. a loss of equity valued in twenty five million euros*”.

Therefore the Prosecutor considers that this is disloyal administration as defined in section 295 of the Criminal Code, and that this has occurred due to the general interest and, in referring to the minority shareholders, these constitute such plurality of persons affected, hence fulfilling the requirements of section 296 (2º) of the Criminal Code.

The general interest cannot be mistaken with the fact that is provided in the document issued by the regulatory body which expresses its concern for not only breaching the obligation to notify of certain transactions but because of this specific transaction between ABENGOA and INVERSIÓN CORPORATIVA, the latter is a majority shareholder of the first with 51%, which could result in a conflict of interests.

The Prosecutor does not accredit, but only states, that such breach of trust, disloyalty of the administration which led to a loss of equity, has affected sectors of the economy apart from the companies in question, as, in support of its pretension, although the appeal relates the functions and master guidelines of the National Securities Exchange Commission, its mere wording does not make it an infringement under section 296 (1º) of the Criminal Code, a condition initially attributed to it and later rejected, nor does it define what the repercussion in the domestic economy is, or in any specific sector therein, which has been affected and that at least for this court has not been disclosed.

FIVE. It also seems feasible a priori to define the involvement of a “plurality of persons affected”, those which, the Prosecutor limits to the minority shareholders, clarifying in the hearing held they were individualizable, and according to the appeal, it was only necessary that these be “more than one”, and, in the initial hypothesis of identification problems, the case was that, between September 23, 2003, the date of the lawsuit, and January 25, 2007, the date of decision appealed against, not one had been specified or identified, as this is not a mass offence which could make such identification impossible.

Even if they were identified, it is the Prosecutor who sustains that it is not these co-holders of company equity who are damaged, but the company ABENGOA, S.A., with damages of twenty five million euros in its favour, which becomes, in accordance with the literal content of the offence of disloyal administration of the infringing party if, and all parties agree to give the company exclusivity as the sole damaged party, in consonance with the decisions invoked and stated in the documents presented; it should be added that the mere figure of the amount defined in the economic damage generated does not operate as an indicator of the affect on the general interest or several persons, which, in addition to these, are ignored beyond the shareholder environment.

In line with the above, the resolution adopted during the General Shareholders’ Meeting of ABENGOA, S.A., April 9, 2006, which relinquished the exercise of civil actions and the express relinquishing before the Courts when the legal representative stated on behalf of the entity that there was “nothing to declare”, has the legal importance that, although the Prosecutor unfortunately insists that an offence involving disloyal administration has occurred, regardless of the criminal type causing the financial damage, this would involve proof of its production even when the supposed damaged party is not considered as such.

SIX. Response must still be given to the reiterated allegation of the Prosecutor regarding the need to clarify the evidence of the procedural legitimacy during the case, mixed as stated with the offence attributed as, otherwise, it breaches the effective judiciary tutelage of the right-duty to exercise a criminal action and fit breaches the right to use the pertinent means of proof. The objective condition of procedurability provided for the persecution of company offences, cannot prevail as a presumption of active legitimacy in the light of its accreditation as the subject of discussion in the plenary meeting and the subject of the ruling, as, apart from what is explained in the second legal ruling, as rightly described by the defendant Lawyers in the confirmation of the ruling being appealed against, which would confuse the semi public nature of such breaches, without eliminating the prevention that such a requirement imposes, thus, the Prosecutor stated in the hearing that the grievance referred to in section 296 (1<sup>o</sup>) of the Criminal Code does not demonstrate such condition in the prior matters; effectively, but because it has accredited “ab initio” with the report filed, defined as such at the start of the process and, on the contrary, to give cover with the possibility to confirm that of the postulating party in this process defines procedural burdens at different times varying depending on section 296.1 or the legitimating of paragraph 2 in this criminal precept. This difference in treatment is not covered by regulations with this lenience, which has been enjoyed in the case, and cannot be transferred to the case after examining the mention as an example performed by the Prosecutor regarding the fact that, during the discussion and examination of evidence, these do include the circumstance of “multiple parties damaged”, the institute of the prescription, even when the judge does not appreciate these in the decision, but the clear differentiating nuance is that such invocations reflect the legal relation of the parties is perfectly defined in the proceedings, but what is concluded here is the absence of cover of the legitimization of one of the parties, the accusation, which makes its position in the proceedings impossible, therefore the appeal presented by the Prosecutor against the decision dated January 25, 2007 is rejected and confirmed entirely.

Having read section 296, 295 of Criminal Code, 786 of Criminal Procedural Act, 238 and 243 of the Organic Act of Judicial Power and supplementary and generally applicable texts, this COURT RESOLVES:

ORDERS

TO REJECT the appeal presented by the Prosecutor against the decision dated January 25, 2007, which is confirmed in its entirety.

Notify the Prosecutor and the parties of this decision, with the instructions established in section 248.4 of the Organic Act of Judicial Power.

No appeals may be lodged against this decision.

By this decision, the Judges stated in the margin agree, order and sign.