

## R. v. CHIPATELA NGANDELAU.

## A CRIMINAL REVIEW CASE OF 1937.

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*Penal Code section 127 (1) (a)—charge against male person of knowingly living in part on the earnings of prostitution—evidence that the accused person in return for payment shared his wife with another male person for a period of twelve months—such evidence per se not proof of the charge in question.*

The accused was charged before the Resident Magistrate, Kitwe, with "living in part from the earnings of prostitution". The accused was convicted. On review it was held that the expression "prostitution" means the "practice by a woman of offering her body for promiscuous or indiscriminate sexual intercourse with men". In order to obtain a conviction under section 127 (1) (a) of the Penal Code it is not sufficient to prove that a male person shared his wife for a period with another male.

Francis, J.: This case has been sent up by the Magistrate for review.

The following facts were established. On some date about a year ago the principal witness for the prosecution, Nyundo, requested the accused Chipatela (of the Kalwena tribe, Balovale) to allow him the services of his wife. The averred intention of the witness was that during the ensuing twelve months he was to share the woman equally with her husband, and upon the accused agreeing, the witness paid over £2 8s. 0d.; the association lasted throughout the stipulated period, during which from time to time the witness made small payments to the woman to buy clothes. At the end of the period the cohabitation ceased.

The accused pleaded "not guilty" to the offence of "living in part on the earnings of prostitution" (Penal Code section 127 (1) (a), and, presumably in reference to the magistrate's explanation of the charge, added, "It is what we do at home". As a counter to this, the Magistrate, of his own initiative, called a witness who denied that it was Balovale custom to "lend out wives". Upon this evidence the accused was found guilty.

The meaning of the expression prostitution is the practice of offering the body for promiscuous or indiscriminate sexual intercourse with men. The evidence here goes merely to show that the accused undertook to share his wife with the witness. There was indeed further evidence—rather obliquely admitted, no doubt to show system—that at the end of the year stipulated for with the witness, the wife was then shared by her husband with another. There is no evidence that the woman was a common prostitute, or that there was any promiscuity in her relations with men generally. The sharing of a woman equally by two men to whose exclusive use she confines herself does not *per se* establish that woman as a prostitute.

The record was referred to the Law Officers so that argument may be adduced in support of the conviction, if thought fit. A reply has been received to the effect that the Law Officers are not prepared to sustain the conviction. The following observation from the same quarter is placed before the Court:

“On inquiry it appears that there is some evidence that the native custom mentioned by the accused is in existence in the Balovale District.”

This may or may not be so, but the question would be relevant only as a defence if the essential ingredients of the offence charged were in proof, and I hold that they are not.

The conviction must be quashed, and the fine returned.