Corte costituzionale

JUDGMENT NO. 26 OF 2007

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

JUDGMENT No. 26 YEAR 2007

In this case, the public prosecutor in criminal proceedings challenged a rule by which the prosecution was precluded from appealing against trial court judgments acquitting the accused, which also applied to proceedings in progress at the time when the law came into force. The prosecution claimed that the provision violated the constitutional requirement of equality, was detrimental to the rights of society to the effective prosecution of offences, and removed a "necessary corollary of the procedural system in force". The Court held that the fact that the opposing parties in criminal prosecutions were so different in nature meant that the principle of equality could not mandate the availability of identical rights at every stage of the proceedings. However, any differences in rights must "be justified by an adequate rationale pertaining to the institutional role of the public prosecutor", and "must also not overstep the limits of rationality". The Court held that the difference in treatment was unjustified because it was "general" (i.e. applying indiscriminately to proceedings for any offence) and "unilateral" (because there was no quid pro quo, consisting in a restriction on the rights of the accused in such cases). It accordingly found, on the facts, that the difference in treatment concerned was not rational, and hence declared it unconstitutional.

THE CONSTITUTIONAL COURT

composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Romano VACCARELLA, 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 Articles 1 and 10 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), commenced pursuant to the referral orders of 16 March 2006 of the Rome Court of Appeal, in criminal proceedings against E. F. and others, and of 16 March 2006 of the Milan Court of Appeal in criminal proceedings against A. M. and others, registered as Nos. 130 and 155 in the Register of

Orders 2006 and published in the *Official Journal of the Republic* Nos. 19 and 22, first special series 2006.

Having heard the Judge Rapporteur Giovanni Maria Flick in chambers on 24 January 2007.

The facts of the case

1. - In the order mentioned in the headnote, the Rome Court of Appeal raised, with reference to Articles 3, 24, 111 and 112 of the Constitution, the question of the constitutionality of Article 1 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 it prevents the public prosecutor from appealing against acquittals, other than in cases falling under Article 603(2) of the Code of Criminal Procedure – that is when new evidence comes to light or is uncovered after the trial court's judgment – and provided that such evidence is decisive.

The referring court – seized of the appeal lodged by the State Prosecutor against the judgment of the *Tribunale di Roma* which had acquitted three individuals charged with the crime of handling stolen goods – notes that whilst appeal proceedings were pending law No. 46 of 2006 entered into force, Article 1 of which, replacing Article 593 of the Code of Criminal Procedure, prevented the public prosecutor from appealing against acquittals, with the exception of cases falling under Article 603(2) of the Code of Criminal Procedure.

In the opinion of the lower court, the contested provision violates various constitutional principles.

In the first place, it breaches the principle of equality, enshrined in Article 3 of the Constitution: in fact, allowing the accused to appeal against convictions without allowing the public prosecutor the corresponding power to appeal against acquittals, other than in an extremely limited number of cases, means placing the accused in “a position that is clearly more favourable than that of other members of society”; in this way, society would suffer a significant limitation on the right/duty of the public prosecutor to prosecute criminal actions, through which its interests are protected. The prosecution's ability to appeal in the cases provided for under Article 603(2) of the Code of Criminal Procedure would in effect end up being “little more than theoretical”, in that

it would be tied to the emergence of evidence during the restricted period of time falling between the passing of the judgment and the expiry of the deadline for appeal.

The contested provision is also argued to breach Article 24 of the Constitution, in that does not enable the “collectivity”, the interests of which are represented and defended by the public prosecutor, “to protect its rights adequately”: this is also the case where the acquittal flows from an error in the reconstruction of the facts or the interpretation of the law.

Article 111 of the Constitution is also said to be violated insofar as it requires that all trials be celebrated “on the basis of an equal confrontation between the parties before an independent and impartial judge”, since the contested provision does not enable to prosecution to present its arguments according to procedures and powers which mirror those available to the defence.

Finally, the said provision is argued to violate Article 112 of the Constitution. According to the referring court in fact, the existence of a second degree of merits proceedings – available both to the public prosecutor and to the accused (in the same way as for the plaintiff and defendant in civil actions) – is a necessary corollary of the procedural system in force: this means that the removal of the prosecution's power to appeal against acquittals would circumvent the requirements imposed by the principle of the mandatory nature of criminal actions, “considered overall”.

2. - In the referral order mentioned in the headnote, the Milan Court of Appeal raised, with reference to Articles 3 and 111(2) of the Constitution, the question of the constitutionality of Articles 1 and 10 of law No. 46 of 2006, insofar respectively as they prevent the public prosecutor from appealing against acquittals (Article 1), and provide that any appeal lodged by the public prosecutor against such judgments prior to the entry into force of the same law must be declared inadmissible, without prejudice to the appellant's right to appeal to the Court of Cassation (Article 10).

The lower court states that, following an appeal by the public prosecutor, it was called upon to celebrate appeal proceedings against various defendants acquitted by the trial court of the charge of aggravated fraud on the grounds that there was no case to answer. In the meantime however law No. 46 of 2006 was enacted, Article 1 of which replaced Article 593 of the Code of Criminal Procedure and thus prevented any appeal against acquittals other than cases provided for under Article 603(2) of the Code of Criminal

Procedure; moreover, Article 10 of the same law provided that, for proceedings already in progress, any appeals already lodged by the public prosecutor were to be declared inadmissible, without prejudice to the prosecution's right to appeal to the Court of Cassation against appeal judgments.

Accepting this aspect of the State Prosecutor's objection, the referring court however doubts that these legislative provisions are compatible with Articles 3 and 111(2) of the Constitution.

The question is stated to be relevant in the proceedings before the lower court insofar as its acceptance would enable an examination of the appeal on the merits, which would otherwise be dismissed by declaration of inadmissibility, since the public prosecutor has not submitted new evidence under the terms of Article 603(2) of the Code of Criminal Procedure.

As far as the issue of non manifest groundlessness is concerned, the referring court argues that the contested provisions violate above all the principle of equality between the parties to the trial enshrined in Article 111(2) of the Constitution. By preventing both the public prosecutor and the accused from appealing against acquittals, such legislation in fact creates “only formal” equality: this is because it would essentially limit the power of appeal of only one of the two parties which has an interest in challenging such judgments, i.e. the public prosecutor.

On the other hand, in the light of the “only possible interpretation” of Article 576 of the Code of Criminal Procedure, as amended by law No. 46 of 2006, acquittals may however be appealed by a private party to proceedings [i.e. the victim]: this results in a further element of inequality, since the public prosecutor ends up in a worse position even than any private parties.

Nor moreover can the situation outlined above of “absolute disparity of treatment” between the parties to the trial be counter-balanced by the right to lodge an appeal against acquittals in cases provided for under Article 603(2) of the Code of Criminal Procedure, which turn out to be “entirely residual”.

The contested provisions are also argued to breach Article 3 of the Constitution on the grounds that they are irrational.

Indeed, in the light of the indications contained in the case law of this court – even though the public prosecutor's power of appeal is not a necessary expression of the

powers implied by his role as the prosecutor of criminal actions – an imbalance between the rights of the prosecution and the defence would in this sense be compatible with the principle of equality between the parties only insofar as it did not overstep the bounds of irrationality, considered in the light of the requirement to protect constitutionally significant interests. On this point, the lower court notes – in accordance with this premise – that the Constitutional Court has upheld the constitutionality of provisions which do not allow the public prosecutor to lodge appeals, including interlocutory appeals, against convictions handed down following summary proceedings (Articles 443(3) and 595 of the Code of Criminal Procedure), in doing so taking into consideration the particular characteristics of this alternative procedure. The same justification could not however apply to the provisions contested today before this court which prevent appeals by the public prosecutor against all acquittals, without any distinction between summary and ordinary proceedings.

In the opinion of the referring court, it is not possible to invoke in favour of the contested provision the right of the accused to a rapid conclusion of proceedings against him, by virtue of the principle of the reasonable length of the same (Article 111(2) of the Constitution): this right cannot be satisfied through the exclusive sacrifice of the public authority's power of appeal, without thereby breaching the other constitutional principle – of no less significance – of the equality of the parties before the court. Moreover, the continuing existence of the public prosecutor's power of appeal against convictions, in contrast to the situation in summary proceedings, is symptomatic of the lack of any rational balancing of the two values.

In the same way, a rational justification of the contested provisions cannot be found in any alleged right of the accused, irrespective of any other factors, to two degrees of merits proceedings in the event of a conviction. No such right is recognised either in the Constitution or in international treaty law; in fact, Article 2(2) of the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms – adopted in Strasbourg on 22 November 1984, and ratified and implemented by law No. 98 of 9 April 1990 – expressly provides that the accused's right to a review of his conviction may be excluded where the findings in question emanate from a higher court or are reached following an appeal against the original acquittal of the accused.

Again, it cannot be argued that the recognition of the public prosecutor's power to argue before a different court that the acquittal by the trial court is mistaken would increase the risk of sentencing an innocent person, given the “inequality of forces in play”. This argument would be valid only in relation to procedural systems which are entirely accusatory in nature, in which no reasons are given for acquittals or convictions; in addition, the “inequality of the forces” suggested would no longer exist after the trial court's judgment, since “the prosecution can no longer search, tap phones or seize”, but rather “only argue”.

Regarding the question of rationality, the newly introduced limits on the public prosecutor's power of appeal cannot even be legitimated by an invocation of the principle of *audi alteram partem*, including the direct and oral nature of proceedings, due to the fact that the appeal court – in contrast to the trial court – considers evidence purely in written form. This assertion is not true for a significant number of trials based on “written submissions” (such as for example those celebrated according to summary proceedings). Above all, it would turn into an argument that “proves too much”: it would still in fact be necessary to explain why a “paper-based acquittal” should have greater weight than a similar conviction; accordingly, pursuing it to its conclusion, this argument implies that no judgment can be appealed.

Finally, the assertion that an acquittal before the trial court would in any case leave a “reasonable doubt” as to the guilt of the accused, thereby removing one of the prerequisites for a conviction in accordance with Article 533(1) of the Code of Criminal Procedure as amended, is argued to be “begging the question”. Any doubts flowing from discrepancies between the outcomes of the two degrees of proceedings are in fact a necessary corollary of a legal system which provides for more than one degree of merits proceedings; on the other hand, if the accused's right to appeal against a conviction can be justified by the possibility that the trial court's verdict may be mistaken, it is not clear how a similar argument cannot apply, in accordance with the principle of equality, to the ability to appeal against acquittals.

The lower court argues that it is not possible to identify any reasonable justification for such inequality between the treatment of the public prosecutor and the private party, since the latter's interest in criminal proceedings is merely compensation, which may equally well be pursued before the civil courts: on the other hand, the public prosecutor

participates in proceedings as a public authority which "promotes, where appropriate on appeal, the state's claim to punishment and the public interest in the restoration of the order breached by the crime".

Conclusions on points of law

1. - The Rome court of appeal questions the constitutionality of Article 1 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 it prevents the public prosecutor from appealing against acquittals, other than in cases falling under Article 603(2) of the Code of Criminal Procedure – that is when new evidence comes to light or is uncovered after the trial court's judgment – and provided that such evidence is decisive.

In the opinion of the referring court, the contested provision is incompatible with Articles 3 and 24 of the Constitution, since – by allowing the accused to appeal against convictions without granting the public prosecutor the corresponding power to appeal against acquittals, other than in situations which are so limited as to appear "little more than theoretical" – it places the accused in "a position that is clearly more favourable than that of other members of society", the interests of whom are protected by the right/duty of the public prosecutor to prosecute criminal actions, thereby preventing such protection from having an adequate scope.

It is also argued to breach Article 111 of the Constitution, which stipulates that all trials be celebrated "on the basis of an equal confrontation between the parties before an independent and impartial judge", since the contested provision does not allow the prosecution to present its arguments according to procedures and powers which reflect those available to the defence.

Finally, the same provision is said to circumvent the limitation imposed by the principle of the mandatory nature of criminal actions (Article 112 of the Constitution), for which the provision of a second degree of merits proceedings also for the public prosecutor should be a corollary.

2. - The Milan court of appeal also questions the constitutionality of Article 1 of law No. 46 of 2006, also invoking as part of the scrutiny of constitutionality the transitional provision contained in Article 10 of the same law. This provision is contested insofar as

it applies the new legislation to proceedings in progress at the time of its entry into force, providing in particular – in sub-sections 2 and 3 – that any appeals already lodged by the public prosecutor against acquittals must 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.

In the opinion of the referring court, the above provisions violate Articles 3 and 111(2) of the Constitution in that they subject the public prosecutor to a treatment that is clearly more detrimental than that afforded to the accused who may appeal against convictions; it is also – according to the lower court – less favourable than the treatment given to any private parties who, in accordance with Article 576 of the Code of Criminal Procedure as amended by Article 6 of law No. 46 of 2006, on the other hand maintain the right to appeal against acquittals.

This discrepancy is not supported by any reasonable justification which attempts to render it compatible with the principle of the equality of the parties before the court, considered in the light of the requirement to protect other constitutional principles.

Indeed, as far as the equality of treatment between the prosecution and the defence is concerned, Parliament's choice cannot be rationally justified by the interest of the accused in a rapid conclusion of proceedings against him: this interest cannot be furthered by a mere limitation of the rights of the other party to proceedings. Nor moreover can such a choice be based on any right of the accused to two degrees of merits proceedings in the event of a conviction: no such right is recognised either in the Constitution or in international treaty law concerning human rights to which Italy has adhered. Furthermore, it cannot be based on any hypothetical increase in the risk flowing from the “inequality of the forces in play” of convicting an innocent person due to the public prosecutor's right to appeal against acquittals, since the suggested “inequality of the forces” would in any case be eliminated after the trial court's judgment.

In the same way, it is not possible to invoke the principle of *audi alteram partem*, including the direct and oral nature of evidence, against the purely “written form” of the evidence considered by the appeal court because – leaving aside the fact that numerous trials (for example, those celebrated according to summary proceedings) are based on “written submissions” both before the trial court and on appeal – it is not clear why a

“file-based acquittal” should have greater weight than a similar conviction; this means that, where the argument is drawn out to its logical conclusion, no judgment can be appealed.

It is also not possible to accept the argument that trial court's acquittals in any case do not mean that it is possible to consider the accused guilty “beyond any reasonable doubt” – as currently required by Article 533(1) of the Code of Criminal Procedure for a conviction – since the potential for differences in the outcome of proceedings is argued to be necessarily inherent in the provision of more than one degree of merits proceedings. On the other hand, if the accused's right to appeal against a conviction can be justified by the possibility that the trial court's verdict is mistaken, it is not clear how a similar argument cannot apply, in accordance with the principle of equality, to the possibility of appeal against acquittals.

Finally, the inequality pointed out with the treatment of any private party, which in criminal proceedings has interests merely in compensation – a claim which may also be brought before the civil courts – is clearly illogical: on the other hand, the public prosecutor participates in proceedings as a public authority which “promotes, where appropriate on appeal, the state's claim to punishment and the public interest in the restoration of the order breached by the crime”

3. - The referral orders raise similar questions, which means that the proceedings in question shall be joined for resolution in a single judgment.

4. - The question is well founded for the purposes of Article 111(2) of the Constitution.

It is important to point out that, according to the consolidated jurisprudence of this court – in providing that “every trial shall be celebrated on the basis of an equal confrontation between the parties” – Article 111(2) of the Constitution, introduced by constitutional law No. 2 of 23 November 1999 (Introduction of the principle of a fair trial into Article 111 of the Constitution) gave autonomous standing to a principle – that of equality between the parties – which was “clearly already presupposed within the previous system of constitutional values” (order No. 110 of 2003, No. 347 of 2002 and No. 421 of 2001).

Even after the constitutional amendment therefore, the assertion – consistently made in the previous case law of the Court (*inter alia*, judgments No. 98 of 1994, No. 432 of 1992 and No. 363 of 1991; orders No. 426 of 1998, No. 324 of 1994 and No. 305 of

1992) – that in criminal trials the principle of equality between the prosecution and the defence does not necessarily entail that the procedural powers of the public prosecutor must be identical to those of the accused remains entirely valid: a difference in treatment "may be justified by the particular institutional position of the public prosecutor, the role assigned to him, as well as by requirements relating to the correct administration of justice, provided that it comply with the requirements of rationality" (orders No. 46 of 2004, No. 165 of 2003, No. 347 of 2002 and No. 421 of 2001).

In the light of this consolidated line of thinking, the physiological differences which characterise the positions of the two parties who by definition participate in the criminal trial – flowing from the different operating conditions and different interests vested in the parties, also by virtue of constitutional principles – make it impossible to conclude that the principle of equality must (or even may) by definition imply the existence of exactly the same powers and rights in the context of each individual stage of proceedings. This is because one of the parties is a public authority exercising official powers and acting to protect collective interests, whilst the other is a private individual defending his own fundamental rights (in particular, the right to personal freedom), which would be compromised by an eventual conviction. Any modifications to this symmetry – irrespective of the direction (that is whether to the advantage of the public party or the private individual) – are however compatible with the requirement of equality, provided that they satisfy two conditions: they must first be justified by an adequate rationale relating to the institutional role of the public prosecutor, i.e. the need for the correct and efficient administration of criminal justice, also with reference to the complete development of other constitutionally relevant goals; secondly, they must also not overstep the limits of rationality – also within the context of an overall rebalancing of powers, having regard to any inequalities in the opposite direction apparent in stages of proceedings other than those involving the individual discriminatory provision in question (see judgments No. 115 of 2001 and No. 98 of 1994).

This scrutiny of rationality must clearly be carried out on the basis of a comparison between the rationale which, in any given case, stands behind the provision which gives rise to the inequality and the size of the "gap" created by it between the positions of the parties: this should be done specifically with a view to clarifying the adequacy of the rationale and whether the size of the "gap" is proportional with that rationale. These

examinations cannot be overlooked, other than at the cost of depriving the requirement of equality between the parties of any substantive content on this point: it is not foreseeable, for instance, that the physiological advantage of the prosecution during preliminary inquiries, based on the wide range of investigative instruments available – an advantage which reflects the institutional role of that authority, also bearing in mind the "invasive" and "coercive" nature of certain measures of inquiry – might in itself enable Parliament to carry out in the name of the need for a "rebalancing" any reduction – including even the most radical – of the public prosecutor's powers in the context of all subsequent stages. Such measures – which would *de facto* deny the existence of any constitutional limits on the asymmetrical distribution of procedural rights between the parties – would deprive the requirement of equality of any substantive validity: this result is even less acceptable given its current understanding as an express and free-standing constitutional principle.

5. - The case law of the Court in this area has in actual fact consistently drawn inspiration from the interpretation mentioned above in relation to the issue – which is of specific relevance here – of the public prosecutor's potentially more detrimental position concerning his powers of appeal.

5.1. - When examining the questions of constitutionality raised in relation to this issue, this court has always taken its founding premise to be correct: i.e. that the legislation governing appeals, as one aspect of the overall regulation of the trial, is also subject – albeit with the particular characteristics which will be discussed below – to the limits imposed by the principle of equality between the parties; the validity of this premise must be confirmed.

The principle in question is not in fact open to a reductionist interpretation, such as that which – laying particular emphasis on the connection stipulated in Article 111(2) of the Constitution between equality of the parties, a fair confrontation, impartiality and independence of the court – attempted to deprive equality between the parties of the role of the essential cornerstone of the entire trial, considering it rather as a guarantee pertaining only to evidential procedures, and with a view to inferring that the only type of appeal which the parties should without question avail themselves of on equal terms is the appeal to the Court of Cassation on the grounds that the law has been broken, provided for under Article 111(7) of the Constitution.

An understanding of this nature would in fact end up interpreting the principle of equality before the court not as a reassertion of the principles contained in Article 3 of the Constitution, but rather as an unethical derogation from the latter: this solution becomes even less plausible where the literal wording of the constitutional provision is considered, in which equality between the parties is stated to be a general principle referring to "all trials", without distinction and without any restriction to specific stages or aspects of proceedings. Moreover, the specific prominence which Parliament, when enacting the Constitution, intended to give to the value of *audi alteram partem* in criminal trials, as confirmed by the precise "directives" in this area set out in Article 111(4) and (5) of the Constitution, cannot be used as a basis for such arguments: this is because it cannot logically be concluded that such a distinct value – rather than complementing and reinforcing the principle of equality – is intended to limit the very same principle, thereby conferring legitimacy on the idea – clearly unacceptable compared to other types of trial, such as for example civil suits – that in criminal trials the equality clause operates only within the bounds of procedures in which evidence is gathered.

5.2. - In the light of the above, this court has reiterated that equality before the court in criminal trials does not entail the necessary equalisation of rights and powers, also as far as the legislation governing appeals is concerned.

On this question – assuming that the guarantee of two levels of jurisdiction is not constitutionally recognised *per se* (*inter alia*, judgment No. 280 of 1995; order No. 316 of 2002) – this court has in particular found that the public prosecutor's power to appeal the trial court's judgment on the merits is, due to the opposing interests in play, more "pliable" than the corresponding power of the accused. The public party's power to appeal is in fact covered by the Constitution only within the limits of the operation of the principle of equality between the parties – which is "flexible" for the reasons highlighted above – since it cannot be understood as being necessarily implied by the principle of the mandatory nature of criminal actions pursuant to Article 112 of the Constitution (judgment No. 280 of 1995; order No. 165 of 2003, No. 347 of 2002, No. 421 of 2001 and No. 426 of 1998); on the other hand the accused's right to appeal is also a corollary of the fundamental value of the right to a defence (Article 24 of the

Constitution), which heightens its resilience when subject to opposing pressures (judgment No. 98 of 1994).

This does not however mean that any eventual limitations of the prosecution's power to appeal, compared to the corresponding rights of the accused, must in any case amount – for the purposes of respect for the principle of equality – to legislative solutions based on a rational justification, subject to the limits of adequacy and proportionality pointed out above: here too, it cannot be concluded – other than at the cost of depriving the assertion of this principle of any value with reference to criminal trials – that the greater "flexibility" highlighted of the legislation governing the public prosecutor's power of appeal can legitimate any imbalance between the positions, thereby *de facto* removing legislative solutions in this area from constitutional scrutiny practically by definition.

5.3. - In a similar vein, this court has thus repeatedly held – both before and after the amendment to Article 111 of the Constitution – that provisions which prevent the public prosecutor from appealing against convictions handed down following summary proceedings, including even interlocutory appeals, are compatible with the principle of equality before the court, except where the judgments in question modified the offences with which the accused is charged offence (Articles 443(3), and 595 of the Code of Criminal Procedure).

It has in fact been noted that the removal of the prosecution's power to appeal on the merits decisions which "in any case confirmed the punishment requested in the trial according to the charges brought" – since the difference between the prosecution's request and the non-appealable judgment is not "qualitative" but merely "quantitative" – could be rationally justified in the light of the "primary objective of a rapid and complete conclusion of trials celebrated at first instance according to the alternative procedure in question" (judgment No. 363 of 1991; orders No. 305 of 1992 and No. 373 of 1991): such proceedings – albeit, following the amendments introduced by law No. 479 of 16 December 1999, at the exclusive choice of the accused – "imply a decision based primarily on the evidence gathered by the party which suffers from the contested limitation, which does not uphold the guarantees of *audi alteram partem*" (orders No. 46 of 2004, No. 165 of 2003, No. 347 of 2002 and No. 421 of 2001).

These characteristics of summary proceedings – which give particular prominence to the asymmetry operating in the opposite direction, i.e. in favour of the public prosecutor

during the preliminary inquiry stage, the results of which may be directly used by the court when reaching its decision (on this point, see judgment No. 98 of 1994) – therefore had the effect of rendering the legislative choice in question "incontestable on the grounds of rationality insofar as proportional to the predominant goal of a prompt conclusion of the trial" (judgment No. 363 of 1991). By contrast – for the reasons mentioned above – the corresponding right of the accused to appeal could not have been sacrificed for this goal (judgment No. 98 of 1994).

6. - The situation is clearly different in the case concerning the question of constitutionality before the court today.

6.1. - Behind the formal equal treatment of the parties – "the public prosecutor and the accused may appeal against convictions" (*ergo*, not against acquittals) – the contested provision contains a radical imbalance. Indeed, in contrast to the accused, the public prosecutor is denied the power to appeal on the merits against judgments where he is entirely unsuccessful, in which the confirmation of the punishment requested in the trial according to the charges brought is denied *per integrum* in relation to all classes of offence.

Furthermore, it cannot be countered that the inability to appeal – confirmed for both parties – against acquittals amounts to a sacrifice also of the interests of the accused, especially where the acquittal is based on a finding of liability or implies unfavourable effects. This consequence of the reform – in relation to which additional and different problems of constitutionality have been proposed, which the Court is not called upon to address in this proceedings – does not in any case have any impact on the finding of inequality whereby only one of the parties, and not the other, is allowed to request the revision on the merits of a judgment which is completely unfavourable to it.

It is also clear that this inequality is not mitigated, other than in an entirely marginal manner, by the derogation contained in Article 593(2) of the Code of Criminal Procedure, according to which appeals against acquittals are permitted where decisive new evidence comes to light or is uncovered after the trial court's judgment: this provision was not contained in the text originally approved by Parliament, but was introduced in the light of the comments of the President of the Republic in his message transmitted to the Houses on 20 January 2006 under the terms of Article 74(2) of the Constitution, in which he stated, amongst other things, that "the elimination of appeals

against acquittals" would bring about – given the "non-systematic nature of the reform" – a condition of inequality "between the parties to the trial [...] in excess of the level compatible with the differences between the roles of the parties". It is in fact patently clear that the situations under consideration – the coming to light or discovery of decisive new evidence before the short deadline for lodging an appeal (Article 585 of the Code of Criminal Procedure) – have such exceptional characteristics as to be relegated *a priori* to the margins of practical application (in addition, obviously, to not covering any error in the assessments on the merits).

Again, it is equally clear that the removal of the public prosecutor's power of appeal cannot – out of respect for the principle of equality before the court – be regarded as being compensated by the broadening of the grounds for appeal to the Court of Cassation, introduced in parallel also by law No. 46 of 2006 (Article 606(1)(d) and (e) of the Code of Criminal Procedure, as amended by Article 8 of the law): this is not only because this extension operates in favour of both parties, and not only the public prosecutor, but also, and above all, because – irrespective of the effective scope of the new and broader grounds of appeal – the remedy in any case does not allow for a full review of the merits of the case, which on the other hand is possible in appeals.

6.2. - The removal of the public prosecutor's power to appeal is also general and "unilateral".

It is general because it does not refer to certain categories of offences, but extends without distinction to all trials: in this way, whilst the reform leaves intact the accused's right to appeal against convictions, even where the offences in question are trivial – although this rule even previously did not apply to sentences ordering the payment of fines (Article 593(3) of the Code of Criminal Procedure; see also, for offences falling under the jurisdiction of the Justice of the Peace, Article 37 of legislative decree No. 274 of 28 August 2000) – on the other hand it removes the prosecution's right to do so even where the offences in question attract more serious punishments and cause greater social alarm, both of which involve constitutional values the highest significance.

It is "unilateral" because it is not offset by any specific "*quid pro quo*" in particular trial procedures – in contrast to the situation already mentioned by this court concerning summary proceedings, which is characterised by a corresponding renunciation by the accused of the exercise of his own rights, with a view to curtailing the length of

proceedings – and applies to ordinary proceedings in which the court's findings are made in the context of a confrontation between the parties, according to the general procedures stipulated in the Code of Procedure.

7. - For the reasons discussed above, the alteration to the equal treatment of the parties brought about by the provision in question cannot be justified, with reference to the requirements of adequacy or proportionality, on the basis of various rationales which according to the parliamentary *travaux preparatoires* lie at the root of the reform.

7.1. - It has been argued in support of the contested legislation above all that an acquittal by the trial court – reinforcing the presumption of innocence – would prevent the accused, having already been declared not guilty by a court of law, from being found guilty by another court of the offence with which he was charged "beyond any reasonable doubt", in accordance with the requirements necessary for a conviction pursuant to Article 533(1) of the Code of Criminal Procedure, as amended by Article 5 of law No. 46 of 2006. In such situations, the repetition of attempts by the state to convict an individual already acquitted would thus take on an "oppressive" aspect at odds with the "principles of a democratic state" (on this question, see in particular the presentation of the draft bill A.C. 4604 by its promoters from the Justice Committee of the Chamber of Deputies).

It is moreover sufficient to note that the confirmation of the guilt of the accused "beyond any reasonable doubt" is the result of an assessment: and the provision of a second degree of jurisdiction over the merits is justified precisely by the opportunity it offers for a full control of the correctness of the assessments of the trial court, and it would therefore be meaningless to assume that these were exact, as this would be tantamount to negating the very rationale underlying appeals. Indeed, whilst the twofold degree [of merits proceedings] aims to reinforce a judgment of "certainty", it cannot overlook the different conclusions which may be reached by the trial court: i.e. a conviction, but clearly also its antithesis – an acquittal.

Against this background, any initiatives of the public prosecutor which intend to verify possible (and where applicable even evident) errors committed by the trial court in finding that the accused was not responsible for the offence cannot be classified *per se* as "oppressive"; its institutional purpose is in fact that of guaranteeing the correct application of the criminal law in the specific case and – by extension – the effective

implementation of the principles of legality and equality, and is aimed at protecting the variety of interests, which may also touch upon fundamental rights, which the contested provisions are intended to uphold.

7.2. - It is argued on the other hand that Parliament's choice was based on the need to bring the Italian legal system into line with the provisions of Article 2 of Additional Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984, ratified and implemented by law No. 98 of 9 April 1990, as well as with Article 14(5) of the International Covenant on Civil and Political Rights, signed in New York on 16 December 1966, ratified and implemented by law No. 881 of 25 October 1977. These provisions of international treaty law stipulate that any person convicted of a criminal offence has the right to a review of his conviction or sentence before a higher court or a court of second instance: this principle – it is argued – would be undermined where the accused could be found guilty before a higher court following an appeal by the public prosecutor against an acquittal handed down by the trial court (see further the report of the promoter on the draft bill A.C. 4604).

This court has however previously found with reference to both provisions that the review by a higher court, provided for therein in favour of the accused, need not necessarily take the form of a merits judgment rather than an appeal to the Court of Cassation; this is because the goal pursued is that of “ensuring in any case a forum before which any procedural or substantive errors committed by the trial court may be presented, with the result that a review on the merits will take place only where such errors have been confirmed” (judgment No. 288 of 1997; see also judgment No. 62 of 1981). On the other hand, the fact that – when amending Article 111 of the Constitution, in order to render it compatible with the principles of a “fair trial” in 1999 – Parliament did not address the issue of appeals and continued to regard appeals to the Court of Cassation on the grounds that the law has been broken as the only appeal constitutionally required as a remedy, is not without significance.

However, the argument that, in the light of the provisions of Article 2 of the Seventh Additional Protocol to the European Convention (on which above all the parliamentary *travaux perparatoires* lay particular emphasis, and which are more recent and systematic than those of the International Covenant), the right of any person found

guilty of an offence to a review of the "conviction or sentence" by a higher court may be subject to exceptions, not only "in regard to offences of a minor character" and "or in cases in which the person concerned was tried in the first instance by the highest tribunal", but also where he "was convicted following an appeal against acquittal" (Article 2(2)) is decisive. This last exception clearly presupposes that national law must provide for the possibility of appeals *contra reum*, and therefore in favour of the prosecution; it therefore implies the recognition that such powers – even where they pertain to appeals on the merits – are compatible with the system of protection set out in the Convention and the Seventh Protocol, as moreover is confirmed by the legislation in force in the majority of continental European countries.

7.3. - Finally, an emphasis is lain on the "indirect" relationship between the appeal court and the evidence (see again the report of the promoters of the draft bill A.C. 4604 cited above): this means that in the case before the court, a framework within which an acquittal by one court (i.e. the trial court), which presided over the hearing of evidence in the presence of the parties, may be overturned by another court (i.e. the appeal court) which by contrast basis its decision primarily on written evidence, has the effect of reducing guarantees relating to the oral and direct nature of evidence, which underpin criminal trials within accusatory systems.

For the purposes of the resolution of the interlocutory constitutional review before the court today, it is not however necessary to examine the correctness of this assertion, which points to tensions within the procedural order currently in force concerning the maintenance of traditional appeals within the ambit of trials with an essentially accusatory character. Indeed, notwithstanding the fact that the contradiction averred within the system – assuming that it effectively exists – remains also in relation to convictions, against which the public prosecutor retains his power of appeal, given the appeal court's ability to amend the decision to the detriment of the accused as a result of different findings on the facts (which could for example result in a change in the offence charged or the recognition of an aggravating circumstance), the argument that the remedy for any lack of guarantees for one of the parties to the trial is to be found – as a preliminary matter – in solutions which remove that absence, rather than the elimination for the other party of those powers which create such a fundamental imbalance between their respective positions, is conclusive.

Furthermore, were it to be objected that the possible alternative solutions to the problem described above, or at least those developed within the context of the current appeals regime, would have a detrimental effect on the time-scale for the conclusion of proceedings, it should be replied that not even principle of the reasonable length of trials – a principle that, in line with the settled case law of this court, is to be assessed in line with the body of other constitutional guarantees (*inter alia*, judgment No. 219 of 2004; orders No. 420 and No. 418 of 2004, No. 251 of 2003, No. 458 and No. 519 of 2002) – may be furthered, as in the case before the court, through the total removal of the relevant procedural powers for only one of the parties. This is without prejudice to the possibility – suggested from various quarters and which is a matter for assessment by Parliament – of a wholesale revision of the legislation governing appeals, with a view to eliminating the tensions which, as mentioned above, underlie this problem.

8. - Furthermore, the sectoral nature of the contested amendment has moreover modified the relationship of equality between the parties to the trial in a manner that also introduces an element of fundamental incoherence into the system.

As a result of the reform in fact, whilst a public prosecutor who is totally unsuccessful at first instance is deprived of the power to lodge an appeal, the prosecution however retains the same power in the event that it is only partially unsuccessful, whether in a "qualitative" sense (conviction for an offence different from than charged or a rejection of aggravating circumstances), or merely in a "quantitative" sense (the passing of a sentence considered to be inadequate).

9. - In the light of the above arguments it must therefore be reiterated that, within the overall framework of the values expressed in the Constitution, the principle of equality before the court does not necessarily entail an equal distribution of powers and rights between the participants in the trial. In particular, as far as the law governing appeals is concerned – without prejudice to Parliament's right, mentioned above, to carry out a general revision of the role and structure of the institution of the appeal – any difference in the structure and availability of the appeal for the accused and for the public prosecutor does not in any case violate the principle of equality, provided that it occurs in accordance with the requirements of rationality, along with its corollaries of adequacy and proportionality, noted at various points in the above.

In the case before the court on the other hand, the limitation effected by the contested legislation on the powers of the public authorities compared to the corresponding rights of the accused overstep the limit which may be tolerated under the Constitution, since it is not founded on an adequate rationale which justifies the radical, general and "unilateral" nature of the said limitation: in addition, for the reasons set out above, it is inherently contradictory due to the maintenance of the public prosecutor's power of appeal against convictions.

The remaining complaints of the referring courts are in consequence moot.

10. - Article 1 of law No. 46 of 2006 must therefore be declared unconstitutional insofar as, replacing Article 593 of the Code of Criminal Procedure, it prevents the public prosecutor from appealing against acquittals, other than in the cases provided for under Article 603(2) of the Code and where the new evidence is decisive.

Similarly, Article 10(2) of law No. 46 of 2006 must also be declared unconstitutional insofar as it provides that any appeal lodged against an acquittal by the public prosecutor prior to the entry into force of the same law must be declared inadmissible.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) *declares* that Article 1 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, replacing Article 593 of the Code of Criminal Procedure, it prevents the public prosecutor from appealing against acquittals, unless Article 603(2) of the Code applies and the new evidence is decisive;

2) *declares* that Article 10(2) of law No. 46 of 20 February 2006 is unconstitutional, insofar as it provides that any appeal lodged against an acquittal by the public prosecutor prior to the entry into force of the said law must be declared inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 24 January 2007.

Signed:

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Registry on 6 February 2007.

The Director of the Registry

Signed: DI PAOLA