

## [COURT OF CRIMINAL APPEAL.]

1944 *Present: Keuneman, de Kretser and Wijeyewardene JJ.*THE KING *v.* MARTIN.99—*M. C. Avissawella, 25,184.*

*Sentence—Leave to appeal—Conviction for rape—Sentence of whipping—Sentence substituted for original sentence—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 4 (c).*

Where the accused who was convicted at the Assizes of robbery and rape was sentenced to five years' rigorous imprisonment in addition to 10 lashes, and where as the sentence of whipping could not be carried out an additional sentence of imprisonment was imposed by the trial Judge acting under section 318 (1) of the Criminal Procedure Code,—

*Held*, that the accused could not be granted leave to appeal against the sentence passed in substitution for the original sentence.

**T**HIS was an application for leave to appeal against a sentence.

No appearance for applicant.

*E. H. T. Gunasekera, C.C.*, for the Crown.

*Cur. adv. vult.*

June 26, 1944. KEUNEMAN J.—

This is an application for leave to appeal against sentence made to the Court of Criminal Appeal under unusual circumstances. On September 7, 1943, the prisoner was found guilty at the Assizes of robbery, rape, &c. and was sentenced to 5 years' rigorous imprisonment and 10 lashes. Leave to appeal against the conviction was applied for to this Court but was refused on September 10, 1943. Thereafter it was found that the sentence of whipping could not be carried into execution, and the matter was brought up before the Judge who presided at the trial. That Judge ordered—on May 5, 1944—that in lieu of the sentence of whipping the prisoner be sentenced to an additional term of two years' rigorous imprisonment. This order was made under section 318 (1) of the Criminal Procedure Code, and leave to appeal against this order is asked for.

Under section 318 (1) where a sentence of whipping is wholly or partially prevented from being carried into execution, the offender shall be kept in custody till the Court that passed the sentence can revise it, and that Court may at its discretion either order the discharge of the offender or else enter a sentence of imprisonment in substitution, which may be additional to any punishment already imposed. In this case it is clear

that a proper application was made to the Judge who presided at the trial, and that the Judge exercised his discretion within the terms of the section.

The right to appeal to this Court is governed by the Court of Criminal Appeal Ordinance, No. 23 of 1938. Under section 4 (c) any convicted person may " appeal with the leave of the Court of Criminal Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law ". Can this sentence passed in substitution of the original sentence be regarded as a " sentence passed on his conviction "? We think not. This view is further supported by the terms of section 5 (3)— " On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal " .

The powers of the Court of Criminal Appeal are under this section restricted to quashing " the sentence passed at the trial " and taking further action upon that. Clearly in the present case it cannot be said that the sentence, against which an appeal is desired, was passed at the trial. In this connection see also section 6.

In our opinion the present application for leave to appeal against sentence cannot be entertained. The application is refused.

*Application refused.*

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