Poder Judicial
República Oriental del Uruguay

Montevideo, August 22, 2021.

IN VIEW OF:

this adolescent offender proceeding, which has the cover page: "**D., Jack - Alleged commission of a serious infraction of Homicide in real concurrence with a serious infraction of Aggravated Severe Injuries - ORAL TRIAL**", identified with the docket number **500-111/2021**, in which participate the Prosecutor Dr Sebastián Dean and the accused adolescent, Jack D., assisted by the Public Defence in charge of Dr Sofía De La Fuente, for final judgement of the Juvenile Court of 1st Circuit of Montevideo.

RESULTING:

1) Completed proceedings

On June 29, 2021, the Court of the 2nd Circuit issued a decision to proceed with the oral trial and referred the case to this court.

It arises from the resolution that the adolescent Jack D. was held in a hospital during the first days that followed the car accident which will be explained below. The adolescent, once he was medically discharged, was arrested on April 5, 2021, and on the same day the arraignment took place, for the alleged commission of two serious offences qualified in the criminal law as crimes of Homicide and Aggravated Severe Injuries, in real concurrence.

From that moment on, a precautionary measure of total house arrest, with authorization to go out only to his secondary education classes and with the prohibition to drive any type of motor-powered vehicle, was enforced. Since such measure was imposed until there is a final, non-appealable judgment, it is still in vigour.

The trial hearings were held on August 15 and 16, 2021.

The two parties of the proceedings made their initial presentations, then the proposed witnesses and experts made their statements, the young defendant testified, and the closing arguments of the prosecution and the defence were heard. Once the closing of the debate was declared (Art. 271.6 of the Code of Criminal Procedure, hereinafter CPP), a new hearing was

scheduled for today with the purpose of communicating this sentence, within the legal term of 150 days since the arraignment, established in the final clause of Art. 76 of the Code of Childhood and Adolescence (hereinafter referred to by its initialism, CNA).

This sentence is dictated with all the content required in Art. 119.1 of the CPP and with a language that this Judge intends to be understood by the adolescent, but, due to the complexity of the case and the need to use legal vocabulary, it may require the use of the mechanism provided for in Art. 76 letter E nr. 7 of the CNA ("*The defender has the duty, under his most serious responsibility, to communicate to the adolescent every judicial resolution pronounced in the process in which he is a party, in simple and clear terms, evacuating all the doubts that he may have*").

2) The object of this trial

The purpose of this trial is to determine the possible juvenile-criminal liability of the minor Jack D. and, if so, whether he committed the two serious offences for which the prosecution charged him.

If it is concluded that there is criminal liability, it will be as well determined: the subjective liability (i.e., whether the offences were committed intentionally or recklessly), whether there is concurrence between the two offences (i.e., how they concur or how they are linked to each other), and which is the appropriate socio-educational measure. In addition, in the event that the adolescent is sentenced to serve any measure, it will be also decided whether the record should subsequently be retained or removed from the judicial and police database.

3) The Prosecution's point of view

In its opening statement, the prosecution argued that there was sufficient evidence to prove in the oral trial that Jack D., on one hand, intentionally killed a young mother who had no possibility of defending herself, and on the other hand, caused to his brother serious injuries that prevented him from performing his regular duties for several months. The Prosecutor stated that on Friday, March 26th of this year, the teenager Jack D. went with his older brother John D. and the latter's partner to the Blue Moon bar located in Solis and Florida, in this city. At approximately 10:30 p.m. an argument broke out between John D. and three other young men who were in the same bar. Minutes later, John D. attacked one of the young men and stabbed him in the neck with a screwdriver. The victim was left lying on the floor, critically injured. Neither John nor his brother Jack came to his aid. In view of the situation and with full knowledge of the facts, Jack D., in order to protect his brother John who was drunk, and prevent him from being arrested, took his brother to his own car and sat him in the passenger seat, with the

intention of facilitating his escape. Jack not only witnessed the events, but was fully aware that his brother had a criminal record and that his arrest would mean a certain conviction. As his brother was intoxicated, Jack D. got behind the wheel, despite having no driver's licence and no driving experience, and drove through the city centre at 130 km/h, without turning on the car lights or even braking at red lights.

As a logical consequence of his voluntary and conscious, careless, and negligent conduct -said the Prosecutor- the teenager ended up hitting the unfortunate Mrs. Olivia F., who was walking along Florida Street and was just crossing San Carlos Street, enabled by the green light. Mrs. Olivia F., a mother of three small children, was crossing the street without committing any type of infraction or risky behaviour and had absolutely no possibility to prevent or defend herself from the terrible aggression of a car at high speed, without lights and guided by a disqualified driver. As a result of the brutal impact, Mrs. Olivia suffered multiple skull fractures and massive brain trauma, which produced her immediate death.

After hitting Mrs. F., Jack D. struck a wrought iron streetlamp, causing severe fractures to John's skull, neck, arms, and ribs. Jack was fortunate to be protected by the car's only airbag, so he was barely injured.

It is worth mentioning that the Prosecutor's Office decided not to charge the adolescent for a possible crime of cover-up, as provided for in Article 197 of the Penal Code (hereinafter, PC), in accordance with Article 42 of the PC, since he was the brother of the person who had committed the first fact. Therefore, the Prosecutor asserted that Jack D. should not be charged with the very special aggravating circumstance of homicide of having been committed "*in order to consummate another crime*" (Art. 312 nr. 4 PC). As he was not charged with a specially aggravated homicide or injuries classified as *very severe*, according to Art. 72 CNA the criminal law infractions attributed to the adolescent fell into the category of "serious" and not "very serious", which in turn meant that it was not necessary to order his incarceration at the National Institute For Adolescent Social Inclusion (hereinafter, INISA) as a precautionary measure provided for in Art. 116 bis CNA.

4) The point of view of the Defence

Firstly, the Defence expressed that Jack D. is a teenager with good feelings, who has never had any troubles with the law, who lives with his parents, attends high school, has friends and is well-loved by peers and adults.

Secondly, as for the facts, on the fateful night of March 26, Jack's only concern was to prevent his brother John from going back to jail, and to achieve this result he acted in a sort of

commotional state, without being able to pause to think about the possible consequences of his conduct.

Thirdly, the Defence explained that Jack was 14 years old when his elder brother John was imprisoned for theft and that he suffered a lot during the 18 months that John was in prison. Jack never understood what had happened and developed a deep fear and distrust towards the police and judicial authorities. Thus, that night, as he watched his brother react strongly to Mr. Bill G.'s previous assault on his cherished automobile, Jack was unable to think of anything other than protecting his brother from a new wrongful conviction. By an act of chance, beyond Jack's control, Mrs. Olivia F. was passing exactly where the teenager was driving and -although he tried to brake to protect the victim's integrity- he could not avoid ramming her, with such misfortune that Mrs. Olivia's head hit the front of a house, and it was this impact that caused her death. In no way did Jack wish to cause Mrs. Olivia's death. On the contrary, he had the unsuccessful intention of avoiding ramming her. Nor did he represent in his mind the concrete possibility of her death, that is, there was no foresight or foreseeability of this homicide, but if anything, just the possibility of some minor inconvenience due to the circumstances in which he was driving the vehicle. Moreover, to the teenager's further sorrow, the accident caused serious injuries to his beloved brother John. Injuries which, in his eagerness to spare his brother from the police and judicial authorities, he clearly did not want and never imagined could happen.

The defence counsel emphasised in her opening statement that the accident caused several injuries to the teenager himself: five fractures in his ribs and a severe cervical traumatism.

This accident -continued the defence- meant a turning point in Jack´s life, since the unforeseen painful consequences caused him immense grief. Since March 26, Jack has been thinking about what happened; he is very sorry for having driven the vehicle and now requires psychological support for the emotional processing of what happened. He has learned his lesson. He deeply regrets the death of Mrs. Olivia F. and the injuries and suffering caused to his brother. For all these reasons, the Defence considers that this case should have been closed and archived in compliance with Art. 104 of the CNA: "*At any stage of the proceedings the Judge may -after hearing the Public Prosecutor's Office, the adolescent and his defence- totally or partially prescind criminal prosecution (...) when: (...) B) The adolescent has suffered, as a result of the act, serious physical or moral damage*", or, failing this, this case should have been archived under Art. 100.1 letter b, CPP: "*The Public Prosecutor's Office may not initiate criminal prosecution or abandon the prosecution already initiated in the following cases: (...) b) if it is a reckless crime that has caused the accused a serious affliction, the effects of which may be considered greater than those derived from the application of a penalty*". This rule reflects what is known in philosophy as *poena naturalis*, a situation which -according to the defence attorney- fits

perfectly with this case and which allows the defendant to be exempted from any criminal reproach.

Given the fact that neither the Prosecutor's Office nor the court closed the case, the Public Defender stated that the socio-educational measure requested by the Prosecutor's Office is totally excessive, absolutely disproportionate, and would not serve an educational purpose but would be exclusively punitive (which is unlawful for an adolescent, considering the purposes of sanctions for minors), for an act not foreseen or desired by the adolescent. The defence counsel noted that, for adults, the penalty for reckless or negligent homicide has a legal minimum of just six months of imprisonment (Art. 314 PC) and for serious reckless or negligent injuries, a minimum of ten months of imprisonment (Arts. 317 and 321 PC).

Considering Beijing Rule 17.1 and Art. 79 of the CNA -the defence said- an adequate socio-educational measure for an adolescent with a clean record such as Jack, would be a total house arrest with authorization to go out to high school and prohibition to drive motor vehicles, for a term not exceeding ten months, with deduction of what has already been served as a precautionary measure.

5) Elements of proof that serve as the basis for the decision

Firstly, in accordance with Art. 76 letter C of the CNA, the psycho-educational and social report prepared by the technical team of the Institute for Children and Adolescents (hereinafter, INAU for its initials in Spanish) was added.

Secondly, through stipulations of facts reached under Art. 268.3, CPP, it was established that, at the time of the accident of March 26, 2021, the adolescent Jack D. was 17 years old, had no prior record, did not have a driver's licence and was the one driving the car involved in the accident.

Thirdly, during the trial the following witnesses testified: Mary J., Bill G., Bob L., Ben K., Peter V., Oswald F. and Steve J., the police officers Greg D., Cathy P., Arthur Z., Craig H. and the expert witnesses Dr Ellen A. and Ernest B. The defendant himself freely chose to testify and was heard before the closing arguments of the parties.

6) Prosecution and defence conclusions

In sum, the following conclusions arise from the closing arguments of the parties.

For the prosecution, it was proven that the accused teenager was fully aware that his driving manner would not allow him to react in time if another car or a pedestrian crossed his way. The offender had foreseen the possible harmful outcomes for third parties that could result from his conduct. However, he did not stop his actions, so he must assume the consequences of his punishable acts, which cannot be justified or exonerated. The malice aforethought is

characterised by a foresight of the possible harmful consequences whose non-observance is due to the selfishness, lack of empathy or carelessness of the perpetrator. There is no direct intention of the result, but there is the foresight that it may occur, and he continued acting, so that he consented to that result as a possible realisation. Therefore, he must be sentenced as the responsible author of the homicide of Mrs. Olivia F. and of the serious injuries of her brother John, with adverted recklessness and in real concurrence. The Prosecutor's Office considers that the requested measure of five years of effective deprivation of liberty at INISA is the appropriate one.

The Defence, for its part, emphasised the lack of will of the adolescent regarding the result of homicide and serious injuries attributed to him. The adolescent acknowledged having committed the acts but not the criminal liability derived therefrom, hence, he should only be held liable for the homicide due to his recklessness, negligence, or lack of skill.

Concerning the injuries suffered by John D., the defence strongly claimed that it was not proven that the teenager had imagined in his mind the possibility of his brother being injured, and stresses that what Jack wanted was precisely to help John to escape from the authorities. If he had imagined that his brother would suffer the serious fractures to his skull, neck, arms, and ribs that he did, he would never have driven the car. Therefore -the defence counsel adds- the victim's death was due to reckless behaviour and the injuries should not be punishable, because the aforementioned *poena naturalis* makes the crime unpunishable. The penalty, besides being well deserved, must be necessary, and in juvenile criminal law it must also be oriented towards the (re)education of the minor offender.

The defence attorney also argued that in the hypothetical case that these offences were to be charged as intentional infractions, they are not linked to each other in a regime of *real concurrence* because they do not respond to independent decisions, but match in *formal or ideal concurrence*, since the teenager had no control of the car after the impact against Mrs. Olivia F. Otherwise, the mere result would be punished, as if it were an objective liability. Therefore, the defence considers that, in case of sentencing for both crimes, Article 57 of the PC should be applied and that the socio-educational measure should only be that of the major offence, without adding more punishment for the other one.

In short, the defence requested that in case of conviction, the socio-educational measure would not be greater than a total house arrest with authorization to go out to classes and with a prohibition to drive motor vehicles, for a term of no more than ten months with deduction of the day of arrest and of what has already been served as a precautionary measure.

7) Facts that are deemed to be true and that have been reliably proven

Firstly, the facts that were subject of stipulation of facts between the parties are deemed to be true: at the time of the accident the adolescent Jack D. was 17 years old, he had no priors, did not have a driver's licence and was the one driving the car.

Secondly, based on the evidence presented at the oral trial, the following facts are considered proven.

- The adolescent Jack D. lives with his parents. He attends the local high school, where he performs well and is valued by his peers. His physical and mental development is within the normal parameters for a boy of his age. When his older brother John was serving an 18-month prison sentence for theft, the teenager was 14 and 15 years old. Jack knew that if John got into further trouble with the law, he would be deprived of his liberty again. This arises from the statements of Mary J. and the teenage defendant himself (cf. tracks 8 to 13 of the August 15 hearing audio and 21 to 23 of the August 16 audio).
- On the night of March 26, 2021, Jack did not drink alcohol, but his brother did. Jack saw John get into an altercation with other customers at the Blue Moon bar and stab with a screwdriver one of the young men with whom he had been arguing. Jack witnessed first-hand how his brother assaulted Bill G. and how Bill G. fell to the ground, seriously injured. He also saw how the victim had earlier provoked his brother by damaging John's treasured car with a screwdriver. This also arises from the statements of Mary J. and the teenage defendant himself (cf. tracks 13 to 16 of the August 15 hearing audio and 23 to 25 of the August 16 audio).
- The teenager did not know the names of these people and realised that this lack of knowledge was reciprocal. He then thought to prevent John from being identified, held accountable and imprisoned. His decision was to do everything in his power to spare his brother from justice. Since John was intoxicated, the teenager deduced that he would not be able to drive fast enough to successfully escape, so he had him get into the car as a passenger and drove the vehicle himself, even though he knew he not only lacked a driver's licence, but also had no experience as a driver. In the urgency of the situation, he did not take the precaution of putting John's seat belt on, nor did he put it on himself. Jack himself testified at the oral trial hearing: "*All I wanted was to get out of there as fast as possible*", "*what I felt was rush, the sense of urgency, I was desperate*", "*I was not going to waste time fastening seat belts*", "*I did not turn on the car lights so that we would not be seen*", *"I knew that if another car or someone crossed my path, I would not be able to react in time*" (cf. Jack's statement, tracks 21 to 24 of the audio of August 16).
- The teenager drove at high speed and without turning on the vehicle's lights, and he was followed, but not closely, by Mr. Bob L. As Mr. Prosecutor said, Jack D. drove

through the downtown streets at 130 km/h. with his lights off and without even braking at red lights. This arises from the testimony of Mr. Bob L. and the very detailed statement of the accident expert Mr. Ernest B. (cf. tracks 39 to 44 of the audio of August 15).

- Upon reaching the intersection of Florida and San Carlos, Jack D. tried to brake, but hit Mrs. Olivia F., who was walking on Florida Street and was crossing San Carlos Street with a green light. At the moment of hitting Mrs. F., the car was travelling at 120 km/h, according to expert witness B. (cf. tracks 44 to 51 of the audio of August 15).
- The multiple cranial fractures and massive brain trauma, caused directly as a consequence of being hit by the car, caused the immediate death of Mrs. Olivia F., as detailed by the medical expert Dr. Ellen A. (cf. tracks 3 to 11 of the audio of August 16).
- The vehicle finally collided with a wrought iron streetlamp, causing severe fractures to the skull, neck, arms, and ribs of John D., on whose side there was no airbag. This also arose from the depositions of the accident's expert and the medical expert.
- As said by the defence counsel, the teenager was also injured. However, he was protected by the only airbag in the car, so he only suffered fractures in five ribs and a cervical traumatism, as described by Dr Ellen A. (cf. track 11 of the audio of August 16).
- Finally, as for the distress caused to the teenager, it is clear from his own statement and that of his sister-in-law Mary J. that he is indeed aware of the mistakes he made, acknowledged the facts and feels remorseful (cf. tracks 10 and 11 of the audio of the hearing of August 15 and tracks 22 and 23 of the audios of the hearing of August 16).

Lastly, it may be added that no evidence was produced as to whether the teenager knew that his brother's car had an airbag. Clearly, it was an old car that did not have airbags ex-factory, and there were apparently no visible elements in the vehicle that would indicate that the driver (and only the driver) had such additional protection. While it is possible that John D. may have told his brother that he had installed an airbag, the evidence in this case is silent on this point.

CONSIDERING:

1) Typicality of the proven facts

As is well known, in order to obtain a conviction in an oral trial, "*full proof is required from which the certainty of the crime and the responsibility of the accused is rationally established*" (Art. 142.1 CPP). In case of doubt, the accused must be acquitted (Art. 142.2 CPP). These rules apply to both adults and adolescents (Art. 75 of the CNA).

a. The homicide

In the opinion of this Judge, based on the autopsy performed, the accidents expert report and the analysis of evidence documented by the police officers who testified at the trial, all of which were also consistent with what the teenager himself acknowledged, there is full proof of the homicide of Mrs. Olivia F. And the cause of death was her being hit by the car driven by the teenager.

It emerges from the deemed true facts and the proven facts, that the teenager Jack D. killed Olivia F., as provided for as a crime in Article 310 of the Penal Code, which states:

> "*Whoever, with intent to kill, kills any person, shall be punished with two to twelve years of imprisonment*".

The participation of the adolescent in these acts was clearly as a perpetrator, since he was the one who carried out the consummative acts of the crime (Art. 60 nr. 1 PC), and the act is attributed to him as committed by malice aforethought and as a consummated act.

The malice in this case lies in what the law establishes in Article 18, paragraph 3 of the Penal Code:

> "***The result that was not intended, but was foreseen, is considered intentional***".

It was consistently proven in the oral trial that the adolescent imagined (represented in his inner self) the possible final result of the "death of some person". There was foresight of a possible undesired result, but the representation did not serve as an inhibiting brake for the adolescent's conduct. The defence counsel is right when she argues that the defendant did not want at any time to kill Mrs. Olivia F. and he even tried to stop the car, but this was unsuccessful due to the high speed at which he was driving. Following a totally causal reasoning -that is to say, looking for cause and effect- this death can be attributed to his conduct from the moment he made the decision to drive a car in those conditions (excessive speed, no lights, inexperienced). With his conduct he created or increased the risk of producing the result punished by a criminal norm, Hence, the elements of the objective imputation are present.

This was accepted by the adolescent himself in his statement, although it is important to clarify that the acknowledgment is limited only to the facts and not to his guilt or criminal responsibility.

As far as the *subjective* aspects are concerned, it is important to highlight that there was no evidence that his mental faculties were altered; quite the opposite, he is a young man with sufficient intelligence to obtain good marks in high school, he has an adequate development for his age and that night he had not drunk any alcohol, so he was fully aware of his behaviour.

Young Jack foresaw that his conduct could create or increase a legally relevant risk. Not only were death or injuries *foreseeable*, but they were undoubtedly *foreseen* by someone who

circulates with their lights off at very high speed in an urban area with pedestrian traffic. Jack D. calculated that the lower visibility, together with the high speed, could lead to a result such as the one that happened. Additionally, his reckless driving was not momentary: the rather extended period which it lasted certainly increased the odds of the occurrence of a fatal outcome. Jack D. had the "warnings" of several red lights, and in each of them he kept his decision to prioritise escape. By doing so, he assumed the risk of a legally relevant result. If by chance no one stood in his path, nobody would have died, but if someone happened to enter his way, it was obviously probable that their death would occur. Jack foresaw this, pondered it quickly and accepted it as a possibility of hypothetical realisation. The conditions in which he was driving made death likely even if he used the brakes. Despite this, the young man did not desist in his intention. On the contrary, he intended to persist in his dangerous behaviour to all the necessary extent to escape prosecution.

National jurisprudence and doctrine are decided in cases such as this one for crimes and infractions of criminal law committed with malice aforethought, as described by Miguel Langón in a commentary on the Uruguayan Criminal Code. According to this author:

> "*The subject does not want the result but foresees it with a high degree of probability and therefore assumes it, accepts it. This is the case, for example, of the individual who drives at excessive speed on a street heavily frequented by pedestrians, whom he sees on the roadway, he does not want to run them over, much less kill them, notwithstanding that, his selfish desire to drive at such speed, for whatever purpose, makes him not to stop, thus assuming as intentional (in a clear legal fiction) the foreseen but undesired result. Whether the result has been foreseen or not by the acting subject, will ultimately depend on whether the crime is imputed intentionally or non-intentionally*" (LANGÓN CUÑARRO, Código Penal Uruguayo y Leyes Complementarias Comentados, Universidad de Montevideo, 2nd edition, Montevideo, 2018, p. 76).

For all these reasons, this Judge does not agree with the Defence that the act was an involuntary manslaughter caused by recklessness or negligence.

Having reached the conclusion that Jack D. committed the homicide of Mrs. F. with malice aforethought by adverted recklessness (*dolus eventualis*), it is necessary to determine which variations of responsibility should be computed.

According to the Prosecutor, the generic aggravating circumstance of treachery (Art. 47 nr. 1 PC) and the mitigating factors, incorporated by analogy, of acknowledgement of the facts and absolute lack of criminal record (Art. 46 nr. 13 PC) should be considered.

In the opinion of this Judge, the mitigating factors of acknowledgement of the facts and absolute lack of criminal record (Art. 46 nr. 13 PC) should be computed. However, while it is true that Mrs. Olivia F. was totally defenceless before the uncontrolled car driven by the teenager, it is also true that his behaviour, his way of driving, was no different due to the defencelessness of the victim. From what we have seen in the trial, his way of driving the car would have been the same if a large truck had crossed it; simply, in that case, others would have been the deceased. Therefore, the aggravating circumstance of treachery should not be considered, especially if we think about the attempt to save the victim by means of the unsuccessful braking action of the vehicle.

It is worth mentioning that in its accusation the prosecution rightly did not include the very special aggravating circumstance of the homicide of having been committed to "consummate another crime" (Art. 312 nr. 4 PC) -another crime which hypothetically would be the crime of cover-up, provided for in Art. 197 PC:

> "*The individual or official who, after a crime has been committed and without prior agreement with the perpetrators, co-perpetrators or accomplices, even if they are not liable, helps them to ensure the benefit or result of the crime, to hinder the investigation of the authorities, to evade prosecution or to evade punishment, as well as whoever suppresses, conceals or in any way alters the evidence of a crime, the effects of a crime or the instruments with which it was committed, shall be punished with three months' imprisonment to ten years' imprisonment*".

The crime of cover-up is not punishable when committed in favour of a sibling ("*blood relatives in the entire straight line and in the collateral line up to the second degree inclusive, of the spouse or cohabitant, or of the parents or adopted children*", says Art. 26 to which Art. 42 PC refers), except when the accessory after the fact had "*participation in the profit, the price or the result of the crime*" (Art. 42 PC), which clearly does not happen in this case.

Therefore, the reasoning of the Prosecutor's Office was correct in considering that the homicide was committed to commit the cover-up but the very special aggravating circumstance of Art. 312 nr. 4 PC is not punishable under our law because the cover-up was of a brother.

b. The injuries

Regarding the injuries caused to John D., the crime of "aggravated severe injuries", in consummated degree, is configured.

We must bear in mind that in Uruguayan law, injuries are "*any physiological disorder from which a disease of the body or mind is derived*" and are classified as minor, severe or very severe, in

accordance with the provisions of articles 316, 317 and 318 of the PC, respectively. In this specific case, young John D. crashed against the windshield of the car and suffered serious fractures to his skull, neck, arms, and ribs. Undoubtedly, and according to the expert opinion of the medical expert Dr Ellen A., such injuries caused John D. to be unable to attend to his ordinary occupations for a period of more than twenty days. In turn, the injuries suffered by John did not cause him an incurable disease, the loss of a sense or any of the other legal hypotheses of "very severe" injuries (Art. 318 PC).

It is clearly a question of "serious" injuries, provided for in Art. 317 of the PC:

> "*The personal injury provided for in the previous article is serious, and the penalty of twenty months imprisonment to six years imprisonment shall be applied, if the fact results in:*
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> *"1. An illness that endangers the life of the offended person, or an inability to attend to ordinary occupations, for a term exceeding twenty days*. (...)".

On the other hand, according to Art. 320 of the Penal Code, the special and very special aggravating circumstances foreseen in Arts. 311 and 312 are applicable to the crime of injuries, "*insofar as they are applicable*". Among them is the special aggravating circumstance of Art. 311 nr. 1 of the PC:

> "*When it is committed in the person of an ascendant or of a legitimate or natural descendant, of a legitimate or natural sibling, ...".*

Thus, the responsibility for the severe injuries that the adolescent Jack caused to his older brother is aggravated by the fact that the victim is his brother. That is why we speak of aggravated severe injuries.

It should also be pointed out that the crime of serious negligent injuries requires a complaint, that is, the Prosecutor does not prosecute it *ex officio* if the victim does not come forward to request that it be investigated and prosecuted, but when it is committed with malice, no such procedural impulse on the part of the victim is required (Art. 322 PC).

Finally, how are these injuries attributed?

We have already seen that the homicide of Mrs. Olivia was committed with adverted recklessness.

As for the injuries, the defence of the adolescent was very insistent that there is no proof that the adolescent had mentally represented to himself the possibility that his brother would be injured. However, from the behaviour shown and from his own statements transcribed above, it arises that he assumed the risk of not being able to "react in time". And just as we concluded

that he accepted the risk of killing one or more persons, it follows that he accepted the risk of dying himself, or of injuring himself, or of killing or injuring his brother, who was in the vehicle without a seat belt and with his movement and cognitive abilities diminished by the alcohol he had ingested.

While it is true that the latter does not arise from a statement of John D. in this trial since John D. made use of his right not to testify against his brother under the protection of Art. 150 of the CPP, it does arise from the statement of Mary J., from the breathalyser test and from the statement of the accident expert (tracks 8 to 13 and 29 to 41 of the audio of August 15).

According to Art. 18 of the Penal Code, the crime is considered non-intentional:

> "*when on the occasion of executing an act, legally indifferent in itself, a result is derived that could have been foreseen but was not foreseen, due to imprudence, lack of skill, negligence or violation of laws or regulations*",

and "*the damage that was foreseen as impossible is considered non-intentional*".

There is no reason to conclude, then, that John's injuries were negligent or that foreseeing accidents with pedestrians was any different from foreseeing the consequences to himself or his brother. Jack prioritised his selfish will to keep his brother from justice over the rights of others and even over the rights of his brother not to be taken in a mad rush that could end very badly for him.

Therefore, the aggravated serious injuries were committed with malice aforethought (specifically, with *dolus eventualis*).

The alterations of liability that the prosecution requests to be computed to the injuries are the same as those requested in relation to the homicide, plus the special aggravating circumstance of the injuries due to the fraternal bond already referred to. The Prosecutor said that, due to the state of his abilities diminished by alcohol, by deciding not to put the seat belt on and making his brother sit where there was no airbag, the teenager left John in a special condition of vulnerability or defencelessness, so that the generic aggravating circumstance of treachery (Art. 47 nr. 1 PC) must be computed.

As already explained in detailing what was proven in the trial, it was not proven that the teenager knew that there was no airbag on the passenger side. Nor was it proven that there was any intent to take advantage of the vulnerability of his brother or that this vulnerability had influenced the actions of the accused teenager.

For this reason, the aggravating circumstance of treachery is not considered as computable. In fact, treachery is defined as a pure attack "treacherous and unsafe attack, at random", traditionally it is said that it implies material concealment, stalking or moral concealment. From the victim's point of view, which is the one adopted by the Penal Code in Article 47.1, it is

required that the victim is "in inadequate conditions of any nature to prevent the attack or defend himself from the aggression".

In addition, the latter is distinguished from abuse of force (Art. 47.6 PC) when the victim is not absolutely defenceless but is not in a position to be able to defend himself with a probability of repelling the offence. Taking these considerations into account in this case, there is no reason to consider the species within the figure of aggravated assault or abuse of force, among other reasons because there was never an attack.

As to the homicide, the mitigating factors of acknowledgement of the facts and absolute lack of criminal record Art. 46 nr. 13 PC) should be computed by analogy to the injuries.

2) How the two offences are linked to each other

Two positions were held in the trial. The Prosecution considers that each serious infraction of the criminal law was committed with an independent decision, and that therefore Art. 54 PC applies. The socio-educational measure to be imposed would then be the one corresponding to the major infraction, increased by the other infraction of the law.

The Defence, on the other hand, stated that the adolescent's decision was only one (to drive so that his brother would not be identified or found) and with the same (one and only) conduct he violated two legal precepts.

Formal or ideal concurrence implies that with a single conduct several legal rights protected by different criminal norms are violated. In such a case, the law provides that just the punishment of the greater offence will be applied. But the law itself contains a caveat, which is that when it appears from the circumstances that the subject intended to violate the two norms the principles of real concurrence will be applied. For example, a subject deceives another by giving him a counterfeit coin in payment. This apparent formality of the concurrence vanishes when it is considered that the subject intended to violate the two criminal rules: a) the one prohibiting the circulation of counterfeit currency and b) the one prohibiting swindling. Taking these conclusions to the case, it is difficult to notice the existence of a purpose when that purpose psychologically does not exist but instead is constructed by the criminal law attributing as purpose or intention that which was simply foreseen. The adverted recklessness is constructed based on a result that is not wanted (and therefore does not integrate a purpose) but which is ratified with the foresight and which the law calls "intent". In conclusion, it seems reasonable to understand that the expression of article 57 PC in the sense of intention to violate all laws, to operate the mechanism of actual repetition (i.e., accumulation of penalties), can only refer to the psychological intention of the individual, not to that which the law subsequently attributes

to him in view of the result. In this way, there would be no inconvenience in sustaining that the conjunction of the crimes of homicide and injury occurs in a regime of formal concurrence.

3) Determination of the measure

According to Art. 79 CNA, all measures adopted may be complemented by the support of technicians, will have an educational purpose, will pursue the assumption of responsibility by the adolescent and will seek to strengthen his respect for human rights as well as the strengthening of family and social ties. The measures will be selected by the Judge, following the criteria of proportionality and suitability to achieve such goals. As well said by the former Minister of the Court of Appeals Dr José María Gómez, "In order to establish the measure to be imposed, several criteria must be taken into account: the effective verification of the illegal act, the participation of the adolescent in it, the proportionality, rationality and suitability of the measure; the age of the adolescent and his personal, family and social circumstances as well as the degree of repentance and maturity of the adolescent, trying to maintain a balance between the sanction imposed on the adolescent and the degree of participation and guilt, also taking into account the magnitude of the damage caused" (cf. GÓMEZ FERREYRA, José María, "Pautas de Determinación de la Pena Juvenil", Judicatura Magazine, edited by AMU-CADE N° 58, Montevideo, July 2015).

Additionally, in the case of an adolescent, deprivation of personal liberty shall only be imposed in the event of a serious act involving violence against another person or for recidivism in committing other serious misconducts, and provided that there is no other appropriate response (rule 17.1 of the Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly in its resolution 40/33 of 28.11.1985, known as the "Beijing Rules").

In this specific case, bearing in mind the very serious harm committed - a young mother of three small children lost her life and Mr. John D. was seriously injured -, also taking into account the level of development of the adolescent -very close to the age of majority-, and the criteria just mentioned, this Judge considers that an adequate judicial measure should be deprivation of liberty, without a regime of semi-liberty, and that, given the seriousness of the act, the preservation of the record, as an accessory measure, is justified. However, due to the attitude demonstrated in accepting the facts and that he has apparently become aware of his mistakes and considering that his intention was to help his brother, instead of establishing the measure requested by the Prosecutor's Office, it will be set at **twelve months of internment in the juvenile detention facilities of INISA**.

I mention by way of example some other cases, similar and different, to establish reasonable and proportional criteria:

- sentence 107/2016 of the Adolescents Court of the 3rd Circuit, confirmed by Judgment 60/2017 of the Family Court of Appeals of 2nd Circuit: homicide with firearm, 3 years, and 6 months internment in INISA.
- Sentence 2/2018 of the Adolescents Court of the 3rd Circuit, confirmed by Judgment 203/2018 of the Court of Family Appeals of 2nd Circuit: homicide with firearm, 4 years of internment in INISA.
- sentence 49/2012 of Court of Family Appeals of 1st Circuit: co-perpetration of homicide with a knife, especially aggravated for having been committed to steal the victim's wallet, 30 months of internment in INISA.
- sentence 106/2013 of the Adolescents Court of the 4th Circuit confirmed by sentence 172/2014 of Court of Family Appeals of 2nd Circuit: homicide during a "game" with a firearm by way of eventual malice: 13 months of internment.
- sentence 85/2021 of Court of Family Appeals of 2nd Circuit: non-intentional homicide (in traffic accident) resulting in two deaths and omission of assistance: non-custodial measures consisting of 22 months of probation, with accompaniment of an INISA educator, obligation to receive psychotherapeutic treatment, prohibition to drive motor vehicles, and community service, the latter for two months.

4) Confidentiality of these proceedings

Without prejudice to the fact that the record will be preserved in the corresponding registry and that the elimination of these judicial proceedings will not be ordered, it must be kept in mind that this is a reserved (non-public) process and that the divulgation by any means of the identification of the adolescent's person is prohibited (Arts. 96 and 97 of the CNA).

For the aforementioned reasons, the cited norms and Arts. 72 to 116 and 222 of the CNA, arts. 1, 3, 18, 46 nr. 13, 60 nr. 1, 310, 317, 320 and 322 of the Penal Code, articles 1st, 2, 13, 119, 120, 270 and 271, concordant and complementary of the CPP, and articles 238 and 239 of 19,670 Act,

I RULE:

I declare the adolescent Jack D. as the responsible author of a serious infraction to the criminal law typified as <u>Homicide</u>, in formal concurrence with another serious infraction to the criminal law typified as <u>Aggravated Severe Injury</u>.

Hence, as a socio-educational measure I impose a deprivation of liberty measure of internment in INISA for the term of twelve months, with deduction of the detention and precautionary measure suffered, and without prejudice of its modification or cessation according to evolution (Art. 94 CNA).

As an accessory sanction, the judicial and administrative record of this case will be preserved (Art. 222 paragraph 3 CNA in its wording given by 18,778 Act).

Once non-appealable, comply.

In due time, archive this file.

Dr. Ana Paula Galguz

Judge