

## **PRINCIPLE OF PROHIBITION OF ILLEGAL EVENTS: AN ANALYSIS BEFORE THE THEORY OF PROPORTIONALITY AND SUPERIOR COURT OF JUSTICE CASE-LAW**

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### **ABSTRACT**

Through the deductive method, the present work aims to expose constitutional and infraconstitutional aspects about the use of illegal evidence in the criminal process, demonstrating the horizontality of the roll in the state the part of the court process, and must pass through the sieve of fair trial and constitutional principles, with the purpose of guaranteeing to the individual the tools for the substantive contradictory effect, deepening the subject further, and the special resource analyzed number 1,630,097 - RJ, wich deals with the prohibition of the use of the illicit evidence in a specific case judged by the court of the Superior Court of Justice, thus demonstrating the scope of applicability of the norm presented.

**keywords:** Illegal evidence, Proportionality, Fair trial.

### **INTRODUCTION**

Restrict individual's freedom is one of the largest penalties the State may exercise. However, for the fundamental right to freedom can be restricted, the State Ente must suffer certain limitations. Thus, this study through a deductive method, seeks to analyze aspects of the use of illegal evidence in criminal proceedings, bringing the judicial mitigation adopted in certain cases, and developed theories on the subject.

In short, initially, seeks to glimpse the practical effect of constitutional norms in the applicability of the substantive law in procedural matters, regarding the use of evidence called unlawful, with considerations about the real purpose of punishment, and on the proportionality of the rule secondary of an offense with the actual severity of the action taken.

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This theme passes directly through the sieve of a fair trial, preserving the dignity of the human person. Therefore, should develop a criminal prosecution through a due process, thus forming a correct belief the magistrate about the facts and giving the accused the real substantial contradictory.

Scoped to demonstrate the limits to which the State is subject, sought to lead practical effect of the rule through a case at the trial of an appeal before the Superior Court of Justice, in which it clarified the issue of illicit evidence, through the constitutional elements of reasonableness and proportionality.

Leaving therefore demonstrated the need for horizontality of the State power in the criminal procedural perspective, to achieve the framework of a balanced system, given the fact that the era in which the state was greater than its nationals already drained and the preservation of current law is unquestionable element of its operators.

## **MATERIAL AND METHODS**

Considering the adopted standard work, it sought through library materials, and scientific articles, electronic web sites, doctrinal understanding and mainly through legislation supporting the development of research. In view of the apparent expansion of the theme in question, this paper does not intend to exhaust the subject, but rather explore succinct and enlightening form the main areas subject to analysis and discussion by the deductive method.

## **THEORY OF PROPORTIONALITY AND ITS APPLICATION BEFORE THE CONSTITUTIONAL PRINCIPLE OF PROHIBITION OF ILLEGAL EVIDENCE**

At first, for understand the crux of the whole discussion, need to discuss the purpose of punishment as well as the vision of society on it. The community in general is corrupt an ideal that is worth has only a retributive and preventive character, however, isn't enough.

In a democratic state, where what is sought is social peace through a social science that is the law, it has to be to sanction an individual who committed crime, should be punished, but above all, have a new vision of the crime, so that the punishment is applied to the proportionality of the measure in relation to the seriousness of the offense.

Furthermore, must pass the scrutiny of a fair trial, outlining the prospect of coming to justice. This is a matter to be worked that seeks the enforcement of fundamental rights, these inherent and subjective of any accused, because regarding the trial, the justice of which derives the duty of impartiality of judges:

Those in charge of law enforcement are responsible for fact-finding, while the judiciary is responsible for truth-telling. The right to a fair trial [is] in the determination of any criminal charge against him, or of his rights and obligations in a lawsuit; all people have the right to a fair and public hearing by a competent, independent, impartial and established by law. (ROVER, 2017, p. 70)

The Constitution guarantees the right to a fair trial by the principles of due process, adversarial, legal defense, and to establish seals to certain types of feathers, pursuant to art. 5, LVI the current charter. Thus, we have the accuracy to specifically address in the list of fundamental rights and individual guarantees, the prohibition of the use of illegal evidence in the process.

In this north envisions is a concern of the constituent to limit the punitive power of the state, giving citizens the right not to be sued by evidence obtained through illicit means, seeking direct cooperation with the provisions of art. 5, section XLI of that statute, which says "the law shall punish any discrimination against fundamental rights and liberties. "

Perceived with such harmony rules the search of the preservation of human dignity provided for in art. 1, item III, of CF. In the criminal case, the individual has the fundamental right to a valid process in which the state does not use the antijurídicos instruments to prove the guilt of the accused.

However, as taught Leonardo Barreto Moreira Alves (2017, p. 49), the Brazilian Court has adopted the proportionality theory as an exceptional way to avail himself of the use of illegal evidence when the benefit of the innocent defendant who produced such proof to its absolution.

With implicit Constitutional forecast, Celso Ribeiro Bastos (1993, p. 276) explains that the principle of proportionality or Reasonableness "must give those hypotheses that their uncompromising observance would lead to injury of a fundamental right even more valued."

There is therefore a collision constitutional requirements of the principle of legality, provided for in art. 5, paragraph XXXIX, of the 1988 Federal Constitution, and the possibility of use of illegal evidence to prove the innocence of the accused, that the precedent is favorable, as aforesaid. Thus, despite the express seal the constitutional text in the use of illegal evidence, it is necessary to enforce the weighting principles, where the principle of proportionality plays a major role in seeking the meaning of the rule of art. 5, item LVI of the Constitution, which is to protect the defendant's high evidentiary power of the state.

Interesting to note the positioning Gilcinéia Zorzan on proportionality, which states that:

The application of this principle allows bring premised on the idea that no principle or right is absolute, since it can suffer weighting on the individual case and it is this weighting technique that your application will result. The technique of balancing of interests in the light of the principle of proportionality is to weigh in the case in conflicting interests and enforce the one who gains more relevance, the exact extent of the application of the rule. According to this principle there is no real conflict between the fundamental guarantees. In the case of contrasting constitutional principles, the system does work a matching mechanism that subjects the principle of least relevance to the greater social value (ZORZAN, 2014, p. 02).

## **CONCEPT OF EVIDENCE AND THEORIES ABOUT THE USE OF UNLAWFUL PROOF IN CRIMINAL PROCESS**

The Probation System adopted in the Brazilian legal system is governed by the Free Convincing Motivated expressly spelled out in Article 155 of the

Criminal Process Code, which guarantees the Magistrate certain freedom in value the evidence to guide the court process, yet predicting a duty to motivate the reasoning which led to the court decision. On the subject, Gustavo Badaró explains:

[...] it is to be noted that the evidentiary systems where the parties are entitled to a true right to the test, the eligibility criteria should be designed from an inclusion scheme: the rule is that the evidence required by parties should be admitted. There will only be excluded in cases of manifest irrelevance or impertinence of evidence means required by the parties. Reverse the signs of these premises would be working with an exclusion regime: as a rule does not admit the evidence unless the party shows that it is appropriate and relevant. In a system with this nature, the right to test no more than a false promise. [...] Therefore, it is not the party that requested the evidence to demonstrate its relevance and importance. The judge is that you can, noting the apparent irrelevance of proof, reject it. repeat, the rule is the admission, the exception is not to admission. That is, only in the event that the judge is convinced of the irrelevance of the fact, or that the proposed proof is naughty, should reject the diligence required by the party (Badaro, 2015, p.283).

As precepts of the 1988 Federal Constitution, article 5, section LVI, "are inadmissible in the proceedings, evidence obtained by unlawful means," but what could be considered as evidence to establish the guilt or innocence of a defendant? For renowned counselor Fernando Capez proof consists of a:

Set of actions taken by the parties, the judge (CPP, arts. 156, 2nd part, 209 and 234) and third parties (eg, experts), intended to lead to the magistrate the conviction of the existence or nonexistence of a fact , the falsity or truth of a statement. It is, therefore, of any means of perception employed by man in order to prove the truth of a claim (CAPEZ, 2003, p. 243).

With the enactment of Law 11.690 / 08, the Criminal Procedure Code passed to govern the matter in question more specifically. anticipated was reiterated in the 1988 Constitution and there was provision in Article 157, caput, of CPP, that: "It is inadmissible and should be desentranhadas the process, the illegal evidence, understood as those obtained in violation of constitutional or legal norms ".

Moreover, even in this sense, the paragraphs pertaining to article 157 of the CPP teach that are also inadmissible evidence derived from illegal, except with respect to those obtained by an independent source, and being

precluded the withdrawal of the decision of the inadmissible evidence, it will wear out by judicial decision.

Calls to note that the Unlawful Evidence may violate both constitutional standards, as the Legal Norms, depending on the legislation that will be offended. However, the doctrine has significant understanding in regard to the gender "Evidence Prohibited, prohibited or inadmissible" and the species "Illegal Evidence" and "Proof Illegitimate". In this sense, Leonardo Barreto Moreira Alves explains that:

[...] The doctrine considered the existence of evidence prohibited gender or sealed or inadmissible, with the species to illegal evidence, rule of law of infringing materials (eg confession obtained through torture; telephone interception held without judicial authorization), and proof illegitimate, that obtained in violation of procedural law rule (eg expert report made only by an unofficial expert). The CPP (and the Federal Constitution itself), but does not receive this distinction, treating proof that violates constitutional rule or cool as always illegal evidence (ALVES, 2017, p. 48).

Given the above, considering the link between Illicit Evidence and Constitutional principles, it appears that the matter in question has a close correlation with the fundamental rights of the person. The taking of evidence linked to the State criminal prosecution, however, there is no need to seek the real truth infringing the limits posed by law as a whole.

### **Theory Of The Fruits Of The Poisonous Tree Or Effect The Distance And The Independent Source In Relation To The Inevitable Discovery**

In addition to sealing the evidence obtained by unlawful means, Article 157, § 1 of the Criminal Procedure Code also devoted expressly to seal the use of illegal evidence by derivation. Thus arises the metaphor that if a tree is poisoned, its fruit will be too.

Thus, if a test is lawful, but manifests itself through an evidence obtained illegally, as the classic example of the doctrine of confession by torture, addiction will be making illegal all evidentiary matters.

Noted that the Theory of fruits of the Poisonous Tree is a construction of the US Supreme Court and was accepted into the Brazilian legal system by the Supreme Court.

Notwithstanding the foregoing, also to be noted about exceptionalities guiding the admissibility of the evidence derived from the illicit. According to Article 157 intelligence, § 1 of the CPP, if not demonstrated the causal link between the tests, or when they can be obtained by an independent source, there is no need to talk about sealing.

Meanwhile, it is considered independent source "one that by itself, following the typical and usual procedures of their research or criminal investigation, could lead to the fact proof of the object "(art. 157, paragraph 2 of the CPP).

However, still there is the Theory of Inevitable Discovery, which guarantees the acceptance of evidence gathered illegally since the end of the discovery of what was proved was inevitable. Thus, the unlawful derived evidence would be produced anyway, even without there being the original illegal evidence.

On the subject under discussion CAPEZ (2013, p 384 and 385) states that:

Article 157 of the CPP hosted the theory of the fruits of the poisoned tree and brought limits to her, taking her inspiration from American legislation, in order to know when a test is or is not derived from illegal, that is, the law sought to contours to establish the causal relationship between an event and another. [...] the legislature therefore considers whether the inevitable discovery source, but such legal provision is too wide, there is grave danger to empty a constitutional guarantee, which is the seal of the use of illegal evidence.

Before the mentioned range by renowned indoctrinator Capez Fernando, attention should be paid to the application of this theory carefully, considering that constitutional guarantees sealing with respect to the illegal evidence might be offended. Therefore, law enforcement officers may not be based on



data only suggestive, but should be convinced that the illegality could actually be rejected by the inevitable discovery.

### **Gathering Evidence Random - Serendipity**

Originating from the English "serendipity," the concept of Serendipity manifests itself in order to discover things by accident. As if it was a coincidence, while seeking a target, the other is discovered casually. As Bolivar Torres the term was serendipity:

Invented in 1754 by Englishman Horace Walpole [...] expressed an old concept as the world: the art of finding what one is not looking for. Its origin is in the ancient oriental legend "The three princes of Serendip" on travelers who, along the way, make happy discoveries unrelated to its original purpose. It is a state of mind, a power of open awareness to the experience, curiosity, chance and imagination, which over the centuries has led to great historical events (such as the accidental invention of penicillin by Alexander Fleming or discovery of America by Christopher Columbus) (Torres, 2014, p. 01).

In the case of criminal investigation, the evidence of Random Encounter is repeatedly identified with regard to telephone intercepts. Thus, as the prevailing understanding of the doctrine, this race will be valid as long as the connecting factors and continence are observed.

### **Theory purged diluted paint or stain**

The Theory purged diluted paint or stain, also called causal relationship theory attenuated obtained as the previous case Wonh Sun against USA (1963):

The citizen is arrested illegally (there was probable cause for his arrest). The confesses and denounces B. The arrest is lawful or unlawful B test? It is illegal evidence for causal derivation. The detail in this case is that B appeared before the competent authority and confessed the commission of the offense. The US Supreme Court held that, at first, the arrest of B would be illegal, but then with his confession, supervening circumstances, evidence becomes lawful (SANTOS, 2011, P.02).

Thus, it appears that there is no need to apply the Theory of the Poisoned Tree Fruits when the causal link between the unlawful proof of origin and the derivative suffer mitigation due to the advent of supervening causes during criminis persecutory.



Until today, the Supreme Court and the High Court of Justice did not use, still in its decisions the Theory of diluted paint, however, for the doctrine she would be provided for in Article 157, § 1 of the CPP.

## **RESULTS AND DISCUSSION**

### **Invalidity of evidence obtained through unauthorized eavesdropping connection in speakerphone and the Understanding of the 5th Chamber of the Superior Court of Justice**

The Special Appeal No. 1,630,097 - RJ, brought under Article 105, item III, paragraph "a" of the Constitution, judged by the illegality of the evidence collected by the police coercively without defendant's consent or judicial authorization through talk on cell phone using the feature "hands-free". In these terms:

Criminal Appeal - Criminal And Criminal Procedure - Narcotics Trafficking - Changes Episode Neighborhood Buenos Aires Park, Fields Of County Of Goytacazes - Police Military Who Were In By Location Routine Patrol, When They Spotted The Implied And Other Individual Transiting On A Motorcycle, Come Those Agents Finds That These Would Have If Shown Apprehensive Presence Police, What Motivated The Holding Of Approach And Staff Review The Suspects, Opportunity That Nothing Was Illegal Found - However And During The Approach Police, Marcelo Received A Phone Call, On Which Makes No Attribution Detail Any Home The Parquet So Only Describe That After That, All Would Have If Directed To The Residence Of Recurring, Where The Mother Found This, Who Would Have Authorized Entry Of Military Police, Who, After The Local Searches Managed To Raise 11.1g (Eleven Grams And A Decigramme) Of "Crack", Put Up In 104 (One Hundred And Four) Housings Plastic Transparent, Which Were Stored Inside Of A Plastic Bag, Hidden Within A Hole In The Mattress Used In Bed Marcelo [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 18/04 / 2017 T5 - Fifth Panel, Publication Date: 28/04/2017 Dje. Hidden Within A Hole In The Mattress Used In Bed Marcelo [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 04/18/2017, T5 - Farm Class, Publication Date: 28/04/2017 Dje. Hidden Within A Hole In The Mattress Used In Bed Marcelo [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 04/18/2017, T5 - Farm Class, Publication Date: 28/04/2017.

It happened that Marcelo was caught red-handed after answering a phone call during the police approach, and the authorities forced him to put your cell phone on "speaker" mode. In connection, the suspect the mothers'

asked him to return to his home in order to give back to a 'material' for someone who awaited him there.

After the call, and the police accompanied Marcelo to his house, entered the scene and found about seven grams of the narcotic substance known as "crack", shredded in one hundred and four packages for sale.

Thus, in view of the facts, with respect to the substance, determined the trial:

[...] The Merits, Has It Is The Identified A Gross Illegitimacy Diligence Of Police Culminating In The Prison Of Recurring, Even Though Nothing Has Been Found In This Illegal Power During The Journal Staff, But Having Been Supported By Agents Law That Heard Information Compromising The Implied Arising Out Of A Connection Call Received By This And Attended With Known Resource Use By "Handsfree", Which Speaker Would Your Mother Own, Requesting That The Son Remove His "Material" That Was In Both Of Residence There Sight There Appeared An Individual Who Would Not Be "The Well" Wishing Recover That Material, Without Success - Scenario That Brings As Imaging The Perspective Of Inidônea Protection Breaking Existence Constitutional Incident On The Infringement Of The Confidentiality Of Data And Telephone Communications Afetas Of Recurring, What Just Could Give By Exception, By Express Authorization Judicial For Much, But What Was Ignored And Disrespected For Those Who Should Ensure By Law Enforcement, But Decided To Take A Way Faster And Easy, Though Unacceptable, To Identify The Purpose Of Reaching The Practice Of A Conduct Illegal Use Of A Suspect [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 04/18/2017, T5 - Fifth Panel, Publication Date: 28/04/2017 Dje. By Express Authorization Judicial For Both, But What Was Ignored And Disrespected For Those Who Should Ensure By Law Enforcement But For Taking Opted A Way Faster And Easy, Though Unacceptable, To Identify The Purpose Of Reaching The Practice Of A Conduct Illegal Of A Suspect [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 18/04/2017, T5 - Fifth Panel, Date Published: Dje 28 / 04/2017. By Express Authorization Judicial For Both, But What Was Ignored And Disrespected For Those Who Should Ensure By Law Enforcement But For Taking Opted A Way Faster And Easy, Though Unacceptable, To Identify The Purpose Of Reaching The Practice Of A Conduct Illegal Of A Suspect [...] Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik, Judgment Date: 18/04/2017, T5 - Fifth Panel, Date Published: Dje 28 / 04/2017. Minister Joel Ilan Paciornik, Date Of Judgment: 18/04/2017, T5 - Fifth Panel, Publication Date: 04/28/2017 Dje. Minister Joel Ilan Paciornik, Date Of Judgment: 18/04/2017, T5 - Fifth Panel, Publication Date: 04/28/2017.

In brief summary, it appears that the Superior Court concluded that the way the evidence was obtained provoked the so-called "self-incrimination" in order that all incriminating evidence that advier the conduct of the defendant himself, even with the confession will only be valid if the act is spontaneous and conscious, from their will.

In this core, there is the inability to produce evidence against himself (Nemo tenetur if detegere), given that even without having legal authorization, the police forced the defendant to put your cell phone on speakerphone, whereby Could the arrest in the act. To know:

[...] Violation Of The Principle Of Non Self-Incrimination, Before The Conduct Of The Agents In Law, According To Own, "Encaminhare" Marcelo Your Own Residence In Order That This Those Oportunizasse The Access To The Site, Which Resulted In The Material Collection Narcotic That There Was Stored - Event That Refers To The Example North Embodied American In Ernesto Case Of Arturo Miranda, Who Was Convicted In First Instance, The Practice Of Rape Crimes And Kidnapping Only Based On Your Own Confession, The That Led To Supreme Court Of The United States Of America, The Judge Miranda Versus Arizona, A Void The Decision And To Withdraw Its Prison, For Understanding That The Accused Did Not Know Your Rights, Creating A Paradigm And Forcing Be Proceeded Immediate Warning ,Known As Miranda Warning (Miranda Warning) Or Miranda Rights (Miranda Rights) Admitting Only If Such A Waiver Of Right, If This Form If Der Express Are Kept By Own Charged Stj- Resp: 1630097 Rj 2016 / 0260240-6 , Rapporteur: Minister Joel Ilan Paciornik, Date Of Judgment: 18/04/2017, T5 - Fifth Panel, Publication Date: 28/04/2017.

Stanchion that urges highlight the North American case of Ernesto Arturo Miranda (Miranda versus Arizona), in which the police conducted the accused in custody without there release the rights to remain silent and to consult a lawyer. Ernesto was arrested and recognized for two victims. After a while, he wrote a confession. However, João Carlos Souto teaches that:

Confess crimes without complying with the provisions of the Fifth Amendment of the Constitution of the United States of America<sup>1</sup>, Did so at variance with the constitutional guarantees relating to the protection of the freedom of the individual, especially when it

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<sup>1</sup>No person shall be compelled in any criminal case to testify against herself.

endangers before the prosecution, which meant that the evidence obtained were inadmitidas front of a court (JOBIM, 2013, p. 03).

Finally, it concluded the nullity of all the evidence adduced. Next:

[...] Requirement That Formal Unfortunately Still Makes No In Our Right Patriotism, But Not Allow That Simply If May Assume That A Implied Have Made Such Waiver, Especially In Episode In Question, That The Evidence Of Autos, Extracted Of Statements Provided By Unequivocally Demonstrate Law Officers That The Recurring, Beyond Not Have Been Advised Of Rights, Even Could This Enjoy, Denying The Militiamen To Set Out For Your Own Home - All Of Revocation The Evidence Illegally Hoarded To Autos , Which, In Casu, Se Translate The Completeness Contingent Probationary - Acquittal That Gives With Fulcrum In Art. 386, Inc. No. Vii Diploma Of Rites - Dismissal Of Defensive Appeal. Stj- Resp: 1630097 Rj 2016 / 0260240-6, Rapporteur: Minister Joel Ilan Paciornik.

Before the above, it is noted that this position was supported by the 5th Chamber of the Superior Court upholding the decision of the State Court of Rio de Janeiro that acquitted Marcelo de Azevedo Freitas, caught red-handed by evidence collected after a telephone conversation interception in "handsfree" feature.

In the words of the Minister Rapporteur Joel Ilan Paciornik (2017, p. 01), even if the telephone interception is one of the main sources of evidence collection against organized crime, the evidence should be inadmissible to violate the Federal Constitution, as well as the legal norms:

The account of the case demonstrates that the approach taken by the militia was obtained involuntarily and coercion by police misconduct, generating a true self-incrimination. One can not forget that any evidence against the defendant that depends himself only applies if the act is done voluntarily and consciously.

In conclusion, it was inferred that the way in which the police obtained the evidence generated contamination in order to offend the lawfulness of evidence element as well as the framework in the Theory of fruits of the poisoned tree, enshrined in Article 5, paragraph LVI of the Federal Constitution and Article 157 and paragraphs of the Criminal procedure Code.

## **FINAL CONSIDERATIONS**

Depending discussion addressed in this study it was found that the constitutional principle of sealing of illegal evidence, provided for in art. 5, subsection LVI's Largest Law, shows some concern of the legislature to protect the unrestrained obtain evidence which might be collected by illegal means.

Among the different theories discussed highlighted the proportionality theory as large influence on the relativity of obtaining evidence means, in order that the motivation is acquit the defendant should be allowed to use the illegal evidence in criminal procedure, aiming between the horizontal state and individual character, this possibility is disclosed in light of human dignity.

However, regarding the jurisprudential analysis, it inferred that the Superior Court found to be contaminated harvested proof, before the expected in the Theory of the Poisoned Tree Fruits. As musty, no one can be required to produce evidence against himself, which is one of the foundations of the principle of self-incrimination.

Thus, the case analyzed demonstrated a perfect tune the analysis of constitutional provisions defining the punitive power of the state, for it was concluded that even if found illegal substances in his residence, the method used directly injured his right to inviolability of their phone calls and surely your privacy, which is why such an approach was considered wrongful.

Thus, the practical effect of the constitutional provision regarding the use of illegal evidence is fully effective and should be adequate to the constitutional elements of proportionality and reasonableness, not so bringing impunity, verifying elements of justice, but especially protection the inviolable and inalienable guarantees of human beings.

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