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ATTEMPTED RAPE: A JURISPRUDENCIAL ANALYSIS OF THE SUPERIOR COURT OF JUSTICE OF BRAZIL

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Abstract: This article discusses the crime of rape, provided for in article 213 of the current Brazilian Penal Code, and its relationship with gender violence. After the legislative change resulting from Law 12,015 of 2009, rape is considered: "to constrain someone, through violence or serious threat, to have sexual intercourse or to practice or allow another lewd act to be practiced with him". Thus, this article aims to analyze the decisions of the last 13 years of the Brazilian Superior Court of Justice (STJ) to determine whether the practice of lewd acts without penetration are being considered a consummated crime or a mere attempt.
Keywords: Attempted Rape; STJ; Gender Violence; Violence against Women.

INTRODUCTION

The production of norms that aim to protect women's rights is an invaluable advance and provides a more dignified life for this social segment. However, as important as the existence of a norm is its application, which, depending on how it is done, can either effect the protection of the legal interest that gave rise to the norm, or reaffirm prejudices and social stigmas.

According to the Brazilian Penal Code in force, rape is to constrain someone, through violence or serious threat, to have carnal intercourse or to practice or allow another lewd act to be practiced with him. However, the fact of criminalizing a conduct that was previously seen as normal does not necessarily mean that there will be a punishment for every individual who practices that conduct.

For a woman, in an attempt to force her to satisfy a man's sexual desires, penetration is not necessary for her to feel violated, disrespected and humiliated. Therefore, the operator of the law needs to have a sensitive look at gender issues when faced with the concrete case, so as not to fail to consider an act performed exactly according to the description of the criminal type as a consummated crime.

CHAPTER 1 - GENDER AND LAW

CLASSIFICATION OF RAPE IN BRAZIL THROUGH TIME

In sixteenth-century Brazil, rape was understood as a crime of sexual violence. Book V of the Ordinances of King Filipe II was the first Brazilian Penal Code and, in relation to the criminal types that protected women, they made it very clear that they were only intended for honest women. In this period, the idea of dishonoring the victim's family was still very strong and overlapped with the victim's personal suffering. The lack of commitment to the pain of the abused woman by society and the legal institutions of the time was manifested in the difference in treatment given to the specific case according to the social positions of the victims and the aggressors.

Subsequently, the Criminal Code of the Empire of 1830, likewise, according to Chapter II, entitled "Crimes against the security of honor", section I, article 222, have carnal copulation through violence, or threats, with a honest woman, had a prison sentence of three to twelve years, in addition to the obligation to adopt the offended. On the other hand, if she was a prostitute, the sentence would be from one month to two years. This code separated penetration and libidinous acts into different offenses - the penalty being the act with greater penetration - and, for both articles, if the defendant married the victim, he was released from the penalty.

The Republican Penal Code of 1890, in relation to women and the crime of rape, the norm continued to differentiate between the honest and the prostitute. According to Title VIII, entitled "Crimes against the security of the honor and honesty of families and public

outrage against indecency", Chapter I, "Of carnal violence", indecent assault (article 266) was punishable by imprisonment for one year. to six years and the crime of rape of an honest woman (article 268) had a prison sentence of one to six years. If the victim was a public woman or a prostitute, the sentence was reduced to six months to two years.

The 1890 code brought to the legal system the meaning of the word rape for the first time. Article 269 of the aforementioned code defined rape as "an act by which a man violently abuses a woman, whether a virgin or not". In addition, this code recognized that the use of physical force was not the only form of violence, but it continued to distinguish between the treatment of an honest woman and a prostitute woman and did not comment on the attempted rape.

This way, the wording of the article, combined with the mentality of the time, reduced rape to penetration. Furthermore, in the popular imagination and in the normative understanding of legal practitioners, there was no possibility of a husband raping his own wife, after all, she was considered his possession from the moment he accepted to marry.

The 1940's code advanced and failed to take into account whether the victim was an honest person or a prostitute. In addition, it changed the name of its title, understanding that these crimes of a sexual nature are not an offense to the honor and honesty of the families, but to the sexual freedom of the victims. According to Title VI, entitled "Crimes against customs", Chapter I, "Crimes against sexual freedom", article 213, constraining a woman to sexual intercourse, through violence or serious threat, was punishable by imprisonment of three to eight years. years old. Subsequently, Federal Law nº 8.072, of July 25, 1990, known as the Law of Heinous Crimes, changed the penalty for the crime of rape, increasing it to imprisonment from six to ten years and determined the inclusion of the crime of rape in the list of heinous crimes.

It can be said that one of the most significant and progressive changes to this code was the removal of the term "honest woman" from the definition of the crime of rape. However, this term remained in the definition of other crimes. In sexual possession through fraud (article 215), indecent assault through fraud (article 216) and in violent abduction or through fraud (article 219), the victim continued to be required to be honest so that the law could be enforced. applied to your specific case.

The 1940 Code remains in effect today. However, the part on sexual crimes underwent a major change with Law 12,015 of 2009. Title VI was renamed "Crimes against sexual dignity" and conceptualizes Rape as "Constraining someone, through violence or serious threat, to to have carnal intercourse or to practice or allow another lewd act to be practiced with him" (Article 213).

With the advent of Law 12,015 of 2009, the expression "honest woman" was definitively removed from the legal text. There was also the repeal of the crime of seduction and the crime of kidnapping. A few years earlier, in 2005, items VII and VIII of article 107, which extinguished the agent's punishment, in rape crimes, when he married the victim or when she married a third party and did not require the continuation of the investigation or criminal action.

Furthermore, the nominal change in the title, from "Crimes Against Customs" to "Crimes Against Sexual Dignity" reveals a significant change in social thought, as it was now understood that every violation of a woman's body was above all a defrauding the victim and their dignity, not their family or their family assets.

This change in understanding, according to Segato, can be explained by the differentiation between the perception of rape in pre-modern and modern societies, given that in the former, rape tends to be a matter of State, a matter of territorial sovereignty, since the woman was seen as a patrimony of the man. On the other hand, in modern societies, with the advent of individualism, citizenship and rights have been extended to women, so that they are no longer the extension of the other's right to be subjects of law.

Another significant change, at the heart of this article, is that with the advent of Law 12,015, the criminal offenses "rape" and "indecent assault" were merged. Today, the understanding is that both non-consensual sexual intercourse and the practice of non-consensual lewd acts are considered rape. This change came to protect the dignity and sexual freedom of the victim, who feels offended and violated regardless of sexual intercourse.

Thus, this exclusivity of vaginal rape, that is, this more incisive punishment, penetration and exclusion of other possible types of rape, according to Segato, is an inheritance and a continuity of the lineage and archaic structures, which are protected by the society. When trying to protect women, the normative construction, the law, notably developed in criteria of male representation, reinforced stereotypes and legitimized behaviors that hurt female sexual dignity.

Therefore, the union of penetration and the libidinous act in the same criminal offense and with the same penalties, reaffirms that, for women, both attitudes go against their sexual freedom and their human dignity. Both acts constrain and humiliate him in the same way.

THE PROBLEMATIZATION OF THE CRIMINAL TYPE: CONSUMMATION AND ATTEMPT

In its evidentiary function, the criminal type circumscribes and delimits criminally unlawful conduct. It so happens that the norm did not define the concept of a libidinous act and only said that any other libidinous act is also rape. Thus, despite the term "libidinous act" being an objective-descriptive element of the criminal type, that is, despite being an element that can easily be understood only with the perception of the senses, this term is broad and opens room for different interpretations. This allows the judge to say for himself what is a lewd act and what is not. Thus, in the absence of an exhaustive definition, the judge's assessment may be governed by his social position and the legal interest that gave rise to the norm may not be protected.

The solution for the interpretation of this word, which encompasses numerous actions of a sexual nature, would be in the identification of the legal interest which the creation of the norm aimed to protect. It is currently accepted that the legal interest forms the basis of the structure and interpretation of criminal types. Thus, if the legal interest sought to protect was the victim's sexual dignity, as stated in the name of this chapter of the penal code, any act that made her feel sexually offended could be understood as a libidinous act, from touching the intimate part even a mere stolen kiss, for example. Thus, if a predominantly liberal conception grants Criminal Law a protective function of goods and interests, any and all non-consented libidinous acts must be punished, and it is up to the legislator to express whether all libidinous acts are really included in the criminal type of rape, as the normative text implies, or not.

Attempted crime is the incomplete realization of the criminal type, of the model described in the law. In other words, once the execution of the crime was initiated, it was not consummated by circumstances beyond the control of the agent. This way, for this criminal type under analysis, there would be an attempt whenever, not only penetration did not occur, but also when no other libidinous act occurred, which in itself would already disfigure the attempt.

The so-called iter criminis, that is, the itinerary covered by the crime from the moment of conception to the one in which the consummation occurs, consists of an internal phase (cogitation) and an external phase (preparatory, executory and consummation acts). Bringing these definitions to the crime of rape, first the aggressor will want to have a sexual relationship with someone (cogitation). The preparatory acts could be to follow the routine of your victim, for example, and, when you grab him by force, the execution begins, which is consummated by the practice of penetration or any other lewd act.

Therefore, if the consummation is the moment in which all the elements described in the criminal type will be gathered, any libidinous act practiced in a specific case cannot be considered merely the beginning of the execution of the crime, since the libidinous act itself is already the consummation, regardless of penetration.

CHAPTER 2 - JURISPRUDENCIAL RESEARCH

RESEARCH METHODOLOGY

Based on all the knowledge mentioned above, the documental research developed took place through the entire content of the judgments made available on the institutional website of the Superior Court of Justice (STJ). It was divided into three stages: First, through the jurisprudence section on that website, the judgments on which this research would focus were selected, using the keyword "Attempted Rape". The chronological framework used was from 2009 to 2022, in order to analyze the last 13 years of discussion about attempted rape, after legislative change on the subject. In all, 132 judgments were found.

The second stage was a thorough reading of the entire content of the judgments to highlight, among the 132 judgments found, those in which the body of the text at some point described how the crime took place. Then, a linguistic-narrative analysis was carried out on these descriptions to verify if the concept of attempt used by the judge in the specific case was in accordance with the concept described in the normative text. All this information was organized in the form of a record.

Finally, the third step of the research was to count the number of appearances of each argument presented to recognize or not the attempt. A spreadsheet with data from all judgments presented by the search system on the STJ (Supreme Court of Justice) website was created, which made it possible to obtain quantitative-qualitative results, which will be exposed below.

CHAPTER 3 - RESULTS

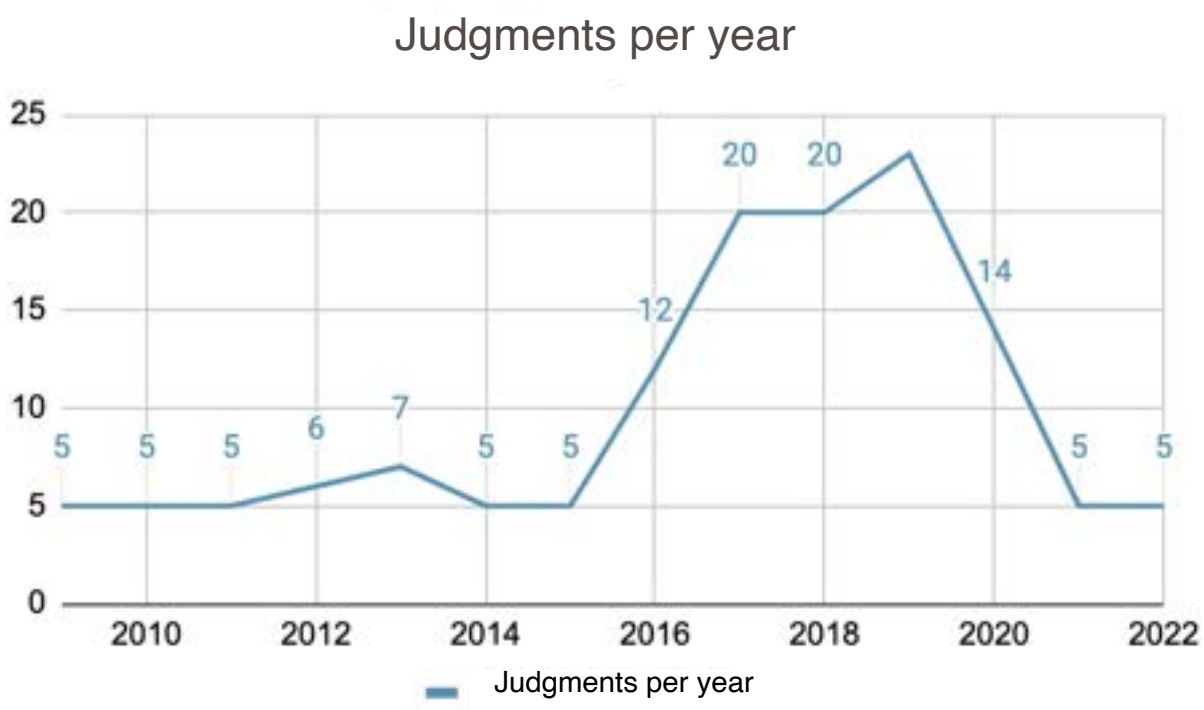
QUANTITATIVE ANALYSIS

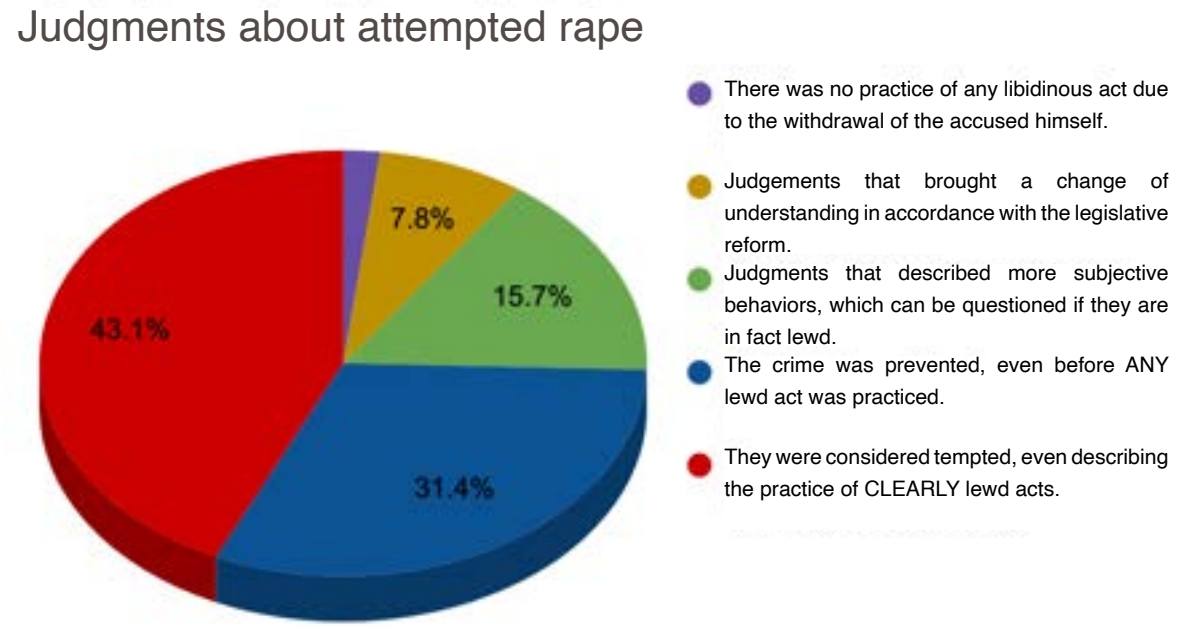
The use of the keywords "rape" and "attempted" in the search for jurisprudence on the STJ website gave rise to the 132 judgments analyzed. Of these, 106 were in fact about rape in its attempted form. The other 26 judgments appeared in the research either because the process dealt with a material contest of crimes and the attempt referred, not to rape, but to the other crime (consummated rape and attempted murder, for example), or because, in the specific case, the accused was responding to lawsuits for other crimes, one of which was rape. Another

reason for cases that did not deal with attempted rape appeared in the search result was when the word "attempted" appeared to describe the agent's conduct, for example, "twice attempted on his life" (HABEAS CORPUS Nº 386.126). - SP (2017/0013639-7).

Of the 106 judgments on attempted rape, only 51 described, in detail, the way in which the crime took place, citing time, place and the way in which the fact took place. From this, it was possible to verify that only 16 judgments gave an interpretation to the attempted rape in accordance with the legal text. That is, in only 16 cases, the conduct desired by the agent (satisfaction of his sexual desires) was prevented before any type of libidinous act was performed, because if performing a libidinous act is also part of the conduct described in the criminal type, it cannot be considered a mere attempt.

On the other hand, 22 judgments considered the crime as attempted while affirming the occurrence of lewd acts. The other 8 judgments refer to more subjective conduct, which are not clearly seen as lewd acts and would depend on a great effort of interpretation by the operator of the law, such as "pulling your hair" or "taking off your clothes". This way, the 22 judgments that did not apply the article in its literality bring acts of which there is no way to question whether they are in fact lewd, such as groping the victim's breasts. Let's see:





QUALITATIVE ANALYSIS

Let us now see some examples of judgments which, when describing the way in which the crime occurred, make it clear that the conduct was prevented even before the practice of any libidinous act:

> In the present case, the decision of the first degree that converted the act into a preventive one consigned the reasons that gave rise to the arrest, being sufficiently substantiated, there being no mention of a vice that makes it disreputable. Here's the excerpt, *verbis*:
>
> *'Considering that the crime left no traces, the materiality is substantiated by the statements of the victim C. M. L, who narrated that she was approached by the accused who wanted to kiss her and take her to a thicket, as well as the testimony of Daniele Aparecida Pereira Campos, friend of the victim and who was with her at the time of the approach and who told that the accused, coming in the opposite direction to the one they were traveling, went to grab her but, as Cláudia got in the front and she was the person grabbed,* ***tempting the accused, to kiss her and run his hand over her pussy, failing because she deviated.'***
>
> (...)
>
> In view of the foregoing, I deny the ordinary appeal.
>
> It's the vote.
>
> (APPEAL IN HABEAS CORPUS, number: 43.423 - MS (2013/0404769-6) - RAPPORTEUR: MINISTER FELIX FISCHER - Attempted rape)

Note that in this specific case, the agent was unable to perform any lewd act, due to circumstances beyond his control: the victim's resistance.

> The court a quo, considering the defendant's appeal, understood that the facts **have not passed the sphere of attempt**, reducing the penalty by half, based on article 14, II, of the Penal Code. To that end, the Court a quo considered the following: (e-STJ, pages: 241/242):
>
> *On the other hand, it turns out that the facts did not go beyond the sphere of the attempt. The Appellant did not even undress, or so did the minor.* ***There was no "skin to skin" contact.***

As is known, the purpose of the libidinous act is, as a rule, sexual satisfaction, and it is impossible to verify this occurrence in the case examined, in its fullness.

To think otherwise would be the same as condemning the Appellant as if he had subjected the victim to oral, anal or even complete carnal intercourse, in breach of the principle of proportionality.

This is the situation that best fits the concrete fact.

(...)

In view of the foregoing, the grounds for the appealed decision subsist, I deny the regimental appeal. (SPECIAL APPEAL Number: 648.069 - SP (2015/0014833-2) - RAPPORTEUR: MINISTER REYNALDO SOARES DA FONSECA - Rape of a vulnerable person)

In this specific case, the first-degree judge stated that there was no "skin-to-skin" contact. Therefore, the agent was unable to perform any lewd acts.

I. Contextualization

The patient had his temporary arrest converted into preventive detention on 12/4/2015, for the alleged practice of the crime of attempted rape, under the following motivation (pages: 67-68, I have highlighted this passage):

(...) The victim described that she was walking along Beiramar Avenue when the defendant, using physical force, pulled him off the sidewalk and said: "you need to have sex with me, it will be something quick" (page: 06).

The sexual intent of the approach made by the accused is denoted, and the crime of rape was not materialized only because a cyclist passed by the place and helped the victim to get rid of the aggressor.

(...) In view of the foregoing, I deny the order. In time, correct the assessment to include the patient's name in full, given that, in the species, there is no legal reason for hiding his identity. (HABEAS CORPUS Number: 365.491 - SC (2016/0204431-4) - RAPPORTEUR: MINISTER ROGERIO SCHIETTI CRUZ - Attempted rape)

As a last example, in this specific case, the agent approached the victim on a public road and was quickly spotted and rescued by a third party. Thus, he was unable to perform any libidinous act, due to circumstances beyond his control: the arrival of a third party.

On the other hand, let us now see judgments which clearly stated that in the specific case there were libidinous acts other than carnal intercourse and, even so, the judges considered the conduct a mere attempt:

Indeed, it appears that the cause of decrease provided for in article 14, II, sole paragraph, of the Penal Code was recognized in the conviction and maintained in the appeal in the following terms, respectively:

'In the third phase, the presence of the cause of decrease provided for in the sole paragraph of article 14 of the Penal Code.

In order to apply this reduction, it is necessary to take into account the iter criminis covered, which, in the present case, was large, since as demonstrated in the case file, the defendant took the minor to the fourth, **he undressed and undressed her and placed himself on top of her, not achieving just penetration, which would consummate the crime.** That way, I make the minimum reduction. of 1/3. Setting the penalty at 4 years of imprisonment.'

[...]' (e-STJ, page: 425.)

'As for the request to reduce the sentence and change the prison regime, the insurgent is also wrong.

In the first and second phases of dosimetry, the penalty was fixed and maintained at the legal minimum, that is, 6 (six) years of imprisonment.

In the third stage, when the cause of reduction regarding the attempt was present, the sentencer decided to reduce the reprimand by 1/3 (one third), the legal minimum provided for in article 14, II, sole paragraph, of the Penal Code, in view of the iter criminis covered by the defendant, which does not deserve any repair. This because, **the accused person took the victim by force to the bedroom, took off his pants and placed his penis in the infant's vagina, failing to effect penetration due to the victim's resistance**, as well as because the victim's grandmother arrived at the scene at the time of the crime.

This way, the reduction of the sentence due to the attempt is correct.

[...]'(e-STJ, page: 527.)

It is observed that the ordinary instances recognized the incidence of the fraction of decrease of 1/3 for the attempt due to the *iter criminis* traveled by the defendant, who came very close to consummation, since the accused took the victim by force to the bedroom, took off his pants and placed his penis in the infant's vagina, unable to effect penetration due to resistance of the victim, as well as because the victim's grandmother arrived at the scene of the crime' (e-STJ, page: 527).

Reviewing such an understanding, in order to uphold the claim of appeal, would require a necessary review of evidence, which is unfeasible in the context of a special appeal, in light of the obstacle contained in Precedent 7 of this Court: 'The claim of simple re-examination of evidence does not gives rise to special appeal.'

(...) In view of the foregoing, I deny the interlocutory appeal.

It's the vote. (SPECIAL APPEAL Number: 1,359,901 - SC (2013/0002747-4) - RAPPORTEUR: MINISTER RIBEIRO DANTAS - Attempted rape).

Note that in this specific case, the judge of first degree considered the crime as attempted and, at the same time, described that the agent came to be in direct contact with the victim, trying to introduce the penis into her vagina. He even states that the crime was not consummated, because there was no penetration. However, this interpretation is totally at odds with the literalness of the legal text, which typifies the practice of lewd acts as rape, even if penetration does not occur.

> The sentencing court, pursuant to article 383 of the Criminal Procedure Code, chose to attribute to the patient's conduct a different criminal type from that described in the indictment., *in verbis*:
>
> "(...)
>
> Although the victim's embarrassment is duly characterized, the attempt must be recognized, since the defendant did not succeed in satisfying his lust. The victim, at all times, staunchly opposed the Defendant's repeated and repeated attacks, so that, **although he touched her private parts, he did it over her clothes, not being able to even kiss her on the mouth.**
>
> (.)
>
> Therefore, other considerations being disregarded, I DEMAND PARTIALLY the state's punitive claim, to CONDEMN VILKY LUIZ CORONA, in accordance with article 213, § 1, in the form of article 14, II, all of the Brazilian Penal Code." (e-STJ, pages : 33-35)."

The **court of origin**, in dismissing the claim, it recognized the validity of the *emendatio libelli*, in a decision thus motivated:

> (...)
>
> *'In casu*, it is observed that in the initial, the facts for which the defendant was convicted in the sentence were duly described (article 213, § 1, with copy in article 14, Penal Code), especially in the following passage: [...] the accused, victim's blunt statement, **passed**

her hands on the informant's breasts and vulva region, over clothes. Not satisfied, he pushed the victim onto a bed, trying to kiss her. The victim reacted by pushing the accused, punching him in all kinds of ways and hitting him with the "broomstick being hit in the shins".

It appears, therefore, that from the aforementioned fragment it is possible to extract all the elements of the crime of rape, in its attempted modality, behold, the exordial NEWS that the denounced **passed her hands on the informant's breasts and vulva region** " and, "not satisfied pushed the victim onto a bed".

Therefore, the specific intent of the crime of rape, consisting of embarrassment, carried out through the use of violence or serious threat, with the purpose of, with the victim having carnal intercourse or practicing another lewd act, was duly reported in the accusatory piece, respectively, in the narrative that the applicant pushed the victim and passed his hands on the victim's breasts and vulva region. (...)

From the analysis of the excerpts, it is observed that the sentencing Court, attentive to the facts narrated in the complaint, gave a different legal definition from that described in the complaint, as it understands that the patient's conduct actually falls within the criminal type of article 213, § 1, with article 14, item II, of the Penal Code, since he "ran his hands over the informant's breasts and vulva region, over her clothes. Not satisfied, he pushed the victim onto a bed, trying to kiss her. The victim reacted pushing the accused, punching him in all kinds of ways and hitting the "broomstick in his shins".

Therefore, having the magistrate promoted the so-called: *emendatio libelli*, according to the limits established by article 383 of the Criminal Procedure Code, the alleged illegal constraint sustained by the defense for non-compliance with the rules of article 384 of the aforementioned Standard, since it is expendable in kind.

Thus, there is no illegal constraint capable of justifying the granting of the order by this Court.

In view of the foregoing, I am not aware of this habeas corpus.

It's like voting. (HABEAS CORPUS Number: 457.561 - ES (2018/0163633-7) - MINISTER RAPPORTEUR RIBEIRO DANTAS - Attempted rape)

In this specific case, the judge of first degree dismissed the consummation on the grounds that the agent had only "run his hand over the victim's clothing". Describing what happened in more detail, the appellate judge said that the agent "ran his hands on the informant's breasts and vulva region", acts clearly understood as lewd. Therefore, these attitudes are fully in accordance with article 213 of the penal code, and must be interpreted as a consummated crime as long as this wording of the article remains.

As to the facts, the accusatory exorbitant narrates the following:

"According to the date of the facts, the accused and the victim were inside the residence, M E was sleeping on the couch, when the accused approached her and started kissing her on the face, and she asked him to stop doing that.

Next act, L A placed her finger in the region of the victim's vagina and M's anus, over the clothes.

With the arrival of M's mother and witness Marcos at the residence, the accused stopped his criminal conduct and walked away from the victim. However, when Marcos entered the house, he saw the accused in the kitchen lifting his pants and with his penis erect.

The victim was asked by her mother and told how the action of the accused took place, moments before.

The accused only failed to maintain carnal intercourse or to consummate another lewd act due to the arrival of people in the house".

(...)

In view of the foregoing, as it appears to be manifestly incapable, the substitutive habeas corpus is not known, recommending to the trial court to speed up the processing of the case, including observing the provisions of article 222, § 2, of the Criminal Procedure Code.

It's the vote. (HABEAS CORPUS Number: 483.099 - SP (2018/0328313-2) - RAPPORTEUR: MINISTER JORGE MUSSI - Attempted rape of vulnerable)

In this specific case, the crime was considered attempted, but the agent "placed his finger in the region of the victim's vagina and anus". Now, if the text of article 213 of the penal code says that "to constrain someone, through violence or serious threat, to have carnal intercourse or to practice or **allow another lewd act to be performed with him**" is rape, this specific case must not be understood as an attempted crime. The judge of second instance, by remaining silent on this discussion, showed agreement with the court of first instance.

Subjectivity of lewd acts

It is known that the term "libidinous acts" is very subjective and comprehensive. Some conducts are clearly seen as lewd, such as, "I felt her vagina" (HC Number: - ES (2018/0163633-7)).

However, other behaviors can cause dissent, such as, "he took off her shorts, pulled her hair and forced her to the bedroom" (RESOURCE IN HABEAS CORPUS Number: 74.508 - MG (2016/0209095-0) or "throwing punches and kicks to the head, face, belly, and leg, in addition to biting its face. (...)stabbed the vagina region." (HABEAS CORPUS, Number 408.893 - SC (2017/0176974-1)).

As already said, a libidinous act means all that by which the person seeks to satisfy lustful instincts, that is, to satisfy his sexual desires. This way, all these physical violence mentioned cannot be seen as mere bodily harm, since they are practiced with the intention of making the victim, after the aggression, practice or allow him to practice acts that will satisfy the aggressor's sexual desires.

Another point to be discussed is when the aggressor shows his genitals and/or makes obscene gestures on himself. There is no doubt that these are lewd acts in order to embarrass someone, to have sexual intercourse or to perform another lewd act. However, these acts are not being framed either in rape (article 211 CP), or in the obscene act (article 233 CP), since the agent's intent is not to "practice an obscene act in a public place".

Alternative Mixed Type Offense

The alternative mixed type of crime is one when the law establishes several nuclei that, if committed in the same factual context, characterize the commission of only one crime. It so happens that some magistrates used this term in their votes, but they continued to consider the practice of lewd acts as a mere attempt.

In SPECIAL APPEAL Number: 1,812,706 - MG (2019/0132206-4) - RAPPORTEUR: MINISTER LAURITA VAZ - Attempted rape), for example, the judge considered the crime as attempted and, at the same time, described that the agent committed a lewd act with the victim, running your hands over the victim's body, including breasts, buttocks and genitals. Therefore, the attitude described is fully in accordance with article 213 of the penal code and must be interpreted as a consummated crime, since it is a crime with an alternative mixed type and it was characterized by committing all the aforementioned lewd acts, even if penetration has not occurred.

Another argument used in the above-mentioned vote was to understand that, since

the crime of rape is an alternative mixed type of crime, for the configuration of the attempt, one must stick to the agent's intent, whether it is to have sexual intercourse or to practice another lewd act. This way, what will define whether a fact fits in the consummation or in the attempt is the agent's intent. At this point, it is necessary to question how intent is earned in crimes of sexual violence, specifically in cases of rape. How to determine if a fact fits the consummation or the attempt from the intent of an agent who practiced a libidinous act and then was interrupted by a third party? In other words, the line between the practice of a lewd act practiced in order to satisfy the agent in the act itself and the practice of a lewd act practiced in order to then practice penetration and, only in it, satisfy his desires, is extremely tenuous and difficult to measure.

The Clash of the Most Beneficial Law

Another extremely relevant point is: even though the theoretical framework of the research is from 2009 to 2020, some judgments refer to crimes that occurred before 2009, to which, theoretically, the law of the time must be applied (Decree-Law, number: 2,848 from 1940). However, as the law of 12,015 2009, according to the magistrates, is more beneficial, it was also applied to cases prior to its creation.

Thus, the argument that the judges considered rape only penetration because they were applying the law in force at the time of the criminal practice does not apply, as they made it clear that they were judging according to the later law.

It happens that, sometimes, the current law was seen as more beneficial, because if before the accused who practiced lewd acts and penetration would answer for the practice of two crimes (rape and indecent assault, articles 2013 and 2014 of the Decree-Law, number: 2,848 of 1940), after the enactment of law 12,015 of 2009, he would respond only to article 213, that is, rape.

Thus, it would no longer be necessary to add the two penalties and the application of a single penalty would be more beneficial. This means that, in the Law, the accused receives the penalty of article 213 both for the practice of a libidinous act and for the practice of penetration.

On the other hand, if the accused of committing lewd acts against a victim were convicted of rape in the consummated modality, as stated in the legal text, to the accused who committed only lewd acts, the most beneficial law would be the Decree-Law, number: 2,848 of 1940, because in it the indecent assault has a penalty of two to seven years, while article 213 of law 12,015 of 2009 has a penalty of six to ten years, which, when reduced from one to two thirds, can be reduced to the maximum of two years, if all circumstances are favorable to the agent.

Thus, based on this research, the magistrates are not applying the norm in accordance with the legal text, but considering the practice of a libidinous act as attempted rape and, for this interpretation, the later norm is actually more beneficial. That is, if the libidinous act were interpreted as a consummated crime, as stated in article 213 of the penal code, law 12,015 of 2009 would not be seen as more beneficial than Decree-Law number: 2,848 of 1940.

The Principle of Reasonability and Proportionality

Another relevant point is the argument of proportionality and reasonableness used by the magistrates. Would it be proportionate for a person accused of committing lewd acts against a victim to receive a penalty equivalent to the practice of sexual intercourse? This is a question often raised by judges. However, the law is clear and any interpretation that diminishes the seriousness of the libidinous

act and places it in the branch of a mere attempt is in disagreement with the legal text.

Finally, let us present a vote totally in accordance with the normative text of article 213, with its exposition of reasons and with the guarantee of the rights of victims of sexual violence:

> In the case of the case file, the defendant was sentenced for rape of a vulnerable person, in the attempted form and in criminal continuity, to a penalty of 10 years, 7 months and 24 days of imprisonment, in a closed regime, because the Magistrate of origin considered that (e-STJ, pages: 241/242):
>
> > *Although the fact that the victim's mother was present on two occasions in the same residence did not prevent the beginning of the enforcement acts, the fact that she eventually agreed implied the impossibility of carrying out the carnal conjunction. In other words, **there is no way to assure that the defendant intended to satisfy his lust just by lying on the victim or rubbing his penis against her**. Considering that the conduct perpetrated by the accused did not constitute a manifestation of his lust, there is no way to say that the accused achieved his desire. For this reason, it is an attempted crime. This is because the defendant's criminal conduct **was paralyzed due to circumstances beyond her control** (imminent presence of the victim's mother) and reluctance of the victim to adhere to the defendant's attitude.*
>
> The Court of origin, in turn, maintained the attempted form, noting that (e-STJ, pages: 474/475 and 494):
>
> > *4.25. From the victim's version at the Police Station, it appears that, 3 (three) times, the accused carried out practices consistent with lying down without clothes on top of his body., **remove her clothes and try to insert the penis into her vagina, failing for various reasons.***
> >
> > *4.26. During the investigation, Debora discussed the facts in detail, stating that the first episode took place on a Thursday night when the victim was watching television on the living room sofa and the defendant in a towel, but without underwear, lay down behind her, in which she pretended to be sleepy and went to her room, whereupon her stepfather also went to the room, **he took off the towel, lowered the clothes and climbed on top of the girl, lying on top of her, in addition to trying to introduce the penis into her vagina**. The victim reported that this situation was repeated in the second and third episodes, on a Saturday night and Sunday night, respectively. (...)*
>
> **As it was seen, the ordinary instances, based on the evidentiary framework of the case, concluded that the defendant intended, in fact, to practice carnal intercourse with the minor, a fact that just did not take place, due to circumstances beyond his control. Thus, the attempt to practice carnal intercourse was effectively demonstrated. However, the acts prior to the attempt at carnal conjunction, in the concrete situation, already reveal, by themselves, the practice of another libidinous act, able to equally configure the criminal type of article 217-A of the Penal Code, in its consummated form.**
>
> **(...)**
>
> **In view of the foregoing, I grant the interlocutory appeal to grant the special appeal, recognizing the rape of the vulnerable in the consummated modality, with the readjustment of the sentence to 12 years of imprisonment, maintaining the other terms of the conviction.**
>
> **It's the vote.**
>
> (SPECIAL APPEAL Number: 1,814,197 - PR (2019/0139633-5) - RAPPORTEUR: MINISTER REYNALDO SOARES DA FONSECA - Attempted rape of vulnerable)

In this specific case, even the judge of first instance having considered the crime in its attempted form, the judge of second instance reformed the decision saying that the practice of libidinous acts other than carnal intercourse,

in itself, are enough for the configuration of the crime in its consummated form.

FINAL CONSIDERATIONS

This research reaffirmed Brandão's understanding, in the sense that access to the Judiciary has only represented the achievement of conflict resolution and accountability for those who violated the law, but not the promotion of social justice and citizen awareness of rights. For there is still in the popular imagination an idea of men's possession of women's bodies, even with the repeal of legal provisions that reiterated this idea and with the creation of laws that ensure their sexual dignity.

This lack of interest in the demands of women and for their well-being has manifested itself in different ways throughout history, so that, if before there were no norms that protected the female audience, today, the application of these norms is made by operators infected with a sexist cultural baggage and sometimes these women remain unprotected.

Thus, something needs to be done so that these rights guaranteed to women after much struggle are not lost through the actions of the judiciary and its agents. We must continue fighting for the production of norms aimed at the female audience and fight even more so that these norms are applied correctly.

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