



# Poder Judicial

República Oriental del Uruguay

Montevideo, June 13, 2022.

## IN VIEW OF:

this case identified as "**D., John and J., Mary. - Alleged commission of an Attempted Specially Aggravated Homicide - ORAL TRIAL**", docket number 488-222/2021, in which participate the Prosecutor's Office of First Circuit represented by the Prosecutor Dr Pedro García, the accused John D. assisted by the Defender Dr Pablo Sánchez and the accused Mary J. assisted by the Public Defence in charge of Dr Claudia Alpina, for final judgement of the Penal Court of First Instance of the 1st. Circuit,

## RESULTING:

### 1. Incorporated proceedings

On March 28, 2022, the resolution to proceed with the oral trial was issued in the Penal Court of Second Circuit, which referred the case to this Court.

From said decision, it appears that the accused, Ms. Mary J., was arrested at 11 p.m. on March 26, 2021. The following day the arraignment hearing took place. Ms. J. served a precautionary measure of total house arrest until June 9, 2021, and from that moment onwards, she is serving pre-trial measures consisting of establishing a residence, prohibition to leave the country and prohibition of communication by any means with Mr. Bill G., Bob L. and Ben K. -measures ordered until there is a non-appealable judgment-

It also emerges from that resolution that on April 8, 2021, while he was hospitalised in the local hospital, restrictive measures were imposed on Mr. John D., in application of art. 222 of the Code of Criminal Procedure (hereinafter, CPP). Later, on June 9, 2021, when he was discharged from hospital, John D. was apprehended. On the same day the arraignment hearing was held, and Mr. D. was placed in pre-trial detention for 90 days. This pre-trial measure was extended in successive hearings and is expected to remain in force until a final, non-appealable judgment is pronounced.

In compliance with the schedule of this tribunal, the trial hearings were held on May 30 and 31 of this year. The opening statements of both parties were heard, evidence was presented, the accused Mary J. gave voluntary testimony, and after a pause, closing arguments were said. Finally, this Judge asked the defendant John D. if he wished to make a statement.

Upon his refusal, the debate was closed, and this Judge called for the present judgment to be heard.

## **2. The subject of this trial**

**2.1** The purpose of this trial is to determine whether the accused can be convicted as perpetrators of the crime attributed to them by the Prosecution, that is, to establish whether they carried out the material acts of the criminal offence of murder with intent to kill Mr. Bill G. and whether the victim's non-death was due to causes beyond their wills and control. If so, the participation of each of the accused and the corresponding penalty shall be determined.

### **2.2. The Prosecution's case**

In his opening argument, the Prosecutor stated, in summary, as follows.

On March 26, 2021 Mr. John D., who worked as a mechanic in a garage, received a salary increase. This was the reason to go out to celebrate together with his partner Mary J. and his younger brother J. D. At approximately 8 p.m. they arrived at the "Blue Moon" bar, located in Solis and Florida of this city. Once there, John D. drank several beers. At around 10.30 p.m. Mr. D., who was already inebriated, got into a heated argument with other bar patrons whom he had never met before. A few minutes later, Mr. D., his girlfriend and his brother left the bar and went to the car park, but the other people with whom Mr. D. had argued also went there and saw John D. and his companions getting into John D.'s car.

Mr. Bill G. then went to his own car and took a screwdriver, with which he scratched the bonnet of John D.'s car.

Immediately afterwards -according to the Prosecutor's account of events- John D. got out of the car and attacked G. He shouted at him that he was going to kill him, insulted him and snatched the screwdriver out of his hands.

His partner Mary J. seconded him in the aggression, pushed Bill G., insulted him and reproached him for having provoked John D.

At that point John D., with the same screwdriver he had taken from the victim, tried repeatedly to stab him in the chest and stomach. At a certain point and in the face of the violent aggression of both defendants, Bill G. slips and falls to the ground; Mary J. throws herself on top of him and in those circumstances, in which the victim is lying on the ground and immobilized by Mary J., John D. pierces him in the neck with the screwdriver.

The victim begins to bleed profusely but is still alive. Mary J. then attempts to choke him by pressing on his neck with both hands, but Ben K. and Bob L. forcefully pull her off the top of their friend, try to stop the bleeding, and call 911 emergency. Mary J. fled the scene, running, but was apprehended fifteen minutes later by the Police.

John D.'s brother, a minor, witnessed the whole incident. He saw that John, after stabbing the victim, was also lying on the ground, so he dragged him to his car, put him in the passenger seat and drove away in a totally reckless manner, which in turn caused the death of another person

and serious injuries to his brother John D., all of which were the subject of an adolescent offender proceeding, separate from these adult proceedings.

Fortunately, in only 7 minutes an ambulance arrived at the car park of the bar. Bill G. received the necessary medical assistance and survived the attack.

Finally, in his opening statement, the Prosecutor added that the alterations of responsibility that should be taken into account in this case are: for both defendants, the special aggravating circumstance of the homicide of having been committed in the presence of a minor (art. 311 nr. 5 of the Penal Code, hereinafter PC); for John D. the generic aggravating circumstance of recidivism (art. 48 nr. 1 PC); for Mary J. the mitigating factors of absolute lack of criminal record and acknowledgment of the facts (art. 46 nr. 13 PC). He affirmed that during the oral trial he would prove these facts, and that due to the importance of the legal right damaged, the sentence requested in the indictment, of **ten years** imprisonment for John D. and **eight years** imprisonment for Mary J., was the appropriate one.

### 2.3. The Defences' points of view

Both defendants emphatically oppose the Prosecution's case.

**The Defence for John D.** argued that the Prosecution would not succeed in proving what it claims, as all the events were the result of a reaction to the damage done to his vehicle.

He disputes the Prosecutor's description of how the events occurred and explains firstly that he was accompanied that night by the people for whom he has the best feelings: his younger brother and his partner. Those two good people who accompanied him, seeing the argument that had arisen in the bar, protected him by convincing him to leave, in order to avoid any inconvenience. When they were at the car park, they saw Bill G. and his two friends approaching them in a threatening manner - especially Bill G., who wielded a screwdriver as a weapon, with which he made a deep and extensive scratch on the bonnet of John D.'s car.

The place where Bill G. made the scratch is not insignificant - said the Defender - because he made the scratch on the bonnet, i.e. in a place that was directly visible to John D., who was sitting behind the wheel, and blocking the car's departure - unless John D. had wanted to run him over.

The Defender also notes that Bill G. was with two other young men. There were three men against John D., his girlfriend and his teenage brother. There was every indication that the aggression of Bill G. and his friends was going to continue *in crescendo*, and there was a noticeable disparity of forces between the aggressors and the assaulted. John D. felt that his brother and girlfriend were in serious danger, and he felt the need to protect them and even himself against an unjust attack by three violent adults.

Furthermore – D.'s Defence continues - the scratch on the bonnet of his car triggered in John D. an emotional state of anger greater than that of any person in such a situation, because of the time and money invested by D. in fixing and "tuning" his car. It wasn't a standard bonnet because it wasn't a standard car. That car was his hobby, his source of pride, his passion for a job well-done. It was a 1975 vehicle in immaculate condition, and Bill G. clearly realised the enormous harm he was causing to John D. with that terrible scratch.

For all these reasons it was logical and necessary for John D. to take the weapon from Bill G. and neutralise his aggression, to protect his affections, family and property. He did just that. He succeeded in taking the screwdriver from him.

However, Bill G. did not desist from his aggression and John D. had to continue to defend himself, being menacing in order to prevent Bill G. from retrieving the screwdriver and hitting or stabbing him.

At a certain point, unfortunately, Mary J. got too close, was caught in the middle and Bill G. caused her to fall. Mary J. was in grave danger, on the ground, with Bill G.

John D. reacted in the only way possible to save his girlfriend: he used the screwdriver to stop the assailant.

John D.'s defence considers, in sum, that there was an unlawful assault by Bill G. and that John D.'s conduct lacks any unlawfulness because he acted in self-defence of Mary J., and therefore only an acquittal is reasonable.

**Mary J.'s Defence**, for its part, argued that at no time did Ms. J. injure, nor did she intend to injure and much less attempt to kill, Mr. Bill G. She did not even intend to insult or assault him in any way. She claimed that she only shouted as an expression of her frustration, because she was aware of the bad temper of John D., who was her partner at the time. Mary J. could have stayed away from the scuffle, but she chose to intervene to separate them, and in the struggle, she fell to the ground when Bill G. slipped. An instant later, she saw G.'s neck bleeding, so she put her hands to stop the flow of blood and save his life. The Defence notes that Mary J. is a volunteer at a nursing home and that two years earlier she had passed a first aid course, so she knew how important it was to stem the flow of blood. Then Bill G.'s friends forced her away and she again wanted to save Bill G.'s life. She remembered that her brother Steve is a paramedic and that he lives only two blocks from the Blue Moon Bar car park, so she ran to her brother's house, looking for him, to call for help. Just before she arrived, she was stopped by two police officers.

Her Defence emphasises that Ms. J. could have fled in John D.'s car, or run in another direction, but did not do so. She ran to quickly bring her paramedic brother. Her conduct was at all times dissuasive and assistive, therefore in no way reprehensible. She pleads then for her acquittal.

#### **2.4. Evidence on which the judgement is based**

Statements were received at the hearings from: Bill G., Bob L., Ben K., Peter V. and Steve J., police officers Greg D., Cathy P., Arthur Z., Craig H. and medical expert Dr. Ellen A. The defendant Mary J. also testified.

Material evidence was included: John D.'s breathalyser which showed 1.2 grammes of alcohol per litre of blood, Mary J.'s first aid certificate and crime report 212/2021 containing the photographic survey carried out by the Forensic Science Police at the scene of the crime.

### **3. Conclusions of the Prosecution and the Defences**

In their respective closing arguments, the Prosecution and the Defences concluded by reaffirming what was announced in their opening statements.

#### 4. Facts to be considered true and proven

In the absence of stipulations of facts reached under art. 268.3 CPP, there are no facts taken initially as true.

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However, the following facts were fully established by the evidence presented at trial:

- On the evening of March 26, 2021, at approximately 8 p.m., John D. went to the Blue Moon bar accompanied by his partner, Mary J., aged 23, and his younger brother, J. D., aged 17. They had arrived there in John D.'s car. It was a 1975 Ford Escort 1600 British-designed car that John D., a mechanic, had carefully upgraded ("tuned") over a number of years.

- At another table in the same bar were three friends: Bill G., Bob L. and Ben K., who had no previous connection or acquaintance with John D.

- At around 10:30 p.m., John D., who had had several beers, had an argument with the three people just mentioned.

- To prevent annoyance, Mary J. and J. D. quickly persuaded John D. to leave the bar. They paid and at 10:40 p.m. went to the car park. John D. was angry and drunk, which is evident from the testimony of witnesses Bill, Bob and Ben, and from the breathalyser test which showed a result of 1.2 grammes of alcohol per litre of blood.

- In the following minutes, several events of criminal relevance occurred. John D. sat behind the wheel of his car. Bill G., Bob L. and Ben K. drove out to the same car park. Bill G. took a screwdriver from his own car and with it made a long, deep scratch on the bonnet of John D.'s car, who angrily got out of his car, lunged at Bill G. and ripped the screwdriver out of his hands, shouting, " I'm gonna kill you, you bastard!". Defendant Mary J. approached, yelled at Bill G. "You idiot, why did you have to provoke him?" and gave him a shove. Bill G. did not fall for this shove, nor did he talk back to Mary J. John D. attacked Bill G. repeatedly with the screwdriver, attempting to stab him in the chest and stomach. Because of the imprecision in his movements (typical of an intoxicated person), John D. misses each time, until at one point Bill G. slips and falls to the ground, dragging Mary J. in his fall, so that Mary J. fell on top of Bill G.

- Just as Bill G. is on the ground with Mary J. on top of him, John D. drives the screwdriver through Bill's neck, severing an artery. Bill G. begins to bleed profusely from his neck. Mary J. puts her hands on his neck until Bob and Ben force her off. Mary J. gets up and runs out. This emerges from the eyewitness statements and the autopsy report of the medical examiner.

- John D.'s younger brother takes him to the car and begins to drive the car at high speed and without turning on any lights, to prevent his brother from being identified and held accountable for stabbing Bill G. This was acknowledged by the adolescent.

- Mary J. was apprehended by two police officers, fifteen minutes after the stabbing, on Rose Park Lane, a street about two blocks away from the scene of the incident. Her brother, Steve J., who is a paramedic, lives on that street, but he did not know that Mary J. was there because she was stopped by the police before she arrived at his home. This emerges from the statements of police officers Greg D. and Cathy P., paramedic Steve J. and the defendant herself. It should be noted that the police officers testified at trial that at the time of her arrest, Mary J. pleaded with

them insistently to go and get her brother, who lived a few metres away from the place of arrest, and to take him to assist the injured man. The defendant John D. is 25 years old and has a criminal record with a conviction for an intentional crime within the last five years. His conviction was for a theft offence and in the year 2018, as can be seen from the certificate of the National Registry of Judicial Records incorporated by reading.

- Defendant Mary J. has no prior record, according to the certificate that was incorporated by reading at the trial.

## CONSIDERING:

### 1) Typicality of the proven facts

On the basis of the various means of evidence referred to above, the prosecution reached the very high standard of proof required for a conviction (cf. Arts. 142.1 and 142.3 of the CPP and, among others, BAYTELMAN, Andrés and VARGAS, Juan Enrique, "Habilidades y Destrezas de los Jueces en la Conducción y Resolución de los Juicios Orales", in the collective work "Oral Trial", directed by Santiago Martínez and Leonel González, Adversarial Criminal Procedure Collection, Del Sur editors, Buenos Aires, 2019, p. 180 to 182) but **only for one of the accused, John D.** This Judge considers that Mary J.'s conduct does not fall within the criminal type attributed by the prosecution, and therefore she will be acquitted.

#### a. The actions of the defendant John D.

The actions of the accused John D. fall, beyond all reasonable doubt, within the provisions of Arts. 60 nr. 1, 310 and 311 nr. 5 of the Penal Code.

John D. intended to kill Bill G.

He even announced it verbally ("I'm gonna kill you"). He tried several times without success attacking Bill G.'s torso and stomach, and finally he stabbed him with a proper weapon (the screwdriver) through the victim's neck and wounded an artery. All this was done in front of a minor, his own brother, and with awareness of the attack and the presence of the teenager.

John D. must answer as the criminally responsible author of the crime of which he was accused, as he personally executed the consummative acts of the criminal type, which in spite of this was not consummated, for reasons beyond the defendant's will and control. At first Mary J. and then Ben K., held back the arterial haemorrhage with their hands, and it took only seven minutes for the ambulance to arrive. It was these three quick successive actions that prevented death as a result of the conduct of John D.

As to the subjective aspects of the homicide committed by the defendant, we must say that John D. responds with direct intent, since he clearly had the will to kill Bill G. Note the place where the thrust was inflicted and the body posture of the victim at the time: he was on the ground, while the defendant was standing up. The accused bent down and inserted the screwdriver deep into the victim's neck. He pierced the neck with the screwdriver. This Judge considers that this

fact is sufficiently eloquent: if the intention had been other than to kill him, that kind of stabbing, in that precise place, would not have existed.

As for the issue developed by the Defence regarding legitimate self-defence, this Judge considers that there is no evidentiary support for its version, without prejudice to the alterations of liability to be computed, which are explained below.

Self-defence is defined in Uruguayan law in Art. 26 of the Penal Code. Anyone who acts in defence of his person or rights, or the person or rights of another, is exempt from responsibility, provided that there is an illegitimate aggression, lack of sufficient provocation on his part and the use of a rational means to defend himself. As Professor Cairoli says, "*aggression means attack, or at least an attempt to attack (...). Whoever takes a cudgel and raises it in front of another person in an aggressive attitude is already attacking, because his conduct implies an imminence of danger (...). The danger of the aggression must be imminent and present, that is to say that it threatens or seriously endangers the life, physical integrity or other legal assets of the person attacked*" (CAIROLI, Derecho Penal Uruguayo, La Ley editor, volume I, Montevideo, p. 374 and 375).

According to the facts proven at trial, there was unlawful conduct by Bill G. in scratching the bonnet of John D.'s car, but there was no endangerment of the people inside the vehicle. John D. could have left the scene with his girlfriend and brother, all of whom were safe, but he did not even attempt to do so. On the contrary, he immediately got out of the vehicle and attacked Bill G. This aggression is also not a proportionate response to the previous unlawful aggression of which the legitimate defence is supposed to be exercised. For all these reasons, there is no legitimate self-defence that would allow for an exemption from unlawfulness and, therefore, it is possible to speak of a criminal wrongdoing.

#### **b. Mary J.'s actions**

According to the proven facts, Mary J. did not intend to kill Bill G.

Quite the contrary, she wanted the confrontation between Bill G. and John D. to stop, to such an extent that she interposed herself between the two of them and ended up falling to the ground on Bill G.

After the wound inflicted on Bill G. by John D., she placed her hands on Bill G.'s neck, but not with the gesture or intention of strangling him, but to stop the bleeding and save his life. This emerges from the eyewitness statements and the autopsy report of the medical examiner.

Her exit from the scene may have been a flight or a search for her paramedic brother, but the proximity of the brother's home, the fact that he is indeed a paramedic and the emotional state and words said by Mary J. to the Police at the time of her arrest are persuasive about her intention to save the wounded man and not to flee the scene or omit assistance to the victim.

## **2) Altering circumstances and individualisation of the penalty**

In order to establish the penalty to John D., the minimum and maximum penalties for the type of crime in question must be taken into account; it is not possible to exceed what is required by

the Prosecution and all the information on the wrongful fact, the seriousness of the act, the culpability, the circumstances altering responsibility, the dangerousness of the person and the form of concurrence of the crimes must be weighed up.

The specific aggravating circumstance of the presence of minors (Art. 311 nr. 5 PC, in its wording given by Art. 2 of 19,538 Act) and the generic aggravating circumstance of recidivism (Art. 48 nr. 1 PC) should be mentioned in relation to John D. as alterations of responsibility. It should be noted that *"our legal system is that of recidivism with a specific time limit: five years from the date on which the sentence for the previous offence became res judicata (...). Furthermore, it should be said that our legislation on recidivism does not differentiate between generic recidivism (when the new offence is different from the first one for which he was already convicted) and specific recidivism (when the offence is of the same nature as the offence for which he was already convicted)"* (CAIROLI, *op. cit.* p. 970).

Night-time is not taken into account on the grounds that the relative darkness of the car park was not deliberately sought or taken advantage of by the defendant to commit the crime (cf. CAIROLI, *op. cit.*, p. 958).

As a mitigating factor, the provocation provided for in Art. 46 nr. 11 PC has to be considered, since D. acted *"under the impulse of anger caused by an unjust act"*. The scratching of the defendant's prized car was undoubtedly an unjust act and an unlawful aggression. It is worth transcribing the reference made by CAMAÑO ROSA, included in judgement 102/2007 of the First Criminal Court of Appeal, published as case 72 of the Magazine "de Derecho Penal N° 19", edited by the Fundación de Cultura Universitaria, Montevideo, 2011, p. 288: *"This supposition, as CAMAÑO ROSA says, refers to the agitated affective state, produced by the provocation in the agent's mind, as a result of an unjust act. For the aforementioned author, it must be an emotional state (an acute, short-lived phenomenon) and not simply a state of passion (a prolonged phenomenon). The objective cause or motive for the anger, i.e. the provoking act, according to the rule, must be "an unjust act". According to the renowned jurist, it can consist of any offence, suitable to provoke anger and can refer not only to the personality (in a broad sense) of the person who reacts, but also to other people (relatives, friends), ideas or things dear to them"*.

*"Unjust does not mean criminal, or even opposed to law, but unjust from the moral point of view (...). The concept of unjust act is relative because it must be linked for its correct interpretation and assessment with the environment in which it occurred, with the culture of the antagonists and other circumstances of the act, time, place where it took place, etc."* (CAIROLI, *op. cit.* p. 931 and 933).

Voluntary drunkenness has to be also considered as a mitigating factor, since it was proven that the accused was intoxicated and that this was not premeditated in order to commit the crime. Art. 46 nr. 4 PC enables voluntary drunkenness not premeditated to commit the crime (as in this case) to be counted as a mitigating factor when it is full. Although the Code does not define "full drunkenness", it defines "serious drunkenness" in the Art. 365 nr. 3 PC: from 1.2 grammes of alcohol per litre of blood. Undoubtedly, this legal criterion means that from that blood alcohol content there is a significant cognitive, motor, and will alteration. That is exactly the blood alcohol content that John D. had at the time of the facts, according to the evidence produced. Therefore, considering Art. 46 nr. 4 and nr. 13 of the Penal Code, his cognitive, motor and will impairment merits the computation of the mitigating circumstance.

All told, Art. 86 of the Penal Code establishes that "[t]he judge shall determine, in the sentence, the sentence that, in his opinion, corresponds, within the maximum and minimum established



by law for each crime, taking into account the greater or lesser dangerousness of the guilty party, his or her personal background, the quantity and number - especially the quality - of the aggravating and mitigating circumstances that concur in the act".

In this case, in short, John D. committed attempted murder as the perpetrator and with direct malice aforethought. His responsibility is mitigated by provocation and drunkenness, and increased by the special aggravating circumstance of having committed the crime in the presence of a minor and the generic aggravating circumstance of recidivism.

According to Art. 311 of the Penal Code, the penalties for especially aggravated murder can range from a minimum of ten to a maximum of twenty-four years of imprisonment.

Pursuant to Art. 87 of the Penal Code, as amended by Art. 3 of 16,707 Act, the crime of **attempted** homicide is punished with one third of the penalty that would correspond to the completed crime, and the penalty may be increased to **two thirds**, taking into account the seriousness of the act and the dangerousness of the agent.

Therefore, the **minimum** penalty for especially aggravated attempted murder is one third of ten years, i.e. **3 years and 4 months** of imprisonment, and the **maximum** penalty is two thirds of twenty-four years, i.e. **16 years** of imprisonment.

The prosecution requested a sentence of ten years imprisonment.

Even though each case is unique and distinct, our jurisprudence has generally applied sentences of between 3 years and 8 months and 6 years to especially aggravated attempted murder. By way of example, judgments 245/2008 of TAP1, 205/2010 of TAP2, 420/2017 of TAP2, 146/2019 of TAP3, 136/2020 of TAP3, 41/2021 and 74/2021 of TAP4 and 992/2022 of the Supreme Court of Justice, all available in the Public Base of National Jurisprudence, and the "table" or "summary table" of sentences imposed in cases of Homicide, can be read in the work of Dr. Jorge VAZ, "Jurisprudencia de la SCJ", in the work of Dr. Jorge VAZ, "Jurisprudencia Sistematizada del Derecho Penal 2020", edited by the Fundación de Cultura Universitaria, Montevideo, 2022, p. 235-239.

Considering all these parameters a sentence of four years and four months' imprisonment is appropriate in this case.

Finally, it is clarified that both for the offence in question and for the amount of the sentence imposed and the defendant's recidivist status, in application of Art. 295 bis of the CPP there is **no possibility of probation**, so that the sentence must be served in its entirety in effective deprivation of liberty in a penitentiary unit.

For the above reasons, the aforementioned rules and the provisions of Arts. 12, 18 and 80 nr. 4 of the Constitution of the Republic; Arts. 1, 3, 18, 46 nrs. 4, 11 and 13, 48 nr. 1, 60 nr. 1, 66, 80, 86, 87, 105 (d and e), 106, 310 and 311 nr. 5 of the Penal Code; Arts. 1°, 2, 6, 13, 119, 120, 141 to 144, concordant and complementary A of the CPP, and Arts. 238 and 239 of Law 19.670,

**I RULE:**

***Acquitting Mary J. and consequently ordering her immediate release and the closure of the proceedings in her respect.***

***Convicting John D. as the criminally responsible author of the crime of Specially Aggravated Homicide, to a sentence of four (4) years and four (4) months of imprisonment, with discount of the suffered detention and of the served precautionary measures.***

***When non-appelleable, comply.***

***In due time, archive this file.***

Dr Juan José Ainmán Themis

Judge