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STALKING ON WOMAN IN CHILDBIRTH: THE INTERVENTION OF THE CASSATION.

Is it configurable the crime of aggravated stalking in case of woman who has recently given birth to a child?

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Owing to current affairs that have shown as victims, mostly, women, our legislator introduced in the juridical sanctioning system the crime of persecutory acts (ex art. 612 *bis* p.c.), also known as *stalking*.

And indeed, the norm punishes “*with the detention from six months to five years anyone, with reiterated behaviour, who threatens or molests someone so as to provoke a persistent and a grave state of anxiety or of fear that is to cause a well-founded awe for her own safety or of a close relative or someone related to her by attachment that is so that to force the same to change his own lifestyle*”.

It is clear that the legislator’s prosecuted aim is to provide a different sanctioning system for all those conducts which, previously, were defined or as less grave incriminatory case in point, like the crime of “threat” or of “coercion”, or as other graver cases, like “domestic abuse”, “personal injury” and “kidnapping”.

So, owing to the impossibility of subsuming in any of such conducts characterized by **reiteration** and by **the negative interference in private life** of the plaintiff, the system identified a new criminal case in point, suitable to repress the increasing persecutory phenomenon.

On a closer inspection, the main feature of the crime taken in consideration is the reiteration of the conducts adopted by the offender, so as to define it as **common offence**.

For this reason, in such normative predisposition, the hypothesis cannot be traced back - no matter how grave it is - to only one conduct of teasing and of threaten, “*neither by unifying or by tracing it back to previous events that are object of other criminal proceedings activated in the same judicial branch, expected the proscription of ne bis in idem*” (Pen. Cass. 24th September 2014 No. 48931).

By proceeding in the close examination of such criminal case in point - punishable only in general intent hypothesis - it emerges that a salient further feature conforms to the heterogeneous **conducts among them alternative** barred by the code, likewise suitable to integrate *stalking*: behaving like that, the legislator wanted to fill a normative emptiness, by providing a concrete sanctioning response previously excluded by the field of application of punitive law.

Nevertheless, it is necessary to underline that the legislator did not exclude the hypothesis (unfortunately, they are frequent) in which the active subject of the crime holds the role of “consort in perseverance of marriage or also separated and divorced, that is to say, someone currently or formerly related to the victim by attachment, or besides, connected through technological and computer instruments”. That is why, in such cases, the punishment provided, following the coming into force of l.n. 119/2013 (so- called femicide law) increased to one third.

Another aggravating circumstance involving an intensification of the sanctioning system until the half of the basis crime, concerns the hypothesis in which the criminal conducts are committed at the expense of weaker subjects and, among them, **pregnant women**.

However undisputed is such expectation, it implies the interesting and, at the same time, difficult query related to the possibility of depicting or not the aggravating circumstance of the above-mentioned case in which the woman is in *childbirth*, so as to extend a further guardianship to the new mother.

So, the first one to pronounce on it was the Court of Appeal of Genoa which, with a recent judgement, dated on the 19th December 2014, excluded that the aggravating circumstance stated in Art.612 *bis*, 3 paragraph p.c., by observing that, with the purpose of configuration of persecutory

acts' crime, are exclusively relevant those offensive conducts of the offender in a moment that is subsequent to that of the birth of his daughter and of the plaintiff. Therefore, "*it could not occur the circumstance of having committed the fact at the expense of a pregnant woman*".

On this issue, we could not omit the *obiter dictum* of the Supreme Assembly which, without giving its own opinion on the configuration of the aggravating circumstance, considered necessary to reject the appeal proposed by the defence counsel of the defendant, as the multiple and repeated events of physical assault, with damage to his ex-cohabitant, "*should be considered particularly grave concerning the fact that the victim of the persecutory acts was a woman in childbirth*" (Pen. Cass. 20th January 2016 n. 2325).

Therefore, it is clear that the choice made by the Judge of Legitimacy is intended to depict the new mother's condition not so much *sic et simpliciter*, as an aggravating circumstance of the crime of Art.612 bis paragraph 3 p.c., as, instead, to sentence- by confirming the sentence by the Ligurian Judge- a further sanctioning weight, expected the gravity of multiple events committed by the defendant (violence, threaten, bodily harm and persecutory acts).

In conclusion, by recalling the last as well as only interpretation of the Court of Cassation in this field, we can maintain that, although the victim is not pregnant, the degree of culpability of the defender is, anyway, more censurable if the victim has recently given birth to a child.