

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**FLAGRANCY IN THE NATIONAL CODE OF CRIMINAL PROCEDURE  
(FLAGRANCIA EN EL CÓDIGO NACIONAL DE PROCEDIMIENTOS PENALES)**

**CASE:** *Amparo en Revisión 384/2017*

**REPORTING JUSTICE:** Arturo Zaldívar Lelo de Larrea

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

**DATE OF THE DECISION:** August 22, 2018

**KEY WORDS:** right to personal freedom, in flagrante delicto, in flagrante delicto by accusation, National Code of Criminal Procedure.

**CITATION OF THE DECISION:** Supreme Court, *Amparo en Revisión 384/2017*, First Chamber, Alfredo Gutiérrez Ortiz Mena, J., decision of August 22, 2018, 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-emblematicas/sentencia/2022-02/AR%20384-2017.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo en Revisión 384/2017*, Mexico.

## SUMMARY OF THE AMPARO EN REVISION 384/2017

**BACKGROUND:** A person went to an establishment called "El Barecito" where a group of people began to assault him. One of them hit him with a bottle in the right eye, another stabbed him in the eye with the knife of a nail clipper and a woman hit him in the head with a glass. The victim left the bar to ask for help and the bar manager requested the assistance of the police. While the victim gave his account of the facts to security agents, two of the assailants left the bar. The victim pointed them out as the persons who had assaulted him moments earlier and the police officers proceeded to detain them. One of the assailants was presented to the Prosecutor's Office and an investigation was initiated for the crime of assault. The supervising judge qualified this detention as legal on the basis of article 146, section II, paragraph b, of the National Code of Criminal Procedure (CNPP). The detainee requested an *amparo* in which he questioned the constitutionality of the aforementioned article because it unduly regulates the concept of *in flagrante delicto* contemplated in article 16 of the Constitution by introducing the case of *in flagrante delicto* "under accusation". The District Judge denied him the *amparo*, so he filed a *recurso de revisión* arguing that the decision did not correctly analyze the assignment of errors in which he questioned the constitutionality of article 146, section II, paragraph b), of the CNPP. The Collegiate Circuit Court that heard the motion, noting that the matter raised the unconstitutionality of a general rule, ordered that the court file be sent to the México's Supreme Court of Justice (this Court). In this way, this Court admitted the proposed recourse and decided to assume jurisdiction to hear the case.

**ISSUE PRESENTED TO THE COURT:** Whether the case of *in flagrante delicto* under accusation introduced by paragraph b), section II, of article 146 of the CNPP is unconstitutional.

**HOLDING:** The *amparo* was denied essentially for the following reasons. Article 16 of the Constitution provides for two hypotheses in which a detention may be considered to have occurred in flagrante delicto: (1) when the accused is detained at the time of committing the offence; and (2) when the accused is detained immediately after having committed the offence. The second case leaves room for interpretation as to the scope of immediacy. Thus, in order to

analyze the meaning and scope of the expression "immediately after", this Court took into account precedents in which it has been held that a detention in flagrante delicto under the latter assumption may occur in the following scenarios: 1) when the probable perpetrator is caught at the time of committing the crime and is pursued materially and uninterruptedly by the person who directly saw the act; and (2) when the detention is made by a person who, although he or she did not directly witness the act, has knowledge of the crime immediately after its commission and also has objective data that allows him or her to identify and detain the probable perpetrator at that time. Thus, this Court considered that article 146 of the CNPP establishes only these two cases of *in flagrante delicto* and that the normative portion challenged only develops one of the cases in which it should be understood that a person has been detained "immediately after" having committed the crime, which is when the person is pointed out by the victim or a witness to the events. This Court noted that paragraph b), whose constitutionality is questioned, is contained within section II of article 16 of the Constitution, which clearly reveals that the legislator's intention was not to create a case of *in flagrante delicto* different from or additional to the one set forth in that section, but to make explicit the cases in which it will be understood that a person has been detained "immediately after" having committed the crime.

**VOTE:** The First Chamber resolved this case by a majority of four votes of the justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (he reserved the right to issue a concurrent opinion), Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena. Norma Lucía Piña Hernández voted against.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=214671>

## EXTRACT OF THE *AMPARO EN REVISION* 384/2017

Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of August 22, 2018, issues the following decision.

### BACKGROUND

- p.2 On July 3, 2016, a man, his wife and his sister-in-law went to an establishment called "El Barecito". A group of people there stared and pointed at him, so the man went to the security staff of the bar to tell them what happened. When he returned to his table, the people who had pointed at him began to assault him. Apparently, the detainee who brought this lawsuit was among the assailants and allegedly hit him with a bottle in the right eye. Another assailant injured him in the eye with a nail clipper blade and a woman hit him in the head with a glass. As a result, the victim headed to the bar's exit to seek help.
- p.3 Observing what happened, the manager of the bar requested the assistance of the police, so moments later two officers arrived at the scene in a patrol car. Immediately after their arrival, they interviewed the victim outside the establishment. While he was telling the security officers what had happened, two of the assailants exited the bar, and he identified them as his assailants moments earlier. As a result, the police officers detained them. The plaintiff was presented by the police to the Prosecutor's Office where an investigation was initiated for the crime of assault.
- p.4 At the initial hearing, one Judge of Mexico City qualified the detention as legal, considering that it was carried out under the premises set forth in article 146, section II, paragraph b), of the National Code of Criminal Procedure (CNPP).

In view of this, the detainee requested an *amparo* for the following reasons:

- p.5-6 The detainee maintained that article 146, section II, paragraph b), of the CNPP is unconstitutional because it unduly regulates and amplifies the concept of *in flagrante delicto*, by establishing a case of "*in flagrante delicto* under accusation" that is contrary to the Constitution. According to the plaintiff, the Constitution only recognizes two forms of

*in flagrante delicto*: 1) when the person is detained at the very moment of committing the crime; 2) when the person is detained immediately after the commission of the offence. For this reason, the detainee considers that the article in question is unconstitutional since it seeks to introduce a concept of '*in flagrante delicto* by accusation' that article 16 of the Constitution does not contemplate.

- p.6 In addition, the detainee maintained that even though the challenged article conditions the detention *in flagrante delicto* by accusation on not interrupting the search for the perpetrator or his/her location immediately after the criminal act has been committed, that condition does not prevent risks of excess. This is because if the premise for detention is the accusation of the victim, injured party or a witness, the search or locating can be carried out on an "unidentified" person, and therefore "there will be cases in which the detention is not made immediately after the crime has been committed".

### STUDY OF THE MERITS

- p.10 This Court must determine whether the grievances invoked by the detainee to overturn the District Judge's decision, which determined that article 146, section II, paragraph b), of the CNPP does not contravene the definition of *in flagrante delicto* envisaged in article 16 of the Federal Constitution, are justified and sufficient.
- p.13 This Court decided that the affected party is right to point out that the District Judge did not fully and exhaustively answer the arguments he put forward in his *Amparo* claim. The judge did not carry out an exhaustive analysis of the concept of *in flagrante delicto*, nor did he fully explain why article 146, section II, paragraph b), of the CNPP is compatible with article 16 of the Constitution.

#### **I. Constitutional doctrine of this Court on the right to personal freedom and the concept of *in flagrante delicto***

The doctrine that this Court has been building in recent years has essentially been based on the provisions of article 16 of the Federal Constitution and article 7 of the American Convention on Human Rights, among other provisions contained in international treaties

signed by the Mexican State. It is important to note that, while the precedents referred to below were derived from cases processed under the rules of the traditional or mixed inquisitorial procedural system, the central arguments adopted therein remain generally applicable to proceedings under the rules of the adversarial criminal system.

- p.19 This Court emphasizes that the fifth paragraph of article 16 of the Federal Constitution only provides two hypotheses in which a detention may be considered to have occurred in *flagrante delicto*, namely: (1) when the accused is detained at the time of committing the offence; and (2) when the accused is detained immediately after the commission of the offence. In this regard, this Court has held that the first of these cases does not raise questions regarding its occurrence. However, the second scenario may present problems of interpretation since it involves determining what should be understood by immediacy.
- p.20-21 This Court has held that a detention in *flagrante delicto*, when made immediately after the crime has been committed, may occur in any of the following scenarios: 1) when the probable perpetrator is caught at the time of committing the offence and is pursued materially and uninterruptedly by the person who directly perceived the act; and 2) when the detention is made by someone who, although he or she did not directly witness the act, has knowledge of the crime immediately after its commission and also has objective data that allows him or her to identify and detain the probable perpetrator at that time. This way of interpreting the constitutional concept of *in flagrante delicto* has been reiterated and specified by this Court in subsequent precedents.

## **II. Analysis of the constitutionality of article 146, section II, paragraph (b) of the CNPP**

- p.23 The contested article states that there is *in flagrante delicto* when: I. The person is detained at the time of committing the offence; or II. When he or she is detained immediately after committing the crime. In particular, this last section contains two paragraphs, which establish the different scenarios in which a person may be considered to have been detained immediately after committing a crime. These scenarios are: a) when the person is caught and is materially and uninterruptedly pursued; and b) when the

person is identified by the victim or a witness to the events, such person is in possession of objects of the crime or when there is information or evidence that would give rise to a justified presumption that such person was involved in the crime.

- p.24 The detainee maintains that article 146, section II, paragraph b), of the CNPP must be declared unconstitutional, since it contains a concept of "*in flagrante delicto* by accusation" that finds no basis in the concept of *in flagrante delicto* provided for in the fifth paragraph of article 16 of the Constitution. In addition, the plaintiff states that even though the challenged article conditions the detention *in flagrante delicto* by accusation on not interrupting search for or locating of the perpetrator immediately after the criminal act has been committed, this does not "avoid the risks of excess". According to the lawsuit, if the premise of the detention is the identification by the victim, the injured party or a witness, then the search or locating can be carried out on an unidentified person. Therefore, there will be cases where the detention is not made immediately after the crime has been committed.

This Court considers that the appellant's arguments are unfounded because Article 146 of the CNPP is sufficiently clear in establishing only two cases of *in flagrante delicto* that are contained in sections I and II. This Court understands that the case provided for in section II, paragraph b), only develops one of the cases in which a person will be deemed to have been detained "immediately after" having committed the offence, which is when the person is pointed out by the victim or a witness to the events.

- p.25 In this regard, the challenged paragraph b) is contained in section II of article 146 of the CNPP, which clearly reveals that the legislator's intention was not to create a case of *in flagrante delicto* different from or additional to what is provided for in that section, but only to make explicit the cases in which it will be understood that a person has been detained "immediately after" having committed the crime. This Court holds that the concept of "*in flagrante delicto* by accusation" is actually one of the hypotheses in which it is possible to detain a person "immediately after" he or she committed a crime. In order for a detention by accusation to be valid, it must be made immediately after the commission of the offence

by searching for or locating the accused without interruption. Under that interpretation, it is clear that the provision in question, by establishing that a person may be detained immediately after having committed a crime when "that person is pointed out by the victim or injured party, an eyewitness to the acts or someone who has intervened with that person in committing the crime and when that person has in his or her possession instruments, objects, proceeds of the crime or information or evidence that make it reasonable to presume that he or she intervened in it", in no way implies a modification or alteration of the constitutional concept of *in flagrante delicto*.

On the contrary, by establishing that a detention by accusation is valid as long as it is carried out immediately after the offence has been committed, it is clear that it is consistent with the definition of *in flagrante delicto* contained in article 16 of the Constitution.

In accordance with article 146, section II, paragraph b), of the CNPP, a detention in flagrante delicto may be considered valid when the victim or an eyewitness to the acts points out the perpetrator, even if the person making the detention has not directly seen the criminal act. This Court considers it important to recall that, in accordance with the interpretation that this Court has been upholding in relation to the fifth paragraph of article 16 of the Constitution, in order for a detention in flagrante delicto to be considered valid, it is not necessary for the officer to have directly seen the criminal act; it is sufficient for the officer to have knowledge of it and of the identity of the alleged perpetrator on the basis of data or objective information. This may occur when the person is identified by the victim or injured party, an eyewitness to the acts or whoever has intervened with him or her in committing the crime and when he or she has in his or her possession instruments, objects, proceeds of the crime or there is information or evidence that makes it reasonable to presume that he or she intervened in it.

p.26 This Court considers it important to reaffirm that the fact that the Constitution and the challenged law authorize detaining a person identified by another person does not mean that an unidentified person can be detained or that the detention does not have to be made immediately after the commission of the act, as the plaintiff seems to assert. For a

detention in flagrante delicto to be valid in constitutional terms, it is essential that it be carried out immediately after the crime has been committed and that objective data exist to identify the probable perpetrator. Therefore, a detention that does not meet these conditions must be classified as arbitrary as it lacks justification and is therefore illegal.

p.27 In light of the foregoing, this Court considers that article 146, section II, paragraph b), of the CNPP is not contrary to article 16 of the Federal Constitution because it does not contemplate a premise different from those included in the constitutional definition of *in flagrante delicto*, but only establishes one of the cases in which it is permissible to detain a person "immediately after" the crime has been committed.

### DECISION

p.28 This Court does not grant the *amparo* or protects the detainee against article 146, section II, paragraph b), of the CNPP.

Since the concepts of infringement put forward by the detainee have proved unfounded, this Court confirms the appealed decision with regard to the act challenged and reserves jurisdiction to the Collegiate Circuit Court that heard this case to undertake the rest of the grievances and resolve them in accordance with the law.