(coat of arms of State…) **COURT OF JUSTICE OF STATE OF…**
JUDICIAL DISTRICT OF…
CRIMINAL COURT
ADDRESS…

JUDGMENT

Trial nº: …
Author: Public Prosecutor's Office of State of…
Accused: John
Mary

I. PROCEDURAL HISTORY

This case is about a criminal action brought by the Public Prosecutor's Office against John and Mary, charging them with the practice of the crime foreseen in art. 121, § 2, sub II, cumulated with art. 14, sub II, all of the Brazilian Penal Code.

According to the indictment, John, with the help of his girlfriend Mary, on 26 March 2021, at around 10:30 p.m., in the car park of the Blue Moon Bar, acting for frivolous reasons, attempted to kill Bill G., striking him in the chest, stomach and an artery with a screwdriver.

Considering that homicide is a crime against life, this crime is subject to the jurisdiction of the Jury Court, as determined by Article 5, subsection XXXVIII, "d" of the Federal Constitution of 1988, whose procedure is ruled by Articles 406 et seq. of the Code of Criminal Procedure.

On May 20, 2021, at the close of the prosecution phase (*judicium accusationis*), the single judge issued the decision of dismissal of Mary, on the grounds that there is no evidence that she was an accomplice or participant in the crime charged by the Public Prosecutor's Office. The judge pointed out that she tried to prevent John from continuing to assault Bill by lying on top of the victim, and that she tried to stem the flow of blood from the victim and lessen the consequences of the injury. In the same decision, the judge admitted John's indictment for the crime of murder qualified by futile motive in the attempted form, in the terms of the complaint presented by the

Public Prosecutor's Office, but dismissed the requests for declassification to grievous bodily harm and, alternatively, of recognition of the exclusion of illegality of legitimate self-defense formulated by the defense on that occasion, on the grounds that neither the demonstration of the absence of *animus necandi* nor that the accused had acted supported by such exclusion was evident, notably in view of the incidence of the principle of in *dubio pro societate* applicable to the phase of the accusation.

The indictment was admitted under the terms of art. 413 of the Code of Criminal Procedure, and the judge based the decision of indictment on the existence of evidence of materiality and sufficient indications of perpratation to submit John to Jury Court.

On April 01, 2021, the defense presented an appeal in Strict Sentence, with the intention of reforming the decision of indictment, recognizing the thesis of declassification for bodily injury of a serious nature or self-defense. However, the Criminal Chamber of the State Court of Justice dismissed the appeal and determined the remittance of the case records to the Presiding Judge of the Jury Court.

On June 15, 2021, the case records were submitted to this Jury Court.

After submission of the case records, the presiding judge of the Jury Court determined that the Public Prosecutor's Office and John's defender should be notified to, within five (5) days, present a list of witnesses who will testify in the plenary session, up to a maximum of five (5), and, if they wish, submit documents and request further steps (Code of Criminal Procedure, art. 422).

The parties presented their witnesses and did not request additional measures, understanding the evidence produced in the phase of the accusation to be sufficient.

A summary report of the case was then prepared, as determined by art. 423, item II, of the Code of Criminal Procedure, and the case was included in the agenda for the Jury Court meeting. The presiding judge verified that the case was in order and determined that the parties, the victim, the witnesses and the experts should be notified to attend the session of instruction and trial scheduled for July 30, 2021.

During the session of the Jury Court, the presiding judge verified that the 25 jurors chosen from the general list of citizens over the age of eighteen (18) of notorious reputation were present, and declared the proceedings complete, announcing the process submitted for trial. The judge then appointed by random drawing 7 members of the Sentencing Council from among the 25 present jurors.

Then, as determined by art. 472 of the Code of Criminal Procedure, the presiding judge stood up and, with him, all those present and made the following exhortation to the jurors: "In the name of the law, I urge you to examine this case impartially and render your decision in accordance with your conscience and the dictates of justice". The jurors, in turn, on being nominally called, made the following commitment: "I so promise".

The following documents were then handed to the jurors: copies of the decision of indictment and of the case report.

The plenary session began with the taking of victim Bill G. personal statements, by the presiding judge, the Public Prosecutor's Office and the defendant's defence counsel, in succession and directly (cross examination system).

In his statement, the victim declared that he was unfairly assaulted by John as he took a screwdriver and scratched his car only to provoke him after an argument occurred between them inside the "Blue Moon" bar. He also stated that John took the tool from his hands, said he was going to kill him and started to strike several blows against him, even after Mary threw herself in front of his body to prevent the crime from continuing. He stated, finally, that John hit him in the artery, and the victim did not die because of being rescued.

The witnesses were then heard.

Prosecution witnesses Ben and Bob were unanimous in the sense that they saw John say that he would kill Bill and then attack him with a screwdriver until the victim fell to the ground, and that Mary tried to stop him, but John hit Bill's artery in an attempt to kill him, and John was then removed from the scene by Jack. They also stated that John was not assaulted by Bill, who did not even react to the assaults.

The expert Jimmy, also listed by the prosecution, said that the last wound inflicted by John hit an artery in Bill, and that this type of wound occurs when one intends to kill the victim, considering the precision of the attack and that it is common knowledge that it is a vital region.

Police officers Greg D. and Cathy P., also witnesses for the prosecution, made statements, and reported that when they arrived at the scene Bill G. was seriously injured, and that the injuries were in a vital region, so that it is apparent that John tried to kill Bill, who only did not die because medical aid was provided.

Defence witness Mary, who was heard as a declarant because she was the

accused's girlfriend, declared that John was provoked by Bill, and that there was no intention to kill because John was drunk and acted disproportionately because of drink.

Witness Jack, also heard as a declarant due to the degree of kinship with the victim (brother), said that John was already leaving the bar when Bill started to provoke him with the same screwdriver with which he had been attacked, even though he realized that John was seriously intoxicated, and that John had no intention of killing him, but only of injuring him in the face of the provocation suffered.

After this, the accused John was questioned, and he exercised his constitutionally guaranteed right to remain silent (Art. 5, Subparagraph LXIII of the Federal Constitution of 1988).

The jurors were then allowed to ask questions to the witnesses and the defendant through the presiding judge, adopting, at this point, the presidential system, in accordance with § 2 of art. 472 of the Code of Criminal Procedure. However, there were no questions.

Then, finding that John was handcuffed, the presiding judge determined the immediate removal of handcuffs in view of the prohibition provided for in art. 474, § 3, of the Code of Criminal Procedure.

After the end of the instruction, the Public Prosecutor's Office was given the opportunity to make an accusation within the limits of the decision to indict, with the possibility of adding aggravating circumstances.

After the debates, the Public Prosecutor's Office insisted on the conviction of the accused for the crime of murder qualified by frivolous motive in the attempted form, basing the accusatory thesis on the statements made by the victim, who stated in the plenary session that he had been seriously threatened and assaulted by John with a screwdriver, which struck him in a vital region at the time of the injuries. He also highlighted the statements of Ben and Bob, who were unanimous in the sense that John visibly intended to kill Bill at the time of the facts. Finally, the report of the *corpus delicti* examination and the expert's testimony were highlighted, emphasizing the lesion that occurred in the region of the artery. He also added the incidence of the aggravating circumstance provided for art. 61, sub II, "l".

The defense, in turn, once again requested the declassification of the crime of attempted murder to the crime of grievous bodily harm, arguing that John was provoked by Bill and that the aggressions occurred in the context of an argument, and that John was drunk, with no *animus necandi*. Subsidiarily, he formulated the thesis of

legitimate defense, substantiating that John injured Bill to defend himself from unjust and imminent aggression. Thirdly, he pleaded, if the previous theses were not accepted, for recognition of the cause of reduced sentence of art. 121, § 1, of the Penal Code (privileged homicide), arguing that John acted with violent emotion after unfair provocation by Bill. Finally, as a last thesis, he pleaded for the removal of the qualifying factor of futile motive and the rejection of the aggravating circumstance raised by the Public Prosecutor, so that only the crime of attempted murder remains.

After the debates, the President asked the jurors if they were qualified to judge or if they needed any further clarifications, and the Sentencing Council confirmed that they were ready to proceed with the session.

Continuing the trial, the presiding judge guided the jurors to the secret room to answer the questions previously submitted by the Public Prosecution and the defense, warning them that they could not communicate among themselves about the case.

The Members of the Sentencing Council affirmed, always by a majority of votes cast in the ballot box, in relation to the 1st Series of Questions (art. 482 of the Code of Criminal Procedure)

1. Was the victim injured by a screwdriver (existence of the fact): YES

2. The accused was the perpetrator of the injuries caused to the victim (authorship): YES

However, in relation to the third question, when questioned if the defendant acted with *animus necandi* (with intent to kill), in order for the defense disqualification thesis (art. 483, §2 of the CPC) to be analyzed, the jurors answered NO, and the other questions raised by the parties remained unanswered, since they referred to the initially imputed homicide.

Thus, the members of the Sentencing Council considered that the accused had not acted with intent to kill, declassifying, therefore, the offense charged for the provision in art. 129, § 1, II, of the Criminal Code (agravated bodily harm), as requested by the defense. As this crime does not have the nature of a crime against life, jurisdiction for the trial belongs to the single judge.

In view of the declassification, the presiding judge of the Jury Court handed down the sentence, as determined by § 1 of art. 492 of the Criminal Procedure Code:

> *§ 1o If the infraction is reclassified to another, under the jurisdiction of a single judge, the President of the Jury Court shall be responsible for passing sentence thereafter, applying the provisions of Articles 69 et seq. of Law No. 9.099, of 26 September 1995, when the offence resulting from the new typification is considered by law as a criminal infraction of less offensive potential.*

II. LEGAL REASONING

In compliance with the constitutional principle of motivation of judicial decisions (art. 93, item IX, of the Federal Constitution of 1988), I will now proceed to the reasoning.

II.1. OF MATERIAL EVIDENCE AND PERPETRATION

Article 129 of the Penal Code describes the crime of bodily injury as follows: "*Offend the bodily integrity or health of another*".

The same legal provision further provides for the crime of aggravated bodily harm:

> ***Bodily harm of a serious nature***
> ***§ 1 If it results in:***
> ***I - Incapacity for habitual occupations, for more than thirty days;***
> ***II - danger to life;***
> ***III - permanent debility of limb, sense or function;***
> ***IV - acceleration of childbirth:***
> ***Penalty - reclusion, from one to five years.***

In the present case, John is charged with the crime of aggravated bodily harm as provided for in art. 129, § 1, sub II of the Penal Code (aggravated bodily harm).

The material evidence of the crime is incontestable, notably through the c*orpus delicti* examination attached to the records, which attests to the bodily harm caused, and the report of the exhibition and seizure of the screwdriver used to commit

the crime, which proves the occurrence of serious harm to Bill G.'s physical integrity, resulting in danger to life.

The perpetration of the crime, in turn, is inferred from the oral evidence gathered in the case record, given that all the witnesses - including the defense witnesses - and the victim were unanimous in affirming that the bodily harm to Bill was committed by John.

Thus, it is clear that John seriously injured Bill with a screwdriver and that these injuries endangered the life of the victim.

II.2. OF THE THESIS OF SELF-DEFENCE - NOT ACCEPTED.

Once the material evidence and perpetration have been ascertained, it is necessary to analyse the thesis of self-defence, which was argued both in the written defence and in the plenary session.

The thesis of self-defense raised by the defendant does not deserve to prosper, since it is not supported by the evidence produced in the records.

In fact, witnesses Ben and Bob reported that they saw no apparent injury to John and that he was not beaten by Bill, who did not even resist the assaults.

As stated in Article 25 of the Criminal Code, "*Self-defence is understood as whoever, using the necessary means moderately, repels an actual or imminent unjust aggression against his own or another's right*".

And, in the case in question, even if it is considered that the victim provoked the aggressions, the means used by the defendant to defend himself is manifestly disproportionate, especially when one verifies the region affected and the number of injuries suffered by the victim.

Furthermore, there was no evidence of injury to the defendant.

Thus, considering the seriousness of the injuries, the version that the accused acted trying to defend himself from unfair and imminent aggression is not credible.

It is worth noting that Bill used the screwdriver to scratch John's car, not to hurt him.

I also verify that the conduct of the accused caused injury of a serious nature to the victim, as it resulted in "danger to life", according to the report of the

examination of the corpus delicti. For this reason, it is applicable the qualifier provided for in art. 129, § 1, II, CC.

On these grounds, I reject the thesis of self-defence raised.

II.3. THE INAPPLICABILITY OF THE AGGRAVATING FACTOR OF PREORDAINED DRUNKENNESS

I will now examine the aggravating factor charged to the defendant by the Public Prosecutor's Office in plenary.

The Public Prosecutor alleged that John committed the crime in a state of preordained drunkenness, which occurs when the agent consumes alcoholic beverages to commit the crime, as provided for in art. 61, item II, "i" of the Criminal Code.

However, the claim has not been adequately substantiated.

This is because, as shown in the record, John consumed alcoholic beverages to celebrate the wage increase, received that same day, and he has not even known the person of Bill G before the crime. Thus, it is not possible to recognize the state of preordained drunkenness, considering that the defendant did not drink with the intention of injuring the victim.

Thus, I reject to recognize this aggravating factor.

III. OPERATIVE PART

Therefore, considering that there is evidence of material evidence and perpetration, and that no affirmative defense has been demonstrated, I JUDGE PARTIALLY APPROPRIATE the State's claim in the complaint to condemn JOHN for the practice of the crime foreseen in article 129, § 1, clause II, of the Brazilian Criminal Code.

I will now analyze the dosimetry of the sentence.

Initially, I emphasize that although the minimum sentence imposed for the crime of aggravated bodily harm is 1 (one) year, the defendant does not deserve the conditional suspension of the procedure provided for in art. 89 of Law No. 9.099/1995, considering that the accused has already been convicted of other crimes, not fulfilling, therefore, the requirements provided to obtain such a benefit.

Moreover, it is not possible to send the case records to the Public Prosecutor's Office with the intention of concluding a Non-Prosecution Agreement, since the crime was committed by violence against the person, under the terms of art. 28-A of the Code of Criminal Procedure.

Criminal Code adopted the three-phase system of sentencing, establishing, in summary, that: in the first phase, the penalty for a term is established pursuant to art. 59 of the Criminal Code; in the second phase, the Judge will examine the mitigating and aggravating circumstances; and, finally, in the third phase, there will be the application of the causes for increasing and diminishing the penalty, establishing the total criminal sanction against the defendant. Afterwards, based on the actual penalty imposed, the judge will determine the initial compliance regime and verify whether it is appropriate to substitute the penalty of imprisonment by a penalty of restriction of rights or conditional suspension of the penalty.

1st PHASE:

In the first phase of the measure of punishment, the judicial circumstances described in article 59 of the Penal Code are analysed to determine the penalty for a term, namely: culpability, history, social conduct, personality of the agent, motives, circumstances and consequences of the crime, as well as the victim's behaviour, always in compliance with the need to reprove and prevent the crime.

The Criminal Code, however, does not indicate how to measure each judicial circumstance, having case law and doctrine, for reasons of legal certainty, established as standard the fraction of 1/8 for each circumstance, based on the range between the minimum and maximum penalty abstractly established. Otherwise see the following excerpt from the Superior Court of Justice[1]:

> *"Regarding the dosimetry of the penalty, it is observed that, given the gap in legislation, case law and doctrine have come to recognize that the ideal criterion for individualizing the basic sentence is an increase of 1/8th for each judicial circumstance negatively valued, to be applied to the range of the penalty abstractly established in the secondary precept of the incriminating criminal type."*

[1] AgRg in EDcl in PET in REsp 1852897/RS, Rel. Minister RIBEIRO DANTAS, Fifth Chamber, judged on 23/03/2021, DJe 29/03/2021.

Therefore, considering that the penalty for the crime of aggravated bodily injury is from 1 (one) to 5 (five) years, there is a period equivalent to 4 (four) years between the minimum and maximum limits, so that each judicial circumstance will be increased by 6 months.

In the first phase of the measure of punishment, in compliance with the circumstances provided for in art. 59 of the Criminal Code, I verify that:

a) Culpability: it was normal to the type of offense, with no elements for greater reproach of the conduct, considering that the severity of the bodily injury constitutes an element of the type, under penalty of *bis in idem*;

b) History: analyzing the certificate of antecedents of the defendant joined to the records, I verify that John is a recidivist and has a bad record.

As more than 5 years have elapsed since the first penalty imposed on John (payment of the fine), the depuratory period has elapsed, so that such conviction does not prevail for the purposes of recidivism, under the terms of Art. 64, Subparagraph I of the Criminal Code:

> *Art. 64 - For the purpose of recidivism:*
>
> *I - the previous conviction does not prevail, if a period of time greater than 5 (five) years has elapsed between the date of completion or extinction of the sentence and the subsequent offence, computed the probation period of the suspension or conditional release, if no revocation has occurred;*
> *(...)*

Considering that this conviction does not serve to characterize recidivism, it incurs as a bad record.

In relation to the imprisonment sentence of 18 months imposed 3 years ago, it will incur as recidivism in the second phase of the measure of punishment, since it constitutes an aggravating circumstance.

According to the understanding established by the Superior Court of Justice, "previous convictions may be used both to value the bad antecedents in the first phase, and to aggravate the penalty in the second phase, as recidivism, without leading to bis in idem, since convictions are of different facts, as occurred in the present case" (AgRg no HC n. 649.807/ES, Ministro Felix Fisher, Quinta Turma,DJe 25/5/2021).

Thus, the present circumstance appears unfavourable to the defendant;

c) Social conduct: sufficient elements were not gathered to analyze the defendant's behavior. I emphasize that previous convictions cannot negatively value the social conduct and personality of the agent, as decided by the Superior Court of Justice in Special Appeal No. 1794854/DF, submitted to the System of Repetitive Appeals[2];

d) Personality of the agent: there is nothing in the records to enable its assessment, as already exposed in item "c";

e) Motives: the motive for the crime is reprehensible, considering that John seriously injured Bill as a result of a mere argument that took place in a bar;

f) Circumstances of the crime: they were normal to the type of crime committed;

g) Consequences of the crime: considering that the danger to life caused was the basis for qualifying the crime, it will not be considered as a negative judicial circumstance, under penalty of *bis in idem*;

h) Victim behavior: the victim's behavior contributed, albeit minimally, to the beginning of the *iter criminis*, so I consider this circumstance favorable to the defendant, not interfering negatively against him.

Thus, considering that there were two negative circumstances, I increase the base sentence by 1 (one) year - 6 months for each -, setting it at 2 (two) years' imprisonment and 96 (ninety-six) days fine.

2nd PHASE:

In the second phase, aggravating and mitigating circumstances are considered, as provided in articles 61, 62 and 65 of the Criminal Code.

As with the judicial circumstances, the Code was silent on the criterion for increasing or decreasing each aggravating and mitigating circumstance, being adopted by the majority doctrine and jurisprudence the criterion of 1/6.

The Superior Court of Justice "*considers the fraction of 1/6 as the usual standard for increasing the intermediate penalty as aggravating factors and determines the need to provide reasons for any increase*".

[2] (REsp 1794854/DF, Rel. Minister LAURITA VAZ, Third Section, judged on 23/06/2021, DJe 01/07/2021)

In the present case, the aggravating factor provided for in art. 61, I, of the Criminal Code is present, since the agent is a repeat offender, having been sentenced to imprisonment 3 years ago.

Thus, I increase the penalty by 1/6, fixing the intermediate penalty at 2 (two) years and 4 (four) months of confinement and 112 (one hundred and twelve) daily fines.

3rd PHASE:

In the third phase, the causes of increase and decrease are analyzed, as provided for in both the general and special parts of the Criminal Code and in extravagant criminal legislation.

In the concrete situation, however, there are no causes of increase or decrease of sentence.

Thus, I maintain the intermediate penalty set, making the penalty of two (2) years and four (4) months of confinement and one hundred and twelve (112) daily fines definitive.

Considering that John has been held in preventive custody for 4 months, I apply the detraction of the penalty, subtracting the time spent in custody, resulting in a final penalty of 2 (two) years of reclusion and 112 (one hundred and twelve) fine-days, whose value is equivalent to 1/30 (one-thirtieth) of the minimum wage in effect at the time of the facts, given the defendant's socioeconomic condition.

THE ENFORCEMENT OF SENTENCE AND THE FINAL PROVISIONS

The regime for enforcement of custodial sentences is regulated by art. 33 of the Penal Code, in these terms:

> *Art. 33 - The reclusion sentence shall be served in a closed, semi-open or open regime. Detention sentences shall be served in a semi-open or open regime, unless it is necessary to transfer to a closed regime.*
> *§ 1 - The following are considered as being*
> *a) closed regime: execution of the sentence in a maximum or medium security establishment;*

b) semi-open regime: execution of the sentence in an agricultural or industrial colony or similar establishment;
c) open regime: execution of the sentence in an appropriate home or establishment

§ 2 - Penalties of deprivation of liberty shall be carried out progressively, according to the convicted person's merit, observing the following criteria and excepting the cases of transfer to a more rigorous regime:
a) the person convicted of a penalty of more than 8 (eight) years shall begin serving it under the closed regime;
b) the convicted non-recidivist convict, whose penalty is over 4 (four) years and not exceeding 8 (eight) years, may, from the beginning, serve it on semi-open regime;
c) the convicted non-recidivist offender whose penalty is equal to or less than 4 (four) years may, from the outset, serve the sentence on open regime.

Thus, although the penalty applied in concrete to the accused is less than 4 years, which would fit the open prison regime, I decline to apply such regime due to his recidivism, in accordance with the legal provision above.

Nevertheless, considering that the judicial circumstances (CP, art. 59) were mostly favorable to the accused, I determine the initial regime semi-open, in terms of Precedent 269 of SCJ.

Considering that the crime was committed by violence to person and also that the accused is a recidivist in intentional crime, I do not replace the custodial sentence now applied by penalty of restriction of rights, under art. 44 of the Criminal Code.

Considering his recidivism also, the conditional suspension of the penalty is also inapplicable, under art. 77 of Criminal Code.

In view of the content of this sentence, particularly about the regime of enforcement of sentence set for the defendant, I grant him the right to appeal free, revoking the remand in custody decreed in the inquisitorial phase.

Add a release order.

I sentence the defendant to pay the procedural costs (art. 804 of the CPP). Due to his poverty situation in the form of law (art. 98, § 3 of the CPC and art. 10 of

Law 1.060/50), since he was dismissed due to the practice of the crime in descent, I determine the suspension of enforceability of the payment.

After this sentence is *res judicata*:

a) Include the record of the sentence in the Official Information System, since entering the defendant's name on the list of those found guilty is unnecessary, given the repeal of article 393, II, of the Code of Criminal Procedure, by article 4 of Law No. 12,403 of May 4, 2011;

b) Notify The Federal Regional Electoral Court, pursuant to article 71, paragraph 2 of the Electoral Code, of the defendant's conviction, along with a copy of this decision, in order to suspend his political rights, pursuant to article 15, item III of Federal Constitution;

c) The final execution order shall be issued, and the execution of the sentence shall be recorded in separate records.

Afterwards, the case records shall be filed with all necessary precautions.