

The parties will pay and receive costs throughout in proportion to their failure and success.

Decree modified.

REVISIONAL CRIMINAL.

Before Mr Justice Banerji.

QUEEN-EMPRESS v. RAM BARAN SINGH.*

Criminal Procedure Code, section 395—Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.

Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict. *Queen-Empress v. Sheodin* (1) referred to.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Benares. The facts of the case sufficiently appear from the order of the Court.

BANERJI, J.—In this case one Ram Baran Singh was convicted by a Magistrate of the first class under sections 454 and 75 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment and to receive 30 stripes. He was medically certified not to be in a fit state of health to undergo the sentence of whipping. The Magistrate thereupon sentenced him to 6 months' additional rigorous imprisonment in lieu of whipping. The Magistrate was evidently acting under the powers conferred on him by section 395 of the Code of Criminal Procedure. Under that section, upon the offender being found not to be in a fit state of health to undergo the sentence of whipping, the Court may either remit the sentence of whipping, or may, in lieu of whipping, sentence him to imprisonment for a term not exceeding twelve months, which may be in addition to any term of imprisonment to which he may have been sentenced for the same offence. But this term of imprisonment, as held in *Queen-Empress v. Sheodin* (1)

* Criminal Revision No. 398 of 1898.

(1) I. L. R., 11 All., 308.

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is a substantive sentence of imprisonment. That being so, the Magistrate was not competent to sentence the accused to imprisonment in lieu of whipping for a period which was in excess of the maximum term of two years, for which, under section 32, he could order the imprisonment of the accused. This is clear from the second paragraph of section 395, which declares that under that section a Court is not authorised to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Section 33, which relates to the powers of a Magistrate to pass a sentence of imprisonment in default of fine, distinctly provides that the imprisonment awarded under that section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32. The absence of a similar provision in section 395 and the provision of the second paragraph of that section, to which I have referred above, leave no room for doubt that the sentence of imprisonment awarded in lieu of whipping cannot be in addition to a substantive sentence of imprisonment for the maximum term which the Magistrate was competent to award. The sentence of additional imprisonment in lieu of whipping passed in this case was therefore clearly illegal and I set it aside. Ram Baran's bail will be discharged.

APPELLATE CIVIL.

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August 8.

Before Mr. Justice Banerji.

JADUBAR SINGH AND OTHERS (DEFENDANTS) v. SHEO SARAN SINGH
PLAINTIFF.*

*Suit for malicious prosecution—Reasonable and probable cause—Evidence
—Conviction of plaintiff by a criminal Court.*

The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if un rebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable

*Second Appeal No. 454 of 1897 from a decree of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 27th March 1897, modifying a decree of Babu Chandi Prasad, Munsif of Raara, dated the 28th January 1897.