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Provisional execution of sentence in the second instance: divergent positions of the Supreme Court.

Provisional execution of sentence after second-instance conviction: Divergent Rulings of the Supreme Court

Rodrigo Alves de Moraes – Unità Faculty – Rodrigopesquisador122@gmail.com - Bachelor's degree in Public and Private Security Management from Lions College. Bachelor of Laws from Cambury University. Specialist in Criminal Law and Criminal Procedure from Unità College. Specialist in Law.
Operational graduate from Faculdade Supremo. Specialist in Advanced Studies in Public Security (SSP-GO/UEG).
He has held the position of Correctional Officer for the State of Goiás since 2017.

Summary

This study analyzes the jurisprudential evolution regarding the provisional execution of sentences after conviction in the second instance within the Brazilian legal system. The topic, of high constitutional importance, is confronted with the principle of presumption of innocence (Article 5, LVII, of the 1988 Brazilian Constitution) and the fundamental rights of the convicted person. The research describes the hermeneutical oscillations of the Supreme Federal Court (STF) in four distinct periods: the admissibility of execution (1988–
This study examines the constitutional changes and legislative shifts that underpinned these jurisprudential changes: the prohibition established in HC 84.078-7/MG (2009–2016); the return to the possibility of imprisonment after the second instance (2016–2019); and the reaffirmation of the imperative nature of final judgment in ADCs nº 43, 44 and 54. Finally, it examines the current scenario consolidated by RE 1.235.340/SC (2024), which prohibits early execution, while respecting the sovereignty of verdicts in the Jury Court. The methodology consists of a bibliographic and documentary review of the main constitutional changes and legislative shifts that underpinned these jurisprudential changes.
Keywords: Provisional Execution of Sentence; Presumption of Innocence; Supreme Federal Court; Constitutional Amendment; Final Judgment.

Abstract

This study analyzes the jurisprudential evolution regarding the provisional execution of sentences following second-instance convictions within the Brazilian legal system. This highly controversial constitutional issue is examined in light of the principle of the presumption of innocence (Art. 5, LVII, CF/88) and the fundamental rights of the defendant. The research describes the hermeneutic shifts of the Brazilian Supreme Court (STF) across four distinct periods: the admissibility of execution (1988–2009); the prohibition established in HC 84.078-7/MG (2009–2016); the return to the possibility of imprisonment after second-instance decisions (2016–2019); and the reaffirmation of the necessity of a final judgment (res judicata) in ADCs 43, 44, and 54. Finally, it examines the current legal landscape consolidated by RE 1.235.340/SC (2024), which forbids early execution except for convictions by the Jury Trial. The methodology relies on a bibliographic and documentary review of the primary constitutional mutations and legislative changes that ground these jurisprudential shifts.

Keywords: Provisional Execution of Sentence; Presumption of Innocence; Supreme Federal Court; Constitutional Mutation; Final Judgment

1. Introduction

Corruption investigations in Brazil, with emphasis on Operation Lava Jato, resulted in...

The conviction of several public and private agents shifted the legal debate towards interpretation.

of the **principle of presumption of innocence.** The Supreme Federal Court (STF) played a leading role.

central discussions on the **early execution of sentences,** whose successive changes of

Case law has had a decisive impact on the outcome and processing of criminal cases.

of high relevance in the country (Galvão, 2024).

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The Supreme Court held the position that provisional imprisonment of the sentence was possible.
between the years 1988 and 2009, as exemplified by **HC 84.336-1/RS,** and was based on the absence
of suspensive effect of ordinary or extraordinary appeals (Brazil, 2004).

Starting in 2009 with the trial Regarding **HC No. 84078-7/MG,** it was settled that
unconstitutionality **of the provisional execution of the sentence in the second instance,** for the reason that
a blatant violation of the principle of presumption of innocence enshrined in Article 5, LVII of the Constitution.
Brazilian Federal University (Brazil, 2009).

However, this understanding was superseded by the judgment in **Habeas Corpus No. 126.292/SP.**
on 02/17/2016, allowing the imprisonment of the convicted individual in the second instance, simply
The argument is that the substantive assessment of the criminal act has already been definitively reached, and therefore it is not up to the...
Superior courts will assess this aspect (Brazil, 2016).

Following the judgment of **ADCs No. 43, 44 and 54,** on 07/11/2019, the Honorable Supreme Court
The Federal Court **declared** the text of article 283 of the CPP (Code of Criminal Procedure) constitutional, which conditions imprisonment as a condition for imprisonment.
final judgment of a criminal conviction, an understanding already applied by the Court between the years
from 2009 to 2016 through the judgment of HC. 84078-7/mg (Brazil, 2019).

Currently, the Supreme Court has declared that the prohibition of imprisonment after a decision of
The second instance does not reach the verdict of the Jury Court, the sovereignty of the verdicts prevailing.
through the judgment of **RE 1.235.340/SC** in 2024 (Brazil, 2026).

2. Theoretical Framework / Results

2.1 - Provisions of international treaties and conventions that address the principle of presumption of innocence:

The Declaration of the Rights of Man and of the Citizen of 1789 was the starting point of
The principle of presumption of innocence, stipulated in article 9, states that "every accused person is presumed innocent until proven guilty."
to be declared guilty and, if deemed necessary to arrest him, all the rigor not required for the custody of
"His person must be severely punished by law" (France, 1789).

Following this historical milestone known as the first dimension of human rights, there was...
a legal expansion of the principle of presumption of innocence, being recognized as a right.
The fundamental nature of the human person is reflected in the various legal instruments around the world, including:

1948 - Universal Declaration of Human Rights (Proclaimed after World War II)
World): “Art. 11, 1 - Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.”
Guilt must be legally proven in the course of a public trial in which all guarantees are upheld.
"The necessary means of defense must be ensured for him."

1950 - European Convention on Human Rights: "Article 6, 2 - Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

1966 - International Covenant on Civil and Political Rights: "Article 14, 2 - Everyone charged with a penal offence shall have the right to be presumed innocent until proved guilty according to law."

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"has been legally established."

1969 - American Convention on Human Rights (Pact of San José, Costa Rica). Regarding this Convention, we observe in the lessons of Barbagalo **(2015, p. 39)** that the Brazilian National Congress approved said pact by Legislative Decree No. 27, of May 6, 1992, and Decree No. 678, of May 26, 1992, determined its validity in Brazil, which brought the principle of presumption of innocence with the following wording: “Art. 8, **2** - Every person accused of a crime has the right to be presumed innocent until proven guilty according to law. During the process, every person has the right, in full equality, to the following minimum guarantees: [...]”.

1982 - Canadian Charter of Rights and Freedoms: "Section 11 - Every person charged with a criminal offence has the right to: D) be presumed innocent until proved guilty according to law in a public trial by an independent and impartial tribunal."

These are the main international instruments that deal with Human Rights and which bring the predictability of the principle of presumption of innocence, and not one of these devices International law stipulates that a guilty verdict is contingent upon a final and unappealable judgment, meaning it cannot be finalized. They require a final, unappealable decision for the defendant to be declared guilty; it is sufficient... that the procedures established by law are followed and that other fundamental rights are respected. guaranteed, such as due process of law, the right to a fair hearing, and the right to a full defense (Barbagalo, 2015).

2.2 - Presumption of innocence in the 1988 Constitution of the Federative Republic of Brazil:

From a historical perspective, the contemporary configuration of the presumption of innocence It became established in the 18th century, emerging as a counterpoint to the inquisitorial system. The latter, characterized by the arbitrary power and monopoly of the sovereign, was gradually replaced by Enlightenment paradigms aimed at limiting state power and structuring a new model. of criminal procedure (Carvalho, 2016).

This principle was incorporated into the national legal system through work initiated in February 1, 1987, through the National Constituent Assembly and its eight Commissions. themes that they discussed and promulgated, in the year 1988, the current Constitution of the Republic (Federal District, 2017).

In the drafting procedure, the Rapporteur of the thematic subcommittee responsible for In his book "Individual Rights and Guarantees," constituent assembly member Darcy Pozza stated that he received more than 1,121 suggestions on the topic were made, among which those of Professor **Candido** stood out. **Mendes,** proposing the following wording: "the innocence of the citizen, or the accused, is presumed until proven guilty." "judicial declaration of their guilt, or of their conviction," approximate text of the wording of the international treaties in force at the time on the subject (Federal District, 2017).

The wording chosen to represent the principle of presumption of innocence was given by **José Ignácio Ferreira,** proposing: "no one will be considered guilty until the final judgment of the case." criminal conviction sentence” (Federal District, 2017).

2.3 - Final judgment:

The finality of a judicial decision is a procedural condition that constitutes rights and/or duties, being applied in a special way during criminal prosecution, conditioning the

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a final criminal conviction, after all appeals have been exhausted, making effective thus the principles of adversarial proceedings and full defense, as well as due process of law. (Barbagalo, 2015).

The volatility of the concept of final judgment in criminal prosecution has become evident. by the Supreme Court, which has taken a position with hermeneutical divergences in the judgments HC 84.078-7/MG (2009–2016); the return to the possibility of imprisonment after the second instance with RE 126.292/SP (2016–2019); and the reaffirmation of the imperative nature of final judgment in ADCs No. 43, 44 and 54. Finally, RE 1.235.340/SC (2024), which prohibits early execution, without prejudice to the sovereignty of verdicts in jury trials.

2.4 - The principle of presumption of innocence as an entrenched clause:

This comparison has already been addressed by other scholars, and without much difficulty, it is... It is clear that the list set forth in Article 60, §4, IV of the Federal Constitution refers to "Rights and "Individual guarantees," thus, the Principle of Innocence or Non-Guilt, provided for in Article 5, LVII of the Brazilian Federal Constitution cannot be abolished (totally or partially) by means of the constituent power. A reforming derivative, which may undergo modifications if constituent power is invoked. original, since it is initial, unlimited, and unconditional.

We emphasize that even in this situation there would be resistance to its modification. This guarantee exists because there is a new doctrinal position that defends the immutability of rights. Fundamental rights, also called Natural Rights.

3. Methodology

This study adopts a qualitative approach, of an exploratory and descriptive nature. The historical-comparative method was used to analyze the fluctuations. case law from the Supreme Federal Court.

Data collection was carried out through direct document research in the repository of jurisprudence of the STF, selecting the main precedents (HCs 84.336/RS, 84.078/MG, 126.292/SP, ADCs 43, 44 and 54, and RE 1.235.340/SC).

Additionally, the bibliographic review technique was employed, consulting... Specialized doctrine in Constitutional Law and Criminal Procedure.

4. Results and Discussion

4.1 - The effects of the principle of presumption of innocence in relation to exceptional appeals (special and extraordinary):

According to the teachings of Fernando Capez (page 863, 2012), Article 27, § 2, of Law No. 8.038/90, which states that extraordinary and special appeals will be received with suspensive effect. In view of

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Therefore, it is stated that such appeals lack suspensive effect. This means, therefore, that the

The filing of either a special appeal or an extraordinary appeal does not prevent immediate execution.

based on the content of the judicial decision; therefore, provisional enforcement of the judgment is possible.

Although there is, in fact, legal support for the Provisional Execution of Sentence, the doctrine points out

the unconstitutionality of article 637 of the CPP, added by Law No. 8.038/90, as well as of

Summary No. 267 of the Superior Court of Justice (STJ), in this sense are the teachings of Fernando Capez:

> The wording given by the constituent legislator to the provision of article 5, LVII ("no one shall be considered guilty...") prioritizes the so-called principle of presumption of innocence from the perspective of the rule of treatment that the agents responsible for criminal prosecution must adopt towards the accused. From this perspective, any and all forms of treatment of the subject of the prosecution that may imply, even implicitly, equating them with the guilty party are prohibited.
> And there is no doubt that enforcing the sentence before it becomes final is one way to draw this parallel.
> [...]
> From this perspective, the rule in Article 27, § 2, of Law No. 8.038/90 appears unconstitutional, since it was drafted in violation of constitutional parameters, and therefore, due to the defect of nullity that taints it, it cannot be applied. (CAPEZ, Fernando. Curso de Processo Penal. 19th Ed. Saraiva, 2012. Page 862.)

Note that the issuance of the arrest warrant before the final judgment of the sentence, in case...

If it is not accompanied by precautionary measures, it will violate the treatment rule stemming from the Principle of non-

culpability, where the defendant must be given treatment commensurate with his situation of

innocence until proven guilty.

Concluding this normative impasse, CAPEZ (p. 864, 2012) asserts that the resources

In special and extraordinary criminal matters, a stay of execution must be granted, in whole and in part.

In any case, even if the need for pretrial detention is foreseen, even if in a different way.

Law No. 8,038 provides as such, since the constitutional system dictates, which, by imposition of

The principle of the hierarchy of legal norms conditions the validity and application of all...

Brazilian legal system.

4.2 - Position of the STF (Supreme Federal Court) regarding the provisional execution of sentences in the second instance, from 1988 to 2009, the period in which provisional execution was permitted:

The Supreme Court had already taken a position in favor of the provisional execution of the sentence on the second attempt.

This is evident even before the promulgation of the 1988 Federal Constitution, as can be inferred from...

HC. No. 64.749-9/SP reviewed and judged on 03/02/1987, where the Reporting Justice was Francisco Rezek

argues for the possibility of prematurely executing the decision rendered in the second instance.

basing his argument on article 393, I of the CPP, which is currently repealed, and which established

As one of the effects of the sentence is imprisonment, let's look at part of his opinion:

> Mr. Justice Francisco Rezek (Rapporteur): - the detention of the defendant is a regular effect of the conviction – and it is clear that the term "sentence," used by the Code of Criminal Procedure, also encompasses the collegiate decision. If this is true, and considering that the extraordinary appeal does not have a suspensive effect, the arrest warrant is not illegitimate. I also recall that the execution, before the sentence becomes final, is provisional (in this case,

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> Furthermore, the defendant has not yet been arrested, and it cannot be said that the absence of the warrant now has any essential effect on the validity of the warrant. It is worth noting that the Law on Criminal Executions requires that the warrant include the certificate of the final judgment of the sentence (art. 116, III) – which demonstrates that the absence of the warrant, at this moment, is not fundamental. Nor does the fact that the judge of first instance issued the warrant imply nullity – a necessary consequence of the judgment that convicted the defendant.

This ruling does not merit criticism, since it was not yet in effect in the legal system.
Brazilian law includes the principle of presumption of innocence, which emerged in 1988 in the wording of...
Article 5, LVII of the still-valid Constitution.

Even after the promulgation of the Federal Constitution, the Supreme Court continued to...
The position favoring the early execution of the sentence is what is found in the judgment of HC No. 84.336-
1/RS issued on 10/01/2004, let's look at the summary:

> HABEAS CORPUS. PROVISIONAL EXECUTION OF SENTENCE IN ORIGINAL ACTION. SUBSTITUTION OF IMPRISONMENT WITH RESTRICTIVE MEASURES. 1. There is no illegal constraint in the provisional execution of a sentence arising from an original criminal action, given that ordinary or extraordinary appeals do not have suspensive effect. It is impossible to examine the issue related to the substitution of imprisonment with restrictive measures, because it was not raised in the habeas corpus petition filed before the Superior Court of Justice, under penalty of suppression of jurisdiction. Precedents. 2. HC partially granted and denied.

In this Habeas Corpus case, Justice Ellen Gracie served as the rapporteur, and in her opinion, she stated...
Of course, it was peaceful in the STF (HC 81,392, 81,340, 82,812, 83,152, 86,067, 83,982, 81,147)
permission to provisionally execute the sentence before it becomes final and unappealable was a
With all due respect, the vote lacks constitutional justification, as the analysis was merely based on the law.
The infra-constitutional provision that attributes only devolutive effect to extraordinary appeals, not having these
the power to suspend the effects of the second instance decision.

The Supreme Federal Court's rulings on this matter continued to have the same reasoning among the...
years from 1988 to 2007, where, on the date of 06/02/2007, with the consideration of the Ordinary Appeal in Habeas Corpus
Corpus (RHC) No. 86,822/MS initiated a greater reflection on the values of the principles.
constitutional, with Justice Gilmar Mendes as the Rapporteur for this Habeas Corpus, who thus positioned himself in
Your vote:

> "Although the judgment of the aforementioned complaint has not yet been concluded, the understanding that is being established, including with my vote, presupposes that any pre-trial detention, after a conviction and without a final and unappealable judgment, may only be implemented if duly justified, in accordance with article 312 of the Code of Criminal Procedure."

The understanding to be established in the Supreme Federal Court (STF), to which the Reporting Justice refers, is precisely in
to deny the provisional execution of the sentence in the second instance based solely on the decision with this
circumstance, and there must also be concrete reasons for ordering the arrest of
convicted.

This Habeas Corpus No. 86,822/MS, judged by the Second Panel of the Supreme Court, was the first.

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Supreme Court precedent denying the restriction of citizens' freedom after the ruling in the second instance.
instance.

Following this landmark moment of reflection, several habeas corpus cases that dealt with this subject were published. They were also granted, preventing a violation of the constitutional principle of presumption of innocence, where decisions became increasingly well-founded and consistent, being alleged in defense of the final judgment, in addition to article 5, LVII of the Brazilian Federal Constitution, the arguments of Dignity of the Human Person (art. 1, III, CFB), the duty of the organs of the Judiciary to justify their decisions (art. 93, IX, CFB), the requirement of final judgment established by articles 105 and 106, III of the Law on Criminal Executions, further alleging that the provisional execution of the sentence violates the principle of the right to a full defense, since it is active in all phases of criminal prosecution, including the stages appeals (art. 5, LV, CFB).

The decisions of the Supreme Federal Court that supported these arguments were: RHC nº 89.550-6/SP/2007; HC nº 91.333-4/MG/2007; HC nº 91.176-5/SP/2007; HC nº 91.232-0/PE/2007; HC nº 94,476/SP/2008; HC nº 93,266/SP/2008; HC nº 93,261/BA/2008; HC nº 85.417-6/RS/2008.

Due to the large number of decisions on the same subject, and having a significant impact. In a social context, the issue gained general repercussion status and was reviewed by the full Supreme Federal Court. through Habeas Corpus No. 84.078-7/MG on February 5, 2009, which will be detailed below.

4.3 - Based on the judgment of HC No. 84.078-7/MG (2009 to 2016), provisional execution is prohibited:

With the ruling in Habeas Corpus No. 84.078-7/MG, the Supreme Court prohibited provisional execution. Regarding the sentence after a second-instance decision, as per the summary by Reporting Justice Eros Grau:

> SUMMARY: HABEAS CORPUS. UNCONSTITUTIONALITY OF THE SO-CALLED "EARLY EXECUTION OF SENTENCE". ARTICLE 5, LVII, OF THE CONSTITUTION OF BRAZIL. DIGNITY OF THE HUMAN PERSON. ARTICLE 1, III, OF THE CONSTITUTION OF BRAZIL. 1. Article 637 of the CPP establishes that "[t]he extraordinary appeal does not have suspensive effect, and once the respondent has presented their arguments, the original records will be sent back to the first instance for the execution of the sentence".
> The Penal Execution Law conditioned the execution of a custodial sentence on the final judgment of the conviction. The 1988 Constitution of Brazil defined, in its article 5, item LVII, that "no one shall be considered guilty until the final judgment of a criminal conviction." 2. Therefore, the precepts conveyed by Law No. 7.210/84, in addition to being adequate to the current constitutional order, supersede, temporally and materially, the provisions of article 637 of the Code of Criminal Procedure. 3. Imprisonment before the final judgment of conviction can only be decreed as a precautionary measure. 4. The right to a full defense cannot be viewed in a restricted way. It encompasses all procedural phases, including extraordinary appeals. Therefore, the execution of the sentence after the appeal judgment also means a restriction of the right to defense, characterizing an imbalance between the state's claim to apply the penalty and the defendant's right to refute that claim. 5. Temporary imprisonment, restriction of the effects of appeals in criminal matters, and exemplary punishment, without any leniency, in "heinous crimes" very well express the sentiment that EVANDRO LINS summarized in the following assertion: "In reality, whoever wants to punish excessively, deep down, wants to do evil, is somewhat similar to the delinquent himself." 6. The anticipation of the execution of the sentence, besides being incompatible with the text of the Constitution, could only be justified in the name of the convenience of the magistrates—not of the criminal process. According to them, if the constitutional principle is upheld, the courts [meaning the Superior Court of Justice and the Supreme Federal Court] will be flooded with special and extraordinary appeals and subsequent motions and appeals, and "no one will be imprisoned anymore." This could be pointed out as incitement to "defensive jurisprudence," which, in the extreme, reduces the scope or even amputates constitutional guarantees. The convenience and improved operational efficiency of the Supreme Federal Court cannot be achieved at this price. 7. In RE 482.006, rapporteur Minister Lewandowski, when it was

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In a debate concerning the constitutionality of a provision in Minas Gerais state law that mandates a reduction in the salaries of public servants removed from their duties while facing criminal charges for alleged crimes related to their official duties [Article 2 of Law No. 2,364/61, which amended Law No. 869/52], the Supreme Federal Court (STF) unanimously affirmed that the provision constitutes a flagrant violation of Article 5, item LVII, of the Brazilian Constitution. This is because – stated the rapporteur – "admitting the reduction of public servants' remuneration in such cases would amount to validating a true anticipation of punishment, without due process of law, and even before any conviction, regardless of any provision for the return of the differences in case of acquittal." That is why the Court unanimously and resoundingly decided against the acceptance of the state law provision by the 1988 Constitution, unanimously affirming the impossibility of anticipating any effect related to property prior to its final judgment. The Court, which vigorously upholds the constitutional provision in the name of guaranteeing property, should not deny it when it comes to guaranteeing liberty, especially since property is more related to the elites; the threat to liberties effectively reaches the subordinate classes. 8. In democracies, even criminals are subjects of rights. They do not lose this quality to become mere procedural objects. They are people, included among those benefited by the constitutional affirmation of their dignity (Article 1, III, of the Constitution of Brazil). Their social exclusion is inadmissible without considering, under any circumstances, the singularities of each criminal offense, which can only be fully ascertained when the conviction of each one becomes final, an order granted.

In addition to the grounds for the rapporteur's vote, the protection of other rights is also evident.
fundamental principles enshrined in the Federal Constitution, such as the principle of full defense (Article 5, LV, CFB)
and the principle of the Dignity of the Human Person (art. 1, III, CFB).

With this new stance from the Supreme Court, the other rulings followed the same line.
In that sense, they are: HC No. 94.408-6/MG/2009; HC No. 96.244/ES/2009; HC No. 98.166/MG/2009; HC
nº 98,463/SP/2009; HC nº 103,583/SP/2010; HC nº 94,681/RJ/2010; HC nº 102,458/RS/2010; HC no.
119.348/SP/2014.

In light of the Brazilian Federal Constitution, the best interpretation adopted by the Supreme Court
Regarding the matter, without a doubt, the one issued in the decision of HC No. 84.078-7/MG was the correct one, taking into account...
considering the values brought by the original constituent legislator, who chose to condition the
The defendant's guilt is contingent upon the final judgment of the criminal conviction, accepting José's proposal.
Ignácio Ferreira, the author of the wording of article 5, LVII of the Magna Carta.

Although the matter was already settled in the Supreme Court, on February 17, 2016, there was a...
modification of understanding by this Honorable Supreme Federal Court through the decision rendered
In the assessment of Habeas Corpus No. 126.292/SP, reverting to the permissive position of execution.
provisional sentence.

4.4 - From 2016 to 2019, with the judgment of HC No. 126.292/SP, the period permitted for provisional execution:

The Reporting Justice for this decision was the late His Excellency Dr. Teori.
Zavascki, who died on January 19, 2017, after the plane he was in crashed,
Paraty, on the coast of Rio de Janeiro.

Despite his absence, his legacy will always be remembered by the defendants who were
sentenced in the second instance and imprisoned under the provisional execution of the sentence,
in accordance with his vote in HC No. 126.292/SP:

Summary: CONSTITUTIONAL. HABEAS CORPUS. CONSTITUTIONAL PRINCIPLE OF

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> PRESUMPTION OF INNOCENCE (CF, ART. 5, LVII). CRIMINAL CONVICTION SENTENCE CONFIRMED BY A SECOND-INSTANCE COURT. PROVISIONAL EXECUTION. OF POSSIBILITY. 1. The provisional execution of a criminal conviction judgment rendered on appeal, even if subject to special or extraordinary appeal, does not compromise the constitutional principle of the presumption of innocence affirmed by article 5, item LVII of the Federal Constitution. 2. Habeas corpus denied.

The present *decision* is quite controversial and interesting, considering that in the legal system

In the national legal system, there has been no emergence of new laws or international treaties and conventions, which

could influence the modification of the Supreme Court Justices' positions, since

Judgment in Habeas Corpus No. 84.078-7/MG, delivered in 2009.

The opinion of Rapporteur Teori Zavascki outlines the reasons that led to the modification of

Understanding of the Supreme Court, see:

> [...] The topic related to the provisional execution of criminal convictions
> This involves reflection on (a) the scope of the principle of presumption of innocence combined with (b) the search for a necessary balance between this principle and the effectiveness of the criminal justice system, which must address values dear not only to the accused, but also to society, given the reality of our intricate and complex criminal justice system.

This concern of the Rapporteur, in rethinking the implications of the principle of presumption of innocence.

This reflects the outrage of society, which is increasingly losing confidence in the Brazilian judicial system.

This discrediting of society stems from the various legal aberrations that are recorded in

a history of case law from the Judiciary, which was brilliantly observed by

Legal scholar Fernando Brandini Barbagalo:

> "Driven by curiosity, I checked the Superior Court of Justice's website to see the status of Mr. Omar's special appeal. In short, the special appeal was not accepted by the Court of Justice of Minas Gerais, and an appeal was filed with the STJ, where the special appeal was then rejected by a single judge (RESP No. 403.551/MG) by Minister Maria Thereza de Assis. As expected, a motion for reconsideration was filed, which, after being denied, was challenged by a motion for clarification, which, although admitted, was dismissed. Then, a new motion for clarification was filed, which was rejected *in limine.* Against this decision, a motion for divergence was filed, which, like the previous appeals, was dismissed. Another decision and another appeal. This time, a motion for reconsideration, which had the same outcome as the other appeals: rejection. Dissatisfied, the combative defense filed yet another motion for clarification, and against this last decision, which was also a rejection, it was..." Another appeal (motion for clarification) was filed. However, before this, which would be the eighth appeal by the defense, was judged, a petition was presented to the president of the Third Section. It concerned a request by the defense for – surprisingly – recognition of the statute of limitations for the punitive claim. On February 24, 2014, the eminent Minister Moura Ribeiro issued a decision, the operative part of which was as follows: 'In view of the foregoing, I declare ex officio the extinction of the punishability of the convicted person, due to the statute of limitations for the punitive claim of the sanction imposed on him, and I consider the motion for clarification on pages 2090/2105 and the interlocutory appeal on pages 2205/2213 to be moot'" (Presumption of Innocence and Exceptional Criminal Appeals, 2015).

This reality that plagues members of the Judiciary, taking into consideration the

A literal and restrictive interpretation of the principle of presumption of innocence leads to various processes...

may be lost due to the lengthy processing time and the consequent extinction of the defendant's punishability.

This is due to the numerous resources provided for in sub-constitutional legislation, and

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that the defense, in its strict fulfillment of legal duty, uses all of them for the benefit of its client, often being unfairly interpreted as procrastinators, due to the exercise of these means.

Furthermore, in the votes of the other Ministers, the words of Minister Luís Roberto stand out. Barroso:

> [...] **1.** The execution of the sentence after a conviction in the second instance does not offend the principle of presumption of innocence or non-culpability (Brazilian Federal Constitution of 1988, art. 5, LVII). **2.** The imprisonment, in this case, is justified by the combination of three legal grounds: (i) the Brazilian Constitution does not condition imprisonment – but rather guilt – on the final judgment of the criminal conviction. The prerequisite for deprivation of liberty is the written and reasoned order of the competent judicial authority, and not its irreviewability.
> Systematic reading of items LVII and LXI of article 5 of the 1988 Constitution; (ii) the presumption of innocence is a principle (and not a rule) and, as such, can be applied with greater or lesser intensity when weighed against other conflicting constitutional principles or legal interests. In the specific case of conviction in the second instance, insofar as there has already been a secure demonstration of the defendant's criminal responsibility and the assessment of facts and evidence has been finalized, the principle of the presumption of innocence acquires less weight when weighed against the constitutional interest in the effectiveness of criminal law (1988 Constitution, articles 5, *caput* and LXXVIII and 144); (iii) with the criminal conviction judgment rendered on appeal, the ordinary instances are exhausted and the execution of the sentence becomes, as a rule, a requirement of public order, necessary to ensure the credibility of the Judiciary and the criminal system. The same logic applies to judgment by a panel of judges in cases of privileged jurisdiction.

In truth, the principle of presumption of innocence is not actually a rule, but neither is it... This can be interpreted in a way that diminishes its scope and effectiveness, as the respected Minister did. Luís Roberto Barroso, given that article 5, §2 of the Federal Constitution shows the cumulative nature that fundamental rights possess, where one cannot be interpreted to the detriment of others. same scope.

The enlightened Minister Luís Roberto Barroso continues to discuss the subject in his vote, once again highlighting the positive aspects resulting from the modification of understanding of the Supreme Federal Court, namely, the possibility of provisionally executing the defendant's sentence after second instance decision, see:

> [...] **3.** There are also three pragmatic grounds that reinforce the choice of the interpretative line adopted here. In fact, the possibility of executing the sentence after conviction in the second instance: (i) allows the criminal justice system to become more functional and balanced, insofar as it curbs the endless filing of dilatory appeals and favors the valorization of ordinary criminal jurisdiction; (ii) reduces the degree of selectivity of the Brazilian punitive system, making it more republican and egalitarian, as well as reducing incentives for white-collar crime, resulting from the minimal risk of effective sentence enforcement; and (iii) promotes the breaking of the impunity paradigm of the criminal system, by preventing the need to await the final judgment of the extraordinary appeal and the special appeal from preventing the application of the sentence (due to prescription) or causing a huge temporal distance between the commission of the crime and the punishment, given that such appeals have a very low acceptance rate.

Further justifying his vote that allows the execution of the sentence in the second instance, the Minister Luís Roberto innovates doctrinally by bringing to light the phenomenon of mutation. constitutional, let's see why:

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> III. THE OCCURRENCE OF CONSTITUTIONAL MUTATION 6. A very brief doctrinal digression on the subject of constitutional mutation is pertinent here. This is an informal mechanism that allows the transformation of the meaning and scope of constitutional norms, without any modification of their text. Mutation is associated with the plasticity that constitutional norms should possess. This new meaning or scope of the constitutional mandate may result from a change in factual reality or from a new perception of law, a reinterpretation of what should be considered ethical or just.
> The tension between normativity and facticity, as well as the incorporation of values into legal hermeneutics, has produced profound changes in the way contemporary law is conceived and practiced.

Strengthening the arguments of Minister Luís Roberto, with the constitutional amendment, we also have...
the application of comparative law, as highlighted by the Reporting Justice Teori Zavascki, citing the work
by Luiza Cristina Fonseca Frischeisen, Mônica Nicida Garcia and Fábio Gusman, who make a
a thorough survey on the operability of the principle of presumption of innocence in various
countries such as England, the United States, Canada, Germany, France, Portugal, Spain, and Argentina,
reporting that in these countries the defendant is not allowed to remain free after the second court decision.

In this instance, since the assessment of the merits of the action has already been exhausted, it is not within the purview of the Superior Court.
to assess the body of evidence regarding the facts.

Thus, res judicata is divided into formal and material; material res judicata
This is established after the exhaustion of ordinary legal avenues, with due confirmation of the defendant's guilt.
through the body of evidence produced up to that point through adversarial proceedings and the right to a full defense; and the
formal res judicata, which takes effect after the consideration of extraordinary appeals or after the
The deadline for filing such appeals has expired.

This position prevailed in the Supreme Court from 2016 until October of [year].
2019, and this is clear from subsequent rulings, I cite: RHC No. 133483/2016; HC No. 130709/CE/2016;
RHC nº 133150/2016; RHC nº 737305/SC/2016; RHC nº 134834/SP/2016; HC nº 134863/SP/2016;
HC nº 138934/SP/2017; HC nº 126665/SP/2017; HC nº 136702/SP/2017; RHC nº 141725/SP/2017;
HC nº 139078/DF/2017; HC nº 142750/RJ/2017; HC nº 140213/SP/2017.

4.5 - Following the judgment of ADCs No. 43, 44 and 54 on 07/11/2019 until 2024, prohibition of provisional execution:

Numerous doctrinal debates arose after the judgment of HC No. 126.292/SP, where
It mitigated the principle of presumption of innocence, subdividing the final judgment into material and...
formal, where the former is exhausted in the second instance through a conviction ruling and the latter after review.
from the corresponding superior court, STJ or STF.

This understanding allowed for the provisional execution of the sentence, which is inconsistent with the text.

Regarding article 283 of the CPP, let's see:

> Article 283. No one may be arrested except in flagrante delicto or by written and reasoned order of the competent judicial authority, as a result of a **final and unappealable conviction** or, during the investigation or trial, by virtue of temporary or preventive detention. (included by Law No. 12,043/2011), (emphasis added).

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> Article 283. No one may be arrested except in flagrante delicto or by written order and substantiated by the competent judicial authority, as a result of pretrial detention or in **by virtue of a final and unappealable criminal conviction.** (included by Law No. 13.964/2019)
>
> (emphasis added).

Even with the legislative modification attributed to article 283 of the CPP, it is observed that imprisonment It is divided into two types, namely, penal imprisonment, which is established after the final judgment of... criminal conviction and pretrial detention, the latter being applicable in the cases outlined in Article 312 of the Brazilian Code of Criminal Procedure.

In defiance of Article 283 of the Code of Criminal Procedure, thousands of provisional execution orders were issued. based on the jurisprudence of the Supreme Court through HC No. 129.292/SP, causing an antinomy. legal.

Under this approach, declaratory actions of constitutionality no. 43 were filed, 44 and 54, with the same objective, to bring article 283 of the CPP into line with the national legal system.

The ADCs (Direct Actions of Unconstitutionality) were reported by Minister Marco Aurélio, who delivered the opinion that was... Approved by the majority of the board on November 7, 2019, with the following summary:

> PRECAUTIONARY MEASURE IN THE DECLARATORY ACTION OF CONSTITUTIONALITY. Article 283 of the Code of Criminal Procedure. Execution of a custodial sentence after the exhaustion of judicial pronouncements at the appellate level. Compatibility with the constitutional principle of presumption of innocence. **Change in understanding by the Supreme Federal Court in the judgment of HC 126.292.** Merely devolutive effect of extraordinary and special appeals.
>
> Special rule associated with the general provision of **Article 283 of the Brazilian Code of Criminal Procedure that conditions the effectiveness of convictions on the final judgment.** Non-retroactivity of the law.
> More severe penalty. Inapplicability to judicial precedents.
> **CONSTITUTIONALITY OF ARTICLE 283 OF THE CODE OF CRIMINAL PROCEDURE.**
> PRECAUTIONARY MEASURE DENIED. (emphasis added).

The Supreme Court restored constitutional order through this declaration of constitutionality, harmonizing the ideals of the federal constitution with the provisions of the law. sub-constitutional.

In the words of Justice Marco Aurélio himself, "to hasten the execution of the sanction." "It implies an anticipation of guilt, as they are inseparable," therefore, imprisonment and guilt are... synonyms.

Furthermore, in his vote, the rapporteur highlights his consistent legal stance in this regard, "implementing "Democratic and republican resistance on the matter," stating that the text of article 5, LVII of the Constitution is Of course, leaving no room for other conclusions, let's see:

> Pay attention to the organic nature of the Law, taking into account the content of Article 5, item LVII, of the Constitution – no one shall be considered guilty until a final and unappealable criminal conviction is issued. **The literal wording of the precept leaves no room for doubt: guilt is a prerequisite for sanction, and the finding only occurs with the final judgment.** The provision does not allow for semantic controversies. The 1988 Constitution enshrined the exceptional nature of custody in the Brazilian penal system, especially regarding the suppression of liberty prior to the final and unappealable conviction. **The rule is to ascertain...**

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> **in order to, by virtue of a final and unappealable conviction, imprison someone in execution of a sentence that does not allow for provisional detention.** (emphasis added).

The eminent rapporteur also emphasizes the importance of the principle of presumption of innocence in

As a consequence of being a fundamental right and being protected by being an entrenched clause, article 60 of the Federal Constitution,

I quote:

> The principle of presumption of innocence is a guarantee enshrined in the Constitution, subject to preclusion, so the constitutionality of article 283 of the Code of Criminal Procedure is beyond question. The precept consists of a reproduction of an **entrenched clause whose essential core not even the derived constituent power is authorized to restrict.** (emphasis added).

Finally, the rapporteur asserts that through this vote, legal certainty will be restored in

our legal system, with the Court resuming its role as guardian of the constitutional text, preserving

The Democratic Rule of Law, granting the legal effects that are a corollary to the primacy of the principle.

Regarding the presumption of innocence, let's consider:

> It is urgent **to restore legal certainty,** proclaiming the simple rule that, in Law, the means justify the end, but not the other way around. **Better days presuppose the unrestricted observance of the normative legal order, especially the constitutional one. This is the price paid for living in a Democratic State of Law,** and it is worth recalling Rui Barbosa when, shortly after the proclamation of the Republic in 1892, he emphasized: “With the law, by the law and within the law; because outside the law there is no salvation.” I deem the requests made in declaratory actions no. 43, 44 and 54 to be valid in order to establish the constitutionality of article 283 of the Code of Criminal Procedure. As a consequence, **I order the suspension of provisional execution of sentences whose final decision has not yet become res judicata, as well as the release of those who have been imprisoned pending appeal, reserving imprisonment only for cases that truly fall under Article 312 of the aforementioned procedural code.** (emphasis added).

Therefore, the prevailing understanding in the judgment of HC No. 84.078-7/MG in 2009

It resurfaced, prohibiting the provisional execution of the sentence in the second instance, allowing it before that.

only temporary arrests and preventive detentions, classified as pre-trial and precautionary measures.

respectively, and provided that there are concrete, individualized arguments, supported by

hypotheses foreseen by law.

4.6 - With the judgment of RE 1.235.340/SC, the provisional execution of the sentence is prohibited except in cases of jury verdict:

Since the advent of the decision rendered in ADCs No. 43, 44 and 54 on 07/11/2019, the prohibition

The provisional enforcement of the sentence was an absolute rule, but this was mitigated with the consideration of the Extraordinary Appeal.

1,235,340/SC.

The Plenary of the Supreme Federal Court, when judging Topic 1,068 of general repercussion,

It consolidated the understanding that the sovereignty of verdicts (article 5, XXXVIII, "c", of the Federal Constitution) authorizes

The immediate execution of the sentences imposed by the Jury Court. The decision is based on the following:

pillars:

> **Sovereignty of Verdicts as an Institutional Guarantee:** Different from Convictions
>
> Since the decisions of the jury are rendered by single judges, they cannot be subject to change.

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merit replaced by higher courts, which gives them an intangible character.

The material justifies the immediate commencement of the sanction.

Compatibility with the Presumption of Innocence: The Supreme Federal Court (STF) has ruled that immediate execution after a jury trial does not violate the principle of presumption of innocence, given that the appeal of Appeals in jury trials are based on specific grounds and do not allow for the reversal of the factual merits of the case. decided by the jury.

Elimination of the 15-Year Limit: The Court interpreted it in accordance with... Constitution to exclude the 15-year maximum sentence stipulated in article 492, I, "e", of the CPP. It was established that enforceability derives from the constitutional competence of the Jury and not from... quantum of the sentence imposed.

Effectiveness of the Criminal Justice System: The decision aims to prevent indefinite delays. of the final judgment and the consequent statute of limitations for the punitive claim, strengthening the The credibility of the Judiciary in the eyes of society and victims.

Exceptional Safeguard: The general precautionary power of the courts to suspend [proceedings] is maintained. The execution of the sentence in exceptional cases, where there are clear indications of nullity or a decision... manifestly contrary to the evidence in the case file.

At the end of the trial, the following thesis was defined: "the sovereignty of the Court's verdicts." The jury authorizes the immediate execution of a sentence imposed by the jury. "Regardless of the total sentence imposed."

5. Final Considerations

With the promulgation of the 1988 Federal Constitution, criminal prosecution became... guided by fundamental rights and guarantees provided for in Article 5 of this Constitution, among which the principle of presumption of innocence (LVII), gaining greater rigidity with the unwavering protection of Article 60, § 4, IV, is undoubtedly a legal provision of great importance, but it has suffered Divergent hermeneutical applications across four historical periods.

It has been demonstrated that the principle of presumption of innocence remained intact during the four periods in which the Supreme Federal Court (STF) ruled on its application to the provisional execution of sentences. It became evident that in each period the Supreme Court was operating under a specific political and legal context. distinct, provoking in the Supreme Federal Court the phenomenon of "constitutional mutation".

The trajectory of the Supreme Federal Court reveals a constant search for balancing individual guarantees and... The effectiveness of the punitive system. While ADCs 43, 44 and 54 reinstated broad protection against In cases of provisional execution in crimes judged by single judges, RE 1.235.340/SC recognized the The constitutional uniqueness of the Jury Court.

It is concluded that the current Brazilian legal system prohibits the provisional execution of sentences as As a general rule, it mandates immediate imprisonment in cases of conviction by a jury, with some exceptions. exceptional cases of nullity or teratology.

Although this is the current position of the Supreme Court, it has been observed from the present

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The study argues that constitutional mutation is a legal and political foundation that guides its application.

of fundamental rights, causing legal uncertainty, conditioning the application of the law.

to the various factors of the Law.

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