IN THE SUPREME COURT OF ZAMBIA **Appeal No. 65/2015**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

MARTIN CHILUBA MUSENGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe, and Lisimba, JJS**
on 2nd June, 2015 and 4th February, 2020

For the Appellant: Mr. H.M. Mweemba, Legal Aid Counsel

For the Respondent: Ms. F. Nyirenda, Assistant Senior State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 124**
2. **Kwezekani Chitalu vs. The People SCZ. No. 43/2014**
3. **Tony Kwimba vs. The People (1982) Z.R. 32**
4. **Khuphe Kafunda vs. The People (2005) Z.R. 31**

Legislation referred to:

1. **The Penal Code Cap 87 of the Laws of Zambia, Section 12A**
2. **The Criminal Procedure Code Cap 88 of the Laws of Zambia, Section 17**

When we heard this appeal, we sat with Mr. Justice Lisimba who has since retired. Therefore, this is a majority judgment.

The appellant was tried and convicted of the offence of murder contrary to Section 200 of the Penal Code by Hon. Madam Justice Makungu and sentenced to the mandatory death penalty.

The brief facts of the case are that the appellant on the 16th October, 2011 while residing at Maheba Refugee Camp ran amok within the Refugee camp and stabbed the deceased and another person who fortunately did not suffer fatal injuries. The matter was reported to the police and they had a tough time apprehending the appellant as he was brandishing a spear and threatening to stab anyone who came near him. The appellant was subsequently charged with the offence of murder which he denied.

The appellant's defence was that on the material day around 17 hours, Kapenda who had bought two bottles of kachasu (a local brew) invited him for a drink. After drinking they left for their homes. On the way, he passed by the house where he had left his spear and as he proceeded, he met the deceased who assaulted him with a stick on the head for no apparent reason. The appellant

stated that the deceased and others attacked him and threw stones at him while calling him a mad man. He stated that at one point as he fled from the mob, he took refuge in a certain house under the bed and the deceased came after him. When he got out from under the bed, the deceased started struggling with him over the spear and that he pushed him with the spear, and he fell. At that point the appellant fled to the police where he was detained, and he was told that he had killed someone. He denied killing the deceased.

The learned trial judge found the appellant guilty as charged and sentenced him to the mandatory death sentence.

The appellant appealed to this court against conviction and sentence. Counsel for the appellant Mr. Mweemba advanced two grounds of appeal. In the first ground of appeal, Counsel contended that the learned trial judge on the facts of this case should have applied her mind to Section 17 of the CPC. Secondly, that the learned trial judge should have found the evidence of drinking as an extenuating circumstance.

It was submitted in relation to ground one that it was the duty of the court to make an order under Section 17 with or without an

application from the defence. It was submitted that there was no evidence that the appellant was a violent man despite the fact that he always carried a spear. That he had never used it on anyone before. Counsel argued that from the evidence of PW1 and other witnesses it was clear that the appellant exhibited abnormal behaviour (that of a mad man) which should have prompted the court to make an order for him to be medically examined as to his condition and state of mind at the time of commission of the offence. Counsel opined that this omission by the trial court rendered the trial a mistrial. It was submitted that in the premises, this Court should quash the conviction and sentence and order a retrial and the appellant should be sent for medical examination to determine the state and condition of his mind at the time of commission of the offence.

In the alternative, we were urged to consider drinking as an extenuating circumstance considering the appellant's evidence where he stated as follows:

> **"Kapenda invited me to go and drink with him where he had bought 2 bottles of kachasu. We started drinking with Kapenda."**

Counsel buttressed his argument by relying on the case of **Jack Chanda and Kennedy Chanda vs. The People**[1] where we held that a failed defence of provocation, evidence of witchcraft and evidence of drinking can amount to extenuating circumstances. Counsel argued that with evidence of drinking the trial court should have followed the holding in **Jack Chanda.**[1] We were urged to quash the death sentence and impose an appropriate sentence taking into account that there was an extenuating circumstance.

In her viva voce response, Ms. Nyirenda the learned Counsel for the State submitted that she supported the conviction. It was submitted that the appellant failed to raise the defence of insanity which defence must be pleaded and proved on a balance of probabilities. In support of this argument Ms. Nyirenda cited the cases of **Kwezekani Chitalu vs. The People**[2] and **Tony Kwimba vs. The People.**[3] She insisted that the appellant cannot be heard to argue that this onus rested on the trial court.

Coming to ground two, Ms. Nyirenda argued that there were no extenuating circumstances in this case. That the appellant's own evidence regarding his alleged drinking was very scanty evidence and it is not clear for how long the appellant had been

drinking. She opined that the case of **Jack Chanda**[1] is not applicable to the case in *casu* on the peculiar circumstances of this case. Counsel urged us to dismiss the appeal for lack of merit.

We have considered the submissions by learned Counsel for the parties. In ground one, which is the main ground of appeal, the issue for our determination in this appeal is whether the learned trial judge erred by not invoking Section 17 of the CPC in view of the evidence before her. Mr. Mweemba's argument is that the trial court after hearing the prosecution evidence should have ordered that the appellant be examined as to his mental condition at the time of commission of the offence. According to the prosecution evidence the appellant always carried a spear, but he never attacked anyone before this incident. However, on this day he ran amok like a mad person. The appellant conceded that on the day in question he carried his spear but denied attacking anyone and alleged that he was attacked by a mob which included the deceased.

In our view, whether the trial court should have invoked Section 17 of the CPC depended on the evidence before it and this is evidence from both parties. Section 17 provides that:

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.

(2) Where an accused person is examined on the order of a court made under subsection (1), a document purporting to be the certificate of the medical officer who carried out the examination shall be receivable in evidence to prove the matters stated therein:

Provided that the court may summon such medical officer to give evidence orally. (Emphasis ours)

In the case in *casu*, while some prosecution witnesses stated that he was running around like a mad man, to the contrary his story was that the deceased and others attacked him since they believed he was mad. In short, the appellant did not put up the defence of insanity or diminished responsibility. In fact, he did not even put up the defence of intoxication or drunkenness. We do not see how the trial court can be blamed for arriving at the conclusion it did as the appellant completely contradicted the evidence of the prosecution.

Generally, it is the duty of the prosecution to prove its case beyond reasonable doubt. However, Section 12A of the Penal Code provides for the defence of diminished responsibility on account of

unsoundness of mind at the time of the commission of the offence. Subsection 3 provides:

> **On a charge of murder, it shall be for the defence to prove the defence of diminished responsibility and the burden of proof shall be on a balance of probabilities.**

In the case of **Khuphe Kafunda vs. The People**[4] we had occasion to pronounce ourselves on the issue of an accused's mental condition at the time of commission of the offence and his mental capacity at the time of trial. We held, *inter alia*, that:

> **2. There is fundamental difference between a decision as to an accused person's mental capacity at the time of the trial and his mental condition at the time of the offence; the one relates to a fair trial, while the other relates to criminal responsibility.**
>
> **3. The onus of establishing unsoundness of mind at the time of the commission of the offence is on the accused.**
>
> **4. Unless an accused is mentally in a condition which enable him to make a proper defence, he will not have a fair trial, and it is in order to protect him that section 160 of the Criminal Procedure Code exist; but where he is able to make a proper defence and the only issue is what was his mental condition at the time of the offence, it is for him to decide what the defence he wishes to put forward and generally how he wishes to defend the matter entirely on the merits, without raising the question of insanity, because this is his privilege.**

Based on our holding above, the onus of establishing unsoundness of mind at the time of the commission of the offence lay squarely on the appellant who was ably represented by Counsel and the trial court was under no obligation to decide for him what defence to advance. We agree with Ms. Nyirenda that Section 17 of the CPC gives the trial court discretion to order an accused to be medically examined at any stage of the proceedings and this must be based on the evidence before it. As we held in **Khupe Kafunda**[4] it was for the appellant to prove that he was of unsound mind at the time of commission of the offence. In this case, the appellant alleged that he was attacked by a mob who included the deceased and he did not allege that at the time, he was of unsound mind. The trial court rejected his story. We agree with Ms. Nyirenda that he cannot now accuse the trial court of failing in its duty to invoke Section 17 of the CPC by ordering that he be sent for medical examination to ascertain his state of mind at the time of commission of the offence. Ground one fails.

Turning to ground two, as argued by Ms. Nyirenda the case of **Jack Chanda**[1] can be distinguished from this case in that the measure of alcohol in that case was common knowledge. However,

in the case in *casu*, we do not know how much alcohol the appellant had taken that day. The impression we get from reading the proceedings is that the appellant and his Counsel took a casual approach in defending this case.

Having considered all the factors herein, the appeal has no merit and it is dismissed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE