



Press Office of the Constitutional Court

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## KIDNAPPING FOR THE PURPOSE OF EXTORTION AND REOFFENDING: THE PROHIBITION ON THE APPLICATION OF THE MITIGATING CIRCUMSTANCE OF ‘OFFENCE MINOR IN TERMS OF SCALE’ SO AS TO PREVAIL OVER AGGRAVATING CIRCUMSTANCES IS UNCONSTITUTIONAL

Persons convicted of the offence of kidnapping for the purpose of extortion may benefit from a sentence reduced by up to one third where the offence is ‘minor in terms of scale’, even if they are reoffenders. The provision prohibiting the application of the mitigating circumstance of ‘offence minor in terms of scale’ on a priority basis over the aggravating circumstance of reoffending is unconstitutional as it prevents a sentence from being imposed that is commensurate and proportionate with the differing level of seriousness of the offence.

This ruling is contained in [judgment no. 143](#) filed today (author Giovanni Amoroso). In this case the Court declared unconstitutional Article 69(4) of the Criminal Code insofar as it provides that the mitigating circumstance of ‘offence minor in terms of scale’ – introduced by the Court by judgment no. 68 of 2012 for the offence of kidnapping for the purpose of extortion – cannot prevail over the aggravating circumstance of reoffending provided for under Article 99(4) of the Criminal Code. The contested provision violates Articles 3 and 27 of the Constitution and frustrates the mitigating function of sentences.

The question of constitutionality had been referred by the Court of Cassation during the course of proceedings concerning the sentencing of five persons convicted of kidnapping for the purpose of extortion, within the broader context of a criminal enterprise pursuing the goal of drug trafficking.

Reversing the trial court’s ruling, the Assize Court of Appeal had previously held that the individuals convicted were eligible to benefit from the mitigating circumstance of ‘offence minor in terms of scale’ since the kidnapping of one of the associates who had failed to surrender proceeds from the sale of drugs had only lasted for several hours.

However, when sentencing the five convicted persons, the Court of Appeal distinguished between their circumstances: for two convicted persons who were not reoffenders the mitigating circumstance was deemed to prevail over the aggravating circumstance that the offence involved five or more persons; this resulted in a significant reduction in the overall sentence compared to that imposed by the trial court. On the other hand, for the three other convicted persons the mitigating circumstance was deemed to be offset by the aggravating circumstance of reoffending under Article 69(4) of the Criminal Code. It thus confirmed the sentence of 20 years' imprisonment imposed at first instance.

The judgment filed today stresses that the function of the mitigating circumstance of 'offence minor in terms of scale' "is specifically to mitigate – having regard solely to the objective elements of the offence (the nature of the criminal act and the extent of the harm or danger) – punishment that is exceptionally harsh and that, precisely for this reason, risks being incapable of adjustment in line with the variety of actual scenarios covered by the *actus reus*".

The Court in fact recalled that the particularly high sentence provided for in relation to kidnapping – a term of imprisonment of between 25 and 30 years – was introduced by the emergency legislation enacted in the wake of the social alarm caused during the 1970s by the large number of kidnappings for ransom carried out by dangerous criminal organisations. These often involved particular brutality and a risk of death for the victim of the kidnapping, which not infrequently occurred.

The judgment reiterates the principle that the sentence must be proportionate with the seriousness of the offence, and that this principle would be frustrated were an "abnormal emphasis" to be placed on reoffending which, as an indication of deplorability and dangerousness, is relevant in strictly subjective terms. The ruling thus reflects the approach taken in other judgments that have ruled legislation unconstitutional in relation to mitigating circumstances indicative of a less serious offence. These include for instance: "minor scale" for the offence of producing and trafficking illegal drugs (judgment no. 251 of 2012); "particularly slight nature" for the offence of handling stolen goods (judgment no. 105 of 2014); "reduced seriousness" for the offence of sexual assault (judgment no. 106 of 2014); and "particularly slight pecuniary loss" for bankruptcy offences and the offence of fraudulent borrowing (judgment no. 205 of 2017).

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