

thereof by any court of competent jurisdiction shall be sentenced to be whipped, not exceeding forty lashes, or be imprisoned for a term not exceeding one year, or both, in the discretion of the court.

On an indictment under this section, the wife is a competent witness to prove the beating and also marriage; proof of performance of marriage ceremony is sufficient without proof of the authority of the officer who performed it. The marriage may be *prima facie* established by presumptive evidence. This section does not create a new offense, but simply attaches a new penalty to the common law offense when attended with circumstances of aggravation. Indictment under this section must aver the circumstances which constituted the offense or increase the punishment; it follows that the nature of the beating must be laid as characterized by the statute and victim of the offense must be described as the wife. *Hanan v. State*, 63 Md. 124.

The word "brutally" in this section is not uncertain or indefinite and is easily understood and applied. A party may be indicted under this section or for the common law offense, or indictment may include two counts, one embracing the statutory and the other the common law offense, and jury must determine whether a conviction under statutory count is warranted. This section is constitutional and valid; it sufficiently regulates mode and manner of inflicting punishment. *Foote v. State*, 59 Md. 266.

An. Code, sec. 16. 1904, sec. 16. 1888, sec. 15. 1882, ch. 120.

16. If any court shall order or direct the punishment as aforesaid by whipping, the same shall be administered by the sheriff of the county or city of Baltimore where the judgment shall be rendered; and said sheriff shall administer the same within the walls of the city or county jail.

Assault with Intent to Murder, Ravish or Rob.

An. Code, sec. 17. 1904, sec. 17. 1888, sec. 16. 1809, ch. 138, sec. 4. 1904, ch. 76. 1908, ch. 366.

17. Every person convicted of crime of an assault with intent to rob, murder, or have carnal knowledge of a female child under age of fourteen years, shall be sentenced to confinement in the penitentiary for not less than two years, nor more than ten years; and every person convicted of the crime of an assault with intent to commit a rape shall be punished with death, or, in the discretion of the court, he shall be sentenced to confinement in the penitentiary for not less than two years nor more than twenty years; and nothing in this section shall be construed to interfere with any prosecution that has or may hereafter be commenced for any violation of the section hereby repealed, happening previous to April 6, 1908.

An assault with intent to rob, murder or rape is not a felony in Maryland; in this state only those crimes are felonies which were such at common law or have been so declared by statute. The death penalty provided by this section is not in violation of arts. 16 or 25 of the Declaration of Rights. *Dutton v. State*, 123 Md. 375.

The allegation that an act was done with intent "feloniously" to rob does not vitiate an indictment under this section. To constitute the crimes of robbery, murder or rape, felonious act and felonious intent must concur. To bring an assault under this section the act must be charged and proved to have been committed with an intent to commit a crime which is a felony. The omission of the allegation of violence from indictment is immaterial; it is sufficient to state with precision facts requisite to constitute an assault and battery, and to aver the intent. *Hollohan v. State*, 32 Md. 399 (decided prior to act, 1904, ch. 76).

A count charging rape may be united with one charging assault with intent to rape; a felony and a misdemeanor may be joined in the same indictment. A verdict which is a nullity is a mere mistrial; prisoner should not be discharged, but a new trial ordered. *State v. Sutton*, 4 Gill, 494 (decided prior to act, 1904, ch. 76).