

## R. v. CHIBUYE CHITALA.

CRIMINAL REVIEW CASE No. 172 OF 1941.

*Person suspected of being in possession of stolen property—person must be in street or road or be loitering—appearance or actions of person must be suspicious—correct method of framing charge.*

In the judgment hereunder it was held that the wording of section 287 of the Penal Code cannot be taken literally because the meaning has been limited by sections 19A and 22 (d) of the Criminal Procedure Code. Before a charge can be laid under this section it is essential that the person to be charged should be in a street or road or should be loitering and that his appearance or actions should be so suspicious that attention is attracted to him.

The method of framing a charge under section 287 of the Penal Code laid down in the present case was approved in *R. v. Second Ngoma* 5 N.R.L.R. 67, and in *R. v. Morgan Kaonga* 5 N.R.L.R. 580. In Kaonga's case the dictum in the present case to the effect that the words "having or conveying" are conjunctive was approved, but the dictum to the effect that it was necessary for the offence to be committed in a street or road was disapproved, the Court holding that the offence need not necessarily be committed in the streets or roads provided it is committed on a journey.

In *Mandavu v. R.* 1962 R. & N. 298 Conroy, C.J. held that the words "having or conveying" are disjunctive. For further cases on this section see *R. v. Nako and Two Others* 1 N.R.L.R. 49; *R. v. Esau Mweve and Lot Banda* 1 N.R.L.R. 75, and *Zimba v. Reg.* 1957 R. & N. 870.

**Robinson, J.:** The facts of this case are that the accused was in Jengwe Compound. A messenger came to him at his hut and asked to see his identity certificate. The accused produced one belonging to another native and when this was pointed out to him, he kept on changing his story as to how he came into possession of it. He was arrested and brought before the court on a charge *contra* section 287 Penal Code of being in possession of identity certificate of Jeffrey Mulinda, reasonably suspected of having been stolen and being unable to give an explanation to the satisfaction of the Court. Evidence was heard. The accused could give no account to the satisfaction of the Court of how he came by it. He was duly convicted and sentenced to one month I.H.L.

Section 287 Penal Code, "Any person who shall be brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained . . ." is not without difficulty, because the words cannot be taken literally. The meaning of them was decided long ago in England in *Hadley v. Perks* (1866) L.R. I.Q.B. 444, when it was pointed out that the words must be read in conjunction with, and supplementary to, the powers given to a constable to stop, search and detain any person who may be reasonably suspected of having or conveying in any manner

anything stolen or unlawfully obtained; and the sections apply only to possession in the streets and not to possession in a house. Our section 287 Penal Code, read in conjunction with section 19A Criminal Procedure Code and section 22 (d) Criminal Procedure Code, are so similar in their terms to the English Acts as to make *Hadley v. Perks* a binding authority in this country. The legal meaning therefore of section 287 is that it only applies to a person "having and conveying" in the sense of "having" *ejusdem generis* with "conveying", and being in the streets or roads with suspected stolen property, or perhaps loitering in such a way that it might be assumed he was carrying such property. I do not think it is going too far to say that before a charge can properly be laid *contra* section 287 Penal Code the evidence would have to show that there was something suspicious in the outward appearance or actions of the accused which led the police officer to take notice of him.

The facts of this case under review do not fit that conception of the law at all. The evidence is not very full but I assume what happened was that the messenger was checking up on natives in the compound, probably going round their huts and demanding to see their identity certificates. There is a special provision of the law which enables a properly authorised messenger to do that, and having exercised his authority it thus came to his knowledge that the identity certificate belonged to another native. Until that moment, he was not suspicious at all but just doing his routine work. The accused was not found conveying an identity certificate reasonably suspected of having been stolen and in my opinion he had committed no offence against section 287 Penal Code. The conviction must be quashed.

In view of the above, to wit that "having in his possession" is *ejusdem generis* with "conveying", there can be no duplicity, and the proper way to charge an offence *contra* section 287 Penal Code is "... having in his possession or conveying . . . reasonably suspected of having been stolen or unlawfully obtained". (See section 127C (b) (1) Criminal Procedure Code.) No more should be put in as any more makes the charge ridiculous. It is for the Court to say whether the explanation is satisfactory or not and that part of the section can form no part of the charge.