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# SUPREME COURT

## Criminal Chamber

## RULING

SPECIAL CASE

Appeal No.: 20907/2017

Decision: Appeal Dismissed

Source: APPEAL

Ruling date: 05/01/2018

Reporting Judge: Mr Miguel Colmenero Menéndez de Luarca

Court Clerk: Ms María Antonia Cao Barredo

Drafted by: FGR

Special Case (Appeal – 1/2017)

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Criminal Chamber

RULING

**Mr Miguel Colmenero Menéndez de Luarca**

**Mr Francisco Monterde Ferrer**

**Mr Alberto Jorge Barreiro**

In the city of Madrid on 5 January 2018

## I. FACTUAL BACKGROUND

**FIRST.-** On 4 December 2017, the examining magistrate issued the following ruling:

"...**I HEREBY RULE**: *that the precautionary measure of* ***PRE-TRIAL DETENTION, WITH COMMUNICATION RIGHTS AND WITHOUT BAIL,*** *as set forth in Preliminary Proceedings 82/2017 of Central Examining Court No. 3, incorporated in this special case, concerning* ***MR ORIOL JUNQUERAS I VIES, MR JOAQUIM FORN I CHIARIELLO, MR JORDI SÁNCHEZ PICANYOL AND MR JORDI CUIXART NAVARRO*** *will be maintained...*"

**SECOND.-** An appeal against the aforementioned ruling has been lodged on behalf of MR ORIOL JUNQUERAS I VIES by Ms Doña Celia López Ariza, his court representative. The Attorney

General's Office and the other parties to the proceedings have been duly informed of this circumstance, in accordance with article 766.3 of the Criminal Prosecution Law.

**THIRD.-** The Attorney General's Office stated in the corresponding proceeding on 15 December that its position was to dismiss the appeal and to maintain the precautionary measure.

In a written pleading presented on 19 December, the procedural representatives of MR JORDI SÀNCHEZ I PICANYOL joined the aforementioned appeal, fully subscribing to the legal arguments stated therein.

In a written pleading presented on 19 December, the procedural representatives of MR JOAN JOSEP NUET I PUJALS joined the aforementioned appeal, fully subscribing to the arguments contained therein.

In a written pleading presented on 19 December, the private prosecution brought by the political party VOX, represented in court by Ms Hidalgo López, opposed the appeal.

**FOURTH.-** On 22 December, this Chamber decided that it would deliberate and rule on this appeal on 4 January 2018 at 10.30 a.m. in a hearing attended by the appellant. This decision is noted in the minutes drawn up for that purpose.

## II. LEGAL REASONING

**FIRST.-** In the ruling made on 4 December 2017, the examining magistrate decided to maintain the measure of pre-trial detention without bail of the person under investigation, Oriol Junqueras Vies, who appeals the aforementioned ruling.

The appellant argues that the measure of pre-trial detention is not based on either the risk of flight or on the risk of destruction of evidence. He therefore considers it necessary to evaluate whether there is any circumstantial evidence that a crime has been committed and whether there is any risk of reoffending.

1. The requirements needed to consider that the precautionary measure of pre-trial detention is constitutionally justified are well known and do not need to be repeated here. The appellant merely refers, firstly, to the need for the existence of sufficient circumstantial evidence that a crime has been committed and of his involvement therein, and, secondly, to the existence of the risk of reoffending.

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2. Some preliminary points must be made. Firstly, the amount of time elapsed would justify the review of the situation of pre-trial detention if, in the light of new circumstances, it might be considered that the reasons taken into account when deciding on or maintaining this provisional measure are no longer applicable.

Secondly, given the procedural stage at which the original ruling was made and at which the present appeal ruling is being decided, the considerations regarding the facts in question and the criminal nature of the conduct (considerations which must have the necessary rationality, examining the plausibility and consistence of the evidence) are provisional in nature.

Thirdly, now is not the time to examine the existence of evidence in respect of the acts attributed to the persons under investigation, but rather to assess whether the circumstantial evidence of the perpetration of a crime and of the appellant's involvement therein are consistent enough to justify the first of the requirements necessary in order to impose the precautionary measure of pre-trial detention (article 503.1.1 of the Criminal Prosecution Law).

Fourthly, although the appellant alleges unequal treatment in respect of the members of the Parliamentary Board, this issue cannot be addressed since the decision regarding his personal situation has not been appealed before this Chamber, which has therefore not had the opportunity to examine the circumstances involved in the respective cases of the members of the Parliamentary Board or to state its criterion.

Fifthly, it must also be taken into account that, according to the available circumstantial evidence, the acts in which the appellant is alleged to have been involved have not been executed in an isolated or individual manner by the appellant but rather they have been carried out as part of plan involving different roles, devised in conjunction with other persons, including members of the Government of Catalonia, of which the appellant was the Vice President, and members of other institutions of Catalonia, with the collaboration of pro-independence associations such as the ANC (Catalan National Assembly) and Òmnium Cultural.

3. The appellant states that the wording of the appealed Ruling "implies that the pursuit of certain political objectives, such as those which are in contradiction with the Constitution to a greater or lesser extent, in itself constitutes criminal conduct". Although the pursuit of the independence of part of the national territory by means of a violent uprising is a crime, the peaceful pursuit of this objective is legitimate; this is something that the Constitution itself promotes since, as stated by the Constitutional Court, Spain is not a militant democracy. Nevertheless, the appellant argues that the political project in pursuit of independence is being criminalised, and that this is a position which cannot be held by this Chamber.

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However, this position cannot be deduced from the appealed ruling. It is legitimate to hold a political position which calls for the independence of part of a national territory. The Constitution allows any political position to be held, including one that argues for the destruction of the Constitution itself and the establishment of a non-democratic system. The appellant can argue the suitability, advisability or desirability of achieving the independence of a part of Spain without committing any crime. As such, the present case has not been brought in order to prosecute political dissent or the espousal of a pro-independence position. The term "political prisoner" is therefore not applicable since nobody is prosecuted for espousing an idea. The system allows the defence of any position and offers many means through which to argue it.

However, in this case, the appellant has not limited himself to holding this theoretical political position or to arguing it through the proper legal channels of a democratic system, but rather he has gone much further.

There is no reason to doubt that the appellant, as Vice President of the Government of Catalonia, together and in agreement with other members of the same government, members of the Parliament of Catalonia and members of other institutions of the same region, with the aim of unilaterally declaring the independence of Catalonia, part of the territory of Spain, has executed a plan which involved the passing of various rules and decisions aimed at achieving that goal, which they have applied in spite of the decisions issued by the Constitutional Court, which declared them unconstitutional, and therefore null and void. Despite these decisions, the appellant, in his capacity as member of the Government of Catalonia, together and in agreement with other persons, has attempted to hold a referendum that the Constitutional Court had previously declared in breach of the Constitution and the law. Furthermore, these persons have made public the result of the votes that were cast and have even proclaimed the independence of Catalonia.

By acting in such a way, executing their plan and implementing it, the appellant and the other participants, acting outside the bounds of the law, have risen up against the Spanish State, against the Constitution, against the Statute of Autonomy of Catalonia and against the rest of the legal system.

The significance of this conduct cannot be trivialised in any way but rather it constitutes an illegitimate act of extreme gravity in a democratic State governed by the rule of law in which abidance with the law is the formal expression of the will of the people approved by its legitimate representatives, along with loyalty to the democratic system which governs it and which imposes certain limitations that must be respected in order to ensure a peaceful and orderly coexistence.

Nevertheless, it is true that despite the enormous gravity of the acts perpetrated, and despite the fact that they could be classified as crimes of disobedience, it is still not possible to

affirm, even provisionally, that they amount to the crimes of rebellion or sedition, of which he has been accused. The significance and negative implications of the acts would increase considerably if reasons existed, albeit provisionally, to consider that such crimes have been perpetrated, the gravity of which not only stems from the corresponding applicable sentences but also from the alarm and concern that these acts have provoked among a significant part of the population who did not participate in their execution but who nevertheless witnessed a profound alteration of the rules of civic coexistence.

4. In this respect, it can be pointed out that article 472 of the Criminal Code, which regulates the crime of rebellion, states that, among other goals (such as repealing, suspending or changing the Constitution in part or in full), declaring the independence of part of the national territory must involve a public and violent uprising in order for it to be considered rebellion. Furthermore, article 544 states that in order for an act to meet the definition of sedition, a public and tumultuous uprising must take place with the aim of impeding, by force or outside legal means, the application of the laws, or of preventing an authority, public institution or public servant from legitimately exercising their duties or fulfilling administrative and judicial decisions. Neither of these two offences requires the achievement of the pursued objective in order for it to be thus considered; it is sufficient to act with the aim of achieving the objective.

As such, neither these articles of the Criminal Code nor the appealed ruling criminalise the pursuit of a political project or the espousal of certain political ideas but rather certain means (public and tumultuous ones in the case of the crime of rebellion) of achieving particular objectives, or the use of public and tumultuous uprising for the aforementioned purposes, in the case of the crime of sedition.

To sustain the consistence of the charges, without losing sight of the fact that we are at the initial stage of this criminal proceeding, it is necessary, in respect of the crime of rebellion, for there to be circumstantial evidence of the existence of violent acts aimed at achieving that objective. Furthermore, it is necessary for there to be circumstantial evidence linking the appellant to the said violent acts. Or, in respect of the crime of sedition, it is necessary for there to be circumstantial evidence of his involvement in acts that can be considered as public and tumultuous uprisings aimed at achieving the purposes listed in the definition of the crime.

**SECOND.-** The appellant denies that what is described in the lawsuit and in the appealed Ruling is encompassed in the definition of the crime of rebellion. He refers to the existence of legal theses which argue that the peaceful proclamation of independence cannot be considered a criminal act. He argues that the accusation is not based on even the most basic reasoning but rather on an artificial link between the persons under investigation and some alleged explosions of

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violence, which never took place. He argues that no description is provided of the nature of this explosion of violence, despite the fact that the likelihood of his causing one in the future is what justifies his detention, or of how he might be involved therein. He denies any knowledge of the ENFOCATS document.

He argues that, in respect of the acts which have been described as violent (hindering the search of the premises of a company, roadblocks, acts of passive resistance), no judgement is made regarding his possible position of control, the orders he may have given and the nature of his involvement in the said acts. As such, he argues that there is no information on which to base the accusation that the crime of rebellion has been committed and no circumstantial evidence of his involvement therein.

1. Firstly, the provisional nature of the appraisals that can be made at this stage of the proceedings notwithstanding, it must be taken into account that, as previously mentioned, the appellant has not acted in isolation but rather from a position of leadership, as a member of a group that acted in a coordinated manner in order to achieve a particular goal: the unilateral proclamation of independence following a self-determination referendum, which was to be held regardless of whether the State, by means of legal instruments, opposed this action. That is to say, they intended to declare independence outside the means offered by law, in breach of the legislation of the Spanish State and announcing their firm intention to disobey the decisions of the Constitutional Court; in other words, acting outside of the rule of law. And they did so through the exercise of power, which explains why they did not need to use the violence at that time in order to attack power as a stepping stone for the execution of their plan.

The agreement between several persons, the pursued goal and certain aspects of the way in which they intended to achieve it, were already quite evident in Decision 1/XI of the Catalan Parliament, which was later declared unconstitutional by the Constitutional Court in Sentence 259/2015, of 2 December. In the aforementioned decision it was agreed to carry out a series of actions aimed at fulfilling the ultimate goal of holding a self-determination referendum, which would be followed, in the case of a favourable result, by the unilateral declaration of the independence of Catalonia. The decision states that the Parliament of Catalonia solemnly declares the initiation of the process for the creation of an independent Catalan State in the form of a republic; that the Parliament of Catalonia, as the repository of sovereignty and the expression of constituent power, reaffirms that this chamber and the process of democratic separation from the Spanish State will not be dependent on the institutions of the Spanish State, in particular the Constitutional Court, which in its opinion lacks legitimacy and competency as a consequence of, among others, the sentence of June 2010 concerning the Statute of Autonomy of Catalonia, previously voted on by the people in a referendum; and that the Parliament of Catalonia urges the

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future government to exclusively comply with the rules or mandates issued from this legitimate and democratic chamber, with the aim of safeguarding the basic rights that could be affected by the decisions of the institutions of the Spanish State, such as those listed in the annex of the decision itself.

This decision was subsequently followed by other sentences and rules approved by the aforementioned parliament, in particular Law 19/2017, of 6 September, concerning the self-determination referendum. The validity of this law was suspended by the Constitutional Court in its ruling of 7 September and declared unconstitutional by the same court in its sentence of 17 October. Article 4.4 of the aforementioned law states the following: "If the counting of validly cast votes yields more votes in favour than votes against, the result implies the independence of Catalonia. With this aim, within two days of the proclamation of the official results by the Electoral Commission, the Parliament of Catalonia will hold an ordinary session to formally declare the independence of Catalonia, to specify its effects and to initiate the constituent process." As such, the holding of the referendum formed part of the plan drawn up by the appellant and the other persons under investigation, as an essential element for the subsequent unilateral declaration of independence. Consequently, the actions geared towards the effective holding of the illegal referendum were also aimed at achieving independence, the declaration of which was explicitly linked to the results of the referendum.

Therefore, directly or indirectly, whether through statements that express a willingness to disregard the decisions contrary to these aims issued by the bodies of the State, or by convening demonstrations, they encouraged the mobilisation of their supporters as an essential element to strengthen the political action aimed at achieving that goal.

2. Secondly, it is easy to draw the conclusion that the Spanish State would not remain passive in the face of the repeated breach of the Constitution and faced with the direct breach of the decisions of the Constitutional Court, which specifically declared the unconstitutional nature of the rules and decisions through which the appellant and the other persons under investigation intended, unilaterally, to achieve the independence of Catalonia, which forms part of the territory of the State. Likewise, it is not at all credible to imagine they would think that the State might accept this new state of affairs unopposed, acquiescing to its eventual disappearance from the centres of power and the administrative centres of the Autonomous Community of Catalonia; or that the State would not resort, if necessary, to the legitimate use of force for the purpose of law enforcement.

Furthermore, it is not credible to suggest that the appellant and the other participants in these acts seriously believed that it was the State rather than them which was acting outside the

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law, when they specifically proclaimed that they would neither obey the Constitutional Court nor be bound by the democratically approved rules of the Spanish State.

Faced with such situations, which have not been listed exhaustively, if the appellant and the other participants, from their respective positions of political responsibility within the Government of Catalonia, encouraged their supporters to mobilise publicly with the aim of strengthening their actions and to force the State to accept independence, it is clear that it was foreseeable that there was a very high likelihood of violent acts occurring in defence of the unilateral declaration of independence. If both the appellant and the other persons under investigation encouraged their supporters to follow this course of action, it is clear that they considered that violent acts could occur, even though this may not have been their wish. As such, any such acts cannot be considered as being outside the bounds of the plan accepted by all of them. Therefore, the acceptance of the plan implied the acceptance of foreseeable and highly likely violent episodes in order to achieve the intended goal.

3. Thirdly, the approach whereby the declaration of independence would take place unilaterally as a consequence of the result of a forbidden referendum, which the Spanish government had warned it would not allow, and which would be followed up with the support of mass mobilisations as a decisive element in order to force the State to give in, entailed a very high likelihood of physical confrontation involving unavoidable violent incidents.

Although it is not necessary to reproduce in detail all that occurred, and without prejudice to the assessment that will be made of other events in due course, many violent acts were committed on 20 and 21 September, in particular on 20 September against the judicial committee during its search of the premises of the Catalan Ministry of Economy, and against the civil guard officers who escorted it, with the aim of impeding the enforcement of the legal decision ordering entry to the ministry building and its search. Furthermore, on 1 October, the scheduled date of the referendum, the appellant and the other participants, in line with their previous actions, more specifically in the declarations made by the appellant on 21 September, encouraged an extremely large number of people to try to open or keep open the premises that were likely to serve as polling stations, as well as to vote therein, despite being aware of the very serious incidents that occurred on 20 and 21 September, among other dates, and despite being aware that the state security forces, in fulfilment of the legislation in force, were obliged to prevent it. On that date, the appellant knew that if his instructions regarding participation in the referendum were followed by his supporters, in spite of it having been declared unconstitutional and unlawful by the Constitutional Court, a physical confrontation would inevitably occur between these supporters and the forces of law and order, represented by the police officers who were enforcing the law, an essential task in a State governed by the rule of law. To actively encourage several million citizens

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to participate in an illegal vote, knowing that they will necessarily meet with the physical opposition of police officers who, representing the rule of law, will act with the sole objective of enforcing its most basic rules, in accordance with the decisions of the Constitutional Court issued for this purpose, constitutes extremely serious conduct; not only because the aforementioned behaviour implies dispensing with democratic rules in order to attempt to forcibly impose one's own ideas, but also because of the alarm and unrest generated among citizens, both within and outside Catalonia, who trust in the rule of law. Furthermore, although fortunately this was not the case, this behaviour posed a real, significant risk of provoking incidents of a far more harmful nature than those which actually occurred.

The appellant and the other persons under investigation encouraged their supporters by invoking their right to vote. However, in a democratic system, there are no grounds to argue the right to vote when the vote in question takes place outside the established legal channels, when it is precisely the law which provides the necessary security, equality, guarantees and effectiveness in order to exercise this right.

It must not be forgotten that the public servants were safeguarding the fulfilment of the basic rules of the constitutional State. It is unacceptable to distort the nature of the aforementioned acts and of the elementary principles of the rule of law, attempting to confuse citizens with statements asserting that those who were in breach of the law were the officers rather than those who turned up to vote illegally and those who encouraged them to do so. It is also unacceptable for some leaders to state that the representatives of the rule of law were the party that should withdraw in order for citizens to exercise a supposed legitimate right to vote.

4. The appellant denies the existence of any circumstantial evidence of his participation in the acts. The crimes of rebellion and sedition are characterised by having multiple actors, which directly implies the agreement between these actors on the main course of action and the distribution of roles. According to the rules of co-authorship, each author must answer for their own acts, except in aspects that can be considered outside the bounds of the agreed plan.

At that time, the appellant held the post of Vice President of the Government of Catalonia. As a member of the Executive Council of the Government of Catalonia, and like the other members of this government, he has not restricted himself to defending independence from a theoretical position, but rather he has also used real means to achieve its proclamation and, under the protection provided by his political position, he has encouraged his supporters to oppose the action of the State in attempting to impede the execution of his plan. By its very nature, this behaviour implies that the supporters of independence had to defend it by means of the aforementioned action outside the bounds of the law, since this approach excluded the law as a

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useful path to achieve the planned objective. It is clear that the appellant knew that once the Constitutional Court annulled the rules on which the persons under investigation aimed to base their action, the State would be forced to act in order to prevent them, by means of a fait accompli, from achieving this objective. In this scenario, as explained above but worth repeating here, it was foreseeable that clashes were highly likely to take place with the state security officers entrusted with enforcing the law and that these clashes were highly likely to escalate into violence. Indeed, this is what happened on 20 and 21 September and on 1 October, the day of the referendum, among other dates. In fact, it was not only unlikely but also inconceivable that the State would remain passive while its representatives were expelled from Catalonia.

It is true that there is no circumstantial evidence of the appellant's direct involvement in specific violent acts. Furthermore, there is no circumstantial evidence that he gave any direct orders in this respect. However, by publicly advocating for unilateral independence, outside the bounds of the prevailing law of the State of which Catalonia forms part, by encouraging citizens to disobey the decisions of the Constitutional Court with the goal of implementing the decisions declared null and void by the aforementioned court and by means of invoking the defence of the right to vote, even outside the bounds of the law, he has urged the supporters of his position to mobilise publicly, occupying public spaces, with the goal of making the unilateral declaration of independence effective. It is clear that both the appellant and the other persons under investigation knew that the State could not and cannot allow such acts, which disregard and impede the application of the laws of a democratic State governed by the rule of law, and that this State would act accordingly, using all the means at its disposal, including the legitimate (and therefore proportionate and justified) use of force. It was foreseeable in such a scenario that clashes involving violence were highly likely to occur.

The appellant, who was acting as Vice President of the Government of Catalonia, could not ignore the fact that by urging his supporters to mobilise against the State, he was also encouraging them to physically clash with the forces entrusted with enforcing the rules of this State.

It cannot be argued, at this stage of the proceedings, that the appellant, who was the vice president of a government that organised the entire process that would eventually lead to the unilateral declaration of independence, had nothing to do with the actions led by that government and with the fact that citizens were being directly and indirectly urged to mobilise, a scenario that was highly likely to lead to violent behaviour, which the appellant and the other persons under investigation made no attempt to impede.

The foregoing is borne out by the fact that when the appellant arrived at the premises of the Ministry of Economy and was able to see that the tumult caused by those opposed to the

execution of the orders to enter and search the premises, legitimately issued by the corresponding judicial authority, had escalated into specific acts of violence against the law enforcement officers and against the judicial committee, he did nothing to put a stop to this behaviour, despite the fact that he was the Vice President of the Government of Catalonia, with sufficient authority to intervene and to ensure compliance with the law. It is equally significant that, despite being fully aware of the events that occurred on 20 September, he called on his supporters to participate in the referendum of 1 October, even though he knew that the State would try to prevent it from being held by using all the means at its disposal.

In light of all the elements described above, it can be affirmed that there is sufficient circumstantial evidence to state that the crime of rebellion has been committed and, collaterally, that a conspiracy existed to commit this crime (article 477 of the Criminal Code), insofar as the plan of the appellant and the other participants necessarily had to foresee that the expulsion of public servants and military personnel from the places where they fulfilled their functions, as enshrined in law and in the Constitution, would inevitably involve violent acts.

5. The appealed ruling (page 20) specifically examines the document entitled "Enfocats". This document refers (page 40) to "the existence of a group of individuals (Strategic Committee) who have fulfilled the function of defining how and when to carry out each of the actions of the process and, consequently of the violence and tumults described in the previous decision...". The appellant was a member of this committee. Without prejudice to the fact that the investigation stage will involve a more detailed analysis and identification of those who, in one way or another, have participated in producing this document, either through the existence of a mutual agreement or in the coincidence between its contents and the events that actually occurred or the steps that were taken, it is not necessary at this stage to draw specific conclusions about its significance and value as proof. At present, it is enough to take into account, as the appealed ruling does, the fact that, generally speaking, it contains many pieces of information that match what actually occurred, insofar as it contains "an action plan to forcefully break away and ensure the success of a possible unilateral path" (page 15 of the appealed ruling).

**THIRD.-** From the perspective of circumstantial evidence, similar observations can be made regarding the crime of sedition, although the appellant does not dwell on its analysis.

1. It can be concluded that at least on 20 September, as a result of some of the entry and search operations that took place, and on 1 October, when an attempt was made to hold the referendum, tumults occurred that were encouraged by the members of the Government of Catalonia. The goal of these actions was either to impede the execution of the orders of the judicial authority in relation to the entry and search of premises, or to impede the execution of the

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orders which, in compliance with the decisions of the Constitutional Court, were aimed at preventing the referendum planned by the persons under investigation from taking place.

Although they allege that the encouragement they gave was at all times within the bounds of peaceful actions, it is clear that, having acted outside the bounds of its authority against the State in order to declare the independence of Catalonia, they directly or indirectly encouraged their supporters to act in the same way. It is equally clear that a State governed by the rule of law would inevitably react, through its security forces, in order to enforce the law. Therefore, the occurrence of tumults aimed at impeding the fulfilment of the orders issued by the competent judicial and administrative authorities was foreseeable with a high degree of likelihood.

It cannot be argued that the appellant was unaware that these acts of mobilisation were being encouraged or that he was unaware of their likely consequences. A comprehensive analysis of his instructions and personal actions rules out this argument.

2. Therefore, if on completion of the investigation stage it were decided that the violent actions could only be considered the individual responsibility of those who carried them out, the appellant's encouragement of the tumult would still constitute behaviour beyond the bounds of the legitimate right to protest, since the clear goal of this tumult was to prevent, by force, the application of laws or the enforcement of the judicial decisions of the Constitutional Court, aimed at enabling the agreed searches and at preventing the holding of a referendum which had been declared unconstitutional but which the appellant and the other persons under investigation were nevertheless determined to hold, whatever the cost. The circumstantial evidence currently available concerning the events of 20 September and 1 October indicates that the supporters of the appellant's position, who were encouraged to defend it though mass mobilisations, did not limit their behaviour to protesting against the actions of the police and judiciary; that is, expressing their disapproval of such actions, but also they physically confronted those entrusted with enforcing the law or with executing judicial decisions, attempting to forcefully impede their legitimate action, in some cases by "building human walls that actively defended polling stations, on occasions forcing police officers backwards, stoning their vehicles or forcing officers to use a degree of force that would otherwise have been unnecessary" (pages 20 and 21 of the appealed ruling). There is no indication that the appellant or the other political leaders of the Government of Catalonia made any attempt to impede the aforementioned behaviour or to prevent it from being repeated. Without prejudice to whatever may arise in the subsequent proceedings of this case, this failure to act may be considered evidence of the appellant's acceptance and defence of the aforementioned behaviour.

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**FOURTH.-** Notwithstanding the fact that the proceedings are at an early stage, serious circumstantial evidence exists pointing to the commission of the crime of misuse of public funds. As it currently stands, article 432 of the Criminal Code punishes any authority or public servant that commits any of the crimes listed in articles 252 and 253 of the Criminal Code, concerning public assets. Article 252 penalises disloyal administration and establishes that it is unlawful for those who are legally empowered to administer the assets of a third party (whether by law, by an authority or through a legal transaction) to overreach these powers and in so doing harm the administered assets. Article 253 refers to misappropriation.

It has not been denied that public money was allocated for the organisation of the referendum of 1 October and for its associated purposes. It is clear that the appellant knew that the Constitutional Court had declared null and void not only the decision to hold the referendum but also, specifically, the decisions to allocate public funds to its organisation. Given that the use of public money for this purpose was declared illegal, it cannot be considered that the funds have been used for a legitimate public purpose, with the corresponding harm to the State that this entails.

The Parliament of Catalonia passed Law 4/2017, of 28 March, concerning the budget of the Government of Catalonia. In various articles, this law establishes several budget allocations for electoral costs and public consultations. Additional provision 40, concerning measures related to the organisation and management of the referendum process, states the following: “1. The government, within the budget available for 2017, must provide allocations to ensure the resources necessary for organisational and management aspects related to the referendum process concerning the political future of Catalonia. 2. The government, within the available budget, must provide a sufficient budgetary allocation to meet the needs and requirements related to the holding of the referendum on the political future of Catalonia, as established in section I.1.2 of Decision 306/XI of the Parliament of Catalonia, in accordance with the conditions set forth in Order 2/2017, of 2 March, of the Council of Statutory Guarantees.”

This law was appealed before the Constitutional Court by the State Attorney’s Office, on behalf of the Prime Minister of the Spanish Government. The Plenary Meeting of the Constitutional Court ruled that the said appeal was admissible and issued a court order on 4 April through which the members of the Governing Board of the Government of Catalonia (of which the appellant formed part, as Vice President of the Government of Catalonia) were notified that the aforementioned additional provision and the contested budget allocations were suspended. The court order warned them that it was “their duty to impede or put a stop to any initiative that

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implied ignoring or evading the said suspension." It also "informed them of the possible consequences, including criminal ones, of failing to obey this request."

Likewise, Constitutional Court Sentence 90/2017, of 5 July, stated that "the duty of the aforementioned authorities and public servants, set forth in the court order of 4 April, remains in force, and now refers to impeding or putting a stop to any initiative that might entail ignoring or evading the verdict of this sentence, in particular by means of carrying out the actions specified therein."

As such, the appellant had been warned of the possible criminal consequences for allocating public funds to the holding of a referendum that the Constitutional Court had declared in breach of the Constitution.

**FIVE.** - Finally, the appellant claims that pre-trial detention affects his right of defence and his right to take part in elections or in the political process.

As regards the first point, it is clear that the situation of pre-trial detention may be somewhat inconvenient in respect of the preparation of his defence, from the moment in which he is deprived of his freedom. However, it is also clear that while the rules intended to guarantee his rights in these legal proceedings are fulfilled, and no complaint has been lodged of any breach of the said rules, the argument of the right of defence in itself does not justify lifting the measure of pre-trial detention if the requirements necessary to justify it exist.

As regards the second point, the right to political participation is evidently a fundamental democratic right. Nevertheless, it is also clear the effective exercise of this right cannot cancel out the consequences of criminal proceedings, especially when they involve such serious crimes. The appellant claims that the rule of law demands freedom in order to guarantee his political participation and the representation of those who have elected him. However, this right does not cancel out the obligation to assume the consequences of the perpetration of a criminal offence, or the consequences that may derive from the existence of circumstantial evidence that a crime has been committed, which on occasions can determine the ordering of precautionary measures that restrict or deprive the person under investigation of certain rights.

In any case, the fact of being involved in criminal proceedings is not at all incompatible with the exercise of the right to political participation, although in some aspects it may entail important restrictions. The appellant was able to stand in the election, was able to vote and has been elected. Furthermore, the proportionality of the measure in respect of the exercise of this right may be taken into account by the investigating judge when the relevant decisions are made, at specific points in the proceedings and according to the circumstances involved.

Meanwhile, it is important not to disregard the fact that, although some political positions enjoy legal privilege, they do not enjoy impunity. Furthermore, in this case, the alleged crimes

under investigation have been committed in the exercise of political activity. Indeed, according to the investigation, one of the features of the alleged crimes is a disregard and contempt for the basic rules of society contained in the laws that govern the democratic system in which their actions and the exercise of their rights are carried out. Therefore, they are not political crimes through which the appellant may be classified as a political prisoner. Firstly, because we live in a democratic system that offers multiple ways to peacefully advocate for any political option. Secondly, because in a democratic system the absence of a qualified majority to reach a certain objective does not make it permissible to resort to violence or tumult, going beyond the bounds of the law, in order to achieve the proposed goals. And, finally, because the appellant is not subject to criminal proceedings and provisionally deprived of his freedom for defending a political idea, but rather for resorting to violent or tumultuous means, as set forth in the Criminal Code.

From another perspective, it must be taken into account that when the appellant stood in the election, both he and the political party to which he belongs knew that criminal proceedings had been initiated, given that this was public knowledge, and therefore were well aware that his political activity could be restricted in some ways as a result of the consequences of these proceedings.

It is clear that the consequences of his status as an investigated, prosecuted, charged or accused party in criminal proceedings cannot be avoided by designating him as an election candidate.

**SIX.-** As far as the risk of reoffending is concerned, the appellant argues that an assessment must be made of the risk of him committing further offences, given the precautionary measures in place.

1. This assessment must not be conducted in general terms, which would involve a prediction of general danger in isolation from the principle of direct responsibility for the acts carried out, but instead it must be conducted specifically in terms of the likelihood of the person under investigation persisting in the criminal activity described above, which has been interrupted by the start of these proceedings and by the adoption of the opportune measures.

As a consequence of the foregoing, in the aforementioned analysis it is not possible to overlook the acts allegedly already carried out by the appellant, which basically consist of encouraging the mobilisation of his supporters in order to strengthen by means outside the bounds of law the political aim of the Government of Catalonia and of other institutions of the Autonomous Community of Catalonia, namely the declaration of unilateral independence. As stated above, given the likely reaction of the State, this mobilisation was very likely to lead to specific violent incidents or at least to a tumult in order to prevent the fulfilment of the laws and

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decisions of the administrative and judicial authorities, as indeed occurred according to the available circumstantial evidence.

Neither can it be overlooked that the plan drawn up, subscribed to and undertaken by the appellant and the other persons under investigation, was implemented over a long time frame, starting at least as far back as 9 November 2015, when Decision 1/XI of the Parliament of Catalonia was approved, and continuing until October 2017. At no time were they persuaded to abandon this plan by the likelihood, and even the certainty, of an obvious reaction by the Spanish State, or by the occurrence of violent incidents or tumults. As such, they were willing to persist in implementing their plan despite the inevitable obstacles that a State governed by the rule of law would put in their way in order to combat extremely serious actions perpetrated outside the bounds of the law.

There is no evidence to date of the appellant's intention to give up the chance of holding the same political position, or a similar one, which enabled him, thanks to the political power at his disposal, to commit the criminal offences with which he is charged. Moreover, apart from declarations not backed up by subsequent deeds, there is no indication that either he or the party that has put him forward as its candidate for the Presidency of the Government of Catalonia are willing to abandon the idea of unilaterally proclaiming the independence of Catalonia with the goal of making it effective, which was their proposed but unfulfilled objective when the State initiated the constitutional and legal measures to defend democracy. In continuing to pursue this objective, there is also no indication that they will not follow the same course of action as the one previously employed, with similar consequences to those which have already occurred.

Meanwhile, as has been stated above, the appellant is the person who, despite his personal situation regarding criminal proceedings, has decided to stand, or has been put forward by his party, as a candidate to the Presidency of the Government of Catalonia, which in theory places him in an important position in terms of making decisions on this matter.

2. Therefore, the assessment of the risk of reoffending is not and cannot be based on the fact that he continues to defend the pertinence of, suitability of or wish for the independence of Catalonia, but rather on his defence of how to achieve this goal, which so far, as stated above, has been characterised by openly disobeying the established laws and by encouraging supporters to take part in mass mobilisations that may even involve physical confrontation with those attempting to enforce democratically passed laws, all with the goal of forcing the State to recognise the independence proclaimed by the appellant and his supporters.

To date, the dialogue referred to in the appeal has only been sought or suggested by the appellant and by those who share his political project exclusively with a view to determining the way in which the Spanish State might recognise the independence of Catalonia. It is therefore an aspiration which, once rejected or impeded by the State, as is likely to occur, will in all likelihood

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lead him, once again, to pursue a course of action that is outside the bounds of the law. The fact of offering dialogue under such conditions or of calling for the establishment of a bilateral relationship cannot be considered an indication of his willingness to abandon his confrontation with the State by means of a course of action outside the bounds of the law with the goal of forcing the State to recognise the independence of Catalonia.

As such, it is not a question of preventing him from continuing to defend his political project, but rather of preventing him from doing so through the course of action followed to date, which has led to the occurrence of the actions described above, which, without prejudice to the result of the investigation stage or to the future verdict of a court, strongly appear to be criminal in nature.

**SEVEN**.- The appeal lodged by Oriol Junqueras has been joined, by means of written pleadings, by Jordi Sànchez i Picanyol and Joan Josep Nuet i Pujals, who are also under investigation and the former of whom is also being held in pre-trial detention.

1. The fact that they have joined the appeal cannot be considered an appeal against the decision regarding their personal situation, including the pre-trial detention of the former, since they did not lodge an appeal before the legal deadline. Therefore, their arguments can only be taken into account insofar as they support the contents of the appeal lodged by the appellant Oriol Junqueras. This being so, it is unnecessary to examine the specific circumstances related to the justification of the precautionary measures decided in respect of the aforementioned two persons.

2. The first pleading focuses on denying the risk of reoffending, stating that on the basis of the presumption of innocence it is difficult to argue that a citizen must be deprived of his freedom not because of actions already carried out, but because of others that he is considered capable of carrying out in the future. He considers that this situation is unlikely to be compatible with the principle of individual guilt.

This issue has been briefly referred to above. Pre-trial detention is not justified on the grounds of the general danger that may be posed by the person under investigation but rather on the grounds that, having already acted in a way that may be deemed criminal, and taking into account that the same reasons that led him to act in this way still exist, and moreover that he maintains the personal or professional position that enabled him to act in such a way, it is entirely reasonable to assume that, given the opportunity, he will continue to act in the same way until he reaches the goal that led him to follow this course of action.

In this case, as has been stated above, no serious evidence exists that the appellant has given up his goal of achieving the independence of Catalonia through a unilateral declaration accompanied by mass mobilisations in order to force the State to accept it. As such, the risk exists, as made clear in the immediate past, of violence or tumults against those who, acting on behalf of

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the State, attempt to enforce the laws and the decisions of the courts. Although it is true that the appellant no longer holds the position of Vice President of the Government of Catalonia, it is nevertheless true that his activities and political aspirations may place him once again, as explained above, in a position of leadership when it comes to making decisions on this issue.

3. As regards the second pleading, he states that the ruling which he is appealing is based on two aspects: on the one hand, the "Enfocats" document, which he does not assess here, considering its examination part of a later stage of the investigation; and, on the other hand, the capacity of the appellant to decide on the suitability and timeframe for implementing the various actions of the so-called "process". He complains of the lack of an evidence-based evaluation of the likelihood of the risk of reoffending and argues that the political circumstances that facilitated the mass demonstrations of September and October no longer exist and that mass mobilisations of the sort that create the risks described in the criminal proceeding no longer take place.

This issue has largely been dealt with above. The likelihood of reoffending does not only depend on external conditions but also on the appellant's attitude; in other words, the likelihood of more mass mobilisations taking place depends strongly on the appellant's behaviour, given his political importance, both before as Vice President of the Government of Catalonia and now as a presidential candidate. The political project still exists and the appellant has not abandoned it. There is also no firm evidence that he has abandoned the course of action followed to date in order to achieve the stated goal. And the adoption of this course of action has led to the acts that are being investigated in this criminal proceeding. Therefore, a significant risk of reoffending continues to exist.

In light of the foregoing, the Court dismisses the appeal lodged by Oriol Junqueras Vies, without prejudice to the fact that a change in circumstances may lead the investigating judge to alter the personal situation of the appellant and that of the rest of the persons under investigation.

## III. APPEAL VERDICT

**THIS COURT RULES**: To dismiss the appeal lodged by Oriol Junqueras Vies, as well as the attached pleadings.

This verdict has been agreed, issued and signed by the distinguished members of this Court, to which I testify in my capacity as Court Clerk.

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