

## R. v. NAKO AND TWO OTHERS.

A CRIMINAL REVIEW CASE OF 1932.

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*Charge of theft under Penal Code section 243—conviction entered under Penal Code section 287 for being found in possession of property suspected to have been stolen—such conviction not permissible.*

Where a person is found in possession of property which he is suspected to have stolen, the correct charge is Theft (con. Penal Code section 243) if the owner of the property is known and ownership can be proved; if the owner is not known then the charge should be laid under Penal Code section 287, which makes it a misdemeanour for a person to be found in possession of property believed to have been stolen and of which such person cannot give an account to the satisfaction of the Court before whom he is brought.

In the judgment of Mr. Justice Hall which follows it will be noted that the learned Judge says, “. . . In a charge of stealing the onus of proof is always on the prosecution; whilst under section 287 the onus is on the accused to give an account to the satisfaction of the Court. . . .” This must not be taken to mean, and the learned Judge presumably had no intention that it should mean, that the prosecution is not always required to make out a prima facie case of guilt. On this point see *Mandavu v. R.* 1962 R. & N. 298.

Since the introduction of the present section 174 (1) (c) into the Criminal Procedure Code by Ordinance 28 of 1940, the dictum in the present case that on a charge of theft there cannot be a conviction under section 287 of the Penal Code is no longer law. Section 174 (1) (c) of the Criminal Procedure Code is as follows: “When a person is charged with stealing a thing and the facts proved amount to an offence under section 287 of the Penal Code he may be convicted of the offence under that section although he was not charged with it”. But, although the present case was not cited, the dictum therein to the effect that section 287 cannot be used where the owner of goods is known was affirmed in *R. v. Morgan Kaonga* 5 N.R.L.R. 580.

For further cases on section 287 of the Penal Code see *R. v. Esau Mwewe* 75 post; *R. v. Chibuye Chitala* 2 N.R.L.R. 116; *R. v. Second Ngona* 5 N.R.L.R. 67; *Zimba v. Reg.* 1957 R. & N. 870.

Hall, J. (extract from judgment on review): On a charge of theft there cannot be a conviction under section 287. In a charge of stealing the onus of proof is always on the prosecution; whilst under section 287 the onus is on the accused to give an account to the satisfaction of the Court, as to how he came by the goods in question. Where the owner of goods is known the only charge that should be laid is one of stealing

or dishonestly receiving. A charge under section 287 will not lie when the owner of the goods is known, since in that case there is no room for reasonable suspicion that the goods are stolen, the owner being able to say definitely whether or not the goods are his.

Conviction quashed.