QUEEN *v.* DANIEL.

D. C., Kégalla, 836.

Right to appeal for enhancement of punishment—Section 406 of the Criminal Procedure Code—Error of law or of fact—Error in point of opinion—Right of party injured or other private complainant to appeal, in a case where the parties are the Crown and the accused—Application for revision of proceedings under s. 426—Necessity for notice of revision.

An appeal for enhancement of punishment is permissible on the ground of error of fact or of law, in cases where both imprisonment and fine have been imposed, and in the cases not excepted in sections 403, 404, and 405 of the Criminal Procedure Code.

Error in point of opinion on the part of a Judge as to the degree of injury to a complainant, or the degree of criminality of an accused, or as to the nature or amount of punishment inflicted, does not amount to an error in law.

Insufficiency of punishment could only be an error in law when a minimum amount of penalty had been prescribed but had not been imposed.

In a criminal prosecution by the Crown, the party injured or other private complainant has not the right of appeal provided for in section 406 of the Criminal Procedure Code.

An application for revision under section 426 will not be entertained without due notice to the respondent.

THE indictment in this case charged the accused with having voluntarily caused grievous hurt to one Mr. Dharmaratna. The accused pleaded provocation, and admitted that he struck him as hard as he could with the fist on the eye and on the ear once or twice, and threw him out of the verandah. The District Judge found the accused guilty, and "sentenced him to simple "imprisonment till the rising of the Court and to a fine of Rs. 50."

The Attorney-General appealed on the ground that the judgment of the Court below was not in conformity with the requirements of section 372 of the Criminal Procedure Code, and that the sentence imposed on the accused was far too inadequate in view of the circumstances of the case.

Dornhorst, for the accused, urged by way of preliminary objection that, as inadequacy of sentence was neither an error of law nor of fact, the appeal preferred should be rejected. He contended that no appeal lay in the present case under sections 404 or 405 of the Criminal Procedure Code, and that if the appeal be taken as one from a "party" as provided in section 406, it could be entertained only on the ground of error of law or fact, but not for mere error of opinion on the part of the Judge in estimating the effects of the circumstances proved in the case.

Cooke, C.C., for the Crown, replied on the preliminary objection and insisted that the District Judge had committed a clear error of law in not acting conformably with section 372 of the Criminal Procedure Code. If it be held that an appeal did not lie, it was open to the Supreme Court to revise the proceedings under section 426.

Canagaratne, for Mr. Dharmaratna, moved, that if the appeal of the Attorney-General should fail on the preliminary objection raised by Mr. Dornhorst, his client should be allowed to file a petition of appeal, as the party really interested in the case.

Cur. adv. vult.

12th February, 1895. BROWNE, J.—

The accused was charged with grievous hurt (Penal Code, section 316), and was found guilty (without its being specifically stated of what offence), and sentenced to simple imprisonment until the rising of the Court and to pay a fine of Rs. 50.

When the appeal was called for argument, Mr. Dornhorst, for accused, submitted that no appeal lay, since the Attorney-General

appealed for the purpose of enhancing the sentence, which the Ordinance did not entitle him to do, the case falling within section 406, and the question of sufficiency of sentence not being an error of law or fact.

Were I to entertain a statement made in argument, without any formal verification, on behalf of the would-be appellant Dharmaratna, that the accused was never imprisoned at all, and so conclude, it might be I would have to hold, that the matter was one falling under section 405 of the Criminal Procedure Code, and I should at once reject such appeal offered. Finding, however, that sentences of both imprisonment and fine have been passed, I must hold, following the decision in *9 S. C. C. 49*, that this not being within the provisions of sections 403, 404, or 405, an appeal does lie for any error of law or fact.

In appealing for an enhancement of punishment, does the Attorney-General appeal for error of fact? Apparently not, for the accused has been convicted of the charge preferred, and not of only some minor offence thereunder, upon the ground that the facts proved justified only the lesser conviction.

Does he appeal for error of law? He does not complain that evidence has been improperly admitted or rejected, or that facts have or have not been found, or that these required some other verdict, or that the Magistrate had not power to impose the sentence which he did.

He has not shown that anything has been done or permitted of which the law, correctly regarded, did not entirely allow. The Magistrate may (in the Attorney-General's judgment) have erred in point of *opinion* as to the degree of injury to the person at whose complaint, made outside the District Court, he for Her Majesty has prosecuted, or as to the degree of criminality of the accused, and in consequence of either, or of natural inclination to mercy, &c., as to the nature or amount of the punishment he inflicted, all or some of which might, when advanced, impel or justify this Court, if so empowered as under section 426, to entertain an application in revision of conviction and sentence. But I hold these are not grounds of law, nor do they disclose that any error in law has been made which vitiates either the conviction or sentence. Insufficiency of punishment could only be an error in law when a minimum amount of penalty had been prescribed but had not been imposed.

I therefore rule that the appeal of the Attorney-General fails, and must be rejected. I was asked in such a contingency to revise the proceedings under section 426, but I do not know what notice to any such effect has been served upon the respondent

(for no copy of notice issued is in the record), and I must decline to act as so requested.

As to the application on behalf of Dharmaratna, that he should be held entitled to file a petition of appeal and be heard thereon, I hold that he is not such a party as section 406 includes in that privilege. He is, as I have said before, only a person who, prior to these proceedings, put in motion the prosecution to see that a criminal offence was punished by informing her of the particulars thereof. He might have been not the person injured, but, as often happens, a relative of his, or some official, as a police officer, who first made complaint to the Police Court. I therefore disallow his application.