

CASE No. 07-2012-03

Facts

The defendants intended to facilitate the illegal entry of a 15-year old into the United States, upon payment of a money fee. In September 2011, the defendants met the minor at her residence and led her to their home, where they spent the night. The following day, the defendants and the minor proceeded to the cross-border post of Candelaria de la Frontera (between El Salvador and Guatemala). Defendant 2 then informed the minor he would cross ahead and wait for her on the Guatemalan side. Defendant 1 remained with the minor. They were intercepted by agents of the Migration Police. Following questioning, Defendant 1 was detained. Shortly after, Defendant 2 was also placed under custody.

The defendants were accused of migrant smuggling. The Public Prosecutor further requested the defendants to be sentenced to pay civil compensation to the minor in the amount of 2000 USD.

Elements of success

- Rigorous assessment of testimonial and documentary evidence
- *In dubio pro reo*

Challenges

- Assistance and support to smuggled migrants
- Sub-standard law enforcement performance
- Lack of corroborating evidence

Background

Defendant 2 was the minor's boyfriend. He was also suspected of rape for having had sexual relations with the minor the night she spent in his residence.

Key issues

- ❖ Evidence (referential witnesses)
- ❖ Civil compensation to victims

Investigation

Both defendants invoked the right not to incriminate oneself.

In ascertaining the facts, authorities relied on documentary evidence, notably (i) certification of site visit (i.e. where the acts occurred), (ii) protocol of detention in *flagrante delicto*. Authorities also took into account testimonial evidence provided by the agent of the Migration Police who detained the defendants. Notably, the said law enforcement agent declared that the minor, upon being questioned, indicated Defendant 1 as the person guiding her into Guatemala. She further recognised Defendant 2 as the person awaiting her on the other side of the border and with whom she and Defendant 1 were to proceed with the travel to the United States. No other questions/information were posed/provided before the detention of the defendants.

Reasoning

The testimony of the law enforcement agent who detained the defendants did not suffice to establish criminal

responsibility. His declarations are merely “*referential*” as the minor herself did not appear in court. In order to be admissible as evidence, referential evidence must meet certain requirements: (i) necessity, in view of the absence of direct witnesses testifying in court, (ii) reliability, which is anchored on the memory and auditory capabilities, coherence and logicity of the person. The Migration Police officer was not a *factum* witness. He was not present in the negotiations and development of the smuggling venture. He could not thus recall – and offer details – on a number of important aspects. The party submitting this referential evidence must ensure that such evidence covers all elements of the criminal type and related circumstances, e.g. capacity of perception of the witness (in this case, the minor), her form of declaring, physical characteristics, interaction with law enforcement agents, ability to recall precise terms of witness’ declarations. The referential witness must be able to expose before the court all the circumstances and details he or she perceived from the witness and surrounding environment. *In casu*, the agent of the Migration Police did not satisfy the requisite of reliability as his declarations were very generic. He did not manage to provide a detailed account of his interaction with the minor. He revealed a suspicious and illogical demeanor, often inconsistent with the terms of the accusation. Referential evidence is extremely exceptional. This is all more so the case when it is not corroborated – as in the instant case - by other means of evidence or strong *indicia* of the crime.

The certification of site visit (documentary evidence) did not provide

any details that could clarify the circumstances of perpetration of the crime. It only vouched for the place where law enforcement agents carried out the specific diligence (i.e. site visit).

The protocol of detention in flagrante delicto is not sufficient to ascertain the perpetration of the crime. This documentary evidence simply attests to the legality of the detention when it is contested by the Defence.

Even though the Public Prosecutor had petitioned for the defendants to be ordered to pay civil compensation to the minor, the Court could not grant the request in view of the following elements: (i) the Public Prosecutor had stated in the accusation that, on trial, the responsibility of the defendants would be proven, namely via the testimony of the minor (which did not occur), (ii) the evidence submitted in trial did not establish the involvement of the defendants in any injuring act upon the minor on trial, (iii) the Public Prosecutor merely requested the maximum penalty for migrant smuggling and, abstractly, that the defendant be sentenced to pay to the minor, as civil compensation, the damage caused thereto, (iv) the *Ned Procedat Ex Officio y Ned Iudex Ultra Petita Partium* maxim prevents the Court from deciding beyond the requests submitted by the parties.

Verdict/Decision

Defendants acquitted.

Opinion

The case unveils the importance of corroborating evidence, particularly

when the person that has been the object of smuggling is not available to testify in court. It further denotes the extremely undermining effects a substandard investigation and deficient collection of evidence may have in the prosecution of migrant smuggling. This is all more so the case given that this is a crime whereas, for its specificities, persons affected are often unwilling to give testimony.