

HAMWEEMBA v THE PEOPLE (1968) ZR 171 (HC)

HIGH COURT

WHELAN J

6th DECEMBER 1968

Flynote

- [1] **Criminal procedure - Charges, form of - Statement of offence disclosing no offence - Possibility of amendment.**

Headnote

In a case where the statement of offence charged violation of Penal Code, section 248, which contains no offence, the mistake could have been rectified in the course of trial by amendment and, even failing that, the appellate court can make an amending order substituting the proper Penal Code section.

Case construed:

Banda v R 5 NRLR 183.

Cave, for the appellant

Chaila, State Advocate, for the respondent:

Judgment

Whelan J: On the 1st August, 1968, the appellant appeared before the subordinate court of the first class for the Kitwe District charged with theft by public servant. In the statement of offence. It was alleged that the offence was contrary to section 248 of the Penal Code. He pleaded not guilty but after trial was convicted, and in the words of the magistrate he was "found guilty of theft by public servant contrary to section 248, Cap. 6, as charged." He appeals to this court against his conviction on a number of points of which in my view there is only one of any substance, and that is that the section the accused was charged of contravening was in fact the wrong section.

[1] Section 248 of the Penal Code merely lays down the enhanced sentence applicable to persons convicted of theft by public servant. The offence of theft is still contained in section 243 of the Penal Code. In 1952 *W. E. Evans, J*, in the case of *Banda v R* had before him the identical point which has been raised in this appeal. An accused was charged in the Kitwe court with theft by public servant contrary to section 248 of the Penal Code. It was argued in that case that as section 248 disclosed no offence the conviction of the accused was bad and the learned judge said (at page 183): "I agree, the charge as it stands discloses no offence at all. Under section 192 of the Criminal Procedure Code the charge could have been amended if there was a charge wrongly laid, but in this case there was no charge at all." This decision of *W. E. Evans, J*, is not of course binding on this court, but I have considered the point at some length during the adjournment of the appeal, and I take the view that the learned judge's construction of the provisions of the Criminal Procedure Code was unnecessarily narrow. It is quite true that section 248 does not contain an offence, but I take the view that the mistake made by inserting the wrong section of the Penal Code in the statement of offence could have been cured by amendment. The point raised in this appeal is the type of point which might well have succeeded in England some 150 years ago, when a conviction of an offence such as the accused stands convicted of today would probably result in his being hanged, and at such times the courts took every opportunity to endeavour to see that persons were not executed for comparatively minor offences, but I take the view, as I have said, that the mistake in putting section 248 in the statement of offence could have been amended in the course of the trial had it been noticed. I consider that the accused was properly convicted on the evidence by the resident magistrate, and his appeal against conviction is dismissed, but it is necessary for me to make an amending order to state that he stands convicted of theft by public servant contrary to sections 243 and 248 of the Penal Code.
Appeal dismissed.