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**RIGHT TO AN ADEQUATE DEFENSE
(DERECHO A UNA DEFENSA ADECUADA)**

CASE: *Amparo Directo en Revisión 2886/2012*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF THE DECISION: June 10, 2013

KEY WORDS: right to an adequate defense; legal due process; defense of the defendant in criminal proceedings by a legal professional.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 2886/2012*, Plenary, Arturo Zaldívar Lelo de Larrea, J., decision of June 10, 2013, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2022-01/ADR%202886-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center of Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo Directo en Revisión 2886/2012*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 2886/2012

BACKGROUND: In November 2010, SVL entered a house in the State of Mexico and seized, without right and without consent, a purse belonging to AMCV that was in a drawer in the kitchen, taking HVG's life in the process. A criminal trial judge in that state convicted SVL of the crime of robbery with aggravating circumstance leading to death. SVL filed an appeal against that decision, but it was confirmed by the collegiate criminal court that heard the case in the same state. SVL then filed an *amparo directo* lawsuit in which he argued that his fundamental right to an adequate defense had been violated, as well as his fundamental rights set forth in Articles 14, 16, 19 and 20 of the Constitution. Among his arguments, SVL claimed that he was not shown a list of public defenders, so he did not accept one, and ended up appointing MVGA, who does not have a law degree, to accompany him when he gave his statement to the Prosecutor's Office. For this reason, SVL argued that no value should have been given to the evidence gathered by the Prosecutor's Office during the preliminary investigation. The collegiate court granted the *amparo* to SVL, but only so that his degree of guilt could be properly grounded. In response to this decision, SVL filed a *recurso de revisión* that the collegiate court referred to the Mexico's Supreme Court of Justice (this Court).

ISSUE PRESENTED TO THE COURT: Whether SVL's right to an adequate defense was violated in the preliminary investigation (regarding technical assistance by a licensed defense attorney), in accordance with the provisions of article 20, section A, section IX of the Constitution in force before the implementation of the adversarial criminal justice system, but in light of the relevant constitutional and conventional provisions in accordance with article 1 of the Political Constitution of the United Mexican States.

HOLDING: SVL was granted the *amparo* essentially for the following reasons. First, this Court concluded that the correct interpretation of the right to an adequate defense within a criminal proceeding implies an effective defense, which is guaranteed when it is provided by a person possessing the technical legal knowledge sufficient to act diligently in order to protect the procedural rights of the accused and thus prevent them from being violated. This right must be

respected beginning with the preliminary investigation through the presence of the defense attorney in statements at prosecution.

VOTE: The Plenary decided this case by a majority of six votes of justices Olga María del Carmen Sánchez Cordero de García Villegas (concurring opinion), Arturo Zaldívar Lelo de Larrea, Alfredo Gutiérrez Ortiz Mena, José Ramón Cossío Díaz, Sergio Armando Valls Hernández (concurring opinion), and Juan Silva Meza. Judges Margarita Beatriz Luna Ramos, José Fernando Franco González Salas (dissenting opinion), Jorge Mario Pardo Rebolledo (dissenting opinion), Luis María Aguilar Morales (dissenting opinion), and Alberto Pérez Dayan voted against. Judge José Ramón Cossío Díaz was absent.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143709>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 2886/2012

p.1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of June 10, 2013, issued the following decision.

BACKGROUND

p.12 On November 24, 2010, SVL, inside a house in the municipality of Teleoyucán, State of Mexico, seized without right and without consent, a purse owned by AMCV that was in a kitchen drawer, taking HVG's life in the process. SVL was arrested that same day.

p.38 The next day, SVL delivered his statement at prosecution in the presence of MVGA, who does not hold a law degree, whom he named to accompany him. In his statement at prosecution SVL accepted the acts attributed to him by the agent of the prosecutor's office.

p.12 The criminal trial judge in the State of Mexico, who processed the case, determined that SVL was criminally liable for the crime of robbery with aggravating circumstances leading to the death of HVG.

p.2,12 SVL filed an appeal. The collegiate criminal court of Tlalnepantla, State of Mexico, which heard the appeal, upheld the decision of the criminal judge. SVL filed an *amparo directo* lawsuit against that decision, in which he argued that his right to an adequate defense was violated, as well as his fundamental rights established in articles 14, 16, 19 and 20 of the Federal Constitution.

p.3,13 The collegiate court that heard the lawsuit granted the *amparo* to SVL, but only so his degree of guilt could be properly grounded. However, the court determined that his right under article 20 of the Constitution (in its text prior to the reform published in the Official Gazette of the Federation on June 18, 2008) had not been violated, because the criminal procedure against SVL was carried out in compliance with each of the formalities established, receiving the witnesses and other evidence that he offered in a timely manner for his defense and helping him submit evidence.

p.15-17 SVL filed a *recurso de revisión* against that decision, in which he claimed that beginning with the preliminary investigation his right to an adequate defense had been violated, and

therefore his confession before the Prosecutor's Office could not have probative value, since the person who assisted him did not have knowledge of the law.

p.3 The collegiate court ordered that the *recurso de revisión* and the court record be sent to this Court.

STUDY OF THE MERITS

p.17 This Court determined that the grievances expressed by the affected party regarding the violation of his fundamental right to an adequate defense in the preliminary investigation resulting from the lack of technical assistance by a licensed defense attorney in his statement at prosecution, in accordance with the text of article 20, section A, section IX, of the Federal Constitution prior to the implementation of the adversarial criminal justice system, are well founded.

p.18 In order to reach this conclusion, this Court reviewed the interpretation by the collegiate court of article 20 of the Constitution, in force on the date on which the events occurred, but in light of the corresponding constitutional and conventional provisions, in accordance with the provisions of the first and second paragraphs of article 1 of the Federal Constitution.

p.18-20 This Court noted that the acts that originated this case were resolved in accordance with the provisions of article 20, part A, section IX, of the Constitution, in force before the implementation of the adversarial criminal justice system on June eighteenth of two thousand eight since the criminal proceedings of this case began under that constitutional framework. Thus, this Court reviewed the constitutionality of this case by analyzing the interpretation by the collegiate court of article 20 of the Constitution that was in force at that time, but in light of the relevant constitutional and conventional provisions, in accordance with the first and second paragraphs of article 1 of the Federal Constitution.

This Court also noted that the American Convention on Human Rights and the International Covenant on Civil and Political Rights, both ratified by Mexico, were in force at that time.

Article 8.2 d) and e) of the American Convention on Human Rights establishes judicial guarantees for any person accused of a crime, including the right to be presumed innocent until proven guilty. During the proceedings, the minimum guarantees of the accused are, *inter alia*, the right to defend himself personally or to be assisted by a defense attorney of his choice, with whom he may communicate freely and privately; and the inalienable right to be assisted by a defense attorney provided by the State, whether or not he is remunerated according to domestic law, if the defendant does not defend himself nor appoints a defense attorney within the time limit laid down by the law.

Article 14.3 d) of the International Covenant on Civil and Political Rights also determines the minimum rights granted to every person accused of a crime in full equality. These rights include the right to defend oneself or be assisted by a defense attorney of one's choice. It also establishes the right to be informed of their right to a defense attorney and, whenever the interests of justice so require, to be appointed a public defender, free of charge, if they do not have sufficient means to pay for one.

- p.21 The Inter-American Court of Human Rights, in interpreting Article 8.2 e) of the American Convention, indicates that the right to an effective defense means it must be provided by a person who is a "legal professional."
- p.21-22 In the case of *Cabrera García and Montiel Flores v. Mexico*, the Inter-American Court interpreted that the adequate defense that the State must guarantee must be an effective defense. That means that the (public) defender must act diligently in order to protect the procedural guarantees of the accused and avoid the infringement of his rights. This is a mandatory criterion for all Mexican judges in accordance with the provisions of the Plenary of this Court of Justice in the case file *Varios 912/2010*.
- p.24 On this same point and taking into consideration paragraphs 9 and 11 of General Comment No. 13, on the Administration of Justice (Article 14) of the Human Rights Committee, this Court concluded that neither the American Convention nor the International Covenant would allow the defendant in criminal proceedings to be defended by a third party who is not an expert in law.

Based on this criterion, this Court determined that the defense that the State must guarantee — in accordance with Article 1.1. of the American Convention and Article 2.1. of the International Covenant — must be as adequate and effective as possible in two dimensions: a formal one, requiring the defense attorney to be an expert in law; and a material one, requiring the defense attorney to also act diligently in order to protect the procedural rights of the accused .

p.25-26 Secondly, this Court analyzed their precedents on the fundamental right to an adequate defense in relation to the assistance granted to the defendant.

It concluded that this right consists of giving every accused the opportunity to have a defense attorney, who has the opportunity to provide evidence, file challenges, present legal arguments, and use the procedural benefits established by the relevant legislation for the defense. The precedents of this Court have established that the fundamental right to an adequate defense is not only related to the physical presence of the defense attorney, but also to the effective legal assistance provided to the defendant.

p.26 In this way, this Court determined that the fundamental right to an adequate defense implies that the defense attorney must not only have sufficient time and means for the preparation of the defense, but also the possibility to plead at the hearing and offer evidence, since the effective participation of the defense attorney is an essential element to an adequate defense.

p.26-27 This Court stated that the constitutional reform to the second paragraph of Article 1 of the Constitution of 2011, requires Mexican judges to prefer interpretations that are more favorable to the fundamental rights of individuals, as well as those that optimize the respect for these rights based on the *pro personae* principle.

p.28 Therefore, this Court considered that the harmonious interpretation of Article 20, part A, section IX, of the Federal Constitution — in its text prior to the reform of June 18, 2008— based on the principle of *pro personae* provided for in Article 1 of the Constitution, in light of Article 8.2 d) and e) of the American Convention on Human Rights, as well as Article 14.3 d) of the International Covenant on Civil and Political Rights, made it necessary to define the right to an adequate defense in criminal proceedings as an effective defense,

which is guaranteed when provided by a third person who possesses sufficient technical knowledge in law to act diligently to protect the procedural rights of the defendant.

p.30 Furthermore, the human right to an adequate defense prohibits the State from hindering the exercise of the right to defense of the defendant and imposes a duty to: i] inform the defendant of the name of his accuser and the information in the case file; ii] give the defendant the opportunity to appoint a defense counsel; iii] allow the defendant to have private interviews with his defense counsel in advance; and iv] in general, allow the application of the corresponding procedural burdens within the criminal process to disprove the accusation of the prosecutor.

However, this Court specified that these are merely formal rules governing the State, which have no relation to the content of the defense itself (the so-called "technical defense"), nor to the efficiency or successful outcome of the activity of the public defender or private attorney. The right to an adequate defense does not go that far. Even though the State has the obligation to give the defendant the opportunity to defend himself, it cannot ensure a correct procedural attitude of the defense attorney. The court cannot be judge and party to review the activity (or inactivity) of defense counsel in criminal proceedings.

p.33 For these reasons, contrary to the collegiate court's ruling, this Court considered that every person should have the advice of a legal professional who is skilled in the field and can defend his interests with legal knowledge during the course of criminal proceeding.

Thus, both the prosecutor and the judge must ensure that the defense attorney appointed by the defendant shows a professional license, in order to guarantee the protection of the right to an adequate defense.

p.33-34 This criterion not only reflects this Court's concern for protecting the right to an adequate defense, but also highlights the importance of the lawyer in ensuring a better outcome for the entire criminal process. Thus, in addition to being a "right" of the defendant, the intervention of a lawyer is also a necessity of the administration of justice, because confronting the power of the prosecution requires a person trained in law and in criminal practice.

- p.34 This Court also determined that if the person appointed to defend the accused is not knowledgeable in law, the right of defense is not really being exercised, since a correct interpretation of the concept of “adequate defense” requires the intervention of a lawyer, who may be private or public.
- p.34-36 Likewise, this Court reiterated that the right to an adequate defense begins with the preliminary investigation and includes the presence of the defense attorney in the statements at prosecution of a witness or of the accused. The intervention of the defense counsel from the stage of the preliminary investigation has a primary function: to be present at any questioning of the defendant, in order to ensure that his right to remain silent is respected, or that his statements are freely issued.
- Thus, respect for the right of defense serves in turn to protect the right to not to self-incriminate. The decision shows that if the freedom of the defendant is not protected from the moment in which he makes his statement during the preliminary investigation, the judicial process could be based on a coerced confession, which is not acceptable in a democratic state governed by the rule of law.
- p.36 Finally, this Court established that to protect the right to an adequate defense, the work of defense attorneys must be effective. The role of the defense counsel cannot be conceived as a mere formal requirement; it must be understood to allow the defendant to have an effective participation in the process.
- p.37 Thus, this Court considered that to guarantee an adequate defense, the defendant must be represented by a licensed lawyer, who has the technical capacity to advise and assess what is legally convenient for the defendant, which skills a non-lawyer does not have. In this context, the defendant, during the preliminary investigation stage and in the proceedings before the judge, must be assisted by a licensed attorney (private lawyer or public defender), regardless of whether he has appointed a non-lawyer to accompany him, since the State is obliged to have professional defense attorneys so the defendant may be granted real and effective legal assistance.
- p.37-38 Having established the interpretation of the fundamental right to an adequate defense, it is now necessary to specify the consequences and effects of the violation of this

fundamental right, which in this case occurred to the detriment of the defendant at the preliminary investigation stage.

As established, the right to an adequate defense must be interpreted from the perspective of the broader protection of human rights, in accordance with the *pro personae* principle. This leads this Court to establish that the defendant is guaranteed his right to an adequate defense only by the appointment of a defense counsel who is a legal professional, who must handle the defense both at the preliminary investigation stage and in the proceeding itself.

p.38-39 Secondly, from the review of the case, this Court finds that at the appointment of MVGA to accompany the defendant, there was no evidence to prove she was a licensed attorney; and despite that, SVL gave his statement at prosecution in her presence only, accepting the criminal acts attributed to him. For this Court, this is a violation of the fundamental right to an adequate defense.

Consequently, in order to repair the violation of the fundamental right to an adequate defense, this Court considered that the statement at prosecution of the defendant should not be effective and cannot therefore be considered at the time of the final decision.

DECISION

p. 41-42 The decision issued by the collegiate criminal court of Tlalnepantla, State of Mexico, is overturned and SVL is granted the *amparo* and protection of the Federal Courts, so that a new decision may be issued in which the statement issued by the affected party before the Prosecutor's Office without the assistance of a licensed defense attorney is not taken into consideration.