

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 70 OF 2013
(High Court HAA 17 of 2010)

BETWEEN : XIONG SHUI

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Mr. S Sharma for the Appellant
Mr. M Delaney for the Respondent

Date of Hearing : 27 October 2014

Date of Ruling : 4 December 2014

RULING

1. This is an application for extension of time to file an application for leave to appeal.
2. The Applicant had been employed as a cook in a shipping vessel. On 5th December 2008 the Applicant had been on deck together with the deceased and other members of the crew. An incident had occurred between him and the deceased. The deceased had slapped him on the back of the head from behind and the Applicant had responded by turning round and

kicking him and the deceased had punched him on the chin. They had been separated and the situation had calmed down. A short time later the Applicant had picked up a knife and gone towards the deceased. In response the deceased had picked up two knives and had said "let's fight". The situation had been calmed down by another crew member. Later, the Applicant had been seen washing his face. Thereafter he had run towards the deceased with a knife in hand and stabbed the deceased once in the thigh and three times to the left side of the chest. One of the stab wounds proved fatal. The victim had died shortly thereafter.

3. The Applicant was convicted of one count of murder and sentenced to life imprisonment with a non-parole period of 11 years on 6th December 2010.
4. The application of the Applicant dated 24th June 2013 was filed on 1st July 2013.
5. The Legal Aid Commission appearing on behalf of the Appellant filed a notice of motion on 11th June 2014 together with an affidavit of the Applicant and the proposed amended application for leave to appeal and sought an extension of time within which to appeal again conviction.
6. In the affidavit of the Applicant he has deposed that he being a Chinese National, worked as a cook and fisherman in a shipping vessel. That he was represented by a lawyer from the Legal Aid Commission and that after he was sentenced he was left without a lawyer. While in prison after learning English he came to know about his right to appeal and sought assistance from the Legal Aid Commission to file an appeal.
7. The grounds of appeal in the proposed leave to appeal application are:
 - i. That the learned trial Judge erred in law when he misdirected the Assessors about the elements of murder.
 - ii. That the learned trial Judge erred in law and in fact when he directed the Assessors on self defence which was never the defence of the Appellant thereby confusing the Assessors resulting in substantial miscarriage of justice.

8. According to Section 26(1) of the Court of Appeal Act (Cap.12) an application for leave to appeal to the Court of Appeal should be filed within 30 days of the date of decision. The section also provides that the Court of Appeal may extend the time within which such notice may be given at any time.

9. Section 35(1)(b) gives a Single Judge of the Court of Appeal the power to extend the time within which an application for leave to appeal may be given.

10. In the present case, the Appellant's application for leave to appeal has been filed after a lapse of about two and a half years. The reasons for the delay as deposed to by the Appellant in his affidavit have been that he being a Chinese National and not being able to understand English, he was unaware of the procedure regarding appeals and it is only after he came to understand English while in prison that he was able to contact the Legal Aid Commission and take steps to lodge an appeal.

11. The submissions of the Appellant refer to the decision in **Kamlesh Kumar v. State**, Criminal Appeal No.CAV 0001/09(21st August 2012) where it was held that the Appellate Courts should examine the following factors in such applications:

- (i) The length of the delay
- (ii) The reason for the delay
- (iii) Whether there is a ground of merit justifying the Appellate Court's consideration
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?

12. The delay in the present case is about two and a half years and the reasons for the delay have been stated as being unaware of the procedure for appealing due to the Appellant being a Chinese National speaking Mandarin Language and unable to understand and speak in English.

13. Even if the reasons given for the delay were to be acceptable it has to be seen whether there is any merit in the grounds of appeal which justify the consideration of the Appellate Court and whether such grounds would succeed.

Grounds of Appeal

14. The first ground urged on behalf of the Appellant is that the learned trial Judge misdirected the Assessors regarding the elements of murder. The thrust of the submission is that the learned trial Judge had used the word 'deliberate' when directing the Assessors as follows:

"A man is guilty of murder if by his unlawful and deliberate act he kills another and at the time of doing so he either intends to kill that person or cause really serious bodily harm. If it is proved that the Accused intended to cause really serious bodily harm but death in fact results, the offence of murder is committed. It is not disputed in this case that the stab wounds inflicted by the Accused on the deceased caused the death of the deceased."

15. It has been submitted that the learned trial Judge had added another element to the offence of murder which is defined in Section 199 of the Penal Code as an "unlawful act". The learned trial Judge had stated "unlawful and deliberate act" which according to the Appellant's submission is wrong in law.
16. Although the word "deliberate" is not there in Section 199, the question is whether it would cause prejudice to the Applicant. It is a word which can be used to describe the conscious act of the accused and therefore would not cause any prejudice as it was in evidence that the Applicant had stabbed the deceased. Therefore the use of the word 'deliberate' would not cause any prejudice.
17. The Appellant has also submitted that in his summing up that the learned trial Judge has used the words "really serious bodily harm" whereas Section 199 uses the words

“grievous harm” only. Here again the question is whether the use of the words “really serious” along with the words “bodily harm” would cause any prejudice to the Applicant.

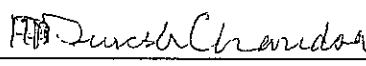
18. In Adriu Volavola v. State Criminal Appeal No.AAU0022of 2002S (5 November 2022) it has been stated that “serious bodily harm” is what “grievous harm” means. The word “grievous” being equated to the word “serious”. Therefore there would have been no prejudice caused to the Applicant as a result of the learned trial Judge using these words in his summing up.
19. Therefore there is no merit in the first ground of appeal.
20. The second ground of appeal is regarding the direction by the learned trial Judge regarding self defence. It was submitted that as a result of the learned trial Judge directing the Assessors on self defence which was not a defence relied on by the Applicant that the Assessors would have been confused. It was submitted further that as a result the effect on the defence of provocation relied upon by the Applicant would have got diluted.
21. It is possible to consider self defence and provocation as defences in the same case depending on the evidence in the case. It is possible that the learned trial Judge, having considered the evidence would have thought that he should place before the Assessors the possible defences even though they were not relied upon by the Accused. The learned trial Judge has in his summing up given a direction on the possible defence of self defence and thereafter directed them on the defence of provocation which are exclusive defences. Giving the directions on self defence would have been advantageous for the Applicant as it is a complete defence.
22. No prejudice would have been caused to the Applicant as a result of the learned trial Judge giving a direction on the possible defence of self defence even though it was not relied upon by the Applicant in the case.

23. Therefore there is no merit in the second ground of appeal.
24. In considering the merits of the appeal to grant an extension of time, the proposed grounds have no merit to grant an extension.
25. On the question of whether any prejudice would be caused if extension is granted, the incident had taken place in 2008 and it is six years since then. The Applicant's submission that no prejudice would be caused if time is extended and a re-trial is ordered, that the witnesses would still be available is not acceptable as it would be uncertain whether the witnesses would be available after such a period of time and as to whether they would be in a position to remember the incident in the way it had occurred in 2008.
26. In the above circumstances extension of time to file an application for leave to appeal is refused.

Orders of Court:

The application for extension of time to file an application for leave to appeal is refused.




Hon. Mr Justice Chandra
RESIDENT JUSTICE OF APPEAL