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Criminal Law - Simple Rape as a Responsive Verdict Under an Indictment for Aggravated Rape

J. C. Parkerson

who resisted a simple order or direction of a police officer would become guilty of that offense. Such an all-embrasive interpretation would hardly conform to the spirit or purpose of the public intimidation article. The *Miller* case held that the statute there involved included the particular situation of destroying the victim's reasoning power by causing a condition of hysteria and terror. It can be argued that the conduct of the defendant was not at variance with the legislative definition of simple rape. Simple rape, being a lesser degree of the crime of aggravated rape, can well be construed as covering a case where the "abnormal condition of the mind" is from terror and hysteria not quite sufficient to amount to complete prevention of resistance. When this result is reached, however, the maxim of strict construction of criminal statutes will be conspicuous by its absence.

Sam J. Friedman

CRIMINAL PROCEDURE — SIMPLE RAPE AS A RESPONSIVE VERDICT UNDER AN INDICTMENT FOR AGGRAVATED RAPE

Defendant was indicted for aggravated rape[1] and convicted of simple rape.[2] The state's case consisted primarily of the alleged victim's testimony that she submitted to the defendant because he threatened to kill her if she refused. Defendant moved for a new trial on the ground that there was not the "slightest scintilla of evidence in the record"[3] to support the verdict of simple rape.[4] This contention was based on the argument that evidence of force and threats to secure consent does not meet the definition of simple rape. The trial judge overruled the motion. On appeal to the Louisiana Supreme Court, *held*, affirmed. A female who is faced by an attacker intending to ravish her forcibly is immediately thrown into a state of fear and confusion which renders her incapable of resisting or of understanding the act of intercourse. Proof of aggravated rape by force necessarily constitutes proof of the lesser crime of simple rape because simple rape requires only that the victim's consent be vitiated by her incapacity *from*

1. LA. R.S. 14:42 (1950).

2. *Id.* 14:43. Simple rape was made responsive to a charge of aggravated rape by La. Acts 1948, No. 161, § 1, which amended LA. CODE OF CRIM. PROC. art. 386 (1928). This article is now LA. R.S. 15:386 (1950).

3. State v. Miller, 237 La. 266, 274, 111 So.2d 108, 110 (1959).

4. A motion for a new trial is the only procedural vehicle available for presentation of a claim that there has been a total lack of evidence to support an essential element of an offense. State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958).

any cause to understand or to resist the act.[5] *State v. Miller*, 237 La. 266, 111 So.2d 108 (1959).

The problem presented by the *Miller* case invites attention to the rules relating to responsive verdicts in Louisiana.[6] Prior to 1948 there was no statutory enumeration of the responsive verdicts in this state. Instructions as to responsive verdicts were based on the jurisprudential "generic" and "lesser included offense" tests.[7] It was the mandatory duty of the trial judge to instruct the jury as to *all* verdicts responsive to the crime charged under these tests.[8] The result was instruction as to numerous verdicts which confused the jury and caused frequent compromise verdicts.[9] This situation prompted a 1948 amendment to Article 386 of the Louisiana Code of Criminal Procedure, which specifically and exclusively enumerates the responsive verdicts for the major crimes.[10] In enacting this amendment, the legislature deliberately reduced the number of responsive verdicts.[11] However, the mandatory language of Article 386, that the "judge *shall* charge the jury the law applicable to *all* offenses of which the accused could be found guilty under the indictment"[12] (emphasis added) remained unchanged. In *State v. Marshfield*[13] the Supreme Court indicated that the trial judge

5. Defendant also contended that the responsive verdict statute, which expressly declares simple rape to be responsive to a charge of aggravated rape, was unconstitutional, and that simple rape was not responsive to aggravated rape under the lesser and included offense test. The court first held that under the reasoning set forth in the text, simple rape would be a lesser and included offense of aggravated rape. Thus, although the court indicated that the statute was constitutional, it was unnecessary to rule expressly on this contention. It was also pointed out by the court that these two points need not have been considered at all because the defendant failed to raise them timely and consequently could have been held to have waived them.

6. This Note is intended to inquire into the possibility that the decision in the instant case was prompted by the rule of the *Marshfield* case which is discussed in the above paragraph. Whether or not the instant decision conforms to accepted rules of statutory construction relating to criminal cases is dealt with in another Note appearing in this issue of the Law Review. See page 600 *supra*.

7. For a detailed treatment of these two tests, see Comment, 5 LOUISIANA LAW REVIEW 603 (1944).

8. LA. CODE OF CRIM. PROC. art. 386 (1928): "Whenever the indictment sets out an offense including other offenses of less magnitude or grade, the judge *shall* charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment and in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter." (Emphasis added.)

9. *The Work of the Louisiana Supreme Court for the 1947-1948 Term — Criminal Law and Procedure*, 9 LOUISIANA LAW REVIEW 247, 266 (1949). See also 9 LOUISIANA LAW REVIEW 18, 41 (1948).

10. Now LA. R.S. 15:386 (1950).

11. *The Work of the Louisiana Supreme Court for the 1947-1948 Term — Criminal Law and Procedure*, 9 LOUISIANA LAW REVIEW 247, 269 (1949).

12. LA. R.S. 15:386 (1950).

13. 229 La. 55, 85 So.2d 28 (1956).

must instruct as to all responsive verdicts even though there is no rational basis in the record to support them.[14] Under this decision trial judges are sometimes placed in the anomalous position of being forced to instruct the jury as to verdicts which are unsupported by the evidence. For example, in the *Marshfield* case, the defendant was indicted for possession of narcotics, and the trial judge refused to instruct the jury that a verdict of attempted possession would be proper, since there was no evidence submitted relating to such an attempt. The Supreme Court reversed the conviction for possession of narcotics, indicating that the mandatory language of Article 386 required instruction as to all responsive verdicts. Therefore the defendant was entitled to an instruction of attempted possession notwithstanding the lack of evidence to support the lesser verdict. A similar situation would be presented if a defendant were charged with murder for an admittedly intentional killing and defended solely on the basis of self defense. In such a case the trial judge would be required to instruct that manslaughter is a responsive verdict[15] even though the evidence would not indicate any reason to reduce the crime to manslaughter.

It is felt that the rule requiring instruction as to all responsive verdicts regardless of the evidence prompted the reasoning applied by the court in the instant case. No evidence was adduced to meet the apparent requirements of simple rape.[16] Nevertheless, since simple rape is listed as responsive to aggravated rape in the 1948 amendment,[17] the trial judge instructed the jury that it would be responsive to the indictment.[18] On appeal the defendant contended that the rule requiring an accused to be discharged if the state fails to prove one of the elements of the crime for which he was convicted[19] should be applied. Had this argument been accepted the verdict of simple rape would have

14. This rule was criticized in Comment, 17 LOUISIANA LAW REVIEW 211 (1956). The writer suggested that on the basis of State v. Espinoso, 223 La. 520, 66 So.2d 323 (1953), the rule may not actually prevail in Louisiana. Although this thesis may not be correct, the comment does include an excellent exposition of the fallacy of such a rule.

15. LA. R.S. 15:386 (1950) lists the following verdicts as responsive to an indictment for murder: (1) guilty as charged, (2) guilty without capital punishment, (3) guilty of manslaughter, and (4) not guilty.

16. *Id.* 14:43.

17. La. Acts 1948, No. 161, § 1, incorporated in LA. R.S. 15:386 (1950).

18. From a reading of the trial transcript, it would seem that the simple rape verdict was the result of a jury compromise. If such a compromise in fact resulted in the verdict, this result at least partially defeats the purpose of the legislature in enacting the 1948 amendment to LA. CODE OF CRIM. PROC. art. 386 (1950), i.e., to avoid compromise verdicts.

19. E.g., State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958).

operated as an acquittal of aggravated rape. Although the state could have proceeded with a new trial for simple rape,[20] the advisability of such a proceeding would have been questionable in that the proof submitted in the initial proceedings would have been previously adjudged to be insufficient for such a verdict by the Supreme Court. However, the court affirmed the decision, reasoning that simple rape only requires the victim to be incapable of resisting or of understanding the act by reason of stupor or abnormality of the mind "from any cause."[21] Therefore, since a forcible attack by a rapist always produces fear and an abnormal condition of the mind, evidence of the forcible attack and resultant state of terror would support the verdict of simple rape. Testimony by the alleged victim appeared in the record reciting that force was used and that she was afraid to the point of hysteria. Consequently the court concluded that there was evidence in the record to support the verdict of simple rape.

Upon a cursory examination of the simple rape article[22] it would seem doubtful that this crime was intended to cover the situation presented in the instant case. Under accepted rules of statutory construction the court could have reached the opposite result.[23] Nevertheless, the case appears to have established that where the victim of a forcible aggravated rape is thrown into a confused state of mind from hysteria or terror, proof of these facts will support a verdict of simple rape. Even though the reasoning used by the court might be at variance with the usual practice of construing criminal statutes strictly,[24] it can hardly be asserted that it was completely contrary to the legislative definition of simple rape. At the same time it is submitted that the case illustrates the disadvantages of the mandatory language of Article 386 and the rule of the *Marshfield* case requiring instruction as to all possible responsive verdicts regardless of the evidence. In the opinion of the writer, the Louisiana legislature

20. State v. Harville, 171 La. 256, 130 So. 348 (1930).

21. LA. R.S. 14:43 (1950): "Simple rape is a rape committed where the sexual consent is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

"(1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic or anesthetic agent, administered by or with the privity of the offender; *or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause*, and the offender knew or should have known of her incapacity." (Emphasis added.)

22. *Ibid.*

23. See note 6 *supra.*

24. See State v. Daniels, 236 La. 998, 109 So.2d 896 (1959). This case is the subject of a Note elsewhere in this issue.

should adopt a rule similar to that proposed by the American Law Institute which would require a "rational basis"[25] to appear in the evidence in support of any verdict upon which the jury is to be instructed.

J. C. Parkerson

DONATIONS MORTIS CAUSA — REQUIREMENT OF "ABILITY TO READ" UNDER NEW WILLS ACT

Decedent's niece petitioned for the probate of her aunt's last will and testament which had been confected under the provisions of the new wills act.[1] Other collateral relatives of decedent opposed probate of the will, contending that the decedent was unable to read at the time the will was confected as required by the statute.[2] The proponents offered the testimony of eight witnesses in their attempt to prove that the testatrix was able to read.[3] The lower court held the will to be null because the pro-

25. ALI MODEL PENAL CODE § 1.08(5), Tentative Draft No. 5 (1956). "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Id.* at 30. The comment which follows this section states that: "Subsection (5) states that the court shall instruct the jury with respect to included offenses only in cases where the evidence makes it appropriate to do so. Where the proof goes to the higher inclusive offense and would not justify any other verdict except a conviction of that offense or an acquittal, it would be improper to instruct the jury with respect to included offenses. Instructions with respect to included offenses in such cases might well be an invitation to the jury to return a compromise or otherwise unwarranted verdict." *Id.* at 42.

1. La. Acts 1952, No. 66, incorporated as LA. R.S. 9:2442-2444 (Supp. 1958).

2. Four witnesses were called by the opponents. Two of these witnesses, who had been rather close associates of the decedent, testified that they had assisted her in such things as making change, reading menus, paying bills, and making telephone calls. These witnesses were unrelated to any of the parties and were apparently completely disinterested.

The other two witnesses were related to the testatrix and would have shared in her estate had she been held to have died intestate. One of these witnesses unequivocally stated that he knew that the decedent could not read.

3. Three of these witnesses were related to the deceased and were named legatees under the will. Their testimony consisted generally of their observations of the testatrix reading the paper.

The attorney before whom the will was executed and who was appearing for the proponents in the case also testified. He stated that he had left a draft of an olographic will with the decedent the day before the confection of the statutory instrument for her to copy. The draft had been in "large lettering." This witness further testified that he had asked the decedent whether she could read and had received an affirmative answer.

A sister of one of the legatees under the statutory will testified that she had seen the decedent copying from the draft of the olographic will left with her by the attorney.

One of the witnesses to the confection of the will stated that the attorney had read the will aloud and that the testatrix was also reading it aloud at the time. This witness was a client of the attorney before whom the will was executed.

The wife of the attorney was another witness to the confection of the will and