

## R. v. ESAU MWEWE AND LOT BANDA.

A CRIMINAL REVIEW CASE OF 1935.

*Penal Code section 287—possessing or conveying property reasonably suspected of having been stolen or unlawfully obtained—uncertainty—evidence of reasonable suspicion necessary—Criminal Procedure Code section 169 does not permit Court to substitute another charge during the trial.*

In order to support a conviction under section 287 of the Penal Code for possession of property reasonably suspected of having been stolen the prosecution must adduce evidence showing that there is reason to suspect that the property has been stolen (or unlawfully obtained); if, however, the explanation given by the accused person is reasonable the Court should not convict.

The charge should be limited to either “possessing” or “conveying” property and should allege reasonable suspicion either that the property was “stolen” or that it was “unlawfully obtained”; to combine “possessing or conveying” or “stolen or unlawfully obtained” in one charge makes for uncertainty and is not permitted.

Section 169 of the Criminal Procedure Code does not enable a court during the hearing of one charge to substitute another charge.

Although the present case was not cited, the dictum in the penultimate paragraph of the judgment to the effect that the words “having . . . or conveying are disjunctive” was not approved in *R. v. Chibuye Chitala* 2 N.R.L.R. 116, and in *R. v. Morgan Kaonga* 5 N.R.L.R. 580 that dictum was expressly disapproved, but in *Mandavu v. R.* 1962 R. & N. 298 Conroy, C.J. did not follow these two cases and held that the words were disjunctive.

For further cases on section 287 of the Penal Code see *R. v. Nako and Two Others* p. 49 *ante*; *R. v. Second Ngoma* 5 N.R.L.R. 67 and *Zimba v. Reg.* 1957 R. & N. 870.

**Francis, J.:** Case No. 7/1935, Subordinate Court (Class III) Ndola District. In the matter of *Rex v. Esau Mbewe and Lot Banda*, convicted of “being found in possession or conveying 5 pieces of timber and 8 ozs. cocoa which may reasonably be suspected of having been stolen or unlawfully obtained contrary to section 287 of the Penal Code”.

This case has been transmitted for review by the Court of the Provincial Commissioner and in respect of the matter the High Court purports to act under Criminal Procedure Code, section 309.

The Court has had the advantage of perusing the copy of a minute in connection with the case addressed by the Provincial Commissioner, Central Province, to the trial Magistrate.

In the first place there is every indication that the Magistrate at some stage of the proceedings before his judgment altered the original

charge, to which the accused had already pleaded, substituting therefor a charge embodying a different offence—to which, incidentally, neither of the accused was called upon to plead. Under the charge as altered the accused were found guilty.

This is irregular. The Magistrate, however, cited in support of his action section 169 of the Criminal Procedure Code. This provision does not authorise the alteration of a charge but provides that “when a person is charged with an offence and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted, etc.”

The offence under section 287 Penal Code should have been either “having in his possession” or “conveying”, not both. Similarly the property should have been described either as “reasonably suspected of having been stolen” or “reasonably suspected of having been unlawfully obtained”, but not both. These are irregularities, minor perhaps in this case, but irregularity nevertheless, by reason of uncertainty.

There is no evidence before the Court that the articles “might reasonably be suspected either of being stolen or unlawfully obtained”—and the explanation given by the accused seems to be a perfectly reasonable one which, for the purpose of this section, should have satisfied the Court. For these reasons the conviction in each case must be quashed and the fines returned.