


The thesis of the legitimate defense of honor in Brazilian criminal law under the perspective of ADPF 779 MC-REF/ DF and a memory of the Doca Street case

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ABSTRACT

The present study seeks to analyze ADPF 779 MC, from a report by Minister Dias Toffoli, and its importance, because of the legitimate defense of honor argument, going back to the Doca Street case, but

without exhausting the theme. Dissatisfaction with the thesis of legitimate defense of honor vs. the dignity of Brazilian women is detailed through a bibliographic and methodological study, by raising a famous case from the 70s, called Doca Street. Finally, it was verified that there is no room for the argument of the legitimate defense of honor, because of the space of death of victims of femicide in the country and that such a measurement is unconstitutional and offensive to female dignity.

Keywords: Femicide. Jury court. Unconstitutionality. The fullness of defense. ADPF 779. Case Dock Street.

1 INTRODUCTION

The Doca Street case was a famous case of femicide that occurred in the 1970s, which portrays the murder of Ângela Diniz, who was killed with 4 (four) shots at close range by her boyfriend Doca Street after he did not accept the end of the relationship. Still, the case is famous for being the protagonist of a horror show in the Brazilian Justice System, mainly by placing the victim in the position of the defendant, as evidenced in the process through the use of the thesis of legitimate defense of honor. In short, the victim was accused by the media and the public of "lesbianism", "betrayal" and "debauchery". On the other hand, the defendant was judged for having defended his honor, being a hardworking and good-natured man, who committed a "simple slip" by taking the life of his girlfriend, who was, according to the newspapers: "a prostitute of luxury from Babylon", among other defamatory circumstances that belittled the victim's image.

In addition, the defense, taking advantage of the structural machismo, which is directly and indirectly introduced into society, adduced the thesis of the legitimate defense of honor and unenforceability of different conduct, reaffirming everything that was already in the minds of the popular. The result given to the defendant was a very low penalty that made him leave the courtroom free, although he had committed femicide.

In this connection, we discuss the use of the thesis of legitimate defense of honor, which was questioned via the ADPF, by the Workers' Party (PT), which considers the use of the thesis incompatible with the Brazilian Legal System, subjecting women to a treatment unequal before the Constitution.

Despite this, some dialogues contrary to the use and application of the ADPF would be the use of the thesis seeking to annul the process and the curtailment of the range of defense within the scope of the jury.

Therefore, the present study does not seek to exhaust the understanding of the subject, but to bring reflective questions beyond the thematic analysis.

2 METHODOLOGY

The applied method was the bibliographical and documentary review, using the ADPF present on the STF website, as well as the analysis of the historical material available by Rádio Novelo called Praia dos Ossos, which reports the Doca Street case.

3 DISCUSSION

1- Initially, it should be noted that the thesis of legitimate defense of honor is not to be confused with legitimate defense, which is provided for in art. 23 art 25, both of the Penal Code, as a reason for excluding unlawfulness. According to such understandings, self-defense is defined as follows: “Self-defense is understood to be someone who, using moderately the necessary means, repels unjust aggression, current or imminent, to his or someone else's right”. The legitimate defense of honor would be the thesis generally used in cases of femicide. This happens when someone driven by defending his “honor” would defend himself by murdering his partner, for example, because she had committed adultery.

2- Willful crimes against life are judged by a popular jury, following the Constitution of the Brazilian Republic, and are guided by the sovereignty of the jury. Its creation dates back to the Greek history of the judgment in which a son murdered his mother. The Goddess of wisdom, Athena, passes the judgment decision to the people and she, assuming the role of judge, would fulfill the sentence, after the people acquit or condemn the defendant. In this sense, it is said that in Brazil, this is a time when the democratic principle prevails in the courts and the judiciary, being present in all instances of power, the people are called to take the pain and the decision is left to the side of his.

3- It should also be mentioned that, unlike the wide defense used in trials, the jury provides for the breadth of defense and even the use of contradictory theses. In this way, there are criticisms of the restriction of the range of defense when being questioned via the ADPF.

4- In this way, the analysis of the thesis used to justify femicides in cases of intentional crimes against life that go to a popular jury was analyzed in the judgment of ADPF 779 MC-REF / DF by Dias Toffoli, whose vote will be analyzed in the present work. Although the other votes are also important, for methodological rigor, we chose to analyze and verify only the rapporteur for reasons of pertinence and brevity of the study, since we do not seek to exhaust the theme.

3.1 DIAS TOFFOLI- RAPPORTEUR'S VOTE

1- The vote of the rapporteur of the case is guided, initially, to have the explanation of concepts already mentioned above and starts to deal with the argument made in the present case having the theme.

2- According to the rapporteur, the thesis of self-defense is legally supported by the understanding of unjust, current, or imminent aggression in which the agent, using moderate means, defends himself or others, and cannot be used to protect revenge or out of sentiment out of step with the relationship. In this regard, the Minister makes the following consideration:

“Given this brief presentation by the institute, it is clear that **the 'legitimate defense of honor'**, in reality, **does not constitute a legitimate defense. I believe that betrayal is inserted in the context of love relationships, and both men and women are susceptible to practicing or suffering from it. Its lack of value lies in the ethical and moral scope, and there is no need to speak of a subjective right to act violently against it.** Incidentally, it was imbued with this spirit and to prevent the judicial authority from acquitting the agent who acted moved by jealousy or other passions and emotions that the ordinary legislator inserted the rule of art. 28, according to which:

*'Art. 28. The following do not exclude criminal liability:
I - the emotion or the passion'.* (emphasis added).

3- Honor is a constitutionally provided fundamental right and a very personal right intrinsic to the human being, being said as individual and proper. In this way, those who have been injured in their hearts can seek reparation, with ordinary legislation providing for methods of compensation for injuries to honor such as slander and defamation, or even through reimbursement of moral damages.

4- Violence against women and even femicide perpetrated cannot be supported from a disproportionate perspective and by a fragile argument of violation of honor. Anyone who uses this theme is committing a vile, cruel, disproportionate crime and is not protecting himself as dictated by such a thesis.

5- The use of this hateful speech to defend the accused reverses the logic of the victim and makes her guilty of the acts which the other commits. Death, then, is the result of the conduct of the adulterous woman, the woman who wears a short skirt, after all, her honor belongs to her husband, see the preponderant understanding of the fragile and illogical discourse of the legitimate defense of honor.

6- The naturalization of hate speech and crimes against women and their lives cannot be supported by macho cultural logic.

3.1.1 The dignity of the human person

1- The history of the use of this argument dates back to the vote for ordination in the Philippines, in which it was about male honor as a legal asset tutored and protected by the state.

"According to this perception, the woman's behavior, especially concerning her sexual conduct, would be an extension of the reputation of the 'head of the family', who, feeling dishonored, would act to correct or end the reason for the dishonor".

2- The human being has an end in himself, and therefore cannot have his value attributed to others. Therefore, the consideration that the woman's honor belongs to her husband, hurts the dignity of the human person and causes the woman to be considered as a "secondary being" and not someone with an end in herself.

3- The dignity of the human person according to Ingo Sarlet apud ADPF 779, needs to be reassembled:

"We consider the dignity of the human person to be the intrinsic and distinctive quality recognized in every human being that makes him or her worthy of the same respect and consideration by the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person both against any acts of a degrading and inhuman nature, as well as guaranteeing the minimum existential conditions for a healthy life, in addition to providing and promoting their active and co-responsible participation in the destinies of their existence and life in communion with other beings humans "

(SARLET, Ingo Wolfgang. Human dignity and fundamental rights in the Federal Constitution of 1988.5. ed. Porto Alegre: Livraria do Advogado, 2007).

4- According to the understanding that the human being is an end in itself, the use of such arguments subverts the logic of the judgment, making the woman become a defendant in a process for her defense and curbing all forms of violence.

3.1.2 Fullness of defense

1- The idea of full defense assumes that other elements can be brought to light in the judgment, not only legal arguments but other arguments such as political, sociological, philosophical, and religious, among others.

2- The said thesis and argument go beyond the mere use of full defense, as it affronts the Brazilian legal system and does not deserve to be accepted or used.

4 FINAL CONSIDERATIONS

The arguments given by the thesis of the legitimate defense of honor refer to gender inequality, which is perpetrated in Brazilian male society.

Judgments carried out in the jury's court, despite having a range of defenses, cannot contradict the legal system.

The Doca Street case was a case not to be repeated and the STF, by stating the prohibition of the use of the argument of self-defense against honor, on the one hand, aims to prevent ridiculous cases like this from being perpetrated.

However, when we analyze the present case, we understand that these absurdities perpetrated as a way of criminalizing the deceased victim or "beating a dead dog", are absurd. Furthermore, this is also a reflection of the inconsistency of the legal, constitutional, and democratic order, see ADPF 779, as it violates fundamental rights, such as life, human dignity, and gender equality of the women involved in the case.

In addition, on the other hand, part of the critical doctrine itself is that many lawyers could use the thesis and purposely cause the annulment of the trial, after all, the jury procedure provides for the breadth of defense, an enshrined constitutional principle.

However, there are certain limits that we cannot cross, this is perhaps one of these is to make the victim the defendant when she was the one who was killed. The consideration of principles must always be done through considerations and some theses as it is used to affront principles and the existence of other people.

The implicit machismo in society causes women victims of femicide and violence to have their dignity injured even after they are dead. It doesn't matter to society if Angela slept with Gabriele, if there was a previous marriage or if she was a drug user, the sanction of lawyers in these cases should be observed.

Lawyers in this sense cannot be outside the reality that surrounds them, the defendant must be defended, the commitment to the case is clear, but not at any cost, and one cannot "throttle women in full jury" or use defenses contrary to the legal system and think that this means full defense.

Finally, the jury procedure is specifically aimed at some guarantees, the society that is the holder of the action and exercises its citizenship on the jury, but also the victim, whatever his past life of having a trial by ordinary people of the people, who take the pains of the case and judge on behalf of society. Although this does not always happen, the jury should be made up of sensible people, in theory, it would serve to try one of the most serious crimes in our society. In the present case, the illustrious comment of a newspaper "they are almost proving that Angela killed Doca", reminds us that a person was killed and that the defendant was never the victim.

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