

CASE LAW JEAN CHARLES DE MENEZES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: ANALYSIS IN THE CONCEPTUAL PERSPECTIVE OF JOHAN GALTUNG

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1 INTRODUCTION

In this year 2016, precisely on March 30, it was released the trial of the case involving the death of Brazilian Jean Charles de Menezes, held before the European Court of Human Rights, based in Strasbourg, France. The case of the death of Jean Charles was very controversial, and widely reported in the media at the time, making it even a film, which starred the actor Selton Mello, and was directed by the director Henrique Goldman, in 2009, such was the impact of events that led to his death. Jean Charle's cousin, Patricia Armani da Silva, took the case of his death to the European Court of Human Rights, claiming that the British justice procedure not to condemn any individual for the death of her cousin, violated articles 2, 3 and 13 of the European Convention on Human Rights, which the English state is a signatory.

2 METHODOLOGY

The goal of this paper is to analyze the procedure of the case before the Court, since its admissibility, steps, until the final judgment of the case by the Grand Chamber of the European Court of Human Rights. This analysis will take into account the facts and arguments in the official documents on the case (available on the World Wide Web), verifying if the conceptual proposals from Johan Galtung on physical, structural and cultural violence, offer tools for a better understanding of what happened.

3 UNDERSTANDING THE FACTS

On July 7, 2005, four 'suicide bombers' exploded bombs in the transportation system of London. Three of them were in the subway and one on a bus. In the attacks, 56 people, including the suicide bombers were killed and many others were injured.

From this event, the Metropolitan Police Service ("MPS"), initiated a major police investigation in order to identify who were involved with the explosions. Also, the police intelligence knew that new attacks could occur in the following days.

On July 21, 2005, two weeks after the first attacks, four explosives were found on the subway lines and one on a bus. From these findings, the Metropolitan Police Service ("MPS") began an operation called Theseus 2, that had as Gold Commander, the Police Commander John McDowall.

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On July 22, 2005, the commander McDowall was informed that the Intelligence had identified Hussain Osman as a suspect in the failed attacks of 21 July. Both Mr. Osman and another suspect were thought to be living in an apartment at 21 Scotia Road, London, the same address of Jean Charles, that lived at 17 Scotia Road.

The strategy of Commander McDowall was to set a surveillance operation (Theseus 2) at 21 Scotia Road, with the objective to “watch” the street, and to follow any person that could leave the premises, until it was safe to stop them. The main goal of the operation was to establish whether the *two suspects were present in the flat and safely arrest them*.

On 22 July 2005, Jean Charles left his apartment, at 09:33 a.m., and went to work. In the surveillance van, an officer saw Jean Charles and suggested that someone should have a look, meaning that it was necessary to verify who he was.

After this, Jean Charles took the bus, and at this point the surveillance team pointed Jean Charles as “a good possible likeness’ to the suspect, Hussein Osman.”³

Summarizing the events, Jean Charles was followed until Stockwell underground station and there, Jean Charles got on a train. The police went in his direction and according with the IPCC⁴ Investigation team (Stockwell Two Report), “Mr de Menezes did not refuse to obey a challenge and was not wearing any clothing that could be classed as suspicious.”⁵

In spite of this, Jean Charles was shoot in the head, several times, and killed by to police officers - SFOs (Charlie 2 and Charlie 12).

In the days following the death of Jean Charles, it was clarified that he was not involved or planning any terrorist attack. The British authorities have apologized to the family for his death, coming to Brazil to do so.

The family received the payment as a kind of reparation / compensation for the death of Jean Charles. The first investigation was conducted by the IPCC (Independent Complaints Commission on Police) British. On September 30, 2005, in its findings, the committee in charge of the investigation submitted to report to the IPCC indicating that certain officers might have committed criminal or disciplinary offenses.

The IPCC Stockwell One Report’s conclusions lead to various facts that put the operation Theseus 2 in check. One is that the train station video where Jean Charles appeared was not available, was blank; and the hard drives went missing when the investigation took place, as it was reported:

56. Thirdly, the report was critical of the delay in handing the investigation to the IPCC: 17.22 The pressures under which the Metropolitan Police were operating following the events of 7 July and 21 July are self-evident. However, the fact that the independent body established by an Act of Parliament to investigate complaints and serious incidents involving the police, and which has independently investigated every fatal police shooting since 1 April 2004, was now to be excluded from the

³ Statement of facts - item 2 - Operation Theseus 2, (b) Events leading to the death of Mr Jean Charles de Menezes. Paragraph 14 (EUROPEAN COURT OF HUMAN RIGHTS, 2010).

⁴ IPCC - Comissão Independente de Queixas contra a Polícia.

⁵ Statement of facts - item 2 - Operation Theseus 2, (b) Events leading to the death of Mr Jean Charles de Menezes. Paragraph 18 (EUROPEAN COURT OF HUMAN RIGHTS, 2010).

scene, is a major concern for an independent investigation, and should never occur again.

17.23 The fact that there was such concern over the problems with the CCTV tapes at STOCKWELL and the fact that the hard drives on the train were missing highlights the problem. This issue could have been resolved a lot earlier had they been under the control of the IPCC.

The IPCC report assessed the conduct of everyone involved in the case and consigned several recommendations. In fact, its conclusion was that the operation had serious flaws. For the two gunmen who killed Jean Charles, the IPCC report cleared them of any unlawful conduct concluding that they acted in self-defense, because they would be convinced that they were dealing with a potential terrorist.

About the driver of the van who watched Jean Charles leaving the building, the report indicated that the authority should examine a possible negligence on his part when he reported Jean Charles as a suspect, considering that other operators thought he did not identify with the real suspect of the attacks, as it follows:

62. With regard to the “identification” of Mr de Menezes as the suspect, the IPCC noted: “20.53 [...] James [the head of the surveillance teams] did not communicate that some of his team thought that the subject was not [the suspect]. This information should have been fully communicated to [the DSO] as it may have influenced her decision-making. The [CPS] may wish to consider whether this negligence by ‘James’ ... satisfies the test for gross negligence.”

One of the commanders of the operation, Cressida Dick, was charged as responsible:

(ii) The DSO

61. With regard to the role of the DSO, the IPCC stated:

“20.77 The order given by Commander DICK was to stop the suspect getting onto the underground station and subsequently the underground train. When interviewed she was asked to explain the word ‘Stop’ and her response was that ‘Stop’ is a common word in policing terms and it was meant as ‘stop and detain’. This opinion is supported by DCI C and Trojan 80 and 84.

20.78 However, the way the order was received by [SO19] must be considered. Following a full briefing, many of the [SO19] officers have described that they believed that they would have to confront a suicide bomber. The [SO19] officers have stated that they believed the man being followed on the bus had been identified as one of the suspects for the failed bombings on 21 July 2005. They had been in a situation of trying to ‘Catch up’ with the surveillance team since their briefing had finished. And as they approached STOCKWELL underground station they heard that the suspect had entered the underground station and they received an order to stop him getting on the underground train. I do not believe that the use of the word ‘Stop’ can be related to normal policing duties. With the mind-set of the [SO19] officers believing that a suicide bomber had entered the underground station, to receive such an order to stop him from DSO cannot be related to normal duties. They had not had the benefit of a rider to their briefing of the sort to which I refer at paragraph 20.8. If they had received such a briefing they might have been more cautious in the way they approached and dealt with Mr DE MENEZES.

[...]

20.82 I [Senior Investigator J.D. Cummins] comment at paragraph 20.47 on the consequences of the surveillance team having failed to adequately identify the person they were following. However, that team had spent thirty minutes following and staying with Mr DE MENEZES and attempting to identify him. That provided Commander DICK with a thirty minute opportunity to act in accordance with the operation strategy. There was no attempt to do so.

20.83 The SO12 officers who were following Mr DE MENEZES had been authorised to carry firearms for their personal protection and the protection of the public. In the context of the events of 7 July and 21 July when, respectively, there had been a successful detonation and an attempted detonation of bombs on buses it was a failure of the management of the operation to permit Mr DE MENEZES to get on the bus at TULSE HILL. If he had been a suicide bomber that event could have been catastrophic. Therefore the failure to use SO12 to stop him getting back on the bus in BRIXTON is an even more inexplicable failure to apply the strategy.

[...]

20.87 [The DSO] has endorsed that she was the person in command.

The [CPS] may wish to consider whether the manner in which this operation was commanded, the failures to have resources properly deployed and the absence of any other tactical options could be considered to be grossly negligent.” (EUROPEAN COURT OF HUMAN RIGHTS, 2016).

The first decision of the Prosecution, taken by the Director of Public Prosecutions (“DPP”), decided to sue the OCPM. By applying the threshold evidential test, no individual was going to be prosecuted, because: “There was ‘insufficient evidence to provide a realistic prospect of conviction against any individual police officer ; that is, it was more likely than not that a jury would not convict.” (EUROPEAN COURT OF HUMAN RIGHTS, 2016).⁶

Jean Charles’s family received a letter with the conclusions of the prosecutor not to prosecute any individual involved with the case. The decision not to prosecute any individual was submitted to judicial review, but the High Court dismissed the application.

The criminal trial of the Office of the Commissioner of the Police of the Metropolis (OCPM) resulted in those conclusions:

101. On 1 November 2007 the jury returned a verdict, finding the OCPM guilty of breaching sections 3 and 33 of the 1974 Act (see paragraphs 157 and 158 below). The jury also attached a rider to its verdict to the effect that Commander Dick bore no “personal culpability” for the impugned events. This rider was endorsed by the trial judge. The OCPM was fined GBP 175,000 and ordered to pay costs of GBP 385,000. (EUROPEAN COURT OF HUMAN RIGHTS, 2016).

In a second judicial review of the decision not to prosecute any individual, the decision maintained the same position, as we can see from the statement below: “133. On 8 April 2009 the DPP confirmed by letter that there remained insufficient evidence to prosecute any individual.” (EUROPEAN COURT OF HUMAN RIGHTS, 2016).

⁶ Item E - The first prosecutorial decision. Paragraph 77.

4 THE CASE BEFORE THE ECHR - EUROPEAN COURT OF HUMAN RIGHTS

The case of the death of Jean Charles came to be analyzed by the Court through his cousin Patricia Armani Da Silva - the applicant, being the case registered as Armani Da Silva v. the United Kingdom (application no. 5878/08). The petition was given on January 21, 2008. The main issue raised by the petition was that the decision of the British authorities not to prosecute any individual for the death of Jean Charles would violate frontally the procedural aspect of Article 2 of the European Convention of Human Rights. The Convention requires the authorities of a State to conduct effectively one independent research that leads to clarification of the facts, establishing the police force used was not excessive or / justified for a given situation, and, in case of excess, that those responsible should be punished in a legal manner.

On September 28, 2010, the English Government was made aware about the application (applicant). On 9 December, 2014, the Chamber of the Fourth Section of the Court decided that the case should be reviewed by the highest body of the European Court of Human Rights, submitting the case to the jurisdiction of the Grand Chamber. This is possible because of Article 30 of the Convention, that says:

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

In case, none of the parties has submitted objection to the case being sent for trial by the Grand Chamber. Thus, the parties submitted memorials on the admissibility of the case and also with regard to their field of merit. Moreover, in the case we had a third party intervention made by Equality and Human Rights Commission, which presented its reasons in writing for the Court.

The hearing of parties, The United Kingdom Government ("the Government"), represented by their Agent, Mr P. McKell of the Foreign and Commonwealth Office, and the applicant, represented by Ms H. Wistrich of Birnberg Peirce & Partners, a lawyer practicing in London, took place on June 10, 2015, at the Court's headquarters in Strasbourg, France. The Grand Chamber's decision only occurred on January 20, 2016, and publicly disclosed on March 30, 2016.

5 THE JUDGMENT BEFORE THE COURT - ECHR

The petition to the Court was about the lack of responsibility of any individual for the death of Jean Charles, by the English state. Specifically, the complaint alleges the following:

(a) The applicant's submissions

190. The applicant does not complain that her cousin was killed by State agents in circumstances which breached Article 2 in its substantive aspect; consequently, she does not aver that his shooting was unlawful or that the conduct and planning of Operation THESEUS 2 was in breach of Article 2. Rather, her complaints fall sole-

ly under the procedural limb of Article 2 of the Convention and relate solely to the fact that no individual police officer was prosecuted following the fatal shooting of Jean Charles de Menezes.

191. More specifically, she argues that:

a) the investigation into her cousin's death fell short of the standard required by Article 2 of the Convention because the authorities were precluded from considering the reasonableness of Charlie 2 and Charlie 12's belief that the use of force was necessary; and

b) the prosecutorial system in England and Wales prevented those responsible for the shooting from being held accountable and, as a consequence, the procedural requirement under Article 2 of the Convention has not been satisfied. (EUROPEAN COURT OF HUMAN RIGHTS, 2016).

The violated articles that the applicant was complaining about were:

SECTION I
RIGHTS AND FREEDOMS
ARTICLE 2
Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection. (EUROPEAN COURT OF HUMAN RIGHTS, 1950).

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Court decided that not processing any individual did not infringe Article 2 of the Convention. The Court found that the shooters acted in self-defense when they shot Jean Charles, and that the decision of the prosecutor in applying the threshold evidential test was not faulty:

276. In light of the above, the Court does not consider that the threshold evidential test applied in England and Wales constituted an "institutional deficiency" or failing in the prosecutorial system which precluded those responsible for the death

of Mr de Menezes being held accountable. (EUROPEAN COURT OF HUMAN RIGHTS, 2016).

Still, the Court rejected the claim of violation of Article 3 of the Convention, because remained unproved evidence that Jean Charles was, somehow, tortured in the event that culminated in his death. The allegation of infringement of Article 13 of the Convention also was rejected by the Court, who considered ill-founded the allegation of this Article 13 in relation to the case.

Thus, the European Court of Human Rights considered the petition admissible, unanimously, but by 13 votes to 4, understood that there was no violation of Article 2 of the Convention, the mainly subject of the petition.

6 THE CONCEPT OF VIOLENCE OF JOHAN GALTUNG

This paper aims to analyze de case law above through the concepts of violence formulated by Johan Galtung. In quick words, it can be put that Galtung typifies three kinds of violence: direct, structural and cultural.

Direct violence in narrow concept is a physical violence, but Galtung go ahead and shows that the direct violence can be physical and psychological:

Under physical violence human beings are hurt somatically, to the point of killing. It is useful to distinguish further between 'biological violence', which reduces somatic capability (below what is potentially possible), and 'physical violence as such', which increases the constraint on human movements - as when a person is imprisoned or put in chains, but also when access to transportation is very unevenly distributed, keeping large segments of a population at the same place with mobility a monopoly of the selected few. But that distinction is less important than the basic distinction between violence that works on the body, and violence that works on the soul; where the latter would include lies, brainwashing, indoctrination of various kinds, threats, etc. that serve to decrease mental potentialities. (GALTUNG, 1969, p. 169).

In addition to the difference of physical and psychological forms of direct violence, Galtung has the following distinctions: (a) between positive and negative approach of influence; (b) the object that is hurt (or not); (c) whether or not there is a subject who acts; (d) between violence intended or unintended; and, finally (e) manifest and the latent violence (GALTUNG, 1969, p. 170-172). All of these distinctions will be investigated in the final version of this work.

Within these violence dimensions, Galtung (1969, p. 170) also proposes a type of direct violence or person, as there that have an identified author, and in the other hand, indirect or structural when the author is not identified. In both cases people could be killed, crippled, physically or psychologically injured, or manipulated.

Lastly, the concept of cultural violence means all "those aspects of culture, the symbolic sphere of our existence exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) - that can be used to justify or legitimize direct or structural violence." (GALTUNG, 1990, p. 291).

Thus, to complete these expanded summary, we reinforce the idea and the intention to promote, in the final version of this work, a thorough dialogue between the case Jean Charles and the dimensions of violence proposed by Galtung.

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