

## The State Of Uttar Pradesh vs Bati And Ors. on 11 April, 1950

**Equivalent citations: AIR1950ALL625, AIR 1950 ALLAHABAD 625**

ORDER

Bind Basni Prasad, J.

1. This is a petition by the State of Uttar Pradesh for the amendment of an order passed by this Court in Criminal Appeal No. 366 of 1948 on 12th July 1949. The three accused who appeared as opposite party were convicted of offences under Sections 148, 449/149 and 307/149, Penal Code, by Shri Mohan Shankar Saksena, Assistant Sessions Judge of Bulandshar, by his judgment, dated 3rd June 1918 and were each sentenced to two years' rigorous imprisonment under Section 148, Penal Code, to four years' rigorous imprisonment and a fine of Rs. 100 or in default to one year's rigorous imprisonment under Section 449/149, Penal Code, and to six years rigorous imprisonment and a fine of Rs. 100 or in default to one year's rigorous imprisonment under Section 307/149, Penal Code. As regards the substantive sentences of imprisonment he directed that they are to run concurrently. As regards the sentence of imprisonment in default of payment of fine he directed that it will run concurrently but after the expiry of the sentences for the substantive offences.

2. In appeal this Court reduced the substantive sentences of imprisonment passed against the opposite parties but in other respects the order of the trial Court was upheld.

3. It is contended by the learned Assistant Government Advocate that the sentences of imprisonment in default of payment of fine passed under the various sections against each accused could not be directed to run concurrently.

4. Notice "was given to counsel for the opposite party and only Mr. Jagdish Sahai has appeared. The legal position is as follows. According to Section 64, Penal Code, sentence of imprisonment for non-payment of fine should be "in excess of any imprisonment" to which the accused may have been sentenced. Section 69, Penal Code provides that "if, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid- the imprisonment shall terminate."

The illustration given under that section makes the position still clearer. If imprisonments in default of the payment of fine imposed for several offences are to run concurrently the application of Section 69, Penal Code, will become impossible. There is also Section 35, Criminal P. C. which provides for direction of sentences of imprisonment to be concurrent but it will be seen that it relates to substantive sentences of imprisonment and not to imprisonments in default of payment of fine. Section 398 (2), Criminal P. C. runs as follows :

"398 (2). When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a farther substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences."

5. The point is covered by decided cases also. In *re Kanda Moopan*, A. I. R. (24) 1937 Mad. 406: (38 Cr. L. J. 796), it was held that:

"It is not competent for the Court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Such order, if passed, is illegal; such direction' can only be given in respect of, sentences of imprisonment or transportation."

The same view was taken in *Emperor v. Subrao Sesharao*, A. I. R. (13) 1926 Bom. 62; (27 Cr. L. J. 111); *Emperor v. Ghulam Ahmad*, A. I. R. (16) 1929 Sind 179: (30 Cr. L. J. 907) and *Emperor v. Akidullah*, 15 I. C. 808: (13 Cr. L. J. 636 (Sind)).

6. When the appeal was heard by this Court this point was not raised on behalf of the prosecution. The present application was made about eight months after the judgment. If the point had been raised at that time the error committed by the learned Sessions Judge would have been rectified. The question is whether at the present stage this Court can rectify the mistake. In *Sri Ram v. Emperor*, A. I. R. (35) 1948 ALL. 106: (49 Cr. L. J. 56), it was held that where the mandatory provisions of the law have been overlooked the Court has power to correct such an error even though the case has already been decided.

7. I, therefore, direct the insertion of the following words in the last paragraph of my judgment, dated 12th July 1949, after the word "maintained" "except that the sentence of imprisonment in default of payment of fine shall not be concurrent as directed by the learned Assistant Sessions Judge but shall be consecutive in each case."