

**THREE ORAL ARGUMENTS IN THE CRIME OF RAPE OF A VULNERABLE
PERSON: PSYCHOANALYTIC APPROACH**

*TRÊS SUSTENTAÇÕES ORAIS EM CRIME DE ESTUPRO DE VULNERÁVEL: ABORDAGEM
PSICANALÍTICA*

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RESUMO

A partir da Advocacia em três casos de estupro de vulnerável, e tendo em conta a recepção das teses nos tribunais, procurou-se ajustar os roteiros e convertê-los em texto, acrescentando citações, notas e referências. Trata-se, sem dúvida, de uma abordagem interdisciplinar que invoca ao direito penal (e à criminologia) algumas categorias da psicanálise, notadamente úteis à compreensão dos fatos, dos não fatos e das respectivas imputações criminais nos casos concretos.

Palavras-Chave: Estupro. Vulnerável. Psicanálise. Verdade.

ABSTRACT

Based on advocacy in three cases of rape of a vulnerable person, and talking into account the reception of the theses in the Courts, I tried to adjust the scripts and convert them into text, adding citations, notes and references. It is, without a doubt, an interdisciplinary approach that invokes to criminal law (and to criminology) some categories of psychoanalysis, notably useful for the understanding of facts, non-facts and the respective criminal imputations in concrete cases.

KEYWORDS: Rape. Vulnerable. Psychoanalysis. Truth.

Summary: 1. First statement; 2. Second statement; 3. Third statement..

Blessed are those who hunger and thirst for righteousness, for they will be satisfied. (Mt 5, 6)

FIRST STATEMENT

In April of 2019, before the 4th Criminal Chamber of the Court of Justice of the State of Paraná, I argued, on appeal, for the defense of two defendants, father and daughter – convicted in the first instance – an unusual case that involved, according to the prosecution, “double incest”, or incest in the double degree, concerning sexual relations between father and daughter in the presence of (and with) the granddaughter/daughter. To clarify: father (“A”, in his fifties), daughter (“B”, in her twenties) and granddaughter (“C”, in early childhood), three direct generations, in the same sexual scene.

The entire accusation stemmed from three aspects: a) an alleged sexual abuse suffered by the daughter [B], as a teenager, by her own father [A]; b) the knowledge of this fact by the husband [D] of this daughter [B], and the subsequent contentious divorce between them [D] and [B]; c) the sexual behavior of the daughter [C] of the couple [D] and [B] at school, reported to the father [D] by the teacher.

The following is the outline of the oral argument¹.

1.

[Greetings.]

There is a painting by Jean-Léon Gérôme entitled *The truth coming out of the well* (1896) which depicts the following scene: a small walled forest, in the center an old well made of stones, and a totally naked lady coming out of it with a horrified face.

¹ Assim estou procedendo às três sustentações ora apresentadas: a partir de meus roteiros de sustentação, acrescentarei citações, notas e referências, a fim de melhor ilustrar os argumentos. Evidentemente, preservarei a identidade das partes. Duas dessas sustentações já foram publicadas, separadamente, na Revista Direito UTP, em 2022. Todavia, agora restam reunidas, corrigidas e acrescentadas as da terceira sustentação.

The legend depicted here by Gêrôme says that on a pleasant, hot afternoon, the lie invited the truth to bathe in the well. The truth was reluctant, but finally agreed. The two undressed and entered the well. At a certain point, the lie broke free and ran away, leaving the well ahead of the truth. It put on the clothes of the truth and wandered the world. The truth, sensing the escape of the lie, came out of the well and couldn't find its own clothes: it wandered naked through the world. It was, of course, demeaned, shunned – because modesty prevailed. And she returned to the well, still naked, embarrassed.

The truth retreated into the well and it lies roamed freely. That's because people, after all, would always rather see a lie dressed up as the truth than the naked truth.

2.

The problem of truth is one of the dearest to philosophy and law. It comes out of classical Greek philosophy and, labyrinthine, reaches contemporary philosophy of language; it passes through all of medieval [scholastic] theology and modern rationalism and its derivations. And although we could choose from an endless menu of theoretical references to illustrate the theme, the case at hand here recommends, for better grounding, psychoanalysis in its state of further elaboration, from Jacques Lacan onwards (obviously, since Sigmund Freud). The most appropriate categories are: the Real, the symbolic and the imaginary.

3.

Straight to the point. Lacan says that there is always a tension between what is real and what language tries to capture. We are therefore always limited – alienated! – in language (“the limits of my world are the limits of my language” – cf. Wittgenstein).

But it is in the dream, in the flawed act, in the chiste, in the symptom that the truth is expressed². These “discursive flaws” cry out to be heard. And if we don't listen, if we despise them, anguish, neurosis – we could say... mistake, lies (dressed up as truth) ensue. Because the truth, therefore, lies in the lack, in the

² Essas são as formações do inconsciente. Veja-se a “trilogia” do inconsciente, de Freud, em A interpretação dos sonhos (1900), Sobre a psicopatologia da vida cotidiana (1901), e O chiste e sua relação com o inconsciente (1905). Em Lacan, veja-se o Seminário 5: As formações do inconsciente (1957).



gap, in the emptiness (This emptiness is desire: the desire to possess the desire of the Other. The desire of the other that doesn't fit into language).

That's right. The Real criticizes what is in front of us: this organized, ordered, cohesive reality, the cover process, the back cover, the rite, the perfect discourse. That is precisely what alienation is. Because speech hides and masks reality – the truth! – than it reveals it. So what is the Real? It's not the thing, the object, the being; it's what's “in between” all that. And so, finally, the Real is not realized. The Real is impossible. And to live is to deal with these impossibilities (cf. Dunker).

4.

Let's go to the “between”, the gap, the discursive flaw – in the specific case. There are two relevant documents in the case file: a “Psychological Care Report” and a “Psychological Report”. The first, signed by a private psychologist and attached by the prosecution; the second, signed by the judicial psychologist of the court of origin.

The first document, from January of 2016, can be summarized and commented on as follows:

(i) psychological counseling of the child for two months, in seven sessions. The treatment began between November and December of 2015, so it was almost two years after the events (which date back to early 2014); the child was two years old at the time of the events, and was already four years old at the time of the “Report”. Such temporality, especially at this age, causes differences in terms of narrative and capacity for expression and communication.

(ii) it was the father [D] and paternal grandparents (therefore ex-husband and ex-in-laws of B) who sought psychological care for the child and ordered the “Report”. There is, therefore, relative reliability in both the care and the document.

(iii) the search began when the child began to display what the school teacher considered to be “inappropriate behavior”, such as masturbation and aggression, which supposedly “increased” after visits to his mother's house [B], despite the fact that he verbalized that he “hasn't seen her mother for a few months”. There is a clear contradiction between “[aggression] increased after visits to the house of her mother” and “she hasn't seen her mother for a few months”. This aggression merits discussion. Is it the aggression of the child because of the

alleged sexual abuse she suffered, or because of the “disappearance of the mother” that occurred after the protective order was put in place by the father? This was never investigated from a psychoanalytical perspective, which represents a serious gap in the investigation of the case.

With regard to the masturbation of the girl, noticed by the teacher at school, the theory of sexuality leaves no doubt about the practice in early childhood, revealing prejudice or ignorance to say that there is “inappropriate behavior” in the event. The prevalence of Christian morality is notorious, since it is known that the paternal family is closely linked to the conservative evangelical congregation – which extends to the school of C itself, a notorious Christian school located in the city of Curitiba.

(iv) The “Report” states that when talking about his mother, C shows “signs of stress, throwing the toys on the floor and asking to go to the bathroom”... interpreted by the psychologist as an “attempt to escape the subject”. Same as the argument above: the stress, aggression and the bathroom (“escape”) were caused by the alleged sexual assault or by the “disappearance of the mother” (protective order: two years without seeing her).

(v) In one session, C reported that she didn't like going to her mother's house “because [A] kept showing me his dick”, and that “her mother and [A] touched [her] vagina”. From this position, the “Report” concluded that the speech of C is contextualized, with appropriate emotion (“upset and aggressive”), with strong indications of being true. For the first time, sexual aggression is present in the narrative of the child, but with an isolated phrase that deserves further investigation. In these “ready-made sentences”, the implantation of false memories in the child by the paternal family cannot be ruled out. Furthermore, the contracted conclusion of the psychologist is unilateral and hasty, based on a one-page “report”, just like a “statement”.

The second document, from June of 2016, can be summarized and commented on as follows:

(i) listening procedure in just two sessions, as a substitute for testimony at the pre-trial hearing. The procedure is an analysis of the case file by the court psychologist and these mere two sessions with the child, two and a half years after the events..

(ii) at the first opportunity, with toys, C tells the “doctor” (psychologist) about the problem with her “daughter” (doll): “she keeps touching her [vagina], I've already told her she can't touch her [vagina]”. Let's remember the speech stumble



in Freud–Lacan: this verbalization by the child is very likely to be the result of the repression of masturbation by the teacher and the paternal family, that moralizing family that engineered the whole plot.

(iii) In the second session, when asked to talk about her mother, she said: “I can't tell him that story; he'll be sad with me”. To clarify, “he” is God. Two perceptions about this speech: the word “story” (in the failed act, the hypothesis of the reproduction of a discourse arises); and “God” as the maximum expression of that Christian moral repression through the religious formation of the paternal family.

(iv) four strong reports of alleged sexual abuse: 1. her mother and grandfather touching, biting and pinching her vagina; 2. Nudity of her mother and grandfather; 3. physical aggression (“hitting her buttocks with a stick”); 4. masturbation of her grandfather and coitus between her mother and grandfather. This narrative, which now appears for the first time, is very fanciful (absurd, fantastic) and contradictory in its relationship with the mother: in the first session, she said that “she was a good mother”, and in the second session she said that “that mother was very bad”. So which “mother” is the child talking about? Mother B or the paternal grandmother? What is the discursive temporality? The scenes supposedly took place when C was two years old: how can we conceive two and a half years later (still at the age of four, almost five) a narrative of nudity, aggression, masturbation and coitus?

(v) conclusion: emotions, language, memory, reprimand, speech. “The sexual subject matter is atypical for her age, which makes the speech [C] indicative of sexual abuse”. The one–line conclusion is rushed and perpetrated on false logic: >> atypical subject matter, >> therefore >> there is abuse. It is also provisional (“indicative” of abuse) which, of course, would merit expansion, discussion, counter–evidence... another serious flaw in the instruction.

So, what are the gaps in the speech of C and in the two psychological reports in the case file?

a) the timing of the “Reports”: approximately two years and two and a half years after the alleged facts; children two years old at the time of the facts, and four years old, almost five, at the time of the analysis.

b) paternal family: repressors (castrators) with notorious conservative Christian morals.

c) in the development of the genital phase, masturbation is a natural occurrence in children from two to five years old.

d) aggressiveness: ambiguity between alleged sexual abuse and the disappearance of the mother (due to a protective order granted to the father).

e) description of sexual events: fanciful narrative (fantastic, absurd and incompatible with the capacity for expression and communication of a four-year-old).

f) speech failure: this “story”; “God” will be sad.

g) contradiction about the goodness versus evil of the mother – which mother?

h) contradiction about temporality with the mother (visits the mother versus not seeing the mother for months).

i) hasty, provisional and unilateral conclusions (on one page, in one line, in a few sessions, without contradiction, without counter-evidence).

5.

In this case, both the faulty act and the fantasy indicate the suggestion of the paternal family. This gap provided by the child (“history”; “God”; “good mother vs. bad mother”; “you can't touch [the vagina]” – castration and repression, etc.) is precious for understanding that we are dealing with the repetition of a discourse, a commentary (in the Foucauldian sense³), and not an original discourse. This is where the truth touches the Real: in the impossibility of it having happened, in the suggestion of a “story” to a child between two and four years old, in the implantation of false memories, in the monstrous manipulation of the own conscience of the daughter/grnddaughter for a hidden – and subsequently known – purpose, which was the denial of the factual-historical context of the divorce and the subsequent guarantee of custody of the child by the father.

There are two monsters here. If the (fantastic) facts described in the complaint are true, the monsters are the defendants/appellants. The facts are inexcusable, repugnant. However, if the facts aren't true and if it all came from the fertile mind of an ex-husband who wanted custody of his daughter and to deny his homosexual orientation, driven by the mother (paternal grandmother) who castrated his son and granddaughter, the monsters are these: the father and paternal grandmother. The monstrosity is even worse than the first, the “(non)fact”, because in a truly ignoble act of creationism, they implanted horrendous false memories in the girl from nothing, causing her psychic trauma as vile as the “(non)fact”.

³ Veja-se A ordem do discurso (Foucault, 1970). O inusitado conceito de comentário, aqui, consiste em “dizer pela primeira vez aquilo que já foi dito antes, e repetir incansavelmente o que jamais havia sido dito”.



A thread of discourse narrated by the victim (because, in any case, “victim”: of the current trustees!) should be expanded in two respects:

– As for the “key complaint”, the masturbation told by the teacher, Freud says: “the mother threatens him/her with castration, which can only be the punishment for playing with the member [genitalia]”. In this case, it is known that C calls her paternal grandmother “mother”. Therefore, the “castrating mother” is the paternal grandmother, the accuser, the “bad mother”. On this point, Freud goes further by corroborating: “...[the left] in the dream signifies the incorrect, the forbidden and the sin, which would be perfectly applicable to infantile masturbation practiced despite a prohibition”⁴.

– “However, in the manifest oneiric content, God is invoked at the same time, as if to ostentatiously reject any idea of prohibition or secrecy”. It's worth remembering the words of C in this respect: “he [God] will be sad with me”.

Still in Freud, and in short: one must remember the scythe with which Zeus castrated his own father “Kronos, the violent old man who devoured his children and on whom Zeus takes revenge in such an unfilial way”. The myth ends up in the Real through the “reproaches and threats that [the daughter] heard from him [her father, paternal grandmother] in the past for ‘playing’ with her genitals”...“repressed memories (...) that remained unconscious [and] insinuated themselves into consciousness (...) in the form of ‘apparently absurd’ images”⁵.

The “apparently absurd images” (fantastic, fanciful) are precisely those described in the “Psychological Report”: biting, nudity, aggression, masturbation, coitus.

6.

As for the evidence: it is limited to the testimony of the father and paternal grandmother, followed by the “Report” that replaced the testimony of the minor – on which the defense was never summoned to speak (!), as well as the precarious speech of the teacher, and another one–page psychological “Report” provided in the case file by the prosecution, and on which the defense was also never summoned to speak (!).

Well, let's look at the testimonies. The father and paternal grandmother just repeat what, in theory, the girl told them (in fact, it's the girl who repeats what

⁴ Idem, Cap. 6-E-11.

⁵ Idem, Cap. 7-F, p. 647.

the father and grandmother implanted in her). A single, fine-tuned, well-crafted/suggested speech. As I said, disgusting. The teacher made little contribution, as she admitted that “all the children [at the school] are used to knowing themselves, to moving around”, adding only that C was more “intense”. Apart from that, she said that “her mother [wasn't] present” at school, and that “she was always late”.

“Reports”: I propose absolute nullity, due to the curtailment of the defense. Although they were briefly mentioned in the closing arguments, the indisputable fact is that at the time they were offered in the case file, the defense was never summoned to manifest itself – while the Public Prosecution was and, in fact, manifested itself, giving notice. It would have been appropriate for the defense not only to challenge the material, but especially to offer a counter-evidence, by hiring another professional psychology team to take more time (and not just on one page) to look at the flawed acts already mentioned. In short, the defense was curtailed due to absolute nullity (cf. art. 5, LV, of the Constitution).

7.

The return to theoretical foundations: Real, symbolic, imaginary. The problem of the truth and an unfair criminal conviction.

In depth, the Real is what already exists even before we interpret it; it is the field of the “thing”, the “object”, which exists by itself and escapes our control, our desire. The imaginary is the Real dimensioned to our control, to our desire, where all our demands are born. The symbolic is the field of relationships formed through language, symbols, signs and interpretations.

And where does the truth lie? In the “Borromean knot”, in other words, in the articulation (more than an intersection) of the Real, the symbolic and the imaginary. That's why what we consider “truth”, strictly speaking, is impregnated with the symbolic and the imaginary, as well as the Real. And that's why there is no such thing as “real truth”, even less so when “real truth” is sought in the process. (It is, after all, a limitation of the truth.) What there is in the process – or should be – is a purification of the truth that is capable of reaching the Real, and that, as said, is impossible, especially with fragile and biased evidence such as that presented in this case.

Thus, according to Nietzsche, it is not lies that are the worst enemy of the truth, but conviction. The biggest question is: How much truth can we bear?



In a concrete case, even if the premise is false, if the evidence is fragile and incomplete, if there is conviction – and we have seen this in Brazil in recent years – the truth is overshadowed. Lies disguised as truth end up overpowering the naked truth, which always returns shyly to the bottom of the well. And “rock bottom” is this unfair conviction in the first degree.

Such an injustice cannot prevail in a Court of Justice, ladies and gentlemen! The few, precarious, insufficient, provisional and unrefuted pieces of evidence in the case file are not enough to send the appellants to prison.

As if the dogmatic, procedural argument were not enough, the process does not pass the sieve of “analysis”. The truth in the process is not capable of being reclaimed. At best, the accusation is the symbolic and the imaginary: mere discourse. It lacks the Real. Because, according to Lacan: “I always tell the truth. Not the whole truth, because there is no way of saying everything. To say it all is impossible, materially: the words are missing. However, it is through this impossibility that the truth touches the Real”⁶.

8.

On the one hand: a horrendous pseudo-story between a child, his mother and his maternal grandfather.

On the other hand: the terrible and artificial architecture of this story, involving a repressive and castrating family, betrayal, repressed male homosexuality, divorce, custody, protective measures, parental alienation, suggestibility, implantation of false memories, curtailment of defense and, in the end, a crime as terrible as that of the pseudo-story, that of the (non)fact: unpayable slander.

Be that as it may – and we strongly defend this second position here – starting with João Cabral de Melo Neto (in “Morte Vida Severina”) (Severina Death Life):

*A dog, because it lives,
is acute.
What lives
does not numb.
What lives hurts.
Man,*

⁶ Lacan, em Televisão (1974).

*because he lives,
collides with what he lives.
To live
is to go between what lives*

Mr. Rapporteur, ladies and gentlemen of the Judiciary: to uphold the appeal. In the sense of acquitting the appellants or, alternatively – and at the very least – annulling the sentence and taking the criminal action back to the event of the “Reports”, by summoning the defense for competent rebuttal, offering counter-evidence and continuing the investigation. This is the request.

SECOND STATEMENT

This time, I argued before the 4th and 5th Criminal Chambers of our State Court of Paraná, in appeals and motions for clarification, bringing here the outline of the appeal speech complemented by citations and references.

1.

[Greetings.]

An appeal is being heard against a decision in a criminal case for the crime of rape of a vulnerable person, in which the complaint stated that between 2005 and 2008 the appellant [A] had sexually molested his own daughter [B], who was twelve years old at the time. The criminal action led to a conviction, at the outset, because the magistrate found, in the evidence of the case, a judgment of authorship and materiality against the appellant. The defense is now filing the appropriate appeal in the hope of seeing a complete reversal of the judgment, because, unless there is a better judgment, the innocence of the appellant is evident, which is the reason for the plea for absolute that will follow.

Materiality would have been confirmed, according to the original judge, by means of a Police Report and a Libidinous Act Report. However, two details were not detailed: 1. The police report is a unilateral and administrative document that does not serve the purpose of attesting to materiality, but only to record an occurrence; 2. The IML reports were drawn up four years after the alleged events, at the time of the alleged confession of the victim of an active sex life with her boyfriend.



As for the authorship, the conviction was basically based on the testimony gathered during the trial. It compiled the alleged testimony of the victim, followed by that of the five informants and prosecution witnesses: the mother of the “victim”, the boyfriend of the “victim”, the maternal grandmother of the “victim”, the maternal grandfather of the “victim”, and the cousin of the “victim”. These five statements, of course, derived directly from what the “victim” told them. But the conviction treated them as a “robust body of evidence”, and the mantra unfairly persisted over the allegations of the defense.

The basic issue before this honorable Court is that the defense evidence – which was robust – was simply not appreciated. They were not worthy of note in the condemnatory decision, as if they simply did not exist. Not the testimonies, not the psychological study, not the psychosocial study, not even the reports themselves, which deserved to be read against the grain – because they were drawn up four years after the alleged facts... nothing! This is what is understood by the curtailment of the defense or, in the analogy of the jury, a decision that is manifestly contrary to the evidence in the case file.

For this reason, the acquittal of the appellant or the annulment of the sentence is the measure expected of this Court.

2.

As has been said, the documentary evidence was not even mentioned in the judgment. The defense compiled: 1. a statement written by the appellant clarifying the facts; 2. the oracle, with only this criminal record, before and after the alleged fact charged here; 3. the passport, personal documents and marriage certificate; 4. an email from the mother of the “victim” to a psychologist, reporting in 2008 a relational problem between herself and her daughter; 5. messages from the “victim” to the new wife of the appellant, complaining about not being invited to his wedding (!).

In fact, among all these documents, the last one stands out – it was simply ignored in the ruling. It's a set of Facebook messages sent by the alleged victim a year after the police report (in 2013). The text reads: “what a ridiculous couple who had the nerve to get married and not even call [their daughter, B] I'm glad you don't consider me anything anymore”. Months later, another message, verbis: “I already know that [A] was here at my mother's house and I hope he doesn't show up again, we don't need intruders in our family, you don't have to

worry about me, you never did, I don't know why you'd want to worry these days, I'm too well off and I don't need insignificant people like him.”

Now, noble judges, that's not the best nomenclature for dealing with a sexual abuser. Complaining, a year after the complaint, that the abusive father didn't invite her to his wedding? Complaining that the abusive father “never cared” about his daughter? This flaw in the writing that reveals the unconscious (cf. Freud, *On the Psychopathology of Everyday Life*, 1901) is capable of proving the plot created by the “victim”. Be that as it may, this document was not even mentioned in the judgment, and no other document capable of condemning the case has come to light.

Thirteen people gave oral evidence. For the prosecution: the alleged victim and five witnesses/informants derived from her and interested parties, such as her mother, grandmother, grandfather, cousin and boyfriend. For the defense: eight people, in supportive statements. Once again, the sentence and the judgment only echoed the accusatory statements, and not a single line was said about the defense testimonies.

As for the key testimony of the entire criminal action, that of the “victim”: the considerations and circumstances, which were very contradictory within it, were not addressed in the judgment. For example, she “didn't remember” whether or not there had been penetration during the alleged abusive acts perpetrated by her father. Special mention should be made of: “The declarant cannot remember if at any time [A] practiced or tried to practice carnal conjunction with [her].” And also: “The complainant had her first sexual relationship 6 months ago with her boyfriend (sic).” (And so the report that same day confirmed carnal conjunction... – by the father or the boyfriend?)

From the oral evidence, therefore, no evidence of guilt can be drawn against the appellant either. The word of the “victim”, merely repeated by a supposed new set of evidence, is weakened by his own contradictions, the factual–historical situation of the family and the effusive denial of his father – whose word is also a means of proof – as well as the eight witnesses/informants who support his conduct.

Establishing the innocence of the appellant once and for all, there is a robust body of expert evidence – all in his favor – which, once again, was not addressed in the sentence.

Firstly, the Report of Libidinous Act Examination and the Report of Carnal Conjunction say that there was carnal conjunction “more than 20 days ago”. Two



considerations here. First of all, the report is from 2012 and, according to the police report, the events took place up until 2008 – four years earlier. This conclusion of the report is neither credible nor acceptable. What's more, the “victim” herself says she can't remember whether or not there was carnal conjunction in the alleged sexual violence she suffered. Finally, the report also mentions the notorious and frequent sexual relations of the “victim” with her boyfriend, since six months ago. This first Report of Libidinous Act is therefore completely disposable.

Secondly, the Report of Bodily Injuries, also from 2012, had its result expressly declared as “prejudiced”. It is therefore irrelevant to the case.

Finally, and most importantly, after countless efforts to carry out a psychological assessment of the case, the “Psychological Report” finally emerged in 2019 (the “victim” was then 23 years old), commissioned by the court and signed by the forensic psychologist of the court, which concluded as follows, in summary:

It is clear that there was hostility prior to the alleged abuse, i.e. it did not arise from the facts narrated in the case file. Apparently, this affective disposition was triggered in early childhood by the jealousy she felt when her father appeared to interfere in the privileged relationship between her and her mother. (...)

The description of the events that she keeps in her memory has quite fantastic characteristics and is apparently far removed from a factual experience. Both the parent represented by phantasmatic characteristics typical of the so-called Imaginary Father (...). As well as the sexual abuse being described in a state of drowsiness and apparent psychic dissociation.

Both the victim and her mother describe behaviors on the part of the accused, in everyday family life, that can be qualified as abusive (although not in the specific sphere of sexual aggression, it has the characteristics of psychological violence): controlling; violent emotional reactions; punishments against the daughter. (emphasis added)

It is important to reiterate that this “Report” was not the subject of a single line in the judgment.

The documentary, oral and expert evidence in conjunction with each other reveal that the scenes produced by the alleged victim are not true. And that,

therefore, the appellant did not commit the crime of which he was unjustly convicted.

3.

The daughter said that her father sexually abused her between 2005 and 2008, when she was between 9 and 12 years old. She said that this happened when her mother was out studying or working (in another statement she said that everything happened when she, the “victim”, was asleep). She said she couldn't remember whether or not there had been penetration, but she “remembers” there having been other libidinous acts other than carnal conjunction. All this was said for the first time by the teenager to her mother and her boyfriend in August of 2012, after which a police report was registered and an inquiry opened at Nucria.

Well then: it was precisely in 2012 (!) that the father told his teenage daughter (now 16) that she would have a baby brother, the fruit of his new marriage – with whose wife he had been since his separation from his mother.

The most likely factual truth comes from this. This is the psychoanalytic foundation built by S. Freud, which is called the “Dissolution of the Oedipus Complex in the Girl” – published in various texts, especially the Three Essays on the Theory of Sexuality (1905), On the Psychogenesis of a Case of Female Homosexuality (1920), The Dissolution of the Oedipus Complex (1924), and The Economic Problem of Masochism (1924). Let's see what they say, with a precise application to the case at hand:

(...) The Oedipus complex in the girl is much more unequivocal than the little penis-bearer; in my experience, it rarely goes beyond the substitution of the mother and the feminine posture towards the father. The renunciation of the penis is not tolerated without an attempt at compensation. The girl passes – in the course of a symbolic equation, we might say – from the penis to the baby, her Oedipus complex culminating in the long-held desire to receive a son from the father as a gift, to bear him a son. We have the impression that the Oedipus complex is gradually being abandoned because this desire is not fulfilled. The two desires, to have a penis and a son, remain strongly



invested in the unconscious, and help prepare the female being for her future sexual role⁷.

And more:

The explanation is as follows. The girl was in the phase of reliving the infantile Oedipus complex during puberty when she experienced disappointment. She became clearly aware of her desire to have a son, and a male son; that he should be a son of his father, and a copy of him, is something that her conscious could not know. But then it turned out that it wasn't she who had the son, but the rival she hated in her unconscious, her mother. Disgusted and bitter, she turned her back on her father⁸.

The “victim” of the case on trial here, in her dissolution of the Oedipus complex, unconsciously, symbolically wanted to have a child with her own father. But it was her rival, the stepmother, who had him. For this reason, the daughter (“victim”) turned her back on her father and fantasized (or invented) a sexual assault, denouncing him in order to end his life (words of the “victim”).

This thesis is corroborated, to a certain extent, by the “Psychological Report” – also not addressed by the Judge in the judgment under appeal – which forcefully records the truth in the specific case. This is what the judicial psychologist, the expert in the case appointed by the Court, concluded:

The complaint was made against the father when the girl was around 16 years old, today she is 23. The history of her relationship with her father is one of rivalry and hostility. According to her father, he was jealous of her and her mother, as she wanted her mother all to herself. When she was little, she demanded that her mother stay with her in her room to sleep. Sometimes her father tried to do this, but she rejected him because she was too afraid of him and only wanted her mother. Nowadays, she assumes that this means that her father abused her from a young age. She also says that her father beat her a lot throughout her life.

Let's repeat: the “victim” said she assumed that her father was abusing her because of the rejection and fear she had of her father as a child. And the

⁷ FREUD, Sigmund. A dissolução do complexo de Édipo. Tradução de Paulo César de Souza. São Paulo: Companhia das Letras, 2011, pp. 212-213.

⁸ FREUD, Sigmund. Sobre a psicogênese de um caso de homossexualidade feminina. Tradução de Paulo César de Souza. São Paulo: Companhia das Letras, 2011, p. 129.

appellant was condemned for this supposition, a childhood reminiscence that is not clear, that is phantasmagorical. But the Psychological Report continues in the same vein, in other words, giving rise to an interpretation by the “victim” of the alleged childhood abuse:

Moving on to an explicitly psychoanalytical analysis, we see that the report of [B] involves various subjective aspects intertwined with the context of the alleged facts (which is common). We observed in the story that there is a significant hostile disposition towards the father figure, which apparently has its roots in childhood. This disposition oscillates between fear and rivalry/rage. The reporter interprets her emotional childhood memories as possible abuse by her father.

The obvious conclusion of the forensic examination is that the fear and anger of the father, which I complement with her frustration at the dissolution of the Oedipus complex, led to a projection or interpretative extension of [sexual] abuse – the sexual nature of which is not yet clear here; but it is a hypothesis that we would have to accept, not least to justify the accusation against the appellant and, once and for all, to push her away.

The expert also appeals to the famous Lacanian concept of the “Name of the Father” to realize that the “victim” has projected onto her father the figure of the imaginary Father, concerning the Father who undermines the relationship between mother and child (a kind of reverse derivation of the Oedipus complex). It is the intruding, rejected Father, the Father of the primordial horde who must be killed by the clan (cf. Totem and Taboo, Freud, 1913). This is how the psychoanalytical reasoning concludes in the report not read by the Judge:

Therefore, in the psychodynamic dimension, the report of [B] seems to evoke the psychological elements described in the paragraphs above, which gives the alleged facts a certain fantastic tone, especially with regard to the complete change that took place in the parent, described as a person who transformed when the victim fell asleep and was woken up by him. On the other hand, it should not be forgotten that both the mother and the daughter characterized the accused as a controlling and reactive person (possibly aggressive), but at no time a sexual aggressor “in the daytime” (when the daughter was awake).

So, in summary, we have the following elements: hostility between daughter and father (apparently from both, daughter and father); the narration of sexual assaults experienced by the victim in moments of



reduced consciousness (sleep); memories with a significant fantastic Oedipal content; feelings of fear and jealousy; therapeutic interventions on the memory with imagination exercises (apparently). The relationship between the parents of the victim was unhealthy and, apparently, in general, the family climate was conflictual.

In other words, the report gives the speech of the “victim” a fantastic tone, a fantastic Oedipal content generated by hostility towards the aggressive father. And so, as has been said, the death of the Father is the goal of the clan (primordial horde), which is realized in this case through his condemnation.

4.

We must not lose sight of the following chronological sequence: 1. the separation (divorce) of father and mother; 2. the new wife of the father; 3. the new child of the father with his new wife; 4. the criminal complaint. As soon as the appellant announced to his daughter/“victim” that his new wife was pregnant, the daughter/“victim” reacted by saying: “I’m going to end your life”. Not only the reaction itself, but also all the psychoanalytical argumentation arising from it deserved to be addressed in a sentence, especially for such a serious conviction. This was not addressed at all.

Nor was anything said in the sentence about the fact that the police report had been registered at the time of the fierce divorce between father and mother – the daughter protecting her abandoned mother, in conjunction (or collusion) with her maternal grandparents, her cousin and her boyfriend.

Finally, it was necessary to compare the first allegation, made in the Police Station, with the testimony given in court, when the alleged victim, then 21 years old, changed her version by saying that her father verbally, psychologically and physically abused her. She also said, for the first time (unlike the other version), hesitantly, that during the sexual abuse there was penetration. The focus of the testimony is and always has been the aggressiveness of the father, his abandonment, and not the alleged sexual abuse.

Therefore, for all the above reasons, Your Excellencies, the present appeal must be granted in order to acquit the appellant, on the basis of the art. 386, I,

of the CPP. Alternatively, he should be acquitted on the basis of art. 386, II, of the CPP, or, in the last resort, on the basis of the art. 386, VII, of the CPP. That is the request. I'll take the floor again, Mr. President.

THIRD STATEMENT

This case is from the Court of the State of Mato Grosso, a more conservative court – although all courts are conservative when it comes to such matters (sexual crimes). If I were to publish the case as a stand-alone article, I would title the text: “Rape of a vulnerable person: the word of the victim and the castration complex”.

I justify this chapter, and perhaps the whole article, on the urgent need to debate judicial cases in which parents have been subjected to severe sentences for rape of a vulnerable person (allegedly perpetrated against their sons and daughters) based on the sole evidence of the “word of the victim”, usually reported by the other parent, and most often in the context of separation or divorce.

Topics that unbelievably still shock prosecutors and magistrates – such as child masturbation, castration complex, libidinal intent, etc. – are not understood and lead to unreasonable convictions.

1.

[Greetings.]

In the famous clinical case “Little Hans”⁹, Freud describes the phobia of horse bites of a five-year-old boy.

One of the first triggers for his phobia was the castration intervention of his mother when he masturbated as a child: “When he was three and a half, his mother saw him grab his penis. She threatened him: 'If you do that, I'll call Dr. A. and he'll cut off your pee-pee. What are you going to pee with then? Hans: 'With the buttocks'.”¹⁰. This is exactly where Hans acquires the “castration complex”.

The sexuality of Hans was uninhibited and well developed for a five-year-old boy, which does not mean any pathology. Let's see:

⁹ FREUD, Sigmund. *Análise da fobia de um garoto de cinco anos (“o pequeno Hans”, 1909)*. Tradução de Paulo César de Souza. São Paulo: Companhia das Letras, 2015.

¹⁰ *Idem*, p. 127.



Hans is four years and three months old. Early this morning his mother bathed him, as she does every day, and then wiped him clean and put talcum on him. When she put talc next to his penis, carefully not to touch it, Hans asked: 'Why don't you take it?'. The mother: 'Because it's a filthy thing to do that'. Hans: 'What is that, a dirty thing? Why? ' The mother: 'Because it's not decent'. Hans (laughing): 'But it's hot!'¹¹

The following is a footnote by Freud, describing another clinical case of child masturbation, now female:

Another mother, herself a neurotic person, and who did not want to believe in child masturbation, reported me a similar attempt of seduction by her three-and-a-half year-old daughter. She had ordered panties for the little one, and saw if they were not tight to her as she walked, putting her hand on the inner side of her thighs, facing up. Suddenly the girl closed her legs, pressing her hand, and asked: 'Leave your hand there, mom. It's so good.'¹².

The relation of the masturbation of little Hans with his phobia for horses is in dialogue with his mother, exactly on the day that the little one saw a horse – and his big penis – on a walk in Schönbrunn. That same day, he thought the horse would enter his room, and his mother asked him: "Do you take the do-pee? ' To which he replied: 'Yes, every night when I'm in bed'. (...) This would then be the beginning of anguish and phobia."¹³

Hans' phobia makes him imagine that his mother also has a "do-pee" similar to the horse, large, and that he will one day have it too.

The fear of the bite of the horse is displaced to the fear of the "black mouth" of the horse (the harness), and then to the fear of the carriages, especially the larger ones ("coach-bus") – which causes the baby-laden belly –, and, ahead, to the "fall" of the horse. The fall, in turn, connects to the evacuation (which Hans calls Lumpf), and to the desire to see his mother "doing Lumpf" – a mixture of sadistic eschatological pleasure (cf. S. Augustine: *inter faeces et urinam nascimur*).

In the end, and after the masturbating excitement of the boy turned into anguish, this deep desire for the mother and consequent revulsion for the father (who is the horse) expresses the classic "Oedipus complex", which later will be

¹¹ *Idem*, p. 140.

¹² *Idem*, p. 140, nota 7.

¹³ *Idem*, p. 146.

solved by Hans himself through the "allegory of the plumber": that installs a "new pipi", larger, in overcoming the original castration suffered.

2.

In the interior of the State, the father [A] was denounced by the State Prosecution on the basis of what his son [B] said. The complaint of 2013 said that between October of 2011 and February of 2012, the appellant committed libidinous acts other than carnal conjunction with his then four-year-old son. This period of time was linked to the birth of another of the children of the appellant, when his then wife [C] spent twenty days in hospital.

These libidinous acts consisted of inserting his finger into the anus of the child, at night and during his bath. According to the complaint, these acts were made up by watching movies in a locked room.

The conduct would have come to light when the child, taking off his clothes in the house of the maternal grandmother, tried to insert his finger into the anus of a cousin, in front of his aunt and grandmother, when he was questioned by his aunt, to which he replied: "that the joke they played most was his father put his finger in his 'ass' and that his father asked him to put his finger in his 'ass' too and still said that the father said that such a joke was legal".

Based on this narrative, the appellant was reported as having committed several offenses under the article 217-A c/c articles 226, II, and 71 of the Criminal Code. Hence the instruction, the condemnation, and the present appeal.

3.

Let's go to the evidence of the Inquiry.

3.1. The BO registered by the child's mother dates from 2013, that is, more than a year after the alleged event, precisely at the time when the divorce of the couple occurred. And the first evidence compiled in the police investigation was a "report" from the guardianship council, also made more than a year after the alleged fact, clarifying that the narrative was dictated by the mother. See: "The child [B] possibly was a victim of rape of vulnerable, being the accused his parent, as reported to us the parent".

3.2. Then, it came to the record a "Report" signed by psychologist hired by the mother, claiming that the child was under her care "for a period", without



specifying which period, and according to which the mother would have perceived changes in the behavior of the appellant and his son, Noting that the son was irritated in the bath and screamed a lot at night. Also noticed an aggressive behavior from the boy with male figures. There would have been several episodes in which the son would lower his pants for the cousins, and tried to insert the finger into the anus of the cousins. In this context, the boy would have said that it was the joke he played with his father, and that it was only for boys. Reported that father and son talked about "gender", and so verbalized: "Look what a hottie that woman, she has breast and "pussy"(sic), "The man's pee is for playing and when he takes off the shorts he gets sex" (sic)".

Here, the psychologist makes a value judgment when she states: "these matters should not be approached in this way with children of the age of [B]". In the sequence of the "Report" the psychologist also judges the appellant, reaching the point of typifying behaviors ("libidinous act", "seduction act"), which is incompatible with her job and with the desire for a psychological report. However, it ends with a psychoanalytic hit, according to all the available literature: that "[B] is in the discovery phase of his body".

3.3. Further, came "Report of hearing" signed by the psychologist of the City (Creas). In this document, the mother of the child confirms the separation from the appellant. It is reappreciated that scene of the child with cousins (finger in the anus), but in direct response to the psychologist the child verbalized expressly that "my father gave me a bath, cleaned my butt, just that". Finally, the psychologist saw psychological shock to the mother, because as for the child, concluded that "did not present characteristics of a child who suffered abuse recently".

3.4. The IML expert report answered negatively (or "prejudiced") to all questions, and thus concluded: "Description: Anus intact; No abrasions. Conclusion: Healthy anus".

3.5. After hearing the appellant and the entire maternal family (directly interested in the convicting health), the police delegate concluded the police investigation report for not proving the material delinquent and determined the archiving of the IP.

Nevertheless, the State Prosecution has sought to detain the appellant and has offered a complaint. The arrest was decreed and carried out, but then revoked by the Court.

4.

Now, the proof to the instruction.

4.1. Twelve witnesses were heard. The few accusatory testimonies were all based on (that is, derived from) the notorious observation of the aunt as to the "joke" of the alleged victim in intending to insert the finger into the anus of the cousin. As seen, this is a behavior absolutely compatible with the age of the child in his personal and drive development (v. little Hans). The various testimonies of the abnegation were not even mentioned in the sentence.

4.2. Interrogation of the accused, denying the fact.

4.3. "Apocryphal" psychosocial study, 2017 – when at this time the alleged victim already had eight years of age. In this document, the mother said that she was surprised by the fact that the appellant manipulated the penis of the child until it was erect (during diaper changing or after bathing). He also said that B tried to touch the genitals of cousins (see that at the beginning of the narrative was the anus of the cousin, not the penis – a failed act of the mother that reveals the disengagement with "constructed truth" versus "truth"). In the same "Study", when asked B about the fact, he became tense, frowned, closed his eyes, and said not to remember. And, thus, surprisingly concluded that B was a victim of the abuses reported by the family.

Precisely on this "Psychosocial Study" the defense commissioned technical opinion to forensic psychologist specialized in psychological evaluation. In the document, indeed based on the best literature about it, in summary: (i) the "Psychosocial Study" did not follow the guidelines of the Federal Council of Psychology; (ii) "at no time (B) brought any speech that suggested an abusive situation perpetrated by the father. The fact that the professional has observed that the infant 'changed his countenance, became tense, frowned, was with the eyes almost closed (...) causing suffering with such question [about the paternal games]' cannot in itself be considered as evidence that the violence occurred"; (iii) in cases like this, technical evidence should be more elucidative and methodologically better founded, which did not occur; (iv) "from the psychological point of view, it is understood that the data presented in the above-mentioned report are fragile for conviction of the accused".

4.4. As for the special testimony of the child, it was treated as follows in the judgment: "In the unimpaired testimony of the child, it is clear that he was calm at the beginning of the questions, answering and explaining everything in detail,



but the moment he touched on the subject of his father, he said he didn't remember, because it had been a long time and it is clear that he was upset.”

Well, “not remembering” or “being bothered” can never be behavior capable of leading to an understanding of sexual abuse and consequent criminal conviction.

4.5. Evidently, the defense wanted to recover the evidence gathered in the investigation, since it was favorable even because the police chief decided to close the case. However, the sentence did not take into account: (i) the testimony of the guardianship counselor of the city, who said that “in order to verify whether there has been abuse, further monitoring is necessary”; (ii) nor that of the psychologist from the City Hall (Creas), who said that the alleged victim “did not present the characteristics of a child who had been abused recently”; (iii) nor that of the supporting witnesses – who did not merit a single line in the judgment; (iv) nor the denial of the appellant in his interrogation, which is just as much a means of proof as a unilateral police report; (v) nor the negative expert report, which in the end technically proves that there was no rape of the anus of the alleged victim; (vi) nor the conclusion of the deputy who investigated the case, to the effect that there was no evidence of materiality.

5.

It became clear during the investigation that the marital relationship between the appellant and his ex-wife, the alleged victim's mother, was conflictual. Not only that, but there was a fierce legal dispute over property, custody and alimony. Unfortunately, it is not new for parties to family lawsuits to use the criminal expedient of falsely accusing the other party of a certain crime in order to gain an advantage in a custody, alimony or property dispute.

Based on the grounds of the ruling, it deserves to be reformed, as it is clear that the oral evidence was insufficient to convict, and that the technical evidence favorable to the appellant was totally disregarded, in favor of another technical evidence that did not comply with the methodological guidelines recommended by the respective Class Council.

6.

Lastly, the psychological/psychoanalytical approach to the case also deserves reinforcement. The defense opinion gives credence to the absence of materiality in the case in question. Not only that, but the most established psychoanalytic literature applied to the species states that children between the ages of two and five are in the midst of developing their third drive stage: the phallic phase, when they “discover” their genitals and erogenous regions, comparing them with those of people close to them (siblings, cousins, parents).

All this clinical analysis ratifies what Freud had already theorized since 1905, when he wrote the Three Essays on the Theory of Sexuality:

(...) we should distinguish three phases in child masturbation. The first belongs to the period of breastfeeding; the second, to the brief period of flowering of sexual activity, around the age of four; only the third corresponds to the masturbation of puberty, often the only one taken into account. (...)

The young child is, above all, shameless, showing, at certain moments in their early years, unmistakable pleasure in stripping their body bare, with emphasis on the sexual parts.

Young children who have had their attention drawn to their own genitals – usually through masturbation – tend to continue without external interference and develop a great interest in the genitals of their playmates¹⁴.

Little [B], our little Hans masturbator in the phallic phase, the alleged victim in this case, was naturally experiencing his drive phase. The mother took advantage of a normal and natural scene for the child to add to the narrative and further strain her troubled relationship with her ex-husband, who is now condemned for something that absolutely does not exist and never existed, except in the fantasy of the mother (or revenge).

If what is required is the victim's word, that is precisely what we have in this case. The intended “firm and coherent word of the victim” (cf. sentence) for the purpose of conviction simply did not occur. On the contrary, what happened was the “firm and coherent” words of the victim to the following effect: “he bathed me, cleaned my buttocks, that's all”.

This is an absolutist position that is echoed in the own opinion of this Court, which was recently upheld in a similar case:

¹⁴ FREUD, Sigmund. Três ensaios sobre a teoria da sexualidade. Tradução de Paulo César de Souza. São Paulo: Companhia das Letras, 2016, pp. 95-100.



If what is required is the word of the victim, that is precisely what we have in this case. There was simply no “firm and coherent word from the victim” (cf. sentence) for the purpose of conviction. On the contrary, what happened was the victim's “firm and coherent” words to the following effect: “he bathed me, cleaned my buttocks, that's all”.

It is the position of an acquittal via that is echoed by this Court itself, which recently ruled in a similar case:

In the case of a crime against sexual dignity, the firm and coherent word of the victim is especially important in the context of the evidence, since crimes of this nature are commonly committed in secret (TJMT Statement No. 10).

(Ap. Crim. 0005061-43.2016.8.11.0018, Isolated Criminal Chambers, Rel.: Justice Pedro Sakamoto, Second Criminal Chamber, judged on 20/05/2020, published in the DJE on June 2nd of 2020).

At this point, for the appellant: all his confidence in the maturity and experience of this Court not to let details go truly unnoticed by the court of origin, and acquit him of the horrendous crime to which he was accused and convicted in the first instance.

That is the request. I take the floor again, Mr. President.

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