

## CHHAJULAL

v.

## THE STATE OF RAJASTHAN

March 17, 1972

[A. N. GROVER AND M. H. BEG, JJ.]

*Indian Penal Code (Act 45 of 1860), ss. 65 and 406 and Code of Criminal Procedure (Act 5 of 1898), ss. 32 and 33—Sentence in default of payment of fine—Powers of First Class Magistrate.*

The appellant was convicted by a first class Magistrate under s. 406, I.P.C., and was sentenced to two years rigorous imprisonment, a fine of Rs. 2000/- and, in default to one year's further rigorous imprisonment.

On the question of the period of imprisonment that could be imposed in default of payment of fine.

HELD : Even if s. 65, I.P.C., could be applied the period of imprisonment in default of payment of fine could not exceed nine months since an offence under s. 406 I.P.C. is punishable with imprisonment up to three years. But reading ss. 32 and 33, Cr. P.C. together the Magistrate could not have awarded more than six months imprisonment in default of payment of fine. The terms s. 33 Cr. P.C. and s. 65 I.P.C., must therefore be harmonised. Hence it must be held that while a *Magistrate's power are specifically limited by section 33 Cr. P.C.* they must also be exercised so as not to contravene s. 65 I.P.C. [908 D-G]

Therefore, just as a First Class Magistrate trying an offence punishable under s. 406 I.P.C., cannot impose the maximum sentence of imprisonment prescribed by the section, because his powers of awarding imprisonment are specifically limited to a term not exceeding two years by s. 32, Cr. P.C. so also he cannot, by resorting to s. 65 I.P.C., award a period of imprisonment in default of payment of fine, on the erroneous assumption that he has the power to award the maximum sentence prescribed by s. 406 I.P.C. [908 G-H; 909 A]

Hence, the sentence of imprisonment in default of fine cannot exceed six months.

*Reg v. Muhammad Sahib*, I.L.R. 1 Mad. 277 (F.B.); *Queen-Empress v. Venkatesagadu*, I.L.R. 10 Mad. 165 and *Empress of India v. Darba*, I.L.R. 1 All. 461, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 117 of 1971.

Appeal by Special Leave from the Order dated February 11 1971 of the Rajasthan High Court in S.B. Criminal Misc. Application No. 152 of 1971.

*Sobhag Mal Jain*, for the appellant.

*K. Baldev Mehta*, for the respondent.

**A** The Judgment of the Court was delivered by

**Beg. J.** The appellant was convicted under Section 406 Indian Penal Code and sentenced to six month's rigorous imprisonment and a fine of Rs. 500/-, and, in default of payment of fine, to three months further rigorous imprisonment, by the Munsif **B** Magistrate of Karoli, District Bharatpur, Rajasthan. On an appeal by him to the Court of Sessions, his conviction was set aside, but the Trial Court was directed to proceed with the case afresh from the stage at which the appellant should have been properly examined under Section 342 Criminal Procedure Code. The appellant was then given a full opportunity, under Section 342 **C** Criminal Procedure Code, to explain the facts and circumstances appearing against him in the case. Thereafter, he also produced five witnesses in defence. He was, however, convicted again and sentenced to two years rigorous imprisonment and to pay fine of Rs. 2,000/-, and, in default to undergo one year's further rigorous imprisonment. The appellant again appealed to the Court of Sessions which dismissed his appeal. The appellant then filed a **D** Revision application which was dismissed summarily by the High Court of Rajasthan. Soon after that, the appellant made another attempt to invoke the inherent jurisdiction of the High Court, by applying under Sec. 561A Criminal Procedure Code, to get at least an illegality in the sentence corrected, but this also failed. A prayer for a certificate of fitness of the case to appeal to this **E** Court was also rejected by the High Court. The appellant then applied under Art. 136 of the Constitution to this Court. That application was admitted only on the question of the period of imprisonment awarded in default of payment of fine. It is this question only which has been argued before us.

**F** Section 33 of the Criminal Procedure Code runs as follows :

“33(1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as it authorised by law in case of such default :

Provided that—

**G** (a) the term is not in excess of the Magistrate's powers under this Code;

**H** (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 32".

The Munsif Magistrate who convicted the appellant had the powers of a Magistrate 1st Class which are restricted, by Section 32, sub.s(i) (a), to imposing imprisonment for a term not exceeding two years and fine not exceeding Rs. 2,000/-. Reading Section 32 and 33 together, it was clear that, in the case before us, the Munsif Magistrate could not award more than six months imprisonment in default of payment of fine.

In answer to the appellant's contention, based on Section 33 of the Criminal Procedure Code, learned Counsel for the State of Rajasthan placed Section 65 Indian Penal Code before us. This Section reads as follows :

"65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine".

It will be seen that even where Section 65 Indian Penal Code is applied by a Court the term of imprisonment in default of payment of fine cannot exceed one fourth of the term of imprisonment which is the maximum period which can be awarded for an offence of which an accused is convicted. An offence under Section 406 Indian Penal Code is punishable with imprisonment which can extend to only three years rigorous imprisonment and a fine. Thus, even if Section 65 Indian Penal Code could be applied, the period of imprisonment in default of payment of fine could not exceed nine months.

It is clear that Section 65 only fixes a maximum period of imprisonment which can be awarded for default of payment of fine whenever any court convicts. On the other hand, Section 33 Criminal Procedure Code governs specifically the powers of 1st Class Magistrates on this matter. Section 33 Criminal Procedure Code also contains the principle embodied in Section 65 Indian Penal Code in its application to Magistrates. Just as a 1st Class Magistrate trying an offence punishable under Section 406 Indian Penal Code cannot impose the maximum amount of imprisonment prescribed by this Section, because his powers of awarding imprisonment are specifically limited to those conferred to Section 32 Criminal Procedure Code, so also he cannot, by resorting to Section 65 Indian Penal Code, award a period of imprisonment in

- A** default of payment of fine on the erroneous assumption that he has the power to award the maximum sentence prescribed by Section 406 Indian Penal Code.

Section 65 of the Indian Penal Code was enacted in 1860. In 1872 Section 309 of the Criminal Procedure Code 1872 enacted : "where a person is sentenced to fine only the Magistrate may award such terms of imprisonment in default of payment of fine as is allowed by law provided that the amount does not exceed the Magistrate's powers under this Act".

**B** It was held in *Reg. v. Muhammad Saib*<sup>(1)</sup>, that Section 309 of the Code of 1972 over-ruled the provisions of Section 65 Indian Penal Code. On a parity of reasoning, Section 33 of the Criminal Procedure Code of 1898, with which we are concerned here, would over-ride Section 65 Indian Penal Code, or, to be more accurate, apply more specifically to Magistrates.

**C** In *Queen-Empress v. Venkatesagadu & Ors.*<sup>(2)</sup>, it was held that Section 33 of the Criminal Procedure Code of 1882 did not authorise a Magistrate to pass sentence in default of payment of fine in excess of the term prescribed by Section 65 Indian Penal Code. Here, reliance was placed upon a decision of Full Bench of the Allahabad High Court in the *Empress of India v. Darba & Ors.*<sup>(3)</sup>.

**D** No case has been cited before us in which an attempt was made to justify an order of a Magistrate, whose jurisdiction to punish is limited by Section 33 Criminal Procedure Code, by applying Section 65 Indian Penal Code. It is obvious that the two Sections must be harmonised. This means that, while a Magistrate's powers are specifically limited by Section 33 Criminal Procedure Code, they must also be so exercised as not to contravene Section 65 Indian Penal Code.

**E** As the sentence of one year's rigorous imprisonment in default of payment of fine passed by the Munsif Magistrate was in excess of his powers, we allow this appeal to the extent that we reduce only the sentence of one year's rigorous imprisonment awarded in default of payment of fine to six months rigorous imprisonment. The rest of the sentence, which is quite legal, must stand. We may observe here that it would have been better if this obvious illegality and excess of power could have been corrected by the High Court when the matter was brought to its notice by means of an application under Section 561A Criminal Procedure Code.

**F** **V.P.S.**

(1) I.L.R. 1 Mad. 277 (FB).

(2) I.L.R. 10 Mad. 165.

(3) I.L.R. 1 All. 461.