ADMINISTRACION
DE JUSTICIA

S U P R E M E   C O U R T

Criminal Division

RULING

SPECIAL PROCEEDINGS

Appeal Nº: *20907/2017*

Decision/Agreement: Appeal Rejected

Legal basis: APPEAL

Date of ruling: 05/01/2018

Judge responsible for drafting the opinion of the court: His Honour: Mr. Miguel Colmenero Menéndez de Luarca

Secretary of the Division*:* The esteemed Ms. Maria Antonia Cao Barredo

Drafted by: FGR

Special Proceedings (Appeal - 1/2017)

ADMINISTRACION DE JUSTICIA

Appeal no.: 20907/2017
Judge responsible for drafting the opinion of the court: His Honour Mr. Miguel Colmenero Menéndez de Luarca
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SUPREME COURT
Criminal Division

RULING

Their Honourable Judges:

Mr. Miguel Colmenero Menéndez de Luarca
Mr. Francisco Monterde Ferrer
Mr. Alberto Jorge Barreiro

In the City of Madrid on the fifth of January two thousand and eighteen.

I. FACTS

ONE.- On 4 December 2017 the Investigating Magistrate issued a ruling, the operative part of which stated:

*"...**I DECREE:** That the precautionary measure agreed in Preliminary Investigation 82/2017 of Central Magistrate Court no. 3 and incorporated into these special proceedings, requiring that **MR. ORIOL JUNQUERAS I VIES,***

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MR. JOAQUIM FORN I CHIARIELLO, MR. JORDI SÁNCHEZ PICANYOL AND MR. JORDI CUIXART NAVARRO SHOULD NOT BE GIVEN BAIL BUT BE HELD ON REMAND WITH VISITING RIGHTS*, should be upheld...".*

TWO.- The Court Representative of MR. ORIOL JUNQUERAS I VIES, Ms. Celia López Ariza, lodged an appeal against that ruling which was forwarded to the Public Prosecutor's Office and other interested parties under Article 766.3 of the Criminal Procedure Act.

THREE.- On 15 December, through the relevant procedure, the Public Prosecutor's Office responded that it wished the appeal to be dismissed and the precautionary measure to be upheld.

On 19 December the legal counsel of MR. JORDI SANCHEZ I PICANYOL presented a statement backing the appeal lodged and endorsing all its arguments.

On 19 December the legal counsel of MR. JOAN JOSEP NUET I PUJALS presented a statement backing the appeal lodged with regard to the pleas contained therein.

On 19 December the Court Representative of the VOX political party, Ms. Hidalgo López, presented a statement objecting to the appeal lodged.

FOUR.- By order of this Division dated 22 December it was agreed that this appeal should be discussed and resolved, as requested, on 4 January 2018 at 10.30 with the appellant in attendance, taking place on the date indicated in accordance with the record drawn up to that end.

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II. LEGAL ARGUMENTS

ONE.- By means of the Ruling of 4 December 2017, the Investigating Magistrate agreed to keep the defendant Oriol Junqueras Vies on remand without bail. The appellant lodged an appeal against that Ruling.

The appellant pleads that the remand measure is not in this case based on the risk of flight or on the risk that he would destroy evidence. Therefore, he believes that it is necessary to interrogate the existence of evidence indicating the committing of offences and the existence of the risk of repeat offending.

1. The prerequisites for deeming the remand measure constitutionally justified are well known and do not need to be rehearsed here. The appellant limited himself to referring firstly to the need for sufficient evidence to exist proving the committing of an offence and his involvement in it, and secondly to the risk of repeat offending.

2. Firstly, some aspects need to be mentioned. On the one hand, with the passage of time a review of the remand situation would be justified if new facts emerged contradicting the grounds on which the remand measure was agreed and upheld.

On the other hand, given the procedural stage at which the contested Ruling and this resolution itself was issued, the observations about the assessable facts and the criminal nature of the conduct, although they must be rationally based and include an examination of the accuracy and consistency of the evidence, are provisional in nature.

Thirdly, even without examining the existence of proof of the acts attributed to the defendants, it is necessary to assess if the evidence of the committing of an offence and the involvement of the appellant are sufficiently consistent to justify invoking the first of

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the prerequisites for agreeing the remand measure (Article 503.1.1 of the Criminal Procedure Act).

Fourthly, although the appellant pleads that he is being treated differently from the members of the Bureau of the Parliament, that issue cannot be addressed, since the decision on his personal situation has not been appealed before this Division. Therefore, it has not had the opportunity to examine the circumstances regarding each member of the Bureau nor specifically to express its opinion.

Fifthly, it should also be taken into account that according to the available evidence, the acts in which the appellant is alleged to be involved were not performed individually by him in isolation. Rather, they were performed as part of a plan involving the allocation of roles and established with other people, either members of the Catalan Government itself, of which the appellant was Vice-President, or members of other institutions in the Autonomous Community, with the collaboration of other pro-independence associations such as the Catalan National Assembly or Omnium Cultural.

3. The appellant pleads that the reading of the contested Ruling "implies that the pursuit of certain political objectives which may contradict the constitution in a more or less significant way, now represents criminal conduct in itself". Although seeking the independence of a part of the national territory through violent uprising is criminal, seeking independence peacefully is lawful. According to the Constitutional Court, that is promoted by the Constitution itself, as we do not live in a militant democracy. The appellant believes that the pro-independence political project is thus criminalised, which cannot be accepted by this Division.

However, that is not apparent from the contested Ruling. Defending an argument or political option based on the establishment of the independence of a part of the national territory is lawful. The Constitution accepts the defence of any political position, including those based on the disappearance of the Constitution itself or the introduction of a non-democratic regime. The

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appellant may defend the relevance, advisability or desirability of pursuing the independence of a part of Spain without committing a crime. Hence the present proceedings have not been brought to persecute political dissent or the defence of a pro-independence option. Therefore, we cannot speak of political prisoners, since no-one is being persecuted for defending an idea, and the system permits the defence of any option, offering plenty of channels to sustain that defence.

However, in this case the appellant neither occupies a hypothetical political position nor defends it from within the typical legal channels of a democratic system. Rather, he has gone much further.

There can be no doubt that the appellant, as Vice-President of the Government of the Autonomous Community, in concert with other members of that Government, the Autonomous Parliament and other Institutions of the Community itself, undertook the execution of a plan which included the approval of various rules and resolutions in pursuit of the unilateral declaration of the independence of Catalonia as a part of Spanish territory, and had proceeded to apply those rules and resolutions in contravention of the resolutions issued by the Constitutional Court declaring them to be unconstitutional and therefore null and void. Despite those resolutions, the appellant, as a member of the Government of the Parliament of Catalonia, in concert with others, tried to hold a referendum that the Constitutional Court had declared unconstitutional and illegal, announced the results of the voting which was able to take place, and proclaimed the independence of Catalonia. By executing their plan in this way and resorting to patently illegal acts, the appellant and the other defendants have risen up against the Spanish state, the Constitution, the Statute of Autonomy of the Community and the rest of the legal system.

The significance of this behaviour is far from banal, as it constitutes an extremely serious unlawful act in a Democratic State of Law, in which compliance with the law as a formal expression of the will of the people approved by their lawful representatives, and

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loyalty to the democratic system governing us, impose certain limits which must be respected in the interests of peaceful and orderly co-existence.

However, it is true that even if such acts are extremely serious and may now be classified as crimes of disobedience, it still cannot be said, even provisionally, that they constitute crimes of rebellion or sedition, as has been alleged. The negative implications of the acts would be significantly increased should there be grounds to deem such offences had been committed, even if provisionally as already mentioned, the gravity of those offences being apparent not only from the sentences associated with them but also from the unease and concern felt as a result of these acts by a large part of the population which did not participate in their execution but which could see how the rules of civic coexistence were being profoundly changed.

4. In this respect, it could be advanced that since Article 472 of the Criminal Code governing the offence of rebellion demands that by declaring the independence of a part of the national territory, among other possible objectives (including the full or partial repeal, suspension or amendment of the Constitution), a public and violent uprising took place. In turn, Article 544 demands that for an offence of sedition to be deemed to have been committed, a public and riotous uprising must have taken place to prevent, by force or beyond the legal channels, the application of the laws, or to hinder any authority, official corporation or public officer from the lawful exercise of their duties or from complying with their agreements or administrative or judicial resolutions. The objective pursued does not need have been achieved for the two types of offence to be deemed to have been committed. The acts only need to have been performed with that end in sight.

Therefore, neither the Criminal Code nor the contested Ruling criminalises the defence of a specific political project or an opinion of that kind. It only criminalises certain means of achieving certain objectives: public and violent means in the case of the offence of rebellion, or

the employment of public and riotous uprisings in the case of the offence of sedition.

To justify the consistency of the allegation without losing sight of the stage at which these criminal proceedings initially took place, with regard to the offence of rebellion, we would need to have evidence of the existence of violent acts committed in pursuit of that objective, and we would also need to have evidence linking the appellant to those violent acts. Conversely, with regard to the offence of sedition, we would need to have evidence of acts which could be considered public and riotous uprisings in pursuit of the objectives established in the precept.

TWO.- The appellant denies that the description in the private prosecution and the contested Ruling matches the offence of rebellion. He refers to the existence of legal opinions rejecting the criminal intention of the peaceful proclamation of independence. He complains of the non-existence of a minimally developed allegation beyond an artificial link between the defendant and some alleged violent explosions which would not have taken place. The appellant says that there is no description of the nature of the violent explosion used to justify remand due to possible future causation, nor of the manner in which he may be involved in it. He denies knowing the ENFOCATS document. The appellant pleads that from none of the acts classified as violent (blocking the registration of a company, blocking roads, committing acts of passive resistance) was a judgement derived about whether he would have been in a position of power, what orders he would have given, and how he would have been involved in such acts. Hence, the appellant claims that there is no information to sustain the charge that he has committed an offence of rebellion and no evidence that he was involved.

1. Firstly, notwithstanding the need to emphasise that the assessments which may now be made are provisional given the procedural status of the proceedings, it must be taken into account that, as already noted, the appellant did not act in isolation, but rather from a position of power as a member of a group which acted in coordination to achieve a specific objective: the

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unilateral declaration of independence after a referendum on self-determination, which it would make despite the State opposing that procedure using legal means. That is to say, the firm intention was to proclaim independence in contravention of the legal system of the Spanish State and to openly breach the decisions of the Constitutional Court. In other words, the group was situating itself beyond the State of Law. And the group proclaimed independence from a position of power, which explains why it was not necessary to use violence at that time to seize power as a preliminary step to implementing the plan.

The agreement between various parties, the end pursued and some aspects of the means of achieving it, already appeared sufficiently clearly in Resolution 1/XI of the Parliament of Catalonia, later declared unconstitutional by the Constitutional Court in Constitutional Court Judgement (STC) 259/2015, of 2 December. In that Resolution it was agreed to undertake a whole set of procedures leading finally to a referendum on self-determination, which would be followed, in the event of a vote in favour, by a unilateral declaration of independence for Catalonia. It was stated in that text that "the Parliament of Catalonia solemnly declares the start of the process to create an independent Catalan state in the form of a republic". The Resolution also stated that "the Parliament of Catalonia, as the repository of sovereignty and the expression of the constituent power, reiterates that this House and the process of democratic disconnection from the Spanish State shall not be subject to the decisions of the institutions of the Spanish State, in particular the Constitutional Court, which it considers devoid of legitimacy and jurisdiction following its ruling of June 2010 on the Statute of Autonomy of Catalonia previously voted on by the people in a referendum, among other rulings". And the Resolution finally stated that "the Parliament of Catalonia urges the future Catalan government to comply exclusively with those rules and mandates emanating from this legitimate and democratic House in order to safeguard fundamental rights which may be affected by decisions of the institutions of the Spanish state, such as those specified in the annex to this resolution".

This Resolution was then followed by other resolutions and rules approved by the aforementioned Parliament and specifically by Law 19/2017, of 6 September, on the referendum on self-determination, which was declared null and void by the Constitutional Court through the court order of 7 September and declared unconstitutional by the same court in the Constitutional Court Judgement (STC) of 17 October. Article 4.4 of that law established that "if the counting of votes validly made gives a result of more affirmative than negative votes, it shall mean the independence of Catalonia. To this end, the Parliament of Catalonia shall, within two days of the proclamation of the results by the Electoral Commission, hold an ordinary session to issue the formal declaration of independence of Catalonia, specify its effects and commence the constituent process". Hence the holding of the referendum appeared within the plan formalised by the appellant and the other defendants, as an element which was indispensable to the subsequent unilateral declaration of independence. Therefore, the procedures leading to the actual holding of the legal referendum, were orientated at the same time to achieving independence, the declaration of which was expressly linked to the results of the consultation.

Hence either by making declarations expressing the will to act in defiance of the contradictory decisions of the organs of the State, or by convening demonstrations, the appellant and the other defendants directly or indirectly incited the mobilisation of their supporters, as an indispensable element bolstering the political action orientated to the obtaining of that objective.

2. Secondly, it is easy to come to the conclusion that the Spanish state would not remain passive in the face of repeated infringement of the Constitution and open breach of the resolutions of the Constitutional Court, which referred to the unconstitutional declaration of the rules and resolutions through which the appellant and the other defendants intended to unilaterally achieve the independence of Catalonia, a part of the territory of that State. Likewise, it is wishful thinking to expect that the Spanish State would not object to the handover and its own eradication from the centres of power and the

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administrative centres of the Autonomous Community, and that if necessary it would not resort to the legitimate use of force, over which it has a monopoly to guarantee enforcement of the law.

Neither can it be accepted that the appellant and the other defendants seriously believed that it was the State acting outside the law rather than they themselves, when they expressly boasted they would neither obey the Constitutional Court nor be subject to the democratically approved rules of the Spanish State.

In the light of these situations and others, if through the occupation of politically responsible positions in the Parliament of Catalonia, the appellant and the other defendants incited their supporters to take to the street in support of their actions and force the state to accept independence, it is clearly predictable that violent acts would be very likely to occur in defence of the unilateral declaration of independence. If both the appellant and the other defendants incited their supporters to follow this path, it is clear that they accepted, even if not desired, the presence of violent acts, which if they occurred, could not be classified as individuals overstepping the mark beyond the framework of the plan accepted by all. Therefore, the acceptance of the plan included the acceptance of predictable and highly probable episodes of violence to achieve the proposed end.

3. Thirdly, the approach by which independence would be unilaterally declared after the result of a prohibited referendum that the Spanish Government had announced it would not permit but which would have the support of popular demonstrations as a decisive element to force the State to give in, entailed a high probability of physical confrontation with inevitable episodes of violence.

Although it is not necessary to rehearse here what occurred in detail, and without prejudice to any evaluation merited by other events at the time, on the 20 and 21 September numerous acts of violence took place. Specifically, on the first of those two days during registration in the Regional Ministry of the Economy, acts of violence were perpetrated against the officers of the court and the

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Guardia Civil agents protecting them, in order to prevent them complying with court order governing entry and registration. On 1 October, the date on which the referendum was due to be held, through their previous actions and specifically the appellant's public statements of 21 September, the appellant and the other defendants encouraged a very high number of people to try to open or keep open the polling stations and to cast their vote, despite the fact that they already knew about the serious incidents that had taken place especially on 20 and 21 September, and knew that the Security Services and Police Forces were obliged to prevent the referendum in compliance with the laws in force. On that date, the appellant knew that if his instructions relating to participation in a referendum declared unconstitutional and illegal by the Constitutional Court, were to be followed by his supporters, it would inevitably lead to physical confrontation between them and the State of Law, as represented by the policemen and women enforcing the law, which is essential in a State of this kind. Inciting several million citizens to vote illegally in the knowledge that they will inevitably meet with the physical opposition of policemen and women representing the State of Law and acting solely to ensure enforcement of the most basic rules and the Constitutional Court rulings ordering their enforcement, constitutes extraordinarily serious conduct. This is not just because the aforementioned conduct involves disregarding democratic rules in favour of trying to impose by force their own ideas. It is also because of the sense of unease and agitation felt by citizens within and beyond Catalonia who believe in the rule of law, and because of the genuinely high risk that harmful consequences could have occurred that would have been much more serious than those which thankfully actually did occur.

The appellant and the other defendants incited their supporters by invoking the defence of the right to vote. However, in a democratic system the existence of an alleged right to vote other than through any legal channel cannot be sustained,

when it is specifically the law which ensures that the exercise of the right to vote is safe, equitable, guaranteed and effective.

With regard to acts such as the aforementioned, it cannot be forgotten that the officials were present specifically to exercise their duty of safeguarding enforcement of the basic laws of a Constitutional State, and to try to mislead citizens with statements arguing that it was the police who were breaking the law, not those turning up to vote illegally and those inducing them to do it, is to misrepresent the nature of those acts and to subvert the basic principles of the State of Law. The contention by some leaders that it was the representatives of the State of Law who should have withdrawn so that the citizens could exercise an alleged legitimate right to vote is equally unacceptable.

4. The appellant denies that there is evidence of his participation in the acts. The offences of rebellion and sedition are committed by an active plural subject, which directly implies agreement between those comprising that subject regarding the central lines of execution and the allocation of roles. According to the rules of joint perpetration, all the perpetrators are responsible for each other's acts, except in cases where individuals have overstepped the mark regarding the plan accepted by everyone.

The appellant then held the office of Vice-President of the Parliament. As a member of the Government of the Parliament of Catalonia alongside other members of that Government, he has not been limited to defending independence from a hypothetical position. Rather he has resorted to patently illegal acts in pursuit of the proclamation of independence and in defending his political position has incited his supporters to oppose the actions of the State, which tried to hinder the execution of his plan. By nature, this means of proceeding implies that the supporters of this option must have resorted to defending it through patently illegal acts, since their approach itself excluded the reference to the Law as a useful means of achieving the proposed objective. It is clear that the appellant knew that once the rules the defendants intended to use in support

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were annulled by the Constitutional Court, the State would have to act to prevent them achieving that same objective through faits accomplis. It does not need repeating that as noted above, in these conditions it was predictable and highly probable that confrontations with the agents of the forces of the State trying to enforce the laws in force were going to happen, and it was also predictable and highly probable that those confrontations would degenerate into episodes of violence, as occurred on 20 and 21 September, on the day of the referendum itself, 1 October, and on other occasions. In reality, it was not just unforeseeable but was totally unimaginable that the State would remain passive while its representatives were expelled from Catalonia.

It is true that there is no proof that the appellant participated personally in the execution of specific violent acts. Neither is there proof that he gave direct orders in this respect. However, by publicly defending the unilateral declaration of independence without any consideration or respect for the laws in force in the State of which Catalonia forms part, by inciting citizens to disobey the resolutions of the Constitutional Court in order to implement the resolutions which that court had declared null and void, and by invoking the defence of the right to vote even though it was beyond the law, he used his position to encourage his supporters to publicly demonstrate by occupying public spaces, the aim being to implement the unilateral declaration of independence. It is plain that both the appellant and the other defendants knew that the state could not consent to that kind of act, which disregards and hinders the application of the laws governing the Democratic State of Law, and that it would act through the means at its disposal, including the legitimate, proportionate and justified use of force. In that situation, it was predictable and highly probable that confrontations would occur involving violence.

The appellant, who was acting as Vice-President of the Government of the Autonomous Community, could not have been unaware that by encouraging his supporters to mobilise against the State, he was also encouraging them to confront the forces trying to enforce the rules of that State.

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At the current stage of the proceedings, it cannot be claimed that the appellant, who was Vice-President of the Government which organised the whole process leading to the unilateral declaration of independence, took no part in the actions encouraged by that Government and the direct or indirect incitement to mass mobilisation, which would predictably and very probably give rise to the violent behaviour they never tried to prevent.

Therefore, when the appellant went to the Regional Ministry of the Economy, he must have realised that the turmoil caused by those opposing the execution of the entry and registration orders lawfully agreed by the judicial authority had degenerated into specific acts of violence against the police and the officers of the court, but did nothing to prevent or interrupt that type of behaviour, despite being Vice-President of the Government of the Autonomous Community with sufficient authority to intervene and to guarantee enforcement of the law. It is equally significant that subsequent to 20 October*, in full knowledge of the events that occurred on that date, he called on his supporters to participate in the referendum of 1 October knowing that the state would try to prevent it with all the means at its disposal *[*translator's note: the first of those dates, which appears in the source document, is almost certainly an error and should probably read 20 September*].

In the light of all the aforementioned elements, it may be asserted that there is sufficiently consistent proof of the committing of the offence of rebellion, and secondarily, of a conspiracy to commit that offence (Article 477 of the Criminal Code), insofar as the plan of the appellant and the other defendants necessarily foresaw that the expulsion of the civil servants and military officials of the State from the sites where they were exercising their constitutionally and lawfully protected duties would be inevitably accompanied by acts of violence.

5. The contested Ruling (page 20) expressly assessed the "Enfocats" document, which "reflects (page 40) the existence of a group of individuals (the Strategic Committee) who defined how and when to carry out each of the actions of the process and,

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consequently, of the violence and tumult detailed in the previous resolution...”. The appellant is a member of that Committee. Without prejudice to whether in the investigation phase there will be a deeper examination of aspects related to those who were in one way or another involved in the preparation of the document, to the existence of an agreement between them, and to the coincidence between the content of the document and the events that actually took place or the steps that were taken, it is not necessary now to precisely determine its significance and evidential value. It is sufficient to take into account, as in the contested Ruling, that the document contains in general terms much information on what was later actually executed, insofar as it contains “plan of action for a forced disconnection guaranteeing the success of a potential unilateral path” (page 15 of the contested Ruling).

THREE.- Something similar may be said in respect of the offence of sedition from a circumstantial perspective, although the appellant does not stop at its analysis.

1. The actions of at least 20 September, on the occasion of some of the entry and registration procedures, and 1 October, regarding the attempt to hold the referendum, led to unrest encouraged by members of the Government of the Parliament, the aim being to prevent the execution of the orders of the judicial authority regarding entry and registration or the orders of the authority which, supported by the resolutions of the Constitutional Court and in an attempt to enforce those resolutions, tried to stop the referendum intended by the defendants from being held.

Although those defendants plead that their incitement always occurred within the framework of peaceful activity, it is clear that having resorted to committing patently illegal acts against the State in order to declare the independence of Catalonia, they were directly or indirectly inciting their supporters to act in that way, and a reaction from the State of Law through its Security Services and Police Forces intended to guarantee enforcement of the law was inevitable. Therefore, it was

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predictable and very highly probable that unrest would at least occur intended to hinder the enforcement of orders emanating from competent judicial or administrative authorities.

In both cases, the appellant could neither be considered to be free of any part in the incitement to mobilisation, neither be ignorant of the predictable consequences of that mobilisation. Joint assessment of his instructions on the individuals and their personal actions is not permitted.

2. Therefore, in the event that as a result of the investigation phase, the violent actions may solely be considered as performed by individuals overstepping the mark, incitement to unrest with the evident objective of preventing the application of the laws by force or enforcement of the judicial resolutions intended to implement the agreed registrations or prevent the holding of a referendum which had been declared unconstitutional and therefore illegal by the Constitutional Court which the appellant and the other defendants tried to hold anyway at all costs, would still remain conduct which goes beyond the lawful right to demonstrate. During the events of 20 September and 1 October, according to the evidence assessable at this moment, the supporters of the line defended by the appellant, once incited to defend that line through popular demonstrations, did not restrict themselves to protesting against police or judicial action, i.e. expressing their opinion objecting to those actions. Rather they physically confronted those acting in defence of the law to execute judicial resolutions by trying to hinder through force their legitimate actions, in some cases "constituting human walls actively defending polling stations making police forces retreat on occasions, throwing stones at their vehicles or forcing the agents into the use of a force which would have otherwise been unnecessary" (pages 21 and 22 of the contested Ruling), there being at no time any evidence that the appellant or the political leaders of the Parliament tried to prevent that

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kind of behaviour or its repetition, which at this time and without prejudice to what may result from subsequent stages in these proceedings, may be evaluated as evidence that they accepted and defended such behaviour.

FOUR.- Neither, with similar reservations, can the existence of serious proof of the committing of a crime of embezzlement be ignored. Article 432 of the Criminal Code itself penalises the authority or public official who commits the crimes of unlawful administration (Article 252) or misappropriation (Article 253) of public funds. Article 252 of the Criminal Code punishes unlawful administration, establishing that those with the powers to administrate another person's assets as granted by the law, ordered by an authority or assumed through a legal business, who exceed the exercise of those powers thus causing damage to that other person's estate, may be punished. Article 253 refers to misappropriation.

It is not denied that public money was designated for the holding of the referendum of 1 October and for the objectives associated with it. It is clear that the appellant knew that the Constitutional Court had declared null and void not just the resolutions agreeing the holding of the referendum, but specifically the other resolutions providing for the use of public money to facilitate the holding of the referendum. Once the use of public money for this purpose had been declared illegal, the funds cannot be considered to have been used for a legitimate public end, with the consequent damage.

The Parliament of Catalonia approved its Budget Act 4/2017 of 28 March, establishing in different articles several budget items for electoral and referendum costs, and in Additional Provision 40 budget items for measures relating to the organisation and management of the referendum process, whereby: "1. Within the available budget for 2017, the Government must provide budget items guaranteeing the necessary organisational and administrative resources to tackle the referendum process on the political future of Catalonia. 2. Within

the possible budget, the Government must guarantee the provision of sufficient funds to tackle the needs and requirements deriving from the holding of the referendum on the political future of Catalonia, agreed in section I.1.2 of Resolution 306/XI of the Parliament of Catalonia, with the conditions established in Opinion 2/2017 of 2 March of the Council for Statutory Guarantees."

The State Attorney lodged an appeal to the Constitutional Court in the name of the Prime Minister. The Constitutional Court in full bench accepted the appeal and issued the order of 4 April, suspending the aforementioned Additional Provision and the contested budget items and agreeing to report the suspension to each member of the Bureau of the Parliament, of which the appellant formed a part as Vice-President, warning them "of their duty to prevent or stop any initiative which involves ignoring or evading the agreed suspension". The order ended by "warning them of the possible liabilities, including criminal liabilities, they could incur in the event they do not fulfil that requirement".

Similarly, the Constitutional Court Judgement (STC) 90/2017 of 5 July declared that "the duty of the aforementioned authorities and officials expressed in the order of 4 April remains, but it now refers to preventing or stopping any initiative which could involve ignoring or evading the decision of this Judgement, specifically through the execution of the procedures specified herein".

Therefore, the appellant had been warned of the possible criminal consequences of unlawfully administering public funds by designating them for the holding of a referendum which the Constitutional Court had declared unconstitutional.

FIVE.- Finally, the appellant pleads that the remand situation affects his right to defend himself and the right to participate in the elections or the political process.

With regard to the former, it is clear that the remand situation may involve some difficulties or hardships in preparing his

defence from the moment the defendant was deprived of his liberty. But it is also clear that as long as the rules tending to guarantee his rights in that procedural situation are complied with, and he has not reported any infringement of those rules, the mere allegation of the right to defend himself does not justify dispensing with remand, if all the necessary prerequisites to justify it are met.

With regard to the latter, it is fully evident that this is a very basic right in a democracy. But it is also clear that the effectiveness of that right cannot render the consequences of a criminal procedure null and void, much less when the allegation of very serious offences has been initiated. The appellant pleads that the State of Law requires liberty to guarantee political participation and the representation of those elected. However, that right does not eradicate the obligation to accept the consequences of committing an offence. Neither does it eradicate the consequences which may arise from the existence of sufficient proof of committing that offence, which occasionally may determine the adoption of cautionary measures limiting or depriving rights.

Anyway, the existence of criminal proceedings is not absolutely incompatible with the exercise of the right to political participation, even though in some aspects it could involve significant limitations. The appellant ran in the elections, could vote and was elected. Furthermore, the proportionality of the measure in relation to the exercise of the alleged right, may be taken into account by the Investigating Judge when taking the relevant decisions, at opportune moments based on the circumstances presenting themselves at each moment.

On the other hand, it must be appreciated that although the exercise of public office may involve the existence of some parliamentary impunity, it does not involve total immunity. Furthermore, in this case, the acts were committed, according to the allegations, in the course of a political activity, and were characterised, again according to the allegations, specifically because they were committed with disregard to the basic rules of coexistence contained in the laws governing the democratic system in which his actions and the exercise of his rights unfolded. Hence, these are not political offences

which enable the appellant to be classified as a political prisoner. Firstly, we live in a democratic system which offers numerous channels to peacefully defend any political option. Secondly, the absence of the necessary majorities to achieve a specific objective in a democracy does not permit resorting to violence or unrest to obtain political ends and entering the sphere of criminal law. Finally, the appellant is not accused and temporarily deprived of his liberty for having defended a political idea, but for having used the violent or riotous means provided for in the Criminal Code.

From another perspective, it should be taken into account that when the appellant ran in the elections, both he and the political party to which he belongs already knew about the initiation of the criminal procedure as it was public knowledge, and therefore they were more than fully aware that their political activity could be limited in some aspects by the consequences arising from that procedure.

It is clear that the consequences of remaining a defendant in a criminal procedure cannot be overcome through the selection of the defendant as a candidate in elections.

SIX.- With regard to the risk of repeat offending, the appellant pleads that an analysis should be made of the risks that the person subject to the cautionary measure would recommit an offence.

1. It is true that such a general analysis, which would involve a prognosis that the perpetrator poses a general risk going beyond the principle of guilt by deed. However, a specific analysis can be made of the probability that the perpetrator would have continued with the criminal activity that he was committing had he not been interrupted by the beginning of the proceedings and the adoption of the opportune measures.

Therefore, the aforementioned analysis cannot disregard the acts allegedly already performed by the appellant, essentially consisting of the incitement to mobilise his supporters to reinforce through patently illegal acts the political intention to unilaterally declare independence, defended by the

Government and other institutions of the Autonomous Community. As noted above, given the predictable reaction of the state, it was very highly probable that mobilisation would degenerate into specific episodes of violence, or at least, in the use of unrest to prevent enforcement of the laws of the resolutions of the administrative or judicial authorities, as according to the currently available evidence, actually occurred.

Neither can it be ignored that the plan prepared, signed, and followed by the appellant and the other defendants was executed over a long period of time, at least from 9 November 2015, when Resolution 1/XI of the Parliament was approved, until October 2017, with neither the probability, or even confirmation, of an evident reaction from the Spanish state, nor the existence of episodes of violence or unrest, inclining them to abandon it at any time. Hence they were disposed to continue with the plan despite the inevitable problem that the State of Law was going to oppose especially serious actions performed beyond the law.

There is currently no information suggesting that the appellant now disregards the possibility of occupying the same or a similar political position to that which permitted him, by virtue of the political power which he held, to execute the criminal acts of which he is accused. Neither, beyond some declarations uncorroborated by subsequent acts, is there any information suggesting that his intention, or the intention of the party supporting him as a candidate to the Presidency of the Parliament, is to abandon the idea of a universal proclamation of independence which would then take effect, an objective proposed but not achieved when the State implemented the constitutional and legal mechanisms to defend democracy. Finally, there is no information suggesting that he is not going to follow the paths already embarked upon, with similarly consequences to those which had previously arisen.

Moreover, as noted above, the appellant is someone who despite his criminal status, has been presented, or has been appointed by his party, as a candidate to the Presidency of the Parliament, which would in principle place him in

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a position of power regarding the decisions to be taken in relation to this matter.

2. Therefore, assessment of the risk of repeat offending cannot refer to the fact that he continues to defend the relevance, advisability or desirability of the independence of Catalonia. It can only refer to the defence of the means by which that objective may be achieved, which as noted above to date has been characterised by open disobedience of the legislation in effect through incitement of his supporters to take to the streets and to confront, even physically, those trying to enforce democratically approved laws, the aim being to oblige the State to recognise the proclamation of independence.

To date the dialogue mentioned in the appeal has solely been claimed or planned by the appellant, and by those accompanying him on his political project, as referring exclusively to the means by which the Spanish State may come to recognise the independence of Catalonia. Therefore, it is a claim which would predictably lead again to resorting to patently illegal acts in the event that the State rejects or impedes that claim, as may rationally be expected. Hence, the offer of this kind of dialogue or the invocation of bilateral avenues in these conditions cannot be assessed as evidence of abandoning confrontation with the State through patently illegal acts in order to oblige the State to recognise the independence of Catalonia.

Therefore, this is not about preventing him from defending his political project. Rather, it is about preventing him from doing so using the same means he has employed to date, which has given rise to well-known infamous acts which, as noted above and without prejudice to the results of the investigation phase or the decisions of a Court at the time, are thoroughly criminal in nature.

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SEVEN.- Attached to the appeal submitted by Oriol Junqueras are two statements by the defendants Jordi Sánchez i Picanyol and Joan Josep Nuet i Pujals, likewise on remand.

1. The attachment of those statements cannot be considered an appeal against the decision personally affecting them insofar as it agreed to keep them on remand, since at the time they had not lodged the appropriate appeal within the legal deadline. Therefore, their arguments may only be taken into account in support of the content of the statement presented by the appellant Oriol Junqueras in favour of the case sustained by the latter. Hence, it is unnecessary to examine the specific circumstances relating to the justification of the cautionary measure agreed with regard to the other two aforementioned defendants.

2. The former focuses on rejecting of repeat offending, indicating that it is very difficult from a presumption of innocence standpoint to decide that a citizen should be deprived of his/her liberty not because of the acts he/she has already committed, but because of other acts which it is deemed he/she may come to commit in the future, a possibility that he considers unlikely to be compatible with the principle of culpability.

A succinct reference has already been made to this issue further above. Remand is not justified by the general risk posed by the defendant. It is only justified by the probability that as he has already committed a criminal act, insofar as the same reasons which drove him to commit it remain and also taking into account that he likewise retains the personal or professional position which permitted him to commit it, there would be serious rational justification for thinking that given the opportunity he would continue committing the offence until he had achieved the objective that encouraged it.

As noted above, in this case there is no significant information seriously indicating that the appellant has abandoned his intention to achieve the independence of Catalonia through a unilateral declaration accompanied by mass demonstrations obliging the State to accept that declaration, with the

consequent risk of the re-occurrence of episodes of violence or unrest against those trying to enforce the laws and the effectiveness of the resolutions of the courts acting on behalf of the State, as already occurred in the immediate past. It is true that the appellant no longer occupies the office of Vice-President of the Government of the Autonomous Community, but it is also true that his activity and his political pretensions may place him again in a position of power when decisions are taken on this issue, as noted above.

3. The latter indicates that the decision contested in the appeal is based on two aspects. On the one hand, the decision is based on the "Enfocats" document, the analysis of which he disregards as he considers it pertains to a later stage of the investigation. On the other hand, it is based on the appellant's ability to decide the suitability of each of the acts in the process and the stage at which it was advisable to deploy them. He complains of the absence of evaluation, still in terms of evidence of the probability of the risk of repeat offending, and argues that the political alignments which permitted the mass demonstrations of last September and October are no longer present, and that the mass demonstrations producing the risks described in the private prosecution no longer occur.

The issue has already substantially been examined above. The probability of repeat offending does not depend solely on external conditions, but rather on the attitude of the perpetrator. In other words, the probability of new demonstrations depends significantly on the conduct of the appellant given his political significance, then as Vice-President of the Government of the Autonomous Community and now as candidate to the Presidency of the Government of the Autonomous Community. The political project remains and the appellant has not abandoned it. Neither is there evidence that the path to achieving the proposed objective, along the lines maintained to date, has been abandoned. And the consequences of that path have already led to the acts being investigated in these proceedings. Hence there is a significant risk of the same criminal conduct being repeated.

Therefore, the appeal lodged by Oriol Junqueras Vies is rejected, without prejudice to whether in the light of new circumstances the Investigating Judge may amend the personal status of the appellant or the other defendants.

III. OPERATIVE PART

THE DIVISION AGREES: To reject the appeal lodged by Oriol Junqueras Vies, together with the statements attached to it.

This ruling is thus agreed, submitted and signed by the Honourable Judges forming the Division examining the appeal, as certified by me as legal representative of the Department of Justice.

Mr. Miguel Colmenero Menéndez de Luarca **Mr. Francisco Monterde Ferrer** **Mr. Alberto Jorge Barreiro**

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