Can Frustrated Rape Be Committed?

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WHETHER or not frustrated rape can be committed has been asked time and again. Viada in commenting on the Penal Code of Spain of 1870 was confronted with the same question. He mentioned leading criminalists and commentators of the Spanish Penal Code who maintained that with respect to rape there can only be a consummation thereof leaving no room for either an attempt or a frustration of the same. This question is both, legal and medico-legal in nature, so that the student of law quite often meets it. Can frustrated rape be committed?

Article 335 of the Revised Penal Code provides: "Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation;

2. When the woman is deprived of reason or otherwise unconscious;

3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the next two preceding paragraphs shall be present."

Essentially, therefore, rape is *carnal knowledge* of a woman with any of the above-mentioned circumstances being attendant. Carnal knowledge presupposes penetration, which means that the sexual organ of the male entered and penetrated the sexual organ of the female (People v. Crowley, 102 N. Y. 234; Ulmer v. State, 160 SW 1188); and mere actual contact of the sexual organ is not sufficient (State v. Grubb, 55 Kan. 678); and if the female is not sufficiently developed to admit of the slightest penetration, there can be no carnal knowledge (White v. Com., 28 SW 340).

For a proper solution of our problem we must first make distinctions. Article 6 of the Revised Penal Code states:

"Consummated felonies as well as those which are frustrated and attempted, are punishable.

"A felony is consummated when all the elements necessary for its execution and accomplishment are present; and it is frustrated when the offender performs all the acts of execution which would produce the felony as a consequence but which nevertheless, do not produce it by reason of causes independent of the will of the perpetrator.

"There is an attempt when the offender commences the commission of a felony directly by overt acts and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance."

There can be no question as to a consummated rape if we bear in mind the codal provisions as to what constitutes the crime of rape and the consummation of any crime. As to attempted rape we have the following case, which is typically illustrative of this crime.

Shortly after 8 o'clock on the night of the 29th of June, 1901, Manuela and Felicisima Rey Hipolito, sisters, the latter 15 years and the former 13 years of age, while in the water closet, some distance from the house in which they lived, observed that the two defendants were concealed behind

a tree near the privy. Upon this the two girls left the closet for the purpose of going back to the house, but before they succeeded in this the defendants approached, Manuel seizing Manuela, and Jose seizing Felicisima. They embraced the girls and tried to throw them on the ground with the intent to rape them. Notwithstanding their forcible efforts to do this they did not succeed in carrying out their purpose owing to the resistance of the girls and their screams for help which attracted the attention of their parents. The girls' parents were not able to catch the accused, as they made their escape before the parents reached the spot. The Philippine Supreme Court decided: The facts related constitute the double crime of attempted rape. (U. S. v. Banzon, 1 Phil. 435).

Similar decisions were rendered in the cases of U. S. v. Salvador, 2 Phil. 549; U. S. v. de la Cruz, 3 Phil. 337; U. S. v. de la Cruz, 9 Phil. 276; U. S. v. Rojo, 10 Phil. 369; and U. S. v. Estrada. 24 Phil. 401. In these cases, all the acts of execution which should produce the crime were not performed by reason of some cause or accident other than the spontaneous desistance of the offenders.

Rape can be distinguished from acts of lasciviousness by the act performed by the accused and by the purpose which motivated him in doing such act. Whenever the act performed by the culprit is characterized by lewdness or lasciviousness, the crime committed is abuse of chastity; but it is attempted or frustrated rape, if the acts performed by the offender clearly indicate that his purpose is to lie with the offended person (Guevara, Commentaries on the Revised Penal Code, 668). Thus the act of an offender who after throwing a girl 7 years old upon the floor, placed his private parts, upon hers and remained in that position for some moments, is a crime against chastity or *abusos deshonestos* (U. S. v. Tan Teng, 23 Phil. 145).

Corpus Juris mentions some cases which hold that penetration is not essential to the consummation of rape and which cases are directly contradictory to the purposes of these notes and comments. A review of those cases reveals that in *carnal abuse, criminal abuse,* and *statutory rape,* the offense is complete even without penetration. But these offenses are different from common-law rape and rape as we understand it under our Revised Penal Code in which crimes, carnal knowledge is the essential element. In the case of State v. Hummer, 65 A 249, the court said: "Criminal abuse which is the assaulting or debauchery of the sexual organs of the female, by the male genitals does not connote penetration, and hence is not identical with criminal knowledge, that is sexual intercourse, or with rape." The same doctrine was enunciated in State v. Huggins, 87 A 630 and Synder v. State, 150 NE 644.

There has been very few prosecutions for the crime of frustrated rape and a close examination of the decisions of our Supreme Court reveals this fact. Lately, the case of People v. Erinia, 50 Phil. 998 is cited in Criminal Law textbooks and quizzers as the lone authority on frustrated rape. In that case the Supreme Court said: "The victim of the crime was a child of 3 years and 11 months 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 va-

gina before being disturbed by the timely intervention of the mother and the sister of the child. 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 guilty of frustrated rape." Mr. Justice Macolm dissenting to the majority opinion said: "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. The instant case is on all fours with the case of Kenney v. State, 65 L. R. A. 316.

To our mind, the Supreme Court in resolving the doubt of penetration in Erinia's favor, should have gone farther, and should have declared him guilty of attempted rape only. In this case the accused was disturbed by the timely intervention of the mother and the sister of the child. Thus, all the acts of execution which should produce the crime were not performed by reason of some cause or accident other than the spontaneous desistance of the offender. On the other hand, if Mr. Justice Malcolm was right in finding from the evidence of record that there was penetration, the accused should have been declared guilty of consummated rape. We still believe in the doctrines laid down in People v. Oscar, 48 Phil. 527. In that case, the Supreme Court said: "The court below found that the crime was frustrated, and not consummated, on the ground that the evidence did not clearly show, that the defendant's genital organ was introduced to its full length into that of the offended party, and that there were no signs of emission of semen. This conclusion is erroneous. Perfect penetration is not essential. 'Any penetration of the female body by the male organ is sufficient (People v. Rivers, 147 Mich. 643). 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 (Rodgers v. State, 30 Tex. App., 510; Brauer v. State, 25 Wis. 413).' Stewart in his work on Legal Medicine, citing Taylor v. State, 111 Ind. 279 and People v. Crowley, 102 N. Y. 234 says at page 137: 'And it is undoubtedly the law that penetration even to the least extent will be sufficient to establish the crime, and this may even be inferred from the circumstances of the case.' Stewart, again, in his same work said, 'Any penetration whether leading 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.' " In the cases of People v. Hernandez, 49 Phil. 980, and People v. Madraso (CA), 34 O. G. 1478, the offenders were convicted of consummated rape upon proof of partial penetration.

In opposition to the leading criminalists and commentators of the Penal Code of the time, Viada maintained that frustrated rape can be committed. He said that this crime results when the accused takes a young girl to the woods and taking advantage of her weakness and innocence abuses her there.

but, the carnal act is not consummated because of a material impossibility, due to the disproportion in the physical development of the genital organs of the offender and the offended party. He asserted that all the acts of execution necessary to produce the crime were performed but the offense did not result because of a cause independent of the will of the perpetrator.

With due deference to Viada we believe that his example is not that of a frustrated rape. We have cited authorities to the effect that a slight penetration constitutes carnal knowledge. In the case of Keeney v. State, 65 L. R. A., 316, the victim was 3 years and 8 months old and the accused was convicted of consummated rape. Therefore in Viada's example where the victim was 6 years of age, the fact that there was penetration can not be denied. From the foregoing cases cited, Viada's example is consummated rape.

Perhaps the latest case that we can cite in support of our stand is the case of People v. Sunga, G. R. No. 38026, dated September 26, 1933. The facts proved were: "The accused attempted to have intercourse with the offended party. The girl resisted but was thrown to the ground, and the accused placed himself on top of her, kissing her, fondling her breast, and attempting to have intercourse with her. In this he did not succeed, for the girl made a stout resistance kicking and crying for help and also when his genital organ touched the private parts of the girl the latter exerted herself and prevented insertion. The semen of the accused was however emitted and was spread on the private parts of the girl. The appellant rose and made his escape." The Supreme Court through Mr. Justice Street said: "The trial court qualified the crime as frustrated rape. In our opinion it was only attempted rape. No rape is committed until penetration is accomplished *and if penetration is accomplished the crime is consummated. There is no room for the conception of frustrated rape in the case of incomplete penetration.*"

It would have been better, in order to erase all doubts, if the court had not added the last sentence of the dispositive part of its decision, which as it now stands is in direct opposition to the statement preceding it. The court stated that if penetration is accomplished, the crime is consummated. In other words, whether the penetration is complete or incomplete, so long as there is penetration, however slight, the crime is consummated. There is no reason, therefore, for the court to conclude that there is no room for the conception of frustrated rape in the case of incomplete penetration from which statement we may imply that frustrated rape can be possibly committed in the case of complete penetration. In spite of such implication, our conclusion is unshaken. We submit that under present Philippine jurisprudence, frustrated rape cannot be committed.