

SENTENCE

I. RELATÓRIO.

This case is about procedure to investigate the practice of infractional act, in which the Public Prosecutor's Office filed a complaint against teenager Jack, accusing him of committing infractional acts analogous to the crimes under article 121, *caput* of the Brazilian Penal Code (murder) and under article 309 of the Brazilian Traffic Code (driving without a license).

The representation narrates the following facts:

"On March 23, 2021, at around 11:00 pm, on the road located on X Street, when Jack was driving a motor vehicle, without a National Driver's License and at a speed above the permitted speed (120km/h), he collided with the victim, Olivia F., while she was crossing the street at the green light for pedestrians. She was thrown against a wall and died instantly due to multiple skull fractures and brain trauma.

Also according to the representation, on the day of the facts, around 8:00 pm, Jack, his brother John and Mary, John's girlfriend, went to the "Blue Moon" Bar to celebrate the salary increase of John. During the celebration, Jack had only had soft drinks, while John had consumed several beers. At approximately 22:30, while John was already drunk, he was involved in a discussion between Bill G. and his two friends, Bob L. and Ben K.

John was then persuaded by Jack and Mary to leave the bar. As they were about to leave, they entered the car park, and a fight between John and Bill started, where the latter being seriously injured by the former. Jack, fearing that his brother would return to prison, then lifted John from the ground, removed him to the passenger seat, and proceeded to drive the vehicle out of control at high speed (130 km/h). The accident that victimized Olivia F. occurred moments later.

After the collision, Jack lost control of the vehicle and crashed into an iron post at a speed of 90km/h, stopping the car instantly.

The police officers, called by Oswald F. (Olivia F.'s brother), the victim's brother, arrived at the scene of the accident. At that moment, Jack was taken in flagrant and taken to the police authority to have an arrest report drawn up, together with the other witnesses who were at the scene for questioning. The vehicle was also apprehended and a technical expertise was requested at the scene of the infraction.

Considering the gravity of the infractional acts attributed, Jack had not been released by the police authority through a term of responsibility, but had been forwarded to the Representative of the Public Prosecutor's Office for an informal hearing, as well as the witnesses. A copy of the Apprehension Act was drawn up by the Civil Police.

The Public Prosecutor concluded, after hearing the adolescent, the police officers and the witness Oswald F., that it was impossible to grant remission in favour of Jack, given the concrete gravity of the investigated infractional acts. He then offered a written Representation for the application of a socio-educational measure of internment, under the terms of art. 180, section III, of Law no. 8069/1990 (Statute of the Child and Adolescent).

Representation was accompanied by documents, including the Apprehension Report of the adolescent, the Necroscopic Examination Report and the Speeding Report on the vehicle at the time of the collision, prepared by specialist Ernest B. Jack's certificate of record of infractional acts was attached to the records, attesting to the fact that there is no record of other proceedings against him.

Having fulfilled the requirements of art. 182, § 1, of Law no. 8069/1990, the Representation was accepted, and the Judge designated a hearing for the adolescent's version, determining his notification and his legal representatives, with a warning about attending the hearing in the company of an attorney-in-law or, in the absence of an attorney, that a public defender would be appointed. The magistrate decided, on this occasion, not to decree the provisional internment of Jack, considering his lack of infractional acts records and the exceptionality of this privative measure of liberty before the conclusion of the procedure of verification of the infractional act, in consonance with the disposition in art. 121 of the Child and Adolescent Statute and in art. 19. 1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

The Presentation Hearing was held on 26 March 2021. The judge concluded that it was impossible to remit in favor of the defendant, and proceeded with the instruction. Initially, statements were taken from Jack and his legal representatives, whose recordings are stored in the media attached to the case records. The Judge then determined the realization of a psychosocial study of the case, to obtain extra-legal elements about the peculiarities of the situation of the adolescent, considering the incidence of the doctrine of integral protection also in the procedures of verification of infractional acts. Finally, the defense was granted a period of three days to present a written preliminary defense and a list of witnesses.

On March 28, a preliminary written defense was presented by the attorney appointed by the defendant, in which he alleged, in synthesis, that Jack had not committed the infraction equivalent to homicide, requesting the declassification to the culpable modality, with the application of a social and educational measure different from internment. In relation to the act analogous to the crime of art. 309 of the Traffic Code, he pleaded for the application of the principle of the absorption, so that only homicide could be considered. At the time, he presented John and Mary as defence witnesses.

According to the Psychosocial Study attached to the file, Jack lives with his parents and attends the local secondary school, where he is a good student and well regarded by his classmates. Moreover, his physical, intellectual and mental development are in the expected range for his age. It was also found that he had never been subject to an infraction procedure.

Following the procedural rite, the hearing was held in continuation on March 31, 2021, with the witnesses Oswald F, Mary, Ernest. B, John, and the police officers James and Daniel, who carried out the seizure of Jack. After that, final oral arguments were presented by the State Public Prosecutor's Office and the defense of the defendant, successively.

The State Public Prosecutor's Office, in its final allegations, reiterated the request for application of a social and educational measure of internment in favour of the Respondent, based on the concrete gravity of the infraction and on the evidence, notably the expert reports attached to the records and testimonies gathered in Court.

The defense of the adolescent, in turn, argued for the declassification of the imputation made against him in relation to the infraction equated to intentional homicide for the culpable modality provided for in art. 302 of the Brazilian Traffic Code, arguing that Jack had not acted with *dollus eventualis* (recklessness), but rather with conscious guilt, imagining that he would be able to avoid possible harmful situations. Finally, he requested the application of a socio-educational measure different from internment, based on the exceptionality of this measure.

It is the report. I will now motivate the sentence, in accordance with Article 93, item IX, of the Federal Constitution of 1988.

II. MOTIVATION

II.1 THE INFRACTIONAL ACTS ATTRIBUTED TO JACK.

The Public Prosecutor's Office charged Jack with two infrafractional acts, equivalent to the crimes under art. 121, *caput* of the Brazilian Criminal Code and art. 309 of the Brazilian Traffic Code.

The first step is to analyse the elements of the infraction equivalent to the crime of art. 121, *caput* of the Brazilian Criminal Code.

To characterize an infraction in general, there must be material evidence of the act and its perpetration. In the specific case, in addition to these elements, the intention of the agent must be demonstrated, since the homicide attributed to the Respondent occurred while driving a motor vehicle; otherwise, the conduct would not fall under the dictates of art. 121, *caput* of the Criminal Code, but rather to an infraction analogous to the offense typified in art. 302 of the Brazilian Traffic Code (culpable homicide while driving a motor vehicle).

In the case, the material evidence is unquestionable. This is because the records include the necroscopic examination report, in which the technical expert stated that the victim died due to cranial trauma resulting from the collision with the vehicle driven by the defendant, as well as the technical expertise on the speed of the vehicle, which showed a speed of 120km/h at the time of the collision, in addition to the apprehension report of the teenager represented, containing the testimony of the police officers of the crime scene and the circumstances of the collision of the vehicle.

On the other hand, the perpetration is also equally demonstrated, and the evidence produced under the right to adversarial proceedings is extremely robust, notably the testimonial evidence and the confession of the adolescent.

It is appropriate to highlight the statements made by the Respondent and the testimony of the witnesses at the subsequent hearing:

JACK:

The defendant reported that he was in the car park of the "Blue Moon" Bar at around 10:00 p.m. when there was an argument between his brother John, who was intoxicated, and Bill G., occurred moments earlier inside the bar. He said that Bill was severely assaulted by John. He stated that, as he feared his brother would return to prison, from which he had recently been released, he removed John from the fight and took him to his car to flee, even though he did not have a driving licence. He stated also he put John in the passenger seat, and started disrespecting red traffic lights, driving the vehicle at the speed of 130km/h. He stated that at the time he was fully aware that the way he was driving would not allow him to react in time if another car or a pedestrian was in his way. However, all he could think about was staying away from Bob (Bill's friend), who was following them no matter what.

OSWALD F.:

Oswald F. stated that he was walking at night with his sister Olivia F., around 10:30 p.m., when she decided to cross the street towards her house, considering that the light was green for pedestrians. He said that a few moments later, when Olivia crossed part of the pedestrian crossing, a vehicle came at high speed and ran her over, throwing her against the wall of a house, which resulted in her instantaneous death. He stated that Jack was the driver of the vehicle.

ERNEST B.:

The expert Ernest B. stated that he examined the vehicle driven by Jack at the time of the event that victimized Olivia F.. He stated that he verified that the car was at 120km/h at the moment of the collision with the victim and at 90km/h when it collided with the post. He clarified, finally, that at that speed, Jack would have hit any car or person passing through the streets at that moment, given the impossibility of maintaining control of the vehicle and to break in time, as occurred.

JAMES:

Police officer James stated that he went to the scene of the accident with his partner Daniel after receiving a phone call which reported that a woman had been killed in a collision. He stated that when he arrived at the scene of the infractional act he found that Jack was still inside the vehicle he had driven, which was stopped due to a collision with a post. He stated that he saw the victim lifeless at the scene of the accident and that the injuries caused by the collision were clear.

DANIEL:

Officer Daniel gave a statement along the same lines as Officer James, adding that he apprehended Jack at the scene of the accident and, together with James, took him to the Civil Police Station.

JOHN:

Since John is Jack's brother, he was heard as a declarant, being released from his obligation to take an oath to tell the truth. At the time, he said he could not remember the time of the accident for being under the influence of alcohol.

MARY:

Mary stated that she was present at the time of the argument between Bill and John, and said she saw Jack leaving the scene with John driving a vehicle, but pointed out that he was fleeing to protect his brother from the persons of Bob and Ben, and to prevent John from being arrested for the injuries done to Bill G.

Thus, there is no doubt that the vehicle that victimised Olivia F. was being driven by Jack at the time of the harmful event, and the perpetration has been proven.

Once the material evidence and the perpetration of the infraction have been demonstrated, it is necessary to proceed to the analysis of the subjective element of the infractional act, considering that the accusation attributes to Jack conduct practiced with *dollus eventuallis* and the defense sustains that the adolescent acted with conscious guilt.

The *dollus eventuallis* is provided for in art. 18, subarticle I, second part, of the Criminal Code, in verbis:

Art. 18 - The crime is said to be:

Intentional crime

I - intentional, when the perpetrator wanted the result or assumed the risk of producing it; [emphasis added]

This intentional modality is configured when the agent is aware of the risk of producing a result that violates a legal interest protected under criminal law through his conduct, accepting the possibility of violation. In other words: even though he is aware of the risk generated by his conduct, the agent does not refrain from acting, accepting the possibility of the occurrence of the result.

On the other hand, Article 18, clause II of the Criminal Code states that a crime is culpable "when the agent causes the result through imprudence, negligence or lack of skill".

This legal provision, however, does not provide for conscious guilt, which is legally provided for in art. 33, sub II, second part, of the Military Criminal Code, in these terms:

Art. 33: The crime is said to be:

I - intentional, when the perpetrator intends the result or assumes the risk of producing it;

II - culpable, when the perpetrator, by failing to use the caution, attention, or ordinary or special diligence, to which he was obliged in view of the circumstances, does not foresee the result that he could foresee or, foreseeing it, lightly supposes that it would not take place or that he could avoid it. [emphasis added].

Thus, conscious guilt occurs when the agent foresees the result, but does not accept it, assuming that he will be able to prevent the occurrence of a harmful result to a legal asset that is protected by law.

The difference between *dolus eventualis* and conscious guilt resides, therefore, in the acceptance or not of the result; in the assumption or not of the risk. In this sense, it is appropriate to verify the circumstances of the present case.

It is incontrovertible that Jack drove the vehicle at high speed, considering that it overtook closed traffic lights and speeded at 130km/h through the streets of the city, causing, therefore, a risk not permitted for all pedestrians who might approach the vehicle.

Some scholars, such as Nelson Hungria, quoted in the work of Fernando Capez, believe that it is identified the occurrence of eventual intention through the Formula of Frank, according to which: "Whatever the case, whatever happens, in any case I will not fail to act"¹.

At the time of the events, as Jack himself stated in his statement, he "*he was fully aware that the way he was driving would not allow him to react in time if another car or a pedestrian was in his way. However, all he could think about was staying away from Bob (Bill's friend), who was following them no matter what*". Thus, it is certain that Jack assumed the risk of damaging the legal property of pedestrians and other drivers of vehicles that eventually appeared on his route, since he did not fail to act, and continued driving at high speed and in an uncontrolled manner to escape with his brother, no matter what happens.

Thus, Jack did not think he could avoid the harmful event; on the contrary: he assumed the risk of producing it, accepting and accepting the "cost" of injuring drivers and pedestrians.

The evidence in the case records allows us to conclude, unequivocally, that the defendant took the risk of killing the victim, so that the request to declassify the infraction analogous to art. 121, *caput*, of the Criminal Code to the crime equivalent to art. 302 of the Brazilian Traffic Code should not be accepted.

¹ Capez, Fernando Parte geral / Fernando Capez. Coleção Curso de Direito Penal. V. 1 – 24. ed. – São Paulo : Saraiva Educação, 2020.

In relation to the infraction equivalent to the crime foreseen in art. 309 of Brazil's Traffic Code, also charged to Jack, the defense is correct in raising the application of the principle of absorption, even though the material evidence and perpetration has been duly proven by the prosecution, considering that Jack does not hold a National Driver's License.

The Brazilian case law has admitted the application of that principle in the criminal sphere, considering that homicide, for being a more serious crime, absorbs driving without a license, for being less harmful. The following is a judgment to that effect:

ORDINARY APPEAL IN HABEAS CORPUS. TRAFFIC OFFENSE ABSORBED BY THE CRIME OF HOMICIDE. PRECAUTIONARY MEASURE IMPOSED IN REPLACE TO PREVENTIVE DETENTION. SUSPENSION OF DRIVING LICENCE. FUMUS COMMISSI DELICTI. PERICULUM LIBERTATIS. ADEQUACY AND PROPORTIONALITY OF THE PRECAUTIONARY MEASURE. APPEAL NOT PROVIDED.

1. Observed the terms of art. 282 of the CPP, the judge, making use of its power of a judge to grant injunctions, may, exceptionally and motivated, in order to avoid preventive detention, impose on the investigated or accused measure that, although not listed literally in art. 319 of the CPP, is provided for in another rule of the system.

2. Art. 294 of the Brazilian Traffic Code states that at any stage of the investigation or criminal prosecution, if it is necessary to guarantee public order, the judge may, as a precautionary measure, ex officio, or at the request of the Public Prosecutor's Office or by representation of the police authority, order, in a reasoned decision, the suspension of a driver's license or permit, or the prohibition against obtaining one.

3. In this case, the judge in question, when charging the appellant under the penalties of art. 121, caput, of the Penal Code, and maintaining the various precautions, referred to previous decisions, in which it was understood by the need to safeguard public order.

4. The establishment of a different precautionary measure, consisting of the suspension of the driving licence, was based on the need to protect society from possible future harm that the full freedom of the accused could cause, since the conduct charged to him is of greater and concrete gravity - homicide committed while driving a motor vehicle arising from the frivolity of a participation in an amateur motor race and illegal on public roads, "with such irresponsibility, lacking the minimum sense of

the existence of rules of coexistence in a community" (fl. 94) - and resulted in the death of a young woman who was pregnant.

5. Appeal not upheld.

(STJ - RHC 97.516/RS, Rel. Minister ROGERIO SCHIETTI CRUZ, SEXTA TURMA, judged on 21/03/2019, DJe 27/03/2019)

HABEAS CORPUS - CRIMINAL PROCEDURE - BRAZILIAN TRAFFIC CODE - CULPABLE BODILY HARM - DRIVING WITHOUT A LICENSE - PRINCIPLE OF ABSORPTION - MORE SERIOUS CRIME ABSORBS THE LESS HARMFUL ONE - EXPRESS WAIVER OF THE RIGHT TO REPRESENTATION - EXTINCTION OF PUNISHABILITY - ORDER GRANTED.

- According to the principle of absorption, culpable bodily harm in traffic (art. 303 of the CTB) absorbs the offense of driving without a license (art. 309 of the CTB), in view of the lesser harmfulness of the latter. Thus, if the right to representation is expressly waived for the crime of culpable bodily harm, the aggravating factor from the absence of a driver's license cannot persist as an autonomous offense, and punishment must also be declared extinguished for the crime of driving without a license.

- Precedents of this Court.

- Order granted to declare extinguished the punishability of the offense of driving without a license.

(STJ - HC 25.084/SP, Rel. Ministro JORGE SCARTEZZINI, QUINTA TURMA, julgado em 18/05/2004, DJ 01/07/2004, p. 224)

EMENTA: CRIMINAL APPEAL - CULPABLE HOMICIDE IN TRAFFIC (ART. 302, SOLE PARAGRAPH, I, OF LAW 9.503/97) - ABSENCE OF THE AGGRAVATING FACTOR AND CONVICTION IN ART. 309 OF LAW 9.503/97 - INFEASIBILITY - PRINCIPLE OF ABSORPTION CORRECTLY APPLIED - CONVICTION UPHeld - REDUCTION OF MONETARY BENEFIT - NECESSITY. **The conducts of causing a traffic accident with negligence and driving a vehicle without a driver's license, in the same context, constitute only the crime of art. 302 of the CTB, with due recognition of the aggravating factor of disqualification of the agent. Monetary compensation, as a substitute penalty, should be set at an amount sufficient for the prevention and reproof of the offense, based on the defendant's economic situation and on concrete data in the case records.**

(TJMG - Criminal Appeal 1.0694.11.006254-4/001, Rel.: Des.(a) Paulo César Dias, 3ª CRIMINAL CHAMBER, judged on 02/02/2021)

At this point, it is appropriate to point out that if the application of the principle of absorption occurs in relation to crimes, it also occurs in relation to adolescents when they commit infractions, considering that the principle of legality, set forth in Art. 35, Subparagraph I, of Law N° 12.594/2021 (National System of Socio-Educational Care Law), prohibits more severe treatment to adolescents than that conferred to adults, in these terms:

Art. 35. The execution of social and educational measures shall be governed by the following principles:

I - legality, and the adolescent may not receive more onerous treatment than that conferred upon the adult;

In effect, the defence's request to apply the principle of absorption to the case in question deserves to be accepted, so that only the infraction equated to the crime of simple homicide subsists.

II.2 ON THE SOCIO-EDUCATIONAL MEASURE

The next stage is the analysis of the adequate social and educational measure to the concrete case.

The list of socio-educational measures is foreseen in article 112 of the Child and Adolescent Statute, in these terms:

Art. 112. Once the infraction has been verified, the competent authority may apply the following measures to the adolescent

I - warning

II - obligation to repair the damage

III - community service

IV - supervised freedom;

V - insertion into a semi-free routine;

VI - confinement in an educational establishment;

VII - any of those provided for in art. 101, I to VI.

The same legal provision, in § 1, establishes the criteria for applying the above measures, in the following terms:

§ 1. The measure applied to the adolescent shall take into account his capacity to comply with it, the circumstances and the seriousness of the infraction.

In the situation concretely under analysis, it is observed that the adolescent Jack confessed to the practice of the infractional act, and has no record of other infractional acts against him, besides being a good student and having a good relationship with his schoolmates, so that a social-educational measure in open environment would be recommended to him, if the gravity of the infraction committed by him were not verified.

The infractional act equated to the crime of homicide is a high concrete gravity, considering that it violates life as a juridical good, to which superior protection is conferred by the national legal system. For this reason, the internment as the only social and educational measure applicable to this case.

Moreover, the case conforms to the provisions of art. 122, subclause I, of Law No. 8.069/1990, since the crime was committed with violence against a person:

Art. 122. The detention measure may only be applied when

I - it is a case of an infractional act committed by means of serious threat or violence to a person;

II - by reiteration in the commission of other serious infractions;

III - by repeated and unjustifiable non-compliance with the previously imposed measure.

The consequences of the infraction are particularly serious, since the victim was the mother of three children aged three, five and ten, who depended entirely on their mother, having lost their father only a year ago.

III. OPERATIVE PART

In light of all the above, I GRANT PARTIALLY PROCEDURE to the Representation, recognizing only the practice of the infraction as equivalent to the crime of art. 121, caput, of the Criminal Code, in view of the incidence of the principle of absorption in relation to the infraction analogous to the crime of art. 309 of the Brazilian Traffic Code, to apply to the adolescent Jack the social-educative measure of INTERNMENT, for indeterminate term, with periodic re-evaluation in period never exceeding six months, in the terms of art. 121, § 2º, of the Child and Adolescent Statute.

Issue the Internment Licence.

The determinations of articles 39 et seq. of Law 12.594/2012 shall be complied with.

Let it be published. Notify the adolescent and his attorney. If the adolescent cannot be found, his parents shall be notified, without prejudice to the attorney, pursuant to article 190 of the Child and Adolescent Statute. In case the summons falls upon the adolescent's person, he shall manifest if he does or does not wish to appeal the sentence (Paragraph 2 of art. 190 of the ECA).

Place, date

JUDGE OF LAW