1934

DALJIT v. KHACHERU

defendant has lost all interest as proprietor and that the plaintiff is the proprietor under this registered deed. The plaintiff can therefore treat the defendant who is holding on possession without his consent as a trespasser without title.

Sulaiman, C.J.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

1934 *August*, 13

EMPEROR *v.* LURKHUR*

Whipping Act (IV of 1909), section 5—Juvenile offender—Whipping must not be in addition to any other sentence.

A comparison of sections 4 and 5 of the Whipping Act makes it quite clear that in the case of an adult a sentence of whipping may be imposed in addition to any other punishment, but in the case of a juvenile offender a whipping can be imposed only in lieu of and not in addition to any other punishment, so that no other punishment can be combined with whipping.

Mr. *D. Sanyal*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BAJPAI, J.:—The applicant Lurkhur was tried by the Assistant Sessions Judge of Allahabad with the help of a jury for an offence under section 376 of the Indian 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 the accused inflicted pain on the girl who was raped. The age of the boy was ascertained by the learned Judge to be 13 years and 6 months and the age of the girl was 9. 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

*Criminal Revision No. 413 of 1934, from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 10th of April, 1934.

1934

EMPEROR v. LURKHUR

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 4 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 4 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.

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 of the 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. *Dagadu* (1) and the case of *Emperor* v. *Kishan Singh* (2). 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 of the Whipping Act when any person (meaning thereby an adult) commits certain offences mentioned in section 4 then he may be punished with whipping

(1) (1891) I.L.R., 16 Bom., 557 (2) (1923) I.L.R., 46 All., 174.

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.

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 4 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 4 years. It was submitted before me by counsel for the applicant that I should act under the provisions of section 31 of the Reformatory Schools Act. That section, however, would not be applicable, because I do not think that the accused should receive a sentence of 4 years' rigorous imprisonment 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 had 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

1934

EMPEROR v. LURKHUR

the accused should be caned. I have had to adopt this course because the accused has already suffered detention for about 10 months and I have to take that fact into consideration.

APPELLATE CRIMINAL

Before Mr. Justice Bajpai

1934
August, 14

EMPEROR *v.* NATHU RAM*

Explosive Substances Act (VI of 1908), section 7—Sanction of Government for "trial"—Whether sanction necessary at preliminary inquiry stage—Sanction for one offence—Alternative charge, and conviction, under another offence—Validity—Criminal Procedure Code, sections 236, 237.

It is not necessary for the prosecution to obtain the sanction of the Local Government, required by section 7 of the Explosive Substances Act for the trial of an offence under that Act, while the case is in the stage of an inquiry by the Magistrate; it is sufficient if sanction has been obtained when the case proceeds to trial in the court of session.

Where sanction was obtained for the prosecution of the accused for an offence under section 4(*b*) of the Explosive Substances Act, and the Sessions Judge at the trial framed a charge in the alternative under section 5 as well and convicted the accused under that section, it was *held* that the conviction was lawful and justified under the provisions of sections 236 and 237 of the Criminal Procedure Code.

Messrs. *Kartar Narain Agarwala* and *Jagat Behari Lal*, for the appellant.

The Government Pleader (Mr. *Shankar Saran*), for the Crown.

BAJPAI, J.:—This is an appeal by Nathu Ram who has been convicted under section 5 of the Explosive Substances Act (Act VI of 1908) by the Assistant Sessions Judge of Etawah and sentenced to 4 years and 6 months' rigorous imprisonment. Mr. *K. N. Agarwala* appearing on behalf of the appellant has taken me through the entire record. Before I deal with the question of fact

*Criminal Appeal No. 1054 of 1933, from an order of Hari Shankar, Assistant Sessions Judge of Etawah, dated the 16th of October, 1933.