

R. v. NOLE PENSULO CHIPEPO.

A CRIMINAL REVIEW CASE OF 1935.

Charges of attempted murder and arson—both charges arising out of the same facts—duplicity of charges—Penal Code section 127 (c)—conviction in respect of both charges—two punishments for one substantive offence against the law.

Where there is doubt which of two or more offences the facts which can be proved will constitute, the accused person may be charged with having committed all or any of such offences and any number of such charges may be tried together or he may be charged in the alternative with having committed some one of the said offences.

It is not, however, permissible in such circumstances to convict the accused person of more than one of such offences.

Section 127 of the Criminal Procedure Code was repealed and replaced by Ordinance 28 of 1940. Although not now specifically provided for, it is still possible to include alternative counts in a charge. The present case is, however, still authority for the proposition that a conviction should not be recorded on more than one of the alternative counts. But see *R. v. Donald Phiri* 4 N.R.L.R. 82 and *R. v. Mungala and Musaka* 1958 R. & N. 109.

Francis, J.: I am afraid there is multiplicity in the charging of two offences founded upon identically the same facts.

Were the offences charged in the alternative under Penal Code, section 127 (c) premising a doubt as to which of the two offences the facts which can be proved will constitute—it would have been a different matter.

In my view the evidence supports a conviction for attempted murder, and it is against the law for two punishments to be imposed for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute the other. For instance, a person who is tried and convicted for kidnapping with intent to steal cannot be punished for the theft of the property found on the person kidnapped.

In this case I propose to quash the conviction and sentence in respect of the charge of arson and enhance the sentence on the charge of attempted murder from three years to five years.

But before doing so the Magistrate should call upon the prisoner under Criminal Procedure Code, section 309 (2) to make such representation in writing as he deems fit.

