JUDGMENT NO. 73 YEAR 2020

The judgment holds that a criminal provision precluding the application of the mitigating circumstance of diminished responsibility to repeat offenders violates the principle of proportionality between the seriousness of the offence and the severity of punishment under Articles 3 and 27 (3) of the Constitution and is, therefore, void.

The Court reiterates here its established case law, according to which manifestly disproportionate penalties are in breach of both the principle of equality before the law and the rehabilitative function of punishment. This latter principle, in particular, is frustrated if sentences cannot be seen as a "just" reaction against the harm caused through past criminal behaviour by the convict concerned.

According to this new judgment, the proportionality principle requires that the punishment bear an adequate relationship also with the subjective elements of criminal responsibility, such as the degree of mental competence of the defendant. Therefore, a provision that rules out a mitigated punishment for partially incompetent defendants who are, at same time, repeat offenders is incompatible with the principle at issue and is, therefore, unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 69(4) of the Criminal Code, initiated by the Ordinary Court of Reggio Calabria in criminal proceedings against V. M. and V. V. with referral order of 29 January 2019, registered as No. 121 in the Register of Referral Orders of 2019 and published in the Official Journal of the Republic No. 36, first special series, of the year 2019.

Having regard to the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò in chambers on 6 April 2020, a session held in accordance with Article 1(a) of the Decree issued by the President of the Court on 24 March 2020;

after deliberation in chambers on 7 April 2020.

[…]

The facts of the case

[…]

1.1. – The referring court states that it has to rule on the criminal responsibility of V. M. and V. V., accused of the joint commission of the offence of aggravated robbery under Articles 624, 625, numbers 2) and 7), and 61, number 5), of the Criminal Code.

Both defendants had a criminal record of multiple prior convictions for crimes against property, some of which were also committed quite recently.

However, the psychiatric examination ordered by the court revealed that both defendants suffer from a mental disorder that significantly diminishes their mental capacity without excluding it. The psychiatric report, indeed, found "psychopathological alterations that meet the diagnostic criteria for Personality Disorder" as well as "psychological scars of a Substance Abuse Disorder (opiates), now in partial remission".

As for V. M. in particular, the expert highlighted "an important depressive imbalance of the affective axis and the presence [...] of markedly disharmonious personological traits" as well as "severe disharmonies of the fundamental organisation of the personality", which "give a dysphoric connotation to affective suffering and, most probably, facilitate the emergence of regressive conduct aimed at obtaining immediate gratification and lacking an adequate assessment of the risk involved", all of the foregoing in a "framework of Persistent Depression".

As for V. V., the expert painted a picture of "personality disorder with mixed traits of the first and second groupings (particularly relevant are schizotypical, narcissistic, histrionic, antisocial traits)", together with "poverty of empathy" and "insistent conviction of being worthy of special consideration".

Questioned at trial on the relevance of the diseases found with respect to the aetiology of the conduct that the defendants were charged with, the expert added that the disorders in question, while not appearing so destructive as to justify a forensic judgment as to a total lack of any mental capacity, affect "especially those parts of the mental functioning that are defined as executive functions, i.e. ability to plan, assessment, inferential evaluation, criteria of appropriateness and opportunity, weighing risk also with respect to personal profit".

[…]

Conclusions on points of law

[…]

4. – On the merits, the questions raised with reference to Articles 3, 27(1) and 27(3) of the Constitution, which are to be examined jointly, are well founded.

[…]

4.2. – The questions brought to the attention of this Court concern a mitigating circumstance reflecting [...] the reduced degree of subjective fault of offenders, which derives from their lower degree of understanding of the wrongness of their own conduct and their impaired capacity to control their own impulses because of the diseases or disorders that affect them (and that must, by express legislative provision, be such as to "significantly diminish" their mental capacity: Article 89 of the Criminal Code).

The principle of proportionality between the seriousness of the offence and the severity of punishment, which has long been affirmed by this Court on the basis of the combined provisions of Articles 3 and 27(3) of the Constitution (at least as far back as Judgment No. 343 of 1993 and followed in, *inter alia*, Judgments No. 40 of 2019, No. 233 of 2018 and No. 236 of 2016), requires in general terms that the punishment be adequately tailored not only to the degree of harm caused to the protected interests, but also to the degree of subjective fault of the offender (Judgment no. 222 of 2018). The latter depends, in addition to the type of *mens rea* by which the offender has engaged in the criminal

activity, on the possible presence of factors that have influenced the perpetrator's decision to act, making it more or less blameworthy.

Paramount among these factors is precisely the presence of significant personality diseases or disorders (as defined by the Supreme Court of Cassation, Joint Criminal Divisions, in its Judgment No. 9163 of 25 January – 8 March 2005), like those that according to medical and legal science diminish the offender's mental capacity, without totally excluding it. Such an offender may well be punished for an offence that he or she could still have avoided, according to the criteria laid down by law. But at the same time, he or she deserves a more lenient punishment, compared to the one applicable to those who decide to engage in identical conduct, while being in the full possession of their mental faculties.

The principle, based on Articles 3 and 27(3) of the Constitution, that punishment must fit the crime requires, as a general rule, that the lower degree of subjective fault should be matched by a more lenient sentence than that which would be appropriate for equally serious conduct in objective terms. This is necessary "in order to ensure that the penalty appears as a response that is – not only proportionate, but also – 'individually tailored' […], thus giving effect to the constitutional requirement of the 'personal' character of criminal responsibility pursuant to Article 27(1) of the Constitution" (Judgment No. 222 of 2018).

4.3. – The rules challenged here prevent a court from holding that the mitigating circumstance of diminished responsibility prevails over the specific indicator of greater guilt (and greater danger) of the offender represented by repeated recidivism, which is based, in turn, on the assumption that recidivists are normally more blameworthy, since they do not give up crime despite already having received an individual warning, through their previous convictions, of their duty to respect the law.

Although the application of the aggravating circumstance of recidivism is discretionary, a provision which precludes the application of the mitigating circumstance of diminished responsibility in respect of repeat offenders is incompatible with the constitutional mandate to impose sentences that are proportionate to the degree of the offender's subjective fault […]. In fact, that preclusion does not enable the court to sentence an offender suffering from personality disorder to a more lenient punishment than that which would be imposed for the same act on an offender of sound mind […], even if the court – as is the case in the main proceedings – considers that the disorder makes it significantly more difficult for him or her to refrain from committing new crimes, despite the warning received through his or her previous convictions.

The prohibition in question, therefore, unduly leads to the same punishment for actions that are essentially different in terms of their gravity, owing to the different degree of subjective fault that characterises them. The Court's case law has, for quite a long time, considered such an outcome as *per se* contrary to Article 3 of the Constitution (Judgment No. 26 of 1979), and incompatible with the rehabilitative function of punishment and the principle of "personality" of criminal liability.

[…]

4.4. – The foregoing conclusion does not entail sacrificing the need to protect society against the heightened social danger posed by recidivism.

While there is no doubt that the severity of punishment must adequately reflect the degree of subjective fault of the offender, the law in force does allow for a security measure to be applied to persons receiving a reduced sentence on account of their diminished responsibility [...]. The security measure, devoid of any "punitive" connotation, does not depend on the subjective fault of the individual concerned, but on his or her social dangerousness, which must moreover – in accordance with Article 679 of the Code of Criminal Procedure – be re-examined on a case-by-case basis by the supervisory court once the sentence has been served (Judgments Nos. 1102 of 1988 and 249 of 1983). Moreover, the security measure should ideally be chosen so as to ensure both that the convicted person's social dangerousness is contained *and* the disorders from which he or she is suffering are adequately treated (in accordance with the principle expressed in Judgment No. 253 of 2003 in relation to those totally lacking any mental capacity). The convicted person should also receive effective support with respect to the purpose of their "resocialisation" – an objective which, as recently recalled in Judgment No. 24 of 2020, the legislator expressly ascribes to probation (Article 228(4) of the Criminal Code), but which reflects a principle that can certainly be extended, in our constitutional framework, to security measures in general.

A rational synergy between punishment and security measures – which is, unfortunately, only minimally achieved in practice – could thus allow for adequate prevention of the risk of new crimes being committed by a convicted person suffering from personality disorders, without any undue departure from the constitutional principles governing punishment, understood as a proportionate reaction to (objectively) harmful and (subjectively) blameworthy conduct.

[…]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 69(4) of the Criminal Code is unconstitutional insofar as it prohibits the mitigating circumstance referred to in Article 89 of the Criminal Code from prevailing over the aggravating circumstance of recidivism referred to in Article 99(4) of the Criminal Code.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 April 2020.

Signed by: Marta CARTABIA, President

Francesco VIGANÒ, Author of the Judgment