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**(2016) 03 CAL CK 0155**  
**In the Calcutta High Court**  
**Case No : CRA No. 12 of 2016**

Soe Win

APPELLANT

Vs

State

RESPONDENT

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**Date of Decision :** 21-03-2016

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 65

**Citation :** (2016) CriLJ 4373

**Hon'ble Judges :** Shivakant Prasad, J.

**Bench :** Single Bench

**Advocate :** Anzer Ali, Advocate, for the Petitioner; S.K. Mandal and S.C. Mishra, Advocates, for the Respondent

**Final Decision :** Allowed

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## Judgement

Shivakant Prasad, J.—The instant appeal is directed against the order of conviction dated 11th September, 2015 passed by the learned Additional Sessions Judge, A&N Islands, Port Blair in Sessions Case No. 24 of 2015.

2. Being aggrieved by and dissatisfied with the impugned order of conviction and sentence passed thereunder the appellants have preferred this appeal under the provision of section 374/375 and Section 482 of the Code of Criminal Procedure inter alia on the ground that on 11th September, 2015 when the case was fixed for framing of the charges the Trial Court decided to read out the charges through a Burmese interpreter and owing to non-knowing of the Burmese language, neither the Court nor the Counsel engaged by the State to defend the accused could properly understand the stand taken by the accused persons and that the order of conviction has been passed on a total non consideration of the vital fact that the accused appellants are poor fisherman and came to the territorial limits of India by mistake and as such, the order of conviction and the fine imposed on him is excess and as such the same is liable to be modified for the reasons that there is no sufficient evidence or material brought by the prosecution in support of the prosecution case to show that the accused

appellants committed the offences as alleged and without any basis only on the basis of the pleading of guilty that too on the basis of the sole interpretation of the interpreter, and that the accused appellants are in judicial custody since his arrest i.e. on 05.11.2014 and is in jail for nearly 1 year. It is further contended on behalf of the appellant that learned Additional Sessions Judge has failed to appreciate the fact that the State has already confiscated the vessel of the appellants worth lakhs of rupees and hence the fine imposed ought not to have been imposed. It is further pointed out that the accused appellants entered into the territory of India by mistake and not with mala fide motive. Accordingly, the appellant has prayed for modification of the order of conviction.

3. This memo of appeal goes to show that the appellants had challenged the entire order of conviction.

4. The chronological event leading to instant appeal is that as many as 07 accused persons who are Burmese nationals had entered into India on 14.11.2014 Shri Shukla, Dy. Commandant, Captain of Aircraft, submitted a report with the Andaman & Nicobar Police contending inter alia that the Helicopter CG820 was launched at 0700 hours, he cited suspicious foreigners boat operation off North Sentinel Island. Boat had foreign nationals at board with Jerricanes and Diving Equipments. Repeated efforts made to communicate with the boat but the crew did not respond and started fleeing. Warning indication given to boat and directed to proceed towards Port Blair. The base was also informed regarding the fact. Thereafter, the Helicopter landed back and after refuelling again launched at 1015 hours and relocated the foreign boat at 1045 hours. The boat was thereafter, apprehended with the help of ICGS Rajshree and the foreign poachers were medically examined and handed over to the A&N Police. Among them, one suspicious accused was apprehended from the coast of North Sentinel Island. On the basis of report, FIR No. 497/14 dated 05.11.2014 was chalked out and the accused persons were produced before the learned Chief Judicial Magistrate under arrest The investigation ended in the charge-sheet vide No. 313 of 2015 dated 12.03.2015. The investigation disclosed that all the accused persons are the Myanmares poachers and they came to the territorial water area of India without any valid documents and the sole purpose of poaching is to collect the sea cucumber.

5. It appears from the order impugned that the boat along with material in the boat were seized by the police and finding sufficient materials they were produced before the Court. As the accused persons pleaded guilty before the Court and learned Judge found that some of the accused persons had previously entered into the territory of India without any valid documents and were previously arrested and convicted in different cases. Thereafter, they were released from jail and repatriated to their country but again they came to territory of India without any valid document so the learned Judge was of the view that they are liable to be punished adequately.

6. Accordingly, the accused Saw Win was found guilty to the charge under

Section 3/7/10/14/15 (C) MZI Act, 1981 read with section 14(A) of Foreigners (Amendment) Act, 2004 and para 3 of FRA order 1963 read with section 7/8 PAT (Amendment) Regulation, 2012 and the rest accused persons were found guilty of the offence under section 14(A) of Foreigners (Amendment) Act, 2004 and para 3 of FRA order 1963 read with section 7/8 PAT (Amendment) Regulation, 2012. The punishment of the alleged offences was duly communicated to the convicted persons by the interpreter. Considering the quantum of punishment, the convict Saw Win was punished with simple imprisonment for a term of three years with fine of Rs. 6,00,000 in default to simple imprisonment for one year for the offence punishable under Section 7/10/14/15 (C), MZI Act, 1981. The convict Saw Win was also punished with simple imprisonment for a term of 5 years with fine of Rs. 50,000/- in default to simple imprisonment for three months for the offence punishable under Section 14(A), Foreigners (Amendment) Act, 2004. The convict Saw Win was also punished with simple imprisonment for a term of 3 years and fine of Rs. 10,000/- in default to simple imprisonment for three months for the offence punishable under Section 7/8, PAT (Amendment) Regulation 2012. The substantive sentences were directed to run concurrently. The other convicts were punished with simple imprisonment for a terms of 5 years with fine of Rs. 50,000/- in default of simple imprisonment for three months for the offence punishable under section 14(A), Foreigners (Amendment) Act, 2004 each and also punished with simple imprisonment for a term of 3 years and fine of Rs. 10,000/- in default to simple imprisonment for 3 months for the offence punishable under Section 7/8, PAT (Amendment) Regulation, 2012 each. The substantive sentences were directed to run concurrently with further direction to set off the period of detention undergone by the convicts during the investigation and trial of the case from substantive period of sentence under Section 428, Cr. P.C.

7. The learned Counsel for the appellant in view of the memo of appeal appears to have challenged the order of conviction on the ground that the appellant could not understand as to what was interpreted to them by the interpreter and the learned Judge could not also understand the language of the appellant, which resulted in wrong order of conviction passed against the appellant. It is further submitted that appellant being foreign national having completed the period of sentence be absolved of the liability to pay fine amount so that they may be pushed back to their country. It is also pointed out that the sentence for 1 year in default of payment of fine of Rs. 6 lakhs for the charges under Sections 7/10/14/15 (C), MZI Act, 1981 is beyond the concept of law providing for simple imprisonment for one year imprisonment in default to pay fine of Rs. 6 Lakhs and has relied on an unreported decision of single Bench of this Hon?ble Court passed in CRA No. 022 of 2015.

8. It would be apt to reproduce the provision of Section 65 of IPC which provides for limit of imprisonment for non payment of fine when imprisonment and fine award able. It reads thus:

"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."

At the same time it would be profitable to reproduce the provision of Section 30 of Code of Criminal Procedure which is a corollary to Section 65 of Indian Penal Code, which provides thus:

"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."

9. On bare reading of the provisions it can safely be said that under Section 65, IPC, the imprisonment in default of fine cannot exceed one-fourth of maximum terms of imprisonment that can be awarded for the offence as the imprisonment in default of payment of fine is not a sentence. It is awarded only as measure to enforce payment of fine. It is a penalty which the person incurs on account of nonpayment of fine. But the term of imprisonment in default of payment of fine is not sentence.

10. So, the learned Magistrate had no discretion to award imprisonment in delicto of non-payment of fine exceeding one-fourth of the substantive punishment awarded in respect of the offence.

11. Therefore, the sentence awarded for the charge under Sections 7/10/14/15 (C) of MZI Act be modified to the extent that in default to pay fine of Rs. 6 lakhs the appellant shall undergo simple imprisonment for six months. However, this Court is not pleased to interfere into the punishment awarded against the appellant in other charges.

12. Ergo the appeal is allowed in part.

13. Copy of this order be sent to the learned Additional Sessions Judge, A&N Islands, Port Blair for information and necessary action.

14. Urgent Photostat certified copy of this judgment be supplied, if applied for.