

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. DOMINGO HERNANDEZ, DEFENDANT AND APPELLANT.

G.R. No. 23916. October 14, 1925

Ponente: OSTRAND, J.

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OSTRAND, J.:

The defendant is accused of the crime of rape, the information alleging "that on or about the 26th day of February, 1925, in the City of Manila, Philippine Islands, the said accused wilfully, unlawfully, and feloniously, by means of force and by intimidating one Conrada Jocson with killing her with a knife which said accused held in his hand should she not accede to his wish, did then and there lie with and have carnal knowledge of said Conrada Jocson, a girl under 12 years of age. That in the commission of the crime the following aggravating circumstances existed to wit: (1) The accused is the husband of the grandmother of said Conrada Jocson and (2) the crime was committed with grave abuse of confidence, inasmuch as the offended and the accused were living in the same house."

The defendant is a man 70 years of age and the offended party is a child of 9 years, the granddaughter of the defendant's wife. There can be no question as to the defendant's guilt. The evidence shows that he and the offended party were living in the same house and that taking advantage of the absence of the other inhabitants of the house, he had intercourse with the child by force and violence. He admits that he did so, but maintains that he was intoxicated at the time and did not know what he was doing. The testimony of the witnesses for the prosecution is, however, to the effect that he did not show any signs of intoxication at the time of the commission of the crime or immediately afterwards.

The court below found the defendant guilty of frustrated rape and sentenced him to suffer ten years and one day of prison mayor. In holding that the crime was frustrated, the court seems to have been of the opinion that there can be no consummated rape without a complete penetration of the hymen. This view is not in accordance with the weight of authority; in fact, it is contrary to practically all modern authorities. In *State vs. Johnson* (91 Mo., 439), the court held that "finding the hymen intact is not always proof that no rape has been committed, nor of virginity; for the cases are not rare where the hymen had to be removed after impregnation and in order to permit delivery."

In the same case, the court further said:

"Any penetration whether reaching to the hymen or not is sufficient to constitute the crime; for as Lord Meadowbank said in a case in Scotland, 'Scientific and anatomical distinctions as to where the vagina commences are worthless in a case of rape; it is enough if the woman's body is entered; and it is not necessary to show to what extent penetration of the parts has taken place; whether it has gone past the hymen, into what is anatomically called the hymen, or even so far as to touch the hymen.' (Stewart on Legal Medicine, p. 137.)"

In *People vs. Rivers* (147 Mich., 643), the court says:

"The law may now indeed be considered as settled that while the rupturing of the hymen is not indispensable to a conviction, there must be proof of some degree of entrance of the male organ 'within the labia of Pudendum.'

" In the following cases it has been held that entry of the labia or lips of the female organ, merely, without rupture of the hymen or laceration of the vagina, is sufficient to warrant conviction of the consummated crime of rape. (Kenney vs. State [Tex. Crim. App.]; 65 L. R. A., 316; 79 S. W., 817 [1903]. See [Eng.] Reg. vs. Lines, 1 Car. & K., 393 [1844]; 44 N. W., 571 [1890]; [Tex.]; Rodgers vs. State, 30 Tex. App., 510; 17 S. W., 1077 [1891]; [Wis.] Brauer vs. State, 25 Wis., 413 [1870].)

In the present case the physician who examined the offended party immediately after the commission of the crime found the labia and the opening of the vagina inflamed, together with an abundance of semen, though the hymen was intact. It also appears from the evidence that the defendant lay on top of the child for over fifteen minutes and continued his efforts of penetration during that period; the child testifies that the defendant succeeded in a partial penetration and that she felt intense pain. In these circumstances, the crime must be regarded as consummated.

The judgment appealed from is therefore modified by finding the defendant guilty of the consummated crime of rape and, in view of the aggravating circumstances mentioned in the information, the penalty imposed upon the defendant is hereby increased to seventeen years, four months and one day of reclusion temporal, with the accessory penalties prescribed by law. In all other respects the judgment is affirmed with the costs against the appellant. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

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