

Application number : 2018/1073
Date of decision : 22/05/2019

REASONING FOR THE DISSENTING VOTE

1. The applicant was detained on remand on 01/11/2017 for the crimes of attempting to overthrow the constitutional order and attempting to overthrow the Government of the Republic of Turkey or to prevent it from carrying out its duties. The applicant claimed that his right to liberty and security had been violated as a consequence of his unlawful detention. Majority of the Court voted in favour of the applicant's detention being lawful and proportionate and thus construed absence of violation of rights.
2. The remand order contains allegations that the applicant was the leader and the organiser of the publicly known "Gezi Events", that the applicant provided financial support to those persons participating in the events, also that the applicant participated in the process of the coup attempt by communicating with H.J.B., allegedly one of the organisers of the coup attempt who held a meeting in a hotel in *Büyükdada* (Prince's Islands) on 15-16 July 2016, as well as with other foreign nationals. The indictment drafted against the applicant on 19/02/2019, however, does not elucidate his participation in the coup attempt of 15 July, neither did it corroborate the content of the applicant's relationship with the said individual as well as with the other foreign nationals. Thus, the charges brought against the applicant were based on the reasoning of the remand decision by the Criminal Peace Magistrate, the allegation that the applicant was the leader and organiser of the "Gezi Events" that were considered as "*a revolt to overthrow the State and the Government of the Republic of Turkey and to prevent it from carrying out its duties*".
3. Hence, the prosecution would be expected, under these circumstances, to present the strong indications of the relationship between the criminal aspect of the said events and the applicant himself. To that effect, the remand decision and the indictment include transcriptions of telephone communications, some photographs on the applicant's mobile phone as well as some witness statements and correspondence among third persons. The prosecution has failed to substantiate that these events individually or as a whole constituted strong evidence as to committal of the crime, which would be the necessary grounds for the applicant's detention on remand.
4. It should, first and foremost, be mentioned that the events of which the applicant is claimed to have been the leader and the organiser, as mentioned in the majority decision of our Court, are the meetings and demonstrations that started on 27/05/2013 in response to the planned landscape and zoning works in Istanbul Taksim Square which consequently spread to many provinces throughout the country (see § 9). As explained in the October 2014 report of the Human Rights Institution of Turkey, these events were interpreted in various forms by the public. While some people regarded them as events that have started initially with environmental concerns which then turned into demonstrations whereby people massively protested government policies in many areas, some others referred to these events as a foreign supported anti-government revolt that started as a pretext for some uprooted trees (§ 9).
5. The duty of the Constitutional Court is not to acknowledge either one of these interpretations. Evidently, the events which spread to almost all the provinces in Turkey included both peaceful demonstrations, and acts of violence that resulted in casualties and

injuries. Hence, the Constitutional Court abstains from a categorical approach when reviewing the individual applications related to the Gezi events and focuses firstly on whether the meeting in which the applicants participated was a peaceful one or not. Even in cases where the meetings and the demonstrations in which the applicants had participated turned into violent acts, the Court's main consideration is to determine whether the applicant personally had resorted to violence or not.

6. In an application regarding the freedom of assembly and association, the Constitutional Court ruled that the conviction of the applicants of the crime of organising and managing an illegal meeting following an assembly and demonstration that did not contain any act of violence, has violated the right to assembly and association as guaranteed in Article 34 of the Constitution (*Ali Orak and Irfan Gül*, Application No: 2014/10626, 18/04/2018). In another application, the Court considered that the applicant's physical treatment by the police after she fell down while escaping from the police during an assembly and demonstration she stated that she was participating to protest extreme force used by the police during the Gezi events, has violated the ban for inhuman treatment as well as the freedom of assembly and association. While acknowledging that the said demonstrations in this application turned into violent acts and that the physical intervention by the law enforcement was necessary to ensure public order, the Court pointed out that the "applicant's involvement in these violent acts could not have been established" and that the law enforcement's disproportionate treatment of the applicant who did not display any aggression would create a "chilling" effect on the exercise of the freedom of assembly and association (*Özge Özgürengin*, Application No: 2014/5218, 19/04/2018, §§ 68, 107, 108).
7. In this regard, what is required in the existing application is to review whether the prosecution was able to establish on relevant and necessary grounds that there have been strong indications showing the applicant's relationship with the acts of violence which would eventually constitute a crime. The majority decision of the Court, however, did with stating that "*considering his social status and his national and international ties, the applicant was in a position to foresee that the events were evolving into acts of violence and the consequences of these events*", and that his detention on remand on the grounds of the prosecution's acknowledgment as strong indications of his involvement in these events (supporting the spreading of the events, holding meetings to that effect, trying to shape national and international public opinion) as stipulated in the remand order and the indictment, cannot be regarded as arbitrary and unfounded (§ 70).
8. This assessment cannot be regarded as establishing the applicant's link with the acts of violence. Firstly, the applicant's participation in the Gezi events and his support for these events, cannot be regarded alone as evidence of his committal of a crime. Because, everyone can organise an assembly and demonstration, join the organisers and wish to spread such activities, on condition that these acts are peaceful. What is essential here, is to establish with concrete facts the applicant's relation with any act of violence.
9. In this regard, the statements in the intercepted phone conversations concerning the purchase and distribution of gas masks and goggles should be underlined. Obviously, if it is established that these masks and goggles were provided to the demonstrators clashing with the police during the events, this could be regarded as strong evidence for the committal of a crime. However, despite the applicant's defence on the contrary, the prosecution has not provided any information showing that these materials have been used in the acts of violence and by members of terrorist organisations. Furthermore, in many

cases brought in the aftermath of the Gezi events, the courts acknowledged while ruling acquittal of the accused that articles such as gas masks and goggles could be used for peaceful purposes and that the accused individuals “carried these articles to protect themselves against the teargas used by security forces during the events” (Istanbul 50th First Instance Criminal Court, E. 2013/460, K. 2013/790, 19/12/2013. For other acquittal decisions, please see, Istanbul 19th First Instance Criminal Court, E. 2013/408, K. 2014/145, 26/12/2014; Istanbul 33rd First Instance Criminal Court, E. 2014/88, K. 2015/145, 29/04/2015).

10. Besides, the applicant’s statements in his intercepted phone conversations during the Gezi events such as “how these demonstrations would change the political situation” and “spreading the events in Anatolia” should not be considered and interpreted separately by isolating them from the entirety and the context of the exchange. The statement of the applicant during his phone conversation with the individual I.P. on 25/10/2013 where he said “what we imagine and would like to see after the Gezi events is that local governments would become more transparent, a more participative model would emerge, in other words the energy coming out of these events would continue to function as an element of democratic opposition or democratic pressure...” shows that he considered these events as pressure exerted by democratic opposition. Likewise, his statements in these phone conversations such as “it would be useful if the organisers of these meetings and demonstrations met with government officials and especially with the (then) Minister of Justice, dialogue had to be started with officials, withdrawal of money from a bank could put the economy in difficulty, giving way to an economic crisis should not be the field of action for leftist democratic groups” are in support of the applicant’s defence.
11. Third party conversations as to the applicant’s financial assistance to the participants of the events are also presented as strong evidence for the committal of a crime. It cannot be understood from the investigation file whether these individuals did participate in the Gezi events, and more importantly whether they had any contact with the applicant and whether they obtained any financial aid from the applicant. Thus, it would not be appropriate to regard these conversations as strong evidence for the committal of crime.
12. In addition, certain photographs seized on the mobile phone of the applicant were also considered as strong evidence for the committal of crime. One of these photographs is a map showing Turkey as divided into regions. The applicant stated in the beginning that he has seen this map in a publication abroad, that he considered it as relevant to the Sevres Treaty and he saved the map as archive material. In his petition submitted to the Criminal Peace Magistrate on 07/03/2018, the applicant stated that he remembered the map wrongly and that the said map was from the training manual of ANG Foundation on “Main bee production”, that the map showed regional origins of bee species and that he photographed the map while he was following an activity of the said Foundation in Artvin. The prosecution did not present any evidence to refute this defence statement of the applicant. Similarly, factual grounds have not been provided to establish strong evidence neither for the photograph found on the applicant’s mobile phone of a banner used in the Gezi events and which he said he had not shared with other people, nor for the photograph taken during a funeral where masked individuals opened the poster of the leader of the terrorist organisation.
13. It was alleged that the applicant was in contact with some internationally renowned persons and organisations, that he frequently travelled abroad during the Gezi events and held

meetings with members of the European Parliament and some foreign individuals, including ambassadors and consuls and that he attempted to provide support for the events from the West. However, the prosecution failed to establish the link between these activities of the applicant and the violent acts during the Gezi events, and the charges brought against him.

14. In light of the reasons explained above, it is understood that the prosecution failed to establish the factual grounds as to the applicant's committal of the crime of overthrowing the government, and the existence of strong evidence to that effect necessary for his detention on remand.
15. Furthermore, it is not possible to agree with the assessment as to the proportionality of the applicant's detention following the assessment of strong suspicion of crime as stated in the majority decision. The mere existence of strong evidence for the committal of a crime is not sufficient for the detention measure to be lawful. Detention should, at the same time, be proportionate. In this regard, *necessity* should also be assessed as an element of proportionality. The Constitutional Court has reviewed the necessity of detention in cases where there had been a significant time lapse between the date of start of investigation and the date of detention. In cases where detention is ordered following no action for longer periods of time after the start of the investigation, the prosecution bears the responsibility to prove why detention would be necessary. The Constitutional Court ruled in previous cases that resorting to the detention measure six months after the initiation of investigation without providing any further evidence other than those included in the initial investigation file, and failure to provide a reasonable explanation as to why detention measure became "necessary" is to be considered as an element of violation of the right to liberty and security of the person (see *Erdem Gül and Can Dündar* [GC], Application No: 2015/18567, 25/02/2016, §§ 79-81).
16. In the present case, the applicant is essentially charged with managing and organising the Gezi events which took place in mid-2013. Hence, following these events, investigation 2013/1120 was initiated against the applicant together with some other suspects, which then was included in the investigation file 2014/40852. Within this framework, interception and physical surveillance orders were given against the applicant. Yet, no custody or remand orders were given, nor the applicant was called in to provide statement in the meantime. The applicant was remanded on 01/11/2017, more than four years after the initial investigation. The vast majority of the evidence presented in the investigation file were based on telephone conversations of the applicant with some individuals during the Gezi events. In other words, almost all the main evidence presented as grounds for the applicant's detention are already those included in the initial investigation file. Without presenting any new significant evidence, the prosecution failed to prove why the applicant's detention after more than four years, was *necessary*.
17. Within this context, it should also be assessed whether the applicant's detention would have been deemed proportionate in state of emergency, as stipulated in Article 15 of the Constitution. In some other applications for detention during the state of emergency where the Constitutional Court found violation of the right to liberty and security on the grounds of absence of strong suspicion of crime, it did not reach a different conclusion under Article 15 of the Constitution (see *Mehmet Hasan Altan (2)* [GC], Application No. 2016/23672, 11/01/2018, § 157; *Şahin Alpay* [GC], Application No. 2016/16092, 11/01/2018, § 110; *Ali Bulaç*, [GC], Application No. 2017/6592, 03/05/2019, § 71). Since the presence of strong suspicion of a crime continues to be the preliminary condition for detention even during

state of emergency, the applicant's detention on remand in the present case has violated his right to liberty and security within the meaning of Article 15 of the Constitution.

18. As per the reasons explained above, I am of the opinion that the applicant's right to liberty and security as guaranteed in Article 15 of the Constitution has been violated and thus, I do not agree with the majority decision to the contrary.

Zühtü ARSLAN
President