IN THE SUPREME COURT OF ZAMBIA **APPEAL No: 206/2012**
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N:

CHARLES SAFELI **APPELLANT**

v.

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Malila, JJS**
On 12th July, 2016 and 7th September, 2016

For the Appellant: Ms. G. Mukulwamutiyo, Senior Legal Aid Counsel, Legal Aid Board.

For the Respondent: Ms. G. Nyalugwe, Principal State Advocate, National Prosecutions Authority.

J U D G M E N T

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Khupe Kafunda v. The People (2005) ZR 31*
2. *Mbaye v. The People (1975) ZR 74*

Legislations referred to:

1. *Section 200 of the Penal Code, chapter 87 of the laws of Zambia*
2. *Sections 160 and 161 of the Criminal Procedure Code*
3. *Mental Disorders Act Cap. 305 of the laws of Zambia*

The appellant, a known marijuana consumer, was tried and convicted by the High Court on one count of murdering his own mother, contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia.

On the fateful day the appellant, probably in a state that can only be imagined, came out of his bedroom and found his grandmother, Susan Mbwili, sitting in the living-room where she used to sleep. Very unusual things began to happen. He demanded for some money from his grandmother to buy dagga. She gave him K3. He protested that the money given was not enough. She, thereupon gave him an additional K10. Apparently unhappy with this further donation to him, the appellant went back into his bedroom and fetched a cooking stick before returning to the living-room where Susan Mbwili was still sitting. Without notice or warning, and out of no provocation whatsoever, the appellant hit Susan Mbwili, twice on the head with the cooking stick. She sustained a cut in the head and bled from the injury inflicted. She screamed for help, prompting the deceased, his mother, to come out of her bedroom and castigate the appellant for injuring his grandmother. The appellant then turned his wrath on to his mother and struck her twice on the

back of her head with the same cooking stick, apparently using the sharper end to inflict injury. The deceased, who had up to the time of the incident been reported to be in salutary health, sustained severe cuts in the head from the assault by the appellant and fell to the ground with blood and other substances gashing out of her fractured skull. She died soon thereafter.

Susan Mbwili, managed to get out of the house and to call for help. A number of people came to the house, some of whom took Susan Mbwili to the clinic where she had her injury sutured. The deceased's body was taken to the mortuary. The appellant was meanwhile arrested and charged for murder. A post-mortem was subsequently conducted on the deceased's body. It confirmed that the deceased had sustained multiple injuries around the head and skull, from which she died.

When the matter came up for plea before the trial court, counsel for the appellant (then accused) applied to court for a medical examination to be conducted on the accused to determine his mental fitness. The learned counsel indicated to the court that he had not, at that stage, spoken to the accused person, but had formed an opinion based on the depositions,

that the accused's state of mind was anything but satisfactory. The trial judge then stood the matter down to enable defence counsel speak with the accused. On resumption of the hearing, the learned defence counsel indicated to the court that he had spoken with the accused person who informed him that he was mentally well and could take plea. The learned defence counsel added that he thought that the accused was "okay" and he could proceed to take plea.

Consequent to the foregoing, the court proceeded to explain the charge to the accused person in English. When called upon to plead, the accused denied the charge. The trial court recorded a plea of not guilty and trial proceeded accordingly.

After hearing the evidence of five prosecution witnesses, including Susan Mbwili, and the appellant having elected to remain silent and not to call any other witnesses in his defence, the learned trial judge was satisfied that the prosecution's case had been proved beyond reasonable doubt. She accordingly convicted the appellant and sentenced him to death.

Discomposed by that judgment, the appellant has appealed on one ground structured as follows:

> **"The learned trial judge misdirected herself in law and in fact when he failed to order that the appellant be taken for mental examination as to his fitness to stand trial and his possible state of mind at the time of commission when there was sufficient indication on the record raising doubt as to his fitness to stand trial."**

The appellant had earlier, in 2013, filed one ground of appeal and heads of argument related thereto. Those are on record. At the hearing of the appeal, Ms. Mukulwamutiyo, learned Senior Legal Aid Counsel for the appellant, to an intent not so clear to us, applied for leave to file a lone ground of appeal and heads of argument out of time, citing challenges that she had in procuring instructions from the appellant, as the chief reason. This was compounded by the fact that she was only furnished with the record of appeal about a fortnight before the hearing. Ms. Nyalugwe, Principal State Advocate on behalf of the respondent, did not object to the application. We thus granted it. Upon perusal of the ground of appeal and the heads of argument filed in court, it occurred to us that both the ground of appeal and the heads of argument filed at the hearing were the

same, word for word, as the ground of appeal and heads of argument already filed in court on the 9th April, 2013.

In those heads of argument in support of the sole ground of appeal, counsel argued that it was a misdirection on the part of the trial judge to fail to order that the appellant be taken for a mental examination to ascertain his fitness to stand trial and to establish also his state of mind at the time of the commission of the offence. According to counsel, there was sufficient indication on the record raising doubt as to the appellant's soundness of mind which should have enlivened the trial judge to make the order in question.

After quoting section 160 of the Criminal Procedure Code, chapter 88 of the laws of Zambia, which provides for the procedure to be followed where, on the trial of a person charged with an offence punishable by death or imprisonment, the question of the possible unsoundness of mind of the accused person arises, the learned counsel submitted that the trial court is mandated in such a case to inquire into such an issue. In the present case, the question was raised by defence counsel and the court had no discretion but to cause an inquiry into the issue.

What the court did instead was to stand the matter down and persuaded defence counsel to consult with the accused. Herein, according to Ms. Mukulwamutiyo, lies the trial court's misdirection.

The learned counsel for the appellant further argued that the trial court was satisfied with the appellant's counsel's statement after consulting the appellant, that he was fit to take plea. The inquiry, according to the learned counsel, should have been conducted by the court in terms of section 160 of the Criminal Procedure Code, and does not begin and end with the accused person who is the subject of the inquiry. The inquiry involves referring the accused person to a medical expert to examine him and a report on the findings of a medical examination rendered to the trial court. Counsel further submitted that the intention of the Legislature in making the inquiry mandatory was to ensure that there is no doubt as to the accused person's soundness of mind and fitness to stand trial. Ms. Mukulwamutiyo quoted a passage from our judgment in **Khupe Kafunda v. The People**[1] as follows:

"There is a 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.

The onus of establishing unsoundness of mind at the time of the commission of the offence is on the accused. 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 exists; 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."

It was the learned counsel's further submission that the appellant was denied a fair trial when the trial court failed to order an inquiry into his fitness to take plea and to stand trial. She fervidly prayed that we uphold the appeal, quash the conviction, set aside the sentence and send the matter for retrial.

In responding to the submissions made on behalf of the appellant, Ms. Nyalugwe, contended that there was no sound basis reflected in the record of appeal upon which the court should have ordered a mental examination of the appellant. The appellant was adequately represented in the trial court by

counsel who made the application for the appellant to be examined. According to the learned Principal State Advocate, an inquiry into the mental state of an accused person cannot be based on mere speculation as the appellant's counsel sought to do before the trial.

In Ms. Nyalugwe's view, there was evidence that the appellant used to smoke dagga, but there is nothing on record to show that his mental state was impaired at the time of the commission of the crime. There was, in effect, no defence to the offence committed by the appellant. A perusal of the record of proceedings, especially the testimony of the appellant's grandmother, reveals that the appellant was in a 'normal' state when the offence was committed. We were urged on this basis, to dismiss the appeal.

In her brief response, Ms. Mukulwamutiyo maintained that there was indeed a sound basis upon which the court ought to have ordered a medical examination. We were referred to the evidence of PW1 in the record of appeal (page 7) as follows:

> **"The accused is my grandson. I know him very well. Charles was normal at the time of the incident. He smokes dagga and he does**

not fear anyone. He did this act deliberately and not as a result of a mental condition."

The learned counsel submitted that it was unsafe to rely on the evidence of PW1 as she was not a medical expert. She prayed that the appeal be upheld.

We have very carefully considered the appellant's grievance against the trial judge. As we understand it, it is not the appellant's desire to raise insanity as a defence or indeed that of intoxication negativing *mens rea*. The appeal is on a purely technical point of procedure where an issue as to possible unfitness to stand trial owing to the state of mind of the accused is raised at plea stage in a trial court.

The relevant provisions of the law respecting the procedure to be followed by a trial court where a question regarding the accused's soundness of mind to take plea or understand judicial proceeding is raised are, as rightly pointed out by counsel for the appellant, to be found in section 160 of the Criminal Procedure Code. We must point out that section 161 of the Criminal Procedure Code is equally relevant. Section 160 provides as follows:

"Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability incapable of making a proper defence, the court shall inquire into and determine such question as soon as it arises."

Section 161 enacts as follows:

"(1) Where a court, in accordance with the provisions of section 160, finds an accused incapable of making a proper defence, it shall enter a plea of "not guilty" if it has not already done so and, to the extent that it has not already done so, it shall hear the evidence of the prosecution and (if any) for the defence.

(2) At the close of such evidence as is mentioned in subsection (1), the court, if it finds that the evidence as it stands:

(a) would, not justify a conviction or a special finding under section 167, shall acquit and discharge the accused; or

(b) would, in the absence of further evidence to the contrary, justify a conviction, or a special finding under section 167, shall order the accused to be detained during the president's pleasure.

(3) An acquittal and discharge under subsection (2) shall be without prejudice to any implementation of the provisions of the Mental Disorders Act, and the High Court may, if it considers in any case that an inquiry under the provisions of section 9 of that Act is desirable, direct that the person

acquitted and discharged be detained and taken before a magistrate for purposes of such an inquiry.

We had occasion in the case of **Mbaye v. The People**[2] to consider the aforesaid provisions of the law and to explain their import. We gave the steps to be followed where the accused's mental condition is in issue as follows:

"(1) The court must immediately inquire into the question and after hearing the psychiatrists' report and any other evidence it may deem relevant, must make a positive determination of the question of the accused's fitness to plead;

(2) if the determination is that the accused is fit to plead then the trial proceeds in the ordinary way, and one of the options open to the defence is to plead insanity at the time of the offence and to ask the court to make a special finding;

(3) if the determination is that the accused is unfit to plead, the trial must still proceed immediately. If at the conclusion of the evidence for the prosecution and, if any, of the evidence for the defence that evidence does not justify either a conviction or a special finding under section 167, the accused must be acquitted and discharged; but if the evidence would justify either a conviction or a special finding no conviction or special finding may be entered but the accused must be detained during the President's pleasure; and

(4) thereafter, if the President on the advice of a medical officer considers that the question of the accused's capacity to make a proper defence should be re-examined he proceeds under section 165 of the Criminal Procedure Code; in other words the President directs that the accused person be brought back before the court for a further inquiry into, and determination of, the question of the accused fitness to plead, and if as a result of that further inquiry the accused is then found fit to plead he is called upon to plead to the charge or information and the trial then commences *denovo.*"

We in the same case, observed that:

> **"the first point which is important to stress is that section 160 imposes a mandatory obligation on the court not only to inquire into the question of the ability of an accused person to make a proper defence, but also to determine that question "as soon as it arises."**

Reverting to the case before us, there is no doubt that the question of the appellant's mental state arose at the instance of the defence just before he took plea. The question is whether the trial court inquired into and determined that question as soon as it arose. Naturally, this demands of us to have clarity as to what form or nature the inquiry by the court as envisioned in section 160 of the Criminal Procedure Code, should take. Ms. Mukulwamutiyo argued, with much verve, that such inquiry as is contemplated in section 160 entails referring the accused

person to a medical expert who, upon due examination of the accused, should generate a report on the mental fitness of the accused person.

Given our observations in **Mbaye v. The People**[2] which we have earlier quoted, it should follow that an inquiry by the court as envisaged in section 160 of the Criminal Procedure Code would entail the receipt and consideration by the trial court of evidence regarding the accused's state of mind. In this regard we would agree with the learned counsel for the appellant that an inquiry cannot begin and end with the accused person's own statement, nor can it be premised solely on the suspicion of non medical experts such as the appellant's learned counsel in the court below.

When the question of the mental state of the appellant was raised, was it dealt with as soon as it arose within the intendment of section 160 of the Criminal Procedure Code? The record of proceeding as set out in the record of appeal records what transpired in the following terms:

"Mr. Mukolwe: We act for the accused and we have an application. From the statements we suspect that the accused may have a mental problem.

We apply for medical examination under section 160 of the CPC.

Ms. Mumba:	**May be before we state our position counsel should state whether he has spoken to his client. His opinion is only suspicion.**
Mr. Mukolwe:	**I have not spoken to my client. My opinion is only based on what I have read from the depositions.**
Ms. Mumba:	**We insist that counsel speaks to the client instead of relying solely on depositions.**
Order:	**Matter stood down to the end of the cause list.**
	Case recalled at 12:20 hours.
Accused:	**Present.**
Mr. Mukolwe:	**I have spoken with the accused. He has informed me that he is okay and that he can take plea. I think that he is okay. He can take plea.**
	[charge explained to accused fully in English language]
	When called upon to plead accused states:
Accused:	**"I understand the charge, I deny the charge."**
Mr. Mukolwe:	**Those are my instructions.**
Court:	**Record a plea of not guilty.**
Order:	**Adjourned to 19th July, 2010 for trial accused remanded in custody."**

To us, it seems the trial judge played no role whatsoever in the whole question of the appellant's mental state other than to stand the matter down. What can be synthesised from this transcript of proceedings in the court below is as follows:

(a) The question of the appellant's mental fitness was raised.

(b) It was not determined by the court at all when it was raised.

(c) The learned counsel for the appellant in the lower court upon further consultation and reflection abandoned, and effectively withdrew the question of the appellant's mental fitness before the court could determine the question in the manner envisaged in section 160 of the Criminal Procedure Code.

In our considered view, when the accused person's mental fitness is raised in a court, there is nothing to stop the court from making incidental clarification from the parties prior to determining, through an inquiry under section 160 of the Criminal Procedure Code, the real question of mental fitness.

The transcript of proceedings in the court below is fairly clear. It was not the court that requested the appellant's counsel

to speak with the appellant. From the record, the prompting came from counsel for the prosecution. In any event, following consultations with the accused person, the appellant's counsel was still entitled to maintain, if he was so minded, the position he had taken earlier, namely, that the mental fitness of the accused person was still an issue to be resolved by the court. He did not, but opted instead to, in effect, inform the court that the question of the appellant's mental state was now a non issue. In this sense, the question was effectively withdrawn before a determination on it was made. There was no longer any question for the court to determine by way of an inquiry under section 160 of the Criminal Procedure Code.

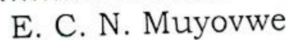
We cannot, in these circumstances, fault the trial court for proceeding as it did.

Turning to the sole authority that was cited by counsel for the appellant, we quite honestly cannot see the relevance to this appeal of the case of **Khupe Kafunda v. The People**[1] relied upon by the appellant's learned counsel. That case related to the distinction between the mental capacity of an accused person at the time of the trial and his mental condition at the time of the

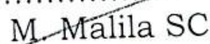
offence. The present appeal questions the procedure adopted when an issue of metal fitness was raised at the commencing of the trial.

Notwithstanding the lucid arguments advanced by the appellant's learned counsel, we think that the present appeal has no merit. We dismiss it accordingly. The death sentence imposed by the trial court shall be served.

....
G. S. Phiri
SUPREME COURT JUDGE



....
E. C. N. Muyovwe
SUPREME COURT JUDGE



....
M. Malila SC
SUPREME COURT JUDGE