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# Criminal Law -- Incest-- Consent

Tala Engel

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case,<sup>10</sup> Justices Douglas<sup>11</sup> and Frankfurter<sup>12</sup> impliedly reserved the question as to whether an executive agreement would be valid if it impaired the constitutional rights of an American citizen.

In the instant case the United States Army took possession of the plaintiff's property as an officers' club in 1945, and when the plaintiff visited the property in 1948 she discovered it to be greatly damaged. The plaintiff filed a claim with the Army asserting that her property had been taken by the United States for public use and therefore she was entitled to just compensation.<sup>13</sup> The United States contended that although the property belonged to an American citizen, it was "enemy territory"<sup>14</sup> and therefore subject to seizure.<sup>15</sup> The plaintiff contended that Austria was not enemy territory at the time of the taking, in July 1945, but was a liberated country.<sup>16</sup> The Court denied the defendant's motion to dismiss.

The trend of the decisions in this area of *de facto* sovereignty has been to extend the operation of constitutional privileges and immunities. However, the extent to which the provisions of the Constitution will be applied to any given case apparently depends upon the special facts of the case; no safe generalizations can be made. The relationship between the claimant and the sovereignty which the United States may hold in the particular area would be a significant factor. Perhaps the most important of the considerations is the fact that the injury was the result of an action by an instrumentality of the United States.

WILLIAM JAY GOLDWORM

### CRIMINAL LAW—INCEST—CONSENT

The defendant, half-brother of the prosecutrix, was convicted of first degree rape and incest. He moved for an order arresting judgment and setting aside the verdict on the grounds that the crimes of rape and incest are mutually exclusive and cannot arise from the same act. *Held*, if the parties are within the prescribed lines of consanguinity, proof of first degree rape may result in a dual conviction of rape and incest. *People v. Wilson*, 135 N.Y.S.2d 893 (1954).

The defendant's contention was that acts constituting rape must necessarily be effectuated without the female's consent, while such consent is an essential element of the crime of incest. Courts generally agree that the crime of rape requires an absence of consent.<sup>1</sup> But such accord is

10. *United States v. Pink*, 315 U.S. 203 (1942).

11. *Id.* at 227.

12. *Id.* at 236.

13. *Filbin Corp. v. United States*, 266 Fed. 911 (D.C. Cir. 1920); *Lajoie v. Milliken*, 242 Mass. 508, 136 N. E. 419, 423 (1922).

14. *Young v. United States*, 97 U.S. 39 (1879).

15. *The Juragua Iron Co., Ltd. v. United States*, 212 U.S. 297 (1909).

16. H. R. Doc. No. 351, 78th Cong., 1st Sess. (1943); 15 DEP'T STATE BULL. 384-864 (1946).

1. See 44 AM. JUR., Rape § 8 (1942).

not found in the interpretation of incest statutes. One heavily supported line of authority holds that the crime of incest *may* occur without the consent of both parties,<sup>2</sup> as where the female is coerced by force or fraud<sup>3</sup> or does not have legal capacity to give her consent.<sup>4</sup> A few of these courts permit the prosecutor to elect whether to indict for rape or incest or both.<sup>5</sup> Other jurisdictions, however, in construing their incest statutes,<sup>6</sup>

2. E.g., *Smith v. State*, 108 Ala. 1, 19 So. 306 (1896); *State v. Haston*, 64 Ariz. 72, 166 P.2d 141 (1946) (by implication) in which the court said: "The commission of the crime of rape in the instant case necessarily carries with it the commission of the crime of incest . . ." Here the defendant had raped his three daughters, ages 8, 14, and 15. *McCaskill v. State*, 55 Fla. 117, 45 So. 843 (1908); *State v. Chambers*, 87 Iowa 1, 53 N.W. 1090 (1893) in which it was stated that the phrase the "act must be willingly done" applies only to the party who commits the offense; *State v. Swindall*, 129 La. 760, 56 So. 702 (1911); *State v. Hughes*, 108 N.J.L. 64, 154 Atl. 867 (1931), *rev'd on other grounds* 109 N.J.L. 189, 160 Atl. 492; *State v. Hittson*, 57 N.M. 100, 254 P. 2d 1063 (1953); *State v. Robinson*, 83 Ohio St. 136, 93 N. E. 623 (1910) (The court gave its opinion that the elements of the crime of incest are present whether the act be done with or without her consent, saying: ". . . it is not less incest because the element of rape is added . . ."); *Signs v. State*, 35 Okla. Crim. 340, 250 Pac. 938 (1926); *State v. Coffey*, 8 Wash. 2d 504, 112 P.2d 989 (1941).

3. E.g., *Smith v. State*, *supra* note 2; *State v. McCall*, 63 N.W. 2d 874 (1954) (by implication); *State v. Columbus*, 9 N.J. Misc. 512, 154 Atl. 605 (1931) (by implication) (The court commented: "We think that the gist of the crime of incest is sexual intercourse within the prohibited degrees, and that, while a father may commit rape upon his daughter, the crime is incest as well, and indictment for either will lie. . ."); *State v. Hughes*, *supra* note 2; *State v. Hittson*, *supra* note 2. (The court stated that it was immaterial whether the defendant used force, fear or persuasion, and it was immaterial that the same testimony would have sustained a conviction for rape).

4. E.g., *State v. Haston*, *supra* note 2; *McCaskill v. State*, *supra* note 2 (Here the prosecutrix was age 12); *State v. Swindall*, *supra* note 2 (The charge was that consent could not affect the issue of the crime of incest where the prosecutrix was under age); *People v. Gibson*, 301 N.Y. 244, 93 N.E. 2d 827 (1950) This court stated that a girl who could not legally consent to intercourse could not legally consent to incestuous intercourse:

Such a female could never be found guilty of the crime of incest because the law, for obvious reasons of public policy, declares that she is unable to consent to sexual intercourse, incestuous or otherwise.

Therefore, the court reasoned, she could never be an accomplice to such an act; *Signs v. State*, *supra* note 2; *State v. McCall*, *supra* note 3.

5. *Smith v. State*, *supra* note 2; *McCaskill v. State*, *supra* note 2; *State v. Chambers*, *supra* note 2.

6. Typical Incest Statutes are as follows: FLA. STAT. §§ 741.21, 741.22 (1953):

A man may not marry any woman to whom he is related by lineal consanguinity, nor his sister, nor his aunt, nor his niece. A woman may not marry any man to whom she is related by lineal consanguinity, nor her brother, nor her uncle, nor her nephew.

Persons within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, who intermarry or commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not exceeding twenty years, or in the county jail not exceeding one year.

N.Y. PENAL LAW § 1110:

When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.

VA. CODE § 18-82 (1950):

If any person commit adultery or fornication, he shall be fined not less than twenty dollars. And if he commit adultery or fornication with any

hold that words such as "with each other" mean "willingly" and, therefore, that consent is a necessary element of incest.<sup>7</sup> The infrequently-used but original view is that consent is not absolute, and, while there may not be sufficient lack of consent to constitute rape, the degree of absence of assent may still be enough to vindicate the female of guilt of incest.<sup>8</sup> Of course, in states where this view is followed, if the amount of force is sufficient to constitute rape, there can be no incest. Attempts to maintain that lack of consent, or force, is a necessary element of incest have not been upheld.<sup>9</sup> In addition to these conflicting views, there are several jurisdictions which have not yet resolved the question of whether or not consent is a necessary element of incest.<sup>10</sup> Thus, it is apparent, there is no unanimity on this issue.

person, whom he is forbidden by law to marry, he shall be deemed guilty of a misdemeanor, provided however that if he commit adultery or fornication with his daughter or his granddaughter, he shall be confined in the penitentiary not less than one nor more than ten years or, in the discretion of the court or jury trying the case, confined in jail not exceeding twelve months and by fine not exceeding five hundred dollars, either or both.

7. *E.g.*, *State v. Learned*, 74 Kan. 328, 85 Pac. 293 (1906) ("The court felt that Kansas was an exception because the statute denounced penalty against both equally, while some state statutes do not. On the question of whether a girl under 18 could consent to incest and be prosecuted, the court said she could assent to incest but not to rape, so that both could be charged with incest although statutory rape was present. However, the court followed, different evidence is needed for rape and incest, so prosecution for one is not a bar to the other"); *People v. Harriden*, 1 Park Crim. 344 (N.Y. 1852); *State v. Jarvis*, 18 Ore. 360, 23 Pac. 251 (1890); *State v. Jarvis*, 20 Ore. 437, 26 Pac. 302 (1891) ("The court said that joint consent is the essence of the crime; if the act is by force, the offense is rape and not incest).

8. *Raiford v. State*, 68 Ga. 672 (1882); *Contra*, *Whidby v. State*, 121 Ga. 588, 49 S. E. 811 (1905) ("The law recognizes no intermediate degree of force in the accomplishment of an illegal act of sexual intercourse which is sufficient to accomplish the act contrary to the consent of the female, and yet not constitute the crime of rape . . .")

9. *State v. Jones*, 233 Iowa 843, 10 N. W. 2d 526 (1943) (The defendant alleged that lack of consent was necessary in order to sustain a charge of incest. The court affirmed the conviction saying that lack of consent, or force, is not an essential element of incest. The dissenting opinion discussed the issue of whether or not a girl aged eight could consent to incest and whether the no consent statute applies only to rape. The distinguishing characteristic, it said, is the closeness of the relationship, not the youthfulness of one of the participants as in statutory rape. It was pointed out that the general rule is that lack of consent is not necessary for incest, but that lack of consent will be implied by law in incest upon a girl under the age of consent. However, the dissenting fraction felt that closeness of relationship is insufficient basis for a different rule in these two situations); *State v. McCall*, 63 N. W. 2d 874 (1954) ("Incest is not essentially an offense against the person of the female. It is an offense with her. . . . Neither force nor violence nor lack of consent are essential elements of that offense.")

10. Holding mutual consent not necessary: *People v. Stratton*, 141 Cal. 604, 75 Pac. 166 (1904); *People v. Rouse*, 2 Mich. N.P. 209 (1871); *Toth v. State*, 141 Neb. 448, 3 N.W.2d 899 (1942) (by implication); *Contra*, *People v. Patterson*, 102 Cal. 239, 36 Pac. 436 (1894) (Holding that although the consent of both is necessary, one may be indicted alone, since one can be guilty where the other is not, as where only one knows of the relationship); *People v. Jenness*, 5 Mich. 305 (1858); *De Groat v. People*, 39 Mich. 124 (1878); *Yeoman v. State*, 21 Neb. 171, 31 N.W. 669 (1887) (The court assumed the theory that both must be guilty or neither, but commented that both need not be prosecuted jointly).

In *People v. Gibson*,<sup>11</sup> a decision preceding the present case, the Court of Appeals of New York stated that, while a female under the age of legal consent could not be an accomplice to an act of incest because of her inability to consent, the male participant could be convicted even though the statute held each punishable.<sup>12</sup> The court, in the principal case, reasoned that if incest could arise from statutory rape, as explained above, it could also arise from first degree rape, since in either situation no consent exists.

In the instant case the defendant relied in part on *People v. Harriden*<sup>13</sup> where the court had decided that the statute applied only where there was mutual consent, and excluded cases in which force was used. However, the court in *People v. Wilson* felt that rape cases should not be exceptions to the incest statute, stating that had the legislature so intended, it would have expressed itself accordingly. The court ruled that, since no exclusion was expressed, and since incest could be founded on statutory rape, the crime of incest could also be based on proof of first degree rape.<sup>14</sup>

The delineation of the act of incest as criminal and the penalties affixed thereto are solely statutory.<sup>15</sup> It seems that the very purpose of the statutes which punish incest is to prohibit intercourse between family members, thereby preserving the closeness and sanctity of the family circle. If mutual consent were an element of this offense, an offender who used force would be beyond the reach of the statute while a more peaceable individual committing the same act would be guilty. Because of the difficulty in proving rape, the user of violence might escape penalty altogether. This would seem to be a direct contravention of the intent of the legislature. Does society, while punishing a man who committed a robbery, at the same time permit another who committed armed robbery to go free because he added a dangerous weapon to the act? Similarly, the element of coerciveness or force should not be an avenue of escape for the violent.

TALA ENGEL

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11. See note 4 *supra*.

12. See note 6 *supra*. (A full discussion of this problem may be found in *People v. Wilson*. The court stated that generally, if the female does consent, she is an accomplice to the act and her testimony must be corroborated in order to convict. If she does not consent, she is not an accomplice and this testimony alone will be sufficient evidence on which to base a conviction. The difficulties of obtaining corroborating evidence in such cases are apparent. See also N.Y. CODE CRIM. PROC. § 399.)

13. 1 Park Crim. 344 (N.Y. 1852).

14. 135 N.Y.S.2d at 896 (1954).

15. Incest as an indictable offense did not exist at common law. See the discussion of the ecclesiastical and secular views in 27 AM. JUR., *Incest* § 1 (1942).