JUDGMENT NO. 213 YEAR 2013

In this case the Court considered a referral order questioning the rule requiring pre-trial remand in custody for persons suspected of the offence of kidnapping for the purposes of extortion. Rather than requiring that the least severe measure possible to adopted, the law by contrast imposed a (rebuttable) presumption in favour of remand in custody. The Court struck down the legislation as unconstitutional, holding that the broad range of manifestations which the offence could take were very different and that "in a not insignificant number of cases, pre-trial requirements may be satisfied by different and less severe measures than remand in custody".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 275(3) of the Code of Criminal Procedure, as amended by Article 2(1) of Decree-Law no. 11 of 23 February 2009 (Urgent measures concerning public safety and to combat sexual violence, and on stalking), converted with amendments by Law no. 38 of 23 April 2009, initiated by the preliminary hearing judge of the *Tribunale di Bologna* in the criminal proceedings pending against C.A. by referral order of 21 June 2012, registered as no. 253 in the Register of Orders 2012 and published in the Official Journal of the Republic no. 45, first special series 2012.

Having heard the Judge Rapporteur Giuseppe Frigo in chambers on 19 June 2013.

[omitted]

Conclusions on points of law

1.– The preliminary hearing judge at the *Tribunale di Bologna* questions the constitutionality of Article 275(3) of the Code of Criminal Procedure, as amended by Article 2 of Decree-Law no. 11 of 23 February 2009 (Urgent measures concerning public safety and to combat sexual violence, and on stalking), converted with amendments by Law no. 38 of 23 April 2009, insofar as it does not enable less severe

pre-trial measures other than remand in custody to be applied in relation to a person for whom there are serious indications of guilt for the offence of kidnapping for the purposes of extortion (Article 630 of the Criminal Code).

The lower court considers that the arguments that led this Court to rule the contested provision unconstitutional in relation to numerous other criminal offences may be extended to proceedings relating to the said offence. In the same way as these offences, the offence provided for under Article 630 of the Criminal Code cannot be treated in the same way as mafia offences, for which the Court upheld as justified the absolute presumption that only pre-trial remand in custody, as provided for under the provision subject to review, was adequate. In the light of the current position under case law in fact, the harm caused by specific instances of the offence of kidnapping for the purposes of extortion may differ significantly both as regards the manner of its commission as well as the violation of protected interests, which may also result in pre-trial requirements that are capable of being satisfied by measures other than remand in custody.

Consequently, the contested presumption is claimed to contrast – in accordance with the previous judgments of this Court – with the principles of equality and reasonableness (Article 3 of the Constitution) and the inviolability of criminal responsibility (Article 3(1) of the Constitution), as well as the presumption of innocence (Article 27(2) of the Constitution).

2.– The question is well founded.

As the lower court recalls, the contested provision has already been ruled unconstitutional several times by this Court insofar as it provides for an absolute presumption – rather than a merely relative presumption – that only pre-trial remand in custody is adequate for meeting the requirements of pre-trial measures in relation to a person for whom there are serious indications of guilt for a range of offences. This has occurred in particular for sexual offences pursuant to Articles 600-bis(1), 609-bis and 609-quater of the Criminal Code (judgment no. 265 of 2010), murder (judgment no. 164 of 2011), the conspiracy offences provided for under Article 74 of Presidential Decree no. 309 of 9 October 1990 laying down the "Consolidated text of laws governing narcotics and psychotropic substances, care and rehabilitation of the relative states of drug addiction" (judgment no. 231 of 2011) and conspiracy to commit the offences

provided for under Articles 473 and 474 of the Criminal Code (see judgment no. 110 of 2012).

The Court also made a similar ruling of unconstitutionality after the referral order was submitted in relation to proceedings for offences committed in the conditions provided for under Article 416-bis of the Criminal Code, or in order to facilitate the activities of the associations provided for under that Article (judgment no. 57 of 2013).

It also ruled unconstitutional on the same grounds the homologous absolute presumption laid down by Article 12(4-bis) of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners) in relation to persons for whom there are serious indications of guilt for any of the offences of aiding and abetting illegal immigration provided for under Article 12(3) (judgment no. 331 of 2011).

3.– In the decisions cited above, this Court held that, in the light of the relevant constitutional principles – specifically the principle of the inviolability of personal freedom (Article 13(1) of the Constitution) and the presumption of innocence (Article 27(2) of the Constitution) – the legislation governing pre-trial measures must be based on the criterion of the "minimum sacrifice necessary". In other words, the restriction of personal freedom must remain within those minimum limits that are indispensable in order to satisfy the pre-trial requirements in the specific case. This means that Parliament is required on the one hand to structure the system of pre-trial measures according to the "sliding scale" model and thus to make available a range of alternative measures, each of which has a different impact on personal freedom; on the other hand, it must stipulate the criteria governing the "individualisation" of pre-trial measures, which are tailored to the requirements applicable in the specific facts of each individual case. These principles are adhered to by the general rules laid down by the Code of Criminal Procedure, which is based on the typification of a "spread" of measures of gradually increasing severity (Articles 281-285) and the related assertion of the principle of "adequacy" (Article 274(1)), in the light of which the courts are required to choose the least severe measure out of those theoretically capable of satisfying the pre-trial requirements applicable in the specific case, and consequently only to apply the "most severe" measure (remand in custody) when all other measures would be inadequate (Article 275(3), first sentence).

4.– In departing decisively from this regime, Article 275(3) of the Code of Criminal Procedure, as amended, conversely deprives the courts of any power to choose, obliging them to order the most severe measure without any possible alternative if there are serious indications of guilt for certain specific offences. This legislative solution is based on a legal assessment that only remand in custody is sufficient to deal with pre-trial requirements (which are in turn rebuttably presumed).

In this respect, this Court has moreover repeatedly asserted that "absolute presumptions, especially when the limit a fundamental human right, will violate the principle of equality if they are arbitrary and irrational, that is if they do not comply with generalised facts of experience, which may be summed up in the maxim *id quod plerumque accidit*. In particular, an absolute presumption will be deemed to be unreasonable whenever it is 'easy' to formulate real factual hypotheses which run contrary to the generalisation underlying the presumption" (see judgments no. 331, no. 231 and no. 164 of 2011, no. 265 and no. 139 of 2010).

The scenario referred to above specifically obtained in relation to the absolute presumption at issue, insofar as it related to the offences listed above. In fact, the rationale justifying the exceptional regime, which the Court had previously found to subsist with regard to mafia offences (the only offences covered by Article 275(3) of the Code of Criminal Procedure prior to the 2009 amendment) (order no. 450 of 1995) could not extend to the offences listed. According to this rationale, owing to the very structure of the offence and its criminal characteristics – due to the fact that membership of a mafia organisation implies permanent membership of a criminal brotherhood, which is normally strongly rooted in the local territory, is characterised by a dense network of personal relations and is endowed with particular intimidating force – generally speaking and according to a generally shared rule of experience, pre-trial requirements can only be adequately satisfied through remand in custody (as the "less severe" measures are not sufficient to sever relations between the suspect and the criminal milieu of origin, thereby neutralising the individual's dangerousness).

No such characteristics could be discerned in relation to the criminal offences listed above. Notwithstanding their undoubted gravity and despicable nature – to which due account will be given when determining the penalty to be imposed on the perpetrator, once his or her guilt has been definitely established – those offences however cover

markedly heterogeneous situations, which are liable above all to result in pre-trial requirements that may be adequately addressed by less severe pre-trial measures other than remand in custody in a not insignificant number of cases.

This Court thus held that Article 275(3) of the Criminal Code violated in this regard both Article 3 of the Constitution (in that it unjustifiably treated in proceedings relating to the offences concerned the same manner as those relating to mafia offences, and also irrationally subjected the range of factual manifestations of the relative criminal offences to the same pre-trial regime), Article 13(1) of the Constitution (as a fundamental point of reference for the ordinary regime of pre-trial detention) and finally Article 27(2) of the Constitution (in that it attributed pre-trial coercive measures with functional features typical of a sentence).

5.– The same conclusions must be reached in relation to the offence of kidnapping for the purposes of extortion, to which the special pre-trial regime is extended by the second sentence of Article 275(3) of the Code of Criminal Procedure by an "indirect" reference to the procedural rule laid down by Article 51(3-bis) of the Code of Criminal Procedure.

This Court has held in relation to another issue that the current punitive arrangements for the offence in question – which are characterised by a punitive statutory response of exceptional harshness (imprisonment of between twenty five and thirty years, as a standard sentence) – result from a series of legislative initiatives dating back to the years 1974-1980, which have the typical features of "emergency" legislation. These initiatives represent the legislative response to the significant social alarm generated "by the extraordinary, disturbing increase during that period of kidnapping for the purposes of extortion perpetrated by dangerous criminal gangs using brutal methods (almost total deprivation of the victim's freedom of movement, kidnappings protracted over very long periods of time, the dispatch of body parts of the kidnapped person to family members as a form of pressure) and extremely high ransom demands". However, in the experience of the courts, the description of the offence under Article 630 of the Criminal Code – which has remained unchanged from the outset ("any person who kidnaps a person for the purpose of achieving an unjust profit for himself or for another as the price of release") – lends itself "to the classification under criminal law also of episodes that are considerably different in criminological

terms and in terms of their harm from those targeted by the emergency legislation": "notwithstanding the marked decline in kidnapping for the purposes of extortion perpetrated 'professionally' by organised criminals recorded from the second half of the 1980 […] – [such episodes] have *de facto* ended up taking on a significant, if not predominant, impact on the more recent case law on kidnapping for the purposes of extortion" (judgment no. 68 of 2012).

The scope of this offence includes, *inter alia*, situations – such as that at issue in the proceedings before the lower court – involving a kidnapping with the goal of securing a monetary payment claimed on the basis of a prior unlawful relationship with the victim: according to now settled case law of the Court of Cassation, following clarification by the Joint Divisions (see judgment no. 962 of 17 December 2003-20 January 2004), such a situation is capable of establishing the *actus reus* for the offence in question, as the prerequisite for the "unjust" nature of the profit achieved by the perpetrator is met, since the claim that he seeks to satisfy is devoid of legal protection, as the entitled party under a transaction with an unlawful cause.

In such an eventuality, and in similar situations, "the criminal act however may – and not infrequently does – have characteristics that are quite different from those of the criminal activity which Parliament sought to combat between 1974 and 1980: this is due to the more or less "occasional nature" of the crime (which often does not involve a significant organisation of people and instruments), the extent of the harm caused to the victim with regard to the duration, location and manner of deprivation of personal freedom as well finally as the amount of the payment demanded as the price of release" (judgment no. 68 of 2012).

Precisely on the basis of these findings, the Court thus declared Article 630 of the Criminal Code unconstitutional insofar as – contrary to the provisions laid down by Article 311 of the Criminal Code in relation to the structurally homologous offence of kidnapping for the purposes of terrorism or subversion – no provision was made for a reduction in sentence "when, owing to the nature, type, means, manner or circumstances of the act, or the particularly minor scale of the harm or danger, the offence is minor in scope" (see judgment no. 68 of 2012).

6.– The considerations referred to above, which were adopted during the review of the penalties imposed for the offence, also have the result that the absolute presumption

that only remand in custody is adequate, as required in relation to the offence falling under the contested provision, cannot be deemed to be sustained by an appropriate "statistical basis". Despite the particular seriousness which the offence takes on under the legislation, also in the case under examination, the said presumption may not in fact be deemed to be compatible with general experience associated with the "inherent structure" and "criminal characteristics" of the offence.

The typical legal paradigm in the present case lacks a necessary link between the agent and an established criminal organisation. In the light of the description of the criminal offence, it cannot be excluded that it may be the result of a merely individual initiative. However when – as occurs in most cases – the kidnapping may be attributed to a range of persons, it may nevertheless remain purely episodic and occasional in nature, being based on a merely rudimentary organisation of means and cause limited harm to protected interests (personal freedom and property). According to the referral order, it would moreover appear that such circumstances obtained in the case at issue in the proceedings before the lower court.

Essentially therefore, the criminal offence to which the presumption applies may be characterised by the most disparate features: from an offence committed "professionally" with brutal methods by rigidly structured criminal organisations endowed with considerable reserves of means and manpower to an offence committed once only by individuals or groups of individuals as a reaction to actions by another person which are deemed to be wrong (in the case at issue, a fraud suffered "*in re illicita*") and with the sole purpose of annulling its pecuniary consequences (in the present case, recovering the modest amount paid by the kidnappers to the fraudster). It must thus be conclusively inferred that, in a not insignificant number of cases, pre-trial requirements may be satisfied by less severe measures other than remand in custody.

7.– As this Court has previously clarified, it is not the presumption in itself that harms constitutional values, but its absolute status, which implies a complete and indiscriminate negation of the significance of the principle of the "minimum sacrifice necessary". Conversely, the provision for a merely relative presumption of the adequacy of remand in custody – with the aim of simplifying the taking of evidence on the basis of recurrent aspects of the criminal conduct considered, but which may nonetheless be rebutted by indications to the contrary – does not breach the limits of constitutionality,

and hence the position under the legislation that pre-trial requirements should ordinarily apply on their most intense level is not objectionable in this respect (see judgments no. 57 of 2013, no. 110 of 2012, no. 331, no. 231 and no. 164 of 2011 and no. 265 of 2010).

Article 275(3), second sentence, of the Code of Criminal Procedure must therefore be declared unconstitutional insofar as – in providing that pre-trial remand in custody shall be imposed where there are serious indications of guilt for the offence provided for under Article 630 of the Criminal Code, unless there are grounds indicating that there are no pre-trial requirements – it does not allow for exemptions in the event that specific information has been obtained in relation to the specific case, which indicates that pre-trial requirements may be satisfied by other measures.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 275(3) of the Code of Criminal Procedure, as amended by Article 2 of Decree-Law no. 11 of 23 February 2009 (Urgent measures concerning public safety and to combat sexual violence, and on stalking), converted with amendments by Law no. 38 of 23 April 2009 is unconstitutional insofar as – in providing that pre-trial remand in custody shall be imposed where there are serious indications of guilt for the offence provided for under Article 630 of the Criminal Code, unless there are grounds indicating that there are no pre-trial requirements – it does not allow for exemptions in the event that specific information has been obtained in relation to the specific case, which indicates that pre-trial requirements may be satisfied by other measures.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 July 2013.