

6557

1. MAN OVER EIGHTEEN YEARS OF AGE—SEXUAL INTERCOURSE WITH DAUGHTER OR SISTER UNDER SIXTEEN YEARS OF AGE, WITH HER CONSENT—MAY BE PROSECUTED AND PUNISHED UNDER SECTION 12414 G. C. NOTWITHSTANDING FACT HE IS ALSO GUILTY OF INCEST.
2. PENALTY FOR RAPE WITH CONSENT—IMPRISONMENT, ONE TO TWENTY YEARS IN PENITENTIARY OR SIX MONTHS IN COUNTY JAIL OR WORKHOUSE—PENALTY APPLIES WHETHER OFFENSE COMMITTED UPON DAUGHTER OR SISTER OF GUILTY PARTY OR FEMALE UNRELATED TO OFFENDER—SECTION 12414 G. C.—PERSON SENTENCED TO PENITENTIARY FOR SUCH OFFENSE, ELIGIBLE FOR PAROLE, EXPIRATION OF ONE YEAR, SUBJECT TO REQUIREMENTS, SECTION 2209-17 G. C. AS TO NOTICE OF INTENDED PAROLE.
3. CONCURRENT SENTENCES — PENITENTIARY — PAROLE —NOTICE—SECTION 2209-17 G. C.

SYLLABUS:

1. Where a man over eighteen years of age has sexual intercourse with his daughter or sister under sixteen years of age, with her consent, he may be prosecuted and punished under the provisions of Section 12414, General Code, notwithstanding the fact that he is also guilty of incest.

2. The penalty prescribed by Section 12414, General Code, for rape with consent is imprisonment for one to twenty years in the penitentiary or six months in the county jail or workhouse, and this penalty applies whether the offense is committed upon the daughter or sister of the guilty party or a female unrelated to the offender. A person sentenced to the penitentiary because of conviction of the offense defined by this section becomes eligible for parole at the expiration of one year, subject, however, to the requirements of Section 2209-17, General Code, with respect to notice of such intended parole.

3. A person convicted of the crime of rape with consent upon his own daughter under the age of sixteen years and of the crime of incest with such daughter and sentenced to the penitentiary on account of each conviction, both sentences to run concurrently, becomes eligible for parole at the end of one year, subject, however, to the requirements of Section 2209-17, General Code, with respect to notice of such intended parole.

Columbus, Ohio, December 21, 1943.

Hon. Herbert R. Mooney, Director of Public Welfare,
Columbus, Ohio.

Dear Sir:

You have requested my opinion as follows:

"Sections 12413 and 12414 of the General Code define and establish the penalty for rape. Section 13023 G. C. defines and establishes the penalty for incest.

Section 12413. Whoever has carnal knowledge of his daughter, sister, or a female person under twelve years of age, forcibly and against her will, shall be imprisoned in the penitentiary during life; and whoever has carnal knowledge of any other female person forcibly and against her will shall be imprisoned in the penitentiary not less than three years nor more than twenty years.

Section 12414. Whoever being eighteen years of age, carnally knows and abuses a female person under the age of sixteen years with her consent shall be imprisoned in the penitentiary not less than one year nor more than twenty years, or six months in the county jail or workhouse. The court is authorized to hear testimony in mitigation or aggravation of such sentence.

Section 13023. Whoever, being nearer of kin by consanguinity or affinity than cousins, having knowledge of such relationship, commit adultery or fornication together, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

Query: May a man be prosecuted and sentenced under Section 12414 G. C. when the offense was committed on his daughter or sister? Should not such an offense against a daughter or sister 'with her consent' be prosecuted under Section 13023 G. C., Incest?

If the determining factors in the first clause of Section 12413 G. C. are (1) the relationship of *daughter or sister*, or a *child under 12 years of age*, and (2) 'forcibly and against her will', should not a man guilty of this forcible offense against his daughter or sister, irrespective of the age of the daughter or sister, be prosecuted under this section carrying a penalty of Life?

As two examples on which the questions contained in this request may be based, we cite the following:

A man was sentenced to the penitentiary on a charge of rape 'with consent' on his daughter 14 years of age. The penalty is listed as 3 to 20 years. It is evident that the penalty of 3 to 20 years assessed in the last provision of Section 12413 G. C. does not apply to an offense against a daughter or sister. In an Opinion of the Attorney General rendered March 5, 1928, No. 1810, is the following statement:

* * * The Supreme Court of Ohio in the case of State vs. Driscoll, 106 O. S. 33, commenting on the provisions of Section 12413, at page 36, recognized that Section 12413, General Code, includes *three separate and distinct crimes*, as follows: "(1) Rape of a daughter or sister (2) rape of a child under twelve years of age (3) rape of any other female." With reference to these crimes, the writer of the opinion, Chief Justice Marshall, on page 37, observed:

"For the first two offenses the penalty is imprisonment for life, and for the third offense imprisonment for not less than three nor more than twenty years. * * *"

Another prisoner was sentenced to the penitentiary on a charge of rape with consent, two counts to run concurrently, and one count for incest to run concurrently with the rape charge, the penalty being listed as 2 to 20 years on the basis that the offense of rape was prosecuted under Section 12414 G. C., carrying a penalty of 1 to 20, and the charge of incest under Section 13023 G. C., 1 to 10. These offenses were committed against the man's own daughter 14 years of age. The indictment states that the offenses of rape were committed 'with her consent'."

You have correctly quoted Section 12414, General Code, in your request, and you ask whether a man may be prosecuted and sentenced pursuant to the provisions of this section when the offense was committed on his daughter or sister, and you suggest that under such circumstances the offender should be prosecuted for incest. If a man over eighteen years of age has sexual intercourse with his daughter or sister who is under the age of sixteen years, with her consent, he violates the provisions of both Section 12414 and Section 13023, General Code. It is entirely possible for a single act to constitute more than one crime. Thus, in *Allen v. State*, 24 O. App., 85, 88, it was said:

"We think the rule is well settled that the Legislature may carve out of a single act or transaction several crimes or offenses, so that the individual may at the same time and in the same transaction commit several separate or distinct crimes."

In *Straub v. State*, 5 O. C. C. (N. S.) 529, it was held, as shown by the first paragraph of the syllabus:

“A person indicted under Section 7019, Revised Statutes, for incest against his daughter, can not escape conviction by showing that in committing the offense he also committed the crime of rape, in that the daughter was under the age of consent, or was overcome by force and violence.”

This syllabus was quoted with approval by Wanamaker, J., in delivering the opinion of the court in the case of *State v. Labus*, 102 O. S., 26, 28. I believe, therefore, that it is clear that a man over eighteen years of age who has sexual intercourse with his daughter or sister under sixteen years of age may be prosecuted and punished for rape with consent as provided in Section 12414, General Code, notwithstanding the fact that he is also guilty of incest.

I come now to a consideration of the other questions contained in your request. You state that a man was sentenced to the penitentiary on a charge of rape with consent on his daughter fourteen years of age and that the penalty is listed as from three to twenty years. If a man over eighteen years of age has sexual intercourse with his daughter under sixteen years of age, with her consent, it is obvious that he does not violate thereby the provisions of Section 12413, General Code, which you have correctly quoted in your request. One of the essential elements of the offense defined therein is that the act be done forcibly and against the will of the female.

However, as heretofore noted, such an act would be a violation of the provisions of Section 12414, General Code. The penalty prescribed by Section 12413, General Code, for forcible rape upon one's daughter or sister is life imprisonment in the penitentiary, whereas, the penalty prescribed for violation of the provisions of Section 12414, General Code, is imprisonment of one to twenty years in the penitentiary or six months in the county jail or workhouse. In so far as Section 12414, General Code, is concerned, it makes no difference whether the offense is committed upon the daughter or sister of the guilty party or a female unrelated to the offender.

The penalty listed in the second of the two examples which you have set forth in your letter appears to me to be incorrect. You state that the prisoner was sentenced to the penitentiary because of a conviction of rape with consent upon his daughter under the provisions of Section 12414, General Code, and of incest with his daughter under the provisions of Section 13023, General Code. Both of these sentences were to run concurrently. The penalty for rape with consent, as heretofore noted, is imprisonment in the penitentiary for not less than one year nor more than twenty years or six months in the county jail or workhouse,

and the penalty for incest is imprisonment in the penitentiary for not less than one year nor more than ten years. Since the minimum term of imprisonment in the penitentiary for each of these offenses is fixed at one year and since the court directed that the sentences should be served concurrently, I believe that the minimum term should be listed at one year rather than two years. See Opinion No. 345 of the Opinions of the Attorney General for 1927, Vol. I, page 588. The maximum penalty is listed correctly at twenty years because that is the maximum provided by Section 12414, General Code, for rape with consent.

In conclusion, I deem it advisable to state that the daughter of this offender being under the age of sixteen years, was in the eyes of the law incapable of consenting to the act of sexual intercourse. It is not strictly accurate to say that her consent has no legal effect. In the case of consent, the offense must be prosecuted under Section 12414, General Code, but if the offense be committed against her will, Section 12413, General Code, applies. In the case of rape with consent, the penalty is imprisonment in the penitentiary for a period of one to twenty years or in the county jail or workhouse for a period of six months, whereas, if a rape is committed without consent upon the daughter or sister of the offender, the penalty is life in the penitentiary. It is therefore clear that consent does have some legal effect, although consent of a female under sixteen years of age can never legalize sexual intercourse where the man is over eighteen years of age, unless the parties are married to each other.

I believe that this discussion will be of assistance to you in solving the questions propounded.

Respectfully,

THOMAS J. HERBERT,
Attorney General.