DOI: 10.15691/0719-9112Vol10n1a5

REVIEW: INVESTIGATIVE PROCEEDINGS DUE TO INFRACTIONS TO LEY N° 20.000 AND DUE PROCEESS

Reseña: Diligencias investigativas por infracciones a la Ley 20.000 y debido proceso

Manuel RODRÍGUEZ VEGA, *Diligencias investigativas por infracciones a la ley 20.000 y debido proceso* (Rubicon Editores, 2020)

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The author presents us this new book that analyses judgements from the Supreme Court of Chile (in what follows, ECS) from January 2016 to December 2019 regarding the practical problems arising from the application of Ley N° 20.000. This review is carried out very didactically. In each chapter it indicates the applicable legislation, as well as the case law doctrine, the review of the respective judgement (and of its related judgements) and on some occasions a commentary on the opinion of the Court.

The first two chapters refer to judgements that are applicable to any study regarding appeals for annulment [*"recursos de nulidad"*]. The author references several judgements concerning the understanding of due process by the ECS (Rol Nº 26.838-2015), as well as the judicial powers in connection with it (Rol Nº 31.025-2016), and the guarantees constituting it (Rol Nº 33.739-2016; 38.176-2016; 55.074-2016; 33.771-2017 y 24.010-2019). The merit of the first chapter consists not only in the comprehensive case law reviewed, but also in the outmost significance of the addressed subjects in the course of the criminal process. The reader will find rulings that are useful in a detention hearing [*"control de detención"*] or in a hearing for the preparation of the oral trial [*"audiencia de preparación de juicio oral"*], in an oral trial hearing [*"audiencia de juicio oral"*] and certainly in drafting an appeal of annulment. *A fortiori*, the subject of this first chapter exceeds the analysis of the offenses contained in Ley N° 20.000.

The second chapter addresses the relationship between due process and the appeal of annulment. Rodríguez invites us to examine a vast collection of judgements. The paramount section of this chapter refers to the cases in which an infringement of guarantees is substantial (Rol Nº 6220-2018) and therefore within the scope of article 373 a) of the Criminal Procedural Code (in what follows, CPP), and how said infraction is realized. In this vein, the author cites several rulings according to which not any infraction to procedural norms leads to a violation of guarantees (Rol Nº 100.710-2016) and that indicate what requirements are to be fulfilled in order to annul the judgement and the oral trial (Rol Nº 43.541-2017; 136-2018; 12.885-2015 y 5816-2019). A discussion regarding the content of the expression "substantial" is presented. On the aforementioned issue, Rodríguez presents us rulings asserting that the exclusion of evidence muss led to the acquittal of the defendant (Rol Nº 1127-2018) and other rulings that affirm that the substantial character of the infraction is not referred to the operative part of the

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judgement but to the entity of the violation (Rol Nº 28.305-2018[1]). This chapter ends with rulings regarding the standing to bring an appeal of annulment pursuant article 373 a) of the CPP (Rol Nº 73.836-2016 y 29.652-2019). This last section is of the outmost interest in particular with regard to the requirement of dully preparing the appeal of annulment (Rol Nº 21.413-2019), which makes it required reading for those who are starting to practice as criminal defense attorneys.

The third chapter addresses the relationship between due process and the police. In particular, with regard to the scope of autonomous action that corresponds to the police, a matter of vital interest. The author reviews case law from the ECS which asserts that the general rule is that from article 80 of the CPP (that is, that the police act under the direction of the Public Ministry) and the exception are the autonomous powers established on article 83 del CPP. Two of the rulings cited by the author are especially remarkable, namely: judgement Rol Nº 39.420-2017 which upheld an appeal for annulment based on the police having overreached its autonomous powers while interrogating and obtaining permission for entering the property of the denounced person without prior authorization by the prosecutor. In similar terms, judgement Rol Nº 5351-2018.

In the fourth chapter, Rodríguez analyses the technique regulated on 25 of the Act N°20.000. The main problem concerning this issue is the registration of the authorization of the undercover agent. Thus, the ECS has understood that the necessary existence of authorization for proceeding as undercover agent is grounded in the right to due process (judgement Rol Nº 26.838-2015). Moreover, the ECS has affirmed that the burden of proving said authorization falls on the Public Ministry [*"Ministerio Público"*] (judgement Rol Nº 21.427-2016) and that this registration cannot be substituted by police records or testimonies of police officers[2] (judgements Rol Nº 35.555-2016 and Rol Nº 4877-2019). In the opposite direction, ruling that the registration in the police report suffices, judgements Rol Nº 38.694-2017 and Rol Nº 6.220-2018. Other controversial subject regarding this investigation technique is whether the authorization is required to contain its substantiation in writing. According to judgement Rol Nº 38.176-2016, the ECS indicated that article 25 does not require it. The author also spins the finer details regarding certain matters, such as the possibility of appointing an informer instead of a police officer. On this matter, the ECS decides in the affirmative[3] in judgement Rol Nº 87.813-2016. Furthermore, the same Court decided in judgement Rol Nº 145-2017 that it was not necessary that the prosecutor designates the specific police officer that will carry out the technique in question. Another issue which I deem prudent to highlight in the compilation by Rodríguez Vega, is the discussion as to whether or not a Gendarmery office

[1] In similar terms, see *Ministerio Público con Hernan Alejandro Vasquez Cid* (2021), considerando 12°.

[2] In the same vein, see *Ministerio Público con Jorge Ignacio Guzman Gatica* (2020).

[3] Agaist, see *Ministerio Público con Jose Miguel Alvarado Escobar* (2021): "V.- That, as a matter of fact, it must be understood that Fica Leviñanco acted under article 25 paragraph 4° of the Act N°20.000, which expressly applies to police officers only, so that investigative acts deriving from the defendant's arrest indeed originate in an unlawful act, whose character is trasmited to all other acts deriving from it" ("*V.- Que, así las cosas, debe entenderse que Fica Leviñanco actuó en la hipótesis del inciso 4° del artículo 25 de la Ley N°20.000, que según expresa disposición del legislador, está reservada para funcionarios policiales, por lo que las diligencias investigativas que derivan en la detención del imputado efectivamente tienen su origen en un acto ilegal, que otorga dicha calidad al resto de las diligencias que devienen de él*").

may act as undercover agent. The ECS decided in favor of it in judgement Rol Nº 45.630-2017. On this matter, Rodríguez, although deeming the interpretation of the highest tribunal correct, clarifies that it exceeds the wording of article 25 of the Drug Act.

In the fifth chapter Rodríguez inquires as to whether or not discreet surveillances are intrusive measures, and therefore those contemplated in article 9 of the CPP (for this reason, requiring judicial authorization). In judgement Rol Nº 73.836-2016 the ECS argues that this is not an intrusive measure[4].

In the sixth chapter the author addresses the discussion regarding the effects of the failure to meet the time limit established on article 41 of Ley N° 20.000. In judgement Rol Nº 43.541-2017 the ECS reasoned that said breach does not entail an infraction contemplated by article 373 a) of the CPP[5]. Against this criterium, judgement Rol Nº 6288-2018.[6]

In the seventh chapter, Rodríguez Vega presents us a series of judgements referred to wiretap interceptions. First of all, the Court affirms that the constitutional rights affected by this measure are the inviolability of communications, as well as the respect and protection of privacy (judgement Rol Nº 46.489-2016). The highest tribunal has understood that the lack of registration of the ruling authorizing the wiretap interception does not infringe due process[7] (Rol Nº 31.025-2016). Moreover, the law does not foresee a sanction for said omission (Rol Nº 26.182-2018). *A fortiori*, the measure of interception is valid even if the telephone has been used by a third party (Rol Nº 46.489-2016). Lastly, the ECS has asserted that the interception carried out in the course of an investigation for a crime contemplated in Ley N° 20.000 whose information has been utilized in a process ruled by the general rules, is acceptable (Rol Nº 28.132-2018).

In the fourth chapter the author analyses a subject that is discussed daily, the anonymous report. Specifically, whether this is enough to constitute probable cause according to article 85 of the CPP. It cites judgement Rol Nº 26.422-2018 which asserts that the anonymous report does not constitute sufficient cause for controlling identity[8]. In the opposite sense, the following rulings are examined: Rol Nº 29.032-2019; Rol Nº 35.167-2017 and Rol Nº 1275-2018.[9]

Chapter nine is the longest in the book. In this section the author reviews in detail the procedure for entering and searching closed places. Firstly, the ECS has affirmed that intimacy and the inviolability of the home are the rights affected by this investigative procedure (Rol Nº 15.397-2019). With regard to the legal presumption established in article 205 of the CPP the ECS has asserted that there is no need for plurality of signs leading to the conclusion that either the defendant or the means of fact verification are in the investigated place (Rol Nº 41.356-2017). Regarding the authorization to enter, the same tribunal decided that the lack of support

[4] In a similar vein, see *Ministerio Público con Victor Jose Silva Cubillos* (2021).

[5] In the same vein, see *Ministerio Público con Victor Jose Silva Cubillos* (2021) and *Ministerio Público con Ronald Enrique Santana* (2021).

[6] In this vein, see *Ministerio Público con Francisco Javier Carreño Miranda* (2021) and *Ministerio Público con Carlos Alberto Donoso Letelier* (2020).

[7] Against, see *Ministerio Público con Ricardo Antonio Ara Parada* (2021).

[8] In a similar vein, see *Ministerio Público con Pedro Alonso Maldonado Pizarro* (2020).

[9] In a similar vein, see *Ministerio Público con Sergio Luis Marroquin Levipil* (2020).

infringes due process (Rol Nº 11.584-2017). The ECS pronounced the following judgements in the opposite sense Rol Nº 20.749-2018 y Rol Nº 7758-2019. Linked to the former subject, the ECS has pointed out that said record does not require to reproduce the factual and legal considerations in virtue of which the authorization was granted (Rol Nº 19.693-2016).

Another subject addressed by the author is whether a report or an indication that a crime has been committed empowers the police to autonomously request to the person in charge of the place the authorization pursuant to article 205 of the CPP. Rodríguez present us judgements in the affirmative, as well as in the negative. According to judgement Rol Nº 5351-2018[10] the police arrested a defendant both in virtue of an arrest warrant against him and for selling drug on a public street. Thereafter the police asked the defendant for permission to enter his domicile. The ECS affirmed that said request with regard to the arrested person is an autonomous measure that is not contemplated in article 83 of the CPP, thus holding the appeal for annulment. In a similar vein, *habeas corpus* [*"recurso de amparo"*] Rol Nº 28.004-2016. Against this opinion, asserting that a mere indication or report allow autonomous action according to article 83 c) of the CPP, judgement Rol Nº 36.710-2017 (about which Rodríguez gives a critical commentary in which he highlights the conceptual confusion of the ECS between *flagrante delicto* and a mere indication). Linked to the latter subject, the author comments ruling Rol Nº 45.412-2017, in which an appeal for annulment is rejected, since the ECS asserts that the person in charge to whom the authorization to enter was requested was not a defendant at the time of the request[11], and had he been a defendant at the moment, their rights should have been read out before said request.

Regarding article 206 the ECS (Rol Nº 22.088-2016) has decided that the normative concept "distress calls" [*"llamadas de auxilio"*] must be interpreted in the light of article 130 del CPP. *A fortiori*, the ECS affirmed in judgement Rol Nº 27.082-2019 that surprising a person possessing drug near his domicile enables the police to act according to article 206 of the CPP[12]. In this vein, the highest tribunal understood that the detection by the police of cannabis sativa plants in an entrance garden authorizes it to enter the place according to article 206 of the CPP (Rol Nº 29.557-2019). Following the case law examination of the refereed article, the ECS has asserted that, if the police let a considerable period of time pass between the detection of the evident indication and the procedure of entering and search, the established requirements are not fulfilled (Rol Nº 32.863-2016). In the opposite sense, Rol Nº 145-2017.

In the same chapter the author presents us various judgements refereed to article 215 of the CPP. I consider relevant to highlight judgement Rol Nº 40.698-2017 that holds an appeal for annulment brought by the defense, considering that what was found in a domicile into which a police officer entered (with a judicial search warrant) in order to find a third party and registered motivated by a different active investigation against the proprietor of said immovable that had no relation whatsoever with the reason in virtue of which the search warrant was dictated against the aforementioned third party.

[10] Against, see *Ministerio Público con Ismael Francisco Lagos Lorca* (2019).

[11] See judgement *Ministerio Público con Sergio Osvaldo Aguilera Peña* (2021).

[12] Against, see *Ministerio Público con Carolina Del Carmen Cabezas Cabezas* (2021).

Lastly, judgement Rol Nº 5816-2019 rejects an appeal for annulment. The factual situation was the following: police officers who had knowledge of a valid arrest warrant saw an individual (they thought this was the person they had to arrest) who, as he saw the officers, entered an immovable. The police officers also accessed the place and acknowledged the presence of three persons (and none of them was the one against whom the arrest warrant had been dictated) who were in possession of drugs and a weapon. In this case, the ECS decided that the good faith of the police must prevail and affirms that the entering was lawful.

In the tenth chapter the author addresses investigative measures carried out in social networks. In judgement Rol Nº 3-2017 the ECS affirms that the right to privacy of a Facebook account holder is not violated if the obtained information is publicly available. In judgement Rol Nº 20.441-2018 the Court argues that the fact that a police officer keeps an account on the social networking site Grindr falls within the scope of the crime prevention activity carried out by police officers[13].

The eleventh chapter refers to the search of the detainee's body and clothing. In judgement Rol Nº 65.431-2016 the ECS affirms that Gendarmery is empowered to register those who enter a detention facility, even without indications. In judgement Rol Nº 2926-2018 the ECS argues that the police search due to the admission into a detention facility as well as the proceedings subsequent to the finding of the drug are not part of an investigation governed by the CPP but are administrative proceedings. The author comments the aforementioned ruling and disagrees with the opinion of the Court. Rodríguez explains that once a person is found in possession of drug in a detention facility the guarantees established in the legal system in favor of the defendant become fully applicable.

The twelfth chapter refers to the chain of custody. In judgement Rol Nº 33.739-2016 the ECS indicates that the lack of identification of the exhibit's unique reference number is not by itself significant enough to generate a defect of nullity. In judgement Rol Nº 9140-2019 the ECS considered that for a defect in the chain of custody to be significant it is necessary to challenge the integrity and identity of the evidence in question[14].

In the penultimate chapter the author analyzes the arrest in *flagrante delicto*[15]. The author cites judgement Rol Nº 43.435-2016 in which the ECS affirms that an identity control may turn into an arrest in *flagrante delicto* according to the circumstances ascertained during said procedure.

The last chapter analyzes several matters linked to the conduct of the proceedings. The ECS, judgement on writ of *habeas corpus* Rol Nº 19.454-2016 confirmed by a majority vote the appealed ruling which asserted that article 39 of Ley N° 20.000 empowers the Judge of Guarantees [*"Juez de Garantía"*] to extend detention without the need of a hearing. In the judgement on the appeal for annulment Rol Nº 31.280-2015 the ECS decided that receiving the report (to which article 43 refers) once the investigation is closed does not infringe due

[13] Against, see *Ministerio Público con Jorge Ignacio Guzman Gatica* (2020).

[14] See *Ministerio Público con Luis Fernando Varas Agurto* (2019), which excludes evidence based on the infringement of norms regulating the chain of custody (articles 187, 188 and 227 of the CPP). Confirmed by the Court of Appeals of Valparaiso, October 18th, 2019.

[15] See *Ministerio Público con Gustavo Emilio Allende Gonzalez* (2021).

process if the report was requested during the investigation and this was known by the defense. In judgement Rol Nº 26.838-2015 the ECS decided that the illegality of the action of the undercover agent contaminates the rest of the evidence derived from it. In judgement Rol Nº 73.836-2016 the Court decided that the prosecutor may offer witnesses to present testimony in the oral trial, even if they had not made a statement during the investigation phase. Linked to the former matter, the ECS resolved (Rol Nº 9140-2019) that article 332 of the CPP allows to contrast the testimony given by the witness with the police report. In judgement Rol Nº 23.005-2018 the ECS understood that the tribunal may impose a more severe sentence than the one required by the prosecution. Lastly, the author reviews a judgement holding a complaint resort ["*recurso de queja*"] (Rol Nº 42.451-2016[16]) which decides that the power to nullify *ex officio* pursuant to article 379 of the CPP, shall not be exercised if the appeal for annulment was lodged by the Public Ministry.

Finally, I deem important to point out that this book by Rodríguez not only should be used on a daily basis by the diverse actors in the criminal process, but also by all those who are beginning to study Criminal Procedural Law. Its greatest virtue is, in my opinion, to serve as a guide for who lacks experience in criminal litigation and wishes to get acquainted with the discussions and problems concerning a subject as controversial as Ley Nº 20.000.

[16] In the same vein, see *Ministerio Público con Gustavo Eduardo Muñoz Pérez* (2019).

CASES CITED

Chile:

Ministerio Público con Ismael Francisco Lagos Lorca (2019). Corte Suprema, Rol Nº 29.510-2018, 31/01/ 2019.

Ministerio Público con Gustavo Eduardo Muñoz Pérez (2019). Corte Suprema, Rol Nº 26.756-2018, 04/03/2019.

Ministerio Público con Luis Fernando Varas Agurto (2019). Juzgado de Garantía de San Antonio, RIT Nº 3950-2019, 27/09/2019.

Ministerio Público con Luis Fernando Varas Agurto (2019). Corte de Apelaciones de Valparaíso, Rol Nº 2039-2019, 18/10/2019.

Ministerio Público con Jorge Ignacio Guzman Gatica (2020). Corte Suprema, Rol Nº 33.721-2019, 10/03/2020.

Ministerio Público con Sergio Luis Marroquin Levipil (2020). Corte Suprema, Rol Nº 7.892-2020, 24/04/2020.

Ministerio Público con Pedro Alonso Maldonado Pizarro (2020). Corte Suprema, Rol Nº 33.232-2020, 09/06/2020.

Ministerio Público con Carlos Alberto Donoso Letelier (2020). Corte de Apelaciones de Rancagua, Rol Nº 1415-2020, 27/10/2020.

Ministerio Público con José Miguel Alvarado Escobar (2021). Corte de Apelaciones de Puerto Montt, Rol Nº 18-2021, 28/01/2021.

Ministro Público con Hernan Alejandro Vasquez Cid (2021). Corte Suprema, Rol Nº 154.765-2020, 24/03/2021.

Ministerio Público con Carolina Del Carmen Cabezas Cabezas (2021). Corte Suprema, Rol Nº16.974-2021, 17/05/2021.

Ministerio Público con Francisco Javier Carreño Miranda (2021). Corte de Apelaciones de Valparaíso, Rol Nº 1088-2021, 26/05/2021.

Ministerio Público con Sergio Osvaldo Aguilera Peña (2021). Corte Suprema, Rol Nº 127.456-2020, 27/05/2021.

Ministerio Público con Gustavo Emilio Allende González (2021). Corte Suprema, Rol Nº25.386-2021, 25/06/2021.

Ministerio Público con Ricardo Antonio Ara Parada (2021). Corte Suprema, Rol Nº 31.701-2021, 09/08/2021.

Ministerio Público con Victor Jose Silva Cubillos (2021). Corte Suprema, Rol Nº 17.413-2021, 17/08/2021.

Ministerio Público con Ronald Enrique Santana (2021). Corte de Apelaciones de Valdivia, Rol Nº 548-2021, 26/08/2021.