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THE USE OF THE PROBATIONARY STANDARD "BEYOND REASONABLE DOUBT" IN BRAZILIAN CRIMINAL PROCEEDINGS IN LIGHT OF THE PRESUMPTION OF INNOCENCE

O USO DO STANDARD PROBATÓRIO "ALÉM DE TODA DÚVIDA RAZOÁVEL" NO PROCESSO PENAL BRASILEIRO A LUZ DA PRESUNÇÃO DE INOCÊNCIA

EL USO DEL ESTÁNDAR DE PRUEBA "MÁS ALLÁ DE TODA DUDA RAZONABLE" EN LOS PROCESOS PENALES BRASILEÑOS A LA LUZ DE LA PRESUNCIÓN DE INOCENCIA

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ABSTRACT

What is the standard of proof? This article, part of a study conducted in the Specialization course Criminal Law specialization program (ESA-MA) in 2023, aims to analyze the standard of proof known as "beyond a reasonable doubt" in light of the presumption of innocence, a fundamental principle enshrined in Article 5, LVII, of the 1988 Federal Constitution of Brazil. The standard of proof originates from the US criminal process and has been gaining ground in the Brazilian legal context. The research is bibliographic and documentary in nature, focusing on the analysis of the decision handed down in Habeas Corpus No. 598,886 - SC, judged on October 27, 2020, under the reporting of Minister Rogerio Schietti in the Superior Court of Justice. This decision explicitly mentions the standard of proof in question and its grounds. The institute has been criticized by renowned authors (Matida, 2019, Ferrer Beltrán, 2007) dedicated to legal epistemology, which leads us to reflect on the expectations for the future of this procedural institute in Brazilian law. Here, we have demonstrated sufficient reasons to justify the need to develop an objective standard of proof in Brazilian Criminal Procedural Law, such as the impossibility of relativizing personal recognition as provided for in Article 226 of the Code of Criminal Procedure. However, despite criticism from notable authors dedicated to legal epistemology, it is important to consider that completely abandoning the standard of proof studied here would be a step backward in terms of respect for the constitutional mandate of the presumption of innocence, as well as in terms of rational evaluation of evidence.

Keywords: Standard of Proof. Presumption of Innocence. Evaluation of Evidence. Beyond a Reasonable Doubt.

RESUMO

O que é standard probatório? O presente artigo, parte integrante do estudo realizado no curso de Especialização em Advocacia Criminal (ESA-MA), em 2023, tem como objetivo analisar o standard de prova denominado "para além de toda dúvida razoável" à luz da presunção de inocência, um princípio fundamental consagrado no Art. 5º, LVII, da Constituição Federal do Brasil de 1988. O standard probatório origina-se do processo penal

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estadunidense e vem conquistando espaço no contexto jurídico brasileiro. A pesquisa é de natureza bibliográfica e documental, concentrando-se na análise da decisão proferida no Habeas Corpus n° 598.886 – SC, julgado em 27 de outubro de 2020, sob relatoria do Ministro Rogerio Schietti no Superior Tribunal de Justiça. Essa decisão menciona explicitamente o standard de prova em questão e seus fundamentos. O instituto recebe críticas de renomados autores (Matida, 2019, Ferrer Beltrán, 2007) dedicados a epistemologia jurídica, o que nos leva a refletir sobre as expectativas quanto ao futuro desse instituto processual no direito brasileiro. Aqui, demonstramos razões suficientes para justificar a necessidade de desenvolver um *standard* de prova objetivo no Direito Processual Penal Pátrio, a exemplo da impossibilidade de relativização do reconhecimento pessoal previsto no art. 226 do Código de Processo Penal. Contudo, em que pese as críticas advindas dos notáveis autores dedicados a epistemologia jurídica, importante considerar que o total abandono do standard de prova aqui estudado seria um retrocesso em termos de respeito ao mandamento constitucional da presunção de inocência, assim como, em termos de avaliação racional da prova.

Palavras-chave: Standard de Prova. Presunção de Inocência. Apreciação da Prova. Além de Toda Dúvida Razoável.

RESUMEN

¿Qué es el estándar probatorio? El presente artículo, que forma parte del estudio realizado en el curso de Especialización en Abogacía Penal (ESA-MA) en 2023, tiene como objetivo analizar el estándar probatorio denominado «más allá de toda duda razonable» a la luz de la presunción de inocencia, un principio fundamental consagrado en el artículo 5, LVII, de la Constitución Federal de Brasil de 1988. El estándar probatorio tiene su origen en el proceso penal estadounidense y está ganando terreno en el contexto jurídico brasileño. La investigación es de naturaleza bibliográfica y documental, y se centra en el análisis de la decisión dictada en el Habeas Corpus n.º 598.886 - SC, juzgado el 27 de octubre de 2020, bajo la relatoría del ministro Rogerio Schietti en el Tribunal Superior de Justicia. Esta decisión menciona explícitamente el estándar probatorio en cuestión y sus fundamentos. El instituto recibe críticas de autores de renombre (Matida, 2019, Ferrer Beltrán, 2007) dedicados a la epistemología jurídica, lo que nos lleva a reflexionar sobre las expectativas respecto al futuro de este instituto procesal en el derecho brasileño. Aquí, demostramos razones suficientes para justificar la necesidad de desarrollar un estándar de prueba objetivo en el Derecho Procesal Penal Nacional, como por ejemplo la imposibilidad de relativizar el reconocimiento personal previsto en el artículo 226 del Código de Procedimiento Penal. Sin embargo, a pesar de las críticas procedentes de destacados autores dedicados a la epistemología jurídica, es importante considerar que el abandono total del estándar de prueba aquí estudiado supondría un retroceso en términos de respeto al mandato constitucional de la presunción de inocencia, así como en términos de evaluación racional de la prueba.

Palabras clave: Estándar Probatorio. Presunción de Inocencia. Apreciación de la Prueba. Más allá de toda Duda Razonable.

1 INTRODUCTION

What is the standard of evidence? We start with this question so that we can understand how evidence is measured in Brazilian judicial decisions. We start from the assumption that the evidential standard, according to Matida (2019), is the degree of sufficiency that the factual hypothesis needs to overcome in order for it to be considered true. But what is the relevance of the evidentiary standard in criminal proceedings? It is a legal instrument that establishes rational criteria of evidential sufficiency, allowing the identification of when there is evidence capable of supporting a conviction or, on the contrary, when the magistrate is unable to issue an unfavorable decision, due to the lack of a minimum of evidence necessary for the conviction hypothesis.

When it comes to the evidentiary standard, it seeks not only to refer to the assessment of the evidence to reach a rational conclusion, but also to the protocols for the production of evidence, its admission to the process, in addition to its qualification and the reflections it will bring in the judicial decision. That is, after the production, admission and evaluation of the evidence, what importance will it have in the result of the process?

The Brazilian criminal procedural system does not have an express provision for an evidentiary standard for conviction and "there is no evidential standard legally provided for or jurisprudentially adopted with a clear formulation", so that judges resort to "flexible criteria of proof, with ample room for judicial discretion" (Baltazar JR., 2007, p.176).

However, currently in Brazil, the standard of proof has been gaining strength, a classic of the American criminal procedure called "beyond all reasonable doubt", a criterion much more demanding than the others and which falls entirely on the shoulders of the accusatory body, according to studies by Matida (2019), Lopes Jr. (2021). The improvement of the institute in Brazilian law aims to reduce the free appreciation of evidence, through pre-defined parameters and rational criteria, thus reducing judicial subjectivism and arbitrariness present in the Brazilian legal scenario.

By enshrining the presumption of innocence and its subprinciple *in dubio pro reo,* the Constitution explicitly signals the adoption of the evidentiary standard "beyond reasonable doubt", which only if achieved authorizes a conviction. However, the standard of proof is not free from criticism and reproach in the context of legal epistemology that proposes its total abandonment in criminal procedural law, as demonstrated (Matida, 2019) by referencing the American Larry Laudan. Such a position sparks a critical debate, as the institute deserves special attention and its necessary development within criminal procedural law.

From this perspective, this article aims to understand the standard of proof, called "beyond all reasonable doubt", in the light of the presumption of innocence, a fundamental principle provided for in Article 5, LVII, of the Federal Constitution of Brazil of 1988. The legal system has its origins in the American criminal procedure and has gained space in the Brazilian legal scenario.

This article, an integral part of the study carried out in the specialization in Criminal Advocacy (ESA-MA), in 2023, is divided into two topics, in addition to the introduction and conclusion, which deal with the "presumption of innocence in the legal system" and "evidentiary standard of the Brazilian criminal procedure".

2 METHODOLOGY

The present research adopted the qualitative approach since it seeks to understand and interpret legal concepts related to the evidentiary standard "beyond all reasonable doubt" in the Brazilian criminal procedure, in the light of the constitutional principle of the presumption of innocence.

As for the nature, it is a bibliographic and documentary research carried out in 2023. The bibliographic research carried out from the examination of national doctrines, scientific articles and academic productions that deal with legal epistemology and evidential standards. The documentary research was based on the analysis of the paradigmatic decision rendered in Habeas Corpus No. 598.886/SC, written by Justice Rogério Schietti Cruz, in the Superior Court of Justice (STJ), judged on October 27, 2020, which makes express reference to the use of the evidentiary standard studied herein.

Thus, the study is inserted in the field of applied research in Criminal Sciences, as it proposes to discuss rational criteria of evidentiary assessment that can contribute to the consolidation of a democratic and constitutionally oriented criminal process.

The decision rendered in the aforementioned Habeas Corpus in the Sixth Panel of the Superior Court of Justice (STJ) is considered a milestone in Brazilian criminal procedure with regard to evidentiary rigor and the use of personal and photographic recognition as evidence. The procedure adopted consisted of a critical analysis between doctrine and jurisprudence, seeking to identify to what extent the application of this standard contributes to the realization of the presumption of innocence and to the reduction of judicial discretion in Brazilian criminal proceedings

3 PRESUMPTION OF INNOCENCE IN THE LEGAL SYSTEM

Presumption of innocence, presumption of non-guilt and state of innocence are different ways of referring to the same constitutional principle, and have no important practical utility in distinguishing them, except for some scholars and jurists who use the semantic distinction to suppress the right to liberty before the final and unappealable criminal sentence.

For Nader (2013), principles are postulates that seek to underpin the entire legal system, not necessarily having an equivalent positive correspondence within our legal system, and may result from implicit clauses or even from international law:

> In the life of law, principles are important in two main phases: in the elaboration of laws and in the application of law, by filling gaps in the law. The principle, according to Mouchet and Becu, "guides, grounds, and limits the positive norms already sanctioned (Idem, 2013, p.200).

When disciplining a certain need of social interest, the competent authority walks with a predefined script, with prior planning and definition of purposes. The starting point for the composition of a legislative act must be the selection of the values and principles that one wants to enshrine in the legal system. Principles are stratified by time and provide legal validity, while values provide social validity. Therefore, the quality of the law depends, among other factors, on the principles chosen by the legislator and on its democratic formation process.

Historically, the presumption of innocence dates back to Roman Law. This was harshly attacked and had its meaning reversed in the inquisition of the Middle Ages, since the doubt, generated by the insufficiency of evidence, was equivalent to a semi-proof that included a judgment of semi-guilt and condemnation to a light penalty. It was actually a presumption of guilt and not of innocence.

The Italian jurist Luigi Ferrajoli (*apud* Lopes, 2015, p.91) argues that the presumption of innocence and the principle of jurisdictionality were enshrined in the Declaration of Human Rights in 1789, and in the late nineteenth and early twentieth centuries, it was again attacked by the totalitarian verb and fascism that represents an autocratic regime, centered on the figure of a dictator.

The principle under analysis was expressly inserted into the Brazilian legal system by the 1988 Constitution, in a more comprehensive and beneficial way for those who respond to a criminal process than the American Convention on Human Rights (ratified by Brazil by

Decree No. 678/1992), insofar as it established in Article 8 that "every person accused of a crime has the right to be presumed innocent, as long as his guilt is not legally proven", while in the Constitution he established as a limit of the presumption of innocence the final and unappealable criminal sentence of conviction.

Since the Constitutions of countries such as the United States, Argentina and Germany do not even explicitly mention the presumption of innocence in their constitutional texts, the Brazilian Federal Constitution of 1988 advances in the protection of individual rights and establishes a temporal and procedural framework for the end of the state of innocence.

In Brazil, the presumption of innocence is expressly enshrined in Article 5, LVII, of the Constitution, being the guiding principle of criminal procedure and, ultimately, we can verify the quality of a procedural system through its level of observance and effectiveness in the legitimate application of this principle.

Regarding this fundamental right, Lopes (2015, p. 92) describes

> We can extract from the presumption of innocence that the formation of the judge's conviction must be built on an adversarial basis, guiding the process, therefore, by the accusatory structure that imposes the dialectic and keeps the judge in a state of observation in rejection of the figure of the inquisitor judge with investigative and instructive powers and consecrates the guarantor judge.

Therefore, the recognition of the authorship of a criminal offense presupposes a final and unappealable conviction (Art.5, item LVII, of the 1988 Federal Constitution). Before this milestone, all people are presumed innocent, and the prosecution has the burden of proving through lawful evidence and following the due process of law the guilt of the defendant, in addition, the precautionary restriction of liberty can only occur in exceptional situations and of extreme necessity, because in criminal prosecution the rule is freedom and incarceration before the final and unappealable decision must be a measure of strict exception and preceded by due Reasons.

From the principle of the presumption of innocence derive two fundamental rules: 1) "evidential", in which the accusing party has the burden of demonstrating the guilt of the accused, and the doubt must be heard in favor of the accused – and not the accused to prove his innocence – and 2) "treatment", in which no one can be considered guilty until after a final and unappealable sentence, This prevents any anticipation of condemnatory judgment or guilt, both by the judge and by the media, as usually happens in cases of great repercussion.

In this understanding, Lopes, (2015, p. 92) ponders,

> The principle in question is imposed on a true duty of treatment, insofar as it requires that the defendant be treated as innocent, that it acts in the internal dimension of the process when it determines that the burden of proof is entirely placed on the accusing body and that the doubt declines towards the acquittal of the defendant and in the restrictions on the abuses of pretrial detention and in the external phase that determines protection against abusive advertising and conviction anticipated by the media.

This creates "a broad spectrum of procedural guarantees that benefit the accused during investigations and the processing of criminal proceedings, without, however, preventing the state from fulfilling its mission of investigating and punishing criminals, making use of all the instruments of criminal prosecution provided for by law", ensuring the legitimate and effective fight against crime (Távora, 2016, p. 72).

In view of the above, we can see that the principle of the presumption of innocence acts directly in the Brazilian criminal procedural system and guides the actions of the parties throughout the criminal prosecution, creating a spectrum of guarantees with a reflection on the protection of the individual.

4 THE EVIDENTIARY STANDARD IN BRAZILIAN CRIMINAL PROCEDURE

Having established the initial premises about the presumption of innocence, it is clear that the original constituent legislator established the presumption of innocence as the guiding principle of our criminal procedural system, which has its final milestone only with the final and unappealable judgment of the criminal conviction.

The *in dubio pro reo* is a manifestation of the presumption of innocence as a rule of evidence and as a rule for the judge, in the sense that not only does the defendant not have any evidential burden, but also in the sense that in order to convict him, robust evidence is needed that goes beyond reasonable doubt. In case of doubt, acquittal must prevail, in line with the principle of *in dubio pro reo.*

In order to rebut the presumption of innocence and the conviction hypothesis to be considered true, it is necessary that the evidence produced in court through the adversarial and ample defense, within the due process of law, be "beyond all reasonable doubt", that is, it is necessary to exceed a more demanding standard of proof than those established for the other branches of law, because in criminal procedural law what is discussed is the freedom and, ultimately, the life of the accused.

In this sense, in order to achieve this more demanding standard of evidence, it is necessary to have an effective control from the production of evidence, its admission to the process and its respective evaluation through objective criteria and pre-defined parameters, removing as far as possible subjectivism and judicial discretion.

It must be clear what are the necessary requirements for the condemnatory outcome. Which evidence was effectively considered by the judicial authority, how it was assessed and what importance each one had for the criminal conviction. Such an aspiration can only be achieved if there are prior and well-defined parameters and criteria for assessing the evidence in a rational and reliable manner.

In the words of Alexandre Morais da Rosa (2019),

> There is, therefore, an intimate relationship and interaction between evidence and criminal decision, in order to establish control mechanisms in both dimensions and, thus, reduce authoritarianism and judicial error. It is necessary, in addition to establishing the rules for admission and production of evidence, to define "what is necessary" in terms of evidence (quality and credibility) to render a conviction or acquittal. And here comes the topic of *the evidentiary* standard.

If, in the distant past, dating back to the inquisition of the Middle Ages, the doubt generated by the insufficiency of proof was equivalent to a semi-proof, which included a judgment of semi-guilt and condemnation to a light penalty. Currently, with the criminal process having the ultimate purpose of controlling the punitive power of the state and the maintenance of guarantees and fundamental rights, doubt determines the acquittal of the accused and the conviction hypothesis can only be achieved if all reasonable doubts are overcome within a standard of proof with pre-established rational criteria.

National jurisprudence is moving slowly in the obligation to fully respect the protocols for the production of evidence, as well as to establish criteria and parameters for evidentiary assessment in a reliable and transparent manner. However, recent decisions have been changing this scenario, where a more demanding and serious evidentiary standard has been gaining more and more strength within a guarantor criminal process that is closer to the Federal Constitution.

In a paradigmatic decision, the Distinguished Superior Court of Justice established the requirement of absolute respect for Article 226 of the Code of Criminal Procedure for the production of recognition of persons and things. In the same sense, it determined that the

recognition made by photography cannot lead to a condemnatory hypothesis, for several reasons, as follows:

> HABEAS CORPUS. AGGRAVATED ROBBERY. PHOTOGRAPHIC RECOGNITION OF A PERSON CARRIED OUT IN THE POLICE INVESTIGATION PHASE. NON-OBSERVANCE OF THE PROCEDURE PROVIDED FOR IN ARTICLE 226 OF THE CPP. INVALID EVIDENCE AS A BASIS FOR CONVICTION. EVIDENTIARY RIGOR. NECESSITY TO AVOID JUDICIAL ERRORS. PARTICIPATION OF MINOR IMPORTANCE. NON-OCCURRENCE. ORDER PARTIALLY GRANTED.
>
> 1. The recognition of a person, in person or by photograph, carried out during the police investigation phase, is only able to identify the defendant and establish the criminal authorship, when the formalities provided for in article 226 of the Code of Criminal Procedure are observed and when corroborated by other evidence collected in the judicial phase, under the scrutiny of the adversary and the full defense.
>
> 2. According to studies in modern psychology, failures and mistakes that can arise from human memory and the ability to store information are common. This is because memory can, over time, fragment and, finally, become inaccessible for the reconstruction of the fact. The probative value of recognition, therefore, has a considerable degree of subjectivism, potentiating flaws and distortions of the act and, consequently, causing judicial errors with deleterious and often irreversible effects.
>
> 3. The recognition of persons must, therefore, observe the procedure provided for in article 226 of the Code of Criminal Procedure, whose formalities constitute a minimum guarantee for those who see themselves in the condition of suspects of the commission of a crime, and are not, as has been understood, a "mere recommendation" of the legislator. In fact, the non-observance of such a procedure gives rise to the nullity of the evidence and, therefore, cannot serve as a ballast for its conviction, even if the act performed in the inquisitorial phase is confirmed in court, unless other evidence, by itself, leads the magistrate to be convinced of the criminal authorship. Nothing prevents, it should be noted, that the judge performs, in court, the act of formal recognition, provided that the due evidentiary procedure is observed.
>
> 4. The recognition of a person by photographic means is even more problematic, especially when it is carried out by simply showing the recognizer photos of the conjectured suspect extracted from police albums or social networks, already previously selected by the police authority. And, even when one tries to follow, with adaptations, the procedure indicated in the Code of Criminal Procedure for face-to-face recognition, there is no way to ignore that the static character, the quality of the photo, the absence of expressions and body mannerisms and the almost always visualization only of the suspect's bust can compromise the suitability and reliability of the act.
>
> 5. It is therefore very urgent to adopt a new course in the Courts' understanding of the consequences of the procedural atypicality of the act of formal recognition of persons; It is no longer possible to endorse the jurisprudence that states that it is a mere

recommendation of the legislator, which ends up allowing the perpetuation of this focus of judicial errors and, consequently, of serious injustices.

6. It is to be required that the judicial police (civil and federal) carry out their investigative function committed to absolute respect for the formalities of this means of evidence. And the Public Prosecutor's Office fulfills the role of supervising the correct application of the criminal law, as it is an organ of external control of police activity and for its inherent function of custos legis, which flows from the constitutional design of its missions, with emphasis on the "defense of the legal order, the democratic regime and the social and individual interests that are inalienable" (Art. 127, caput, of the Constitution of the Republic), as well as its specific function of "ensuring the effective respect of the Public Powers [including, of course, those it itself exercises] [...] promoting the necessary measures to guarantee it" (Art. 129, II).

7. In kind, the recognition of the first patient took place by photographic means and did not minimally follow the normative script provided for in the Code of Criminal Procedure. There was no prior description of the person to be recognized and no other photographs of possible suspects were shown; On the contrary, the police authority chose photos of a suspect who had already committed other crimes, but who absolutely did not indicate, until then, having any connection with the robbery investigated.

8. Under the aegis of a criminal process committed to the rights and values affirmed in the Constitution of the Republic, a procedural truth is sought in which the historical reconstruction of the facts object of the judgment is linked to precise rules, which ensure the parties greater control over the judicial activity; a truth, therefore, obtained in a "procedurally admissible and valid" way (Figueiredo Dias).

9. The first patient was recognized by photograph, without any observance of the legal procedure, and there was no other evidence produced against him. In addition, the flaws and inconsistencies of the supposed recognition – his height is 1.95 m and everyone said that he would be around 1.70 m; the robbers had their faces partially covered; Nothing related to the crime was found in his possession and the police authority did not even explain how he would have come to the suspicion that he could be one of the perpetrators of the robbery – they are more evident with the statements of three of the victims in court, when they deny the possibility of recognizing the accused.

10. Under such conditions, the act of recognition of the first patient must be declared absolutely null and void, with his consequent acquittal, in the absence of any other independent and suitable evidence to form a judicial conviction about the authorship of the crime of robbery that was imputed to him.

11. As for the second patient, he would have, at most – as acknowledged by the sentencing Magistrate – borrowed the vehicle used by the robbers to get to the restaurant and flee the scene of the crime in possession of the stolen objects, conduct that cannot be considered as decisive for the commission of the crime, not least because it was not possible to demonstrate whether there was actually such a loan of the car with the prior knowledge of its illicit use by the duo who committed the theft. Thus, it is necessary to recognize the general cause for reduction of sentence provided for in article 29, § 1, of the Penal Code (participation of minor importance).

12. Conclusions: 1) The recognition of persons must comply with the procedure provided for in article 226 of the Code of Criminal Procedure, whose formalities constitute a minimum guarantee for those who are suspected of committing a crime; 2) In view of the effects and risks of a failed recognition, the non-observance of the procedure described in the aforementioned procedural rule renders the recognition of the suspect invalid and cannot serve as a basis for a possible conviction, even if the recognition is confirmed in court; 3) The magistrate may perform, in court, the act of formal recognition, provided that the due evidentiary procedure is observed, as well as he may be convinced of the criminal authorship from the examination of other evidence that does not have a cause and effect relationship with the vitiated act of recognition; 4) The recognition of the suspect by simply showing photograph(s) to the recognizer, in addition to having to follow the same procedure as personal recognition, must be seen as a step preceding any personal recognition and, therefore, cannot serve as evidence in a criminal action, even if confirmed in court.
(HC 598.886SC, Rel. Justice ROGERIO SCHIETTI CRUZ, SIXTH PANEL, judged in 27102020, DJe 18122020)

In the judgment of HC 598.886/SC, of the rapporteurship of Justice Rogério Schietti Cruz, the Sixth Panel decided, reviewing the previous interpretation, in the sense that "determine, from now on, the invalidity of any formal recognition - personal or photographic - that does not strictly follow what is determined by article 226 of the CPP, under penalty of continuing to generate instability and insecurity of judicial sentences that, under the pretext that other evidence produced in support of such an act - all, however, derived from a recognition that does not conform to the normative model - would authorize the conviction, thus increasing the concrete risk of serious judicial errors".

The decision under analysis set an important precedent in national jurisprudence in relation to conviction based on personal recognition provided for in article 226 of the Code of Criminal Procedure by establishing strict parameters to be followed for the validity of the production of evidence. The criteria adopted have been uniformly reproduced by the superior court of justice to the present day, including to suspend the early fulfillment of criminal convictions and to revoke precautionary arrests until the final judgment on the merits of the appeals that reach the STJ.

Regarding the recognition of persons, Mirabete (2004) describes that "it is the act by which someone verifies and confirms the identity of the person or thing that is shown to him, with a person or thing that he has already seen, that he knows, in a procedural act performed before the police or judicial authority, according to the special form provided for by law. The recognition, as recommended by the national legislation, is personal. It seems obvious, but this is one of the most common illegalities committed in police headquarters when carrying out reconnaissance: the reconnaissance made by photographs.

The way in which the procedure is carried out differs from what is recommended by the national criminal procedural legislation. The recognition of persons and things is regulated in Article 226 et seq. of the Code of Criminal Procedure, which determines the placement of persons to be recognized next to others who have any similarity with it ("line-up" methodology). The simple display of a single person to be recognized, through photographic images, opens great margins for undue recognition resulting from false memories and the suggestibility of victims and witnesses through the authorities involved in the act.

In relation to the requirements made by the Code of Criminal Procedure, Lopes Júnior (2017, p.490) ponders that these precautions are not useless formalities; on the contrary, "they constitute a condition for the credibility of the evidentiary instrument, reflecting on the quality of the judicial protection provided and on the reliability of a country's judicial system"

The biggest problem occurs when the flawed recognition, personal or photographic – the latter in disagreement with the procedure established in Article 226 of the Code of Criminal Procedure (almost always from photos of the face or bust extracted from police albums or found on social networks) – is later "ratified" in court by the recognizer and used as a basis for condemnation, as a sufficient argument for the proof of criminal authorship even without the support of other independent and suitable evidence for this purpose.

The criminal lawyer must be attentive at the hearing to prevent the accusatory body or even the presiding judicial authority of the act from intending to carry out a personal recognition at the hearing itself. In addition to being a right of the accused, not to produce evidence against himself, the act seeks precisely to validate the illegal recognition made at police headquarters.

Let us see that the evidential standard is precisely the degree of sufficiency that the factual hypothesis needs to overcome to be considered true. Standards of proof are "criteria that indicate when proof of a fact has been achieved, that is, criteria that indicate when it is justified to accept as true the hypothesis it describes" (Gascón Abellán, 2005, p. 129). These are, therefore, standards that point to a demarcation, a minimum of evidence that must be overcome in order to consider a fact as proven. In direct terms, they define "the 'amount of evidence' (level of evidential sufficiency or degree of confirmation" (Kircher, 2018, p. 190).

In the case under analysis, the Citizen Court established that in criminal proceedings in which the decisive evidence is personal recognition, the degree of evidential sufficiency can only be achieved when carried out in accordance with the legal provisions of Article 226 of the Code of Criminal Procedure. Thus, the evidence produced (personal recognition) will

only rebut the presumption of innocence, overcoming any and all reasonable doubt when produced strictly following the legal protocols, thereby authorizing a condemnatory decree, as long as it is clear, being in line with the other evidence in the records. Otherwise, acquittal is a measure that is required.

In other words, the magistrate is unable to positively assess the personal recognition made by photograph in isolation to sanction the accused with the condemnatory edict, because the evidence will not have the quality and credibility necessary to achieve a degree of evidential sufficiency capable of going beyond all reasonable doubt.

In his own vote, the reporting Justice ponders on the *evidentiary standard*, adducing that: "The case covered in these records fully adjusts to the reports of failures and inconsistencies in the photographic recognition mentioned above. And, even more, it shows how the judicial authority, when sentencing, was content with this evidence so fragile and riddled with vices, simply clinging to data, therefore, absolutely insufficient to affirm the criminal participation of the accused, *beyond a reasonable doubt*."

It is possible to identify that the judiciary has established a rational criterion, where evidence will be sufficient only when produced following the pre-defined legal parameters. The jurisprudence under analysis serves to demonstrate that there was, in this specific case, an advance in the criteria of evidentiary evaluation, adopting a more demanding standard of proof.

It could also have gone further, since, since the Public Prosecutor's Office is the holder of the criminal action and the duty of the accusatory body has the absolute burden of proving the just cause of the Criminal Action (authorship + materiality), having the first contact with the evidence produced in disagreement with the governing rules, it should now request the return of the records for further investigations, essential to the filing of the complaint under the terms of Article 16 of the Code of Criminal Procedure.

It is important to recognize that, in this sense, the development of national legal thought must move forward, in search of a standardization of rational criteria for evidentiary assessment, so that we can increasingly reduce judicial subjectivism with regard to the free assessment of evidence. It is necessary to take more seriously the complex (re)cognitive function of criminal prosecution, as well as the necessary mechanisms of epistemic control and more demanding standards of proof, typical of a democratic procedural regime.

In this sense, we agree with the author Jordi Ferrer Beltrán (2007), when he states that "the reduction of spaces of arbitrariness in the justice system demands an effort to

overcome the so-called psychological or persuasive conception of evidence (related to the acquisition of the mental state of conviction or belief, that is, of the judge's internal psychological processes).

Finally, such doctrinal development, as important and significant as it is for the field of criminal sciences, is not free from criticism and considerations, which we intend to address in a conclusive topic.

5 CONCLUSION

The mention of the term standard of proof has become, in recent years, increasingly common when discussing evidentiary issues, within the scope of Brazilian procedural law. However, despite the sharp increase in references to the evidentiary standard in judicial decisions at the various levels of jurisdiction, there does not seem to be full mastery over the understanding of what function it fulfills in the field of judicial proceedings.

The criticism refers to the fad in the use of the evidential standard of "beyond all reasonable doubt", as if the mere discursive presence of the expression, by itself, already guaranteed rationality to the decision, when in fact the mere reference to the term in a decision does not bring with it any guarantee that the decision has been made after a process of rational evaluation of the evidence. It draws attention to the fact that there is a rhetorical use of the procedural institute to solve all the problems that evidentiary discussions raise, neglecting its real function within the accusatory game.

It is perceived that the excessive use of the expression can usually serve only to make up the judge's activity, giving rise to legality and reliability to the decisions, uncommitted to the real application of the criminal procedural institute. The rational criterion of evidentiary assessment was born as a counterpoint to the current model of management of the judicial decision based on the free assessment of evidence.

Currently there is an understanding that it is important to guarantee the judge freedom regarding the evaluation of the evidence, this does not imply consent to subjectivism. To say that the trial should be free expresses the concern to distance ourselves from the normative constraints, then characteristic of the evidence charged, but it does not mean uncritical agreement with the whims and intimate opinions of the judges. If, due to the development of modern legal thought, the model of taxed evidence was replaced by the system of free evidentiary assessment, such an understanding should not accept that it is "free of any rule", as it must follow minimally rational and logical guidelines.

Another point is that the standard of proof "beyond all reasonable doubt", a translation of the classic standard of proof of the American criminal procedure called "*beyond a reasonable doubt",* also presents a strong reference to the psychological aspect, as well as the system of free appreciation of evidence, as they signal in the same way to the intimate conviction of the judge.

Now, if the main objective of the most demanding standard of proof studied here is precisely to reduce subjectivism and judicial discretion, in addition to controlling the way in which the analysis of evidence takes place, conferring greater credibility and reliability to the judicial decision, how to achieve this purpose when we also operate here with the internal conscience of the judge.

However, in spite of the criticisms coming from notable authors dedicated to legal epistemology, it is important to consider that the total abandonment of the standard of proof studied here would be a setback in terms of respect for the constitutional commandment of the presumption of innocence, as well as in terms of rational evaluation of evidence.

I believe that it is necessary to develop the procedural institute, in order to materialize this more demanding standard of proof, underlining the relevance of evidence as the only and exclusive way to its satisfaction, and thus, increasingly narrow the subjectivity inherent in the term "reasonable doubt".

The possibility of using the category "beyond reasonable doubt" is supported due to its relevance and international consolidation, but *based on a more precise definition of its content*, guided by the parameters of the rational evaluation of the test. Undoubtedly, it is impossible to define a totally objective standard, because in the judicial decision there will always be a space for subjectivism (Knijnik, 2007, p. 46; Nardelli and Mascarenhas, 2016, p. 61).

Such purpose must be achieved through collective deliberations in the creation of laws that materialize such desire, as well as through the judiciary, with a firm jurisprudence, evaluating the evidence in a uniform and stable way, as in the example of the decision studied here regarding the absolute respect and without exceptions to article 226 of the Code of Criminal Procedure.

The adoption of an evidentiary standard with logical and objective criteria is a fundamental step towards the consecration of a rational theory of evidence, in which abusive views on judicial discretion in the evidentiary assessment of the factual judgment in criminal

proceedings are overcome. And as also defended by (Vasconcellos, 2020) it consolidates the choice for a rational system for legitimizing and limiting the state's punitive power.

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