UNOFFICIAL TRANSLATION

This document has been translated from its original language using DeepL Pro (AI translation technology) in order to make more content available to HIV Justice Academy users. We acknowledge the limitations of machine translation and do not guarantee the accuracy of the translated version.
No copyright infringement is intended. If you are the copyright holder of this document and have any concerns, please contact academy@hivjustice.net.

TRADUCTION NON OFFICIELLE

Ce document a été traduit de sa langue d'origine à l'aide de DeepL Pro (une technologie de traduction en ligne basée sur l'intelligence artificielle) pour offrir aux utilisateurs de HIV Justice Academy une plus grande sélection de ressources. Nous sommes conscients des limites de la traduction automatique et ne garantissons donc pas l'exactitude de la traduction.
Aucune violation des droits d'auteur n'est intentionnelle. Si vous êtes le détenteur des droits d'auteur associés à ce document et que sa traduction vous préoccupe, veuillez contacter academy@hivjustice.net.

TRADUCCIÓN NO OFICIAL

Este documento fue traducido de su idioma original usando DeepL Pro (una aplicación web basada en inteligencia artificial) a fin de facilitar la lectura del contenido para los usuarios de la HIV Justice Academy. Reconocemos las limitaciones de las traducciones realizadas a través de este tipo de tecnología y no podemos garantizar la precisión de la versión traducida.
No se pretende infringir los derechos de autor. Si usted es el titular de los derechos de autor de este documento y tiene alguna duda, pónganse en contacto con academy@hivjustice.net.

НЕОФИЦИАЛЬНЫЙ ПЕРЕВОД

Этот документ был переведен с языка оригинала с помощью DeepL Pro (технологии перевода на основе искусственного интеллекта), чтобы обеспечить доступ пользователей Академии правосудия по ВИЧ к большему объему контента. Мы отдаем себе отчет в ограниченных возможностях машинного перевода и не гарантируем точности переведенной версии документа
Мы не имели намерения нарушить чьи-либо авторские права. Если вам принадлежат авторские права на этот документ, и у вас имеются возражения, пожалуйста, напишите нам на адрес academy@hivjustice.net

Supreme Court, Second Criminal Chamber, Judgment 690/2019 of 11 Mar. 2020, Rec. 1807/2018

Speaker: Llarena Conde, Pablo.

LAW 12814/2020

ECLI: *EN:TS:2020:806*

INJURY. Contagion of a sexually transmitted disease. Transmission of HIV in cases in which the infected person knew of his partner's illness. The complainant knew that her partner was a carrier of HIV, so that having agreed to have sexual relations with him, without any kind of prophylaxis, the transmission of the disease is not worthy of criminal reproach. External evidence of the disease that the complainant had to perceive, as she herself was diagnosed months later, and neither after this diagnosis, nor when she reported the alleged assault, did she make any allusion to the contagion of the disease. In dubio pro reo. Self endangerment of the complainant herself.

The SC dismissed the appeal lodged against the judgment of the Madrid Provincial Court and upheld the conviction for the crime of aggravated injury due to HIV infection.

T R I B U N A L S U P P E R A M E

Criminal Division

Judgement No. 690/2019

Sentencing date: 11/03/2020

Type of proceedings: APPEAL IN CASE Number

of the proceedings: 1807/2018

Judgment/Argument:

Date of Voting and Judgment: 23/10/2019

Speaker: H.E. Mr. Pablo Llarena Conde

Jurisdiction: Madrid Provincial Court, 26th Section

Legal Adviser in the Administration of Justice: Ms Sonsoles de la Cuesta y de Quero Transcribed by:

sop

Note:

APPEAL NO.: 1807/2018

Rapporteur: H.E. Mr. Pablo Llarena Conde

Counsel for the Administration of Justice: Ms. Sonsoles de la Cuesta y de Quero

SUPREME COURT

Criminal Division

Judgement No. 690/2019

Your Excellencies. Excellencies.

Mr. Julián Sánchez Melgar

Ms. Ana María Ferrer García

D. Pablo Llarena Conde

D. Vicente Magro Servet

Dª. Susana Polo García

In Madrid, 11 March 2020.

This court has heard the cassation appeal 1807/2018 filed by Clemencia, represented by the attorney Carolina Pérez Sauquillo Pelayo, under the legal direction of Esperanza López Ayuso, against the judgement handed down on 16 April 2018 by the Madrid Provincial Court, 26th Section, in the ordinary summary 1763/2017, in which Luciano was acquitted of the charges brought by the accusations (aggravated injuries of article 149.1 of the Criminal Code, maltreatment in the context of violence against women under article 153.1 and 3 of the Criminal Code, and possession of a prohibited weapon, provided for and criminalised in article 563 of the same legal body). The respondent was the Public Prosecutor's Office and Luciano, represented by Victoria Brualla Gómez de la Torre, under the legal direction of Javier Martínez Arenas.

The rapporteur was Mr. Pablo Llarena Conde.

FACTUAL BACKGROUND

FIRST.- The Court for Violence against Women no. 8 of Madrid, opened ordinary summary proceedings 1/2016 for the alleged crime of aggravated injuries, mistreatment of work in the context of violence against women and possession of a prohibited weapon, against Luciano, which once concluded was referred for trial to the Provincial Court of Madrid, Section 26. On 16 April 2018, summary proceedings 1763/2017 were opened and judgement no. 286/2018 was handed down, containing the following PROVEN FACTS:

"1.1 It is declared proven that the defendant, Luciano, whose personal circumstances are recorded in the case file, had been diagnosed with HIV infection since 15 July 2004.

In 2012, he began a relationship with Clemencia, with whom he lived for a year and a half in the city of Madrid, until September 2014.

In September 2013, Clemencia was diagnosed as a carrier of HIV, a virus that had been transmitted to her by the defendant in the course of their sexual practices as a couple.

1.2- It has not been established beyond doubt that Clemencia was unaware of the sexually transmitted disease from which her partner was suffering and, consequently, that she had sexual relations with him without being aware of that fact.

2.1- At around 20.00 hours on 21 June 2014, in the family home in Madrid, an argument broke out between the defendant and Clemencia, the causes and circumstances of which have not been proven.

2.2- Then, when the police went to the house, when they proceeded to arrest Luciano, after the search they found a knife 24 cm long and 22 cm sharp in his trouser pocket.

THIRD.- This list of facts that have been declared proven results from the evidence given at the trial, fundamentally from the statement of the complainant and the defendant, as follows

as well as other evidence that we have considered to verify whether their respective statements are corroborated.

The accusation against the defendant is based primarily on the testimony provided by the complainant, Clemencia, which for the following reasons does not constitute sufficient evidence to establish his guilt.

3.1- It is true that during the trial the complainant ratified the complaint made against the defendant, stating that Luciano never admitted to her that he was a carrier of HIV and that if she had known this she would not have had "unprotected" sexual relations with him. She also confirmed that on 21 June 2014, she was assaulted by Luciano in the course of an argument they had at her home.

His testimony, however, is not consistent with the rest of the evidence that has been presented.

Thus, although the complainant categorically denies knowing that her partner was a carrier of HIV, she acknowledged in the plenary session that in the neighbourhood (Pozo de Tío Raimundo, Entrevías) where they lived and where she had grown up, it was said that he was a carrier of the disease, although she claims that he denied it when she questioned him about it. He acknowledged that he was known in the neighbourhood as "Luciano, Cebollero". She also stated that her cousin's husband told her about this, that he knew that Luciano was a former drug addict and that they used cocaine and hashish together when they could and, finally, that Luciano's sister, Vicenta, warned her to protect herself.

Moreover, regarding this conversation, the defendant's sister, Vicenta, in the convincing and sincere statement she made in the trial, stated that when she found out that Clemencia was starting a relationship with her brother, she warned or advised her to "protect herself,... that she would take measures...", although she acknowledged that she did not tell her what she had to protect herself from, but that the context of the conversation they had, in her opinion, was clear, as she explained that when a girl talks to another girl about protecting herself, they implicitly understand each other. He went so far as to say "... there was little more to say to a person like Clemencia...", to which she replied "that nothing was wrong"; he said that he had the impression that she knew everything, especially when she was a friend from a previous relationship with his brother.

It should be noted that Adelaida, who was at Clemencia and Luciano's home on 21 June, a friend of the couple, said that "if the whole neighbourhood knew that Luciano was a carrier of the virus, I don't know why she wouldn't have known".

Also by way of illustration, we should point out that in the forensic medical report in the proceedings, folios 522 and following, the defendant was examined at the Infanta Leonor Hospital on 28 May 2013 and from this report we should point out that mention is made of "risky sexual relations..., for three months lesions on the penis, pruritic. It gets worse when she has sex...", external evidence of a sexually transmitted disease that Clemencia should have been aware of when she had sex, as she was diagnosed with the infection months later, in September 2013.

Furthermore, given her status as a user of high-risk narcotic substances, as she herself acknowledged, as well as the drug addiction of her partner with whom she shared the consumption, it is clear that she should have been aware of the risk to which she was subjecting herself, not only by engaging in sexual relations but also by the mere fact of consuming narcotic substances of such a nature.

Finally, it should be noted that when she reported the incident that allegedly took place on 21 June (assault), she made no mention of having been infected with the disease, a circumstance of which she was already aware, and subsequently availed herself of the exemption in Article 416 of the Criminal Procedure Act, although, three months later, she reported having been infected and having been assaulted on her back with a biro.

by the defendant, facts which are not the subject of these proceedings.

All these circumstances referred to above raise the reasonable doubt as to the extent to which Clemencia was unaware that Luciano did not suffer from such a disease and, consequently, whether she accepted the risk of having sexual relations with him under such conditions.

3.2- On the other hand, no prosecution evidence worthy of being taken into account has been produced in the plenary proceedings to prove that on 21 June 2014, Clemencia was assaulted by the defendant, as no prosecution evidence has been produced in the opinion of this Court to corroborate the incriminating account of the complainant, given that she did not show any injuries, the only witness to these events, Adelaida, did not remember what happened and the police officers who went to the house only witnessed the aggressiveness shown by the defendant, a circumstance which led them to recognise that they had to reduce him, later finding a closed knife in a pocket of his trousers during the search.

In these conditions we must conclude that the testimony given by the complainant lacks sufficient convincing force to establish the facts of the accusation, which we have expressly declared not proven".

SECOND.- The Court of First Instance issued the following pronouncement: "

JUDGMENT

Acquit Luciano of the charges brought against him by the accusations, declaring ex officio the costs of this trial and annulling all the precautionary measures ordered against him.

Once this decision is final, in accordance with the provisions of articles 5 and 9 of Organic Law 10/2007, of 8 October, regulating the police database on identifiers obtained from DNA, proceed to cancel all data belonging to the accused, as well as the samples or traces obtained from the same.

The knife seized in this case should be disposed of in accordance with the law.

This judgment is not final. An appeal in cassation may be lodged against this judgment, which must be prepared in the manner provided for in Articles 854 and 855 of the Criminal Procedure Act, within five days of the last written notification thereof.

The Public Prosecutor's Office and the other parties to the proceedings shall be notified

of this decision. Thus, by this judgment, we pronounce, order and sign it.

THIRD.- Once the parties were notified of the judgement, the legal representation of Clemencia (private prosecution) announced its intention to lodge an appeal in cassation for infringement of the law, an appeal which was considered prepared and the necessary proceedings and certifications for its substantiation and resolution were sent to this Second Chamber of the Supreme Court, and the corresponding roll was formed and the appeal was formalised.

FOURTH - The appeal lodged by Clemencia was based on the following GROUNDS OF APPEAL:

For infringement of the law, based on number 1 of article 849 of the LECrim, as the judgement under appeal committed an error of law by classifying the facts prosecuted as not constituting a crime of aggravated injury, provided for and punishable under art. 149.1 of the Criminal Code, with the aggravating circumstance of kinship, given that in those declared proven there are the requirements that make up the crime of aggravated injury by subjecting the victim to dangerous situations that he is not safe to control, and therefore articles 149. 1 and 149. 1 of the Criminal Code have been infringed.
149.1 in conjunction with articles 153.1 and 3 of the Penal Code .

FIFTH - After the parties were informed of the appeal, the Public Prosecutor's Office, in a letter dated 9 July

The appellant Luciano, in his letter of 27 June 2018, requested that the action be dismissed as inadmissible and challenged the substance of the plea in law and sought its dismissal. After being admitted by the Chamber, the case was closed for judgment to be delivered in due course. Once the case had been referred for judgment, the vote was held on 23 October 2019, which, given the issues to be dealt with, was extended to the present day.

THE LEGAL BASIS

PRELIMINARY.- Section 26 of the Provincial Court of Madrid, in its Ordinary Proceedings no. 1763/2017, stemming from Ordinary Proceedings 1/2016 of those of the Court for violence against women no. 8 of Madrid, handed down a judgment on 16 April 2018 in which it acquitted Luciano, among others, of the crime of injury under article 149.1 of the Criminal Code with which he had been charged, as well as the crime of mistreatment of work in the context of violence against women under articles 153.1 and 153.3 of the Criminal Code.

The present cassation appeal has been lodged against the acquittal for these two offences by the representation of Clemencia, who was the private prosecutor in these proceedings and who had argued that the accused had committed both offences, in addition to the offence of possession of a prohibited weapon under article 563 of the penal code.

The appeal is based on a single plea of infringement of the law, under Article 849.1 of the LECRIM, albeit with a triple dimension, as it considers that the offence of injury in Article 149.1 of the Criminal Code was not applied, as well as the aggravating circumstance of kinship in Article 23, in addition to considering that the facts can also be subsumed under the offence of mistreatment in the context of violence against women in Articles 153.1 and 3 of the Criminal Code.

FIRST.- The appeal assumes the established constitutional and jurisprudential doctrine that prevents the Court from assessing personal evidence that has not been taken in its presence, as well as admitting the intangibility of the factual account described in the first instance judgment in consideration of the procedural channel through which it develops its disagreement with the judgment.

Nevertheless, he considers that the description of the proven facts provided by the trial court should have led to the accused being convicted as the perpetrator of a crime of assault and battery under Article 149.1 of the Criminal Code, with the aggravation of kinship of article 23 of the same punitive text, given that the Court describes that the accused knew since 2004 that he was a carrier of HIV, and that it was through sexual relations with his partner Clemencia that he ended up transmitting the disease to her in 2013, without the consent that she may have given having any other consequence than to reduce by one or two degrees the penalty legally established for the harmful act prosecuted (art. 155 of the Criminal Code).

1. Beyond the ethical assessment which, in terms of freedom of decision, may be merited if a person who knows that they are suffering from a sexual disease hides its existence from those who have sexual practices with them, the criminal consideration of this reality is approached by the legislator on the basis of the right to health, contemplating the legal right from its more specific meaning of the *absence of disease or illness* in a population or individual. Sexual activity without adopting the precise health prophylaxis when required can not only lead to the propagation of bacterial, viral or parasitic pathogens that can be transmitted sexually, with mild or transitory consequences for human health on many occasions, but can also lead to serious long-term results, even of a permanent nature, such as infertility, chronic diseases, carcinomas or premature death, as well as serious vertical pathologies in the foetus or in the new-born child.

In any case, our legislator's consideration of health as a right deserving of specific criminal protection, as far as sexually transmitted disease contagion is concerned, has been based primarily on the requirement that the behaviours of

risk produce a result. In this way, the legal right has been configured as personal in nature, ruling out the classification of these conducts as crimes against collective health, i.e. as crimes of potential danger in view of the risk of spreading the infection or disease, for which a healthy person who has risky relations with an individual who is known to be ill could also be held responsible.

This has not been the case in all our legislative precedents. The Penal Code of 1822 condemned as responsible for a crime against public health (art. 378), "*Those who introduce or spread contagious diseases or contagious effects, and those who break quarantines and sanitary cordons, or escape from lazarettos".* This specific provision disappeared in the Penal Code of 1848 and in the crimes against public health contained in Title V, Book II, of the Penal Code of 1870, and it was the Penal Code of 1928 that re-established the crime of malicious spreading of disease within the crimes against public health, as well as introducing, for the first time, the specific crime of venereal contagion within the crimes against life, bodily integrity and the health of persons.

These two specific provisions disappeared in the Criminal Code of 1932 (articles 346 to 352 for crimes against public health and 421 to 430 for crimes of injury), and it was in the reform of the Criminal Code of 1944, operated by the law of 24 April 1958, that an article 348 bis was introduced, which provided that "*Anyone who maliciously spreads a disease transmissible to persons shall be punished with the penalty of lesser imprisonment. However, the courts, taking into account the degree of perversity of the offender, the purpose pursued or the danger that the disease entails, may impose the immediate higher penalty, without prejudice to punishing the act as appropriate if it constitutes a more serious offence*"; wording that persisted until the repeal of the Consolidated Text of the Criminal Code approved by Decree 3096/1973, of 14 September. In any case, the precept was difficult to apply in practice insofar as, by requiring the malicious spread of the disease, it required an intentionality that was alien to reckless conduct and eventual malice, as well as leaving out of the objective scope of application the cases of mere creation of danger, despite being the element that could have justified a differentiated classification with respect to the offences of injury in which the episodes with actual injury would be subsumed. In this way, the most criminologically relevant conduct for the legal good of public health was left out of any incrimination: that of the person who, without wanting or intending the spread of the disease, acts despite being fully aware of the high risk of infecting another person.

The specific provision of considering the spread of diseases as an offence was excluded from the 1995 Criminal Code, which, since its initial drafting, does not contemplate any criminal offence of endangering public health through contagion, so that the incrimination of conduct involving the transmission of diseases or permanent deterioration of health, including the transmission of acquired immunodeficiency syndrome (AIDS), has to be placed in the classification of injuries in Articles 147 et seq. of the Criminal Code, must be included in the classification of injuries in articles 147 and subsequent articles of the Penal Code, given that the basic type of the offence of bodily injury admits any means or procedure in order to cause an injury that undermines the bodily integrity or the physical or mental health of a person, thus integrating into the typical conduct the contagion or transmission, intentional or negligent, of a disease or illness to another person, whatever its nature may be.

2. With regard to the culpable causation of this type of damage to the victim's health, the ruling of this Court 528/2011, of 6 June, in a case of AIDS infection, after describing the performance of numerous coitus knowing that the accused was suffering from the contagious infection, stated that it is unquestionable that the use of condoms, as the doctors themselves had prescribed, not only eliminated the presence of direct malice, but also prevented the possibility of appreciating eventual malice, as the doctors themselves had prescribed, not only eliminated the presence of direct malice, but also ruled out the possibility of assessing eventual malice since, whatever the doctrinal criterion adopted in this respect, the fact is that both the hypothesis of a close representation of the causation of the result and the hypothesis of a close representation of the causation of the result were excluded.

The same could be said of the acceptance of the risk as a consequence of the action carried out, just as it could be said of the assumption of the consequences of the risk generated.

However, the decision considered that this was not the case in relation to the classification of the conduct as negligent, which should also be considered as serious for the purposes of including it in the provisions of article 152.1.2 of the Criminal Code, due to the importance of the risk caused and the potential result derived from it (the contagion of AIDS). This guilty characterisation emphasised the fact that, whether or not condoms were used in sexual relations by the person who was a carrier of the virus (HIV), he infected his partner by not using them effectively enough, without forgetting an element that must be considered essential for the purposes of the legal characterisation of this type of contagious conduct, which is the prior information to the partner that he was infected with HIV, in the understanding that: a) that the right to privacy of the patient is limited by the right to life and health of the similar person and b) that the existence or not of this prior information is crucial, because if the partner is not informed that he/she is a carrier of the virus, the transmitter is placed in a position of *control of the act* that sustains the perpetrator in a crime of injury, given that the passive subject would accept having sexual relations in a different way to how he/she would have done if he/she had known that he/she was having sexual relations with an infected person.

3. On the contrary, Judgement 1218/2011, of 8 November, highlighted that the defendant had sexual relations with his victim without a condom on two occasions and, in order to continue having relations, omitted to inform her that he was a carrier of a disease transmissible with this type of relations, resulting in contagion with the active subject being aware of the high degree of probability that it would actually occur, which, transcending the field of conscious guilt, characterises intentional intent from the perspective of the doctrine of representation of the result, followed by our jurisprudence from our jurisprudence from April 1992 (known as the "rape case"), characterises the eventual malice from the perspective of the doctrine of the representation of the result, followed by our jurisprudence from the judgement of 23 April 1992 (known as *the* "*rape case*"), in which it was stated that "if the perpetrator knew of the specific legally disapproved danger and if, despite this, he acted in the way he did, his decision is equivalent to the ratification of the result which - with different intensities - has been required by jurisprudence for the configuration of eventual malice. In recent times, it has been convincingly demonstrated in the doctrine that, despite programmatic statements that seem to emphasise the requirements of the theory of consent, the Supreme Court has for some time now, in its pronouncements, been moving ever closer to the consequences of the theory of probability. This is not surprising, as this evolution can also be seen in the theory of malice aforethought". The judgement adds that "the case law of this Court, however, allows the existence of malice aforethought to be admitted when the perpetrator subjects the victim to dangerous situations which he is not certain to control, even if he is not pursuing the typical result. The eventual malice, therefore, is not excluded simply because of the hope that the result will not occur or because it was not desired by the perpetrator".

4. The singularity introduced by the present appeal is to argue that even if the appellant knew that the accused was a carrier of HIV, and even if she agreed to have sexual relations with him without any kind of prophylaxis, the transmission of the disease is deserving of criminal reproach, insofar as Article 155 of the Criminal Code establishes that "*In crimes of assault,* except, of course, in those cases in which consent is given by a minor or a person with a disability and in need of special protection, in which case, which is not the case here, the consent would be null and void and would have no effect.

In the development of this argument, the appeal is based on the concurrence of the presupposition of objective imputation corresponding to the criminal offence of injury, highlighting that it is declared proven that "*the defendant, Luciano, whose personal circumstances are recorded in the case file, had been diagnosed with HIV infection since 15 July 2004.*

In 2012, he began a relationship with Clemencia, with whom he lived for a year and a half in the city of Madrid, until September 2014.

In September 2013, Clemencia was diagnosed as a carrier of HIV, which had been transmitted to her by the defendant in the course of their sexual practices as a couple.

5. Thus, the question that arises is the appropriate criminal response when the objective requirements of the type of injury are met and either the victim had placed himself in the situation of risk from which the result foreseen by the rule derives (self-endangerment), or he assumed the situation of danger created by another (heteroposition in danger). These are cases in which the criminal response becomes complex with regard to third party participants, given that self-endangerment does not exclude the possibility that a third party may maliciously cooperate in the victim's carrying out the risky conduct from which the victim's injuries will arise, nor is there a lack of cases in which a third party carries out the risky conduct on the victim with the latter's full consent.

Sectors of doctrine maintain that both cooperation in self-injury and consensual self-injury exclude the liability of the third party. They consider that the harmful result is fully attributable to the victim's sphere of responsibility, not only when a third party facilitates the victim's self-injury, but also when the injury arises from a risky activity carried out by a third party with the consent of the victim, provided that: the activity is organised with the victim; the victim is self-responsible; and the third party has no special duty of protection with respect to the victim's property that is affected.

However, there are reasons that justify that in cases of self-injury the third party can be treated differently than in cases of self-injury, because even if in the former the victim gives his consent to engage in the ultimately harmful activity, it is clear that the injured person does not trigger the risk process himself, which will then have an unforeseeable development, nor in most cases will he be able to evaluate the risk in its full dimension, nor control it or cancel it, it is clear that the injured person does not himself trigger the risk process that will later have an unforeseeable development, nor in most cases will he be able to assess the risk in its full dimension, nor control or cancel it afterwards, so that the individual transfers to the third party all the capacity to control or desist from the situation. The person who agrees to travel as a passenger in a car that is to be driven by someone who is known to have consumed a significant amount of alcoholic beverages does not have the same degree of perception of psychomotor impairment as the driver, nor, on most occasions, can he or she put an end to the risky situation or become aware of the risky manoeuvre that the driver may adopt suddenly and unexpectedly, either by overtaking without visibility or in a tight space, or by not slowing down at the precise moment when the driver is approaching a steeper curve.

Thus, consensual self-harm is structurally different from self-injury, and it is important to determine in which cases it should lead to the punishment of the third party who caused the harm.

It is notorious that the criterion of *control of the act* can be decisive for a distinction between cooperation with an unpunished self-injury (injury caused by one's own responsibility) and injury caused by the risky behaviour of a third party, but the canon cannot be raised as a differentiating element in all those cases in which there is a *shared control of the risk* between the third party and the person endangered.

For this differentiation, the lower court judgment resorts to the element of consent, which is not appropriate because it avoids the fact that the fullness of adhesion would require that it be projected onto the harmful result being prosecuted and, even in that case, that the normative criterion set out in Article 155 of the Criminal Code attributes to consent a reduction in the penalty that lies in the lower value of the action, but in no way a criminal irrelevance in the face of acts that entail the

breach of the standard of conduct imposed by the legislator.

As is maintained by relevant doctrinal sectors, the consensual self-injury entails a teleological restriction of the type of injury when the danger is equivalent, in its substantive aspect, to a normally unpunished self-injury with the cooperation of third parties. An equivalence that requires the communion of the elements that blur the liability of the perpetrator with that of the injured person himself, specifically: a) That the victim has adequate knowledge of the risk; b) That he consents to the risky action causing the harm, without being driven by a marked incitement of the perpetrator; c) That the harm is a consequence of the risk assumed, without adding other carelessness of the performer and d) That the victim, up to the moment of complete lack of control of the risk, has been able to control it in a manner equivalent to the perpetrator himself. This is fully predictable with respect to a person who, knowing of the contagious pathology of another, voluntarily and freely decides to have sexual relations with him, knowing that these are a vehicle for the transmission of the disease. A position which, *obiter dictum* and without elaborating on the underlying reasons, was reflected in the STS 528/2011, of 6 June, for which His Excellency Judge José Manuel Maza Martín was the rapporteur.

SECOND.- Despite the above, the account of proven facts in the judgement of the court of first instance does not describe that the victim knew and accepted the risk inherent in the sexual relations that she had with the accused in their relationship as a couple. At number 1.2 of the historical account, the Court describes that: "*It has not been proven beyond doubt that Clemencia was unaware of the sexually transmitted disease that her partner was suffering from and, consequently, that she had sexual relations with him without being aware of this*".

In principle, the expression "*ignorance has not been proven*" is tantamount to not knowing whether the appellant knew of the inherent risk of having unprotected sexual relations with the accused, which prevents not only asserting that Clemencia gave consent, but also assessing the concurrence of the elements set out above that would make it possible to exclude punishability in cases of heteroposition in danger.

The wording of the factual account is not, however, capricious, but is perfectly consistent with the legal grounds of the judgment. In its third legal basis, the lower court judgment analyses that Clemencia maintained in the plenary session that the accused had never admitted to her that he was HIV-positive, adding that if she had known this she would never have had *"unprotected"* sex with him. However, in this analysis, the Court summarises its position by stating that *"her testimony, however, is not congruent with the rest of the evidence that has been presented",* going on to reflect the set of elements that lead the trial body to find *"a reasonable doubt as to the extent to which Clemencia was unaware that Luciano did not suffer from the disease and, consequently, whether she accepted the risk of having sexual relations with him in such conditions".*

Beyond the fact that the testimony given by the victim derives from a police action that was prompted by a heated argument between Clemencia and the accused, the Court highlights a series of elements that point to a reality contrary to that expressed in the testimony given by the complainant. Specifically, the judgement links the following evidence:

a) Although the complainant categorically denies that she knew that her partner was a carrier of HIV, she admitted in court that in the neighbourhood where they lived and where she had grown up (Pozo de Tío Raimundo, Entrevías), it was said that the accused was a carrier of the disease, although she claims that he denied it when she questioned him about it.

b) He further stated that the accused was known in the neighbourhood as "*Luciano, el Cebollero*" and that he knew that Luciano was a former drug addict and that they used cocaine and hashish together when they could.

c) Clemencia also admitted that the accused's sister, Vicenta, when they began their relationship, warned her to protect herself, leaving implicit what she was referring to without being more specific; the latter said that the complainant's reply was "*that nothing was wrong*".

d) Adelaida, a friend of the couple who was at Clemencia and Luciano's home on 21 June 2014, openly reflected in the plenary that if everyone in the neighbourhood knew that Luciano was a carrier of the virus, she did not understand why his partner Clemencia should not have known.

e) Clemencia, as a user of narcotic substances (as she herself acknowledged in court), and aware of the drug addiction of her partner with whom she shared drug use, must have been aware of the risk to which she was exposed, not only by having sexual relations, but also by sharing the consumption of narcotic substances.

f) The forensic medical report included in the proceedings (folios 522 and following), states that the defendant was examined at the Infanta Leonor Hospital on 28 May 2013 and that the report mentions "*risky sexual relations..., for three months lesions on the penis, pruritic. It worsens when he has sex...* ", external evidence of sexually transmitted disease that leads the Court to support that Clemencia must have perceived and consented to sexual relations with risk of disease transmission, given that she herself was diagnosed with the infection months later, in September 2013, in addition to being diagnosed as a carrier of HIV.

g) Neither after this diagnosis, nor when Clemencia reported the assault that allegedly took place on 21 June 2014, did she include any mention of having the disease, a circumstance of which she had been aware since September 2013, having subsequently availed herself of the exemption from testifying against her partner provided for in article 416 of the LECrim. It was three months later when she reported the infection.

On the basis of this analysis, the Court concludes that "*there remains a margin of doubt in favour of the defendant which is decisive for his acquittal*". adding that "*one of the guarantees incorporated in the right to the presumption of innocence (*art. 24.2 EC*) is that the guilt of the accused must be proven beyond reasonable doubt and the fact is that, in this case, of the various facts on which the accusation is based, the only one that has been proven is that the complainant had a sentimental relationship with the defendant and that as a result of the sexual relations they had, she became infected with the virus (HIV) of which he was a carrier, although it has not been established that Clemencia was unaware of the pathology suffered by her sentimental partner*".

We have already indicated on some occasions that the presumption of innocence does not extend to causes excluding imputability (SSTC 209/1999, of 29 November, 133/1994, of 9 May; 36/1996, of 11 March; 87/2001, of 2 April or 335/2017, of 11 May). There is no constitutional presumption that someone can know and consent to being harmed by an infectious impairment to their health, when consent is not reflected as a negative element of the type of injury. In this way, what the judgement is proclaiming is the transcendence of the principle of *in dubio pro reo* to the sphere of the circumstances excluding the unlawfulness of a conduct, thus contradicting the initial doctrine of this Court which considers that although the constituent elements of the offence must be proven by the prosecution, the exonerating and mitigating factors must be as proven as the act itself and the burden of proof lies with the person who opposes their concurrence (SSTS 489/2004, of 19 April or 415/2016, of 18 April, among many others). Notwithstanding this doctrine, the jurisprudence of this Chamber has announced on various occasions (SSTS 639/2016, of 19 July; or 335/2017, of 11 May) the convenience of reviewing the inflexibility of the budget, having come to appreciate the operability of the *principle in dubio pro reo* when there are well-founded and stable indications of the absence of material unlawfulness of

the conduct (STS 802/2016, of 26 October), which requires that the allegation has not been surprising and that the prosecution is given the opportunity to refute it in contradictory debate. If in such circumstances a credible doubt arises as to the veracity of the assertion of a fact on which the material unlawfulness of the conduct, and thus the conviction or acquittal of the accused, depends, if the court directly or indirectly expresses its doubt, i.e. it cannot rule out with certainty that the events took place in a different manner more favourable to the accused, and nevertheless adopts the version most detrimental to the accused, it would violate the principle of *in dubio pro reo*, an auxiliary judicial element of weighing, but of singular value as a rule of judgement due to its proximity to the constitutional rule of the presumption of innocence.

THIRD - The allegation concerning the improper non-application of Article 153 of the Criminal Code must also be rejected.

Article 849.1 of the LECRIM establishes as a ground for cassation "*When, given the facts that are declared proven (...) a criminal precept of a substantive nature or another legal rule of the same nature that must be observed in the application of the Criminal Law has been infringed*". It is therefore, as the most stable case law of the Court has established, a plea in which only problems relating to the application of the legal rule are raised and discussed, which inevitably requires starting from specific and stable facts, which must be those subject to judicial re-evaluation. It is a means of challenge that serves to raise discrepancies of a substantive criminal nature, seeking to correct or improve the legal approach given in the judgment under appeal to facts that have already been defined. The plea thus requires the most absolute respect for the factual account declared proven or obliges one to seek its modification beforehand by means of Articles 849.2 LECRIM (error in the assessment of the evidence) or in the violation of the right to the presumption of innocence, article 852 of the procedural law (STS 589/2010, of 24 June), as it is not possible to seek a control of the legality of the judicial decision by altering the supporting factual reality in terms of argumentation, regardless of whether this is done by modifying the factual account in its entirety through a unilateral reinterpretation of the evidence or by eliminating or introducing nuances that condition or deviate the applied and applicable legal hermeneutics.

From this point of view, it should be remembered that the criminal offence set out in Article 153.1 punishes anyone who "by any means or procedure .... *hits or mistreats another person without causing injury, when the offended party is or has been a wife, or a woman who is or has been linked to him by an analogous relationship of affection even without cohabitation, or a particularly vulnerable person who lives with the perpetrator*", which in no way finds factual support in the lower court ruling, which merely states that "At *around 8 p.m. on 21 June 2014, in the family home in Madrid, an argument broke out between the defendant and Clemencia, the causes and circumstances of which have not been proven*".

The plea is dismissed.

FOURTH - The dismissal of the appeal leads to the appellant being ordered to pay the costs, in accordance with the provisions of article 901 of the LECRIM.

FAILURE

For all the foregoing reasons, in the name of the King and by the authority vested in it by the Constitution, this Court has decided

Dismiss the appeal brought by Clemencia's legal representative against the judgment delivered on 16 April 2018 by the 26th Section of the Madrid Provincial Court in Case 1763/2017, with the appellant being ordered to pay the costs incurred in the processing of her appeal.

Communicate this judgment to the aforementioned Provincial Court for the appropriate legal purposes, with the return of the case that was sent to it, with an acknowledgement of receipt.

This decision shall be notified to the parties, who shall be informed that there is no right of appeal against it, and shall be inserted in the legislative collection.

It is so agreed and signed.

Julián Sánchez Melgar Ana María Ferrer García Pablo Llarena Conde

Vicente Magro Servet Susana Polo García