

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 45/federal/2019



Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 31/7/2019 headed by the Judge Madhat Al-Mahmood and the membership of Judges Farooq Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Abood Salih Al-Temime, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who are authorized in the name of the people to judge and they made the following decision:

The Plaintiffs:

1. Muthana Hamid Hwaiti -lawyer- his agent the attorney Shahad Tariq.
2. Shahad Tariq –attorney.
3. Ali Abd Al-Jabbar Issa –attorney.

The Defendant: The speaker of the parliament/ being in this post - his agents the legal officials the director Salim Taha Yasein and the legal advisor Haytham Majid Salim.

The Claim

The Plaintiffs claimed that article (57/Alif) of the (amended) Criminal Procedure law No.(23) for 1971 stipulated that (the accused, the accuser, civil claimant, civilly responsible for the act of the accused, and their agent may attend the investigation

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procedures, the judge or the investigator may prevent any of them from attending if necessary for reasons stated in the minutes, but he allow them to have access to the investigation when decline this necessity. They may not speak unless he authorized them, and if he did not authorize, it shall be recorded in the minutes), the plaintiffs also added in the case petition that the legislator didn't obligate the attendance of the agent of the accused during his investigation session but permissively, with the proof that he used the letter (Lam with kasra (I, E)), but authorize the judge or the investigator to prevent any of the mentioned from attending if necessary, also the legislator in paragraph (Alif) of article (57) above has prevent all the parties from speaking unless the judge authorized it, this judge is similar to the provision in the fundamentalism article (68) which obligate that the discussion of the witness during the trial by the president of the competent court. The order of the Coalition Provisional Authority No.(3) for 2003 has decided to repeal the statement (by the court) but the investigation phase wasn't included by that, and that paragraph (4th) of article (19) of the constitution indicated to guarantee of the right to defense through all the stages of investigation and trial, which means that this right is constitutionally guaranteed, obligation not alternative, as right of the accused must be considered, in contrariwise to the provision of the Criminal Procedure law No.(23) for 1971, as it granted the right of defense in the mentioned article (57) during the trial, without the investigation phases in contradict to what stated in the constitution, by making it cover the investigation and the trial phases. The plaintiffs requested (to judge that paragraph (Alif) of article (57) of the Criminal Procedure law No.(23) for 1971 (the amended) to be

unconstitutional for violating the text of article (19/4th) of the constitution. The agents of the defendant (the speaker of the I.C.R./ being in this post) has respond to the case petition with the following: the challenged text does not violate the provisions of article (19/4th of the constitution as it granted the right to a defense and it sacred, the challenged text regulate this right in the presence of the parties and their agents) before the investigative bodies and courts, it is no secret that some investigations have a specificity in maintaining confidentiality or influencing the progress of the investigation, so that the article -under challenge- has organized the competent party to investigate, specially these procedures is submitted to the cassation court censorship, if it contain violation it will exposed to evocation, in addition to that the challenged text was set as legislative option and does not violate the constitution. For all that the agents of the defendant requested to reject the case. After the case was registered according to paragraph (3rd) of article (1) of the F.S.C. Bylaw No.(1) for 2005, and completing the required procedure according to paragraph (2nd) of article (2) of the mentioned bylaw, the date 31/7/2017 was set to proceed with the argument, the court convened and the attorney Shahad Tariq has attended incumbently and as agent for the plaintiff Muthana Hamid according to the power of attorney linked to the case petition, the attorney Ali Abd Al-Jabbar has attended as plaintiff, the agents of the defendant has attended, and continue with the argument in presence and publicly, the agent of the plaintiff and the plaintiff by herself repeated what listed in the case petition and clear that the challenged text limit the right of defense stipulated in article (19) of the constitution by granting the judge or the interrogator the right to

make the investigation session secretive, or not to allow the agent of the plaintiff to speak despite our belief that there are cases where the investigation session needs to be confidential, the agents of the defendant (repeated the answering draft) and requested to reject the case. The court scrutinized the case petition and found that its judgment reasons are completed so the argument has closed and issued the following decision.

The Decision

After scrutiny and deliberation by the F.S.C., the court found that the plaintiffs has challenged article (57/Alif) of the (amended) Criminal Procedure law No.(23) for 1971 which stipulated that (the accused, the accuser, civil claimant, civilly responsible for the act of the accused, and their agent may attend the investigation procedures, the judge or the investigator may prevent any of them from attending if necessary for reasons stated in the minutes, put he allow them to have access to the investigation when decline this necessity. They may not speak unless he authorized them, and if he did not authorize, it shall be recorded in the minutes.), the plaintiff claimed that the legislator didn't obligate the attendance of the agent of the accused during his investigation session but permissive, and authorize the judge or the investigator to prevent any of the mentioned from attending which violate the provision of article (4th) of article (19) of the constitution which stipulate that ((the right to a defense shall be sacred and guaranteed in all phases of investigation and the trial)) in contrary to what listed in the mentioned article (57) as it limited it to the phase of investigation only, for the aforementioned the plaintiffs requested (to judge that article

(57/Alif) of the Criminal Procedure law No.(23) for 1971 (the amended) to be unconstitutional for violating the text of article (19/4th) of the constitution). The F.S.C. found that the restriction established by the legislator according to the text of the mentioned article (57/alif) regarding the attendance of the concerned persons in the investigation sessions is (a temporary restriction for specific cases related to the security and safety of the society and for the public interest), and that what is happened in their absence will be announced after the circumstances of confidentiality has removed, and they can challenge that procedure according to the law, as for releasing the freedom to discuss for the complainants and witnesses without the permission of the court it will lead to a breach of the session and the proper conduct of it whereas (the order of the proceedings, investigation or trial sessions) shall be determined by the president of the court according to article (63/1) of the civil procedure law No.(83) for 1969 and articles (168, 64) of the Criminal Procedure law No.(23) for 1971 (the amended), as for the claim that the text of the challenged article has limit the defend attend in the investigation phase, other text has confirmed his attendance during the procedure of the court, if the accused doesn't have attorney the court shall assign an attorney for him and the general budget shall afford his expenses. From the aforementioned it's clear that article (57) of the mentioned Criminal Procedure law that is under challenge has granted the right of defense to the accused accordingly it is in accordance with article (19/4th) of the constitution and doesn't violate it. Accordingly the F.S.C. decided to reject the case and to burden the plaintiffs the expenses and advocacy fees for the agents of the defendant amount of one

hundred thousand Iraqi dinars. The decision has been issued decisively and unanimously according to the provisions of article (94) of the constitution, and article (5/2nd) of the F.S.C. law No.(30) for 2005, and issued publicly on 31/7/2019.

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