

Lurkhur Vs. Emperor

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Court : Allahabad

Decided On : Aug-13-1934

Reported in : AIR1934All976; 153Ind.Cas.582

Appellant : Lurkhur

Respondent : Emperor

Judgement :

ORDER

Bajpai, J.

1. The applicant Lurkhur was tried by the Assistant Sessions Judge of Allahabad with the help of a jury for an offence under Section 376, Penal Code, and found guilty. The learned Judge then pondered over the question of sentence. He thought that a sentence of whipping should be passed in view of the fact that he inflicted pain on the girl who was raped. The age of the boy was ascertained by the learned Judge to be 13 years and six months and the age of the girl was nine. It is clear that the Judge intended that the sentence of whipping should undoubtedly be passed. He says, 'I am compelled to pass the sentence of whipping....' He was further of the opinion that the accused should also be given a small sentence of imprisonment, but at the same time he was averse to sending the youthful offender to an ordinary jail and thought that the best place for him was the Reformatory School; but under the Reformatory Schools Act, the minimum

sentence of imprisonment that would enable the convict to have the benefit of the School is four years under the rules framed by the United Provinces Government. The result therefore was that although the Judge thought that 'a small sentence of imprisonment and a few stripes of cane would have met the justice in the case' he was compelled to give a sentence of four years' imprisonment in order to entitle the offender to go to the Reformatory School. He was definitely of the opinion that a sentence of whipping should be passed.

2. The conviction and the sentence was affirmed in appeal by the learned Sessions Judge who came to the conclusion that there was no misdirection or non-direction to the jury and there was no mistake of law which would entitle the appellate Court to interfere with the decision of the trial Court. It was not brought to the notice of the learned Sessions Judge that the sentence was illegal. In revision it has been argued before me that under Section 5, Whipping Act, a sentence of whipping is to be imposed in lieu of any other punishment and not in addition to any other punishment. This contention is supported by the case of *Queen-Empress v. Dagdu* 16 Bom. 357 and the case of *Kishun Singh v. Emperor* 1924 All. 455. In both these cases it was held that if the sentence of whipping is passed on a juvenile offender under the Whipping Act, no other sentence can be passed, for the whipping is considered to be in lieu of either a single punishment or a combined punishment. I agree with the view taken in those cases and I may add another reason to the reasons mentioned in them. Under Section 4, Whipping Act, when any person (meaning thereby an adult) commits certain offences mentioned in Section 4 then he may be punished with whipping in lieu of or in addition to any other punishment to which he may be liable, and the succeeding Section 5 says that when a juvenile offender commits certain offences mentioned in the section then he may be punished with whipping in lieu of any other punishment to which he may be liable. It is noticeable that whereas the Legislature definitely mentions the words, 'in addition to' in Section 4, it does not use similar words in Section 5.

3. The position therefore is that it was illegal on the part of the learned Assistant Sessions Judge to inflict a sentence of whipping on the accused in addition to the sentence of imprisonment. He intended whipping to be the primary sentence, but that sentence has not so far been inflicted. The accused has suffered detention in

the Reformatory School for about ten months and if I were to remit the sentence of imprisonment and to uphold the whipping I may not be in error legally, but the fact remains that the accused would for all practical purposes be receiving a double sentence, namely, imprisonment in addition to whipping. I have got to make allowance for this fact; nor can I reduce the sentence from four years to the term already undergone, because, in that case my order would be illegal, inasmuch as the punishment suffered in the Reformatory School should not be less than four years. It was submitted before me by counsel for the applicant that I should act under the provisions of Section 31, Reformatory Schools Act. That section however would not be applicable because I do not think that the accused should receive a sentence of four years R.I. and it is only then that he could be sent to the Reformatory School and it is subsequent to this that Section 31 comes into play. I propose to follow the procedure adopted by Stuart, J., in the Allahabad case mentioned above. I alter the sentence to one day's simple imprisonment and as that sentence has already been served I direct that the applicant be released from custody. This should not be taken as a precedent, for ordinarily in a case like this the accused should be caned. I have had to adopt this course because the accused has already suffered detention for about ten months and I have to take that fact into consideration.