

[G. R. No. 3574. August 02, 1907]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. NICOMEDES DE DIOS
DEFENDANT AND APPELLANT.**

D E C I S I O N

TORRES, J.:

Lucia Valencia, mother of Silvina Cunanan, a minor, on February 7, 1906, filed in the justice of the peace court of Santa Rita, Province of Pampanga, an information of the following tenor:

“The undersigned accuses Nicomedes de Dios, of this locality, of the crime of attempted rape, committed in the following manner:

“That between the hours of 11 and 12 of yesterday, the 6th instant, while her daughter Silvina Cunanan, 17 years of age, was in the house of one Vicenta de Dios, situated in the barrio of San Jose, of this town, in the company of Agueda Fajardo, daughter of the latter, Nicomedes de Dios, who lives in the neighborhood, went up the said house for the purpose of having carnal intercourse with her above-mentioned daughter; for the said Nicomedes de Dios, by holding both her hands, embraced her and forced her to lie down with the avowed intention of raping her, all of which would have been accomplished were it not for the timely arrival of Vicenta de Dios, the owner of the house, who, while buying some food at one of the nearby shops, was suddenly summoned by Agueda Fajardo, a little girl who was sent away from the house by the accused in order that he might freely gratify his desires. That upon the arrival of Vicenta and upon seeing both of them in that position, the accused lying upon and embracing her daughter,

who lay lengthwise with her back against the floor, she separated them immediately and, by beating him several times with a piece of rope, drove him from her house. All of which was committed contrary to law.”

Upon the termination of the preliminary investigation, the provincial fiscal, on the 26th of March following, filed in his turn a complaint charging the accused with the crime of rape, in the following words:

“Between 11 and 12 a. m. of the 6th day of February last, while Silvina Cunanan, 17 years of age, was in the house of Vicenta de Dios, which is situated in the barrio of San Jose, within the municipality of Santa Rita, Province of Pampanga, P. I., the accused, Nicomedes de Dios, went up the said house and then and there and maliciously, intentionally, and forcibly seized, embraced, and kissed the above-mentioned Silvina Cunanan and gagged her to prevent her from crying out for help, until by means of the force employed and in spite of her resistance, he succeeded in lying down with her and had carnal intercourse with her three times against her will. All contrary to the statute.”

The case came on for trial by virtue of said complaint, and the court, in view of the evidence produced, rendered judgment on July 27 of the same year and found Nicomedes de Dios guilty of the crime of rape, and sentenced him to fourteen years eight months and one day of *reclusion temporal*, with the accessories prescribed in article 59, to endow the injured party in the sum of 1,000 pesos, to acknowledge and support the offspring, should there be any, and to pay the costs of the trial. From this judgment the defendant appealed.

In order to determine whether or not the crime of rape or some other crime against chastity has been really committed, it becomes necessary to consider the testimony of the physician who examined the body of the injured party many days after the occurrence. The physician testified (p. 24) that he did not discover any signs of violence used upon the body of the young woman Silvina Cunanan, but that there was a defloration caused by sexual intercourse; that he had not seen any marks of violence on the sexual organs nor on other parts of her body; that such defloration had not existed for a long time, although he was unable to state accurately how much time had elapsed from the date; of the occurrence to

the day (March 20) when the physical examination was held.

The injured party, Silvina Cunanan, said to be 14 years of age, stated that before the noon hour of February 6, 1906, she was in the house of Vicenta de Dios, with no company other than that of the little girl, Agueda Fajardo, said Vicenta de Dios having left the house in the meantime to buy some food; that the accused, Nicomedes de Dios, went up the house and without any warning embraced her and by making her lie down on the floor he placed himself on her body; that at that moment the little girl ran away to call for Vicenta, the owner of the house, and during the absence of the girl the accused succeeded in accomplishing his criminal purpose; that in spite of her resistance he had carnal intercourse with her twice; that she was unable to make any outcry in view of the fact that he had caught hold of and had gagged her; and that Vicenta de Dios, who returned to her house one hour after she was summoned, upon finding the accused on her body took her away from him, and that as he was leaving the house she whipped him with a piece of rope several times.

Vicenta de Dios stated that in response to the summons of her daughter, Agueda Fajardo, she returned to the house wherein she found the accused lying down with the young woman, Silvina Cunanan, wherefore she separated them and whipped the accused with a piece of rope as he left the house. The little girl, who confirms the testimony of the injured party, said that when the latter was thrown down to the floor by the accused, she hastened to call for her own mother, and on her return she remained on the ground floor of the house and did not see the accused again.

From the above-stated facts it will be seen that there is no evidence on record sufficient to prove that the crime, of which the accused is charged, has been committed; for it was not thoroughly demonstrated at the trial beyond reasonable doubt that said defendant, having twice had sexual intercourse with Silvina Cunanan, could have employed physical force or intimidation against her.

Inasmuch as it took the offender one full hour to have sexual intercourse twice with the so called injured party, and as no struggle had ensued between the two, no resistance was offered by the latter for the protection of her chastity, and no outcries for help were made by her, even though the act took place in the center of the town, it is undeniable that, although consent was not previously given by the young woman, Silvina Ounanan, to the realization of the repeated sexual intercourse had between herself and the accused, nevertheless the daring attitude of the latter was responsible for her yielding and tacitly

giving her assent, contributing by her quietude and passivity to the consummation of the two acts of intercourse, which in criminal law should perhaps be termed the crime of seduction (*estupro*).

Pacheco, the learned commentator of the Penal Code, says:

“The crime of rape is not to be presumed; consent and not physical force is the common origin of acts between man and woman. Strong evidence and indications of great weight will alone support such a presumption.”

The well-known commentator Viada expresses a similar opinion in the following words:

“Should the records disclose that some hesitation was shown by the woman or that she had contributed in some way to the realization of the act, this will perhaps constitute an offense very different from that of rape.”

Inasmuch as the facts proven at the trial do not constitute the crime of rape, on account of the absence of those essential elements specified in article 438 of the Penal Code, we find that the conviction of the accused is contrary to law, and therefore, with reversal of the judgment appealed from, we must acquit and do hereby acquit Nicomedes de Dios with the costs of both instances *de officio*. The accused will be set at liberty without delay. So ordered.

Arellano, C. J., Johnson, Willard, and Tracey, JJ., concur.