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OFFENSE ANALOGOUS TO THE RAPE OF A VULNERABLE PERSON AMONG ADOLESCENTS: CONTROVERSIES IN THE STATE COURTS AFTER PRECEDENT 593 OF THE STJ

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ABSTRACT

The present work aims to analyze the adequacy of normative, doctrinal and jurisprudential understandings with regard to the vulnerability of the victim in cases of infraction analogous to the crime of rape of a vulnerable person in relation to the sexual act committed between adolescents in a consensual manner. The objective of the study was to analyze the approach adopted by the State Courts in the face of controversies about the offense analogous to the rape of a vulnerable person, when they involve minors in the active and passive pole, since the implementation of Precedent 593 of the STJ. For data collection, the research was both bibliographic and documentary. Therefore, pertinent legal documents were analyzed, covering the legislation on the rape of a vulnerable person, the STJ's own Precedent 593, and some court judgments. According to the results achieved, it was clear that there is still a legal gap in relation to the infraction act analogous to the crime of rape of a vulnerable person, which requires legal operators to seek means to carry out a specific analysis of the cases involving the consensual sexual relationship between adolescents. Thus, as a solution to the legal gap, it is possible that a clause similar to the Romeo and Juliet exception will be adopted in Brazil, which has been used in certain states of the United States of America with the objective of decriminalizing sexual relations between adolescents when the age between them is equal to or less than five years.

Keywords: Rape of a vulnerable person. Infraction act. Vulnerability. Legal gap. Except for Romeo and Juliet.

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INTRODUCTION

This article deals with the controversies of the offense analogous to the rape of a vulnerable person in the understandings present in the judgments of the State Courts after the creation of precedent 593 of the Superior Court of Justice (STJ), in which this matter is extremely important because it deals with the practice of sexual relations or libidinous acts in which one or both of them are under 14 years of age and practice a relationship with consent.

However, because it is a topic little addressed by society and also too neglected, this subject leads to great social debates, especially in concrete cases, considering that in the passive or active pole there are minors or that both involved in the relationship are considered perpetrators and victims at the same time, and because they maintain a carnal relationship they commit an infraction analogous to the crime of rape of a vulnerable person.

The penal code, in its article 217-A and § 5, together with precedent 593 of the Supreme Court of Justice (STJ), establish that minors under 14 years of age are considered absolutely vulnerable, that is, that in concrete cases there can be no possibility of exception to remove the incidence of the rule if there is the practice of the sexual act regardless of the consent of the minor. However, it is understood that the rape of vulnerable people is very common involving adolescents who start a romantic relationship with each other early, especially in regions that have a lower socioeconomic development index or even due to cultural factors.

Thus, this theme is extremely relevant, considering that knowing the nuances of rape of vulnerable people contributes to the development of more effective legal strategies and the protection of these vulnerable groups. In addition, it serves as a means to improve legal interpretation as well as to strengthen coherence in decisions related to the subject, in the Brazilian legal scenario. Therefore, there should be more rigor in the laws that deal with this matter so that this obstacle is mitigated.

The guiding problem of the present work is to answer the following question: How have controversies about the rape of vulnerable people been addressed when there are minors in the active and passive poles, in the judgments of the State Courts since the creation of Precedent 593 of the STJ?

The objective of the study was to analyze the approach adopted by the State Courts in the face of controversies about the offense analogous to the rape of a vulnerable person, when they involve minors in the active and passive pole, since the implementation of Precedent 593 of the STJ. Regarding the specifics, they were: to understand the concept of

rape of vulnerable/bilateral according to the legislation and the legal implications of relativization; examine the application of the offense analogous to the rape of a vulnerable person, before the creation of Precedent 593 of the STJ; analyze the impacts of Precedent 593 of the STJ on the interpretations and decisions of the Courts.

METHODOLOGY

This study, by exploring the controversies about the offense analogous to the rape of a vulnerable person in the understanding present in the judgments of the State Courts after the creation of Precedent 593 of the STJ, adopted a qualitative methodology. For data collection, the research was both bibliographic and documentary. For this, pertinent legal documents were analyzed, including the legislation on the rape of a vulnerable person, the STJ's own precedent 593 and some judgments of the state courts.

RESULTS

Sexual violence includes any practice that constrains a woman to witness, maintain or participate in unwanted sexual intercourse, through intimidation, threats, coercion, and even the use of force, as well as that incites her to sell or use, in any way, her sexuality, that prevents her from using contraceptive means or forces her into marriage, to pregnancy, abortion or prostitution, through coercion, blackmail, bribery or manipulation, and finally, to limit or annul the exercise of their sexual and reproductive rights (CUNHA; PINTO, 2018).

The concept of sexual violence is still quite broad, mainly because it contemplates all the crimes provided for in the criminal law, in the same way that it directly interferes in situations that are not typified (NUCCI, 2020).

Therefore, sexual violence is configured as the act that conglomerates actions that fall within the legal definitions of rape, physical aggression and excessive sexual demands on a person's body, which the partner is not comfortable with, also characterizing sex without consent.

With the modification made by Law 12.015/09, the crimes of rape and violent indecent assault were brought together in a single criminal capitulation, becoming a single crime of multiple actions. The main changes implemented can be mentioned.

> With regard to rape, it is no longer a crime committed only against women and is now defined as constraining someone, through violence or serious threat, to have carnal intercourse or to practice or allow another libidinous act to be practiced with him. As a result, violent indecent assault became part of the crime of rape provided for in article 213 of the Penal Code and there was recognition of rape of male people who thus have equal treatment in relation to women. The overlapping of prejudices,

> homophobias, and "modesty" by the defense of human beings is clearly seen (PACELLI, 2020, p. 18).

According to these implementations, the legislation became more coherent and, at the same time, more rigid, with the intention of intimidating the aggressor agent to be afraid of committing the crime.

It is important to note that the crime of rape, as well as the rape of the vulnerable, as provided for in article 5, XLIII of the CF/88, "are non-bailable and insusceptible to pardon or amnesty, for which the principals, the executors and those who, being able to avoid them, omit to do so, are answerable". In this way, the current criminal law began to act in a more rigid way, and to disseminate the defense of the sexual dignity of minors.

Chapter II of Title VI of the Penal Code ceased to be "On the Seduction and Corruption of Minors" to be named "On Sexual Crimes Against the Vulnerable", therefore, it is worth noting that the name given to a certain Title or even to a Chapter of the Penal Code has the purpose of influencing the analysis of each typical figure contained therein.

> Thus, a whole differentiated guardianship is created when the victims were children and adolescents under 14 (fourteen) years of age, or if it is a person who, due to illness or mental deficiency, does not have the necessary discernment to practice the act, or, for any reason, cannot defend himself. The Code now expressly protects minors under 14 years of age, objectively defining that sexual intercourse with minors under 14 years of age is rape. This ends the discussion about whether the presumption of violence, whether it would be relative or absolute. All cases of presumption of violence under article 224 were revoked (PACELLI, 2020, p. 18).

The second title of chapter II made it more coherent and addressed sexual crimes as a whole, since the expression crimes against customs no longer showed the reality of the goods legally defended by the criminal types that were found in Title VI of the Penal Code.

However, for Capez (2019, p. 1) the new wording that was given to article 213 of the Penal Code brought relevant changes, so to speak, the crime of rape is characterized by the conduct of "Constraining someone, through violence or serious threat, to have carnal intercourse or to practice or allow another libidinous act to be practiced with him". However, he still continues with the same sentence as before (imprisonment from 6 to 10 years).

Rape now contains the conduct of constraining someone, not necessarily a woman, to the practice of acts related to sexual pleasure or sexual appetite, which in previous wording was characterized as a crime of violent indecent assault (art. 214 of the Penal Code), now annulled. Likewise, Viana (2018, p. 95) adds:

> The crime of rape is defined as "constraining a woman to carnal intercourse, through violence or serious threat" (CP, art. 213). Through the penal provision, the woman's sexual freedom, her right to dispose of her own body, her freedom of choice in the practice of carnal intercourse are protected. This is a heinous crime, under the terms of article 1 of Law No. 8,072/90.

In view of this, for Sousa (2017, p. 9), "for the configuration of rape, it is enough for a person (man or woman) to force another (man or woman) to practice any libidinous act with him (carnal intercourse, anal intercourse, fellatio, etc.)". The new article 213 is applicable only to conduct against people over 14 years of age, so that, if the victim is under 14 years of age, she is immediately framed in article 217-A, being characterized as a crime of rape of a vulnerable person, which has a much more serious penalty.

Although all criminal types have common aspects that are repudiated by the whole society, none of them arouses as much repugnance as sexual crimes, as these are usually practiced by the agent with violence, in order to satisfy his own lust, and when not, they are characterized by violating the victim's sexual freedom, causing him pain, suffering and embarrassment.

DISCUSSION

It is important to note that in article 2 of the Statute of the Child and Adolescent (ECA) the age criterion is established to differentiate children from adolescents, considering children as those up to 12 years old and adolescents individuals aged between 12 and 18 years. (BRAZIL, 1990). Furthermore, Article 103 of the ECA guarantees that when children and adolescents practice conducts foreseen as a crime or criminal misdemeanors, they commit an infraction, in which they will have the application of different punishments due to being in the training phase and because they are more vulnerable, in this way the legal system imposes socio-educational measures in order to correct and reintegrate minors into society, instead of applying custodial sentences.

Mendes (2014) argues that adolescents are partially unimputable, because although the Federal Constitution and the Penal Code exempt them from penalties, they establish a special rule that imposes socio-educational measures to answer for their infractions. Nucci (2020) argues that legal protection in cases of sexual crimes should be absolute for children under 12 years of age and relative to adolescents over 12 years of age, so that sanctions are not disproportionately applied to those who have a consensual relationship with adolescents over 13 years of age, since there is no violation of sexual dignity.

Although Precedent No. 593 of the (STJ) consolidates in its text the objective typification in which there can be no exceptions to sexual acts involving minors under fourteen years of age even if they are consensual, there are still controversies in the state courts, since some follow the strict form of understanding, but others relativize considering

the individual circumstances of each case, especially in a situation analogous to the crime of rape of a vulnerable person.

In Brazil, although the theory of the Romeo and Juliet exception is not adopted in the country, some state courts use it to resolve conflicts in sexual relationships involving individuals who are close in age, in order to correct legal injustices and protect adolescents from being unduly criminalized.

The theory of the Romeo and Juliet exception called "*Romeo and Juliet Law"* was created in the United States of America so that the law provided for in the legal system would not recognize the presumption of violence when the age difference between those involved is equal to or less than five, thus, so that there are no punishments disproportionately in relation to sexual discoveries (CHAVES; FURTADO, 2018).

It is evident that Criminal Law needs to follow social changes and should intervene only when strictly necessary, that is, only when there is an exclusive offense to the protected legal good, otherwise not. Thus, it is understood that the relationship involving minors who practice libidinous acts or carnal conjunction with each other in a consensual manner should not be punished, as there is no violation of the protected legal good.

In November 2017, the STJ published precedent 593, which reads as follows:

> Precedent 593 - The crime of rape of a vulnerable person is configured with carnal intercourse or practice of a libidinous act with a minor under 14 years of age, and any consent of the victim to the practice of the act, her previous sexual experience or the existence of a romantic relationship with the agent is irrelevant. (Precedent 593, THIRD SECTION, judged on 10/25/2017, DJe 11/06/2017).

The publication of the precedent made clear the STJ's understanding of vulnerability and also listed the main arguments that relativized vulnerability and expressly excluded them from the reasons that could lead to the exclusion of typicality.

Although it does not have a mandatory content, it should serve as a reference to judgments subsequent to its publication. In addition, the STJ, when publishing the aforementioned precedent, the STJ published a considerable number of judgments and listed them as precedents, showing that, in its opinion, the vulnerability of minors under 14 years of age is absolute and none of the arguments listed therein should be used for the purpose of ruling out punishability.

The crime of rape of a vulnerable person is provided for in article 217-A of the Brazilian Penal Code, which establishes that:

> Article 217-A. Having carnal intercourse or practicing another libidinous act with a minor under 14 (fourteen) years of age.
> Penalty - imprisonment, from 8 (eight) to 15 (fifteen) years.

> § 1 The same penalty is incurred by anyone who performs the actions described in the caput with someone who, due to mental illness or deficiency, does not have the necessary discernment to perform the act, or who, for any other reason, cannot offer resistance.
> § 2 (VETOED)
> § 3 If the conduct results in bodily injury of a serious nature: Penalty - imprisonment, from 10 (ten) to 20 (twenty) years.
> § 4 If the conduct results in death:
> Penalty - imprisonment, from 12 (twelve) to 30 (thirty) years (BRASIL, 1940).

The aforementioned article was included in the Penal Code through Law No. 12,015/2009, with the aim of protecting the sexual dignity and fundamental rights of children and adolescents who are victims of sexual abuse. According to the caput of the aforementioned article, in order to have the configuration of the crime, it is enough for the active subject to practice carnal conjunction or libidinous acts with a minor under fourteen years of age. Thus, for the configuration of the crime, it is not necessary to use physical violence or serious threat, because even if the victim claims consent, the crime will be characterized, since this consent is not valid (CHAVES; FURTADO, 2018).

In this case, the legislator adopted the age criterion to delimit the vulnerability of children under fourteen years of age, as well as those who have some physical and mental disability, understanding that their low maturity makes them susceptible to being victims of sexual abuse.

Bitencourt, argues on the subject:

> In the hypothesis of a sexual crime against a vulnerable person, sexual freedom cannot be spoken of as a protected legal good, since it is recognized that there is no full availability of the exercise of this freedom, which is exactly what characterizes their vulnerability. In fact, the criminalization of the conduct described in article 217-A seeks to protect the evolution and normal development of the minor's personality, so that, in his adult phase, he can freely decide, and without psychological trauma, his sexual behavior (BITENCOURT, 2020, p. 222, emphasis added).

Thus, due to the lack of maturity of children under fourteen years of age to fully understand the sexual act, state protection is guaranteed to ensure their physical and mental growth. As a result, these individuals end up having their freedom of choice restricted in relation to the beginning of their sexual activities due to vulnerability.

However, due to the occurrence of many judgments in relation to the subject and because there are some debates in the Courts regarding the legal nature of the vulnerability that is provided for in article 217-A of the Penal Code, the Superior Court of Justice (STJ), issued precedent 593, in 2017, with the following basis:

> Precedent 593 - The crime of rape of a vulnerable person is configured as carnal conjunction or the practice of a libidinous act with a minor under 14 years of age, and any consent of the victim to the practice of the act, her previous sexual

> experience or the existence of a romantic relationship with the agent is irrelevant (BRASIL, 2017).

The enactment of the precedent was intended to resolve all divergences in relation to the understanding of the crime of rape of a vulnerable person. This measure is justified by the fact that the precedents reflect the consolidated position of the jurisprudence in the higher courts, contributing to greater legal stability and facilitating the judgment of recurring issues presented to the judiciary (CHAVES; FURTADO, 2018).

However, article 217-A of the Penal Code, supported by precedent No. 593 of the Superior Court of Justice (STJ), established as a crime any sexual act performed with individuals under fourteen years of age. It is, therefore, an objective typification in which there are no margins for exceptions, even in the face of the minor's consent.

> INTERLOCUTORY APPEAL IN THE SPECIAL APPEAL. RAPE OF A VULNERABLE PERSON. VICTIM UNDER THE AGE OF 14. ABSOLUTE PRESUMPTION OF VIOLENCE. CONSENT OF THE VICTIM. LOVE RELATIONSHIP. IRRELEVANCE. PRECEDENT No. 593/STJ.
> 1. Under the terms of Precedent No. 593 of the Superior Court of Justice, "the crime of rape of a vulnerable person is configured with carnal intercourse or the practice of a libidinous act with a minor under 14 years of age, and any consent of the victim to the practice of the act, her previous sexual experience or the existence of a romantic relationship with the agent is irrelevant".
> 2. In the present case, even considering the factual circumstances that led to the acquittal of the defendant in both instances - "the victim and the appellant had sexual relations for a considerable period of time, with the consent of the former, and even with the knowledge of other relatives of hers. In addition, the offended party has already had past romantic involvement, including the practice of sexual relations"-, the understanding established within the scope of this Court must prevail, in the sense that "The crime of rape of a vulnerable person is configured with carnal conjunction or practice of a libidinous act with a minor under 14 years of age, and any consent of the victim for the practice of the act is irrelevant, their previous sexual experience or existence of a romantic relationship with the agent" (Precedent No. 593/STJ).
> 3. Since the facts outlined in the judgment under appeal are outlined, the analysis of the merits of the special appeal is not hindered by Precedent No. 7/STJ, since it is not necessary to incur into the factual and evidentiary collection.
> 4. Appeal dismissed (Minas Gerais, 2018).

However, Chaves and Furtado (2018) highlight that in the analysis of the victim's vulnerability, it is verified that both judges and doctrinaires, when sustaining the absolute presumption, focus mainly on the sexual violation of children and adolescents by adults. However, there is a paucity of debate regarding sexual acts among adolescents that occur with mutual consent.

In this scenario, Costa (2020) argues that the application of the penal provision requires a more careful reflection when used against acts committed by adolescents, considering their condition as a person in development. Otherwise, there is a risk of

criminalizing the natural sexual experience and denying children under 14 the right to self-determination.

However, it is evident that there is a distinction when adolescents practice a sexual act in a consensual way compared to an adult, because these minors have a similar level of physical, emotional and psychological development. Thus, it is not appropriate for these minors to suffer sanctions equally as adults. Thus, it is necessary for judges to carry out a more specific analysis in relation to these cases (Costa, 2020).

The Federal Constitution, through its article 227, guarantees the protection of children and adolescents, imposing on the family, society and the State the responsibility for the care and guarantee of their rights (BRASIL, 1988).

In addition, the Statute of the Child and Adolescent (ECA) is responsible for offering the essential guidelines for the protection of the rights of children and adolescents. It is provided in Article 3 that all children and adolescents have all the fundamental rights and guarantees that are inherent to the human person, without prejudice to the full protection of the law, in which they are guaranteed through legal provisions or other means, all opportunities for their physical, mental, moral and spiritual development (BRASIL, 1990).

The doctrinal and jurisprudential discussion, from then on, was to know whether only simple rape could be considered heinous, or whether it also extended to qualified forms, with the majority arguing that both simple and qualified rape were heinous, with the corresponding increase in the penalty. In this sense, it is worth highlighting the jurisprudence of the Federal Supreme Court, for which:

> PENAL. CRIMINAL PROCEDURE. HABEAS CORPUS. SIMPLE RAPE WITH PRESUMED VIOLENCE. HEINOUS CRIME NOT CHARACTERIZED. MATTER NOT SUBMITTED TO THE STATE COURT OR TO THE SUPERIOR COURT OF JUSTICE. SUPPRESSION OF INSTANCE. INADMISSIBILITY. PROGRESSION OF PRISON REGIME. POSSIBILITY, IN THEORY. ORDER GRANTED EX OFFICIO.
> I - There is no knowledge of a matter not submitted to the lower court, under penalty of undue suppression of the instance.
> II - Although the patient's situation is not specifically assessed, it is established, from the outset, that the jurisprudence of the Federal Supreme Court is in the sense that "the crimes of rape and violent indecent assault, both in their simple forms Penal Code, arts. 213 and 214 as in the qualified ones (Penal Code, art. 223, caput and sole paragraph), are heinous crimes".
> III - After the judgment of HC 82.929/SP by the Plenary of the STF, the progression of the prison regime is no longer prohibited to those convicted of committing heinous crimes.
> IV - Determination to the Court of Executions to assess the possibility of granting the requested progression, in view of the objective and subjective requirements established in the LEP.
> V - Order granted ex officio. (STF - HC: 93674 SP , Rapporteur: RICARDO LEWANDOWSKI, Judgment Date: 10/07/2022, First Panel, Publication Date: DJe-202 DIVULG 10-23-2022 PUBLIC 10-24-2022 EMENT VOL-02338-03 PP-00438) (emphasis added)

It is also worth noting the ruling of the Superior Court of Justice, which considers both violent indecent assault and rape to be heinous crimes, identifying them as simple and qualified, with no possibility of progression of the prison regime established, in verbis:

> CRIMINAL PROCEDURE. HABEAS CORPUS. RAPE AND VIOLENT INDECENT ASSAULT. HIDEOUS NATURE IN SIMPLE AND QUALIFIED FORMS. REGIME PROGRESSION PROHIBITED BY THE LEGISLATION THAT DEALS WITH HEINOUS CRIMES. CONSTITUTIONALITY. AN UNDERSTANDING THAT IS STILL AN EXPRESSION OF THE PLENARY JURISPRUDENCE OF THE FEDERAL SUPREME COURT. CRIMINAL CONTINUITY. IMPOSSIBILITY. CRIMES OF DIFFERENT KINDS. ABSENCE OF ILLEGAL CONSTRAINT. ORDER DENIED.
> 1. Rape and violent indecent assault are heinous crimes in simple or qualified forms (Law 8.072/90, art. 1, incs. V and VI), which is why the progression of the fixed prison regime is prohibited, considered, until now, as constitutional by the Federal Supreme Court (...) (STJ - HC: 43359 SP 2005/0062539-3, Rapporteur: Justice ARNALDO ESTEVES LIMA, Judgment Date: 12/06/2022, T5 - FIFTH PANEL, Publication Date: DJ 04/03/2022 p. 374)

Therefore, according to the Federal Supreme Court and the Superior Court of Justice, there is no doubt about the heinous treatment given to the crime of rape, whether simple or qualified, as well as to the violent indecent assault, the latter already revoked by Law 12.015/09. Therefore, the legal good that is intended to be protected is taken into account, which is the sexual dignity of the person, penal treatments that innovated the conception of the crimes under analysis, conferring more severe penalties to those who violate the intimate life and sexual freedom of others.

But, despite the changes introduced by the law of heinous crimes, the Brazilian criminal legislation still needed to follow new thoughts, adapting to the new facts and events, and it is about these new changes in the Penal Code that we will discuss in the next chapter.

In Brazil, some state courts have sought to apply the Romeo and Juliet theory to resolve issues involving sexual relationships between people of close age. For example, it is possible to cite the Court of Justice of Goiás, which understood that the conduct of young people should be relativized due to age proximity, while recognizing the freedom of adolescents to consent to the act.

> CRIMINAL APPEAL. RAPE OF A VULNERABLE PERSON. COMPARATIVE LAW. ANALYSIS OF THE CONCRETE CASE. ROMEO AND JULIET LAW EXCEPTION. ACQUITTAL.
> In the wake of comparative law, Brazilian law should adopt a similar orientation, according to which there is no crime for cases in which the sexual exploitation of adolescents is not found and the hypothesis of sexual acts committed between adolescents/young people, close in age, of their own free will, without resulting in behavioral change or psychological distress (art. 386, item VI, Code of Criminal Procedure) 10 APPEAL KNOWN AND GRANTED. SENTENCE REFORMED. (TJ-GO – APR: 03471174020138090095, Rapporteur: DES. Leandro Crispim, judgment date: 05/02/2017, 2nd Criminal Chamber, publication date: DJ 2316 of 07/27/2017.

This is also how the Court of Justice of Santa Catarina can also be pointed out, in the judgment of the appeal: 20110983973, which dealt with sexual relationships between cousins, aged 13 and 15 years. In which the rapporteur Judge Ricardo Roesler, considering the exception of Romeo and Juliet, voted for the acquittal of the represented.

> Fictitious violence against a minor under 14 years of age, which is the basis for the crime of rape of a vulnerable person (article 217-A, of the CP), presupposes the inability of the minor to fully self-determine and to defend himself, in contrast to the foreseeable maturity of the adult. For this reason, in the case of sexual practice between adolescents - one aged 13 (victim) and the other 15 years old (perpetrator) - the presumption to characterize the fact as an infraction analogous to the crime of rape does not apply freely; It is necessary to show that the adolescent had an exact understanding of the circumstances and, mainly, the deliberate intention of satisfying his own lust, counting on the victim's prematurity and inexperience. (...) Well, because the presumption of violence is taken from the assumption of experience of one (the adult) and the immaturity of the other (the victim); The same conclusion cannot be simply taken when the practice of a sexual act between two minors is at stake (emphasis added). (...) If we are not able to admit our limitations to ourselves, let us only have some sensitivity to the human soul, and let us take as a paradigm the example adopted today in the United States - a country notoriously recognized for its reprimand of sexual crimes committed by young people (notably homosexuals), but which has admitted the atypicality of the conduct when sexual intercourse occurs between adolescents. This is what is conventionally called Romeo and Juliet Law. The provision, of Shakespearean inspiration, has been established as a way to prevent the imprisonment of young people who have sexual relations, whose age difference does not exceed five years. (...) Law, especially criminal law, must necessarily deal with what must be submitted to its correction. And to identify what is subject to intervention by the Judiciary than what is not, more is required, much more than the bureaucracy and arrogance of legal protocols: sensitivity is required, attention to the other; some broadening of horizons of sensibility is required. The solution of all human miseries is not the task of the Judiciary, which at most has a supporting role. When the roles are reversed, when the Judiciary intervenes beyond its surroundings, without care and caution, the result can be disastrous. Solutions that may seem, at an unsuspecting eye, a symptom of poetic justice (beautiful in literary works, but as a rule pathetic as a judgment guide) can, in practice, unfold collateral effects much more pernicious than effective judicial inertia. Here is a case whose solution must be sought far, far away from the direct intervention of the Judiciary (italics).

The decisions presented increasingly highlight the need for the law enforcer to be able to relativize the victim's vulnerability in some exceptional cases, taking into account some peculiarities of the specific case. In order to avoid disproportionate decisions.

In addition, it is clear that in relation to sexual practice between adolescents - one aged 13 (victim) and the other 15 years old (perpetrator) - it was clarified that the presumption does not freely apply to characterize the fact as an infraction analogous to the crime of rape. Thus, it is imperative that it be evidenced that the adolescent had an exact understanding of the circumstances and, mainly, the deliberate intention of satisfying his own lust, counting on the victim's prematurity and inexperience. The presumption of violence is taken from the assumption of experience of one (the adult) and the immaturity of

the other (the victim); The same conclusion cannot simply be taken when the practice of a sexual act between two minors is at stake.

In this sense, it is argued that the minimum age for sexual consent among adolescents takes into account the age difference and the possibility of a balance of power as a way to determine whether consent is valid or not. Therefore, it is essential that, while there is no legal reform that defines an exception under the terms of the Romeo and Juliet law, judges can continue to analyze the material aspect to characterize the infraction.

CONCLUSION

The development of the present work enabled an in-depth analysis of how the legislation, the doctrinaires and the judges have understood the nature of the presumption of vulnerability of the victim in the crime of rape of a vulnerable person. From this, it was possible to reflect on the difficulties encountered in solving cases involving consensual sexual relationships between adolescents and the importance of a specific analysis on the subject.

In view of this, as it is a crime of extreme gravity and high social reproach, the penalty attributed to the type is considerably high, and the crime is included in the list of heinous crimes, as mentioned in the study. In addition, the legislator, in the reform of the Penal Code with the creation of Law 12.015/2009, decided to treat age vulnerability as absolute. Thus, there would be no room for any interpretation that could lead to the impunity of the aggressor or even to the disqualification of the victim.

Despite this, the doctrinal debates are not unanimous, because, even if they all recognize the legislator's choice, most of the authors surveyed still defend the possibility of relativizing the victim's vulnerability in the circumstances of the concrete case.

As is known, it was only in 2014 that the STJ was able to pacify its understanding, starting to consider the vulnerability provided for in article 217-A as of an absolute nature, and recently established its position in precedent 593. The precedent aimed to ensure legal certainty to citizens, taking into account that, even after the higher courts adopted a peaceful position on the subject, the state courts judged considering vulnerability as absolute, or as relative.

According to the results achieved, it was clear that there is still a relevant legal gap in relation to the infraction act analogous to the crime of rape of a vulnerable person, which requires legal operators to seek means to carry out a specific analysis of cases involving consensual sexual relationships between adolescents. Thus, as a solution to this legal gap, it is possible that a clause similar to the "Romeo and Juliet" exception will be adopted in

Brazil, which has been used in certain states of the United States of America with the objective of decriminalizing sexual relations between adolescents when the age between them is equal to or less than five years.

In order to have the legislative change, it would be necessary to present a bill that includes an exception in article 217-A of the Penal Code, along the lines of the so-called "Romeo and Juliet" clause, recognizing criminal atypicality in cases of consensual relations between adolescents who are at least 14 years old and with an age difference of up to five years between them. as long as there is no violence, threat or any other means of intimidation.

In this sense, for this exception to really be used in Brazil, it would be necessary to rethink the way in which article 217-A of the Penal Code is currently interpreted, since it considers vulnerability to be absolute, without taking into account the particularities of each case. Therefore, the adoption of the so-called "Romeo and Juliet" clause would require, first of all, a change in the law itself or a new reading by the courts.

The proposal aims to protect young people from not being treated as criminals in a romantic relationship in which abuse and coercion do not occur. Although such changes reduce the protection of the law, it would make the penal system more attentive to the reality of these young people, respecting their autonomy and promoting the application of the principles of reasonableness and proportionality, based on what is provided for in the Statute of the Child and Adolescent.

Another way to make these changes feasible would be through jurisprudence. This means that the courts, especially the higher courts, could come to recognize that the simple application of sanctions with the objective of curbing these conducts does not solve the situation.

Although Precedent 593 of the STJ consolidates, in its text, an objective typification in which there can be no margins for exceptions, some courts have been relativizing this understanding, in concrete cases, in an exceptional way, because they understand that the conviction of adolescents, in this situation, is more harmful than protective. Therefore, if this understanding is truly consolidated, it may result in the issuance of a binding precedent by the Federal Supreme Court (STF), as only then will a fairer and more uniform application occur throughout the country, aiming to protect these vulnerable from suffering disproportionate sanctions.

From these reflections, the need arises for a broader debate on the subject among legal operators, especially by those who draft and apply laws, with the aim of building a solid legal doctrine, capable of bringing pacification and social justice. Such changes may

occur through legislative changes, such as the modification of article 217-A of the Penal Code, or by the maturation of jurisprudence, with eventual consolidation in a binding precedent. Thus, the measures will be able to take into account the reality of adolescents, combining the principles of proportionality and reasonableness, seeking to make their protection compatible with justice.

THANKS

To God and my family.

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