



Writ Of Habeas Corpus 124.306 Rio De Janeiro STATE

Country: Brazil

Region: Americas

Year: 2016

Court: Supreme Federal Court of Brazil

Health Topics: Child and adolescent health, Health care and health services, Hospitals, Prisons, Sexual and reproductive health

Human Rights: Freedom from discrimination, Right to bodily integrity

Facts

The writ of Habeas Corpus was brought for the release of the defendants who were arrested for providing illegal abortion services through their clinic with the consent of the women. The Criminal District Court released the defendants but allowed the appeal of the Public Prosecutor for a pre-trial detention. The decision was based on the necessity of safeguarding public order and for the enforcement of the criminal law. The defendants claimed that the requirements of a pre-trial detention were not satisfied as they were citizens with no prior criminal record and there were no attempts of fleeing from the judicial system. There was no specific motive, grounds or reasons for the pre-trial detention.

Decision and Reasoning

The Court allowed the Habeas Corpus as an exceptional circumstance and ordered the release of the defendants. It stated that the pre-trial detention did not satisfy the legal requirement of Article 312 of the Criminal Procedure Code, which requires cogent evidence be present for such detention in order to ensure public or economic order or for the enforcement of the law.

The Court then went on to analyse the constitutional validity of the criminalization of abortion. The Court stated that although the protected legal good was the life of the unborn child, criminalization of abortion during the first trimester violates fundamental rights of women such as right to autonomy, right to physical and psychological integrity, right to reproductive rights and the right to gender equality. The Court stated that it was not allowed to declare unconstitutionality of a law, which existed prior to the framing of the Constitution but it stated that constitutional interpretation to exclude the first trimester from the criminal law's ambit was necessary. The Court also recommended that as abortion projects a psychological, physical and moral complexities, which could be avoided, it is the role of the State to work towards awareness of contraceptive methods and provide sex education.

Decision Excerpts

In the instant case, the original pretrial detention order did not satisfy the legal requirements pursuant to article 312 of the Criminal Procedure Code⁷, which states that the pretrial detention may only be imposed when there is concrete evidence that it is necessary in order to guarantee the public order or the economic order, for the convenience of the proceedings, or to ensure the enforcement of the law. It should be noted that imprisonment becomes even less justifiable when it is verified that the defendants: (i) do not have any criminal record and are upstanding citizens; (ii) are employed and have a permanent residence; (iii) have duly attended the court summons; and (iv) shall serve their sentences on day release conditions in the event of conviction. Therefore, the case law of the Supreme Court, which states that pretrial detention is illegal without the empirically-driven demonstration of the presence of its legal requirements, governs (HC 109.449, Justice Rapporteur Marco Aurélio; and HC 115.623 Justice Rapporteur Rosa Weber).

"Não se encontram preenchidos, no caso concreto, os requisitos do art. 312 do Código de Processo Penal 5, que exigem, para decretação da prisão preventiva, que estejam presentes riscos para a ordem pública ou para a ordem econômica, conveniência para a instrução criminal ou necessidade de assegurar a aplicação da lei. Note-se que a prisão torna-se ainda menos justificável diante da constatação de que os pacientes: (i) são primários e com bons antecedentes; (ii) têm trabalho e residência fixa; (iii) têm comparecido devidamente aos atos de instrução do processo; e (iv) cumprirão a pena, no máximo, em regime aberto, na hipótese de condenação. Aplicável, portanto, a orientação jurisprudencial do Supremo

Tribunal Federal no sentido de que "é ilegal a prisão cautelar decretada sem a demonstração, empiricamente motivada, dos requisitos legais (HC 109.449, Rel. Min. Marco Aurélio; e HC 115.623, Rel. Min. Rosa Weber)." (Para 9)

"First of all, criminalization violates the woman's autonomy, which corresponds to the essential core of individual freedom, protected by the principle of human dignity (Federal Constitution of 1988, article 1, III). The autonomy expresses the self-determination of persons, that is, the right to make their own basic existential choices and moral decisions regarding the course of their lives. Every individual " man or woman " is assured a legitimate sphere of privacy within which they live their values, interests and desires. In this space, the State and society have no right to intervene."

"A criminalização viola, em primeiro lugar, a autonomia da mulher, que corresponde ao núcleo essencial da liberdade individual, protegida pelo princípio da dignidade humana (CF/1988, art. 1º, III). A autonomia expressa a autodeterminação das pessoas, isto é, o direito de fazerem suas escolhas existenciais básicas e de tomarem as próprias decisões morais a propósito do rumo de sua vida. Todo indivíduo " homem ou mulher " tem assegurado um espaço legítimo de privacidade dentro do qual lhe caberá viver seus valores, interesses e desejos. Neste espaço, o Estado e a sociedade não têm o direito de interferir." (Para 24)

"Secondly, criminalization affects the physical and psychological integrity of the woman. The right to physical integrity (Federal Constitution of 1988, article 5, caput and III) protects individuals from undue interference and injury to their bodies and minds, and also relates to the rights to health and safety. Physical integrity is disturbed because the body of the woman is the one that will suffer the transformations, risks, and consequences of pregnancy. While a desired pregnancy may be a blessing, the same state, when unwanted, can transmute into a torment. Psychological integrity, in turn, is affected by the assumption of a lifelong obligation, demanding self-abnegation, as well as dedication and deep commitment to the newborn. Moreover, what could be a blessing if met with a woman's own desire, can change to an ordeal when it results from an heteronomous imposition. Giving birth to a child by the imposition of criminal law constitutes a serious violation of the physical and psychological integrity of the woman."

"Em segundo lugar, a criminalização afeta a integridade física e psíquica da mulher. O direito à integridade psicofísica (CF/1988, art. 5º, caput e III) protege os indivíduos contra interferências indevidas e lesões aos seus corpos e mentes, relacionando-se, ainda, ao direito à saúde e à segurança. A integridade física é abalada porque o corpo da mulher que sofrerá as transformações, riscos e consequências da gestação. Aquilo que pode ser uma bênção quando se cuida de uma gravidez desejada, transmuta-se em tormento quando indesejada. A integridade psíquica, por sua vez, é afetada pela assunção de uma obrigação para toda a vida, exigindo renúncia, dedicação e comprometimento profundo com outro ser. Também aqui, o que seria uma bênção se decorresse de vontade própria, pode se transformar em prova quando decorra de uma imposição heterônoma. Ter um filho por determinação do direito penal constitui grave violação à integridade física e psíquica de uma mulher." (Para 26)