

Criminal Law. Rape, Attempts to Commit. Attempt, to Commit Rape. Punishment, for Attempted Rape.

A person convicted of the crime of attempting to commit rape may be subjected to a punishment of imprisonment in the state prison for a period of two and one-half years, or such person may be tried for assault under Subdivision 5, Section 8313, Revised Codes.

Helena, Montana, April 3, 1909.

Hon. W. S. Towner, County Attorney, Fort Benton, Montana.

Dear Sir:

I am in receipt of your letter of the 23rd ultimo, asking opinion from this office on the following question:

“What punishment, if any, can be legally inflicted upon a person convicted of the crime of attempting to commit rape on or about February 5, 1909?”

The statute as it existed on February 5, 1909 (Section 8339) fixed the punishment for rape at “not less than five years,” while the statute (Section 8895) prescribes the punishment for attempts to commit crime at “not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so committed.” The statute prescribing the punishment for rape not having named any maximum punishment, puts it within the power and authority of the court to sentence the person

convicted of rape "to imprisonment during his natural life, or for any number of years not less than" the minimum punishment prescribed by said Section 8339.

Section 8902, Revised Codes.

The argument that may be made is that as the court must take into account the maximum penalty which could be inflicted if the person were proven guilty of the offense he is convicted of attempting to commit, and as the maximum of that penalty is life imprisonment, that it is impossible for the court to determine what would be one-half of the defendant's life, that the statute is therefore meaningless; and, consequently, no penalty for this offense is within the law.

A similar question, under similar statutes, was considered by the Supreme Court of California, in which the court held that:

"The crime of rape being punishable by imprisonment for life, or any specified term of years not less than five, a judgment of imprisonment for five years for an attempt to commit rape is warranted," by the statutes.

People v. Gardiner, 98 Cal. 127, 32 Pac. 880.

The California court proceeds upon the theory that a life imprisonment is longer than any fixed number of years; hence, double the time of sentence for any attempt to commit rape would be less than a life imprisonment, and for that reason a court could legally sentence the defendant convicted of attempting to commit rape for a definite number of years' imprisonment. This, though logical, seems to be carrying the doctrine to the extreme, for under that holding a defendant convicted of the attempt to commit rape could be sentenced to imprisonment for one hundred years or more. However, as our statute fixes the minimum term at five years, and then by the provisions of Section 8902, Revised Codes, gives the court the authority to impose a life sentence, it follows as a necessary conclusion from the statute that a sentence of five years is less than a sentence for life; hence, if the court in fixing the punishment for the crime of attempting to commit rape keeps within the five year limit; that is, does not impose a greater punishment than two and one-half years, there is no doubt but the Supreme Court would sustain the judgment.

Our conclusion then is, that the defendant may be informed against for, and if convicted of the crime of attempting to commit rape, may be legally imprisoned for a period not exceeding two and one-half years.

Said Section 8933 was amended by Chapter ten, Laws of 1909, which fixes the punishment for rape at not less than two years nor more than ninety-nine years. This act was approved February 12, 1909. This law of 1909, in so far as it can be considered as an increase of punishment, is *ex post facto*, and therefore not applicable to offenses prior to its enactment. But, in so far as it decreases the punishment, it does apply to offenses committed prior thereto.

8 Cyc. 1027, 1029, 1030.

It will require a decision from the Supreme Court to determine whether or not this later statute shall be construed as increasing or as

decreasing the punishment, and it will be unwise to raise the question unless in a case of absolute necessity, and in the case cited by you no such necessity appears to arise.

Furthermore, Section 8313, Revised Codes, relating to assaults, provides, in subdivision 5 thereof, that any one who "assaults another with intent to commit a felony" is guilty of assault in the second degree, and fixes the maximum punishment at five years' imprisonment and two thousand dollars fine.

If, therefore, the defendant committed an assault with intent to commit a felony, to-wit, the crime of rape, he may be prosecuted under the provisions of Subdivision 5, Section 8313, of the Revised Codes.

Very truly yours,

ALBERT J. GALEN,

Attorney General.