

The right to trial within reasonable time and consequences of the excessive duration of the proceedings (Ruling n° 1304 – 21-85.655)

09/11/2022



Ruling No. 1304

PARTIAL QUASHING

DISMISSAL

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE CRIMINAL CHAMBER OF THE COURT OF CASSATION

The Prosecutor-General at the *cour d'appel* (Court of Appeal) of Versailles and Messrs [E] [P] and [B] [P] brought appeals against the ruling of that court, 9th Chamber, of 15 September 2021, which, in the proceeding against the latter two persons and Messrs [R] [G], [J] [A] and [X] [Z], on the charges of complicity in active corruption, receipt of illegally obtained property, misuse of company assets, forgery and the use of forged documents, declared the partial annulment of the proceedings and ordered the remainder to be dismissed.

By order of 30 November 2021, the President of the criminal chamber joined the appeals and ordered their immediate examination.

Submissions, both for and in defence, as well as additional comments were filed.

On the report of Ms Planchon, judge, the observations of the firm of Célice, Texidor, Périer, counsel for Messrs [E] [P] and [B] [P], the observations of the firm of Spinosi, counsel for Messrs [X] [Z] et [J] [A], and the observations of the firm of Lyon-Caen and Thiriez, counsel for Messrs [J] et [U] [F] and Ms [N] [F], on their personal behalf and as successor to [H] [C], and of [3], and the submissions of Ms Bellone, Advocate General referee, the lawyers having had the floor last, after discussions in the public hearing of 22 September 2022 in which were present Mr Bonnal, President, Ms Planchon, judge-*rapporteur*, Ms de la Lance, Mr de Larosière de Champfeu, Ms Ingall-Montagnier, Ms Labrousse, Mr d'Huy, Ms Ménotti, Ms Leprieur, Ms Sudre, Mr Samuel, Mr Maziau, Ms Goanvic, judges of the Chamber, Mr Ascensi, Mr Joly, Mr Violeau, Mr Mallard, judge referee-rapporteurs, Ms Bellone, Advocate General referee, and Ms Boudalia, Chamber Registrar,

The criminal chamber of the *Cour de cassation* (Court of Cassation), composed of the above-mentioned President and judges, after having deliberated in accordance with the law, has issued this ruling.

Facts and Procedure

1. It follows from the ruling under appeal and the documents from the proceedings that:
2. On 26 June 2002, the Public Prosecutor opened an inquiry into corruption and influence peddling charges following a report from the Hauts-de-Seine Department of Competition Policy, Consumer Affairs and Fraud Control concerning the terms and conditions for the renewal in 2000 of the public service delegation contract awarded to [2] for the production and distribution of heating in the district of *La Défense*. [S] [L], then mayor of [Location 4] and president of the awarding intermunicipal authority, was suspected of having had the latter authority approve the decision to enter into negotiations with [2] alone, represented by Mr [J] [A], a partner with Mr [R] [G] and Mr [X] [Z], in return for the payment of secret cash commissions between June 2001 and January 2002.
3. Numerous additional indictments were issued between 2004 and 2005 for acts of concealment, misuse of company assets and complicity in that offence, favoritism and conspiracy and concealment of those offences, and forgery and the use of forged documents, the latter actions having been disclosed by Mr and Ms [F] Furthermore, on 27 June 2005, the Investigating Judge ordered that this proceeding be combined with the investigation opened on 23 January 2003 regarding the charge of misuse of company assets involving the company known as [3], headed by Mr [E] [P].
4. Six persons, including [S] [L], who died on [Date of death 1] 2019, were charged and, on 7 November 2019, the Investigating Judge ordered that Messrs [G], [A], [Z], [P] and [K] be referred to the Criminal Court, which annulled the entire enquiry and investigation proceeding by a ruling of 11 January 2021, against which the Public Prosecutor's Office

and the civil parties appealed.

[...]

Reviewing pleas

[...]

The fourth plea proposed by the Prosecutor-General

Statement of plea

7. The fourth plea proposed by the Prosecutor-General alleges infringement of the preliminary article and Articles 427, 591, 593 and 802 of the Criminal Procedure Code.

8. The plea criticizes the ruling under appeal insofar as it annulled the proceedings which led to the referral of Messrs [G], [A] and [Z] to the Nanterre Criminal Court and the referral of Messrs [P] et [K] for the facts in relation to the corruption part of the case, whereas:

(1) the failure to comply with the recommendation set out in the preliminary article of the Criminal Procedure Code concerning the compliance with a reasonable time to rule on the accusation of a person does not necessarily violate the principles of the operation of criminal justice and due process (*droits de la défense*), and does not irreparably compromise the fairness of the trial and the balance of the rights of both parties, and in any event has no direct impact on the validity of the proceedings;

(2) the fact that it is impossible for the *cour d'appel* (Court of Appeal) to personally examine witnesses or co-defendants or to allow the parties to question them or to have them examined does not in itself render the proceedings null and void and does not necessarily infringe upon due process (*droits de la défense*).

The Court's response

Having regard to Article 6, § 1 of the European Convention on Human Rights and the preliminary article and Article 802 of the Criminal Procedure Code:

9. Article 6, § 1 of the European Convention on Human Rights provides for the right of every accused to have his case tried by a court within a reasonable time after the judicial proceedings have begun. This right is rooted in the need to ensure that an accused does not remain for too long in a state of uncertainty regarding the resolution of the criminal charge to be brought against him (ECHR, ruling of 3 December 2009, *Kart v. Turkey*, No 8917/05, § 68).

10. The plea poses the question of which consequences, if any, the fact that the proceedings have lasted for an unreasonable length of time may have on the validity of the proceedings.

11. The *Cour de cassation* (Court of Cassation) has consistently held that exceeding the reasonable time defined in Article 6, § 1 of the European Convention on Human Rights does not affect the validity of the proceedings. It cannot lead to the annulment of the proceeding and, subject to the statute of limitations, it does not constitute a ground for terminating the prosecution (Crim., 3 February 1993, appeal no 92-83.443, Bull. crim. 1993, no 57; Ass. plén., 4 June 2021, appeal no 21-81.656, published in the Bulletin).

12. It follows from paragraph 9 that the right to be tried within a reasonable time only protects the interests of the persons concerned by the proceedings. The infringement of this right does not therefore constitute a breach of a rule of public policy. Nor does it constitute an infringement of a rule of procedure prescribed by law under penalty of nullity, or a failure to observe a substantial formality within the meaning of Article 802 of the Criminal Procedure Code. It does not, in itself, infringe upon the defendants' due process rights (*droits de la défense*), yet the consequences such delay may have had for the exercise of those rights must be taken into account when the judgment is made on the merits, under the conditions set out in paragraphs 23 to 26.

13. Moreover, when a case is brought before the court after an investigation conducted by an investigating judge (*information judiciaire*), Article 385 of the Criminal Procedure Code provides that, when said investigating judge has issued a reasoned indictment (*ordonnance de renvoi*), the parties cannot challenge, before the trial court, the validity of prior proceedings, since the indictment cures any irregularities that may have affected the proceedings pursuant to Article 179, paragraph 6 of the aforesaid Code (Crim., 26 May 2010, appeal no 10-81.839, Bull. criminal. 2010, no 95). This same article provided that, when the trial court finds an irregularity in the reasoned indictment, they do not have jurisdiction to set it aside but may only refer the case back to the Public Prosecutor's Office for referral to the investigating judge (*juge d'instruction*) for the purpose of curing said irregularity by the issuance of a superseding indictment (Crim., 13 June 2019, appeal no 19-82.326, Bull. criminal. 2019, no 112).

14. Finally, the excessive duration of criminal proceedings cannot lead to the proceedings being nullified when each individual part of said proceedings is intrinsically regular.

15. These rules do not disregard any treaty principles.

16. The European Court of Human Rights considers that the remedies available to a litigant at national level to complain about the length of a proceeding are effective within the meaning of Article 13 of the European Convention on Human Rights, either if they allow a speedier decision from the court, or if the litigant in question is adequately compensated for the delays suffered (ECHR, ruling of 24 January 2017, *Hiernaux v. France*, no 28022/15, § 45).

17. It has never held that a failure to observe the right to be tried within a reasonable time constituted a breach of due process (*droits de la défense*).

18. Several mechanisms of domestic law address treaty requirements.

19. First, at the investigative stage, Articles 221-1 through 221-3 of the Criminal Procedure Code allow the parties, under certain conditions, as well as the President of the investigating chamber of the court of appeals (*chambre de l'instruction*) – who, under Article 220 of the Code, endeavours to ensure that proceedings are not unreasonably delayed – to refer the matter to that court, which may then continue the investigation, close it or entrust it to another investigating judge (*juge d'instruction*).

20. Next, under Article 175-1 of the same code, a party may request that the Investigating Judge close the investigation.

21. Finally, Article L. 141-1 of the Judicial Code gives the aggrieved party the right to seek compensation from the State for defective operation of the judicial system, notably when a case takes an unreasonable amount of time to be concluded (1st Civ., 4 November 2010, appeal no 09-69.955, Bull. 2010, I, no 219).

22. It follows from all of those factors that the principle that failure to conclude a case within a reasonable time, and the consequences this may have had on due process (*droits de la défense*), have no bearing on the validity of the proceedings, must be upheld.

23. Consequently, a trial court which finds that the duration of the proceedings is excessive cannot dispense with examining the merits of the case. In so doing, it has several legal ways to take this situation into account.

24. First of all, it is that court's role, pursuant to Article 427 of the Criminal Procedure Code, to assess the value of the evidence submitted to it and debated before it during the adversarial proceedings. It must, in that regard, take into account the possible deterioration of the evidence as a result of the passage of time since the date of the facts, including the fact that the parties might no longer be able to challenge the value of, or consequences to be drawn from, said evidence. Thus, it must apply the treaty principle that a conviction cannot be pronounced on the sole basis of a single piece of testimony made by a witness whom the accused has asked to confront but has never been able to. The deterioration of evidence may, where appropriate, lead to an acquittal.

25. Next, according to the last paragraph of Article 10 of the Criminal Procedure Code, in the presence of civil parties, where the court finds that the mental or physical state of the accused makes it impossible for him to appear in court and present a defence for an extended period of time, the court may, of its own motion or at the request of the parties, decide, after having requested an expert opinion to establish that this is indeed the case, that a hearing will be held to decide only on the civil action, the criminal case itself (*action publique*) being stayed in the meantime.

26. Finally, in applying the criteria set forth in Article 132-1 of the Penal Code, the court may determine the nature and severity of the sentence it imposes, taking into account the possible consequences of the proceedings having lasted for an unreasonable amount of time and, where appropriate, decide that no sentence need be imposed (*dispense de peine*) if it finds that the conditions of Article 132-59 of the Criminal Code have been met.

27. In the present case, to set aside the proceedings which led to the indictment of Messrs [G], [A] and [Z], and of Messrs [P] and [K] for 'the facts in relation to the corruption part of the case', the ruling under appeal states that an overall assessment of the course of the proceedings, which has lasted almost twenty years, based on the complexity of the case and the conduct of the parties and the competent authorities, provides a basis for holding that the proceeding has exceeded a reasonable time.

28. The ruling goes on to point out that this delay prevents Messrs [G] and [A], who no longer have the requisite physical and intellectual capacities, from participating in their trials, following and commenting on the proceedings, verifying the accuracy of their defences and comparing them with the statements of other defendants, victims or witnesses, confronting the latter and effectively exercising the rights of the defence, insofar as those failings cannot be compensated by the defendants' representation by their lawyers at the hearing, and that since the acts of corruption, misuse of company assets and receipt of the proceeds of misuse of company assets cannot be debated at the hearing in an adversarial proceeding, the persons in question would be deprived of their right to a fair trial.

29. The judges further note that while Mr [Z] may be able to attend his trial, he will not be able to answer for the offences he is accused of in the absence of [S] [L] and Messrs [G] and [A]; that he would have to defend himself alone on all the facts, including on matters for which he could not explain himself in place of the relevant persons; and that, since he would not be in a position to respond effectively to the statements of certain witnesses with whom he had never had any interaction, he would need to refute the accusations levelled against each of the three other defendants without being able to face them, and he would be deprived of any possibility of having his statements corroborated.

30. They add that the same applies to Messrs [P] and [K] who, although they are able to attend their trial, would be deprived of adversarial debate and could not, in the absence of the main respondents, effectively exercise their due process rights.

31. With regard to the consequences of the finding that the duration of the proceedings was unreasonable and infringed on the right to a fair trial, as well as due process, for Messrs [G], [A] and [Z], the *cour d'appel* (Court of Appeal), having found that the proceedings relating to the facts connected with the 'corruption part' violate the reasonable-time standard and irremediably violate all the principles governing criminal justice, in particular due process (*droits de la défense*) and the rules of evidence, concludes that it cannot itself participate in that violation by allowing a fundamentally unfair trial to proceed.

32. In so doing, the *cour d'appel* (Court of Appeal) disregarded the statutes mentioned above, as well as the principle referred to in paragraph 22.

33. First, it wrongly inferred from Article 6, § 1 of the European Convention on Human Rights and the preliminary article of the Criminal Procedure Code that it should annul the proceedings.

34. Second, it did not rule on the merits of the case in the light of the evidence submitted to it in accordance with Article 427 of the Criminal Procedure Code.

35. The case is therefore eligible for quashing.

[...]

Scope and consequences of the quashing

38. The ruling is quashed in all its provisions except those which ordered the indictment of Messrs [P] and [K] for trial on charges of misuse of company assets, concealment, forgery and the use of forged documents.

ON THESE GROUNDS, the Court:

On the appeals brought by Messrs [P] and [K]:

DISMISSES them;

On the appeal brought by the Prosecutor-General:

QUASHES and SETS ASIDE the abovementioned ruling of the *cour d'appel* (Court of Appeal) of Versailles of 15 September 2021 in all its provisions except those which ordered that Messrs. [P] and [K] be remanded for trial on charges of misuse of company assets, concealment, forgery and use of forged documents;

And for a new ruling, in accordance with the law, within the limits of the reversal hereby pronounced,

REFERS the case and the parties to the *cour d'appel* (Court of Appeal) of Versailles, otherwise composed, to that designated by a special decision taken in chambers;

Sets the total sum that Messrs [P] and [K] are to pay to Mr and Ms [F] and [3] at 2,500 euros, pursuant to Article 618-1 of the Criminal Procedure Code;

ORDERS the printing of this ruling, its transcription in the registers of the Registrar of the *cour d'appel* (Court of Appeal) of Paris and its annotation in the margin or following the partially quashed ruling;

Thus ordered and adjudged by the criminal chamber of the *Cour de cassation* (Court of Cassation) and decreed by the President on the ninth day of the month of November of the year two thousand and twenty-two.

President : Mr Bonnal

Judge : Ms Planchon

Advocate General referee : Ms Bellone

Lawyer(s) : SCP Célice, Texidor, Périer – SCP Spinosi – SCP Lyon-Caen and Thiriez

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Institution judiciaire

Translated rulings