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Supreme Federal Court
JURISPRUDENCE SERVICE
Court Gazette 10.04.91
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09.10.1991

SECOND PANEL

HABEAS CORPUS No. 68,704-1

SAO PAULO

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PETITIONER AND PATIENT: CARLOS ALBERTO DO AMARAL

COECER: COURT OF JUSTICE OF THE STATE OF SAO PAULO

RAPE - FORENSIC MEDICAL EXAMINATION - EVIDENCE - VICTIM'S TESTIMONY. The female victim was not a virgin; she was married and a mother, thus, the forensic medical examination is dispensable. The existence of semen in the vagina is not essential to verify the offense, taking into consideration the embarrassment of the woman in regards to the penetrative examination, in face of the violence. Witness evidence is of difficult development, since that is a rarely witnessed event. The victim's testimony is given extra importance, whereas it is not necessary to investigate in detail, for purposes of typification, the everyday conduct. The fact the female victim is a harlot does not play any part into the investigation, especially because the people heard, clarified that the agent, threatening the victim with a firearm, forced her to enter a certain room, naked, while the other participants carried out the robbery.

JUDGMENT

After reviewing, reporting on and discussing the case records, the Justices of the Supreme Federal Court, in second panel, according to the minutes of judgments and shorthand notes,

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HC no. 68,704-1-SP

by unanimous vote, to reject the habeas corpus.

Brasilia, September 10, 1991

NÊRI DA SILVEIRA - PRESIDENT

[Signature]
MARCO AURELIO - RAPPORTEUR

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HABEAS CORPUS No. 68,704-1

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SAO PAULO

RAPPORTEUR: JUDGE MARCO AURELIO

PETITIONER AND PATIENT: CARLOS ALBERTO DO AMARAL

COERCER: COURT OF JUSTICE OF THE STATE OF SAO PAULO

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REPORT

JUDGE MARCO AURELIO - Request to examine two causes in the initial petition of this habeas corpus. The first is introduced from the perspective that the just cause for appeal is not fully clarified. Even in the face of imputation of crime that leaves traces - of rape (Article 213 of the Criminal Code) - the forensic medical examination was not performed. The victim refused to give permission for the performance of this examination, being that the jurisprudence, in regards to the supply of the forensic medical examination, gives more relevance to the witness evidence. The second cause concerns the conviction on the basis of the victim's exclusive testimony, taken at the stage of police investigation. According to the reported, the testimony does not seem adequate, since it deals with a "woman who works in a massage shop, or, in other words, whose occupation is the world's oldest profession". It is asserted that the witnesses who testified in the police stage did not

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witness the rape. The alleged victim did not appear in court to reaffirm the facts; therefore, the distinguished Court could not lay the foundations for the conviction regarding the testimony that she provided. It is worth pointing out the non-compliance with the provisions of articles 158, 564, section III, item "c", of the Penal Code and section LV of article 5 of the 1988 Federal Constitution. Together with the initial petition, documents of pages 6-54 are attached.

The habeas corpus being pleaded, firstly, before the Superior Court of Justice (page 55), the jurisdiction to judge it was declined, occurring the consignment to this Court (page 57). Requested the usual information, the official statement from the court was attached to pages 65 to 74, containing the report of the processing of the criminal action in which the Patient, was sentenced and his attempts in reversing the situation. Initially, the Defendant was convicted to seven years, nine months and ten days of seclusion as subject to article 157, paragraph 2, sub-paragraphs I and II, combined with article 51, paragraph 1, of the Penal Code, in initial writing, being acquitted of breach of article 213.

The Department of Public Prosecution appealed, transmuting the absolution into conviction, whilst the attempted criminal review was unsuccessful. The Department of Public Prosecution declared to be aware of the habeas corpus and denial of the order. According to legal opinion, the witness evidence was enough proof of sexual violence, and the involvement of the Petitioner with the Patient that, armed, consciously joined the illicit purpose of

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the perpetrator of the rape, coercing the victim and bystanders. The victim was heard on the inquisitorial phase, being that, in Court, five witnesses had confirmed the rape and the conscious and decisive involvement of the Patient. Still, according to the aforesaid statement, the refusal of the victim to submit to forensic medical examination cannot be considered in favor of the offender. On page 194, the acting Deputy-Attorney General, Dr. Mardem Costa Pinto, transcribed the judgment of this Court, according to which "since the rape victim is a married woman, the forensic medical examination is not required, especially when witness evidence in relation to the fact is added to the records" - habeas corpus no. 67,703-7-SP, Rapporteur Sydney Sanches. Judgment published in the Court Gazette of December 19, 1989, page 17,760.

I received these records for analysis on September 6, 1991, returning them on September 9, in order to amend the official notification, to include the correct abbreviation of the State of origin.

These are the facts.

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VOTE

JUDGE MARCO AURELIO (RAPPORTEUR) -

Initially, I would like to highlight a personal judgment in relation to the jurisdiction of the Superior Court of Justice in evaluating this habeas corpus. Each and every filing is directed against the authority that represents the agency. However, the majority understanding of the Court is towards their own jurisdiction when the action revealing the alleged embarrassment was practiced by a Committee.

On the merits.

The forensic medical examination is not required in the crime of rape if the woman is married and, therefore, accustomed to engaging in sexual intercourse. This consensus becomes more accepted when the collected witness evidence is categorical in regards to the occurrence of offence. While evaluating habeas corpus no. 58,734-8, this Court, through Judgment approved by Judge Antonio Neder, he had opportunity to establish that:

"Rape, under serious threat, is a crime that leaves no trace. In this case, the expert examination is dismissed".

In this case, the conjunction was obtained through

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physical violence and in the course of a robbery, having been witnessed by several victims who were in the massage shop. One of the offenders guided the rape victim to one of the rooms, thus perpetrating the crime. Due to the fact the victim was not a virgin woman, it is not necessary to consider traces of the sexual act, since the existence of sperm is not essential for the judicial scope. In regards to the articulation solely on the victim's testimony, a person of questionable conduct, according to the initial petition, one has to bear in mind that the Judgment delivered in the declaratory proceedings lodged against the decision in the criminal review brought by the Patient, rules that the offended person was heard in the dismembered court records and that involved the perpetrator of the rape (page 163). On the other hand, while the other participants have attempted to exonerate him, the people heard confirmed the participation of the Patient, actively, on the events (page 165 - Judgment pronounced in criminal revision no. 42,994-3).

The habeas corpus cannot result in the opening of a new ordinary prosecution. Aims to entice away acts of embarrassment deemed clear, considered the process by which the sentence is imposed. In this case, the addictions pointed out to by the Petitioner do not exist. In the wake of the approval by the Department of Public Prosecution, I deny the order.

This is my vote.

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PETITION OF HABEAS CORPUS No. 68,704-1

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SAO PAULO

V O T E

Judge CARLOS VELLOSO: - Mr. President, if the crime of rape is committed against a woman who is not a virgin, there cannot be assurance that it leaves traces. It is not, therefore, an offence which, according to art. 158 of the Code of Criminal Procedure, requires the direct or indirect forensic medical examination. In this case, if there is witness evidence regarding the occurrence of rape, this is enough to justify the conviction, and legitimize the enforceable judgment.

Taking into account these considerations, I adhere to the vote of the eminent Rapporteur. [Signature]

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HABEAS CORPUS

No. 00687041/130

Origin : SAO PAULO
Rapporteur : JUDGE MARCO AURELIO

V O T E

JUDGE PAULO BROSSARD: Mr. President, although it is not the case from the records, in my view, even if the woman is not a virgin, the identification of the offense and its authorship is possible. I recall that two professors of Forensic Medicine at the University of Campinas have been performing studies in this line, extremely interesting, with great security, obtaining conclusive results in terms of identifying the authors of offences that would not normally leave signs or traces.

Meaning that, with this peripheral note, I follow the vote of the eminent Rapporteur.

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SUMMARY OF MINUTES

HC 68,704-1- SP

Rapporteur: Judge Marco Aurelio. Petitioner: Carlos Alberto do Amaral. Coercer: Court of Justice of the State of Sao Paulo. Patient: Carlos Alberto do Amaral.

Decision: Unanimously, the Panel dismissed the habeas corpus. Absent, occasionally, Judge Celio Borja. Second Panel, 09.10.91.

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Presidency of Judge Neri da Silveira.

Judges Celio Borja, Paulo Brossard, Carlos Velloso and Marco Aurelio attended the session.

Deputy-Attorney General, Dr. Claudio Lemos Fonteles.

[Signature]
JOSE WILSON ARAGAO
Secretary

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