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**RIGHT TO AN ADEQUATE DEFENSE, IMMEDIATE PRESENTATION TO THE
PROSECUTOR'S OFFICE AND PRESUMPTION OF INNOCENCE
(DERECHO A UNA DEFENSA ADECUADA, A LA PUESTA A DISPOSICIÓN INMEDIATA
ANTE EL MINISTERIO PÚBLICO Y PRESUNCIÓN DE INOCENCIA)**

CASE: *Amparo Directo en Revisión 5601/2014*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: June 17, 2015

KEY WORDS: right to an adequate defense; right to be immediately presented to the Prosecutor's Office in the event of detentions in flagrante delicto, identification procedures in the Gesell chamber, right to the presumption of innocence, presumption of innocence as an evidentiary standard, presumption of innocence as an evidentiary rule.

CITATION OF THE DECISION: Supreme Court of Justice, *Amparo Directo en Revisión 5601/2014*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of June 17, 2015, 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/ADR5601-2014.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo Directo en Revisión 5601/2014*, Mexico.

SUMMARY OF *AMPARO DIRECTO EN REVISION* 5601/2014

BACKGROUND: In June 2013, a judge in the Federal District issued a decision in a criminal case in which he convicted LAC, AQT and CLVT of the crime of aggravated homicide of JCL. Both those sentenced in the criminal case and the prosecutor's office appealed the decision, which was amended in one part and confirmed in another by the Superior Court of Justice of the Federal District. LAC and CLVT filed an *amparo directo* lawsuit against that decision, which was denied by the Collegiate Circuit Court that heard the case. They then filed a *recurso de revisión* which was referred by the Collegiate Circuit Court to the Mexico's Supreme Court of Justice (this Court). In their *recurso de revisión*, LAC and CLVT raised grievances that can be summarized as follows: (i) arguments of legality related to the assessment of the evidence and the inaccurate application of criminal law to their detriment; (ii) the improper action of the authorities with regard to their immediate presentation to the Prosecutor's Office, because almost five hours elapsed from the time they were detained and their presentation; and (iii) their identification in the Gesell chamber without the presence of their defense attorney.

ISSUE PRESENTED TO THE COURT: Whether the Collegiate Circuit Court correctly analyzed the arguments raised by the affected parties in light of the constitutional doctrine of this Court in relation to the rights to an adequate defense, the immediate presentation to the Prosecutor's Office in case of detentions in flagrante delicto, and the presumption of innocence.

HOLDING: The decision of the Collegiate Circuit Court was overturned essentially for the following reasons. Because it did not analyze the arguments raised by the affected parties in their *recurso de revisión* in light of the constitutional doctrine of this Court of the rights to an adequate defense, the immediate presentation to the public prosecutor's office in cases of detention in flagrante delicto, and the presumption of innocence. In addition to making some precisions on the proper application of constitutional precedents in this specific case, this Court considered granting the *amparo* to the affected parties for the reasons explained below. First, because the Collegiate Circuit Court incorrectly interpreted the content of section IX of part A of article 20 of the Constitution. The presence of the defense counsel in the identification procedure

through the Gesell chamber constitutes a fundamental right to representation of the defendant. Second, because the Collegiate Circuit Court did not analyze the time that had elapsed between the arrest of the affected parties and their presentation to the Prosecutor's Office in light of the doctrine developed by this Court. Finally, because the decision of the Collegiate Circuit Court violated the constitutional doctrine of this Court on the right to the presumption of innocence. This is so because the Collegiate Circuit Court wrongly assumed that the evidentiary sufficiency to which the presumption of innocence refers when considered as an evidentiary standard is only established on the basis of the inculpatory evidence. Also because it was argued that the requirement imposed on the affected parties to disprove the evidence that incriminated them did not assume that the burden of proof was reversed or that they would have to prove their innocence. The Collegiate Circuit Court did not adequately assess the different evidentiary scenarios that were presented in the criminal proceedings, nor the way in which they related to the right to the presumption of innocence as an evidentiary standard and an evidentiary rule.

VOTE: The First Chamber decided this case unanimously by five votes of the justices Olga María del Carmen Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring opinion), and Alfredo Gutiérrez Ortiz Mena.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=173564>

EXTRACT OF THE *AMPARO DIRECTO EN REVISION* 5601/2014

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of June 17, 2015, issued the following decision.

BACKGROUND

- p.5 On August 31, 2012, at approximately 9:40 p.m., LAC, AQT and CLVT were arrested by agents of the Ministry of Public Security of the Federal District, who presented them to the Prosecutor's Office at 3:05 a.m. on September 1, almost five hours later. At 5:40 p.m., the Prosecutor's Office issued a detention order for the detainees and informed them of their rights pursuant to article 20, part A, of the Federal Constitution. The detainees appointed their defense counsel and gave their statement to the prosecution, in which they denied the charges made against them.
- p.7,10 During the preliminary investigation, the witnesses presented by the Prosecutor's Office verified and confirmed the identity of LAC, AQT and CLVT as the presumed perpetrators of JCL's murder through the Gesell chamber, without their defense attorney being present.
- p.1 In June 2013, a criminal judge in the Federal District issued a decision in which LAC, AQT and CLVT were convicted of the crime of aggravated homicide of JCL. Those convicted and the Prosecutor's Office both appealed this decision.
- p.2 The Criminal Chamber of the Justice Court of the Federal District amended the decision in one part and confirmed it in another.
- p.4,5,8 LAC and CLVT filed an *amparo directo* lawsuit against this decision, which was also decided against them, and therefore they filed a *recurso de revisión* that was sent by the Collegiate Circuit Court to this Court. In their *recurso de revisión*, LAC and CLVT raised grievances that can be summarized as follows: (i) arguments of legality related to the assessment of the evidence and the inaccurate application of the criminal law to their detriment; (ii) the misconduct of the authorities in holding him almost five hours before presenting him to the Prosecutor's Office; (iii) their identification in the Gesell chamber without the presence of their defense attorney.

STUDY OF THE MERITS

p.12 This Court resolves that the arguments put forward by the affected parties in their *recurso de revisión* in relation to the violation of their rights to an adequate defense, the immediate presentation to the Prosecutor's Office in the event of detentions in flagrante delicto, and the presumption of innocence were justified, since the Collegiate Circuit Court did not analyze their arguments in light of this Court's constitutional doctrine on these fundamental rights.

I. Right to an adequate defense

p.14 To better understand this part of the decision, it is important to recall that LAC and CLVT were identified by witnesses presented by the Prosecutor's Office through the Gesell chamber without their defense attorney being present, a situation that from the point of view of this Court violates the fundamental rights of the defendants in the criminal process. Before reviewing the arguments on the violation of the affected parties' right to an adequate defense, this Court refers to some important considerations on the reasonings of the Collegiate Circuit Court with respect to the constitutional precedents applicable to the case.

For this Court, the binding case law cited by the Collegiate Circuit Court, under the heading "INOPERATIVE GRIEVANCES. THEIR ANALYSIS IS UNNECESSARY WHEN THERE IS BINDING CASE LAW" is not applicable, since although there is currently binding case law that establishes that the presence of the defense attorney of the accused party is necessary in the identification procedure by means of the Gesell chamber, when the decision of the corresponding *amparo directo* was issued, that case law was a non binding precedent.¹

p.15-17 In reality the Collegiate Circuit Court did not deviate from this Court's criterion because it did not share it, which was possible since it was non binding case law; instead it

¹ The precedent refers here to the decision titled "IDENTIFICATION OF THE ACCUSED THROUGH THE GESELL CHAMBER. THE ATTENDANCE OF THE DEFENSE ATTORNEY IS REQUIRED IN SAID PROCEDURE. Tenth Epoch, Registration: 2008588, Instance: First Chamber, Type of Decision: Binding case law, Source: Federal Judicial Weekly, Publication: Friday, March 6, 2015 09:00 h, Matter(s): Constitutional and Criminal, Decision: 1a./J. 10/2015.

distinguished the precedent because it considered that it did not apply to the facts of this case. The Collegiate Circuit Court considered that LAC and CLVT were not unknown to the victim or to the prosecution witnesses, since they had seen them at the time of the events and prior to them. From this the Collegiate Circuit Court concluded that it was not relevant that their defense attorney be present during the process of recognition and identification through the Gesell chamber, because this was not decisive in the accusation made against them.

This Court is of the opinion that the distinction from a binding or persuasive precedent, often used as an argumentative technique by the Collegiate Circuit Courts in relation to the precedents of this Court, requires the identification of relevant facts to justify a different treatment, since the distinction necessarily entails the creation of a new rule applicable to those facts. Thus, the facts identified in the new case — as a differentiating element — justify the inapplicability of the rule derived from a precedent that in principle seems applicable to the specific case. This is because, when a precedent establishing the interpretation of a fundamental right is distinguished, the distinction necessarily implies modifying the scope established for that right in the precedent in question.

In this case, this Court considers that the argument of the Collegiate Circuit Court to distinguish the precedent is incorrect. The specialized literature has pointed out that the lineup or Gessell chamber identification only makes sense if the identified person was previously unknown to the witness, which occurs in this case, since the prosecution's witnesses had only seen LAC and CLVT once.

p.18 Furthermore, the criterion held by the Collegiate Circuit Court would imply accepting that, in a case such as this, anyone accused by the Prosecutor's Office does not have the right to have a defense attorney in the identification process. This Court cannot share that interpretation of the scope of the right to an adequate defense. In the factual scenario analyzed, the presence of the defense attorney in the identification process through the Gesell chamber is fully justified, since it constitutes a right to representation of the accused before the accusation made by a person who claims to recognize and identify him as the perpetrator of a crime.

p.19 Also taking into consideration the specialized legal theory on the psychology of testimony and the reliability of witnesses and their memories, for this Court the presence of the defense counsel in the identification process is indispensable, since this guarantees that the accused may challenge the identification in order to be able to attack the credibility of the attributes of the testimonial evidence.

In this context, this Court reiterates the constitutional doctrine of the right to an adequate defense in the context of identification through the Gesell chamber, according to which this fundamental right is satisfied only when it is carried out through a lawyer, since the lawyer has the professional training to exercise such a defense and because the principle of equity between the parties must also be respected, given that the Prosecutor's Office, as accuser, is a technical body represented by a lawyer and, consequently, the accused must also be represented by a professional in the same field and not merely by a trusted person, since this is the only way to guarantee respect for the right of the accused to an adequate defense and to procedural equality.

II. Right to be presented without delay

p. 23 This Court also finds the arguments of LAC and CLVT on the violation of their right to be presented without delay to the Prosecutor's Office in case of in flagrante delicto well founded, since the Collegiate Circuit Court only mentioned the time that had elapsed between their arrest, without analyzing that situation in light of the doctrine developed by this Court. To address this issue, the decision reconstructs the line of case law that the Supreme Court has developed on the subject.

p.24 In *Amparo Directo* 2470/2011, the First Chamber of this Court, article 16 of the Constitution was construed, in accordance with article 7.5 of the American Convention on Human Rights, to give content to the expressions "immediately", "promptly " or "without delay" that qualify the manner in which a person who is detained in flagrante delicto must be presented to the public prosecutor's office. This Court held that it was possible to adopt a standard that would enable the judge to assess whether the right to be presented without delay is violated, taking into account two necessities: on the one hand, that the detention of the person being presented should not be unjustifiably delayed, since this would result in the restriction of the right to personal freedom without State control and surveillance;

and, on the other hand, that consideration should be given to the distance between the place of detention and the office of the public prosecutor, and other peculiarities of each specific case. In the same precedent, this Court specifically established that these two parameters must be used to assess whether the time of detention by police authorities exceeded what was "strictly necessary" to carry out the transfer and presentation of the detainee to the Public Prosecutor.

- p.25 Also, with regard to the interpretation of article 21 of the Constitution, the First Chamber of this Court clarified in the *amparos directos en revision* 997/2012, 517/2011, 3229/2012, and 3403/2012 that "only evidence that has been obtained without the authorization of the Prosecutor's Office and results directly from the unjustified delay may be invalidated".
- p.26 However, in the *amparos directos en revision* 2190/2014 and 2397/2014, the First Chamber of this Court determined that the unjustified prolongation of the defendant's presentation before the Prosecutor's Office does not in itself cause the report prepared by the police on the arrest to be illegal; that will depend on the specific circumstances of each case. Furthermore, although this Court reiterated the view that the statement of the accused before the prosecutor should be annulled as a result of the occurrence of an unjustified delay, it specified that the foregoing "is only applicable in the case of a confession, in which the probable perpetrator accepts responsibility for the offence attributed to him, regardless of the degree of incrimination".
- p.27 In the same precedents, this Court clarified that the exclusion of the confession as evidence was justified because there is a "presumption that [the person testifying] may have been coerced into making this acceptance or that at least the period of uncertainty generated by remaining in the custody of police officers, without any control by the Prosecutor's Office, constitutes sufficient pressure to drive that person to testify to his or her detriment."
- p.27-28 On the basis of the foregoing, this Court stated that "the prolonged and unjustified detention of a person makes it possible to presume the existence of coercive acts that directly affect his or her will, unless there is objective evidence to the contrary". Thus, in these cases the confession must be presumed to be coerced and, therefore, must be

considered as unlawful evidence, on the understanding that the "evidentiary exclusion has extensive effects on all evidence generated, obtained or derived from the confession".

This Court also held that the statement "shall remain as long as it is not possible to deduce incriminating information from the statement to the prosecution, since it is not suitable to contribute in the demonstration the legal assumptions that allow a person to be subjected to criminal proceedings or to issue a conviction [...], unless it concurs with some other violation of human rights that requires the annulment of the statement, as happens when it is issued without the legal assistance of a legal professional who assumes the defense of the accused during the course of the procedural stages".

p.28 Consequently, this Court determined in the previous precedents that, when the unjustified delay in the presentation of the detainee to the public prosecutor is demonstrated, the parameter for the evidentiary exclusion of the statement to the prosecution of the accused must be different from the parameter determined for the evidentiary exclusion of any statement that the probable perpetrator has rendered without the assistance of a legal professional.

III. Right to the presumption of innocence

This Court also finds that in settling this case the Collegiate Circuit Court departed from the doctrine that this Chamber has been establishing in relation to the different aspects of the presumption of innocence. The collegiate body assumed that the evidentiary sufficiency referred to in the presumption of innocence as an evidentiary standard is only established on the basis of the inculpatory evidence. To be clear, the Collegiate Circuit Court interpreted LAC's and CLVT's problem as not providing evidence that would "disprove" the evidence that incriminated them.

p.29 However, contrary to the interpretation of the Collegiate Circuit Court, this Court has established in its constitutional doctrine that evidentiary sufficiency cannot be determined only from the joint analysis of the levels of corroboration of the theory of guilt alleged by the public prosecutor and the theory of innocence proposed by the defense; the exculpatory evidence can also be used in at least two ways to generate a reasonable

doubt: by questioning the credibility of the inculpatory evidence that supports the theory of guilt and by corroborating the theory of innocence alleged by the defense.

p.30 The decision also contravenes this Court's doctrine when the Collegiate Circuit Court determines that the defendants must "disprove" the evidence that incriminates them, and that this requirement does not imply a reversal of the burden of proof requiring them to prove their innocence. For this Court, these statements do not adequately account for the different evidentiary scenarios that arise in criminal proceedings and the way in which they affect the right to the presumption of innocence as an evidentiary standard and an evidentiary rule.

To explain the above, first of all it must be understood that the presumption of innocence is a fundamental right whose content and scope has been developed and specified by this Court according to different scenarios. In the *Amparo en Revision* 349/2012, the First Chamber of this Court identified three aspects of the presumption of innocence: (1) as a rule of procedural treatment; (2) as an evidentiary rule; and (3) as an evidentiary standard or judgment rule.

a) The presumption of innocence as an evidentiary standard

p.31-33 In the same precedent, this Court held that the presumption of innocence as an evidentiary standard or a judgment rule "may be understood as a rule that orders judges to acquit the accused when during the process sufficient evidence has not been provided to prove the existence of the crime and the responsibility of the person". Two ways of understanding this aspect of the presumption of innocence were thus distinguished: (i) as the evidentiary standard itself, which are the conditions that the inculpatory evidence must satisfy in order to consider that it is sufficient to convict; and (ii) as the burden of proof rule, which is a rule that establishes which of the parties must be procedurally harmed by the fact that the evidentiary standard ("burden of proof" in the Anglo-Saxon terminology) is not met; this implies, in accordance with the principle *in dubio pro reo*, which requires the acquittal of the defendant in case of doubt about meeting the standard, that the public prosecutor will be the party harmed by the non-satisfaction of the standard.

- p.33 Also, this Court has repeatedly held that in order to be able to consider that there is sufficient inculpatory evidence to undermine the presumption of innocence, the judge must ensure that the inculpatory evidence disproves the theory of innocence alleged by the defense at trial and it must be ruled out that any exculpatory evidence or contradictory facts give rise to a reasonable doubt on the theory of guilt sustained by the accusing party.
- p.34 In greater detail, this Court specified in the *Amparo Directo en Revision* 4380/2013 the cases in which exculpatory evidence can be considered to favor the presumption of innocence as an evidentiary standard. In this precedent, this Court explained that "when there is both inculpatory and exculpatory evidence, the theory of guilt can only be sufficiently proven if, at the time of evaluating the evidentiary material, the levels of corroboration of both the theory of guilt proposed by the prosecution and the theory of innocence alleged by the defense are analyzed concurrently." Accordingly, probatory value cannot be subtracted from the exculpatory evidence on the grounds that there is sufficient inculpatory evidence, since "the sufficiency of the inculpatory evidence can only be established in confrontation with the exculpatory evidence". For this reason, this Court specified that the exculpatory evidence "may give rise to a reasonable doubt both in the event that it questions the reliability of the inculpatory evidence, and in the event that the theory of innocence actually alleged by the defense is corroborated by these exculpatory elements."
- p.35 In the same sense, in resolving the *Amparo Directo en Revision* 3457/2013, the First Chamber of this Court held that "a reasonable doubt can be found in cases in which the defendant's defense does not properly propose a theory of innocence, but a version of the facts that is only incompatible with some aspects of the prosecution's account, for example, when the defense theory assumes any of the following positions: (i) the facts that fit under the basic description of the criminal offense are proven but not those of a complex crime; (ii) the facts of the basic description of the criminal offense are proven but not those that fit under a qualifier or modifier; (iii) the facts showing that the crime was attempted and not consummated are proven; or (iv) it is established that the acts were committed but it was not willful wrongdoing." However, in such situations, the confirmation of the defense theory only raises a reasonable doubt about one aspect of the prosecution

theory, so this should not result in an acquittal, and the prosecution theory should be considered unproven only to the extent proposed by the defense.

p.36 The decision explains that in criminal matters the parties often present at least two totally or partially incompatible versions of the facts relevant to the process, which means that both inculpatory evidence and exculpatory evidence can coexist in the evidentiary material. For this reason, this Court clarified that "not only evidence that directly supports the defense theory must be considered as exculpatory evidence, but also any means of proof intended to call into question the credibility of the inculpatory evidence or more broadly to call into question any aspect of the prosecution's theory ", since "ordinary judges have the obligation to assess all exculpatory evidence so as not to violate the presumption of innocence enjoyed by all defendants".

This is so since, in the conception of "doubt" as rational uncertainty about the truth of the theory of guilt, the satisfaction of the evidentiary standard does not depend on the existence of a subjective belief of the judge free of doubts, but on the absence within the whole of the evidentiary material of evidentiary elements that justify the existence of a doubt.

p.38 In the same precedent, this Court stated that the obligation of the Amparo courts when faced with an allegation of violation of the principle *in dubio pro reo* is "to verify whether, in light of the available evidentiary material, the trial court should have doubted the guilt of the accused, since there is evidence to justify the existence of a rational uncertainty about the truth of the theory of guilt, either because it is not sufficiently confirmed or because the theory of innocence raised by the defense is corroborated".

b) The presumption of innocence as an evidentiary rule

In the *Amparo en Revision* 349/2012 the First Chamber of this Court held that the presumption of innocence as an evidentiary rule is a right that "establishes the requirements that the evidentiary activity must meet and the characteristics that each of the pieces of evidence provided by the Prosecutor's Office must meet in order to be able to consider that there is valid inculpatory evidence and thus destroy the innocent status that every defendant has". According to this doctrine, the first requirement that the

evidence must meet in order to overcome the presumption of innocence understood as an evidentiary standard is that it can be qualified as inculpatory evidence.

- p.39 On this last point, in *Amparo Directo* 4380/2013 the First Chamber of this Court explained that "only evidence aimed at directly or indirectly proving the relevant facts in a criminal proceeding - the existence of the crime and/or the criminal responsibility of the defendant - can be considered inculpatory evidence". In this regard, it was specified that "[t]he inculpatory evidence will be direct if the evidence relates to the criminal act as a whole or to any aspect of it that can be observed (elements of the crime) and/or to the manner in which a person has intervened in those acts (criminal responsibility)"; while "the inculpatory evidence will be indirect if the evidence refers to a secondary fact from which the existence of the crime, any of its elements and/or the responsibility of the accused, can be inferred".
- p.40 Following this line of thought, when resolving the *Amparo Directo en Revision* 3457/2013, the First Chamber of this Court explained, on the one hand, that "when analyzing the legality of a decision the Amparo courts must verify that the evidence on which the conviction is based can be considered as inculpatory evidence [...] in such a way that they cannot uncritically assume that all the evidentiary material in the case file constitutes inculpatory evidence capable of setting aside the presumption of innocence." On the other hand, it was specified that "when it is considered that what exists is indirect inculpatory evidence, the Amparo courts are obligated to review the reasonableness of the inference made by the trial judges to prove the existence of the fact to be proven in the criminal process."
- p.36 Likewise, in the *Amparo Directo en Revision* 3457/2013, the First Chamber of this Court pointed out that the interpretation of the concept of doubt "as the 'lack of conviction' or the 'indeterminacy of the mood or thought' of the judge is an interpretation contrary to a protectionist understanding of the presumption of innocence ", since, according to "the specialized legal theory, when a sentence is subject to the 'states of intimate conviction' that a judge may have in relation to the existence of the crime and/or the responsibility of the accused, the door to irrationality is opened because the judge may reach those states of conviction without a connection between them and the available evidence".

p.40 In the *Amparo en Revision* 349/2012, the First Chamber of this Court also held that the presumption of innocence as an evidentiary rule implicitly contains a rule that imposes the burden of proof ("burden of producing evidence" in Anglo-Saxon terminology) or the provision of inculpatory evidence on the party that has that procedural burden, which as seen "from the current wording of section V of part A of article 20 of the Constitution [...] it is the responsibility of the accusing party, and in principle the second paragraph of article 21 of the Constitution itself assigns that role to the Prosecutor's Office."

p.41 Also, in this precedent, this Court held that, with the current wording of article 20 of the Constitution, any evidence provided by the Prosecutor's Office in trial must respect the principles of publicity, contradiction and immediacy in order to be considered valid inculpatory evidence at the time of the evidentiary assessment."

In direct relation to this issue, in *Amparo Directo* 14/2011 the First Chamber of this Court established the following: for the inculpatory evidence to be valid it must also have been obtained without violating the fundamental rights of the accused, since the presumption of innocence as an evidentiary rule is violated "when the judicial bodies have assessed an evidentiary activity to be harmful to other fundamental rights or lacking fundamental guarantees".

DECISION

p.42-43 The decision of the Collegiate Circuit Court is overturned because the rights to an adequate defense, to presentation without delay, and to the presumption of innocence of the affected parties were violated. A new decision must be issued with respect to the decision issued by the Criminal Chamber of the Superior Court of Justice of the Federal District, based on the constitutional interpretation contained in this decision of the fundamental rights violated.