

Shanti Lal vs State Of M.P on 8 October, 2007

Equivalent citations: 2007 AIR SCW 6494, 2007 (11) SCC 243, 2008 CRI. L. J. 386, (2007) 2 CRILR(RAJ) 911, (2008) 2 CGLJ 392, (2007) 4 JCC 145 (SC), 2007 CRILR(SC&MP) 911, (2008) 3 TAC 57, 2007 (11) SCALE 686, 2007 (4) JCC 145, 2008 (1) CRI RJ 694, 2008 (1) SCC(CRI) 1, (2007) 59 ALLINDCAS 103 (SC), (2009) 3 ACC 622, (2009) 2 ACJ 1288, (2008) 65 ALLINDCAS 763 (CHH), (2007) 3 CGLJ 407, (2007) 2 EFR 702, (2007) 38 OCR 870, (2007) 11 SCALE 686, (2007) 8 SUPREME 263, (2008) 1 MPHT 1, (2008) 1 JAB LJ 362, (2008) 1 KER LT 503, (2008) 1 MADLW(CRI) 509, (2007) 4 RECCRIR 563, (2007) 4 CURCRIR 195, (2007) 4 CHANDCRIC 118, (2007) 4 ALLCRILR 779, (2007) 4 CRIMES 369, 2007 (3) ANDHLT(CRI) 235 SC, 2008 (60) ACC (SOC) 34 (CAL)

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Bench: C.K. Thakker, Altamas Kabir

CASE NO.:

Appeal (crl.) 1375 of 2007

PETITIONER:

SHANTI LAL

RESPONDENT:

STATE OF M.P

DATE OF JUDGMENT: 08/10/2007

BENCH:

C.K. THAKKER & ALTAMAS KABIR

JUDGMENT:

J U D G M E N T ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO. 752 OF 2007 C.K. THAKKER, J.

1. Leave granted.

2. The present appeal is filed by the appellant- accused against the judgment and order dated February 20, 2004 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Appeal No. 1258 of 1997. By the said order, the High Court confirmed an order of conviction and sentence recorded by the Second Additional Sessions Judge, Neemuch on November 20, 1997 in Special Criminal Case No. 12 of 1994. Both the courts convicted the appellant herein for an offence under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter referred to as the Act) and ordered him to undergo rigorous imprisonment for ten years and also to pay fine of rupees one lakh, in default to undergo rigorous imprisonment for three years.

3. The case of the prosecution was that on May 1, 1993, at about 4.00 a.m. in the morning, Station House Officer, Ratangarh received secret information through an informant that one Shantilal (appellant herein) resident of village Kankariya Talai was carrying narcotic drug and was expected to have come from the said village. He was to carry illegal opium to Beju (Rajasthan). The information was recorded by the Officer in Rojnamcha No. 997. The Rojnamcha was then sent for information to S.D.O.P., Jawad in accordance with Sectin 42 of the Act. ASI Gopal Singh (PW7) proceeded with the police party along with panch-witnesses Modi Ram (PW4) and Abdul Tazim (PW8) in a jeep. They were divided in two groups and hid themselves. At about 7.00 a.m., the appellant was seen taking out a bag used to carry fertilizer from a heap of grain from a field. When he was coming out of Bara with the bag in his hand, he was intercepted by ASI Gopal Singh and caught with the assistance of police party. Gopal Singh told the accused that it was suspected that he was carrying contraband material and he had right to get search made by a Gazetted Officer or by a Magistrate or by the witness himself i.e. Gopal Singh. The appellant, however, opted his search by ASI Gopal Singh himself. Accordingly, search was conducted. From the person of the appellant-accused, nothing was found but the bag carried by him contained 7 kilos, 60 grams of narcotic drug. The substance was smelt by panch-witnesses and it was found to be opium. The appellant was arrested on the allegation that he was possessing unlawful opium. He was taken to the Police Station where a crime was registered. Muddamal was deposited in Malkhana. After due investigation, charge-sheet was filed against the accused in Sessions Court, Mandsaur. The case was thereafter transferred to the Additional Sessions Judge for disposal in accordance with law.

4. The accused pleaded not guilty to the charge. He contended that he was falsely implicated in the case and claimed to be tried. He also contended that he was arrested four days prior to the incident.

5. The trial Court on the basis of the evidence adduced by the prosecution and believing the testimony of PW 7-ASI Gopal Singh, PW 4-Modi Ram (panch I), PW8-Abdul Wazim (panch II) and other witnesses, held that the prosecution was successful in proving the case against the accused. It also held that all procedural requirements had been complied with and the accused was found to be in possession of 7 kilos and 60 grams of opium and had committed an offence punishable under Section 18 of the Act.

6. On question of sentence, the Court afforded hearing to the accused and finally passed the following order;

For violation of provisions of Section 8 of the NDPS Act, the accused Shantilal S/o Devilal, aged 32 years, R/o. Village Kankariya Talai, P.S. Ratangarh, District Mandsaur being found guilty of the offence punishable under Section 18 NDPS Act is punished with rigorous imprisonment for 10 (ten) years with a fine of rupees one lakh. In default of payment of fine, he shall undergo a further rigorous imprisonment for 3 (three) years .

7. Being aggrieved by the said order, the appellant moved the High Court of Madhya Pradesh. (Indore Bench) which confirmed the order of conviction as well as sentence recorded by the trial Court. It observed that the trial Court had rightly held that the accused was carrying contraband opium weighing 7 kilos and 60 grams and conviction recorded against him could not be said to be illegal. Regarding sentence, the High Court observed that minimum sentence was awarded by the trial Court and it did not call for interference. Accordingly, the appeal was dismissed.

8. The appellant challenged the orders passed by both the courts by filing the present appeal. This Court on January 31, 2007 passed the following order;

Delay condoned.

The Trial Court passed the judgment and order dated 2.11.1997 convicting and sentencing the accused under sections 8 and 18 of the NDPS Act of rigorous imprisonment of 10 years and fine of Rs.1 lakh, and in default, further additional rigorous imprisonment for three years. It is now stated by the learned counsel for the petitioner that the petitioner has undergone the sentence for nine years and six months and that he is not able to pay the amount of fine of Rs.1 lakh. If the amount of fine is not paid, as ordered by the Court, the petitioner has to undergo the rigorous imprisonment of three years.

Issue notice to the respondent limited to the question as to whether the sentence on default of payment of fine may be reduced .

9. We have heard the learned counsel for the parties. The learned counsel for the appellant contended that both the courts had committed an error of law in convicting the appellant. From the evidence of the prosecution witnesses, it was not established that the appellant had committed an offence under the Act and hence he is entitled to acquittal. It was also submitted that mandatory requirements of the Act had not been observed and on that ground also, conviction of the appellant cannot stand. It was further argued that there is specific provision for imposition of fine on the accused in the Act, but there is no provision to impose sentence in lieu of payment of fine and hence, no punishment could have been awarded on the accused in default of payment of fine. To that extent, therefore, the order is illegal and is liable to be set aside. The counsel submitted that substantive sentence imposed on the appellant-accused under Section 18 of the Act was rigorous imprisonment for ten years. The appellant has already undergone the said sentence. But as the fine of rupees one lakh was imposed and in default of fine, the trial Court ordered the appellant to undergo rigorous imprisonment for three years that he is in jail as he could not pay the amount of fine. Since the Court has no right to order substantive sentence in default of payment of fine, the order passed by the Court imposing sentence and action of authorities in keeping the appellant in jail are illegal and unlawful and the appellant is entitled to be set at liberty forthwith. Alternatively, it was submitted by the learned counsel that the appellant is a poor person; he was mere carrier and the contraband opium did not belong to him; it was his first offence; he did not abscond after the incident and surrendered immediately; even after he was enlarged on bail, he never abused the concession granted in his favour; he presented himself before the authority of law as soon as he came to know about the dismissal of his appeal by the High Court. He has his family and even if it

is held by this Court that imprisonment can be ordered in default of payment of fine as held by both the courts, on the facts and in the circumstances of the case that part of the order may be set aside and liberal view may be taken directing the release of the appellant.

10. The learned Advocate for the State of Madhya Pradesh, on the other hand, supported the order of conviction and sentence. He submitted that the trial Court appreciated the evidence on record and considered the sworn testimony of prosecution witnesses, believed them and recorded a finding of guilt against the appellant. It was also observed that the procedural requirements had been complied with and prosecution was successful in proving the guilt of the accused. Minimum substantive sentence as also minimum amount of fine (rigorous imprisonment for ten years and payment of fine of rupees one lakh] was imposed on the appellant. Such an order cannot be termed illegal or contrary to law. The counsel submitted that even in absence of express provision to suffer imprisonment in default of payment of fine, the Court must be conceded with the said power and it cannot be objected to. The learned counsel contended that the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC) make it clear that a Court of law can award imprisonment in default of payment of fine up to one- fourth of the term of imprisonment which a Court is competent to inflict as punishment for the offence. As under Section 18 of the Act (contravention in relation to opium) a competent Court can order rigorous imprisonment on an offender for a term which may extend to twenty years, imprisonment in default of payment of fine could be ordered up to five years. The trial Court, however, taking liberal view, imposed sentence in default of payment of fine of three years which could not be said to be unlawful or otherwise illegal. The counsel, therefore, submitted that the appeal deserves to be dismissed as no case has been made out by the appellant.

11. We have given our anxious consideration to the rival submissions of the parties and in our judgment, the appeal deserves to be partly allowed.

12. So far as the conviction recorded by the trial Court and confirmed by the High Court is concerned, no infirmity has been pointed out by the learned counsel so as to come to the conclusion that finding of guilt recorded by the trial Court and confirmed by the High Court can be held wrong or illegal. Both the courts considered the depositions on oath of the prosecution witnesses and held that it was proved beyond reasonable doubt that the appellant-accused was found in possession of contraband opium weighing 7 kilos 60 grams. Both the Courts have also held that all the procedural requirements had been complied with. The appellant- accused was not possessing on his person contraband opium, but it was recovered from a bag. Taking into account all the facts, in our opinion, both the courts were right in convicting the accused. We are, therefore, unable to uphold the argument of the learned counsel for the appellant that by holding the appellant guilty, the Courts below have committed an error of law. To that extent, therefore, the contention has no force and is accordingly negatived.

13. As regards sentence, the appellant was carrying opium (7 kilos and 60 grams) and his case was covered by Section 18 of the Act. Minimum sentence prescribed thereunder is rigorous imprisonment for ten years which had been imposed by both the Courts below which is clearly in consonance with law. Hence, even that part of the order suffers from no infirmity and must be

upheld.

14. The learned counsel for the appellant, however, submitted that the appellant has already undergone substantive sentence of ten years. From the order of January 31, 2007 extracted hereinabove, it appears prima facie that what the appellant says is correct. This is further clear from the application [Criminal Miscellaneous Application No. 1075 of 2006] filed on December 7, 2006. But it cannot be overlooked that the appellant was also ordered to pay minimum fine of rupees one lakh as required by Section 18 of the Act, and in default, he was ordered to undergo rigorous imprisonment for three years. Admittedly, the said period is not over.

15. Thus, an important and debatable question which arises for our consideration is whether a Court of law can order a convict to remain in jail in default of payment of fine? It is true that Section 18 of the Act does not expressly say so. It merely provides for imposition of sentence as also payment of fine. The said section, as it stood at the relevant time, read thus;

18. Punishment for contravention in relation to opium poppy and opium. Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter- State or uses opium shall be punishable, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

16. In our opinion, however, even in absence of specific provision in the Act empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court administering criminal justice. In this regard, it may be appropriate to consider the relevant provisions of the Indian Penal Code [IPC] and the Code of Criminal Procedure, 1973 [CrPC]. Section 40, IPC defines offence. Sections 41 and 42 explain special law and local law respectively. Chapter III, IPC prescribes various punishments. Few Sections are relevant which deal with imposition of fine and imprisonment in default of payment of fine. They are Sections 63 to 70 and reads thus;

63. Amount of fine Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. Sentence of imprisonment for non- payment of fine In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other

imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable 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.

66. Description of imprisonment for non- payment of fine The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

67. Imprisonment for non-payment of fine, when offence punishable with fine only If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed tile following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

68. Imprisonment to terminate on payment of fine The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine 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.

70. Fine leviabie within six years or during imprisonment-Death not to discharge property from liability The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

17. Section 30, CrPC provides for sentence of imprisonment in default of fine . It is also relevant and reads as under;

30. Sentence of imprisonment in default of fine.- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term-

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the 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 29.

18. We may as well refer to Section 25 of the General Clauses Act, 1897 which states;

25. Recovery of fines.- Sections 63 to 70 of the Indian Penal Code (45 of 1860) and the provisions of the Code of Criminal Procedure (5 of 1898) for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.

19. From the above provisions, in our opinion, it is clear that if a person commits any offence under IPC, he can be punished and when such offence is punishable with substantive sentence and fine, or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 30, CrPC prescribes maximum period for which a Court may award imprisonment in default of payment of fine.

20. But more important issue is whether the above statutory provisions would apply to special laws and offences committed by a person not covered by IPC. In the present case, we are concerned with the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 which is a special law. There is no express power in a Court to order imprisonment in default of payment of fine. But to us, the law is well-settled and it has been held since more than a century that such an order can be passed by a competent Court of law having power to impose fine as one of the punishments.

21. In *Queen-Empress v. Yakoob Sahib*, ILR (1899) 22 Mad 238, the accused was convicted for an offence under Section 3(10) of the Towns Nuisances Act (Madras), 1889 (Act III of 1889) and was ordered to pay a fine of rupees eight and in default of payment, to undergo simple imprisonment for one week. The relevant provision of law empowered the Court to award fine not exceeding Rs. 50 or imprisonment of either description not exceeding eight days .

22. Benson, J. observed that the question was whether the award of a week's imprisonment in default of payment of fine was legal. His Lordship considered the relevant provisions of IPC and stated;

The question is whether the award of a week's imprisonment in default of payment of the fine is legal, or whether the term of imprisonment in default is limited by Section 65, Indian Penal Code, to one-fourth of the term (eight days) of imprisonment awardable for the offence under Section 3 of Act III of 1889, i.e., to two days in the present case. Section 67, Indian Penal Code, has obviously no

application to the case. It refers solely to the cases in which the offence is punishable with fine only. The present case is punishable with imprisonment or with fine at the option of the Magistrate, though not with both. Section 65, Indian Penal Code, however, in my opinion, is applicable to such a sentence. The words punishable with imprisonment as well as fine in that Section must be understood in the same sense as those words bear in Section 64. The wording of Section 64, it must be admitted, is not happy, but I am of opinion that the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Those cases the section divides into three classes, viz., offences (1) punishable with imprisonment as well as fine, (2) punishable with imprisonment and fine and (3) punishable with fine only. The first of these classes in my opinion includes two classes, viz., (a) offences like the present punishable with imprisonment or fine in the alternative, and (b) offences punishable, as most of those under the Indian Penal Code are, with imprisonment, or fine, or both, cumulatively. Grammatically it would seem also to include the second class, viz., offences punishable with imprisonment and fine, but this class is separately mentioned, probably because reference was intended to cases in which a substantive sentence of imprisonment must be awarded, the fine, if any, being only in addition thereto. The Legislature, by Section 64, having given the general power to impose imprisonment in default of payment of fine, then proceeded to lay down limits to that power. Section 65 limited the power in the first class of cases, Section 67 in the third class. If the second class is, as I think it is, included in the first, then Section 65 applies to it also; but, in any case, Section 33, Criminal Procedure Code, imposes the same limit in unmistakable terms. It seems to me unreasonable to suppose that the Legislature did not intend to include cases like the present in the first class since the result would be that, in such cases alone, there would be no limit save that of the general power of a Magistrate, and a first-class Magistrate in a case like the present could award two years rigorous imprisonment in default of payment of a petty fine, though in all other classes of cases his power is strictly limited. (emphasis supplied)

23. In *Sukhdeo Singh v. Calcutta Corporation*, AIR 1953 Cal 41, A was convicted by the Municipal Magistrate for keeping a buffalo within the municipal limit without the prior permission of the Municipal Board. He was, therefore fined Rs. 15 and in default, to suffer simple imprisonment for one week. It was contended by A that in lieu of fine, the Magistrate could not have passed an order of sentence of imprisonment as no such power had been given to him under the Calcutta Municipal Act, 1923 [Act III of 1923]. The Court, however, after considering Sections 40, 41, 42 and 64 to 67, IPC came to the conclusion that the learned Magistrate could order sentence of imprisonment in lieu of fine by virtue of the said provisions.

24. A similar question came up for consideration before this Court before fifty years in *Bashiruddin Ashraf v. State of Bihar*, 1957 SCR 1032. There a mutawalli was charged for violating the provision of Section 58 of the Bihar Wakfs Act, 1947 (Bihar Act VIII of 1948) for not discharging the obligation enjoined upon him as a mutawalli. He was, therefore, convicted under Section 65(1) of the Act by the Divisional Magistrate, Patna and was ordered to pay a fine of Rs. 100 and in default to undergo simple imprisonment for 15 days. Section 65(1) read thus;

65 (1) If a mutawalli fails without reasonable cause, the burden of proving which shall be upon him, to comply with any order or direction made or issued under clauses (i), (o) or (q) of sub-section (2)

of section 27 or under section 56, to comply with the provisions of sub-section (1) of section 57, sub-section (1) of section 58, section 59 or section 60, or to furnish any statement, annual account, estimate, explanation or other document or information relating to the waqf of which he is mutawalli, which he is required or called upon to furnish under any of the other provisions of this Act, he shall be punishable with fine which may extend, in the case of the first, offence, to two hundred rupees and, in the case of second or any subsequent offence, to five hundred rupees.

25. It was contended on behalf of the mutawalli that Section 65 did not provide for imprisonment in default of payment of fine. He was, however, ordered to suffer 15 days simple imprisonment in default of payment of fine which was illegal. This Court considered Section 33 of the Code of Criminal Procedure, 1898 (similar to Section 30 of the present Code of Criminal Procedure, 1973) and Sections 40 and 67, IPC and held that the contention had no force and it was open to the Court to order imprisonment of the accused in default of payment of fine.

26. Though Section 25 of the General Clauses Act, 1897 was not referred to in Bashiruddin Ashraf, in our opinion, bare reading of the said provision also makes it explicitly clear and leaves no room for doubt that Sections 63 to 70, IPC and the provisions of CrPC relating to award of imprisonment in default of payment of fine would apply to all cases wherein fines have been imposed on an offender unless the Act, Regulation, Rule or Bye-law contains an express provision to the contrary. We are, therefore, unable to uphold the bald contention of the appellant that in absence of specific provision to order imprisonment in default of payment of fine in a statute, a Court of law has no power to order imprisonment of an offender who fails to pay fine and such action would be illegal or without authority of law. In our judgment, in absence of a provision to the contrary, viz. that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a Court subject to the relevant provisions of IPC and CrPC.

27. The next submission of the learned counsel for the appellant, however, has substance. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

28. A general principle of law reflected in Sections 63 to 70, IPC is that an amount of fine should not be harsh or excessive. The makers of IPC were conscious of this problem. The Authors of the Code, therefore, observed;

Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in

assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich Zamindar. It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, and who would not cross a room to avoid it. The number of the poor in every country exceeds in a very great ratio the number of the rich. The number of poor criminal it is a matter of absolute indifference whether the fine to which he is liable to be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who had laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the Courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able to pay a hundred rupees than to pay a lac. A just and wise Judge, even if entrusted with a boundless discretion will not, under ordinary circumstances, would leave it quite in the power of an unjust or inconsiderate Judge to inflict on such an offender all the evil which can be inflicted on him by means of fine .

It appears to us that the punishment of fine is a pecuniary appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of existence embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth . [see Ratanlal & Dhirajlal, Law of Crimes ; 26th Edn.; (2007); pp.221-22]

29. The Authors further stated;

The next question which it became our duty to consider was this : when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is aid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not

sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course. The high authority of Mr. Livingstone is here against us. He allows the criminal, if sentenced to a fine exceeding one-fourth of his property, to compel the Judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds, that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him; the object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe; but it ought not, on the other hand, to call the offender into council with his Judges, and to allow him an option between two punishments. In general, the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime. To look out systematically for the most sensitive part of a man's mind, in order that we may not direct our penal sanctions towards that part of his mind, seems an injudicious policy.

We are far from thinking that the course which we propose is unexceptionable; but it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days [See Ratanlal & Dhirajlal; supra; pp.226-27]

30. The issue also came up for consideration in some cases. In *Emperor v. Mendi Ali*, ILR 1941 All 608 :

AIR 1941 All 310, M was charged with an offence of murder of his wife. The Sessions Court, however, convicted him for an offence punishable under Section 304, Part I, IPC since M had committed the offence of killing his wife in grave and sudden provocation as he saw her (his wife) with his own eyes committing adultery with N . M was thus altogether deprived of the power of self-control. But the Sessions Judge not only imposed the maximum imprisonment of ten years under Section 304, Part I, but he also imposed a fine of Rs.100 or to undergo rigorous imprisonment for one year.

31. In a suo motu revision, the High Court observed that the Sessions Judge had awarded maximum term of sentence on M for the offence for which he was found guilty and added to it a fine (which there could surely have been little prospect of his paying). The result was that he was, in effect, sentenced to eleven years rigorous imprisonment .

32. Considering the facts, Braund, J. stated;

So far as the fine is concerned, I cannot think it is proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. And, in my judgment, without venturing to say whether it is a course which is strictly in accordance with the law or not, I cannot help thinking that it becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergo in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. I venture to think that Judges should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment .

(emphasis supplied)

33. We may as well refer to a decision of this Court in Palaniappa Gounder v. State of T.N. & Ors., (1977) 2 SCC 634. In that case, P was convicted by the Principal Sessions Judge, Salem and was sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence from death to imprisonment for life. But while reducing the sentence, the Court imposed a fine of Rs.20,000/- on P. Leave was granted by this Court limited to the question of the propriety of fine.

34. The Court considered the provisions of IPC as also CrPC and observed that Courts have power to impose a sentence of fine and if fine is imposed on an offender, it cannot be challenged as contrary to law.

35. Speaking for the Court, Chandrachud, J. (as His Lordship then was) said;

But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000/- is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconsciously or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill gotten wealth. But wrote different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some

of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see, for example), *State v. Pandurang Singh*, AIR 1956 Bom 711, at p.714) but before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the cases. As observed by this Court in *Adamji Umer Dalal v. The State of Bombay*, (1952) SCR 172, determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court Mahajan J. observed in that case that: "in imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases" (p. 177). Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300/- to Rs. 4,000/- on the ground that due regard was not paid by the lower Court to the principles governing the imposition of a sentence of fine .

36. We are mindful and conscious that the present case is under the NDPS Act. Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh [fine which shall not be less than one lakh rupees]. It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, CrPC authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court.

37. For the reasons aforesaid, the appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of rupees one lakh is also upheld. But an order that in default of payment of fine, the appellant shall undergo rigorous imprisonment for three years is reduced to rigorous imprisonment for six months. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for six months as modified by us in default of payment of fine, the appellant shall be

set at liberty forthwith unless he is required in any other offence. If the appellant has not completed the said period, he will be released after the period indicated hereinabove is over. The appeal is accordingly disposed of.