

## R. v. BENSON MBEWE.

CRIMINAL REVIEW CASE NO. 224 OF 1939.

*Criminal Procedure Code section 168—conviction of offence lesser than the offence charged.*

The facts appear from the judgment hereunder.

As to the meaning to be attributed to the words "minor offence" see *R. v. E. Mumbi Chilao* 5 N.R.L.R. 459.

Robinson, A.C.J.: In this case the accused was charged with an offence *contra* section 249 Penal Code (theft by a servant). The Magistrate came to the conclusion that there was insufficient evidence of theft but a clear case had been made out of neglect of duty *contra* section 75 (2) of Cap. 62<sup>1</sup> (Employment of Natives Ordinance). Therefore he invoked section 169 Criminal Procedure Code and convicted the accused of the latter charge.

I am afraid the true function of section 169 Criminal Procedure Code<sup>2</sup> has been misunderstood. A good clue to it is to be found in the marginal note which reads "when offence proved is included in offence charged": Now the offence charged is theft and the definition of theft is found in section 236 Penal Code. It is difficult to illustrate the point perhaps with theft because there must be a fraudulent taking or conversion, but take, for instance, section 220 Penal Code: "Assault causing actual bodily harm". If the actual bodily harm cannot be proved, section 169 Criminal Procedure Code can be invoked to substantiate a conviction for simple assault, section 219 Penal Code. The greater includes the less.

But in this case, section 75 (1) of Cap. 62 has no relation at all to the crime of theft and therefore section 169 has no application. I hope I have made myself clear.

The conviction must be quashed.

The correct way would have been to have found the accused not guilty on the charge of theft and then to have charged him again quite distinctly on a charge *contra* Cap. 62<sup>1</sup>; he had never been in peril of that latter charge as he would have been in a case where section 169 could properly have been invoked.

<sup>1</sup> Now Cap. 171.—*Editor*.

<sup>2</sup> Now section 168 Criminal Procedure Code.—*Editor*.