



CRIMINAL LAW: SPECIFIC OFFENCES

– Intermediate Exercise SS 2021 –

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Francisco, the director of the cardiac surgery department at Santa Maria public hospital, is a well-known surgeon specialized in cardiac diseases. On 27 February 2020, on which he scheduled for himself an ‘on-call’ night shift, Maria, a young specialist in cardiac surgery takes on the presential night shift. As Maria completed her specialisation only three months ago and cardiac surgeries require the presence of minimum two specialists, Francisco, being the other specialist available at that time, is required to show up within thirty minutes (from the moment he will be notified) in case that a patient needs to be operated outside the daily agenda, i.e., because of emergency.

On the aforementioned day, Catarina arrives with her husband Pedro, who has been a patient of Francisco for many years now, at 11:30 pm at Santa Maria, and Pedro is already unconscious.

Pedro is a 60-year-old famous Portuguese painter, who presents various symptoms of the Alzheimer disease by experiencing greater memory loss and certain cognitive difficulties leading among other things to troubles related to money handling, disorientation and inability to recognise persons that used to be close to him. Having identified those difficulties some time ago, he decides that Catarina, his wife, shall handle health care related decisions on his behalf in those cases, in which he will not be able to do so solely by himself. In that context, he explains to Catarina that he would like to live long enough to see his grandchildren getting older, even if he won’t be able to recognise them, and that he would like to continue enjoying the Portuguese sun for the years to come. Catarina promises to respect his will. Besides this, Pedro, during the first months he was diagnosed with the Alzheimer disease,



gave an interview in a Portuguese journal expressing his great love for life and stating he would like to enjoy the colours of the Portuguese countryside and the ocean until the day he will take his last breath. That interview did not entail any reference to his medical condition.

That night, Maria examines Pedro and diagnoses a severe heart episode. This is when she also realises that it is of literally life importance for Pedro to be operated immediately due to the suspicion of an internal bleeding. She calls Francisco to inform him, but the latter believes that this is most likely a misjudgement and Pedro is not in danger, but he reassures her that he will show up in thirty minutes as agreed. In reality, Francisco, who knows both Pedro and Catarina for many years now, decides to stay at home and go to the hospital the day after, believing that it is simply Catarina who overreacts due to the special condition of Pedro and thinking that in any case Pedro would be fine until next morning.

Maria waits for Francisco for thirty minutes, as agreed, and, since he does not show up within that time window, she announces to Catarina that they will have to move on without Francisco. Catarina, who does not know Maria personally and she does not trust her, reacts negatively saying that she denies her consent and they should definitely wait for Francisco to show up. Maria, who happens to admire the artwork of Pedro and has read the aforementioned interview, ignores her and moves on with the surgery, during which it becomes apparent that there was indeed an internal bleeding that could have led to Pedro's death within the next three hours.

The surgery goes particularly well, and Pedro recovers from the heart episode relatively quickly – fact that leads to the immediate promotion of Maria, while Francisco is forced to quit his job. Maria is gradually becoming a well-respected young surgeon specialised in dealing with internal bleedings. As such, she is called to a cardiac surgery conference on 10 January 2021, where she decides to open her presentation by touching upon her recent experience. In that context, she reveals that some really well-known Portuguese citizens belonging to the arts' world have successfully been treated by her saying among other things: 'Despite the family drama, despite the insecurity feelings, despite the deep pain mental diseases are causing, I was strong enough to intervene and save a life, a life of a real artist – even if I will never be remembered by that greatly talented patient.'



João, Pedro's son and student in the Lisbon Medical School, was one of the conference participants. At the break, many colleagues approached him and asked him how his father feels after all these months and expressed their sympathy as they did not think that Pedro was among other things an Alzheimer patient.

Evaluate the actions of Maria and Francisco in the light of the Portuguese Criminal Law.

Boa sorte!/Good luck!

I. Maria (12 points) - Her behaviour to be examined in the light of:

1. Art. 150 PC (2 points)

- starting with Art. 150 (1) PC
 - doctor or legally authorised person (+)
 - medical intervention or treatment (+)
 - chirurgical operation
 - acting in accordance with lege artis rules (+)
 - no counter-evidence
 - she waits until Francisco shows up following the respective guidelines
 - acting with the intention of preventing, diagnosing, debilitating or minimising illness, suffering, injury or bodily fatigue or mental disturbance (+)
- Art. 150 (1) PC (+); no violation against bodily integrity

2. Art. 156 (1) PC (5 points); to be additionally examined, as Art. 150 PC addresses violations against bodily integrity, whereas Art. 156 PC addresses violations against personal freedom

- Objective:

- doctor or legally authorised person (+)
- medical intervention or treatment (+)
chirurgical operation
- without patient's consent?

Pedro being unconscious → not able to consent personally

Catarina, being his legal representative denies her consent, but not on the basis of Pedro's wishes or his best interests, instead, out of mistrust towards Maria

however, there are other grounds that allow a safe conclusion that Pedro would provide his consent (see his pro-vita interview)

→ **Art. 156 (2a) Port PC** is activated in terms of a *lex specialis* (compared to Art. 39 Port PC) leading to the **exclusion of Maria's liability for the alleged violation against personal freedom** ('The act is not punishable when the consent: a) can only be obtained with the postponement of the medical intervention that involves a threat to the patient's life or serious danger for the patient's body or health; [...])

- obligation to behave according to the subjective analysis that the patient would undertake in that case (+)
- taking into account information about the patients' beliefs and lifestyle (+)

3. Art. 195 PC (5 points); to be additionally examined, as it addresses a distinct legal interest, namely privacy

- Objective elements:

- notion of secret of another person

- objective element (+)

true facts the knowledge of which is limited to an objectively controlled number of people;

according to the exercise formulation, only the family of João and the doctors treating him were aware of his medical condition and the emotional situation of his wife, Catarina

- subjective element (+)

there is no indication that João being a public figure was not interested to keep his medical condition as a secret, even if, when he finds out what happened, he cannot process it;

the same applies to his wife, who on top of this had to deal with all the practical issues associated with Pedro's condition

- normative element (+)

legitimate interest in protecting secrecy in case of Alzheimer patients given the risk of their exploitation by strangers, or the risk of being discriminated due to their disease;

similarly in case of his wife as a relative of an Alzheimer patient and given the intimacy associated with the feelings her husband suffering causes to her

- notion of medical secrecy (+)

Maria is aware of Pedro's situation and the family related issues only due to the fact that she happened to undertake the surgery on that night

Maria being subject to duty to secrecy as a doctor and principal researcher

- breach of secrecy (+)

revealing (even just indirectly) personal information, incl. that related to medical condition, in people that are not legitimately expected to know

- without consent (+)
Pedro or his wife/family was not even aware that Maria would give that presentation in which she referred to his case by almost photographing him

- **subjective elements:**
 - intention (+)
Maria is acting at least with dolus directus of 2nd degree; being sure about the consequences of her actions, namely the breach of confidentiality, but not necessarily accepting them – given that she provides this information to emphatically support her devotion to medicine

II. Francisco (8 points)

1. His behaviour to be examined in the light of Art. 131 Port. PC in combination with Art. 10 and 23 Port. PC (4 points):

- **Objective elements to be first examined:**

- whoever (+); no special requirement in terms of subjective scope

- act/omission that may lead to death (+)

Francisco does not show up in the hospital despite being notified to do so; omission (delay);

legal duty arising from law as this is a public hospital; besides this, Pedro was already a patient of Francisco

- death (-)

Pedro survives thanks to the intervention of Maria, which breaks the causation link between Francisco's omission and the death result that would take place within 6 hours, namely before Francisco would arrive at the hospital → **Art. 131 in combination with Art. 23 Port PC**

- **subjective elements:**

- intention (+); **attempt by negligence being impossible**

Francisco acts with at least dolus eventualis as, being an experienced surgeon, he knows that Pedro's death is a likely outcome and reacts indifferently believing that Pedro will be fine until next morning

Alternative answer: no homicidal intention → liability (-) on subjective grounds

- **Penalty framework:** 8 to 16 years imprisonment (Art. 131 Port PC) → approx. 6 to 11 years imprisonment (mitigation according to Art. 73[1a-b] Port PC)

2. His behaviour to be examined in the light of Art. 138 (1b) Port. PC (4 points):

- **Objective elements to be first examined:**
 - whoever (+); no special requirement in terms of subjective scope
 - abandonment without defence (?)
 - possible arguments:
 - (+) since Maria, theoretically, was not able to take on the operation needed by herself
 - (-) considering that there was at least one specialist able to take care of him until the next morning [not that strong, since Maria was expected to abstain from intervening without being assisted by a second specialist at this stage of her career]
 - duty to [...] assist (+) ... on legal grounds, as doctor in a public hospital, being on 'on-call' shift

- **subjective elements:**
 - intention (+)

Francisco acts with at least *dolus eventualis* as, being an experienced surgeon, he knows that Pedro's death is a likely outcome and reacts indifferently believing that Pedro will be fine until next morning

- **penalty framework:** 1 to 5 years imprisonment (Art. 138 [1b] Port PC)

***3. Lex specialis - His behaviour to be examined in the light of Art. 284 Port. PC:**

- **Objective elements to be first examined:**
 - doctor (+)
 - refusal of medical aid (?)
 - (+) considering that Maria was expected to abstain from intervening without being assisted by a second specialist at this stage of her career
 - danger to life or serious danger to the physical integrity of another person (+)
 - danger that cannot be removed in any other way (?)
 - (+) considering that Maria was expected to abstain from intervening without being assisted by a second specialist at this stage of her career

- **subjective elements:**
 - intention (+)

Francisco acts with at least dolus eventualis as, being an experienced surgeon, he knows that Pedro's death is a likely outcome and reacts indifferently believing that Pedro will be fine until next morning