[COURT OF CRIMINAL APPEAL.]

1944 *Present:* **Keuneman, de Kretser and Jayetileke JJ.**

THE KING *v.* P. A. KADIRESU *et al.*

10—M. C. Mallakam, 23,165.

Statement made to a Police Officer—Use of statement to contradict witness—In a trial other than that for offence under investigation—Sentence of whipping—Alternative punishment—Power of Supreme Court to revise an illegal sentence imposed per incuriam*—Criminal Procedure Code, s. 122 (3); 317 and 318.*

A statement made to a Police Officer in the course of an investigation under Chapter XII. of the Criminal Procedure Code may be used for the purpose of contradicting a witness in any other case than the trial of that offence during the inquiry into which it was made to the Police Officer.

A trial Judge has power to revise an illegal sentence imposed *per incuriam.*

There is no provision in the Criminal Procedure Code for imposing an alternative punishment in the event of a sentence of whipping not being executed.

Where a sentence of whipping is in fact wholly or partially prevented from being carried into execution, the Court that passed the sentence has power to impose an additional sentence of imprisonment.

APPEAL against conviction by a Judge and Jury before the Northern Circuit.

H. V. Perera, K.C. (with him *M. M. Kumarakulasingham*), for first to third accused, appellants.—The three accused in this case have been convicted of robbing, on the highway, a certain medical officer and his wife. The chief ground of appeal is that a statement made by the second accused to a police officer while the latter was investigating into some other offence was wrongly admitted at the trial in the present case. A statement made under Chapter 12 of the Criminal Procedure Code cannot, according to section 122 (3), be used in any other case than at the trial of that offence during the inquiry into which it was made to the police

officer or inquirer. The word " witness " in the section may be particularly noted. Such a statement cannot be regarded as the written statement of the person examined, because it is neither sworn to nor signed by the person examined. It is only a memorandum made by the inquirer of what he considers is relevant. In the circumstances section 155 of the Evidence Ordinance does not render it admissible. See also *Dissanayake v. Gunaratna* [1]. The permission which supersedes the prohibition in section 122 (3) of the Criminal Procedure Code is not absolute—*Maxwell v. Director of Public Prosecution* [2].

As regards the punishment imposed on the accused there are several irregularities. The sentence originally passed was 10 years rigorous imprisonment and 10 lashes. The sentence of lashes was irregular in view of section 57 of the Penal Code. The trial Judge, therefore, altered the whole sentence subsequently to 5 years' imprisonment and 10 lashes. It is submitted that he had no jurisdiction to revise the sentence. Further, if whipping could not be carried out an alternative sentence of additional imprisonment was passed. This alternative sentence too is irregular and was a misapplication of section 318 of the Crimnal Procedure Code.

E. H. T. Gunasekara, C.C., for the Crown.—A statement made under Chapter 12 of the Criminal Procedure Code can be used for other proceedings than the case in respect of which the investigation was made—*Chitty et al. v. Peries* [3]. The statement in question in the present case was put in at the request of the Counsel for the defence.

A sentence passed *per incuriam* can be revised by the Supreme Court—*The Police Officer of Mawalla v. Galapatha* [4]; *In revision P. C. Batticaloa 8306* [5].

Cur. adv. vult.

November 3, 1944. KEUNEMAN J.—

The following points have been argued for the appellants:—

(1) It was urged that it was irregular and illegal to admit in this case, for the purpose of establishing a contradiction, a statement made by the second accused in the course of an inquiry under Chapter 12 of the Criminal Procedure Code into another offence alleged to have been committed by the second accused. It was contended that the words " otherwise than to prove that a witness made a different statement at a different time " amounted to a permission only to contradict a witness in the course of the trial which resulted from the particular inquiry under Chapter 12, and not at any other criminal trial. We do not agree that the wide language used should be given such a restricted meaning and think that the statement in question was properly admitted and proved.

(2) The statement in question was that the first accused was employed at the time of this offence by the second accused. In his evidence the second accused admitted that the first accused had been in his employment up to six months before the offence, but stated that the first accused had then left his service.

[1] *(1938) 11 C. L. W. 12 at 14.*
[2] *(1934) 151 Law Times (N.S.) 477 at 481.*
[3] *(1940) 41 N. L. R. 145.*
[4] *(1915) 1 C. W. R. 197.*
[5] *(1921) 23 N. L. R. 475.*

The trial Judge did not specifically say that the statement which was denied was not evidence in the case. It was argued, we think correctly, that this amounted to a non-direction. But the trial Judge dealt fully both with the statement and the denial and stated towards the end of his charge—" There is another point which by no means is conclusive at all. It is that all these three men are known to each other,—two of them live within a quarter mile of the scene, one *has been* under the employ of the second accused, and two of them are brothers. "

The trial Judge has here correctly stated the effect of the evidence. Even if there was a non-direction, the matter was of little or no importance. The main question was whether the three accused had been correctly identified. All the elements necessary to constitute the offences of unlawful assembly, robbery and hurt had been abundantly proved. We do not think the non-direction could have in any way influenced the jury in arriving at their verdict.

(3) Certain alleged irregularities with regard to the first identification parade were stressed, but we do not think they are of substance or that they affected the credibility of the witnesses. These alleged irregularities were fully explained to the jury.

(4) The original sentences imposed under counts 5 and 6 were certainly not justified in law, *viz.*, 10 years rigorous imprisonment on each of these counts together with 5 lashes on each of these counts, *i.e.*, 10 lashes in all. The next day the prisoners were produced before Court and their Counsel pointed out that under section 57 of the Penal Code no person who had been sentenced to death or to imprisonment for more than five years shall be punished by whipping. The trial Judge thereupon altered the sentences on the counts 2, 4, 5, and 6, reducing the sentences under the 3rd and 4th counts to 5 years rigorous imprisonment each. Under counts 5 and 6 he imposed 5 years rigorous imprisonment and 5 lashes on each count, all sentences to be concurrent. It is contended that he had no power to do this. We are, however, of opinion that the trial Judge having imposed an illegal sentence *per incuriam* had the power to set aside the illegal sentence and to impose a legal sentence; see *Police Officer of Mawalla v. Galapatha*[1], in this connection.

(5) There is a further point. The Trial Judge added a further provision that if the accused were not given the whipping the sentence was to be 12 years rigorous imprisonment. This we think the trial Judge had no power to do. There is provision in the Criminal Procedure Code for imposing a sentence of imprisonment in default of the payment of a fine, but there does not appear to be any section which authorises an alternative punishment in the event of a sentence of whipping not being executed.

Where sentence of whipping is in fact wholly or partially prevented from being carried into execution under section 317 of the Criminal Procedure Code, the Court that passed the sentence can revise it under section 318, and has power to impose an additional sentence of imprisonment. This is a reasonable provision, for it is advisable to wait until it is known whether the sentence of whipping has been even partially executed before the Court decides what further steps should be taken in punishing the offender. We are of opinion that the alternative sentence of 12 years

[1] *1 C. W. R. 197.*

rigorous imprisonment if there was no whipping was not justified in law, and we delete that portion of the sentence. The sentences of five years rigorous imprisonment and five lashes under each of the counts 5 and 6 will stand, as will the punishments imposed under the other counts, the sentences of imprisonment being concurrent.

Subject to the deletions indicated above, the appeals and applications are dismissed.

Appeals dismissed.