

Only the French version is authentic

RIGHTS OF THE DEFENCE

Dismissal

Summary

The right to make statements, to answer questions or to remain silent must be brought to the attention of the person appearing before the investigating chamber seized in a dispute relating to a preventive measure. Notwithstanding this, failure to notify this right has no bearing on the legality of the decision taken with regard to the preventive measure; the only consequence is that a court deciding to refer the matter to a trial judge or deciding upon the guilt of the prosecuted person may not take into account statements relating to the fact that have been so gathered.

Appellant: Mr A.. X...

Facts and procedure

1. It follows from the ruling under appeal and the documents relevant to the proceedings that:
2. Pursuant to the complaint lodged by Mrs B.. Y..., Mr X... was charged with the above-mentioned offences [*armed robbery, arrest, abduction, detention or sequestration, in an organised gang and criminal conspiracy*] on 22 July 2018 and placed in pre-trial detention on the same day.
3. Mr X.... filed a request for release which was rejected by an order of the liberty and custody judge dated 13 October 2020.
4. Mr X. appealed this decision.

Reviewing pleas

On the second plea

5. It is not of a nature to admit the appeal within the scope of Article 567-1-1 of the Code of Criminal Procedure.

On the first plea

Statement of plea

6. The plea objects to the ruling under appeal rejecting Mr X's request for release, whereas:

"1°/ the declaration of unconstitutionality of the provisions of Article 199 of the Code of Criminal Procedure which will be pronounced as a result of the incidental Priority Constitutional Question will deprive the ruling under appeal of any legal basis since the investigating chamber did not inform Mr X... of his right to remain silent during the court debates;

2°/ the person who appears before the investigating chamber, in matters of pre-trial detention, must be informed of his or her right, during the debates, to make statements, to answer questions put to him or her or to remain silent; that failure to comply with the obligation to inform the interested party of their right to remain silent is obviously detrimental to them; that in ruling on the request for release of Mr X., without notifying him of his right to remain silent, the investigating chamber ignored Article 199 of the Code of Criminal Procedure and Article 6 of the European Convention on Human Rights. "

Court's response

The first part of the plea

7. By ruling of 16 February 2021, the Cour de cassation (*Court of Cassation*) decided not to refer the Priority Constitutional Question raised by Mr X... to the Conseil constitutionnel (*Constitutional Council*), a Priority Constitutional Question having already been referred to the latter by the Cour de cassation (*Court of Cassation*) by decision of 9 February 2021 (no. 20-86.533) and questioning the constitutionality of this article on the same grounds.

8. Article 23-5, paragraph 4 of Ordinance no. 58-1067 of 7 November 1958 relating to the Organic Law on the Constitutional Council provides that when a case has been referred to the Conseil constitutionnel (*Constitutional Council*), the Conseil d'Etat (*Council of State*) or the Cour de cassation (*Court of Cassation*) shall stay proceedings until ruling has been given. This is not so in the event the person concerned is deprived of liberty as a result of the proceedings where the law provides for the Cour de cassation (*Court of Cassation*) to rule within a specific time limit. That is the situation in this case.

9. It is recalled that in its decision no. 2009-595 DC of 3 December 2009, the Conseil constitutionnel (*Constitutional Council*) ruled that while paragraph 4 of the above-mentioned article may lead to a final decision being handed down in proceedings in which a Priority Constitutional Question has been referred to the Conseil constitutionnel (*Constitutional Council*) and without waiting for it to rule, neither this provision nor the authority of res judicata can in such circumstances deprive the litigant of the right to bring a new case to allow the decision of the Conseil constitutionnel (*Constitutional Council*) to be taken into account.

10. The same must apply in the event the Cour de cassation (*Court of Cassation*) has made use of Article R.49-33 of the Code of Criminal Procedure.

The second part of the plea

11. It may be inferred from Article 6 of the European Convention on Human Rights and the Preliminary Article of the Code of Criminal Procedure that a court in deciding to refer the matter to a trial judge or deciding upon the guilt of the prosecuted person may not take into account, against the person prosecuted, statements about the facts made by that person before that court or before a different court without the

person concerned having been informed, by the court that gathered the statements, of his or her right to remain silent, where such information was required.

12. Until now the Cour de cassation (*Court of Cassation*) has held that this information did not have to be given at a hearing relating to the pre-trial detention of the accused since the purpose of such a hearing is not to assess the evidence against the accused, but rather to examine the need to place or maintain the accused in detention (Crim. 7 August 2019, Appeal No. 19-83.508).

13. However, the Cour de cassation (*Court of Cassation*) now considers that it can be inferred from Article 5 1. c of the European Convention on Human Rights that the investigating chamber must ensure at each stage of the procedure, and even of its own accord, that the legal conditions for preventive measures are met, by expressly noting the existence of serious or corroborating evidence making it likely that the person charged participated as a perpetrator or accomplice in the commission of the offences that have been referred to the examining judge (Crim. 27 January 2021, Appeal No. 20-85.990, in the process of publication).

14. This means that this evidence features in the debates before the investigating chamber dealing with the dispute regarding preventive measures.

15. As such, the person concerned may be required to make statements which, if included in the case file, are likely to be taken into consideration by the courts deciding on the referral of the case to the trial court or on guilt.

16. It follows from the above that the right to make statements, to answer questions or to remain silent must be brought to the attention of the person appearing before the investigating chamber hearing the case concerning a preventive measure.

17. However, the modification of the case law referred to in paragraphs 12 to 14 does not imply that the investigating chamber is called upon to rule on the merits of the charges against the person, which is a distinct matter to that of preventive measures.

18. Accordingly, the lack of information about the right to remain silent has no bearing on the legality of the decision relating to the preventive measure.

19. However, in the absence of such information, the statements of the person concerned may not, in accordance with the principle laid down in paragraph 11, be used against him or her by the courts called upon to pronounce a committal for trial or a finding of guilt.

20. In this case, it is clear from the ruling under appeal that the investigating chamber heard the accused, who had requested to appear before it, without informing him of his right to make statements, to answer questions or to remain silent.

21. No consequence may nevertheless be drawn from this as to the lawfulness of the decision confirming the rejection of the application for release.

22. The second part of the plea, which is irrelevant, must therefore be rejected.

23. In addition, the ruling is in order as regards form.

ON THESE GROUNDS, the Court:

DISMISSES the appeal.

President: Mr Soulard

Reporting Judge: Mr Leblanc, Judge Referee

Advocate-General: Mr Aubert

Lawyer(s): SCP Sevaux et Mathonnet