N. 787/2012 Reg. Ord.

THE ITALIAN REPUBLIC
MILAN APPEALS COURT
Section V, Penal

composed by the magistrates

-Magistrate Pietro CARFAGNA	Presiding Magistrate	[There appears a stamp which reads: Milan Public Prosecutor, Penal Secretariat, 29 JAN 2013, APPROVED....., The General Prosecutor]
-Magistrate Sergio PICCINNI LEOPARDI	Counselor	
-Magistrate Pietro CACCIALANZA	Counselor	

have pronounced the following

ORDER

concerning the request presented on 23 August 2013 concerning KOSTERRI Arben, born in Shkoder (Albania) on 29 January 1976, resident of Ireland, represented by private counsel Fabrizio Cardinali, attorney (with office in Novara, corso Cavallotti n. 40) and by Adrian Mac Lynn, attorney (with office in Galway, Ireland, Churchyard Street);

stating that the defense requests:
- mainly, "to declare the nullity of the notices and the subsequent non-execution of sentence no. 4954, issued on 5/12/2011 by the Milan Appeals court, Section IV, Penal, in regard to the penal procedure no. 5331/2010 R.G. App. Of 20/03/2012";
- second, in regard to article 175 subsection 2 of the Code of Criminal Procedure "arrange for the restitution of Kosterri Arben within the terms established by the appeal brought against this same sentence";

having sought the counsel of the Public Prosecutor, on 23 October 2012, with which the rejection of this same request is asked for;

having read the acts of the proceedings and heard the Defense Attorney

observes

That in the instance under examination, integrated into the record for 10 January 2013, the Defense of Kosterri Arben hereby states:
- That on 19 June 2008, in regards to the Kosterri case, the Preliminary Hearing Judge of Milan issued a European arrest warrant based on the application of the precautionary measure of custody in jail, issued by the Preliminary Hearing Judge on 17 September 2007, as per penal proceeding no. 806/99 RGNR and 2969/99 RG Preliminary Hearing;
- That as per the aforementioned, on 14 June 2012 the defendant was subject to precautionary measures such as to the obligation to present oneself before the judiciary police for the territory of one's residence (Galway – Ireland).
- That only though such subjection to the measure was he made aware of the standing proceeding against him, which he previously had no knowledge of;

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- that therefore, on 25 July 2012, he made the defenders his fiduciaries in order to assert his own judiciary position in Italy;
- that only on 2 August 2012 did he learn about the facts surrounding the reasons for the issuance of the European arrest warrant (concerning several violations involving narcotics, committed in 2003) in his name, issued by sentence no. 4954 of the Milan Appeals Court dated 5 December 2011, issued in regard to penal proceeding no. 5331/2010 R.G. App., which is irrevocable, dated 20 March 2012, under which he was condemned to nine years and eight months in jail;
- that he was never informed of the sentence, originating from the aforementioned proceeding, having never been formally notified of vocatio in judicum, his name having merely been notified to the court-appointed attorney, with whom he did not establish any type of contact.

Consequently, Kosterri objects to the vocatio in jus based on the nullity of any notifications in this respect, which is upheld by law, ex. Art. 679 in the Code for Penal Procedure, concerning enforceability.

According to ex art. 175 of the Code of Penal Procedure, he demands remission under the terms of the appeal of this sentence before the Appeals Court.

On 23 October 2012 the Attorney General has requested the rejection of the request, by stating:

- that the complain concerning the non-execution of the sentence lacks foundations, "he had been formally notified as per article 165 of the code of penal procedure through consignment to Kosterri Arben's – who remained a fugitive throughout the entire process - court-appointed attorney who did not contest the charges";
- that "Kosterri Arben did seem to have been aware of the penal proceeding in question towards the end of January 2010 (see note 11.01.2010 by the Ministry of the Interior, a copy and annotation of which is attached to the copy of the MFA, also attached to the motion)";
- that "the request for restitution placed on 23.08.2012 is manifestly late, due to awareness of the existence of a penal proceeding against him, thereto voluntarily subtracted at least during the appeals judgment phase".

The competence of the Appeals Court is asserted, due to the duplicity of the request of the condemned; an petition of remission in the terms put forward by ex. Art. 175 of the Code for Penal Proceeding contrary to a second instance sentence (had it been a single one it could have been decided by the competent judge for the appeal) and a petition of assessment on the lack of enforcement by the competent judge for the execution.

According to the jurisprudence of the Court of Cassation, "the competence falls upon the judge responsible for the execution who will oversee a restitution request, to propose appeals that go hand in hand with the the declaratory request of non-execution of the sentence (default judgment type) as a result of the invalidity of notifications and therefore by nonexistence of the enforcement"; Cass. Pen. Sect. I, 20 April 2010, no. 16645, mass. 247561; also as per Cass. Pen. Sect. I, 16 March 2011 no. 16523, mass. 250438, which states that "the judge responsible for the execution before which the nullity of the enforceability has been object and contextually putting forward a motion for restitution to contest as a result of the lack of knowledge on the proceedings, must – as a precondition – verify the validity of the supposed claim and, once the enforceability has been ascertained, must be upheld to autonomously examine the motion presented as per art. 175 of the code of penal procedure".

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The substance of the matter results from the following proceedings:

- that on 4 April 2008, the Preliminary Hearing Judge of Milan, within the framework of proceeding no. 806/99 RGNR and 2969/99 RG Preliminary Hearing, had declared the fugitive status of Kosterri Arben, stating that "[he] shall be subject to a preventive custody order as it had already been ordered by the Preliminary Hearing Judge on 17 September 2007 was not upheld and that it is not possible to proceed in the manner provided for under art. 293 of the Code on Penal Procedure, as a result of the fruitless search notification issued on 17 March 2008 by the Italian finance police – Fiscal Police Section of Como"; in the same fugitive status decree the Preliminary Hearing Judge had nominated Laura Oteri, a court-appointed attorney, with an office in Milan, at viale Romagna no. 22;
- that the citation to appear before court, issued on 10 March 2009 within the framework of proceeding no. 17060/08 RBNR c 6111/08 RG Preliminary Hearing (concerning the same acts involving the European arrest warrant, regardless of the two different numbers) was communicated to Kosterri Arben through the court-appointed attorney, as per ex art. 165 of Code on Penal Procedure;
- that the in absentia extract of the conclusive sentence regarding the first instance proceeding, issued on 22 December 2009 within the framework of proceeding no. 6935/09 RG Trib. (and always referring back to proceeding no. 17060/08 RGNR and 6111/08 RG Preliminary Hearing) had been communicated to Kosterri Arben through the court-appointed attorney, as per ex art. 165 of the Code on Penal Procedure, on 15 February 2010;
- that following the same guidelines, the citation decree for the appeals case was communicated, under the Milan jurisdiction (Anti-crime Division) which was referred to on a note dated 16 July 2011 involving several accused in the proceeding (among these Kosterri Arben) and cross-checked on the SDI database, stating "subject to a preventive custody order, no. 806/99 RFBR and no. 2969/99 RG Preliminary Hearing, issued on 25.02.2008 by the Milan Tribunal under the Fiscal Police Section of the Italian finance police of Como, the legal measures of which had already extended internationally";
- that therefore, at the hearing of 15 November 2011, the Appeals court had declared the nonappearance of the accused;
- that on 5 December 2011 the Appeals Court had finalized the proceeding concerning Kosterri, and the in absentia extract of the sentence was notified to the court-appointed attorney, as per ex art. 165 of the Code on Penal Procedure, on 2 February 2012.

In this way, the vocatio in jus of the accused, according to what is stated in article 165 of the Code on Penal Procedure, is justified, as well as the fugitive status decree in the same manner as the fruitless search notification of the individual in question which was subsequently issued.

It should be added that according to the Supreme Court, certain temporary limitations for the efficiency of fugitive status decree could take place, linked to the different phases of the proceeding by the decree on accused who cannot be found: "The last paragraph of art. 170 of the Code on Penal Procedure is not applicable to fugitives, according to which the decree on an accused who cannot be found issued during the judgment is not valid for first instance cases and that the one issued is not valid for the purpose of appeals cases or commitment for trials, because such regulations are exclusively reserved for the accused who cannot be found and not fugitives, the latter which shall be subject to the regulations expressed by art. 173, which states that notifications must be pursued by way of a filing in Chancery as per what is stated in the first paragraph of art. 170, that these claims are limited to the sole formality of filing in Chancery, without the option to qualifying for a decree on accused who cannot be found to be issued, once the fugitive status is ascertained based on a constant and persistent search for the individual" (this is how Cass. Pen. Section I dated 28 January 1966, no. 111, mass. 101408; as well as Cass. Pen. Section VI, 29 June 1982, no. 10837, mass. 156132, according to which "the decree on accused who cannot be found must not be issued for defendants that are evasive or fugitive, because no regulations impose the need for the issuance

of a fugitive status declaration". Also, the same article (296 from the Code on Penal Procedure) which amends the dispositions concerning a fugitive status, establishes that "a fugitive status shall remain valid until the legal actions that resulted in such status is revoked, as per art. 299, or has in another way lost its validity or or the offense void or the sentence for which the legal actions was issued").

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Therefore, the request of withdrawal of suit must be examined.

Concerning this, the most recent jurisprudence concerns the efficacy of the principle of awareness for this proceeding, as highlighted by the European Human Rights Court statement "which, following along the subject of trials in absentia and the violation of the principle sanctioned by art. 6, par. 1 and 3 of the ECHR, has more than once reiterated that the simple absence of the accused from his place of residence does not provide enough circumstantial evidence to demonstrate that the aforementioned was aware of a process against himself, given that their absence could be attributed to their will to conceal themselves from justice to unequivocally renounce to their right to appear before a court of law"; as is mentioned in Cass. Pen. Sect. II of 20 October 2009, no. 47229, mass. 245425, in which the European Court's sentence of 12 June 2007 on Pititto vs. Italy, ric. no. 19321/03 is referenced, as well as the same Court's decision of 1 March 2006 in Sejdovic vs. Italy, ric. no. 56581/00.

In the wake of this, the following affirmation was made "in order to ensure restitution within the terms for challenging a sentence in absentia the onus probandi for the proceeding or injunction from the competent authorities; does not ensure that, said evidence, in the case of the accused defended by the court-appointed attorney who becomes a fugitive, having said status, chosen out of his own free will, has chosen to evade penal proceedings and knowledge of them" (according to Cass. Pen. Sect. V of 29 January 2010, no. 14889, mass 246866).

Therefore, the general considerations are upheld as follows "the accused in absentia who intends to request the restitution by way of appeal for not having been made aware of the proceeding and without having had voluntarily renounced to appear before court or submit an appeal, or not having the mediums to prove this situation, has the duty to -if the request is made within a thirty day time frame counting from the sentence notification date issued to the court-appointed attorney, to produce the facts from which it can be deduced that the accused become aware of the sentence at a different time or posterior to sentencing": as per Cass. Pen. Sect. II of 8 March 2011, no. 12791, mass. 249677.

In this regard, after having examined the facts behind the request to declare the nullity of the notifications, it is clear that Kosterri has absolutely no knowledge of the proceedings against him, and much less of the final measures of the first and second instance decisions.

It is true that the request for restitution was made well after the thirty day time frame from which the sentence of the Appeals Court was made known to the court-appointed attorney. Still, this Court does not consider to be able to obtain the opinion of the Public Prosecutor, according to which Kosterri would have been aware of the proceedings since January 2010.

As the Defense revealed, from the Ministry of the Interior's notes dated 11 January 2010, present records for the penal proceeding, Interpol Dublin had communicated that Kosterri lived in Galway (Ireland), Great Western House, on that very same date. It truly concerned a private communication in order to identify the apprehended and follow suit, through the Irish central Authorities most apt for this as per a note of the Ministry of the Interior from the same date, leading to a European arrest warrant.

Not even the annotations on the bottom of the MAE copy attached to the petition, which according to the Public Prosecutor provided the necessary elements to make the plaintiff Kosterri aware of the

proceedings, offers cues into the matter. If it is, in fact, a handwritten annotation in the English language ("This warrant is endorsed for execution pursuant to order of the High Court (Pearl J) made on the 27th day of January 2010") which the Defense translated to mean "the present warrant has been approved for its execution as per ordinance from the High Court (Peart J)

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issued on the 27th of January of 2010". It does give way, in other terms, to the internal fulfillment by the requested Country, in order to carry out the arrest warrant.
Finally, according to the proceedings, only on 14 June 2012, having been subject to the cautionary measure equivalent to the duty to appear before the judiciary police, Kosterri had been made aware of the proceeding.
From that moment on Kosterri had the thirty days in which he had the duty to initiate the request for restitution. The defense's opinion differs, according to which at that very moment he had, at the very least, knowledge of legal actions against him, but not of the proceeding itself. But this theory does not take into account that once that the individual was made aware of the legal action against him, the condemned is not entitled to put off the right to forfeiture established by law in order to benefit from a restitution according to the terms of Appeal. The same Defense makes known that the day in which Kosterri makes them his proxy in order to be informed of the proceeding was dated 25 July 2012, which confirms that the thirty days since 14 June 2012 were up; act which was dateless, accompanied by an incomplete but legible "scratch" of a fax dated 20 July 2012, the time frame of which was also past what is legally established.
Nevertheless the restitution petition for the appeal will be considered late, with Kosterri being at fault for having surpassed the thirty day time frame for doing so, as per what is established in the penalty of forfeiture by art. 175 of the Code on penal Procedure, for which the time frame for presenting it would have had been 14 June 2012, according to which he would have been able to request an updated not only on the outstanding legal actions against him, but on the proceeding itself.

therefore
having read art. 670 and art. 175 of the Code on Penal Procedure

the petition presented on 23 August 2012 by Kosterri Arben has been
declined

declaring that
sentence no. 4954 issued by the Milan Appeals Court on 5 December 2011 concerning proceeding no. 5331/2010 R.G.C. App has been determined as irrevocable on 20 March 2012.

Sent to the Chancery for notification purposes. The present proceedings are to be communicated to the petitioner and his Defenders as well as to the Public Prosecutor.

Milan, 15 January 2013

Attorneys
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Presiding Magistrate
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