

Ajavon v Benin (provisional measures) (2018) 2 AfCLR 470

Application 013/2017, *Sebastien Germain Ajavon v Republic of Benin*

Order, 7 December 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSALOULA

The applicant, a politician, alleges the violation of many provisions of the African Charter, including those relating to the right to a fair trial, following his sentencing to 20 years' imprisonment for drug trafficking. The Court ordered the respondent State to stay the execution of the judgment of the national court until it had rendered its decision on the merits of the application.

Jurisdiction (provisional measures, prima facie jurisdiction, 28)

Provisional measures (risk of execution of prison sentence, 44-46)

I. The Parties

1. The Applicant is Mr Sébastien Germain AJAVON (herein-after referred to as "the Applicant"), a businessman and politician of the Republic of Benin.

2. The Respondent State is the Republic of Benin (hereinafter referred to as "the Respondent State") which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. The Respondent State also deposited on 8 February 2016 the declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive cases directly from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Court was seized of the Application on 27 February 2017. The Applicant submits that, between 26 and 27 October 2016, the *gendarmerie* of the Autonomous Port of Cotonou and the Benin Customs authorities were alerted to the presence of a large quantity of cocaine in a container aboard the ship "MSC Sophie" transporting frozen goods.

4. Based on the information given by the Intelligence and Documentation Department of the Office of the President of the Republic of Benin, the Public Prosecutor's Office and the Benin Customs, as of 28 October 2016, initiated legal proceedings against the Applicant

and his three employees for trafficking eighteen (18) kilograms of pure cocaine found in a container of frozen goods imported by *Société Comptoir Mondial de Négoce* (COMON SA) of which he is the Chief Executive Officer.

5. On 4 November 2016, the Criminal Chamber of Cotonou First Class Court of First Instance Court, by Judgment No. 262/IFD-16, acquitted the Applicant and one of his employees for lack of evidence and for benefit of the doubt. The other two employees were released without charge.

6. The Applicant alleges that, in the process, the Customs Administration suspended the container terminal of the *Transit and Consignment Brokerage Company* (SOCOTRAC) and withdrew its customs brokerage license. The High Authority for the Audiovisual and Communication (HAAC), by two decisions both dated 28 November 2016, disconnected the signals of the radio station SOLEIL FM and the TV channel SIKKA TV. The Applicant alleges that he is the majority shareholder in all these companies.

7. In his application of 27 February 2017, the Applicant indicated that he brought the matter before this Court in the belief that the international drug trafficking case and the subsequent proceedings were part of a conspiracy orchestrated against him and violated his human rights guaranteed and protected by international human rights instruments.

8. Moreover, in October 2018, the Applicant reported the creation by the Respondent State, in July 2018, of a special court to try him once again for the same case of drug trafficking, and actually sentenced him to twenty years in prison.

9. The Applicant argued that the sentences passed against him by CRIET on 18 October 2018 violate the international conventions ratified by the Respondent State and place him in a precarious and extremely serious situation. He also argued that the Respondent State basically violated his right to a fair trial in several respects, citing the following violations: the right to be notified of the charges levelled against him; the right of access to the record of proceedings; the right to have his cause heard by the competent national courts; the right to respect for the principle of reasonable time; the right to respect for the principle of the independence of the judiciary; the right to assistance by Counsel; the right to respect for the principle of *non bis in idem* and the right to respect for the principle of two-tier jurisdiction.

III. Summary of procedure before the Court

10. The Request was received at the Registry on 27 February 2017 and was served on the Respondent State on 31 March 2017. By a

letter dated 29 May 2017 received at the Registry on 1 June 2017, the Respondent State filed its brief on preliminary objections.

11. In a letter dated 17 July 2017 received by the Registry on 19 July 2017, the Applicant filed his rejoinder to the preliminary objections raised by the Respondent State; and on 29 August 2017, the Respondent State submitted its rejoinder on the preliminary objections.

12. On 9 October 2017, the Applicant responded to the rejoinder; and on 14 November 2017, the Respondent State submitted its response to the Applicant's observations on its rejoinder.

13. On 27 November 2017, the Registry notified the Parties that the written procedure in the case was closed.

14. In a letter dated 6 November 2017 received at the Registry on 11 December 2017, the Applicant alleged further attacks against his person, the use of new methods by the Respondent State to stifle his businesses and, for that reason, solicited a public hearing. He reiterated this prayer on 26 March 2018.

15. On 9 May 2018, the Court held its public hearing, placed the matter under deliberation and allowed the Respondent State leave to file its response to the Applicant's new observations within thirty (30) days. The response was submitted at the Registry on 13 May 2018.

16. In a letter dated 15 October 2018 received on 16 October 2018, the Applicant brought new allegations on the matter before the Court, arguing in his written pleadings that while the Court's decision was being awaited by the Parties, the State of Benin, by a law dated 2 July 2018, created a special court named "Anti-Economic Crimes and Terrorism Court (hereinafter referred to as "CRIET") to once again hear the case of international drug trafficking in which he was involved. Alleging that this new procedure involves further violations of his rights, the Applicant requested that the Court issue an order requesting the Respondent State to stay its proceedings before CRIET.

17. On 24 October 2018, the Registry notified the Respondent State of the Applicant's new allegations.

18. On 26 October 2018, the Applicant filed another letter in which he referred to the CRIET judgment No. 007/3C.COR of 18 October 2018 convicting him, and prayed the Court to issue, as an interim measure, an order for a stay of execution of the said judgment. This letter was registered in the Registry on 31 October 2018.

19. On 31 October 2018, the Registry received from the Applicant a letter dated the same day by which the Applicant tendered the record of proceedings of the General Assembly of Cotonou Magistrates highlighting the illegality of CRIET, and requested the Court to take all appropriate measures, including a stay of execution of the judgment delivered by CRIET until examination of the cassation appeal.

20. On 5 November 2018, the Applicant addressed to the Court

a *corrigendum* to the letter dated 31 October 2018, requesting the Court to consider a stay of execution of the judgment of CRIET until its decision and not until consideration of the cassation appeal. The said letter was received at the Registry on 20 November 2018 and served on the Respondent State on the same day.

21. On 7 November 2018, the Registry notified the Respondent State of the Applicant's letters dated 26 and 31 October 2018, respectively.

22. On 12 November 2018, the Applicant reiterated his request for a stay of execution of CRIET judgment in a letter received at the Registry on 19 November 2018 and served on the Respondent State on 20 November 2018.

23. On 13 November 2018, the Respondent State submitted its observations on admissibility of the new allegations filed by the Applicant. The Respondent State's submissions were received on 14 November 2018 at the Registry, which served the same on the Applicant on the same day.

24. On 20 November 2018, the Registry received the Respondent State's observations as contained in its letter of 19 November 2018, regarding the stay of execution of CRIET judgment. The Registry transmitted the said observations to the Applicant on the same day.

25. On 21 November 2018, the Applicant tendered before the Court a set of documents in support of the allegations of violation of his rights, consisting of a study report conducted by the Benin Bar Association on CRIET, the transcript of the statement of the President of the National Union of Benin Magistrates and a copy of the judgment delivered by CRIET. The said documents were forwarded to the Respondent State on the same day.

26. On 5 December 2018, the Court issued an interim order to set aside the deliberation and reopen the written proceedings. It also admitted the new evidence filed by the Parties after the matter was placed under deliberation.

IV. On *prima facie* jurisdiction

27. In dealing with any Application filed before it, the Court has to ascertain that it has jurisdiction pursuant to Rule 39 of its Rules and Articles 3 and 5(3) of the Protocol.

28. However, in examining a request for provisional measures, the Court need not establish that it has jurisdiction on the merits of the

case, but simply satisfy itself that it has *prima facie*¹ jurisdiction.

29. Article 3(1) of the Protocol stipulates that: “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instruments ratified by the States concerned.”

30. In terms of Article 5(3) of the Protocol, “The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”

31. As specified in paragraph 2 of this Order, the Respondent State is a party to the Charter and to the Protocol, and also has deposited the declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations as per Article 34(6) of the Protocol read together with Article 5(3) thereof.

32. In the instant case, the rights of which the Applicant alleges violation are protected by the provisions of Articles 3(2), 5, 6, 7, 14 and 26 of the Charter.

33. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. On the provisional measures requested

34. The Applicant prays the Court to order a stay of execution of the 18 October 2018 Judgment No. 007/3C.COR rendered by CRIET.

35. He contends that, notwithstanding his appeal before the Court of Cassation, the Respondent State can at any time proceed with execution of the judgment of CRIET; adding that CRIET decisions are not subject to appeal and that the appeal before the Court of Cassation is an extraordinary remedy.

36. The Applicant submits further that execution of judgment No. 007/ 3C.COR of 18 October 2018 rendered by CRIET, would have unforeseeable consequences for him, and prays the Court take the decision for a stay of execution of the said judgment, as a matter of urgency.

37. The Respondent State submits that the Applicant cannot ask the Court for a stay of execution of a judgment of a Benin court under

¹ Application No. 002/2013. Order of 15/3/2013 for Provisional Measures, *African Commission on Human and Peoples' Rights v Libya* (herein-after referred to as *African Commission on Human and Peoples' Rights v Libya*, Order for Provisional Measures”) para 10; Application No. 024/2016. Order of 3/6/2016 for Provisional Measures, *Amini Juma v United Republic of Tanzania* (herein-after referred to as “*Amini Juma v United Republic of Tanzania*, Order for Provisional Measures”) para 8.

Benin's positive law and the laws declared by the Constitutional Court as being in conformity with Benin's Constitution.

38. It further submits that it is established jurisprudence that community courts do not have jurisdiction to issue injunctions to Member States in respect of their domestic laws and procedures; adding that to admit such injunctions would lead to the obliteration of domestic court decisions. The Respondent State also refers to the Applicant's cassation appeal, describing the same as premature and unfounded.

39. Finally, the Respondent State prays the Court to dismiss the Applicant's claims as premature and baseless. The Court notes that Article 27(2) of the Protocol provides that:

"In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

40. Further, Rule 51(1) of the Rules provides that the Court may:

"[a]t the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice."

41. The Court notes that it lies with it to decide for each case, whether in light of the particular circumstances of the matter, it should exercise the jurisdiction conferred on it by the aforementioned provisions.

42. The Court notes that, although in terms of Article 19 paragraph 2 of the Law establishing CRIET, its judgments are subject to cassation appeal,² Article 594 of the Benin Code of Criminal Procedure declares invalid the appeal of convicted persons who are not in detention or have not obtained exemption from execution of the sentence.³

43. In the circumstances of the instant case, wherein the Applicant is not in detention and has not obtained exemption from execution of the sentence, the Court holds that there is still the risk that the prison sentence would be executed notwithstanding possible cassation appeal.

44. In view of the foregoing, the Court finds that the circumstances of this case highlight a situation of extreme gravity and presents a risk of irreparable harm to the Applicant if the CRIET's decision of 18 October 2018 were to be enforced prior to this Court's decision in the

2 "The judgments of the Economic Crimes and Terrorism Court shall be justified. They shall be delivered in open Court and shall be subject to cassation appeal by the convicted person, the Public Prosecutor's Office and the civil Parties."

3 "Persons subject to custodial sentence with or without bail shall be declared incompetent to file any appeal. In order for his Application to be admitted, It is sufficient for the Applicant to present him/herself before the Office of the Prosecutor to undergo the detention."

matter pending before it.

45. The Court therefore holds in conclusion that the said circumstances require it to order Provisional Measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, so as to preserve the *status quo*.

46. The Court specifies that this Order is necessarily provisional and does not in any way prejudice the findings the Court might make as regards its jurisdiction, admissibility of the Application and the merits of this matter.

VI. Operative part

47. For these reasons,
The Court,
unanimously

Orders the Respondent State to:

- i. *stay* execution of Judgment No. 007/3C.COR of 18 October 2018 delivered by the Economic Crimes and Terrorism Court established by Law No. 2018/13 of 2 July 2018, pending this Court's final decision in the instant Application;
- ii. *report* to this Court within fifteen (15) days of receipt of this Order on the measures taken to implement the same.