1945 *Present:* **Soertsz A.C.J.**

THE ATTORNEY-GENERAL *v.* KUNCHIHAMBU *et al.*

In Revision M. C. Mannar, 4,139.

Appeal—Prescribed minimum punishment not imposed—Error in law—Right of prosecutor to appeal—Revision—Effect of delay—Criminal Procedure Code, ss. 338, 357.

Insufficiency of punishment is an error in law when a minimum amount of penalty has been prescribed and has not been imposed. The proper remedy of the prosecutor in such a case is by way of appeal under section 388 of the Criminal Procedure Code.

The Supreme Court, when considering whether it should exercise its powers of revision under section 357 of the Criminal Procedure Code, would regard with disapproval delay on the part of the petitioner.

THIS was an application for revision.

T. K. Curtis, C.C., for the Attorney-General.

H. V. Perera, K.C. (with him *G. E. Chitty* and *H. Wanigatunge*), for the second accused, respondent.

July 24, 1945. SOERTSZ A.C.J.—

This is an application by the Attorney-General seeking to have the sentence passed by the Magistrate on the second accused revised on the ground that the Magistrate in convicting him and sentencing him as he did overlooked a provision of the Control of Prices Regulations, 1942, which made the imposition of a term of imprisonment imperative because this accused had a previous conviction. The sentence passed by the Magistrate was one of fine. It is perfectly clear that the sentence passed by the Magistrate was in contravention of the requirements in the Control of Prices Regulations to which I have just referred. The question is whether this is a proper case for the exercise of our revisionary power.

Mr. H. V. Perera, appearing on behalf of the second accused, respondent, takes the preliminary objection that this is not a matter in which this

Court will entertain an application for revision because, he submits, by section 338 of the Criminal Procedure Code a right of appeal lies in such a case and the Attorney-General ought to have resorted to that right. He submits that the error complained of, in this instance, is an error in law and he invites attention to sub-section 1 of section 338 which confers a right of appeal to the Supreme Court against any judgment for any error in law. That this error is an error in law is clear apart from authority, but if authority were required there is the case of *The Queen v. Daniel,*[1] in which Browne J. observed that insufficiency of punishment would be an error in law when a minimum amount of penalty has been prescribed and has not been imposed. This is such a case. I cannot accede to the ingenious argument of Mr. Curtis, on behalf of the Attorney-General that the right of appeal given by section 338 (1) of the Criminal Procedure Code is a right of appeal against a judgment only and not against a sentence. In my view a sentence is a part of the judgment and the error in this case was an error in the course of the judgment.

Mr. Curtis next relied upon section 357 of the Criminal Procedure Code and pointed out that by sub-section 1 of that section the Supreme Court " may in any case the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge in its discretion exercise any of the powers conferred by section 346, 347 and 348 ". There is no doubt, and indeed it is not disputed on behalf of the second accused, respondent, that this Court has a discretion and that it is open to this Court to deal with a sentence which appears on the face of it to be illegal. But a discretion such as that must be exercised in regard to the attendant circumstances of a particular case and, looking at the facts of this case, I find that when the Magistrate imposed the sentence he did on the second accused the Price Control Inspector who was present in Court invited the Magistrate's attention to the fact that this accused was already labouring under a previous conviction but the Magistrate does not appear to have taken any action upon the statement made by the Price Control Inspector. The sentence was passed in February, 1945, and this application was made on May 25, 1945, and now it is the end of July. In view of the delay that has occurred I do not think that I ought to exercise the discretion vested in me by section 357 (1) of the Criminal Procedure Code.

Mr. Curtis asks in tones of rhetorical indignation if this Court is going to be a party to an illegal sentence remaining upon the record of a case. It is a very disturbing question to have to answer but the answer I would venture is that however much it may offend one's aesthetic sense to have an illegal sentence left upon the record, there are cases in which one must put up with that grievance lest one inflicts a great hardship on a man who had had every reason to think that he had been dealt with and punished for the offence with which he had been charged and of which he had been convicted and that his troubles were over. In matters of this kind too *interest reipublicae ut finis sit litium.*

For these reasons I refuse to exercise my discretion and I reject the application for an alteration of the sentence.

Application refused.

[1] *N. L. R. p. 87.*