

THE PEOPLE OF THE PHILIPPINE ISLANDS, PAINTIFF AND APPELLEE, VS. JULIAN ERINIA Y VINOLLA, DEFENDANT AND APPELLANT.

G. R. No. 26298. January 20, 1927

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is an appeal from a judgment of the Court of First Instance of Manila finding the defendant guilty of the crime of consummated rape and sentencing him to suffer seventeen years, four months and one day of reclusion temporal, with the accessory penalties provided by law and to pay the costs.

The victim of the crime was a child of 3 years and 11 months old and the evidence is conclusive that the defendant endeavored to have carnal intercourse with her, but there may be some doubt whether he succeeded in penetrating the vagina before being disturbed by the timely intervention of the mother and the sister of the child. The physician who examined the genital organ of the child a few hours after the commission of the crime found a slight inflammation of the exterior parts of the organ, indicating that an effort had been made to enter the vagina, but in testifying before the court he expressed doubts as to whether the entry had been effected. The mother of the child testified that she found its genital organ covered with a sticky substance, but that cannot be considered conclusive evidence of penetration.

It has been suggested that the child was of such tender age that penetration was impossible; that the crime of rape consequently was impossible of consummation; and that, therefore, the offense committed should be treated only as abusos deshonestos. We do not think so. It is probably true that a complete penetration was impossible, but such penetration is not essential to the commission of the crime; it is sufficient if there is a penetration of the labia. In the case of *Kenney vs. State* ([Tex. Crim. App.], 79 S. W., 817; 65 L. R. A., 316) where the offended party was a child of the age of 3 years and 8 months, the testimony of several physicians was to the effect that the labia of the privates of a child of that age can be entered by a man's male organ to the hymen and the defendant was found guilty of the consummated crime of rape.

There being no conclusive evidence of penetration of the genital organ of the offended party, the defendant is entitled to the benefit of the doubt and can only be found guilty of frustrated rape, but in view of the fact that he was living in the house of the parents of the child as their guest, the aggravating circumstance of abuse of confidence existed and the penalty must therefore be imposed in its maximum degree.

The judgment appealed from is modified and the defendant-appellant is hereby found guilty of the crime of frustrated rape, and is sentenced to suffer twelve years of prision mayor, with the accessory penalties prescribed by law, and with the costs in both instances. So ordered.

Johnson, Street, Villamor, Romualdez, and Villa-Real, JJ., concur.

MALCOLM, J., dissenting:

In my opinion, the accused is guilty of raping a child 3 years and 11 months of age. It is consummated rape according to the evidence of record, the findings of the trial judge, and our decisions. (People vs. Hernandez [1925], 49 Phil., 980; People vs. Oscar [1925], 48 Phil, 527.) The instant case is on all fours with the case of Kenney vs. State (65 L. R. A., 316), cited in the majority decision. In the Kenney case, the penalty was death, and here for this horrible crime, should be placed in the maximum degree, or seventeen years, four months, and one day imprisonment, as imposed by the trial court. Accordingly, my vote is for affirmance of the judgment. Judgment modified.

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