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STATUTORY RAPE AND THE FELONY-MURDER DOCTRINE

The Penal Code of 1939 provides that:

"All murder which be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree."¹

Did the offense of rape in this section of the Code include statutory rape in its definition? This question remained unanswered from the time of the passage of the act until the case of *Commonwealth v. Capps*.² The uncertainty was a direct consequence of the statutory history concerning the subject in Pennsylvania. In 1860, a statute³ was passed which made all murder committed in the perpetration of the aforementioned offenses murder in the first degree. Under this act, rape was defined as it had been at common law—unlawful carnal knowledge of a woman forcibly and against her will. Subsequently, an act in 1887⁴ made carnal knowledge of a woman child under the age of sixteen with or without her consent also the offense of rape. The courts then had to determine whether this broader definition was to be applied to the prior act which made all murder in the perpetration of rape, murder in the first degree.

The court in *Commonwealth v. Exler*⁵ said that in the absence of an express provision of the legislature it was for the judicial authority to determine whether the legislature intended to apply the broader definition or not. It concluded that an inference of such an intent was not warranted.

Thus until the passage of the Code in 1939, the common law definition was applied to the felony-murder law of the Act of 1860. The Penal Code of 1939 merely codified the existing law on the subject into one act. In section 701, it adopted the law of the Act of 1860 and in section 721⁶ it included the definition of rape of the Act of 1887. Now that both the felony-murder law and the broader definition of rape were included within the same act would the latter be applied to the former? Not until the *Capps* case was this question to be resolved.

It is true that in the case of *Commonwealth v. Neill*⁷ the court said the common law definition of rape was to apply, but the court completely ignored

¹ PA. STAT. ANN. tit. 18, § 4701 (Purdon 1945).

² 382 Pa. 72, 114 A. 2d 338 (1955).

³ Act of March 30, 1860, P. L. 382, §§ 74, 91.

⁴ Act of March 19, 1887, P. L. 128.

⁵ 243 Pa. 507, 89 A. 2d 968 (1914).

⁶ PA. STAT. ANN. tit. 18, § 4721 (Purdon 1945): "Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, or whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with or without her consent, is guilty of rape . . ."

⁷ 362 Pa. 507, 67 A. 2d 276 (1949).

the Code of 1939. The court relied on the law of *Commonwealth v. Exler*. The *Exler* case, however, antedated the present Code. There the court had to determine whether the Act of 1887 was to be applied to the prior Act of 1860. The court in the *Capps* case pointed out that as soon as the present act was passed the reasoning of the *Exler* decision became wholly inoperative. No longer was there any question of the applicability of the enlarged definition of rape to a prior law, for the Code now contained both the broader definition and the felony-murder section in the same act.

To support its contention that the statutory definition of the Code was to be applied to the felony-murder section, the court relied on the case of *Commonwealth v. Maloney*.⁸ In that case the court said:

"When the Penal Code of 1939 refers to burglary, it must be understood to mean the crime of burglary as defined in section 901 of the same act. The rule is well settled that a word or phrase the meaning of which is clear when used in one section of an act will be construed to mean the same thing in another section of the same act."

The court in the *Capps* case then concluded,

"In section 701 of the code, rape is included in the same sentence as burglary. It necessarily follows that the definition of rape in section 721 is to be used in all sections of the act and this definition includes statutory rape."⁹

The judgment of the court in the *Capps* case stands on firm ground and cannot be challenged. The outcome of this ruling, however, will be most unfortunate. One who, in the commission of consensual intercourse with a woman child under the statutory age, unintentionally causes her death is deemed to be as culpable as the man who perpetrates a forcible act, causing death. Both will be prosecuted for murder in the first degree.

To merge both forcible and consensual intercourse within the compass of the felony-murder section of the Code is to ignore a fundamental difference in the two, a difference which goes to the very core of that section. Note that the other enumerated offenses in section 701 are arson, robbery, burglary, and kidnapping. These crimes were originally included in the Pennsylvania statute because of their dangerous propensities. The Pennsylvania courts have said that every burglar is a potential assassin.¹⁰ By analogy, it appears that rape was included with the others because of its forcible nature and the resultant risk to human life. Statutory rape, however, is not *sui generis* with these other offenses. Such rape may be consensual intercourse with a woman child under the statutory age. This age determinate which negates any consent that might be

⁸ 365 Pa. 1, 73 A. 2d 707 (1950).

⁹ See note 2, *supra*, at 341.

¹⁰ *Com. v. Aston*, 26 Lan. L. Rev. 322 (1909).

given also eliminates the necessity of force which originally placed rape within the operation of the felony-murder statute.

Furthermore, there is not an identity of purpose in placing rape within the felony-murder section and in broadening the definition of rape. The purpose of the former was to hold a man to the highest degree of responsibility for the death because he was involved in an act that was eminently dangerous to human life. The latter aimed at the moral harm that would result. This analysis of the situation has been made:

"An unwise disposition of a girl's sexual 'treasure,' it is thought, harms both her and the social structure which anticipates certain patterned uses. Hence the law of statutory rape intervenes to prevent what is predicted will be an unwise disposition. And prevention is sought not by penalizing the naive girl, but by sanctioning the male who is deemed to be responsible for the occurrence."¹¹

Thus by including both the statutory definition of rape and the felony-murder law in the same act, the one has been applied to the other even though the purpose for each is separate and distinct from the other.

It is interesting to note that there was substantial evidence in the *Capps* trial of a forcible act. The court said, "There was abundant evidence of a circumstantial nature to permit the jury to find that forcible intercourse was in fact committed." It did not deem it necessary to establish the element of force, since statutory rape had been committed. Thus it removed what might be an onerous task from the prosecution, the proof of force to sustain a conviction of first degree murder. Would the court have come to the same conclusions had the act in question been clearly without any force and the death unintentional? Perhaps the court overlooked the fact that the rule they were promulgating would be applied with equal zeal in such cases. It is more likely, however, that it felt bound to announce this construction of that part of the Code because of the legislature's failure to express any contrary intent.

Since the legislature has not expressly differentiated the meanings to be applied to rape in different sections of the Code, the judiciary is bound to apply the definition as set out in one section of the act to all the other parts of the same act. This is true notwithstanding the fact that the purpose for including the broader definition of rape in the act is separate and distinct from the purpose for including rape within the section dealing with felony-murder.

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¹¹ See note 2, *supra*, at 342.