

## Mushtaq vs State on 15 January, 1954

**Equivalent citations: 1954CRILJ1288**

### JUDGMENT

Agarwala, J.

1. Mushtaq and Kalwa, two boys aged 15 and 14 at the time of the commission of the offence, that is on 8-5-1950, were prosecuted under Section 376, I.P.C. on a charge of committing rape on a girl of 11 years of age.
2. The prosecution case was that on 8-5-1950, in the afternoon while the girl Dropadi and her brother Rup Chand were digging earth from a village pond, these two boys coming from an adjoining village were grazing their cattle nearby. The brother Rup Chand went away home, and they took advantage of the girl being alone and felled her down and committed rape on her, one after the other. When the girl's brother returned, he heard the cries of his sister and on running up found one of the boys committing rape on her and the other holding her by the hands. He raised an alarm and the two boys ran away. Other people came on the scene and they gave a chase to the boys and caught them and took them to the police station, where the first information report was lodged by Rup Chand on the same day at about 7-5 P.M.
3. The defence of Mushtaq and Kalwa was that they had nothing to do with the matter and that they had been implicated on account of enmity, and it was suggested on their behalf that somebody else might have committed rape on the girl.
4. The girl was medically examined and she was found to have been recently raped. The 'lungis' of the boys were also examined and they were found to have blood-stains and spermatozoa on them.
5. The prosecution produced the girl Dropadi and Rup Chand and four other persons as witnesses. On considering the entire evidence on the record the learned Sessions Judge came to the conclusion that Mushtaq, indeed, did ravish the girl; and so far as Kalwa was concerned that Kalwa did certainly aid Mushtaq but that as against Kalwa himself committing rape there was the solitary statement of the girl, and he held that Kalwa could be convicted only of abetting and aiding the offence which Mushtaq committed. He consequently held that both of them were guilty under Section 376, I.P.C. and sentenced each of them to eight months' rigorous imprisonment, and in addition to this he sentenced Mushtaq to eight stripes.

In the case of Kalwa, as he was of the age of 14, the learned Sessions Judge added that the benefit of the First Offenders' Probation Act might be extended to him. He, therefore, ordered that instead of Kalwa being detained in jail, that Kalwa be set at large under Section 4 of the U. P. First Offenders' Probation Act with two sureties in the amount of Rs. 250/- to keep the peace and to be of good

behaviour for three years and to appear and receive sentence when called upon to do so. He made certain further directions in this connection.

6. Mushtaq appealed against the sentence and on reading the Sessions Court judgment, a learned Judge of this Court issued notice to Kalwa to show cause why the application of the First Offenders' Probation Act by the Sessions Judge should not be set aside and he should not be sent to Jail, and to Mushtaq to show cause why his sentence of imprisonment should not be enhanced. The appeal of Mushtaq and the notice issued to Mushtaq and Kalwa by the learned Judge of this Court have both come up for decision before us now.

7. After having heard learned Counsel for the appellant Mushtaq and also on the notice for enhancement on behalf of both Mushtaq and Kalwa and after perusing the record, we have come to the conclusion that the case against both of them was amply established by the evidence on the record.

8. The evidence of the girl and of her brother Rup Chand and at least two of the witnesses, Himmat and Phool Singh, is worthy of reliance. They were, therefore, rightly convicted under Section 376, I.P.C.

9. The only question for determination now is whether the sentence in the case of Mushtaq Was adequate, and whether the application of the First Offenders' Probation Act in the case of Kalwa was justified in law or not. The application of the First Offenders' Probation Act was certainly erroneous, because Section 4 of the Act does not apply to a person who is convicted of an offence punishable with death or transportation for life. An offence under Section 376, I.P.C. is punishable with transportation for life. The benefit of the First Offenders' Probation Act could not, therefore, have been extended to Kalwa.

But it was urged by learned Counsel for the accused that Kalwa could be given the benefit of the U. P. Children Act (Act No. 1 of 1952) which, though not in existence at the time when the learned Sessions Judge recorded the conviction, has now come into existence during the pendency of the appeal, Under this Act a "child", who is defined as a person below the age of 16, can be given the benefits provided by the Act if he is convicted of any offence punish-able with transportation for life. Section 29, upon which reliance is placed, reads as follows:

Where a child is found to have committed an offence punishable with transportation or imprisonment, the court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to an approved school for such period of stay as will not exceed beyond the time when the child will attain the age of 18 years or for a shorter period, the reasons for such period to be recorded in writing.

The section empowers the Court to send a "child" to an approved school if it thinks that it is expedient so to deal with the child. "Child", as we have already observed means a person who is under 16 years of age. Both the accused were under the age of 16 years when they committed the offence; Mushtaq was 15 and Kalwa was 14.

Mushtaq was over 16 when he was convicted by the court below, and Kalwa was 15 when he was convicted by the court below. So that Kalwa could have been dealt with under the U. P. Children Act, if that Act had been in existence at that time. The Act has come into force during the pendency of the appeal and the question comes up before us now after three years of the institution of the appeal.

10. The question is whether the Act at this time when we are asked to apply it is applicable, and, when even Kalwa is over 16 years of age, we can deal with him under Section 29 on the ground that he was a child when he committed the offence and he was also a child when the proceedings were initiated against him and even when the court below convicted him. Under Section 75 of the Act the crucial date on which the age of the accused is to be considered is the date either on which the proceedings under the Act were initiated against him, or on which he was arrested in connection with which proceedings were Initiated against him under the Act.

It may be mentioned that the Children Act it-self creates certain offences and provides for their punishment. Therefore, if a person is arrested in connection with those offences, and if he is a child on that date, he can get the benefit of the Act. Otherwise, a person must be a child on the date on which an application oral or written is made for extending the benefit of Section 29 of the Act. The former contingency does not apply to the present case as the appellants were not arrested in connection with any offence provided for by the Act. So we can extend the benefit of Section 29 of the Act only if Kalwa is a child 'now' when an oral request is being made to the Court. Since he is over 16, we do not think that we can act under Section 29 at all, Section 29, therefore, cannot be applied to Kalwa much less to Mushtaq.

11. The learned Deputy Government Advocate had raised a contention in this connection which may also be dealt with here. He urged that because of Section 17 of the Children Act, even if Kalwa was under 16, the benefit of Section 29 could not have been given to him. We do not think that this contention is sound. Section 17 reads as follows:

Whoever seduces or indulges in immoral behaviour with a girl under the age of sixteen years shall, on conviction, be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees or with both.

All that Section 17 does is that it provides for a fresh offence. It creates an offence and provides for its punishment. The offence that it creates is seduction or immoral behaviour with a girl under 16. The section does not necessarily conflict, with any other provision of the Indian Penal Code; those provisions are not in any way modified by this Act. The seduction and indulgence in immoral behaviour is made punish-able under the Act if it is done with a girl under the age of 16. As Dropadi was a girl under the age of 16, Kalwa and Mushtaq could be punished under Section 17 in addition to their being punished under the Indian Penal Code. But this does not mean that the benefits of Section 29 of the Children Act could not be extended to them, if they were children at this time.

12. The result, therefore, is that Kalwa's sentence under Section 376, I.P.C. of eight months' rigorous imprisonment, which was imposed by the learned Sessions Judge, must be restored and the application of the First Offenders' Probation Act to him must be set aside. He is on bail, he shall be taken into custody forthwith and shall serve out his sentence.

13. The next question to be decided is whether we should enhance the sentence imposed on Mushtaq. He was 15 at the time when he committed the act and of the age of 16 when the conviction was recorded by the court below. He is now 18 1/2 years of age. But his age at the present moment cannot be taken into consideration in considering the question of enhancement. What has to be considered by the Court in determining the question of sentence is the age when the person committed the offence, and not When he is being dealt with by the Court.

The question, therefore, which we have to consider is, what should be the proper punishment for Mushtaq, assuming him to be of the age of 15 when he committed the offence. The evidence discloses that he was a normally well-built boy of 15 and capable of sexual intercourse. The court below has remarked that such offences should be dealt with severely. We are also of the same opinion. The offence of rape under Section 376 is punishable with transportation for life. Taking everything into consideration, we think that a sentence of eight months' rigorous imprisonment was wholly inadequate and we think that a sentence of two years' rigorous imprisonment should have been awarded to him. We accordingly enhance the sentence of imprisonment imposed on Mushtaq and sentence him to two years' rigorous imprisonment under Section 376, L P. C. The sentence of stripes will remain and is confirmed. He will surrender to his bail and serve out the sentence. The sentence of stripes will be administered to him when he is medically found fit for the same. The appeal of Mushtaq is dismissed.

14. Leave to appeal to the Supreme Court is refused. The notice for enhancement is dealt with as stated above.