

Review on Attempted Rape under Chinese Criminal Law

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Abstract

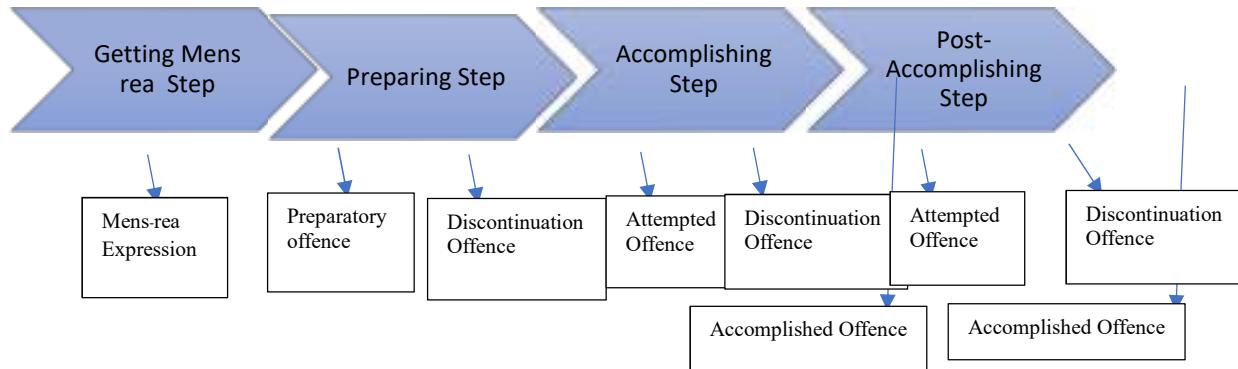
From the rising of the responsibility doctrine in 20th century, the attempted rape is becoming significant as the compromised theory of penetration and touch to fight uncertainty in Chinese Judicial. At the same time the underpinning fundaments of its requirement which be constitutive time and applicable space dimensions should be clarified. Different types of the attempted rape have distancing punishment, while the Supreme Court formulated the measure rules of decrease 50% imprisonment terms in principle. Whether the gang rape constitutes the attempted, and whether the attempted of stimulate intercourse has criminal punishable are still at issue.

Keywords: Attempted rape, Constitution crime, Penetration

1. Introduce

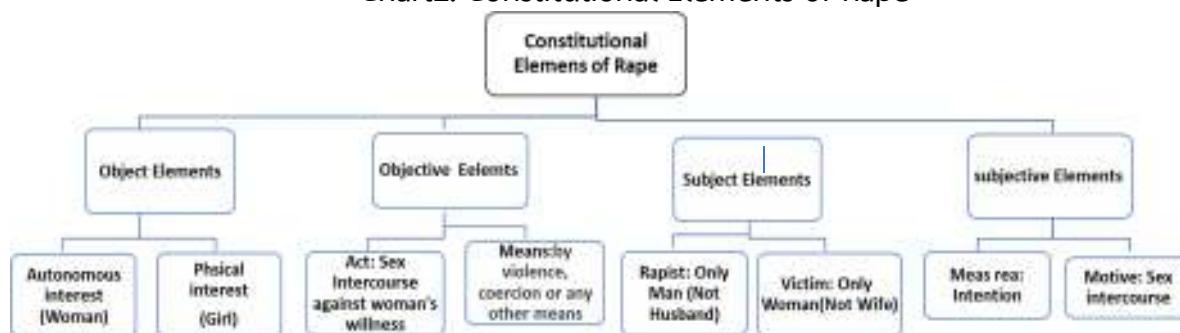
In the theory of Chinese criminal law, the intentional crime is usually divided into the completed forms and the incomplete forms, that is, the accomplished belongs to the completed form, while the attempted, the preparation, and the suspension are the incomplete forms. Incomplete crimes fall somewhere in the middle of the “commit a

crime” process, which consists of six steps:(1) The actor gets the idea for the crime. (2) The actor evaluates the idea, deciding whether to proceed. (3) The actor decides to go forward with the idea. (4) The actor prepares for the crime, by obtaining necessary weapons, for example. (5) The actor begins the crime, and (6) The actor finishes, or completes the crime. (Jerome Hall 1960:558) In China, intentional crime is divided into the following forms according to different stages. (Chart1).The inchoate crime or incomplete crime is a crime on examples of preparatory crime, attempted crime and discontinuation crime. The most common inchoate crime is attempt. (Larry K. Gaines, Roger Le Roy Miller, 2006: 105) According to the Paragraph1 Article 23 of Chinese Penal Code, A criminal attempt refers to a case where an offender has already started to commit a crime but is prevented from completing it for reasons independent of his will. In the period of result responsibility, once having result, the actor will be punished, and did not punish attempted crime. This is the principle of objective Imputation. While the responsibility in 20th century made that intent and negligence are as the requires of crime constitution, also punish the attempted without result.

**Chart 1: The Forms of Intentional Crime in Different Steps**

When reviews on the attempted rape, the constitution of rape should be certainty and understood clearly at first. The completed constitutional elements of rape are stipulated in article 236 of the penal code. Rape crime includes 2 types: (1) General Rape and (2) Statutory Rape. Completed rape has many important elements which be highlighted and different with Thailand. (Chart2: Constitutional

Elements of rape). However, the statutory rape must be met with special requirement in addition: (1) The victim is the girl under 14 years old. (2) the intention with raping unaged girl. (3) Regardless of girl's will. Under these element contents, the problem of attempted rape is an extremely complicated and controversial, be faced and solved in criminal justice.

Chart2: Constitutional Elements of Rape

2. Fundamental Premise: Definitional Boundary of Attempted Rape and the Completed Rape

A premise to discuss the rape with is how to judge rape has been completed or constitutive requirements, this is also a very important problem in Chinese criminal law. Unfortunately, there is no specific provisions or interpretation in Chinese Penal Code, only expression as “build sexual relationship”, rather than “sex intercourse” In Thailand. In fact, “build sexual relationship” equal to “sex intercourse” totally, it is just a little embarrassing or taboo when mentioned the phrase “sex intercourse” in China. What’s the meaning of sex intercourse? There are 2 main viewpoints--- Penetration and Touch Doctrines. Judging the special rape case with different standpoint will result in the different sentences.

Scenario Case 1: When A raped B, he tries to penetrate B’s vagina with his penis, but is too nervous to complete with un-erected. A punctured B’s hymen with his finger.

- (1) In the Touch doctrine, A is the completed Rape, without any dispute.
- (2) In the Penetration doctrine, the interpretation should be further clear what’s the Penetration.

If the penetration only refers to “penis penetrates vagina”, A constituted the attempted rape. If the penetration expanded refers to “penetrate the vagina with any objects”, A is completed rape. So, it is necessary to interpret penetration means by the legislature or judiciary.

2.1 Penetration Doctrine: How to understand the meaning of sexual

penetration in criminal law?

In traditional or dominant (mainstream) sex culture, intercourse only refers to penis penetrate the woman’s vagina for generation reproduction. But in civilization society, the intercourse has met the different sexual orientations for sexual pleasure. Sex intercourse (or coitus or copulation) has also different views as following: (1) It is principally the insertion and thrusting of the penis, usually when erect, into the vagina for sexual pleasure, reproduction, or both. This is also known as vaginal intercourse or vaginal sex. (Wayne Weiten 2008:422-423) (2) Other forms of penetrative sexual intercourse include anal sex (penetration of the anus by the penis), oral sex (penetration of the mouth by the penis or oral penetration of the female genitalia), fingering (sexual penetration by fingers), and penetration by use of a dildo (especially a strap-on dildo). (Nilamadhab Kar, 2005: 107-112) These activities involve physical intimacy between two or more individuals and are usually used among humans solely for physical or emotion pleasure and can contribute to human bonding. Moreover, Non-penetrative sex or outercourse includes heavy petting, frottage and mutual masturbation. (M. Hodge 2000:385) According to linguistic lexicology in Chinese, Penetration has 2 means: (1) Put into, squeeze into, pierce, insert or add in---- basic connotation; (2) man’s penis penetrate the woman’s vagina---implied connotation. This is reflected in the relatively conservative attitudes towards sex in eastern cultures.

In Thailand, the (2) viewpoint has been accepted by criminal law. On the contrary, Chinese criminal law has still been persisted in the (1) view which is narrow scope of sexual intercourse. That's to say, until to present, the sexual penetration in criminal law only refers to the man's penis penetrate the woman's vagina.

2.2 Touch Doctrine: How to understand the meaning of sexual touch in criminal law?

In fact, Non-sexual intercourse or outercourse had been regulated in criminal law for protection of sexual rights widely. But In what form is a question. In most countries, these forms of sexual behaviors were regulated with sexual assault offence (excluded rape). In Chinese Penal Code, the Article 237 Stipulated compulsory indecent sexual assault or insult crime. On the one hand, it is necessary to exam the motive of sexual behaviors. If the defendant desired to penetrate the vagina with his penis, only to touch because that his penis cannot be erect, the defendant is the attempted rape. While the defendant only desired to touch the vagina with his penis, not to penetrate, he will constitute the sexual assault of article 237. On the other hand, whether the touch doctrine can be expanded to the rape crime has been on issue. Especially, for protection the child broadly, many scholars insisted on the adoption the touch theory with the statutory rape. If the male adult raped the girl under 14 years old, he has already been completed rape when his penis touched the girl's vagina. But prof. Zhang Mingkai objects to

this view in his textbook. The reasons are mainly: (1) the touch doctrine makes the criterion of accomplished statutory rape too early, which leads that the completed criterion of sexual assault girl with lesser punishment become the complete criterion of statutory rape with heavier punishment. Not conducive to distinguish these two different crimes. (2) Touch doctrine is not conducive to encouraging the perpetrator to give up during rape, nor is it conducive to protecting the reputation of the girl victim. (3) Touch doctrine should not be applied to the completed criteria for statutory rape only because that it is difficult to penetrate the girl's vagina. (Zhang Mingkai, 2016: 875)

2.3 The Compromise Theory: the standpoint in Chinese criminal law in criminal judicial.

However, in criminal judicial, the judges have been almost adopted the dichotomy criteria on rape cases----Compromise theory according to the victim' age. When the victim is woman over 14 years old, only the defendant's penis penetrated the woman's vagina, he constituted the completed rape. When the victim is girl under 14 years old, once the defendant's penis touched the girl's vagina, he had been already constituted the statutory rape.

Analyzed the Case1, the virgin girl was 15 years old, the court made the decision that the defendant was the attempted rape. Of course, the prosecutor believed that this decision was unfair to the victim and filed the

appeal. In my opinion, this decision is correct:

(1) There is no interpretation of sexual intercourse and penetration. When adopted the expended meaning (physical penetration) or narrow meaning (only penis penetrated vagina), should be in favor of the defendant.

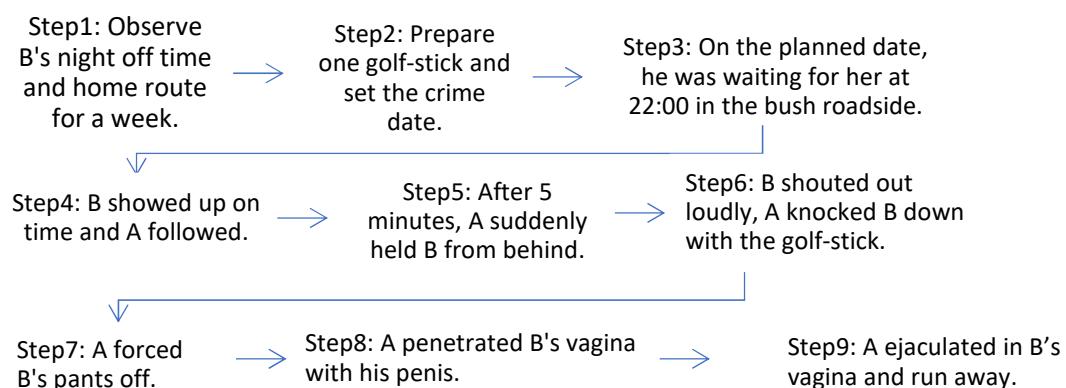
(2) According to the “Failure of crime purpose” characters of attempted theory, (will be discussed at the 3rd chart), it is obvious that the crime purpose is the defendant’s purpose or motive in logically.

(3) Crime Conviction and Punishment Measure are the 2 divided judge procedures by court. The Attempted rapist is not necessarily less severe than all the completed rapist.

3.3 Time and Space: The Basic Requirements on Attempted Rape

Then, the basic requirements on attempted rape should be analyzed by two dimensions---Time and Space. Thinking of every crime as a process, which developed stage was the attempted, and which one was the completed. For example, A fascinated with B and desire to have sex with B. But he knew for certain that B would refuse him. So, he drew up a detailed plan for raping B. What time intervals may exist for attempted rape? On the guidance of the attempted rape’s constitutive characters, can be judged legally.

Chart 3: One Rape Plan and Procedure



3.1 The 3 Constitutive Characters of Attempted Rape

The article 23, paragraph 1 stipulates that Criminal attempt occurs when a crime has already begun to be carried out but is not consummated because of factors independent

of the will of the criminal element. So, the attempted rape constituted 3 constitutive characters.

3.1.1 Rape act has already begun to be carried out

From chart3, what step is the

beginning of the rape constitution? The act which has already begun to be carried out is the starting or origin point of perpetrating act, marks the criminal act into the implementation stage. On the identification of act which begun to be carried out, there are many different theories of criminal law in other countries. (H.c.mult.Urs Kindhäuser, 2015: 297) The subjective doctrine believes that crime is the discovery of the dangerous personality of the actor, when this danger idea or criminal idea be discovered, this moment is the starting point of criminal act. This doctrine is aimed for social defense, the dangerous idea is as the basis of criminal punishment on the attempted, the starting point of criminal act was ahead, therefore, expand the scope of the attempted. Just like Chart 3, If A's idea was discovered resulted that he cannot continue this plan after step1 or step2, A is also the attempted rape. The objective doctrine (Divided into the formal and the substantive) believe that the actor should begin to carry out the constitutional elemental act of special crime, it is the only start point of criminal act. For the rape as instance, "force act by means" is the constitutional element, so only after step5, A may constitute the attempted rape.

In my opinion, the objective doctrine also needs be modified with subjective doctrine. For example, A may constitute the attempted rape after step7 because that the rape behavior and rape idea have also be discovered which the victim's pants were took off. But When A held B behind at step5, A

cannot continue his plan because that the other man helped B and prevent A at that moment. It's difficult to judge the A's rape idea unless he expressed his rape idea by oral.

3.1.2 Rape is not consummated (Failure of rape purpose)

Be Not consummated or failure of crime purpose is the basic symbol of difference between the attempted rape and the completed rape. what's the meaning of be not consummated? Although there are different descriptions or interpretations, as far as I understand, it refers that the infringed result which the defendant's wish or allow such consequences to occur is not occurred, and this result is also determined by the nature of the act. On the one hand, the intention of rape can be direct intentional (wish) or indirect intentional (allow such consequence to occur). When it comes to indirect principal, the attempted rapist may be omission with indirect intentional. When a wife was raped by a mental patient, the husband was stand by without helping his wife. In essential, husband has a criminal duty or obligation. If the mental patient cannot penetrate the victim's vagina with his penis, the husband constituted the attempted rape. On the other hand, the result should be the result of constitutional elemental act. When A raped B by force, there are 2 results, one is the result of means-----such as B was beaten to serious injury, the other is constitutional elemental result-----the vagina was penetrated, obviously, the latter is the result of the attempted rape.

Last but not at least, it is not that the attempted cannot be constituted, once the result above has occurred. In fact, it may be also the attempted if the result does not from the certain cause. In the above case, the victim B at Step 5 knew the A's motive, then pretended that she has too long time not to having sex with anybody and was very willing to have sex with A. indeed, she only feared more serious injury. A believed it, and B didn't resist any more during sexual intercourse. It seemed that A had already succeeded, but only if he violated B's will and knew clearly that he violated B's will, the rape was accomplished or completed. Therefore, the attempted rape can only be considered at this situation. (Claus Roxin, 2011: 151)

3.1.3 The failure is due to factors independent of the will of the criminal element

The factors independent of the will of the criminal element refers to the fact that the criminal will is always violated, and it is impossible to objectively make the crime impossible, or to make the criminal idea that it is impossible to be completed and thus forced to stop the crime. In other words, if not automatically quit the crime by actor, or automatically and effectively prevent the occurrence of the crime, it is the reason other than the will of the offender. In general, there are 3 situations according with the reasons:

(1) Reasons for suppressing the will of crime. A certain fact makes the perpetrator

think that it is impossible to continue to commit crimes objectively, and thus is forced to stop the crime. Under this circumstance, the perpetrator has no choice subjectively to continue the crime, and thus is forced to stop the crime. When A was at step 5\6\7, Suddenly heard sirens, thought the police to catch him, then were forced to flee the scene. Even if the vehicle is actual an ambulance, or the police car is not to arrest A, but A thinks that it is objectively impossible to continue to carry out the rape, still belongs to reasons beyond will.

(2) The reason for suppressing criminal act. That is, certain circumstances, makes it impossible for the perpetrator to continue to commit crimes objectively. When a rape is committed, it is discovered and stopped by other man.

(3) The reason for suppressing the consequences of crime. That is, the perpetrator has already done what he believes should be practiced, but some circumstances prevent the infringement from happening. Before sexual penetration, A who used the violent mean resulted B was in a coma. A thought B was died and gave up the rape crime. About half an hour after A fled the scene, B waked up and left by herself.

3.2 The Applicable Space of Attempted Rape

In criminal law theory, which spaces have the possibility of constituting an attempted rape, there is still on issue. What needs to be further studied the spaces of these situations-----Aggravated consequential

offense, Conduct offence, and Operation offences.

3.2.1 Aggravated consequential offense

Whether the aggravated consequential offense has an attempted, there has been debated abroad.(Zhang Mingkai 1997:17) Article 236, Paragraph 3 of Chinese Penal Code has stipulated 5 aggravated consequential offenses: Whoever rapes a woman or has sexual relations with a girl involving one of the following circumstances is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death:

(1) rape a woman or have sexual relations with a girl and when the circumstances are odious;

(2) rape several women or have sexual relations with several girls;

(3) rape a woman in a public place and in the public;

(4) rape a woman in turn with another or more persons;

(5) cause the victim serious injury, death, or other serious consequences.

The scholars who has denied this issue believed that is based on the occurrence of the result. Having the aggravating result constitutes the aggravated consequential offense, or not constitutes that. It has not any necessary space to constitute the attempted of the aggravated consequential offense. But more scholars hold it affirmatively, but the

reasons are different: (1) If the result of the aggravation is intentional, once there is no aggravation result, it is the attempted of the aggravated consequential offense. The perpetrator intended to cause serious injuries to woman for rape (As the 5th above). The perpetrator raped woman but didn't caused serious injuries. (2) When an aggravating result occurs but no basic result occurs, the result is an aggravated attempt. The perpetrator caused serious injuries to the victimized woman but failed to rape the woman. (3) The aggravated offense is a complex of deliberate and negligent crimes, the attempted rape can be in the concept of negligence, so the aggravated consequential offense has the attempted. The attempted crime in China is not for accusation or charge but may be for various forms under the same accusation or charge.

3.2.2 Omission offense

An omission is a failure to act, which generally attracts different legal consequences from positive conduct. In the criminal law, an omission will constitute an actus reus and give rise to liability only when the law imposes a duty to act and the defendant is in breach of that duty.(Cardi, W. Jonathan, 2005: 921-988) The omission offence divided into the real (purity) omission and unreal (impurity) omission in Chinese criminal law. The rape crime is as one of unreal omission which can be committed by act (Begehungsdelikte) or failure to act. If the attempted rape occurs in the space of the omission, the perpetrator must have certain

obligation in criminal law. For example, in statutory rape case, one teacher in kindergarten was indifferent with raping one child by other man in her room. But if the rapist constituted an attempt, the childcare staff will also constitute an attempted rape.

3.2.3 Operation offence

The operation offence is just Unternehmensdelikt in German criminal law theory. In common circumstances, the criminal law imposes a lenient punishment system on attempted offenders. However, in some cases, the criminal interests infringed between the attempted and the completed have no differences and distinctions, so the criminal law treats them in the same way. This phenomenon that only the attempted crime by essence was treated as the completed crime, was named after Operation offence. (Vgl., C, 2006: 350) Scholars in Germany believed that there are two reasons for legislators to create the elements of an operation offence: First, although the perpetrator stopped at the attempted stage, it is almost impossible to control the dangers

caused thereby. Second, the attempted act itself has caused damage to the legal interests, so it is necessary to treat the attempt and the completed as the same. In Scenario Case 1 above, A who punctured B's hymen with his finger constituted the attempted rape, but he will be punishment as the same treated measure with the completed rape. this is the typical case of operation offence.

4.Types and Measures: The Punishment on Attempted Rape

Criminal punishment will be discussed by the types and measures of the attempted rape. Different type of the attempted rape reflects different degree on illegality. Moreover, it is easy to be confused between some types of the attempted rape and the decriminalized sex intercourse. Therefore, it is significant to categorize the attempted rape in judicial practice.

4.1 Mainly Types of Attempted Rape

In Chinese criminal law theory, there are main types of the attempted as following:

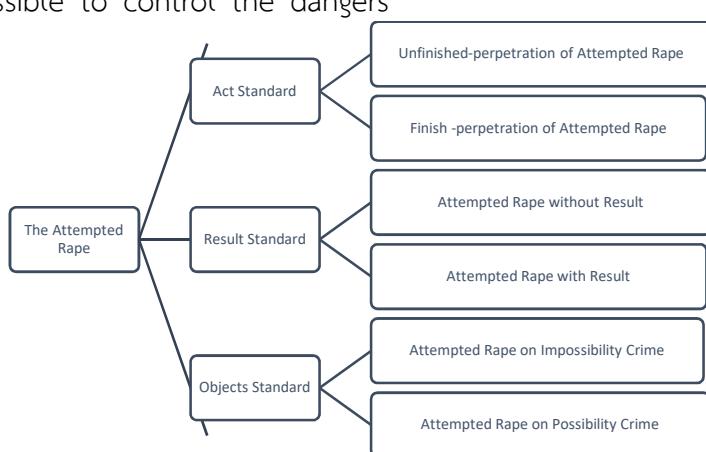


Chart4: The Theoretic Categories of Attempted Rape

Obviously, at different standard classifications, in general, the criminal punishment of the upper type is lighter than the below type at every group. Because that the criminal interest of different attempted rape has relative otherness in degree. There is no dispute about it. Here focuses on the issue of Impossibility crime on attempted rape. About Impossibility crime, there are mainly 3 situations:

(1). Impossibility Means

The perpetrator has the idea of completing rape, but the means he used cannot result in the consequence.

Case4-1: In order to rape B, A had a drug into B's drinking water. But the drug was the fake medicine. In fact, B knew A's plan, and is willing to sexual intercourse with A. However, A "raped" B whom was pretending to be fell down by drug according the original plan.

In such cases of mistaking, since the perpetrator has both the intention and the act of rape crime, it is natural to conviction by intentional crime. However, the means of its use or the carefully selected tools of crime cannot achieve the criminal intent. This kind of error cannot (and in fact does not) result in harm to society or individual. Therefore, it should be determined by the attempted. However, since the actual behavior is unlikely to produce a legal interest which be infringed, it cannot be considered a criminal act. To put it bluntly, it cannot be considered that all acts committed with rape intention are criminal acts stipulated by criminal law.

(2). Impossibility Victim

The defendant has the idea of completing rape, but the victim does not the object of rape crime. That's to say, the rape victim does not exist, so the result is impossible.

Case4-2: One night, A met a beautiful B at suburbs road and had an idea of raping B. So, he hugged B from behind and forcibly removed B's trousers. Only to find that B is a male, not female. A gave up raping and escaped.

Since the object of rape crime cannot be male, therefore, A in the case constitutes an attempt rape. But the question is, what if B is a transgender but "her" national citizen identity is still male? If A raped B, he did not constitute rape, perhaps was not guilty in criminal law. However, if he gave up, was an attempted rape. This is a depressing decision by Chinese penal code. Because that the sexual rights of male victims and "LGBTQIA" groups have been not enough criminal protection in China until present.

(3). Impossibility defendant

The actor has a certain identity and is legally qualified for a certain act or excludes a specific crime or a serious violation of the law. For example, criminalization of marital rape has not been progress in Chinese criminal law, even been discussed in academia for decades.

Case4-3: On a night without moonlight, A followed by B on a lonely road. Then A stunned B from the back and raped B. After the rape, A returns home. Half an hour later, his

wife came home and found out that it was B.

In the course of the case, there are 3 opinions: The first opinion is that A was not guilty. The reason is that although A had committed rape, but the person who was raped is his wife, it did not cause social harm, and should not be treated as a crime. The second opinion is that A constituted the completed rape. The reason is that A had subjectively committed the crime of rape, and objectively carried out rape. Although the raped person is his wife, it should still constitute the completed rape. The third opinion is that A constituted an attempted rape. The reason is that A had a criminal intention and committed a criminal act, but because of the object's misunderstanding, he can only be an attempted rape. In sum, the punish-ability of attempting rape on impossibility crime has always been controversial. Some scholars strongly oppose to be criminalized. This is a question that needs further study.

4.2 Punishment Measures of the Attempted Rape

In Article 237, paragraph 1, (General Rape) “.....shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years”.

Paragraph2, (Statutory Rape) “.....shall be given a heavier punishment”.

Paragraph3, (Aggravated consequential Rape) “be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death”.

In Article 23, paragraph 2, An offender who attempts to commit a crime may, in comparison with one who completes the crime, be given a lighter or mitigated punishment.

How to apply the above provisions comprehensively in the case of attempted rape? In 2017, In order to further standardize the discretion of punishment, implement the criminal policy, enhance the openness of sentencing, achieve fairness in sentencing, the Supreme People's Court Gazetted the Guiding Opinions on Sentencing for Common Crime (II)(for Trial Implementation).

Table5: List of Standardized Punishment for Rape

Concreted Plots in Case	Coordinate Measuring Criterion	Attempted rape
Rape 1 woman	3-6 years imprisonment	1.5-3 years imprison
Rape 1 girl	4-7 years imprisonment	2-3.5 years imprison
-The circumstances are odious	10-13 years imprisonment	5-6.5 year imprison
- Rape 3 women or girls		
-Rape in the public place		
-Gang Rape		
-Cause serious injury, or other serious consequences		
Integrated Evaluation:	13 years imprisonment	Integrated Evaluation:
- Odious Degree	life imprisonment	- Degree of implementation
- Number of the Victim	Death penalty	- Degree of the damage
- Injury Result		- The reasons for the failure
		Decrease 50% of the Coordinate Measuring Criterion

Note: Regardless of other punishment measure plots.

5. Gang and Stimulate: Two Controversial issues on Attempted Rape

In recent years, the controversy surrounding the crime of rape has been endless. Only on the attempted, the cases on the attempted gang rape and the attempted of stimulate intercourse have been discussed and analyzed, which has been different explained.

5.1 The attempted gang rape

[China Guiding Case No. 790] On June 28, 2010, A and B colluded to rape C, B cheated C to the rental room, then rape her by violent. But B cannot penetrate with his penis, A completed rape. The primary court sentenced that they constituted gang rape, A was the completed crime, B was the attempted crime and mitigated punishment. However, the appellate court determined that

they constituted gang rape, both A and B were the completed crime.

Guiding case proposition

The gang rape is aggravated by the plot, and the plot itself has no independent problems, and the attempt is a cessation of crime. As long as 2 or more perpetrators intentionally raped the same victim at the same time period based on joint rape, they should be considered to have a gang rape plot, and whether the perpetrators succeed, does not affect the constitution of the gang rape. Otherwise, whether every defendant will be as the attempted gang rape, or only ones who cannot complete rape constitute the attempted gang rape, it is difficult to draw a reason decision. If all defendants were the attempted gang rape, the punishment of ones

who had already completed rape will be reduced. If only defendant who cannot completed rape was the attempted gang rape, what on earth the gang rape is the completed or the attempted? It will be a paradoxical proposition.

As for the determination of the defendant's attempt: (1) if all perpetrators penetrated or all of them did not penetrate, they also constitute gang rape. All perpetrators who penetrated were punished as the completed rape, on the contrary, all perpetrators who cannot penetrate were punished as the attempted rape. (2) Ones had already penetrated with their penises and the others had not penetrated in the same gang rape case, all perpetrators constituted the gang rape and part of perpetrators who cannot penetrate were also the completed rape. The theoretical reasons are that they were accomplice or joint offences. According to the principle of "one accomplished, all accomplished", even only one completed, should be treated as all defendants had completed rape. But only can be distinguished by punishment measures.

Some Scholars' different Views

Q1: Is there attempted gang rape?

The gang rape is not a simple rule of sentencing, but an aggravated crime, and thus there is an attempted gang rape. When all defendants had already completed rape, will be constituted the completed gang rape. When none of defendants had completed rape, may be constituted the attempted gang

rape. When part of defendants had already completed rape, other part of defendants had not completed rape: On the one hand, should be constituted the attempted gang rape. One the other hand, all defendant should be constituted the completed rape meanwhile. (Li Duo 2014)

Q2: How to deal with the overlap between the attempted gang rape and the completed rape?

In judicial practice, if the accused constituted the attempted gang rape, also constituted the completed rape, he should be treated as the principle of the imaginative joinder of offenses. If only judge the attempted gang rape, there is no assessment which the illegal facts that have constituted the completed rape. If only judge the completed rape, there is no assessment which the illegal fact that they have constituted the gang rape, only when it is determined to be imaginative joinder of offenses, can a comprehensive evaluation of all illegal facts and a proper equivalent sentence be realized. (Zhang Mingkai2016:875)

5.2 The attempted of stimulate intercourse

Scenario Case: A was B's friend through the blind date online one month ago, then making appointment to go to one beautiful beach for holidays. A booked the 2 rooms which next to in a hotel. They played together during the day, had dinner together. After happy-crazy at one bar, they went back the hotel. A who brought some fruits knocked on

the door into B' room. When they had just chat for about ten minutes, A suddenly stood up and hugged B. B refused him and asked him to leave her room. But A pushed B down on the bed and tried to take off B's pajamas. Despite of her resistance, A still kissed her and took off her pajamas. B claimed that she was in healthy inconvenient period of menstruation. A gave up and returned to his own room. B called the police and A was arrested.

Q: Did A's behaviors constitute an attempted rape?

Many scholars believe that A constituted an attempted rape. On the analysis of constitution of rape crime, A's behaviors were totally in line with the constitutional elements of rape, that is, be forcible sexual intercourse against woman's will. B asked A to leave her room at once---not willing to sexual intercourse; A pushed B down on the bed, kiss her and took off her pajamas---by forcible means. B's pretend excuse (menstruation period) was the cause of A's unfinished purpose for raping. Therefore, A constituted an attempted rape.

However, other scholars believe that A's behavior is only a kind of simulated intercourse, that is, a prelude to flirting between lovers in life. It is tentative offer from A to B about sexual intercourse. When A knows that B truly refused, A did not entangle with B any more. Since A and B were prospective closed relationships, A should not be a crime. It's important to emphasize that the subjective element of rape prescribed in Chinese Penal

Code is "against woman's will", not "without consent" in other countries. There is certain difference between them. In practice, how to judge "against woman's will" is indeed difficult to determine, mainly relying on a presumption of objective behaviors.

The related research shows that acquaintance rape accounts for a high proportion of rape cases in the world. Examples of acquaintances include blind date victim, a classmate, co-worker, employer, family member, spouse, counselor, therapist, religious official, or medical doctor. (Chancellor, Arthur S 2011:167) Although the data obtained by different research institutions are not completely consistent, the results are basically more than 50% in China. In what is now the Post-Weinstein era, victims of sexual assault and harassment are finally being believed. As much as this is overdue, in the context of rape, simply believing victims will not be enough to fix endemic problems arising in how rape is defined, prosecuted, and punished. (Kari Hong 2018:259) The booming rape cases which have been influenced by MeToo Movement attracts the public's eyes, but in criminal justice, it is necessary to calmly and objectively treat the trend of the expansion of such rape punishment.

6. Conclusion

With the limited requirement, only a brief review on the attempted rape under Chinese Criminal law, it is unable to be analyzed deeply and adequately. From this

century, there has been developed disputes between different schools in criminal theories in China, even the logical structure of textbooks (Including constituent elements theory of crime) have been quite different. With multifarious unpinning theories, can deduce contrasting decisions in judicial practices. More and more the young bloods who study criminal law abroad integrate into academic spheres every year, promote the sustainability of Chinese criminal law's developing, however, maybe bring the great challenges on certainty of criminal law.

Rape, which is one of felony in traditional theory, and the attempted offence is also the complex theoretical system. To criminal regulate the rape crime cannot be separable from local culture, therefore, it is necessary to understand exotic sexual culture for studying sex crime. To echo to the quote at the beginning, as if Freud's whisper that reminding us, caution on the repressed sex desire which be encage in the unconscious, be uncontrol of civilization rules which flee from the moral and law' cage, just like savage monsters.

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