Rights of defense and late notification of the right to remain silent: accused who did not speak shall justify that the late notification infringed their interest to refer a plea of nullity

28/10/2021

Ruling no 655 of 4 June 2021 (21-81.656) - Cour de cassation (Court of Cassation) - Plenary Session - ECLI:FR:CCASS:2021:CR90655

Dismissal

Only the french version is authentic

Appellant(s): Mr C... Z...

Facts and procedure

1. It follows from the ruling under appeal and the elements of the procedure that:

2. An investigation was opened concerning the circumstances under which the intermediaries, of whom Mr [D] [AB], Mr [F] [J] and Mr [H], known as "Network K", intervened in and were paid for sales activities undertaken with a view to concluding arms contracts between France and the Saudi Arabian authorities on one hand, and Pakistan, on the other.

3. By order dated 12 June 2014, the investigating judges remanded Mr [CD] [P], Mr [F] [J], Mr [D] [AB], Mr [B] [Y], Mr [CF] [AE] and Mr [CE] [Q] to the Criminal Court, charged with misuse of company assets, prejudicial to Société française d'exportation de systèmes d'armement (Sofresa) and Direction des chantiers navals-International (Dcn-I), and aiding and abetting, and concealing these same serious offences. These private companies with public capital had received a delegation from the French State for managing certain aspects of the arms contracts concerned and had moreover designated and remunerated the chosen intermediaries with a view to making sales efforts to foreign States.

4. Prior to this decision, these same judges, by order dated 6 February 2014, declined jurisdiction to recognise the acts likely to be attributed to Mr [A] [X] and Mr [C] [Z], that the latter could have committed in carrying out their ministerial duties.

5. The Investigating Commission of the Court of Justice of the Republic received an application on 26 June 2014. By ruling of 30 September 2019, the commission ordered that Mr [X] be referred to this same Court for aiding and abetting the misuse of company assets of Sofresa and Dcn-I and concealment, and Mr [Z] for aiding and abetting the misuse of company assets, prejudicial to these same legal entities.

6. By ruling of 4 March 2021, the Court of Justice of the Republic acquitted Mr [X] and declared Mr [Z] guilty, and sentenced him to a two-year suspended prison sentence and a fine of 100,000 euros.

Reviewing pleas

On the first plea

Statement of plea

7. The plea objects to the ruling for informing Mr [Z] of his right to remain silent after the requests for additional information and the joining to the merits, whereas "pursuant to Article 406 of the Criminal Procedure Code, the president, after having noted his identity and acknowledging the action that was referred to the tribunal, informs the accused of his rights, during the deliberations, to make declarations, to respond to the questions that are asked of him, or to remain silent. Ignorance of the obligation to inform the accused of his right to remain silent by its nature adversely affects him. Protecting the rights of the defence sought in this ruling is only ensured if the accused is informed of this right at the start of the hearing prior to any deliberations, including on requests for additional information made in limine litis. It follows in the case of the statements in the ruling under appeal that Mr [Z], who appeared at the Court of Justice hearing on 19 January 2021, was only informed of the right to make declarations, to respond to the questions that are asked of him, or to remain silent after Mr [X]'s lawyers supported a request for additional information in limine litis, that the public prosecution presented its requisitions on this request and that the Court joined this incident to the merits after having withdrawn for deliberation. In so ruling, while the deliberations had begun as soon as this request was considered, the cour d'appel (Court of Appeal) infringed the sense and the scope of the above-mentioned ruling."

Court's response

8. According to Article 406 of the Criminal Procedure Code, the president or one of the assessors designated by the president, after having noted his identity and acknowledging the action that was referred to the tribunal, shall inform the accused of their rights, during deliberations, to make declarations, to respond to the questions that are asked of them, or to remain silent.

9. These provisions are, according to Article 26 of Institutional Act No 93-1252 of 23 November 1993, applicable before the Court of Justice of the Republic.

10. Under the terms of Article 802 of the Criminal Procedure Code, in cases infringing procedures that are time-barred by law under penalty of nullity or non-compliance with essential procedural requirements, any jurisdiction, including the Cour de cassation (Court of Cassation), that receives a referral for a request for setting aside can only rule on nullity when this request has the effect of infringing on the interests of the party it concerns.

11. Such an infringement is by nature distinguished as regarding the accused, when they were not informed as required by the above-mentioned Article 406 (Crim., 8 July 2015, appeal no 14-85.699, Bull. Crim. 2015, no 178).

12. The situation is treated differently for an accused that receives this information after the opening deliberations concerning a request that is made, at the beginning of the hearing, by another party, and during which the accused has not spoken. In this case, completing this formality later can only result in nullity regarding the accused if they justify that it infringed on their interests.

13. The ruling mentions that the president read out the referral sent to the Court, noted the presence of Mr [X]'s lawyers, asked Mr [Z] if he had appointed a lawyer, and that Mr [Z] responded that he was self-represented.

14. It notes that the president gave the floor to Mr [X]'s lawyers concerning their request for additional information presented in limine litis, that the public prosecution presented its requisitions, that Mr [X]'s lawyers stated that they had no other observation to present and that after a recess in the hearing, the president informed the parties that the incident was joined to the merits of the case.

15. It adds that the president then notified the accused parties of their rights, during the deliberations, to make declarations, to respond to questions asked of them, or to remain silent.

16. Although this notification to Mr [Z] was wrongly made after the deliberations on the request for additional information, the ruling is not open to censure for the following reasons.

17. Firstly, the Court of Justice of the Republic did not receive any request from Mr [Z].

18. Secondly, the party concerned did not speak during the deliberations on additional information, and does not allege that he was not allowed to do so.

19. Lastly, Mr [Z], who was able to make any request for additional information at any time, including during the deliberations on the merits of the case, makes no objection to the conditions under which the request presented by Mr [X] were evoked or to the decision to join it to the merits of the case, and neither does he oppose the motives by which the request was denied.

20. Under these conditions, Mr [Z] does not have grounds to claim that the late notification that he was given, during deliberations, that he had the right to make declarations, to respond to questions asked of him or to remain silent, necessarily causes him harm and does not establish how it would have been prejudicial to his interests.

21. The plea must therefore be dismissed.

On the second plea

Statement of plea

22. The plea objects to the ruling for overriding the hearing of absent witnesses without having asked Mr [Z] for his observations on this point, and without giving a reason for doing so, whereas "any accused person has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The trial as a whole must respect the rights of the defence, the adversarial principle, and the principle of equality of arms. By deciding to overrule the examination of the four absent witnesses after having received the observations of the public prosecution and Mr [X]'s lawyer, without having even requested the observations of Mr [Z] on this point, and without having given the reason for its decision in light of the circumstances of the case, the Court of Justice infringed on the right to a fair trial as is guaranteed by Articles 6, §1 and 6, §3, d, of the European Convention on Human Rights, Articles 591 and 593 of the Criminal Procedure Code, along with the principle of equality of arms and the adversarial principle."

Court's response

23. According to Article 6, §3, d, of the Convention on the Protection of Human Rights and Fundamental Freedoms, everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

24. According to established case law (Crim., 27 June 2001, appeal no 00-87.414, Bull. crim., 2001, no 164; Crim., 4 March 2014, appeal no 13-81.916, Bull. crim., 2014, no 63), the trial courts cannot, without incurring censure, abstain from ordering hearing witnesses requested by the defence without stating the reasons for their decision, if they receive referrals due to conclusions that are duly submitted, demonstrating the usefulness of their testimony.

25. In order to not hear four of the eight witnesses cited by the public prosecution only, the ruling mentions that the president called witnesses, noted that four of them were present and acknowledged the excuses provided by those that were absent, that the public prosecution's representative had, soon after, indicated that he renounced hearing the absent witnesses and that the lawyers for Mr [X] stated that they had no observation to provide.

26. The ruling specifies, after the interrogation of the accused on the merits, that the witnesses present were heard and that the president then had the statements read for three of the four absent witnesses, gathered during the investigation.

27. Given these statements, Mr [Z] cannot claim the alleged insufficient motives by which the Court of Justice of the Republic decided to not hear the absent witnesses, nor that his observations were not requested on this point.

28. On the one hand, these witnesses were cited by the public prosecution, who then renounced hearing them, and Mr [Z] did not himself refer a request for a witness to appear or to be heard to the jurisdiction, whether for the opening of deliberations or during the hearing. On the other hand, he did not demonstrate how the decision to not summon the witnesses cited by the public prosecution would be prejudicial to his interests. Lastly, he does not allege that he was prevented from expressing himself.

29. Consequently, the plea is unfounded.

On the third plea

Statement of plea

30. The plea objects to the ruling for considering that the acts of aiding and abetting the misuse of company assets allegedly committed from 1993 to 1995 are not time-barred, whereas:

"1°/ The statute of limitations for prosecution for a serious offence of the misuse of company assets starts from the date of presentation of the financial statements in which the disputed expenses were charged to the company. It is only in cases of concealment that this starting point may be moved to the day where the acts appeared and were noted under conditions allowing for the prosecution to be carried out. In this case, it follows from the statements of the ruling under appeal that the payment of commissions attached to the disputed contracts by

Sofresa and Dcn-I were indeed recorded in the account statements for 1995 and 1996 under the heading "technical fees" and "advances on commissions". Nevertheless, by moving the starting point of the prosecution, when the amount of disputed commissions paid is recorded in the account statements of the financial years concerned was necessarily lacking in any concealment, regardless of the methods by which they were paid, the Court of Justice did not draw the required legal conclusions that would infer its own statements, in breach of Articles 8 of the Criminal Procedure Code in its applicable formulation at the time of the acts, 9-1, 593 of the Criminal Procedure Code, and L. 242-6 paragraph 1, 3° of the Commercial Code in its then-applicable version;

2°/ In cases of concealment, the starting point of the statute of limitations of a prosecution must be set for the day where the serious offence appeared and was able to be noted under conditions allowing for the prosecution to be carried out. Notwithstanding the very numerous reports in the press that appeared from July 1996 making reference to irregularities concerning arms contracts signed on the one hand with Pakistan, and on the other hand, with Saudi Arabia, and explicitly stating the implementation of a possible system of back-channelling of commissions benefiting Mr [X], in order to set aside any statute of limitations, the Court of Justice affirms that the "starting point for the statute of limitations cannot depend on publication of articles in the press without sufficient detail, often written in the conditional tense, and limited to stating a suspicion or offering a hypothesis". By so determining when Mr [X] produced no less than twelve press articles that were particularly detailed on the supposed financing of his campaign through back-channelling of commissions from arms contracts, published from 1998 to 2001, and invoked, in his conclusions, the two episodes of "Le Vrai Journal", broadcast on Canal+ on 6 and 20 September 1998, covering these same elements, clearly demonstrating the serious offence under conditions allowing the prosecution to be carried out, the Court of Justice did not legally justify its decision, in breach of Articles 8 of the Criminal Procedure Code in its applicable formulation at the time of the acts, 9-1, 593 of the Criminal Procedure Code, and L. 242-6, paragraph 1, 3° of the Commercial Code in its then-applicable version;

3°/ In cases of concealment, the starting point of the statute of limitations for the prosecution must be set on the day when the serious offence appeared and was able to be noted under the conditions allowing for the prosecution to be carried out. Notwithstanding the proven knowledge of the acts cited by these counts by the investigating courts and the public prosecution the so-called "Fondo" affair starting in 1998 and 1999, the Court of Justice limits itself to the peremptory assertion that "the Fondo affair invoked by Mr [X] is totally unrelated to the facts of the case". It follows however from the referral ruling from the investigating commission of the Court of Justice of the Republic (CJR D 4059 p. 224), that the legal investigation opened in 1997 in the Fondo case, concerning a loan agreement of 5 million francs backed by a cash deposit of the same amount having benefited the Parti républicain in June 1996, requested the origin of the funds and possible links between these elements and the arms contracts in these counts, as is specifically pointed out in the above-mentioned ruling of 30 September 2019 by affirming that "this line of reasoning had already appeared in the Fondo case". Moreover, it follows that the elements extracted from the Fondo trial and attached to this procedure, that Mr [CG] [BA], a reporter, had been examined by the investigating courts on 28 October 1998 following the broadcast of his reports of 6 and 20 September 1998 on Canal+ in the "Le Vrai Journal" programme, on the possible source of these 5 million francs in cash, with regard to the two declarations received "by intermediaries having a role to play, concerning the back-channelling of commissions that would have been paid at the time of the arms contract concluded between France and Saudi Arabia under the name of Sawari II" (CJR D506/3). Lastly, it follows from the elements produced by Mr [X] to support his conclusions that in this Fondo case, after having learned of the acts reported by the reporter from Canal+, the Public Prosecutor asked the investigating judges, in an additional indictment dated 6 August 1999, to "continue to investigate the acts for which they received a referral (...) including in order to find the origin of the 5 million francs in cash deposited through the FSCE to American Express Bank in Luxembourg (request for waiver of defence secrecy obligation)", a request that was dismissed by the investigating judges as well as by the Investigating Chamber following the appeal of the public prosecution. Given these objective and corroborative elements that establish that starting in 1998, and up to the latest date of 6 August 1999 in the legal investigation referred to as the Fondo case, the public prosecution was well aware of the possible existence of back-channelling of commissions linked to arms contracts that are listed in the charges, the Court of Justice cannot, without distorting the elements of the case and the elements produced in deliberations, affirm that

the Fondo affair was totally unrelated to the facts of the case. In so ruling, the Court of Justice infringed Articles 8 in its formulation applicable to the facts of the case, 9-1, and 593 of the Criminal Procedure Code, together with Articles L. 242-6, paragraph 1, 3° of the Commercial Code in its then-applicable version, and Article 6, §1 of the European Convention on Human Rights, guaranteeing everyone who is accused the right to a fair trial;

4°/ That by so refusing to take into account the decisive elements of the Fondo case, fundamental to the exercise of the rights of the defence, in that said elements were of a nature that unquestionably established the statute of limitations for the acts that are the subject of these charges, and produced in deliberations for the first time before the Court in that they had been deliberately concealed during the entire investigation procedure to all of the defendants, who were refused, on several occasions, the transmission of the entire Fondo case file, to only have an adversarial access to certain elements of this case, carefully sorted by the investigating judge in an evident attempt to avoid the discovery that the statute of limitations had not been reached for the defendants, the Court of Justice infringed Mr [Z]'s right to a fair trial, which involves complying with the principle of equality of arms and basic rights to have an adversarial trial, together with respecting the rights of the defence, and deprived its decision of any legal basis under the preliminary Article, and Articles 427 and 593 of the Criminal Procedure Code, and Articles 6, §1 and 6, §3 of the European Convention on Human Rights."

Court's response

31. According to established case law (Crim., 3 May 1990, appeal no 89-81.370, Bull. crim. 1990, no 168; Crim., 25 June 2013, appeal no 11-88.037, Bull. crim. 2013, no 153), on the one hand, the exception to the statute of limitations has a public order dimension and can, for this reason, be made at any time. On the other hand, when it is raised for the first time before the Cour de cassation (Court of Cassation), it is only admissible on the condition that the Court finds in the findings of the trial courts, that if applicable it is up to the requesting person to take the initiative, the elements necessary to determine their value, without which the plea made for the statute of limitations of the prosecution is new and a mixed question of law and of fact, and as such inadmissible.

32. It does not follow from any statement in the ruling, nor from any finding before the Court of Justice of the Republic, that Mr [Z] has evoked the statute of limitations for prosecution.

33. The ruling does not contain the necessary elements to assess the value of the objections in the third part of the plea, taken from the additional indictment of 6 August 1999, which were not subject to the evaluation of the trial courts. As it is founded on this additional indictment, this plea is therefore inadmissible.

34. Consequently it falls on the Cour de cassation (Court of Cassation) to respond to the first two parts of the plea and to the other objections lodged for the third part, to determine if it finds elements in the findings of the trial courts that allow for declaring the statute of limitations of the prosecution.

35. According to Article 8 of the Criminal Procedure Code in its then-applicable formulation, the statute of limitations for prosecution for serious offences for the misuse of company assets, aiding and abetting and concealment of the misuse of company assets is a period of three years. In cases of concealment, this short period, according to established case law (Crim., 13 February 1989, appeal no 88-81.218, Bull. crim. 1989, no 69) starting on the day where the infringement appeared and could be established under conditions allowing for the prosecution to be carried out.

36. In order to dismiss the plea made for the statute of limitations for the prosecution presented by Mr [X] before the Court of Justice of the Republic, after having pointed out that the alleged acts of Mr [Z] and Mr [X] took place from 1993 to 1995, the ruling states that the starting point for the statute of limitations was set at 21 September 2006, the date on which the Nautilus case was referred, which had a note from 11 September 2002 showing a link

between the Karachi bombing on 8 May 2002 and the system of undisclosed payments put in place when arms contracts were established, having allowed for the financing of the election campaign for Mr [X], the investigating commission pointed out the confidential nature of the note that was in place until its seizure in 2006, which was only reported to the media long afterwards.

37. The ruling notes, on the one hand, that the payment of the disputed sums was actually recorded in the accounting records of Sofresa and Dcn-I only under the line item, "technical fees" or "advances on commission", not allowing for the type of expenses to be identified. On the other hand, just the mention of such payments did not allow for determining a possible misuse of company assets without carrying out an analysis of the methods of payment of the commissions.

38. It adds that it makes no difference that certain public authorities could have known of the acts likely to be infringements considering that this information was not provided to the public prosecution, which can on its own carry out the prosecution, and the starting point of the statute of limitations could not depend on the publication of press articles with few details, often written in the conditional tense and limited to presenting a suspicion or imagining a hypothesis.

39. Moreover, it stipulates that it could only be said that the judicial authorities were aware of the existence of back-channelling of commissions paid to Network K as a part of the disputed contracts considering that, on the one hand, the Fondo affair is completely unrelated to the facts of the case, on the other hand, the public prosecutor was not informed of the report from Mr [TY] dated 23 April 1998 prior to said report being submitted to the legal investigation carried out by the investigating judges.

40. It follows from these findings, devoid of insufficiency or contradiction, that the Court of Justice of the Republic precisely set the starting point for the statute of limitations at 21 September 2006, in such a way that the public prosecution is not time-barred and that in its first two parts and for the remainder of the third, the plea is unfounded.

41. Lastly, the Court of Justice of the Republic, which did not receive a referral from Mr [Z] of any plea relating to conditions under which only a partial attachment to the case file of elements of the so-called Fondo affair case file could have been an infringement of the principles of a fair trial, did not, to note that this case was unrelated to the acts for which the Court received a referral, dismiss those of the elements that were produced for the first time before the Court, so that the fourth part lacks in fact.

42. The plea must therefore be dismissed.

On the fourth plea

Statement of plea

43. The plea objects to the ruling for declaring Mr [Z] guilty of aiding and abetting the misuse of company assets without ruling on the infringements of his right to a fair trial and the rights of the defence, due to the unreasonable delay between the acts, the start of the proceedings, and the judgement by the Court of Justice of the Republic, whereas "the right to a fair trial involves everyone who has a criminal accusation placed against them, having the right to their case being decided in a reasonable amount of time so that the rights of the parties are respected. It follows in this case that the reference material in the ruling under appeal that Mr [Z] invoked an

infringement of his right to a "fair trial due to the unreasonable amount of time that had passed between the acts, the start of the proceedings, and the present hearing". In spite of the resulting clear infringement of the rights of the defence, as it is a judgement concerning acts that were allegedly committed more than 28 years earlier, given the inevitable decay of elements of proof due, for example, to the death of not only the main contract negotiator, but also of numerous people involved in the disputed contracts, the ruling under appeal is limited to declaring Mr [Z] guilty of the acts of which he is accused, without any reasoning being given for the clearly unreasonable delay in the trial. In so ruling, the Court of Justice infringed Articles 6, §1, of the European Convention on Human Rights, and the preliminary Article and Article 593 of the Criminal Procedure Code, together with Article L. 111-3 of the Judicial Organisation Code."

Court's response

44. Article 385 of the Criminal Procedure Code, applicable before the Court of Justice of the Republic, provides that pleas of nullity must, in all cases, be presented before any defence on the merits of the case itself.

45. There is no reference material from the ruling nor from the statement of case sent to the Court of Justice of the Republic prior to the opening of deliberations by Mr [Z] that he referred a plea of nullity for exceeding the reasonable delay due to the excessive duration of the proceedings.

46. Although, starting on 2 February 2021, Mr [Z] was represented then assisted by a lawyer, and the latter did not present conclusions to the same ends and, according to the statements of the ruling, orally requested, mainly, for the party concerned to be acquitted, as well as, secondarily, the termination of the proceedings due to going beyond the reasonable time frame between the acts, the start of the proceedings, and the hearing.

47. Mr [Z] could not criticise the absence of a response to this request, considering that the plea of nullity presented by his lawyer at the moment of deliberations on the merits of the case were, as such, inadmissible.

48. In any event, according to established case law (Crim., 24 April 2013, appeal no 12-82.863, Bull. crim. 2013, no 100), going beyond the reasonable time frame defined in Article 6, §1, of the Convention on the Protection of Human Rights and Fundamental Freedoms has no incidence on the validity of the proceedings and cannot be used as a basis for a request to terminate these same proceedings.

49. The plea must therefore be dismissed.

On the fifth plea

Statement of plea

50. The plea objects to the ruling for declaring Mr [Z] guilty of aiding and abetting the misuse of company assets, after having ruled on the guilt of [CF] [O] and of Mr [P] on account of misuse of company funds, in their respective roles as chief executive officers of Sofresa and Dcn-I, whereas:

"1°/ Under the terms of Article 68-1 of the Constitution, the Court of Justice has the jurisdiction to prosecute members of the government for acts considered to be crimes or serious offences committed while carrying out their duties. By declaring Mr [O] and Mr [P] guilty of serious offences of the misuse of company assets of which Mr

[Z] was accused of aiding and abetting, when the latter, in their roles as directors of Sofresa and Dcn-I, fell into the jurisdiction of ordinary law, the Court of Justice of the Republic ruled outside of its jurisdiction, infringing the above-mentioned article;

2°/ In order to declare Mr [Z] guilty of aiding and abetting the misuse of company assets allegedly committed by Mr [O], in his role as chief executive officer of Sofresa, the ruling under appeal declares that the latter is the "author" of the serious offence of misuse of company assets committed against Sofresa through a use of company assets contrary to the company's interest, committed in his personal interest. It is however undisputed that the prosecution was extinguished in relation to Mr [O], due to his death which occurred on 16 October 2011, without him ever having been able to be examined during the legal investigation and without his guilt having ever been established while he was living. In so ruling based on a post-mortem guilty charge as the origin of Mr [Z] being charged with aiding and abetting, the Court of Justice not only infringed the right to a fair trial, which involves the respect of the principle of equality of arms and a fair balance between the parties, and supposes that the accused is able to defend their cause under conditions that comply with the principle of equity, but also the right to the presumption of innocence, infringing Articles 6, §1 and 6, §2 of the European Convention on Human Rights."

Court's response

51. It follows from Articles 121-6 and 121-7 of the Criminal Code that aiding and abetting implies the existence of a main punishable act that the trial courts must describe in detail, without regard to the situation of the author of this main act in relation to prosecution (Crim., 28 May 1990, appeal no 89-83.826, Bull. crim. 1990, no 214).

52. The main act was defined in the referral as misuse of company assets attributable to [CF] [O], deceased, and to Mr [P]. The Court of Justice of the Republic sought, as was required, to determine the existence of the main act, and investigated if assets or credit from Sofresa and Dcn-I had been used for personal gain by the respective company directors, in a way that was contrary to company interest. It did not rule on the guilt of the parties concerned.

53. The plea must therefore be dismissed.

On the first three parts of the sixth plea

Statement of plea

54. The plea objects to the ruling for declaring Mr [Z] guilty of aiding and abetting serious offences of misuse of company assets allegedly committed against Sofresa and Dcn-I, whereas:

"1°/ No misuse of company assets can be demonstrated without an act of using assets of the company in a fashion that is contrary to the company's interest and committed in the personal interest of its director. It follows in this case from the findings present in the ruling under appeal that the Agosta contract, like the Saudi Arabian contracts, for which negotiations had been in progress for several years without being able to be concluded, were "signed" after the intervention of the members of Network K, for amounts of several billion francs, and that they were "beneficiaries", notwithstanding the advantages given to Network K through the methods of payment of commissions that were contractually set then unilaterally modified. Moreover, no element of the ruling under appeal demonstrates how the directors of Sofresa and Dcn-I would have used the assets of their companies for personal gain through signing these contracts. By nevertheless maintaining the finding of serious offences of

misuse of company assets against Sofresa and Dcn-I, without establishing how the signing of arms contracts they were found to be party to were contrary to the interests of the companies concerned and revealed an effort on the part of their directors to seek personal gain, nor demonstrate how the amounts of the commissions paid to the intermediaries were abnormal and could possibly lessen the financial resources of Sofresa and Dcn-I, while, even though the commissions were paid by the purchasing countries, the price of the contract being increased accordingly, the Court of Justice did not describe the existence of a main punishable act of misuse of company assets, essential for charging Mr [Z] with aiding and abetting, infringing Articles 121-6 and 121-7 of the Criminal Code, and L. 242-6, paragraph 1, 3° of the Commercial Code in its then-applicable version, and 593 of the Criminal Procedure Code;

2°/ Any contradiction of pleas is equivalent to their absence. It follows in this case that the findings in the ruling under appeal state that a possible misuse of company assets can "only result from establishing the abnormality of the methods of payment of said commissions and their lack of usefulness in the prospects for the signature of contracts" (p. 53, no 248). The establishment of the occurrence of a serious offence of misuse of company assets against Sofresa, is however expressly maintained by the ruling under appeal "independent of the question of the usefulness of Network K" (p. 57, no 271). In so ruling by these contradictory pleas that simultaneously demonstrate proof of the lack of usefulness of the network being a determining factor and irrelevant in establishing the serious offence of misuse of company assets, the Court of Justice did not legally justify its decision, infringing Articles 121-6 and 121-7 of the Criminal Code, L. 242-6, paragraph 1, 3° of the Commercial Code in its then-applicable version, and 593 of the Criminal Procedure Code;

3°/ The burden of proof falls on the prosecution and doubt benefits the accused. It is indeed in this case the prosecutor's responsibility to demonstrate the lack of usefulness of the involvement of Network K in the signing of the contracts, to demonstrate the existence of a misuse of company assets. Without being able to establish such proof, when the disputed contracts as a whole were explicitly signed after the involvement of Network K, the Court of Justice bases the establishment of a serious offence of misuse of company assets on the affirmations that "Mr [AB] and Mr El Assir were incapable of specifying possible consideration for Sofresa" (p. 56, no 267) and that "the investigations carried out did not demonstrate that the acceleration that took place in January 1995, a few days prior to the date of the payment of the first instalment, while the Agosta contract had already been signed for four months, could find its justification in an event having interfered in the outcome of negotiations that were already completed, or in the progress of the execution of the contract" (p. 58, no 277). By basing the charges made of Mr [Z] of aiding and abetting the misuse of company assets without the presence of certain proof provided by the intermediaries of Network K of their usefulness in the signing and execution of contracts, where it is on the contrary the responsibility of the prosecution to demonstrate their lack of usefulness, the Court of Justice switched the burden of proof and infringed on the principle of the presumption of innocence which requires that doubt benefit the accused, infringing the preliminary Article, and Articles 427 and 593 of the Criminal Procedure Code, and 6, §2 of the European Convention on Human Rights."

Court's response

55. In order to establish the existence of a main act of misuse of company assets that can be charged to [CF] [O], director of Sofresa, the ruling maintains that, starting in 1993, three of the four Saudi Arabian contracts concerned were finalised, before Mr [CG] was replaced by [CF] [O] as director of the company, and that Mr [AB], who was director of the Isola 2000 ski station, located in the constituency for which Mr [Z] was representative, was called on.

56. The ruling states that between late 1993 and early 1994, [CF] [O] signed, on the one hand, consulting contracts with Network K, and on the other hand, various riders and other agreements providing Network K, or companies working with it, exorbitant financial benefits in relation to usual fees, indicated in the proceedings under the word "balourds" ("foolishness") and considered, starting in 1996, unacceptable by the management and control bodies of Sofresa.

57. The Court of Justice of the Republic deduced, independently of the question of the usefulness of Network K, that there was evidence of a use of Sofresa's assets that was contrary to the company's interest, of which [CF] [O] was the author in personal interest, the fact that the Saudi Arabian contracts were finally signed, or even benefited, cannot justify the advantages granted to this network in the setting and unilateral modification of the terms of payment of commissions, without any consideration for Sofresa, which was thus exposed to a cash flow underfunding.

58. In order to establish the existence of a main act of misuse of company assets attributable to Mr [P], director of Dcn-I, the ruling states that the negotiations relating to the Agosta contract between France and Pakistan, which had begun in 1992, were in the process of being finalised when, in May-June 1994, Mr. [AB] and Mr. [J] entered into contact with Dcn-I, which, however, already had a network of intermediaries.

59. The ruling specifies that the intervention of Mr [AB] and Mr [J], whose usefulness has never been demonstrated, was marked by various contracts and riders signed by Mr [P] with the interested parties, granting them, on the one hand, substantial commissions, and on the other hand, unusual conditions for the advance collection of a significant percentage of these same commissions.

60. It observed that the use of Network K was due to the intervention of Mr [Q], then chargé de mission for Mr [Z], Minister of Defence, and noted that the usual intermediaries already designated in this case were remunerated under the usual conditions, in particular by payments spread out over the medium or long term.

61. It notes, moreover, that the company Mercor, under the control of members of Network K and beneficiary of some of the advantages granted under abnormal conditions to the members of this network, has, by a legal artifice including an assignment of a claim to a Spanish bank, exonerated itself from any commitment, while the contract was only in its first months of execution, without Dcn-I reacting or initiating any proceedings.

62. Finally, it added that, whatever the profit that was made from the Agosta contract, its signature, two months after the conclusion of the agreement with Mercor, could not justify the advantages granted through the methods of payment of commissions contractually fixed and then modified without any immediate consideration for Dcn-I, which was thus exposed to a cash flow underfunding of the arms contract.

63. The Court of Justice of the Republic deduced that Mr [P] made use of the assets of Dcn-I in a way that he knew was contrary to the company's interest and in his personal interest, thus preserving his corporate mandate and his remuneration as company director.

64. On the basis of these findings, which are within its sovereign power, and of these reasons, which are free of any shortcomings or contradictions, the Court, without reversing the burden of proof, characterised all the constituent elements of the misuse of company assets of which Mr [Z] is accused of aiding and abetting and justified its decision.

65. The plea is therefore unfounded.

On parts four to seven of the sixth plea

Statement of plea

66. The plea presents the same criticism to the ruling, whereas:

4°/ In order to declare Mr [Z] guilty of aiding and abetting the misuse of company assets, the ruling held that he had, in respect of acts of commission, "replaced Mr [CG] as president of Sofresa by appointing [CF] [O] as his successor" (no 290), that "as soon as he arrived at the Ministry of Defence" he had "increased contacts with the Saudi Arabian authorities through networks set up by Mr [CG], and in particular his Saudi Arabian counterpart Prince Sultan, concerning the Mouette/Shola/Slbs and Sawari II contracts under negotiation" (no 292), that he had "taken part" in "the various stages of the negotiation of arms contracts" (no 293), to have "intervened in the Agosta contract after an arbitration by the Prime Minister in July 1993 authorising the taking of a guarantee for the entire project up to a level of 50% so that the State guarantee could be granted" (no 294), to have "also intervened on several occasions to encourage the conclusion of the Saudi Arabian contracts" (no 295), and finally to have given his "agreement" to the intervention of Network K (no 296). All of these findings highlight the central and driving role of Mr [Z] in the negotiation and conclusion of the Saudi Arabian and Pakistani arms contracts in France's interest, in his capacity as Minister of Defence, and in no way characterise any act of aiding and abetting with regard to the unilateral modifications of the methods of payment of commissions, which alone are recognised as constituting the serious offences of misuse of company assets allegedly committed by Mr [O] and Mr [P] to the detriment of Sofresa and Dcn-I. In so ruling, the Court of Justice did not legally justify its decision, infringing Articles 121-6 and 121-7 of the Criminal Code, L. 242-6 paragraph 1, 3° of the Commercial Code in the then-applicable version and 593 of the Criminal Procedure Code;

5°/ In order to declare Mr. [Z] guilty of aiding and abetting the misuse of company assets, the ruling further states that "it is established that he was informed of the various stages of the negotiation of the arms contracts in which he was involved and of the granting by Sofresa and Dcn-I of advantages to the [J]/[AB] network, for which he had contributed to put in contact personally initially with Sofresa" (no 293). The mere fact of having been informed of the granting of advantages to Network K, assuming it is proven, cannot constitute an act of commission of aiding and abetting necessarily exclusive of any inaction or abstention. It is moreover contradicted by the statements in the ruling under appeal according to which Mr. [Z] always "denied having been informed of the content of the agreements made with the intermediaries, which were not part of his concerns" (no 289), without being supported by the slightest piece of evidence. In so ruling, the Court of Justice did not further justify its decision, infringing Articles 121-6 and 121-7 of the Criminal Code, L. 242-6, paragraph 1, 3° of the Commercial Code in the then-applicable version and 593 of the Criminal Procedure Code;

6°/ It was up to the judges to assess the alleged acts of aiding and abetting the misuse of company assets by Mr [Z] on the date they were committed. The mere finding of Mr [Z]'s agreement to the intervention of Network K with a view to obtaining the signature of arms contracts beneficial to France, could not, without disregarding the above-mentioned principle of legality, be interpreted a posteriori as an act of aiding and abetting the misuse of company assets resulting from the advantages from which the members of this network benefited through the modifications of the terms of payment of the contractually determined commissions. By deducing the finding of the alleged acts from circumstances subsequent to Mr [Z]'s agreement to the intervention of Network K, without in any way seeking to analyse the facts in the light of the economic, legal and political situation in France at the time of the incriminated contracts, the Court of Justice did not legally justify its decision, infringing Articles 112-1 and 121-7 of the Criminal Code, L. 242-6, paragraph 1, 3° of the Commercial Code in the then-applicable version, 593 of

the Criminal Procedure Code, and 7 of the European Convention on Human Rights;

7°/ Aiding and abetting presuppose that the principal perpetrator voluntarily and consciously participated in the offence committed at the time the assistance was provided or the instructions given. After having itself noted that Mr [Z] had always denied having been informed of the content of the agreements made with the intermediaries, the Court of Justice could not simply state that it is established that Mr [Z] "played a central and driving role in the preparation and execution of the misuse of company assets committed to the detriment of Dcn-I and Sofresa, of which he had full knowledge", without even explaining the elements of the offence on which it had based this peremptory assertion, which is still firmly contested by the defendant. In so ruling, the Court of Justice did not legally characterise the intentional element of the serious offences of aiding and abetting the misuse of company assets, infringing Articles 121-3, 121-6 and 121-7 of the Criminal Code, L. 242-6 paragraph 1, 3° of the Commercial Code in its then-applicable version, 593 of the Criminal Procedure Code, and 6, §1, of the European Convention on Human Rights."

Court's response

67. In order to declare Mr [Z] guilty of aiding and abetting the serious offence of the misuse of company assets, the ruling held that, having been appointed Minister of Defence in March 1993 in the government of Mr [X], he composed his cabinet by appointing his closest collaborator, Mr [Q], to the position of chargé de mission and replaced Mr [CG] as president of the company Sofresa with [CF] [O].

68. The ruling notes that the arms contracts referred to in the proceedings were the subject of negotiations which, initiated under the authority of the previous government, were approaching the conclusive phase during the political changeover and on the margins of which the networks of intermediaries set up at the time continued to be active and remunerated in accordance with the practices in force at the time, i.e. at the rate of the client's payments throughout the duration of the contract.

69. It notes that, as soon as he arrived at the Ministry of Defence, Mr [Z] increased contacts with the Saudi Arabian authorities concerning contracts related to their country, that he took part in the negotiation of arms contracts and that he was informed of the granting of advantages to Network K by Sofresa and Dcn-I, which had come into contact with the interested parties, in the case of Sofresa, thanks to his personal intervention, and in the case of Dcn-I, through the intermediary of his chargé de mission, Mr [Q].

70. It recalls that Mr [Z], on the one hand, intervened on the Agosta contract in order to obtain authorisation for the State guarantee for the entire project, whereas an arbitration by the Prime Minister in July 1993 had resulted in a 50% guarantee, and on the other hand, on 13 January 1995, a few days before the entry into force of this contract, he granted the State guarantee, in particular to Dcn-I, as a supplement to the Coface cover.

71. It added that Mr [Z] also came forward on several occasions to encourage the conclusion of the Saudi Arabian contracts, in particular in March 1995, by requesting Sofresa for this purpose, whereas Thomson, the main contractor for the contracts, faced with financing difficulties and the share of risk it was asked to guarantee, opposed the execution of the Sawari II contract, which led Sofresa to remunerate the intermediaries in advance out of its own cash.

72. It notes that the intervention of Network K was only made possible with the agreement of Mr [Q] and Mr [Z], who had placed his trust in the latter and had established a close relationship with Mr [AB].

73. It stated that, in this context and because of the importance that Mr [Z] attached to the signing of these arms contracts, Mr [Q] had no reason to keep the information he held to himself or not to report it and that he stated

before the investigating judge that he had not acted alone and that he was Mr [Z]'s subordinate, who "was aware of everything in real time" and, before the criminal court, that, as he had no personal authority over the chairmen of Sofresa and Dcn-I, he had always acted under the authority of his minister.

74. The Court of Justice of the Republic deduced that, contrary to what Mr [Z] had constantly maintained, he had, through his multiple interventions in his capacity as Minister of Defence, played a central and driving role in the preparation and realisation of the misuse of company assets, committed to the detriment of Dcn-I and Sofresa, of which he had full knowledge, and that the offence of aiding and abetting in the misuse of company assets was constituted against him in its elements of fact and of intent.

75. In light of these findings, which are within its sovereign power, and of these reasons, which are free of any shortcomings or contradictions, it characterised the acts of aiding and abetting in the serious offence of the misuse of company assets of which Mr [Z] is accused, and justified its decision.

76. The plea is therefore unfounded.

On the seventh plea

Statement of plea

77. The plea objects to the ruling for ordering Mr [Z] to pay a fine of 100,000 euros, whereas:

"1°/ In criminal matters, the court that imposes a fine must give reasons for its decision in light of the circumstances of the offence, the personality and the personal situation of the offender, taking into account the offender's resources and expenses. In order to impose a fine of 100,000 euros, the ruling under appeal merely states that the only elements produced by the person concerned were "vague and unsupported by the production of any document", without at any time calling into question the truthfulness of Mr [Z]'s indications, according to which he had no personal assets other than a car paid for on credit, held two overdrawn bank accounts and received two pensions, one from the National Assembly and the other from the Inspectorate of Finance. In so ruling, without indicating in what way the information provided by Mr [Z] was insufficient, nor explaining the personal situation of the latter and the amount of his resources and expenses that it had to take into consideration in order to reach its decision, the cour d'appel (Court of Appeal) did not justify its decision infringing Articles 132-1 and 132-20, paragraph 2, of the Criminal Code, together with Articles 485-1 and 593 of the Criminal Procedure Code;

2°/ European case law accepts that the unreasonable length of proceedings infringing Article 6, §1 of the European Convention on Human Rights may have an influence on the sentence. By merely setting the amount of the fine imposed on Mr [Z] at 100,000 euros, without even taking into consideration the particular circumstances of the offence and his personal situation, in which he was called upon to answer for acts allegedly committed more than 28 years prior, infringing his right to be tried within a reasonable amount of time, and at the cost of being unable to effectively exercise his rights of defence, the cour d'appel (Court of Appeal) infringed Articles 132-1 and 132-20, paragraph 2, of the Criminal Code, and Articles 485-1 and 593 of the Criminal Procedure Code, together with Article 6, §1 of the European Convention on Human Rights."

Court's response

78. According to Article 485-1 of the Criminal Procedure Code, in criminal cases, the choice of penalty must be justified in the light of the provisions of Articles 132-1 and 132-20 of the Criminal Code, except in the case of a mandatory penalty or the confiscation of the proceeds or object of the offence. As a result, the fine must be justified, taking into account the seriousness of the offence, the personality of the offender and his or her personal situation, including resources and expenses.

79. In sentencing Mr [Z] to a fine of 100,000 euros, the ruling refers to his professional background and family situation.

80. It describes in detail the harmfulness of the acts prosecuted for the companies concerned, which are owned by the State and placed under its supervision, and points out that these acts are the result of a disregard for the general interest.

81. It stated that when asked to justify his socio-economic situation, Mr [Z] produced a letter in which he alleged that he had no real estate assets, that he had two bank accounts with debit balances and that he received two pensions, one from the National Assembly and the other from the Inspectorate General of Finance, the amounts of which he did not indicate.

82. It added that the person concerned did not mention his pensions as a local elected official and did not provide any supporting documents.

83. It concluded that, in view of the sole elements produced by the person concerned, which were very vague and not supported by the production of any document, the fine should be set at 100,000 euros.

84. In light of these reasons, which were the result of its sovereign assessment, the Court of Justice of the Republic, which was not asked to moderate the quantum of the sentence on account of the excessive length of the proceedings, justified its decision.

85. Consequently, the second part of the plea, which is inadmissible as new and mixed with fact and law, is unfounded for the remaining parts

86. Moreover, the ruling is procedurally correct.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

President: Ms Duval-Arnould, acting as First President
Reporting Judge: Mr Seys, assisted by Mr Dureux, auditor at the documentation, studies and reports service (Service de Documentation, des

Advocate-General: Mr Petitprez

Lawyer(s): SCP Gatineau, Fattaccini et Rebeyrol

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