CASE TRANSLATION: **SPAIN**

Case citation:
STS 2047/2015

Name and level of the court:
Tribunal Supremo, Sala de lo Penal (Supreme Court, Criminal Chamber)

Date of decision:
19 May 2015

Speaker:
Hon. Sr. D.: President of the Criminal Chamber, Manuel Marchena Gómez

Members of the court:
D. Manuel Marchena Gómez, D. Julián Sánchez Melgar, D. Juan Ramón Berdugo Gómez de la Torre, D. Luciano Varela Castro, D. Perfecto Andrés Ibáñez

Spain; sexual abuse of a minor; communications via social networks; authenticity

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Body: Supreme Court. Criminal Chamber

Headquarters: Madrid

Section: 1

Date: 19/05/2015

Appeal No: 2387/2014

Resolution Number: 300/2015

Procedure: Criminal– Abbreviation Procedure/Summary

Speaker Hon. Sr. D.: Manuel Marchena Gómez

Ruling/Judgment:

Secretary of Chamber: Ilma. Sra. Dña. Sonsoles de la Cuesta and de Quero

SUPREME COURT

Criminal Chamber

Judgment Number: 300/2015

Type of Resolution: Judgment

Excmos. Sres.:

D. Manuel Marchena Gómez

D. Julián Sánchez Melgar

D. Juan Ramón Berdugo Gómez de la Torre

D. Luciano Varela Castro

D. Perfecto Andrés Ibáñez

In the name of the King

The second chamber of the penal, of the Supreme Court, constituted by their Excellencies mentioned in the margins,

In the exercise of the judicial authority that the Constitution and the peoples of Spain grant it, has dictated the

Following

Judgment

SUMMARY:

The Supreme Court sets out the criteria for accepting messages from social networks as evidence in legal proceedings.

Confirms the validity of the transcript of the communication by a minor with a friend via a social network, to whom she told about sexual abuse by her mother's boyfriend.

In a judgment, the Criminal Chamber of the Supreme Court point out that the test of two-way communication through any of the multiple instant messaging systems must be addressed with 'all caution', because 'the possibility of manipulation forms part of the reality of things'. In this sense, it affirms that 'the anonymity afforded by such systems and the free creation of accounts with false identity make it possible to appear as a communication in which a single user relates to himself.'

The ruling, which is given by the speaker, President of the Criminal Chamber, Manuel Marchena, affirms that if the conversations are challenged, when printed files are presented in the case, the burden of proof is shifted to whoever intends to take advantage of their suitability as evidence. For this reason, it is considered essential to use expert witnesses to identify the true origin of that communication, the identity of its interlocutors and the integrity of its contents.

In the present case, the Supreme Court confirms the validity of the transcript of the dialogues maintained in the social network Tuenti by a minor with a friend, to whom [the minor] recounted the sexual abuse by the mother's boyfriend. The victim did not dare to tell what had happened to her father and her sister, nor her mother, for fear that they would not believe her, as happened when her daughter spoke before the director of the Institute and the Police about the [sexual] touches. The private accusation submitted in the case screenshots of the minor´s Tuenti account.

The Provincial Court of Valladolid sentenced the man to 5 years and 1 day of imprisonment for the crime of sexual abuse. The Supreme Court rejected the appeal of the convicted in which, amongst other reasons, the appellant questioned the authenticity of the dialogue in Tuenti, arguing that it could be manipulated.

According to the judgment, there is no doubt that the conversations were genuine. The judges relied on the fact that the victim made available to the judge her Tuenti password so that, if it was questioned, its authenticity could be verified by an expert report. It was also valued that the friend of the victim, declared as a witness at the trial where he could be questioned by the accusers and the defence.

JUDGMENT

In the Villa of Madrid, nineteen of May in the year two thousand and fifteen.

This Chamber, composed as it is recorded, has seen the appeal for infraction of the law, breach of form and violation of constitutional precept, filed by the legal representative of Luis Francisco, against the ruling issued by the Audiencia Provincial Court of Valladolid (Second Section), dated 19 November 2014, in the case presented against Luis Francisco, for a crime of sexual abuse, their excellencies of the Second Chamber of the Supreme Court, who as mentioned in the margin, expressed themselves, by Voting and Judgment under the Presidency of the first of the aforementioned. The Public Prosecutor has intervened, the appellant represented by Clerk (Procurador) Miguel Ángel Capetillo Vega and appellant Abilio represented by Clerk (Procurador) doña Susana Gómez Castaño. The Presiding Judge is Sr .D. Manuel Marchena Gómez.

I. FACTUAL BACKGROUND

First.- The Investigating Court no. 1 of Valladolid, initiated prior proceedings abbreviated proceedings no. 3316/2013, against Luis Francisco and, once it was concluded sent it to the Provincial Court of Valladolid (Second Section), roll abbreviated procedure no. 21/2014 which, on 19 November 2014, issued judgment No. 346/2014 which contains the following PROVED FACTS:

'Ana María, born NUM000 of 2000, is the daughter of Don Abilio and Doña Belen, who separated by mutual agreement in 2005, thereafter residing with the mother both Ana María and her sister Micaela, in the house located in the CALLE000 nº NUM001, NUM002, of the locality of Villanubla (Valladolid).

Don Luis Francisco, an adult with no criminal record, began a relationship with Doña Belen years ago, beginning to live with her and her daughters at the address indicated in 2006 or 2007. Because of problems of coexistence with her mother and with Don Luis Francisco, in October 2012 Micaela went to live with her father in CAMINO000 nº NUM003, NUM004 Street of the locality of Villanubla (Valladolid), the mother having agreed to this change, in such a way that she did not even communicate the marriage separation to the court, taking the change of residence of Micaela's change of residence, who was a minor, in a consensual way between his parents.

At the beginning of April 2013, Don Luis Francisco, on a date that was not specified exactly, taking advantage of the relationship of co-habitation with Doña Belen and Ana María, and with the excuse of helping the latter with her schoolwork, entered the room in which Ana María was studying while her mother was on the ground floor of the apartment, placed himself behind Ana Maria while she was sitting in front of the computer and touched her breast above her clothes, Ana María asked him to stop, Don Luis Francisco continuing to touch. Don Luis Francisco had behaved like this with Ana María on other occasions, though the number of times and the dates have not been specified, although they all happened between April and May 2013.

One Saturday that has not been specified but occurred in the month of April of 2013, whilst Doña Belen was working and Don Luis Francisco and Ana María were alone in the house, Ana María went out to the street to see the children of the communions, realizing at once that she had not taken the house keys, so she returned home to pick them up, Don Luis Francisco opened the door and who, from the ground floor of the apartment, told Ana María that he wanted to see her new bra, and upon refusing to do so and in

response to her telling him that she did not have a sufficient level of trust with him to show it to him, he told her that she had a complex about having really big breasts, but that he believed that she had pretty breasts, and tried to lift up the blouse and touch her breasts, without being able to lift up the blouse or it be proved in this occasion that he was able to touch her breasts.

At least twice in April 2013, Don Luis Francisco, on the excuse of helping Ana María with her tasks, entered her room whilst she was studying sitting or lying on the bed, and put his hand on Ana María's genitals, on top of her clothes. Ana María told him that she was sleepy and that she wanted to sleep and took his hand away, Don Luis Francisco left the room.

This situation made Ana María feel fearful and uneasy, without daring to tell these facts to her mother, because she was not sure she would believe her, and without telling her father or sister Micaela, because she did not know how they would react and because she was ashamed of what had happened.

On 31 May 2013, around 20 hours, Ana Maria was having a conversation via Tuenti with her friend Constancio, who she told that her mother's boyfriend 'touched the ...' and that she should show him her new bra, that he had tried to raise the shirt and touched her, that he had touched 'her parts', stating that 'he had touched those at the top' and that 'the bottom part was touched twice or so', that on the day of the communions he tried to raise her shirt, Constantius insisting that she tell her mother.

After this conversation, Ana María continued without telling these facts to her parents or her sister. In an excursion that she went on with her school, on a date that has not confirmed or specified but in any case between 1 and 19 June 2013, Ana María and her classmates were in a bar and her friend Sandra thought that Ana María looked sad, so she asked her what was wrong, both of them going to the toilet where Ana María told her what happened with her mother's partner, also telling her friends Lourdes and Ariadna later on the same day, her friends insisting that she had to tell someone 'just in case it went further', so on June 19, Ana Maria told one of her teachers, Doña Custodia, what had happened, who in turn informed the Director of the Institute, Doña Felicidad. She summoned Ana María's mother and the Municipal Police for the following day, 21st Ana María recounting the facts again before her mother, Doña Custodia, Doña Felicidad and the agents of the Municipal Police, without Doña Belen giving credibility at that moment in time to Ana María's manifestations, which she also didn't give at a later date.

Second.- The Provincial Court of Valladolid, Second Section, issued the following pronouncement:

'OUR RULING: That we must CONDEMN DON Luis Francisco as the perpetrator of a continuing crime of sexual abuse of a thirteen year old child, with a prevalence derived from his superior status, articles 183.1 and 4. d) and 74.1 of the Penal Code, without the concurrence of circumstances modifying criminal responsibility, to the sentence of FIVE YEARS AND ONE DAY OF IMPRISONMENT, in addition to a special disqualification from the exercise of the right to vote during the sentence, with the added penalty of PROHIBITION OF PROXIMITY TO Ana María AND HER ADDRESS AT DISTANCE NOT LESS THAN 500 METERS, AND OF COMMUNICATION WITH HER BY ANY MEANS OR PROCESS, DURING A PERIOD OF SIX YEARS AND ONE DAY, also imposing the MEASURE OF SURVEILLANCE IN LIBERTY, once the custodial sentence expires, PROHIBITION OF PROXIMITY TO Ana María AND HER ADDRESS AT A DISTANCE NOT LESS THAN 500 METERS, AND OF COMMUNICATION WITH HER BY ANY MEANS OR PROCESS FOR FIVE YEARS, AND PARTICIPATION IN A SEXUAL EDUCATION PROGRAM (which may be undertaken with the execution of the custodial sentence), as well as the payment of the costs of proceedings, including those of the private prosecutor. In the area of civil liability, Don Luis Francisco should indemnify Ana María to the amount of 3,000 euros, which amount will accrue interest as provided in Article 576 of the LEC.

This resolution is to be notified to the parties, letting them know that it is not final with right to file an appeal before the Second Chamber of the Supreme Court, which must be prepared in writing authorized by an Attorney and court clerk, filed before this court within FIVE DAYS, of the last notification and which must contain the requirements of article 855 et seq. of the Criminal Procedure Act (LEC).'

Third.- Once the judgment had been notified to the parties, an appeal was prepared by the appellant, which was announced, and the necessary certificates for its substantiation and resolution were sent to this Second Chamber of the Supreme Court, the corresponding roll being formed and the appeal formalized.

Fourth .- The legal representation of the appellant Luis Francisco, based his appeal on the following grounds of appeal:

I.- Under the ambit of art. 849.2 of the LECrim. II.- Under the ambit of art. 850 of the LECrim. III.- Under the ambit of art. 852 of the LECrim, for violation of art. 24 (right to effective judicial protection and presumption of innocence).

Fifth.- Having been instructed the parties to the appeal filed, the Attorney General, in writing on 2 February 2015, carrying out the procedure that was conferred on him, and for reasons that he argued, interested in the inadmissibility of the grounds of appeal that were later rejected.

Sixth.- By order dated 27 April 2015, the appeal was declared admitted, and the records were concluded to indicate in the corresponding order the deliberation and ruling.

Seventh.- Once the anticipated ruling was made, the deliberation of the same was held on 13 May 2015.

II. LEGAL FOUNDATIONS

1 .- Sentence No. 346/2014, dated 19 November, issued by the Second Section of the Provincial Court of Valladolid, sentenced the accused Luis Francisco, as perpetrator of a continuing crime of sexual abuse of thirteen year old child, to 5 years and 1 day in prison, as well as the additional penalties and security measures that are reflected in the factual background of this resolution.

For the legal representation of the accused an appeal is filed. Three grounds are given, which will be subject to individual consideration, without prejudice to precise references in order to avoid unwanted reiterations.

2 .- The first of the challenges, under the protection of art. 849.2 of the LECrim argues an error of fact in the evaluation of the evidence, derived from documents presented as part of the case and that demonstrate the error of the judge.

To endorse the error which took place the Tribunal a quo, referred to the conversations through the Tuenti mentioned in folios 178 to 190 and 199 et seq. of the case, which would show that communications between the victim and Constancio were not daily, as mentioned in the ruling. This would affect the credibility of the victim. Also call upon the documents to demonstrate the mistake of the judges of first instance, the textual document the private prosecutor of the individual prosecuting attorney in folios 175 and 176, the report of the expert psychologist registered in the Institute of Legal Medicine, dated 16 September 2013, and the act in which the minor was examined at the instruction stage of proceedings.

The ground is not viable.

At the outset, the argument falls within terms of inadmissibility provided for in art. 884.4 of the LECrim, insofar as it is indicates how documents have not met the requisites for appeal purposes.

The conversations between Ana María and Constancio, incorporated to the cause as 'screenshots' obtained from the victim's mobile telephone, are not considered documents for appeal purposes. It is personal evidence that has been documented after the event for its incorporation in the cause. They do not suddenly acquire the character of a document to support an appeal challenge. This has been stated repeatedly by this Chamber in relation to, for example, the transcripts of dialogues or conversations maintained by telephone, even if they appear in a written or even a sound medium (for all, SSTS 956/2013 of December 17, 1024/2007, 1157/2000, 18 July and 942/2000, 2 June).

As the prosecutor points out in his report, the writings of the private prosecutor – mentioned by the appellant in the redaction of the plea – do not have such a character either. These are actions of a procedural nature, not real documents to enable the taking of the path offered by article 849.2 of the LECrim. Moreover, its content not only does not contradict the judgment history, but reinforces it. The same can be said of the psychological expert report. In fact, the complainant continues the reasoning of the prosecutor and does not rely on him to contradict the facts, but to question it. Hence, the basis of the ground does not follow, in that it does not add or remove some factual proclamation of the deposition of the proven facts. And to do so through the content of a single expert opinion or several coincident opinions that have been unjustified by the Court of First Instance (SSTS 458/2014, June 9, 370/2010, April 29, 182/2000, 8th February, 1224/2000, 8th July, 1572/2000, 17th October, 1729/2003, 24th December, 299/2004, 4th March and 417/2004, 29th March, among others). Finally, the declarations of the child in the investigation phase were not treated as documents. Its insufficiency to form the appeal concept of a document has been proclaimed so often

by this Chamber, that it is now unnecessary to justify its rejection with great argumentative efforts. It is a case of, as is well known, question of personal evidence that has been documented in the case, which lacks, in appeal terms, the evidential meaning that is trying to be attributed to it. Its valuation is inseparable from the proximity of the first court as a source of evidence. Hence, the tenacity of the appellant seeking to establish the alleged error of a decision of the court is manifestly futile (see SSTS 76/2013, 31 January; 546/2007, 12th June and 795/2007, 3rd October).

Nevertheless, in answering the third of the grounds formalized by the defence, the Chamber has assessed the allegations of the appellant, not from the perspective of the rejection of the appeal enforced by way of article 849.2 of the LECrim, but for what they have by way of affirmation of insufficient evidence and, therefore, coinciding with the constitutional right to the presumption of innocence (article 24.2 CE).

3 .- The second of the grounds alleges breach of form, under the protection of article 850.1 of the LECrim.

The defence alleges that the statements of local police officers Nos. 8463 and 8856 were concerned in time and form in the written provisional conclusions. However, they did not come into play because the Prosecutor's Office waived its proposal as evidence. That decision, he argued, had no reason to prejudice the defence.

The appellant is wrong.

In principle, the prior declaration of relevance and consequent admission of the evidence concerned in the provisional findings of any of the parties, does not oblige the court, in an unavoidable manner, to act as if it was the plenary proceedings. The initial relevance of a particular piece of evidence does not preclude during the plenary sessions, it being useful. Not everything pertinent is confirmed as necessary when it has been dealt with in the plenary session – as happened in the present case – a good part of the evidence proposed by both parties. In the words of this Chamber, expressed in numerous precedents, not even the fact that its previous and anticipated declaration of relevance, weakens the origin of the subsequent rejection. Contrary to the issue of relevance, which moves in the field of admissibility as a faculty of the court, is the need for its implementation as developed in the field of practice, so that evidence initially admitted as relevant may be lawfully not relevant, because the evidence is not relevant or inadmissible (SSTS 46/2012, 1st February, 746/2010, 27th July and 804/2008, 2nd December). We have also said that this ground of appeal does not seek to resolve formal refusals of evidence, but that such a refusal must have produced defencelessness, in such a way that the ground requires '... to show, on the one hand, the relationship existing between the facts which were wanted and could not be proved by inadmissible evidence, and on the other hand it must convincingly argued that the final resolution of the proceedings could have been favourable if the disputed evidence had been accepted '(SSTS 1023/2012, 12th December, 104/2002, 29th January, 181/2007, 13th April and 421/2007, 24th May).

We must add to the reasons for the rejection of the ground the fact that the defence –despite what it argues – did not propose in its written conclusions that the evidence whose practice it now claims. The Chamber has examined its evidential proposal (folio 195) and notes that only the testimonies of Belen and the agent of the Guardia Civil NUM005 were of interest to them.. The fact of having routinely proposed interested by the Prosecutor's Office '... even if they were waived' does not confer the availability of that proposal. It implies the anticipated acceptance of the outcome that, on its relevance and necessity, can be adopted by the Court.

The plea must therefore be dismissed on the ground that it is unfounded (article 885.1 LECrim).

4 .- The third of the grounds, under articles 5.4 of the LOPJ and 852 of the LECrim, denounces the violation of constitutional rights to effective judicial protection and presumption of innocence (articles 24.1 and 2 EC).

The defence understands that, in addition to defective and irrational reasons, the only evidence on which the conviction of Luis Francisco was based was the victim's statement. However, there were visible contradictions in this statement. Her credibility has been questioned by her own mother. The expert opinion on which the conclusions of the psychologist of the Institute of Legal Medicine were based, have gaps derived from the lack of a documentary support to which the defence could have had access. In addition, the psychologist's reading of the statements made by Ana María were predisposed in her favour, undermining the obligation of impartiality that the witness must be under in carrying out his work. To make matters worse, the accused's poor relationship

with the victim was a notorious fact, which became apparent during the development of the plenary session. His demands and discipline in studying were the source of the confrontations. This reality was also noticed by the witness, a sergeant of the Civil Guard, who noted the clear relationship as enemies between Luis Francisco with the two daughters of Belen, his girlfriend.

The arguments aimed at fighting the probative assessment of the court are also enriched – with some systematic dislocation – with allegations coming from the first of the grounds, to support the existence of an error in the evaluation of the evidence from article 849.2 of the LECrim. For example, it is said the anomaly around the fact that Ana Maria told a friend of the opposite sex, two years her senior, about her experience '*... instead of telling it, as it would be more logical for such intimate facts, either to a member of her family, to one of her close friends or to a teacher.*' There was also a reaction to the unconditional evidentiary acceptance of the dialogue between Ana María and her friend Constancio, which was incorporated into the cause through screenshots of the Tuenti account. The defence points out that *'... the context in which it unfolded is unknown, and if any phrase was eliminated*'.

The ground is not viable.

Only a precise understanding of the concept and the functional significance of the appeal can explain the limitations of this Chamber when assessing a challenge based on the breach of constitutional law on the presumption of innocence. These limitations become much more visible in assumptions such as the one submitted for our consideration. It is a sexual assault in which the aggressor and victim openly disagree about what actually happened and where both sides offer the Chamber openly contradictory evidence. And, although it is often forgotten, there is no similarity between the procedural position of the Provincial Court before which the evidence was presented and the ability of the Supreme Court to weigh in legal terms the correctness of the inference of that decision-making body. It is not up to us now to make a new assessment of the evidence. In the end, it is not possible for us to proceed to a sequential analysis of each and every one of the arguments by which the appellant seeks to establish the error of assessment in which the Court of First Instance could have incurred. Even if it is obvious to remind them of our position as a Court of Appeal it does not authorize us to choose between the evidentiary assessment suggested by the appellant and the one proclaimed by the Court of First Instance. Our cognitive ambit does not, in short, enable us to displace the evidentiary conclusion reached by the Court of First Instance before more attractive arguments that could contain, where appropriate, the appellant's challenging discourse. Neither can we neutralize the reasoning of the decision-making body, replacing it with the hypothesis of exclusion formulated by the appellant, provided that, of course, it is an expression of a logical and rational process of evaluation of the evidence, (SSTS 326/2012, 26th April, 80/2012, 10th February, 790/2009, 8th July, 593/2009, 8th June and 277/2009, 13th April). The control of appeal for the respect for the right to the presumption of innocence has been clearly limited by constitutional jurisprudence and this same Chamber (see STS 553/2008, 18th September). It is in that exclusive ambit in which we must assess the claims of the defence.

In accordance with this idea, the sufficiency of the evidence table weighted by the Court of First Instance and the rational of the value process on which the proclamation of the proven fact is based, are beyond doubt.

The Court of First Instance evaluated the testimony of the accused, who has denied at all times to have opposed the sexual indemnity of the victim. Whenever he entered her room ~~s~~he went to '... *Ana María's request to help her with her French homework, staying two or three minutes in the room, since what Ana María wanted was for him to do the homework for her, which he refused to do, and denying also that he had made comments to Ana María about the way she dressed or her underwear'* (sic).

This refusal, however, is in contrast with other elements of the position that are duly exposed and reasoned by the judges of First Instance. On the one hand, the conversation held in Tuenti between Ana María and her friend Constancio, to whom she spontaneously explained the accused's conduct. The psychological report of the expert of the Institute of Legal Medicine, who ruled out that the story told by Ana María was supported by her imagination, was also considered. The FJ 2º [Legal Foundations] of the first instance judgment also addresses the alleged contradictions in the testimony of the minor. The existence of chronological jumps were ruled out which could question the reality of the facts and

analyses the lack of uniformity of Ana María's manifestations when fixing the number of times in which she would have been subject to touches by the accused. It is interesting to note the verbatim transcript of the reasoning of the judges at first instance : *'... it is true that Ana María has not specified the exact dates in which the facts took place, especially considering her age should be especially taken into consideration in assessing her testimony, it being obvious that her references cannot be those that would be facilitated by an adult, since a twelve-year-old girl takes as a landmark elements than those of an adult person, but moving away from this premise, it cannot be gauged that there are no data which permit specifying the period of time in which the events unfolded, Ana María has consistently maintained that the first occasion on which the accused touched her was after Easter 2013, which she spent with her father, and bearing in mind that on Easter Friday was in 2013 the 29th day of March 2013, and that the first time Ana María told someone what happened was on 31st May 2013 (to her friend Constancio in Tuenti), the facts which happened in those two months of April and May 2013. This reference is sufficient for the purpose of fixing the temporal scope in which the events occur, without the lack of precision exact number of the specific days in which these are carried out to be considered to generate any lack of defence for Sr. Luis Francisco.'*

The Chamber does not know of the existence of an extravagant reasoning, unrelated to the doctrine of rationality imposed by our constitutional system of evidence evaluation. Neither does it detect it in the line of argument that served the judges of first instance to exclude any doubts about the reality of the facts from the exact number of the occasions on which the abuses occurred: '... although it is true that there has been no uniformity in the manifestations of Ana María in relation to the number of times in which the accused touched her chest or the genitals above the clothes, also what has been specified is a) that on only one of the occasions (it was a Saturday and her mother was working outside the house) happened outside her bedroom, which was the day he was going to see the children having communion and she left the keys at home and when he returned for them Sr. Luis Francisco, on the ground floor of the apartment, asked her to show him her the bra and tried to lift her shirt, b) the rest of the occasions happened in her bedroom, when she was lying down or sitting in bed, in which Sr. Luis Francisco put his hand on her genitals above the clothes and at least on two other occasions that touched her chest over her clothes when she was sitting, being and in relation to this last behaviour where Ana María is then points out that there were more occasions apart from these two, but without providing the information which allow the dates to be specified, either directly or by reference to other facts.'

Nor do we appreciate a lack of assessment of the proof of discharge. On the contrary, there is an ad hoc reasoning of the Court of First Instance in order to attend to the core argument on which the defence's thesis to exonerate was based, namely, on the existence of an act of resentment to avenge the rupture of the family circle. The victim's contact with her biological father and his sister was guaranteed without the need for any denouncement such as that which had taken place in the beginning of the present case. In fact, Ana María had no obstacles to the maintenance of this family relationship, since both domiciles are separated by a distance that does not exceed one hundred meters. Along the same lines the Chamber endorses the argument of the judges of the first instance, when they discard the theory of revenge. *"It cannot, perceive in short, be that Ana Maria benefitted in any way from inventing these facts, which is supported by the fact that Ana Maria has always had, in relation to the behaviour of the accused, the same version: that he had touched her chest, genitals through her clothes, which shows a lack of interest in exaggerating the accusation, since she could have referred to direct touches or worse behaviour, and she hadn't."*

We cannot, in short, share the criticisms of defence to support the evidence on which the historical judgment is based. The fact that Ana María's mother questions the veracity of her own daughter's testimony may be due to different reasons. One of them, of course, could be related to the desire to avoid a serious conviction for the person with whom she shares her life. But even if the doubts about Ana María's testimony were real and totally unrelated to any interest which has not been confessed, the truth is that her opinion about the credibility of the complainant does not constitute a *sine qua non* for the admission of the denounced facts. Her version is simply an additional element, to be integrated in the evidential frame offered by the parties to the decision-making body. And this court has concluded the authorship from the evaluation of all the evidence proposals submitted during the plenary.

Nor can we accept the idea of the bias of the expert of the Institute of Legal Medicine who gave findings on the credibility of Ana María. This lack of impartiality would have been due to alleged contamination derived from the fact that, as the defence reasoned, he read the statements made by Ana María during the first instance stage of proceedings.

In our view, however, it would be pointless to make the validity of the scientific conclusions reached by any technician/expert, depend on the fact that, prior to preparing conclusions, the technician consulted the precise background for the opinion.

The same non-acceptance has to be made against the criticism of the defence for the fact that the documentary and verbal support which was collected during the examination of the minor was not available to them. This requirement makes perfect sense when it comes to asserting anticipated evidence in the absence of the witness in the plenary (SSTS 925/2012, 8 November, 940/2013, 13 December, among others). But in the present case, Ana María testified before the examining judge and did so later in the plenary session, submitting herself to cross-examination by both parties. There has therefore been no hint of a lack of defence.

On the other hand, the fact that a Civil Guard sergeant testifies about the existing family conflict in the family circle lacks evidential relevance. There is no maximum of experience that circumscribes sexual abuse to families living in harmony. Similarly, the fact that Ana María first told her experience to a friend of the opposite sex via Tuenti and not to any relative or teacher cannot also be an argument. The victim, as shown by the proven facts, commented to several school friends who, in turn, informed the teachers about her complaints. No abnormality exists in this way of transmitting one's own experience.

Regarding the complaint about the lack of authenticity of the dialogue maintained by Ana María with Constancio via Tuenti, the Chamber wants to clarify a basic idea. And it is that the test of a bidirectional communication through any of the multiple systems of instant messaging must be approached with all due caution. The possibility of manipulating the digital files through which this exchange of ideas materializes is part of the reality of things. The anonymity authorized by such systems and the free creation of accounts with a false identity make it perfectly possible to appear as a communication in which a single user relates to himself. Hence, the challenge of the authenticity of any of these conversations, when they are presented to the cause through printed files, shifting the burden of proof to whoever seeks to take advantage of their evidentiary suitability. It will be indispensable in such a case for an expert to be directed to provide a report on the evidence which identifies the true origin of that communication, the identity of the interlocutors and, finally, the integrity of its content.

In the present case, there are two reasons which exclude any doubts. The first was the fact that it was the victim herself who made the Tuenti password available to the judge at First Instance so that, if this conversation were questioned, its authenticity could be guaranteed through the corresponding expert report. The second, the fact that the interlocutor with whom Ana María related with was proposed as a witness and went to the plenary. There he could be questioned by the accused and defence about the context and the terms in which the victim – Ana María – and the witness Constantius – maintained that dialogue. The judge of First Instance clearly explained in the FJ 2 [Legal Foundations] of the appealed judgment: *'... regarding the conversation via Tuenti a photocopy of which was presented by the private prosecutor, because the two people who held the conversation, Ana María and her friend Constancio, in the plenary said that they effectively maintained that conversation and in those terms, without either of them mentioning that there had been any manipulation in the photocopy of that conversation, which is not only on the record by the private prosecutor in Folios 178 to 190, but also in the photographs included that the Guardia Civil [the Police] to had taken of the mobile telephone of the minor (folios 199 et seq.), since, according to the document, Ana María obtained access in his presence her Tuenti account via a computer, but the history was only able to go back as far as 26 October 2013, because they could only visualize it through the TuenTi app for mobile telephones, the agents taking photographs of the screens corresponding to the conversation, which coincide exactly with the printed sheets that were presented by the private prosecutor. In fact in the claim in which these photocopies were attached, the private prosecutor provided Ana María's password in Tuenti and requested that, if there was any technical or evidential doubt, that it be officiated by 'Tuenti España', indicating its address, so that they can certify the content of that conversation, without the defence having made any request in this regard.*

Taking into account that both Ana María and Constantius have avowed the content of the conversation that was facilitated both to the private prosecutor in addition to the Guardia Civil [the Police], the challenge of the defence cannot be accepted the said documentary remaining within the body of evidence for its assessment with all the other evidence that have been evaluated.'

In short, the Chamber has not perceived that the legal rights of the accused have been failed, or the right to the presumption of innocence. The Court of Appeal, with a praiseworthy argument, systematized the elements of position that it serves, with absolute adequacy, to support the victim's version and approach it to neutralize the significance of the defence arguments and facts asserted by the defence.

The reason must be rejected (article 885.1 LECrim).

5 .- The dismissal of the appeal entails the order of costs, in the terms established in article 901 the LECrim.

III. JUDGMENT

That we must declare that there are NO GROUNDS for the appeal, filed by Luis Francisco against the judgment dated 19 November 2014, issued by the Second Section of the Provincial Court of Valladolid, in the case followed by the crime of sexual abuse and we order the appellant to pay the costs caused.

This judgment shall be communicated to the Court of Appeal for the appropriate legal effects, with return of the cause that was sent at that time, with an acknowledgment of receipt.

To this end our judgment, which will be published in the Legislative Collection we pronounce it, we send it and we sign it.

D. Manuel Marchena Gómez, D. Julián Sánchez Melgar, D. Juan Ramón Berdugo Gómez de la Torre, D. Luciano Varela Castro, D. Perfecto Andrés Ibáñez

PUBLICATION .- Read and published has been the previous judgment by the Magistrate Speaker Hon. Sr. D Manuel Marchena Gómez, having being held a public hearing on the day of its date the Second Chamber of the Supreme Court, which as Secretary I certify.

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