
(1928) 05 AHC CK 0011
In the Allahabad High Court

Emperor	Vs	APPELLANT
Motha		RESPONDENT

Date of Decision : 22-05-1928

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : AIR 1929 All 322

Hon'ble Judges : Iqbal Ahmad, J;Boys, J;Banerji, J

Bench : Full Bench

Judgement

Boys and Iqbal Ahmad, JJ.—A boy who has been found by the learned Additional Sessions Judge of Aligarh to be in his estimate not more than 15 years of age, has been convicted of rape u/s 376, I.P.C. There can be no question but that the offence was committed in the most brutal manner on a little girl, some 10 years of age. Very grievous injuries were inflicted upon her and they were inflicted upon her by the accused when she was in the employ of the accused's father and he therefore was to some extent in a trusted position. The learned Judge thought that the boy's age precluded the desirability of sending him to jail. He could have, however, sentenced him to imprisonment and then sent him to a reformatory school. His reason for considering it undesirable to send him to a reformatory school, he expresses as follows;

The question of sending him to reformatory school is also undesirable because he is the son of an agriculturist and he will learn more by ploughing in his field than by remaining in any reformatory school.

2. The reason appears to us wholly inadequate. It might just as well be said that the son of any other man employed out of doors or indeed, the son of many types of artizan would get more good by learning his father's trade than he would by going to a reformatory school. The learned Judge, having rejected the idea of imprisonment and the idea of a reformatory school, then considered whether the boy should be whipped. In the Civil Surgeon's view the boy could not undergo whipping in the ordinary way, so he was ordered to receive a caning

in jail of 20 blows on his hand. The learned Judge also remarks:

No doubt the girl has suffered much and the learned Counsel who appeared for the accused was good enough to tell the accused's father to pay Rs. 30 to the girl's father and the money has been paid in my presence to the girl's father.

3. Here again the learned Judge does not appear to have exercised a well-balanced judgment. The fact that the accused's father was willing to pay Rs. 30 to the girl's father is absolutely no reason whatsoever for letting off the guilty son lightly. Neither would the accused be sufferer by such a procedure nor would the girl benefit.

4. The sentence of caning has no doubt before now been carried out.

5. The local Government being dissatisfied with the punishment inflicted in this case has considered it desirable to apply on the revisional side of this Court asking that the sentence be enhanced, on the grounds: (1) that the sentence passed on the accused is inadequate and (2) that a sentence of imprisonment is imperative under the law.

6. The learned Judge before whom this application was presented appears to have been in some doubt. He remarked that the sentence was not illegal and a sentence of whipping in lieu of imprisonment was in the case of a juvenile a legal sentence. He, however, directed that the case should be put up before a Bench of two Judges to decide whether notice should issue under the circumstances particularly in reference to "the accused's physical growth".

7. However, as the case has been referred to us we have to consider whether notice should issue. In view of the gravity of the offence we have no hesitation in saying that notice should issue. We have had to consider the law bearing on the point and as we have had to consider it with some care it is desirable to put on record the result for the assistance, if it be such assistance, of the Bench before whom the case may come.

8. We agree that, though the Judge may have not acted wisely, the sentence was not an illegal sentence. The boy was a juvenile and as such Section 5, Whipping Act, would be applicable. We had then to consider what order could be passed by this Court if we decided to issue notice for it was clearly futile to issue notice if the Court was to arrive at the decision that nothing could be done. The first question for determination is whether a sentence of imprisonment can be inflicted as well as whipping in the case of a juvenile. Section 4 of the present Whipping Act (Act 4 of 1909) says clearly that

whoever commits raps may be punished with whipping in lieu of or in addition to any other punishment.

9. So far then a juvenile could clearly be sentenced both to imprisonment and whipping. Section 5 says that any juvenile offender who commits any offence (e.g. rape) under the Indian Penal Code except certain offences may be punished

with whipping in lieu of any other punishment. It may be suggested that if a juvenile comes within the terms "whoever" in Section 4 then in this particular case, Section 5 would be a surplusage. On this the argument may be founded that the combined effect of Ss 4 and 5 is that in the case of a juvenile if whipping is to be inflicted it can only be inflicted in lieu of imprisonment. But we do not think that this is a safe conclusion. In the first place Section 5 only in terms makes it possible to remit the imprisonment and does not say that imprisonment and whipping may not both be inflicted. Again in Section 4 of the Act of 1864 in the corresponding Section 4 only the words "in addition to any other punishment" appeared while in the corresponding Section 5, referring to juveniles the words appeared "in lieu of any other punishment." Under that Act it was held and obviously correctly held in *Reg v. Kusa* [1870] 7 B.H.C. CrL. 70 that Section 4 was also applicable to juveniles and while they together with others could be punishable with both imprisonment and whipping. Section 5 gave the Court a discretion in cases of juveniles (not given in the case of adults) not to inflict imprisonment.

10. It would next appear that the legislature thought it desirable to give the same discretion in the case of adults and therefore in the new Act (Act 4 of 1909) we find that the words "in lieu of or" have been inserted before the words "in addition to any other." This was clearly done with a view to giving a discretion to inflict only whipping in the case of adults also and not with the intention of removing the discretion to give both imprisonment and whipping in the case of juveniles which had hitherto existed. Obviously, if the discretion had been actually definitely taken away it would not be for this Court to say that it was not the intention of the legislature to take it away. But where the sections certainly remain open to the construction that the Courts have discretion still to inflict both imprisonment and whipping it is material to consider what the object of the legislature was in inserting in Section 4 the words "in lieu of."

11. Finally we would note that to construe that this discretion still remains with the Courts to give both punishments in the case of juveniles is not necessarily to treat Section 5 as if it was now surplusage, for the scope of the two sections is wholly different. Section 4 only covers particular offences while Section 5 deals with all the offences in the Penal Code with the exception of a few specified and also deals with other offences. If then the Government Advocate urges us to hold that the present sentence of 20 canings is inadequate, that we have power to enhance the sentence to imprisonment in addition and that having so enhanced it, it is open to us to consider whether the recourse should not be had to the Reformatory Act by virtue of Section 8 of that Act, these are steps that cannot be taken without notice to the accused. We have only noted such points as we have had to consider for the assistance possibly of a Bench that may hear the case after notice had issued. Let notice go to the accused. (After hearing the accused the following order was passed.)

Boys and Banerji, JJ.

12. In this case notice was issued to the opposite party to show cause why the sentence should not be enhanced. The reasons for issuing that notice and the desirability of a sentence of imprisonment are set out in the order of this Court dated 22nd February 1928. We think that there is no question of our power to inflict a sentence of imprisonment though the sentence of whipping has been carried out. In the first place the whole of the evidence on the record tends to show that the accused in this case was not under the age of 16. The opinion of the learned Judge as he has expressed it can hardly be construed as a finding. Even if it be regarded as a finding, the next question that arises is whether that finding is final or whether the "Court" referred to includes the appellate Court. We can find no reason for holding that the use of the word Court excludes the appellate Court. It is a much more natural interpretation to put on the word "Court" that it is intended to exclude the refusal of jail or other authorities to accept the finding. Apart altogether, however, from either of these considerations we are also of opinion that upon a proper interpretation of Ss 4 and 5, Whipping Act a sentence of imprisonment can be inflicted and in this respect we accept the view of the Bench that has issued the notice.

13. In view of the serious and brutal nature of the attack we enhance the sentence on the accused by inflicting a sentence of 18 months rigorous imprisonment. The District Magistrate will be informed and will issue a warrant in the ordinary course.