IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 188/2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

CHRISBORN KALONGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.

On 4th December, 2018 and on 10th December, 2018.

For the Appellant: *Mr J. Zulu, Senior Legal Aid Counsel - Legal Aid Board.*

For the Respondents: *Mr. F.M. Sikazwe, Senior State Advocate - National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. ***Chinyama v The People (1975) Z.R. 140***
2. ***Khupe Kafunda v The People (2005) Z.R. 31***

Statutes referred to:

1. ***Penal Code, Chapter 87, Laws of Zambia, section 200.***
2. ***Criminal Procedure Code, Chapter 88, Laws of Zambia, sections 17(1), 167(1) (3).***

The appellant was convicted on one count of murder contrary to **section 200** of the **Penal Code** and sentenced to death. The case

related to the gruesome killing of Fanwell Mwampatisha on the 25th November, 2015 at Chibombo in which the deceased's head was crushed with a heavy carved wooden stool. Both arms and legs were equally broken with the stool.

At the commencement of trial in the matter, the learned Counsel for the appellant applied before the trial court under **section 17(1)** of the **Criminal Procedure Code (CPC)** to have the appellant medically examined as regards his state of mind at the time of allegedly committing the offence and whether he could stand trial or make a defence. The section reads as follows-

> **17. (1) A court may, at any stage in a trial or inquiry, order that an accused person be medically examined for the purpose of ascertaining any matter which is or may be, in the opinion of the court, material to the proceedings before the court.**

It is clear from the section that it is expansively couched to cover all cases including an application for medical examination to ascertain the state of mind of an accused at the time of the offence.

The application, in this case, was precipitated by what the learned Counsel termed as challenges he had "*to move on the same level with the accused*". The learned State Advocate on behalf of the

respondent left the matter for the court to decide as he had had no interaction with the appellant.

The learned trial judge asked the appellant whether he was failing to communicate with his lawyer. The appellant did not respond. The learned trial judge then asked the appellant whether he was able to follow the proceedings to which the appellant replied in the affirmative. The learned trial judge then rejected the application without giving reasons and proceeded to receive the evidence on behalf of the prosecution. Upon putting the appellant on his defence, his advocate informed the court that his client would remain silent. The learned trial judge went on to deliver a judgment in which he found the appellant guilty and convicted him.

The appellant's grievance in the one ground of appeal put forward is that the learned trial judge erred in law and fact when he rejected the appellant's application to be medically examined for no reason which denied him the opportunity to effectively discharge the onus of establishing the defence of unsoundness of mind at the time of the offence. The appeal, therefore, focuses on the rejection of the application to have the appellant medically examined

notwithstanding that even the application to determine the appellant's ability to stand trial and defend himself was equally rejected.

Both advocates are agreed in their submissions that the learned trial judge erred in rejecting the application to have the appellant medically examined as this deprived him of an opportunity to discharge the onus of establishing the state of his mind at the time of committing the offence and we concur. This is consistent with what this court has said before in such cases as **Chinyama v The People** and **Khupe Kafunda v The People** cited in this appeal. Indeed, the learned trial judge ought to have ordered the medical examination of the appellant as to his state of mind at the time of commission of the offence which would have settled one way or the other the appellant's criminal responsibility for his actions.

The point of difference in this appeal, however, is that Mr Zulu is of the position that the error creates a doubt as regards the appellant's criminal responsibility, as we understood the submission, which should be resolved in favour of the appellant; that the sentence of death should, therefore, be substituted with a special finding that

the appellant is not guilty by reason of insanity and should be detained during the Presidents' pleasure pursuant to **section 167(1)(3)** of the **Criminal Procedure Code**. The section states-

> **167. (1) Where an act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his actions at the time when the act was done or omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made the same, the court shall make a special finding to the effect that the accused was not guilty by reason of insanity.**
>
> (2) ...
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> **(3) Where a special finding is made under subsection (1), the court so finding shall order the person to whom such finding relates to be detained during the President's pleasure.**

Mr Sikazwe does not agree with Mr Zulu's position and contends that there is no evidence in the record of appeal that would justify a special finding under section 167 of the CPC. His view is that the noted error amounts to a mistrial which should be remedied by the case being sent back to the High Court for retrial before another judge.

We have considered the arguments as well as section 167(1) and (3) of the CPC. It is clear from this section that before the special finding can be made, there must be evidence given at the trial of the

accused which satisfies the court that the accused was insane so as not to be responsible for his actions at the time of the offence. The state of mind cannot, therefore, be presumed under the section, more so given the consequences that the special finding leads to an order of detention during the President's pleasure which may not portend well for an accused who might possibly be innocent of the crime.

We are, therefore, unable to agree with Mr Zulu that a special finding should be made as there is no evidence of the appellant's state of mind at the time of commission of the offence. We note from the record that there was evidence given by witnesses for the prosecution of the unusual behaviour and appearance of the appellant at the time of the offence. This, in our view, presented the Court with another opportunity to correct the error rejecting the application for medical examination. The learned trial judge should have seized the opportunity and ordered that the appellant be medically examined at that juncture. Instead and to the prejudice of the appellant's case, the learned trial judge regarded the evidence, as the judgment shows, as being incapable of negating the intention to kill or the mental responsibility. This approach to the evidence was wrong.

It follows from the foregoing that the outcome of the error by the Court below rejecting the application to have the appellant medically examined is that the conviction cannot be sustained. We agree with Mr Sikazwe that the error amounted to a mistrial. We, accordingly quash the conviction and set aside the sentence of death. In the interests of justice, we order that the matter be remitted back to the High Court for a retrial before a different judge.

To the foregoing extent the appeal is partially successful.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE