Corte costituzionale

JUDGMENT NO. 320 OF 2007

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

JUDGMENT No. 320 YEAR 2007

In this case the Court considered a rule which prevented the prosecution from appealing against acquittals handed down in summary proceedings, along with a transitional provision that the rule was also to apply to proceedings in progress at the time when the contested provision entered into force. The Court stated that the principle of equality before the court did not dictate that the prosecution and the defence enjoy identical procedural rights, which may be justified by the asymmetrical division of the powers of the parties, provided that any restrictions respected the need for the efficient and proper administration of justice, and were reasonable. Although it had previously found that restrictions on the public prosecutor's right to appeal against convictions which did not modify the offence charged were permitted on the grounds that they pursued the goal of a rapid conclusion to trials, the same did not apply to the contested provisions, since in the former situation the prosecution's case was successful whilst in the latter it was not. Therefore, given that the accused already has the right to choose summary proceedings unilaterally, the complete removal of the prosecution's right of appeal was not justified. Moreover, the arrangements were also inherently incoherent, since the prosecution may appeal against convictions which modify the offence charged (in which it is therefore partially successful), but not against acquittals (where it is entirely unsuccessful). The Court therefore struck down the provision due to its unjustified violation of the principle of equality before the court.

THE CONSTITUTIONAL COURT

composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 443 of the Code of Criminal Procedure, as amended by Article 2 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals), and Article 10 of the same law, commenced pursuant to the referral orders of 21 March 2006 of the Military Court of Appeal, Verona section, and of 6 April and 28 April 2006 of the Milan Court of Appeal, respectively registered as Nos. 275 and 589 in the Register of Orders 2006 and No. 115 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 36, first special series 2006 and Nos. 1 and 12, first special series 2007.

Having heard the Judge Rapporteur Giovanni Maria Flick in chambers on 4 July 2007.

The facts of the case

1. - In the order mentioned in the headnote, the Military Court of Appeal, Verona section, raised with reference to Articles 3(1), 111(2) and (7) and 112 of the Constitution, the question of the constitutionality of Article 2 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals) insofar as, by amending Article 443 of the Code of Criminal Procedure, it deprives the public prosecutor of the power to appeal against acquittals handed down in summary proceedings; and secondly of the constitutionality of Article 10 of the same law, insofar as it applies the new legislation to proceedings in progress at the time of its entry into force, also providing that any appeal previously lodged by the public prosecutor against a judgment of acquittal be declared inadmissible by order not subject to appeal, without prejudice to the appellant's right to appeal to the Court of Cassation within forty five days of the service of the ruling of inadmissibility.

The lower court, having been seized of an appeal lodged by the public prosecutor against an acquittal in summary proceedings, considers that the contested provisions – which in the case before the court require that the appeal be declared inadmissible – in the first place breach the principle of equality of the parties before the court enshrined in Article 111(2) of the Constitution.

As a result of the amendment in fact, the public prosecutor – who is already unable to dispute the accused's right to choose summary proceedings – is stated to have almost completely lost the ability to appeal against judgments handed down by the trial courts: the prosecution may exercise its right to appeal only in the "marginal" case of convictions which modify the offence charged (Article 443(3) of the Code of Criminal Procedure). The question over this provision's constitutionality moreover takes on a particular relevance precisely in the light of this court's findings on the previous restriction of the public prosecutor's power of appeal in summary proceedings in relation to convictions which do not modify the offence charged: this restriction is considered to be legitimate both because – along with the reduction in sentence – it amounts to the "*quid pro quo*" for the accused's renunciation of a right to a full hearing, an option which favours a more rapid conclusion of trials, and also because it concerns situations in which the prosecution's case has in any event been accepted (judgment No. 363 of 1991 and order No. 421 of 2001). The latter decisive condition is by contrast not satisfied under the new legislation which – by removing the power to appeal against acquittals – "disfigures the prerogatives of the prosecution in a general manner and in particular with regard to the most important aspect of his interest in an appeal".

This therefore results in an imbalance which oversteps the threshold for compatibility with the constitutional principle in question: this is because, whilst it may be true that the principle of equality of the parties before the court does not necessarily imply that the public prosecutor and of the accused must enjoy identical procedural rights, it is however equally true – again in the wake of the aforementioned judgment No. 363 of 1991 – that any difference in treatment may be justified only by the particular institutional position of the public prosecutor, by the role assigned to him, or by requirements related to the correct administration of justice. None of these hypotheses applies to the case before the court.

According to the referring court, the contested provisions also breach Article 112 of the Constitution: this conclusion is reached on the basis of this court's *dictum* in judgment No. 98 of 1994, according to which the extent of the powers of the public prosecutor – notwithstanding their regulation under ordinary legislation – may be challenged on the grounds of irrationality where these powers, considered overall, are found not to be suitable for the fulfilment of the tasks essential for the prosecution of

criminal actions. This is precisely the “borderline situation” which was created by Article 2 of law No. 46 of 2006: by introducing a “general and indiscriminate” limit on the public prosecutor's power to request a review on the merits by a higher court of judgments which reject the prosecution's case, the contested provision is stated to have caused detriment to the “essential core” of the powers presupposed by the constitutional principle at issue.

The lower court also considers that Article 3 of the Constitution has been breached, finding it to be entirely irrational that the prosecution is entitled to appeal in summary proceedings in situations in which the prosecution's case has only been partially accepted (convictions which modify the offence charged), whilst he does not on the other hand enjoy similar powers in the “more significant” eventuality in which the prosecution's case has been completely rejected (acquittals).

On this point – again in the opinion of the referring court – it is not sufficient to counter that the public prosecutor may in any case appeal against acquittals to the Court of Cassation, and moreover subject to longer time limits following the amendment of Article 606(1)(d) and (e) of the Code of Criminal Procedure pursuant to Article 8 of law No. 46 of 2006. Even following the broadening of the grounds of appeal which may be averred, the appeal to the Court of Cassation remains in fact an appeal mechanism with limited grounds for complaint, whilst a normal appeal may complain on any point and may challenge the judgment on the grounds that it is “inherently unjust”. And this is not all: the new appeals regime may be unconstitutional on further grounds in relation to this matter since – by transforming the Court of Cassation “into a substantive merits court with jurisdiction over the whole country” – it would entail an inevitable increase in the proceedings pending before the Court of Cassation, with an equally inevitable lengthening of the time-scale for their resolution. In fact, in the event of a reversal of an acquittal by the trial court by the Court of Cassation, as many as five instances of proceedings may be necessary in order to reach a definitive judgment (first instance; judgment by the Court of Cassation on appeal by the public prosecutor; again first instance; ordinary appeal and appeal to the Court of Cassation against a conviction), with the resulting violation of the principle of the reasonable length of trials enshrined in Article 111(2), last sentence, of the Constitution.

At the same time, the possibility of the Court of Cassation – which has become "the sole appeal court for acquittals" issued in summary proceedings – being called upon to "review" any evidence heard, or to give supplementary reasons in support of the judgment "also in relation to specific documents in the case file", places the contested provisions in "sharp contrast" with that court's role under the terms of Article 111(7) of the Constitution: i.e. the role of "court of last and highest instance" against breaches of the law contained in judgments and measures in the area of personal freedom issued by merits courts. This constitutional role does not in fact preclude the conferral of different functions on the Court of Cassation, which may entail a requirement to examine part of the case file from proceedings before the lower courts; however, a "deviation" of this nature would in any case have to be reasonably limited and not significantly modify the characteristics of the institution of the appeal to the Court of Cassation. These conditions have not been satisfied in the case before the court.

2. - A similar question of the constitutionality of Article 443 of the Code of Criminal Procedure, as amended by Article 2 of law No. 46 of 2006, and of Article 10(1), (2) and (3) of the same law, is raised in the referral order issued on 6 April 2006 (order No. 589 of 2006) of the Milan Court of Appeal with reference to Articles 3 and 111(2) of the Constitution.

The referring court – having been seized of appeals lodged by the public prosecutor and by the private party against an acquittal in summary proceedings – points out that, in preventing both the public prosecutor and the accused from appealing against acquittals, the new wording of Article 443 of the Code of Criminal Procedure places the parties on the same footing only in a formal sense: in reality, it creates a marked inequality in treatment, which must be regarded as incompatible both with the principle of rationality as well as that of equality of the parties before the court.

Following the reform in fact, the accused no longer has the right to appeal against judgments in summary proceedings only "in relation to secondary aspects" (such as non-standard acquittals), and maintains in all cases the right to contest guilty verdicts on the merits. In complete contrast, the prosecution retains the power of appeal exclusively "on secondary questions" (the classification of the conduct or the severity of the sentence), and may no longer appeal in cases in which "the oversight over the proper administration of justice should be more incisive".

On this point, the referring court recalls how this court found a “limited asymmetry” of the parties' powers of appeal to be legitimate specifically in the context of summary proceedings due to the particular nature of the special procedures and the procedural economy goals pursued. In the case before the court however, it is not possible to identify any constitutional value capable of “counterbalancing and legitimising” the “disfigurement” contemplated of the prosecution's power of appeal. The *travaux preparatoires* behind the reform in fact indicate that the contested provision was proposed not on the model of the goals of procedural economy pursued by summary proceedings, or in any case by the requirement of procedural simplification; it was rather born out of the conviction that – in contrast to the prosecution – the accused must always be assured “a second chance on the merits” in the event of a conviction: this was also necessary in order to implement Article 2 of Additional Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Strasbourg on 22 November 1984, and ratified and implemented by law No. 98 of 9 April 1990, which guarantees the accused the right to have his conviction reviewed by a higher court.

However, this justification is in the opinion of the referring court mistaken in that Article 2(2) of the Additional Protocol expressly stipulates that derogations may be made from the principle affirmed therein where the accused has been found guilty and sentenced following an appeal against an acquittal: this exception clearly refers to appeals by the prosecution against acquittals at first instance. However, even assuming for the sake of argument that this is not the case, the provision of the accused's right to two degrees of merits proceedings does not in any case entail the necessary denial of similar rights to the other parties to the trial: indeed, the requirements contained in the Protocol may well be complied with through a systematic reform of the appeals regime rather than by the complete abolition of the public prosecutor's power to appeal against acquittals.

The contested legislative solution cannot even be justified by the additional argument – also drawn from the *travaux preparatoires* – that it would be “incongruous” if the appeal court, which receives evidence essentially from the case file, could overturn the acquittal issued by another court – such as the trial court – which on the other hand heard evidence in the presence of the parties. The referring court finds that not only can

this argument not apply to summary proceedings (which is based on written submissions even at first instance), but it also in any event does not explain why an acquittal on the strength of the case file “should have greater weight than a similar conviction”: this means that the logical conclusion of the opposing argument should if anything be that “no judgment may be appealed by anyone”.

A further and conclusive aspect of the irrationality of the contested provisions is argued to flow from the fact that they allow the public prosecutor to appeal against convictions – clearly in order to obtain a heavier sentence – containing a confirmation of guilt which also partially accepts the prosecution's case, whilst denying him the ability to appeal against acquittals in which by contrast the said party is “totally unsuccessful”.

3. - The same rules contained in the provisions of Articles 443 of the Code of Criminal Procedure, as amended by Article 2 of law No. 46 of 2006 and Article 10(1), (2) and (3) of the same law are challenged by the Milan Court of Appeal in a further referral order issued on 28 April 2006 (order No. 115 of 2007), with reference to Articles 3 and 111 of the Constitution.

The lower court – which was also called upon to pass judgment on an appeal lodged by the public prosecutor against an acquittal in summary proceedings – considers that the contested provisions clearly violate the principle of equality before the court enshrined in Article 111 of the Constitution.

Starting from the assumption that the requirement of equality evoked by the constitutional provision cannot be understood as being limited only to the phase in which evidence is heard, but must apply for the entire duration of the trial until the definitive judgment, the referring court finds that the reform creates a clear and irrational imbalance between the parties to the trial, depriving only one of them of the procedural instrument necessary for asserting the fundamental interest which he represents. By providing that acquittals handed down in summary proceedings may not be appealed against, the reform is in fact stated to have completely deprived the public prosecutor of the power to stake the claim to punishment in relation to the individuals against whom the criminal action was commenced; at the same time however it leaves intact the accused's right to appeal against judgments in which he is “unsuccessful” in relation to his interest in a recognition of his innocence.

This creates an imbalance which is so fundamental that it cannot be justified even by the need to ensure that the trial has a reasonable length, given the “expediting” goal of summary proceedings: indeed, it is with reference to this end that this court has found the exclusion of the public prosecutor's right of appeal against convictions which do not modify the offence charged (Article 443(3) of the Code of Criminal Procedure) to be constitutionally legitimate.

It is also necessary to point out the inherent irrationality of a system in which the public prosecutor retains the right to appeal against certain types of convictions, whilst he may not appeal against acquittals.

Finally, the contested provisions are stated to create an irrational disparity in treatment between the public prosecutor and any private party to the trial. In fact, according to the lower court, private parties retain the ability to appeal against acquittals even after the reform: this means that the private party's interest in compensation for damage caused ends up, against all logic, enjoying greater protection than that afforded to the state's claim to punishment represented by the public prosecutor.

Conclusions on points of law

1. - The military court of appeal, Verona section, questions the constitutionality of Article 2 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals), insofar as, by amending Article 443 of the Code of Criminal Procedure, it prevents the public prosecutor from appealing against acquittals handed down in summary proceedings; it also questions the constitutionality of the transitional provision contained in Article 10 the same law, insofar as it applies the new applies the new legislation to proceedings in progress at the time of its entry into force, providing in addition that any appeal previously lodged by the public prosecutor against a judgment of acquittal be declared inadmissible, without prejudice to the appellant's right on his part to appeal to the Court of Cassation within forty five days of the service of the ruling of inadmissibility

The contested provisions are stated to violate in particular the principle of equality of the parties before the court contained in Article 111(2) of the Constitution. As a result of this, the public prosecutor – who is already unable to dispute the accused's right to choose summary proceedings – almost completely loses his power of appeal against

judgments handed down in summary proceedings even where – as in the event of an acquittal – his interest in an appeal is thrown into greater relief.

This limitation is moreover claimed to prevent the prosecution from carrying out the tasks provided for in Article 112 of the Constitution in relation to the effective and efficient exercise of criminal actions, thereby violating also this fundamental principle.

In the opinion of the referring court, Article 3 of the Constitution has also been breached, as it is entirely irrational that in summary proceedings the prosecution is entitled to appeal against convictions which modify the offence charged (Article 443(3) of the Code of Criminal Procedure), and therefore in situations in which the prosecution's case has been only partially accepted, whilst it does not enjoy similar powers in the "more significant" eventuality in which the prosecution's case has been completely rejected (as occurs in acquittals).

This means lastly that the only appeal available to the prosecution against an acquittal is to the Court of Cassation – albeit before expiry of the longer deadlines applicable pursuant to the amendment of law No. 46 of 2006 and Article 606 of the Code of Criminal Procedure – which not only does not preclude the existence of the breaches of the Constitution averred, but also introduces further grounds for unconstitutionality. First, the new legislative framework results in an inevitable increase in the proceedings pending before the Court of Cassation and in consequence of the relevant time-scales for their resolution – in contrast with the principle of the reasonable length of trials contained in Article 111(2), last sentence, of the Constitution; secondly, it distorts the role of the Court of Cassation – as specified under Article 111(7) of the Constitution – essentially transforming it into a "merits court with jurisdiction over the whole country".

2. - The provisions contained in Article 443 of the Code of Criminal Procedure, as amended by Article 2 of law No. 46 of 2006, and in Article 10(1), (2) and (3) of the same law are also disputed by the Milan Court of Appeal in two referral orders with a largely similar tone.

Here too the referring court asserts that the lack of an appeal against acquittals handed down in summary proceedings is incompatible with the principle of equality of the parties before the court enshrined in Article 111(2) of the Constitution. In fact, the result of the contested provisions is that the accused loses the right of appeal only in

relation to “secondary” aspects, such as a non-full acquittals: in all cases he retains the right to appeal on the merits against decisions in which he is “unsuccessful” in relation to his interest in a recognition of his innocence. By contrast, the public prosecutor may appeal only on “secondary questions”, such as a conviction for an offence different from that with which he was charged (Article 443(3) of the Code of Criminal Procedure), whilst he may not appeal in cases in which “the oversight over the proper administration of justice should be more incisive” – i.e. acquittals.

The Milan court also finds that the principle of rationality (Article 3 of the Constitution) has been violated insofar as the public prosecutor retains the power to appeal against convictions which modify the offence charged, which also contain an assertion of the guilt of the accused; yet he may not appeal against acquittals, which entirely reject the prosecution's case.

Finally, only referral order No. 115 of 2007 also complains of the irrational disparity in treatment between the public prosecutor and any private party brought about by the contested provisions. According to the lower court, the private party in fact retains the power to appeal against acquittals even after the reform: this has the illogical consequence that – given the broader rights of appeal granted to “private parties to a prosecution” – the private party's interest in compensation for damage caused ends up enjoying greater protection than that afforded to the prosecution's arguments.

3. - The referral orders concern the same provisions and raise largely similar questions, and therefore the cases at issue may be joined for resolution in a single decision.

4. - As regards the requirement contained in Article 111(2) of the Constitution, the question is well-founded.

It is important to point out that, in accordance with the settled case law of this court, the principle of equality of the parties before the court – currently a self-standing provision contained in Article 111(2) of the Constitution introduced by constitutional law No. 2 of 23 November 1999, but already firmly incorporated into the previous system of constitutional values – does not necessarily imply that the public prosecutor and the accused must enjoy identical procedural rights in criminal trials. Given the inherent structural differences between the two parties to criminal trials, an asymmetrical division of powers between the parties is compatible with the principle of

equality, subject to a twofold condition: first, such imbalances must be adequately justified by the institutional role of the public prosecutor, that is by requirements of the efficient and proper administration of criminal justice, also in order to ensure the complete realisation of other constitutionally relevant goals; secondly, they must in any case comply – also from the viewpoint of an overall rebalancing of the positions of the parties – with the requirements of reasonableness (see the recent judgment No. 26 of 2007; see also, *inter alia*, judgments No. 98 of 1994 and No. 432 of 1992; and orders No. 46 of 2004 and No. 165 of 2003).

5. - In the light of the above, the court finds that the provisions governing summary proceedings contemplated, right from the start, limits on the appealability of the judgment, which were specifically intended to avoid "the complete resolution" of cases celebrated at first instance according to these procedures being delayed through the application of the ordinary appeals regime; this would entail the risk of compromising the procedural economy goal of the special proceedings (as stated in the report on the preliminary draft of the Code of Criminal Procedure of 1988). Under the terms of the original Article 443 of the Code of Criminal Procedure, these limits were divided in an essentially equal manner between the parties: neither party was in fact allowed to appeal against acquittals with a view to obtaining a different form of acquittal, or against judgments imposing alternative sentences (sub-section 1); the accused was prevented from appealing against fines and convictions imposing sentences which did not have to be enforced (sub-section 2); the public prosecutor was prevented from appealing against convictions, except where they modified the offence charged (sub-section 3).

Subsequent interventions, first by this court (judgment No. 363 of 1991) and then by Parliament (Article 31 of law No. 479 of 16 December 1999) however resulted in the complete removal of the limits on appeals by the accused and also the abolition of the limit – in relation to both of the parties – concerning judgments imposing alternative sentences; by contrast, the limit which applied only to the public prosecutor remained in place. The removal of the prosecution's power to appeal against convictions which do not modify the offence charged was found in particular by the Court not to breach the principle of equality between the accused and the prosecution on the grounds that it was justified first by the "primary objective of a rapid and complete conclusion of trials celebrated at first instance according to summary proceedings"; secondly, it was also

justified by the fact that the judgments which could no longer be appealed against in any case amounted to “acceptance of the prosecution's case” presented before the court: this is because Parliament chose to privilege “effective sentencing [...] over its complete correspondence to the nature of the offence charged” in a manner which was “faultless as regards the requirement of rationality insofar as proportional to the pre-eminent goal of the rapid conclusion of the trial” (judgment No. 363 of 1991 and order No. 305 of 1992).

6. - At the same time however, far-reaching changes were also made to the overall structure of summary proceedings – which had initially been characterised by three conditions: the accused's renunciation of full court proceedings involving the hearing of evidence in exchange for a reduced sentence in the event of a conviction; the consent of the public prosecutor; and the possibility of ruling on the case on the basis of the contents of the case file alone.

Subsequently, the case law of this court introduced the requirement on the public prosecutor to give reasons in the event of disagreement, along with a court review, following conclusion of oral proceedings, on the well foundedness of these reasons (judgments No. 81 of 1991, No. 183 and No. 66 of 1990). Considering then the situation in which disagreement is justified by the inability to conclude the trial on the basis of the case file due to investigative shortfalls attributable to the prosecution, this court called for the introduction by Parliament of a mechanism for introducing new evidence (judgment No. 92 of 1992), holding by contrast that the problem could not be resolved through the simple removal of the requirement of consent. The court found in fact that such an operation would have made necessary – with a view to re-establishing the “'internal' balance of the institution” – both new legislation on the public prosecutor's right to present evidence, as well as a review of the limits on appeals by the that party: such limits would be rationally justified “as a matter of principle... only if accompanied by the [...] consent” of the party affected by them (judgment No. 442 of 1994 and order No. 33 of 1998).

The court's suggestions were acted upon – albeit only partially – in law No. 479 of 1999. Having deprived the public prosecutor of the power to have a say in the choice of procedure, the amendment established access to summary proceedings as a full “right” of any accused who makes such a request, it no longer being subject to a court review of

the possibility of concluding the trial on the basis of the case file: accordingly – as a remedy for any shortfalls in the investigation – the law provided for a broad power for the court to order the hearing of new evidence *ex officio*. In addition, it also provided that the accused may make his request conditional on specific additional evidence, provided that this is compatible with the goals of procedural efficiency furthered by the procedure. As far as the public prosecutor's right to present evidence is concerned, this is limited to the right to submit rebuttal evidence in cases involving a "conditional" request for summary proceedings, whilst the bar on appeals by the prosecution pursuant to Article 443(3) of the Code of Criminal Procedure remains in place.

Even after the 1999 amendment however, the Court continued to hold that this exclusion was compatible with the principle of equality of the parties in that it was still rationally justified by the objective of procedural efficiency (orders No. 165 of 2003, No. 347 of 2002 and No. 421 of 2001): this is because – as recently reaffirmed in judgment No. 26 of 2007 – the exclusion continues to apply to judgments which, albeit with a "quantitative" disparity compared to the requests of the prosecution, in any case accept the prosecution's case.

7. - It was against this background that Article 2 of law No. 46 of 2006 – the provision challenged before this court – repealed the last sentence of Article 443(1) of the Code of Criminal Procedure ("where the purpose of the appeal is to modify a non-standard acquittal"), thereby generally precluding both the public prosecutor and the accused from appealing against acquittals in summary proceedings.

The amendment represents a single element in a broader design – evoked in the very title of the law – which aims to remove all rights to appeal against acquittals as a rule valid throughout the criminal procedural system: and this means – first and foremost – within the context of ordinary proceedings. As far as can be inferred from the *travaux preparatoires*, it was not Parliament's intention that the inclusion of summary proceedings within this design should satisfy "intrinsic" goals distinct from those brought in support of the legislation as a whole, including for instance that of increasing the "reward" aspect of alternative procedures, or their capacity to "expedite" the conclusion of trials. The provision contested before the court today is in fact classified in the *travaux* as a simple "connecting" or "coordinating" provision in relation to the amendment made in respect of ordinary proceedings (see the report on the draft bill No.

4604/C and the comments of the rapporteur to the Chamber of Deputies in its sitting of 25 July 2005).

However, in judgment No. 26 of 2007, this court declared the removal of the public prosecutor's power of appeal against acquittals handed down in ordinary proceedings (pursuant to Article 1 of law No. 46 of 2006, which replaced Article 593 of the Code of Criminal Procedure) to be unconstitutional due to violation of the principle of equality before the court: the court found that the resulting imbalance between the powers of the prosecution and the accused – due to its fundamental, generalised and unilateral nature – was not sufficiently justified by the reasons which, according to the *travaux preparatoires*, underlay the reform (that is: the alleged impossibility of considering an accused acquitted at first instance to be guilty "beyond all reasonable doubt"; the requirement to implement specific international law provisions; the expediency of avoiding acquittals handed down by a court – such as that at first instance – which heard evidence in open court in the presence of the parties from being overturned by another court – such as an appeal court – which by contrast bases its decision on mainly written evidence).

8. - The outcome of the constitutional review cannot be different as regards the corresponding repeal provision concerning summary proceedings: amongst other things, this provision could not in any case apply to the last of the grounds mentioned above, given the prevalently "file-based" nature, even at first instance, of trials celebrated according to that procedure.

8.1. - The preliminary observations made in the above judgment No. 26 of 2007 clearly apply also to the provision contested before this court: underneath the formally equal treatment of the parties – "the accused and the public prosecution may not appeal against judgments of acquittal" (Article 443(1) of the Code of Criminal Procedure, as amended) – the said provision encapsulates "a fundamental imbalance". In contrast to the accused – who retains the right to appeal against judgments which find him guilty – the public prosecutor is in fact totally deprived of the corresponding power to appeal on the merits against judgments which entirely reject the prosecution's case. This limitation, which cannot be regarded as being compensated for by the broadening of the grounds of appeal to the Court of Cassation introduced in tandem – moreover in favour of both parties – by Article 8 of law No. 46 of 2006 (amending Article 606(1) of the

Code of Criminal Procedure): this is because, irrespective of the effective scope of the new and broader grounds of appeal, the remedy in any case does not allow for the full merits review which is possible in an appeal.

On the other hand, it is equally clear that the arguments on the basis of which this court has repeatedly upheld the legitimacy of the original limit on appeals by the prosecution in summary proceedings under the terms of Article 443(3) of the Code of Criminal Procedure cannot apply to the exclusion at issue before this court. In fact, as already mentioned above, the imbalance brought about by the public prosecutor's inability to appeal against convictions which do not modify the offence charged has been found to be "faultless as regards the requirement of rationality insofar as proportional to the pre-eminent goal of a rapid conclusion to trials" celebrated under summary proceedings: this is because these judgments in any case imply acceptance of the prosecution's case, albeit on a "quantitatively" different level compared to the requests of the prosecution. Similar reasoning could clearly not be applied to the fundamental removal of the power to appeal against acquittals which on the other hand reject the prosecution's case *in toto*.

However, even disregarding the indications contained in the previous constitutional case law recalled above, the removal in question could not be justified by the goal of ensuring a faster conclusion of trials celebrated at first instance according to summary proceedings. However – as pointed out above – the argument of more rapid conclusions was not invoked in favour of the contested provision in the *travaux preparatoires*; moreover, it is not even certain that it can be achieved, given the possibility that the nature of judgments by the Court of Cassation, which as a rule only reverses lower courts' judgments, may have the result – in cases of appeals against acquittals containing errors of law – of increasing the degrees of proceedings necessary in order to arrive at a definitive judgment.

On this point the finding that, according to the settled case law of this court, the constitutional principle of the reasonable length of trials (Article 111(2) of the Constitution) – to which the provisions intended to save time and guarantee procedural efficiency are related – must be tempered against the background of other constitutional guarantees (*inter alia*, judgment No. 219 of 2004; order No. 420 and No. 418 of 2004) and cannot in any case be pursued "through the total removal of the relevant procedural

rights for only one of the parties" is in fact comprehensive and renders other questions moot (judgment No. 26 of 2007).

This conclusion appears even more valid given the features which the institution of summary proceedings, which was moreover already significantly weighed against the prosecution, have taken on following the development set out above, including the resulting significant increase – compared to the original regime – of the value of the "sacrifice" corresponding to the accused's renunciation of the hearing of evidence in open court.

In this respect, the emphasis falls in the first place on the removal of the requirement of the prosecution's consent to the use of summary proceedings: indeed, even this court identified consent as one of the prerequisites for the assessment of the rationality of the provisions limiting the power of appeal (judgment No. 442 of 1994 and order No. 33 of 1998); moreover, consent still applies as a justification – within the context of the regulation of alternative procedures – for the absence of appeals against judgments in which a sentence is passed at the request of the parties (Article 448(2) of the Code of Criminal Procedure). Accordingly, faced with "suffering" an entirely unilateral choice by the accused resulting in the loss of the possibility to present the prosecution's case in open court, the public prosecutor's role as a party to the case in summary proceedings is currently limited – with the exception of his eventual right to present rebuttal evidence of additional evidence requested by the accused – to the mere participation in discussions; by contrast, the court's decision may even make findings on the facts which are even completely at odds with those suggested by the case file compiled by the public prosecutor himself: this is due both to additional evidence heard *ex officio* or at the request of the accused as well as to initiatives carried out by the latter – in particular after law No. 397 of 7 December 2000 (Provisions governing investigations by the defence) – using the instrument of defence investigations, the results of which may also be used in summary proceedings (order No. 57 of 2005).

In conclusion, this results in an overall picture which is not at all capable of justifying the total removal of the public prosecutor's power of appeal against acquittals against the background of an overall rebalancing of the powers granted to the parties in the context of the procedure celebrated before the lower court.

8.2. - It must be added to this that the contested provision has also created an inherent incoherence in the law governing appeals by the public prosecutor similar to that already created – in relation to ordinary proceedings – by Article 1 of law No. 46 of 2006 and already held unconstitutional by this court (judgment No. 26 of 2007).

In fact, as a result of the legislative amendment before the court, the public prosecutor is deprived of the power to appeal against acquittals which entirely reject the prosecution's case, whilst he retains the power to appeal against convictions which modify the offence charged which by contrast accept, albeit partially, its case and confirm the guilt of the accused.

8.3. - In the light of the above considerations, this court finds that the contested legislation amounts to a breach of the principle of equality of the parties which is not supported by an adequate justification and accordingly violates Article 111(2) of the Constitution.

The remaining grounds for censure proposed by the referring courts are accordingly moot.

9. - Article 2 of law No. 46 of 2006 must therefore be declared unconstitutional insofar as, by amending Article 443(1) of the Code of Criminal Procedure, it prevents the public prosecutor from appealing against acquittals in summary proceedings.

Correspondingly, also Article 10(2) of law No. 46 of 2006 must be declared unconstitutional, insofar as it provides that any appeals lodged by the public prosecutor against an acquittal in summary proceedings before the entry into force of the law must be declared inadmissible. This declaration of unconstitutionality resolves the questions raised by the referring courts, without it being necessary to address sub-sections 1 and 3 of Article 10, even though they were expressly addressed in the examination of the Milan Court of Appeal. In fact – in stipulating that the provisions of law No. 46 of 2006 apply “to proceedings in progress at the time of the entry into force of the law” – sub-section 1 limits itself to reiterating the general principle that the applicable law is that in force at the material time is valid in relation to procedural matters; on the other hand, sub-section 3 – which allows a party whose appeal has been declared inadmissible pursuant to sub-section 2 to appeal against the acquittal at first instance to the Court of Cassation – is by definition inapplicable in the case before the court, since the

prerequisite of the declaration of inadmissibility of the public prosecutor's appeal is no longer fulfilled.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) *declares* that Article 2 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals) is unconstitutional insofar as, by amending Article 443(1) of the Code of Criminal Procedure, prevents the public prosecutor from appealing against acquittals in handed down in summary proceedings;

2) *declares* that Article 10(2) of law No. 46 of 20 February 2006 is unconstitutional insofar as it provides that any appeal lodged by the public prosecutor against an acquittal handed down in summary proceedings before the entry into force of the same law must be declared inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 10 July 2007.

Signed:

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Registry on 20 July 2007.

The Director of the Registry

Signed: DI PAOLA