

## USE OF HABEAS CORPUS AGAINST PROVISIONAL REMEDIES

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STJ accepts the request to withdraw the freezing of assets given delay in the criminal proceeding

The Superior Court of Justice (STJ) opened a crucial criminal precedent by granting, via habeas corpus, the withdrawal of the freezing of the defendant's assets because of the unreasonable delay in the criminal proceeding (three years between the freezing of the assets and the pressing of charges). The Court's decision was handed down on March 22, at the judgment of the Ordinary Appeal in Habeas Corpus 147.043/SP.

The decision is relevant because, in recent years, it has expanded the legal hypotheses for the decree of provisional remedies for indefinite periods. There is also a disproportion of the amounts of the restrictions, no differentiation between licit and illicit assets, and even vagueness about the kind of the measure imposed, which is often called "unavailability" of assets.

The abusive constriction of assets can cause immeasurable damage to the accused, who must face the criminal process without the resources affected by the provisional remedy. To withdraw the freezing, it is necessary to prove the absence of just cause for criminal prosecution what is an apparent inversion of the burden of proof.

In the case in question, the habeas corpus originates from a criminal proceeding derived from Operation Brazilian Cost, a splitting of Operation Lava Jato underway in the Federal Court of São Paulo/SP. The criminal proceeding investigates the existence of a criminal organization involving public officials and people linked to a company responsible for the development and management of consigned credit control software, with payment of bribes to public officials and political party.

In an ordinary appeal in habeas corpus, the defense claimed, in summary:

- the existence of an excess of time of the criminal case, since it had been ready for follow-up for more than a year, and there was not even a forecast for the beginning of the criminal trial, since the Court did not even decide about the receipt of the accusation offered two years ago; and
- that the central point of the original claim and ordinary appeal was not the maintenance of the freezing of the appellant's assets per se (which has lasted for almost five years), but the excess of time for the formation of guilt that could legitimize the provisional remedy.

## STJ precedents

The STJ's precedents are firm in the sense of not accepting the request for withdrawal of property remedies with the use of habeas corpus. The Court holds that "the determination of freezing of assets (...) does not characterize current or near constraint on his freedom of locomotion, for which reason the writ is not the appropriate way to address the issue. (AgRg in HC 508.036/SC, reporting justice Jorge Mussi, Fifth Panel, judged on 05/28/2019, DJe 04/06/2019)

In addition, the Court has established a precedent that "the procedural deadlines do not have the characteristics of fatality and non-extendability, making it essential to reason the excess of time, not considering the mere arithmetic sum of the deadlines for procedural acts (precedents)" (RHC 88.588/MS, reporting minister Felix Fischer, Fifth Class, judged on 14/11/2017, DJe 22/11/2017).

In the judgment of the Ordinary Appeal in Habeas Corpus 147.043/SP, the dissenting vote of the minister, Rogerio Schietti Cruz, emphasized the need to observe precedents and respect the case law of the STJ.

The minister said that the correct way to address the issue is to request restitution to the judge and, of this rejection, as Article 593, II, of the Code of Criminal Procedure, the appeal. If the situation is teratological, a writ of mandamus may be filed and, in the STJ, an appeal in a writ of mandamus against a decision denying it at its origin.

However, the other ministers that made up the panel understood that the controversy of the ordinary appeal was whether there is excess in the formation of guilt and that, consequently, the issue would affect the maintenance or not of precautionary measures.

## The rapporteur's vote

In his vote, the rapporteur emphasizes the premise that "the guarantee of reasonable duration of the process prevails both for judicial proceedings and for pre-procedural investigation, and should be based not only on the arithmetic criterion of time but also on the nuances of prosecution.

The rapporteur also pointed out the need to ensure isonomic treatment among the accused, even in habeas corpus, considering that, previously, the regional Court had already granted the withdrawal to a codefendant in a writ of mandamus for the delay in the progress of investigations.

The illegal constraint in the present case would be configured, therefore, in face of the abusive use of the property provisional remedy, which directly violated the guarantee of the reasonable duration of the process, foreseen in article 5, subsection LXXVIII, of the Federal Constitution of 1988, according to which "everyone, in the judicial and administrative sphere, is assured a reasonable duration of the process and the means that guarantee the celerity of its proceedings".

Furthermore, article 131, item I, of the Code of Criminal Procedure states that when the freeze is determined during the course of an investigation, it must be withdrawn if the charges are not pressed within 60 days. In the case in question, the restriction had already lasted for more than five years, and the charges had not even been accepted. Therefore, the norm could be used as a parameter to assess the reasonableness of the length of the process.

Thus, although habeas corpus is a constitutional remedy aimed at guaranteeing the right of locomotion, its use must be admitted in cases where the excessive delay in the formation of guilt can cause harm to the constitutionally guaranteed right of the accused.

Although there is no definition in the legal system on what is understood by the reasonability of the duration of the process, the constriction of the accused's property cannot persist indefinitely in time, when there is not even a forecast for the end of the case and, in this case, for the very receipt of the charges.