TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

KERAHD LONEY, Defendant

Criminal Case No. 6-74

Trial Division of the High Court

Ponape District

January 31, 1975

Prosecution for rape. The Trial Division of the High Court, Brown, Associate Justice, held that the offense charged occurred where defendant lured victim into house, threatened to beat or kill her with a rock if she resisted, caught her and threw her to the floor when she attempted to run, and penetrated her.

1. **Rape—Elements—Force**

   Whether rapist threatened to kill, or to beat victim, was immaterial with respect to necessary element of force. (11 TTC § 1302)

2. **Rape—Elements—Penetration**

   Testimony of rapist's victim that there was penetration, and medical officer's testimony that examination showed lacerations of the posterior wall of the vagina and a ruptured hymen established intercourse. (11 TTC § 1302)

3. **Rape—Elements—Penetration**

   If the other requisite elements of rape are established, any penetration, however slight, is sufficient to complete the crime. (11 TTC § 1302)

4. **Rape—Elements—Emission**

   Proof of emission is not necessary to establishing rape. (11 TTC § 1302)

5. **Rape—Elements—Force**

   With respect to proof of force as a necessary element of rape, the victim's resistance need only be such as to make the absence of consent and the actual resistance reasonably apparent, and must be apportioned to the outrage, and the amount of resistance required depends upon the surrounding circumstances, such as the relative strength of the parties, the age and condition of the victim, the uselessness of resistance as it would appear to the victim and the degree of force shown by the perpetrator, and the victim is not required to resist until her strength or consciousness is gone. (11 TTC § 1302)

6. **Rape—Elements—Force**

   Where defendant lured 12 year old girl into house, threatened to beat or kill her with a rock in his hand, physically restrained her when she tried to run and threw her to the floor and assaulted her, force was established. (11 TTC § 1302)

7. **Rape—Elements—Force**

   Where victim tried to run away from rapist but was caught and thrown to the floor, it was established that the intercourse was against her will. (11 TTC § 1302)

8. **Constitutional Law—Double Jeopardy**

   Where defendant was found guilty of both rape and statutory rape, finding of guilty of the latter charge would be set aside on motion of defendant. (11 TTC § 1302)

Assessor: YOSTER CARL, *Associate Judge*
Interpreter: HERBERT GALLEN
Reporter MISSY F. TMAN
Counsel for Plaintiff: MINOR POUNDS, ESQ., *District Attorney*, and DICKSON SANTOS, *Assistant District Prosecutor*

Counsel for Defendant: LEO MCSHANE, ESQ., *Acting Chief Public Defender,* and KLETUS JAMES, *Public Defender's Representative*

BROWN, *Associate Justice*

In a two count information, defendant was charged with rape, a violation of 11 TTC 1302, and statutory rape, a violation of Chapter 4, Section 4–2, Ponape District Code.

[1] The complaining witness, a female now 14 years of age and never married, testified that on or about June 8, 1973, she met defendant in Kolonia, Ponape District, and was induced by the latter to enter a small house which was near the place they had met. While the young girl was in the house, defendant came in carrying a rock in his hand and instructed the child to remove her clothing stating that if she did not do so, he would kill her. It may be that defendant stated that he would beat her, but that possible difference is wholly immaterial here. The child burst into tears and attempted to flee; but the defendant, who by then was nude, physically restrained her, tore her underclothing off, and threw her to the floor where the acts complained of took place over a period of time.

It is unnecessary to discuss in any detail the acts which took place other than to state that the child was subjected to sexual intercourse and sodomy or attempted sodomy.

Upon returning to her home, the child advised her parents of what had occurred; and, six days later was examined by a medical officer who found lacerations of the posterior wall of the vagina and a ruptured hymen. The medical officer testified that his findings were consistent with a recent sexual experience by an inexperienced girl, described the injury as a recent one, and stated that fresh blood was noted.

On the date of the medical examination, the complaining

witness reported the incident to the police and accompanied an investigating officer as the latter sought to locate the assailant whom the child did not know by name but could recognize by sight. While driving near the hospital, the complaining witness observed the defendant, identified him to the police officer, and the latter thereupon arrested defendant.

After weighing all of the evidence adduced during the trial, the Court found defendant guilty as charged.

11 TTC 1302 provides as follows:

"Rape. Every person who shall unlawfully have sexual intercourse with a female, not his wife, by force and against her will, shall be guilty of rape."

It is incumbent upon the prosecution to prove beyond a reasonable doubt each of the following elements: (1) that the defendant unlawfully had sexual intercourse with a female, not his wife, (2) by force, and (3) against her will.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the prosecution the burden of proving him guilty beyond a reasonable doubt, which is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that stage of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that the trier of fact cannot say that an abiding conviction cannot be felt, to a moral certainty, of the truth of the charge. In the instant case, the burden of proof was carried, and the court, as the trier of fact, finds that defendant's guilt was so clearly established as to be beyond a reasonable doubt

and to a moral certainty. *People v. Van Dyke*, 11 N.E.2d 165 (Ill.), Cert. den. 345 U.S. 978, 73 S. Ct. 1127.

[2–4] In considering the three elements which comprise the crime of rape, the evidence is without contradiction that the victim was never, and is not now married to the defendant. Her testimony was credible and was to the effect that two attempts to engage in sexual intercourse with her were made by the defendant. On the first attempt, it is possible that there may not have been any sexual penetration; her testimony was somewhat unclear as to that matter. However, as to the second attempt, her testimony was firm that there had, indeed, been sexual penetration. The testimony of the medical officer who conducted a pelvic examination upon the girl and found lacerations of the posterior wall of the vagina and a ruptured hymen was consistent with and fortified the victim's testimony concerning penetration. In fact, no other inference could reasonably be drawn from it. Thus it becomes unimportant to ponder over whether it was the first attempt, the second attempt, or both, that resulted in penetration; both attempts were part of the same transaction. It is elementary that if the other requisite elements of the crime of rape are established, any sexual penetration, however slight, is sufficient to complete the crime. Proof of emission is not necessary. *State v. Pollock*, 114 P.2d 249, 250 (Ariz.).

[5, 6] The second element requires proof of force. In the olden days, the requirement was that a woman must "resist to the uttermost"; but that no longer is the law, although she must resist in fact. *People v. Brown*, 33 P.2d 460 (Cal. App.); *People v. Crosby*, 120 P. 441 (Cal. App.). The conduct of the female person need only be such as to make the absence of consent and the actual resistance reasonably apparent. The resistance must be proportioned to the outrage and the amount of resistance required depends upon the

surrounding circumstances, such as the relative strength and ability of the parties, the age and condition of the female, the uselessness of resistance as it would appear to her, and the degree of force shown by the perpetrator. She is not required to resist until either her strength or consciousness is gone; her resistance need continue only until it becomes so apparently useless as to justify its cessation. *People v. Nash*, 67 Cal. Rptr. 621 (Cal. App.). Here, a twelve year old girl had been lured into a concrete block house by a grown man who, with a rock held in his hand, threatened her with death or a beating should she not succumb to his sexual attentions. The child tried to run but was physically restrained by the defendant, who then threw her to the floor and proceeded to assault her sexually. The testimony of the complaining witness was uncontradicted, thoroughly believable, and more than sufficient to prove the element of force.

[7] The final element, that the act be against the female's will, likewise was established. Being against the female's will is synonymous with being without her consent. *Stephenson v. State*, 48 So.2d 255 (Ala. App.). Here, the child tried to escape but was failed. This act alone is sufficient to establish lack of consent. No further discussion of the third element is necessary.

The prosecution proved beyond a reasonable doubt that the defendant was guilty of rape.

As to the count charging defendant with statutory rape, in violation of Section 4–2, Ponape District Code, that section reads as follows:

"Section 4–2. Statutory Rape. Whoever within the territorial jurisdiction of Ponape District, carnally knows any female, not his wife, who has not attained the age of 15 years, shall, upon conviction thereof, be imprisoned for a period of not more than five years or fined not exceeding one thousand dollars ($1,000.00) or both. (P.L. 138–68, 9/20/68.)"

By "carnally knowing" a female is meant merely that the accused had sexual intercourse with her. *State v. Ramsdell*, 45 N.W.2d 503 (Iowa); *Strawdersman v. Com.*, 108 S.E.2d 376 (Va.). The same test concerning the definition of carnal knowledge, or sexual intercourse, is applied precisely as in a case of rape and as has been discussed above.

In the case at bar, the evidence is without dispute that on June 8, 1973, the complaining witness had attained an age of only 12 years.

The prosecution proved beyond a reasonable doubt that defendant was guilty of the crime of statutory rape, a violation of Section 4–2, Ponape District Code.

[8] Accordingly, the Court finds defendant guilty as charged; but, upon motion of defendant, sets aside the finding of guilty as to Count Two, only. Defendant urges that to convict him under both counts would constitute placing him in double jeopardy, citing *Waller v. Florida*, 399 U.S. 387, 25 L.Ed.2d 435, 90 S.Ct. 1184. It is unnecessary to discuss at any length the merits of defendant's contention; the setting aside of the finding of guilty as to Count Two fully protects all of his rights in that regard. In passing, it may be remarked that 11 TTC 1302 and Section 4–2, Ponape District Code, differ as to the elements of the respective crimes to which they apply. Nothing in 11 TTC 1302 limits in any way the age of the complaining witness; and force and want of consent are not elements of Section 4–2, Ponape District Code.

Therefore, Count Two having been set aside, the Court finds defendant guilty as to Count One, only, herein.