
(1934) 05 PAT CK 0003
In the Patna High Court

Emperor		APPELLANT
	Vs	
Rashbehari Singh and Another		RESPONDENT

Date of Decision : 25-05-1934

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 391
Penal Code, 1860 (IPC) — Section 376, 511

Citation : AIR 1934 Patna 551

Hon'ble Judges : Verma, J

Bench : Division Bench

Judgement

Verma, J.—The Additional Sessions Judge of Gaya has submitted a report in two oases: (1) Emperor v. Rashbehari Singh, and (2) Emperor v. Brijmohan Bania, both of which were tried by jury. In the first case the jury returned a unanimous verdict of guilty u/s 376 read with Section 511, Penal Code, against Rashbehari Singh. The learned Additional Sessions Judge accepted this verdict, convicted Rashbehari Singh and sentenced him

to undergo rigorous imprisonment for two years and to whipping of twenty stripes after the sentence of imprisonment,

passed by his order dated 17th March 1934 "has been undergone." Now, the latter part of the order relating to the sentence of whipping is certainly against the provisions of Section 391 Criminal P.C., This section in Clause (b) provides:

Whipping shall not be inflicted until 15 days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the appellate Court; but the whipping shall be inflicted as soon as practicable after the expiry of 15 days, or, in case of an appeal, as soon as practicable after the receipt of the order of the appellate Court confirming the sentence.

2. The last portion of the order, which says that the stripes will be given after the sentence of imprisonment has been undergone, is clearly in correct in this sense that the time mentioned for inflicting the corporal punishment is not in

accordance with law. I would accordingly direct that that portion of the order of the learned Additional Sessions Judge be modified to this extent that the sentence of whipping passed against Rashbehari Singh should be executed as soon after the receipt of this order as practicable.

3. The second case Emperor v. Brijmohan Bania has given rise to certain complications. In this case Mr. S.N. Banerji represents Brijmohan and appears against the reference. Brijmohan was also convicted u/s 376 read with Section 511, Penal Code, and sentenced to two years' rigorous imprisonment and to receive twenty stripes of whipping after the sentence of imprisonment passed by the learned Additional Sessions Judge of Gaya in his order dated 10th March 1934 had expired. The report of the learned Additional Sessions Judge is dated 17th/18th April 1934. The case was put up for orders on 1st May 1934, but on that day notice was ordered to be issued by me. On 3rd May 1934, it appears that an appeal was moved on behalf of Brijmohan Bania, but it was summarily dismissed on that day by me. The reference or report has now come up before me for disposal.

4. Mr. S.N. Banerji has raised various objections against any interference, modification or correction of the sentence as originally passed by the Additional Sessions Judge against Brijmohan Bania. The learned advocate contends in the first place that the reference is incompetent on the ground that Section 438, which is the only section that deals with references, always contemplates references with regard to cases dealt with by a subordinate Court. To support this proposition he has cited the decision in Ramasis Thakur v. Emperor 1933 Pat 697. That was a case in which a Magistrate, after having dismissed the appeal of a particular individual in a particular case, came to the conclusion, while dealing with the case of another co-accused, that his original order of dismissal with regard to the first accused was wrong.

5. The Magistrate then referred the matter to the High Court so that the order of dismissal might be set aside. The case came up for disposal before Macpherson, J., who held that the reference was incompetent. But at the same time his Lordship went into the merits of the case and was of opinion that the original order of the learned Magistrate was right and his second thoughts were not preferable to the first.

In the case before me, apart from the question whether the reference is competent or not, the question to be considered is whether, if a lower Court finds that it has passed an illegal order and informs the High Court of the mistake and the High Court is of opinion that the order is 1 legal, is it competent to the High Court to set right the illegality? I cannot agree with the contention that this Court cannot set it right simply because the form in which the information has come happens to be in the form of a reference; and my opinion is that if there is a real mistake or illegality, the sooner it is set right the better.

6. In the present case an information as contemplated by Section 439, Criminal

P.C., has come (I treat the reference as an information) from the Sessions Judge that he has made a mistake, and I feel that it is a mistake. I should have no hesitation in setting the mistake right if, of course, I have the power to do so.

Then arises the second question. The appeal of Brijmohan Bania was dismissed by me summarily on 3rd May 1934. The question is that having dismissed the appeal is it open to me now to interfere with the whipping portion of the order which is not in accordance with law? As I have already said, while dealing with the case of Rashbehari Singh, there is no doubt that the last portion of the order is incorrect.

7. The appeal of Brijmohan was dismissed summarily on merits. There was certainly a note by the office on the memorandum of appeal that there was a criminal reference pending. It would perhaps have been better to postpone passing any orders, on the memorandum of appeal till the reference was considered. An order however, has already been passed on the appeal and the question is whether this Court is powerless to set right an incorrect order to which its attention has been drawn. The reference or the information of the Sessions Judge came up before this Court, as I have already said, on the 1st May, and the order was to issue notice. Till the notices were served the matter could not be disposed of. Now, I find that there is a time fixed in the sentence of whipping which time is not in accordance with law.

8. The illegality is not with regard to the nature of the sentence inflicted on Brijmohan nor is it with regard to the quantity of sentence, but it is with regard to the time fixed for the purposes of executing, the sentence of whipping. The fact that the appeal of Brijmohan has been dismissed clearly indicates that I did not disapprove of the quantity or quality of the sentence. It having appeared now that the time fixed for inflicting the sentence of whipping is wrong u/s 561-A, Criminal P.C. I would correct the mistake which the learned Additional Sessions Judge has discovered in his own order. I would accordingly direct that the order of the Sessions Judge be modified to this extent that the sentence of whipping passed against Brijmohan Bania be executed as soon as practicable after the receipt of this order instead of after the sentence of imprisonment has been undergone.