

IN THE SUPREME COURT OF ZAMBIA SCZ NO.233, 234/2017
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

CLEMENT MOONGA
JOHN MOONGA



1ST APPELLANT
2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Muyovwe and Chinyama, JJS.

On 5th March, 2019 and on 13th, March, 2019.

For the Appellant: Ms E.I. Banda, Senior Legal Aid Counsel of Legal Aid Board.

For the Respondents: Mrs M. Chipanta-Mwansa, Deputy Chief State Advocate of National Prosecutions Authority.

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Stewart v The People (1973) Z.R. 204*

Statutes referred to:

1. *The Penal Code, Chapter 87, Laws of Zambia, section 294(2)(a).*

2. *The Supreme Court of Zambia Act, Chapter 25, Laws of Zambia, Rule 12.*
3. *The Criminal Procedure Code, Chapter 88, Laws of Zambia, section 305(1).*

The appellants were charged with and convicted of the offence of armed aggravated robbery contrary to **section 294(2)(a)** of the **Penal Code**. The substance of the particulars of offence alleged that the two appellants, on 2nd July 2014 at Chisamba in the Central Province of Zambia, jointly and whilst acting together being armed with an iron bar and a firearm did steal from Francis Grugarn (the correct second name as we understand is Grogan) several properties and that at or immediately before or immediately after the time of such stealing used actual violence to the said Francis Grogan in order to prevent or overcome resistance to the said property from being stolen. The appellants were sentenced to suffer death in a judgment delivered on 19th February, 2015.

At the hearing of the appeal, Mrs. Chipanta – Mwansa drew our attention to a letter, in the record of appeal, dated 28th April, 2015,

under the hand of Mr. Justice J. M. Siavwapa, the trial judge in the High Court at the time, conveying a recommendation to the President of the Republic of Zambia pursuant to **section 305(1)** of the **Criminal Procedure Code** that the death penalty be commuted to that of life imprisonment. The learned judge noted that the property in the case was recovered and no appeal had been lodged (by the date of the letter). The said section states-

305. (1) As soon as conveniently may be after sentence of death has been pronounced by the High Court, if no appeal from the sentence is preferred, or if such appeal is preferred and dismissed, then as soon as conveniently may be thereafter, the presiding Judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

When we asked the learned Deputy Chief State Advocate whether the recommendation has already been acted upon, she showed uncertainty on the issue. Mrs. Banda, however, stated that she had been informed by the prison authorities that in fact the recommendation has been acted upon and the death sentence has been commuted to life imprisonment.

We have perused the record and note that the Notice of Intention to Appeal is dated 16th May, 2017 but was received in the High Court Registry at Kabwe on 17th October, 2017. This was more than two years after the date of judgment and well beyond the time allowed for filing an appeal. The record of appeal does not show that leave to file the appeal out of time in terms of **Rule 12** of the **Supreme Court Rules** had been obtained. The absence of leave to proceed with the appeal renders the appeal incompetent.

We would, however, comment also that **section 305(1)** of the **Criminal Procedure Code** apprehends a situation where no appeal is pending as occurred at the time when the learned judge made the recommendation. After the period within which to appeal has elapsed and a recommendation has been made to the President it should be improper for the convict to institute an appeal as the matter is now within the realm of the Executive to deal with. One reason for deferring the fate of a convict to the Executive under section **305(1)** of the **Criminal Procedure Code** was alluded to by Baron J. P,

constituted as a three member panel sitting at the High Court in the case of **Stewart v The People (1973) Z.R. 204** in the following terms:

The law cannot cater for every conceivable situation; there will always be hard cases it is precisely because the law is not geared to deal with every deserving case that the prerogative of mercy is exercised, and it is only through that channel that the harshness of the present case can be alleviated. We propose to pass the papers in this case to His Excellency the President; we have no doubt that the Advisory Committee on the Prerogative of Mercy will accord the appellant the sympathy he deserves.

It provides means by which convicts found worthy of deserving can be reprieved from suffering capital punishment when circumstances since the letter of recommendation was sent after the period in which to file a Notice of Intention to appeal had expired the appellant could no longer proceed with an appeal unless he had withdrawn the letter before it was acted upon. In other words the letter of recommendation became a bar to any attempt to institute an appeal.

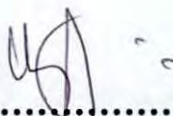
after the expiration of the period of appeal. In these regards the appeal is irregularly before us and we dismiss it.



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G.S. PHIRI
SUPREME COURT JUDGE



.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE



.....
J. CHINYAMA
SUPREME COURT JUDGE