IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0029 OF 2001S
(High Court Criminal Action No. 3 of 1999S)

BETWEEN:

MOOL CHAND LAL

Appellant

AND:

THE STATE

Respondent

Coram: Eichelbaum, JA
Tompkins, JA
Penlington, JA

Hearing: Thursday 21 August 2003, Suva

Counsel: Appellant in person
Mr. P. Ridgway for the Respondent

Date of Judgment: Tuesday 26 August 2003

JUDGMENT OF THE COURT

In November 1999 the appellant was convicted of murder and sentenced to life imprisonment. When in October 2001 the appellant applied for leave to appeal against sentence, a single judge of this Court dismissed the application on the ground that in murder, there was no right of appeal against sentence. Then in February 2002 the appellant sought leave to appeal against conviction. After conducting a hearing the President (Reddy P) sitting as a single Judge dismissed the application for leave to appeal out of time, concluding that the proposed appeal had no prospect of succeeding.

Following this ruling the appellant, as was his right under s.35(3) of the Court of Appeal Act, asked to have his application determined by the Court.

In this form the matter first came before this Court at the May sittings of this year. In a minute dated 30 May 2003 the Court stated that the appropriate course was for a representative of the Legal Aid Commission to consider the available material in order to make an assessment whether a grant of legal aid to assist the applicant on the application for leave to appeal out of time was appropriate. When the matter was called at the present session of the Court we were supplied with a copy of a letter from the Director of Legal Aid to the appellant dated 17 June 2003 stating that the application for legal aid had been unsuccessful, adding that the decision was based on the Commission's guidelines concerning reasonable prospects of success. The applicant informed us that he had unsuccessfully exercised his right of appeal against that decision. He said he did not have the ability to argue the case on his own behalf, and asked the Court to supply legal assistance. In response to questions from the Court regarding the delay of over 2 years in filing his appeal, he said he had understood his trial lawyer would file an appeal, but on making inquiry found that the lawyer has not done so because no provision had been made for his fees. The applicant said he was unable to afford a lawyer. As noted, after that he had taken steps to pursue an appeal on his own account.

There have been available to us the transcript of the interviews of the applicant together with a transcript of the trial Judge's summing up to the assessors. In brief the facts of the offence were that in the course of a robbery, the applicant hit the victim 3 times with a pinch bar. In evidence the applicant did not deny hitting the deceased with the bar but claimed he did so in the heat of the moment and under provocation. From the material available to us it seems that by the end of the trial, provocation was the only live issue. In dismissing the application for leave to appeal out of time the learned President said the evidence against the appellant was overwhelming. He referred particularly to the applicant's statements under caution.

In a document dated 21 October 2002 the applicant advanced 3 matters in support of his proposed appeal, first lack of evidence of malice aforethought, second that the

defence of provocation should have succeeded and third, existence of a reasonable doubt whether the applicant knew the probability of the consequences of striking the deceased. Under the last heading he complained about the absence of an appropriate direction. As to the first and second headings clearly these were issues of fact for the assessors and the trial Judge to resolve. The assessors unanimously decided them against the applicant and the Judge accepted their conclusions. There is no basis for challenging those findings.

The applicant's third ground seems to have been advanced under a misunderstanding of the prosecution case. The summing up indicates that in regard to malice aforethought, the prosecution relied on s.202(a) of the Penal Code alone, that is an intention to cause death, or to do grievous harm to the victim. There was no occasion, so far as we can see, for giving a direction on s.202(b), to which the applicant's submission related, that is the further alternative open to the prosecution, knowledge that the act causing death would probably cause death or grievous harm, even though accompanied by indifference whether death or grievous harm was caused or not. The evidence of an intent to cause at least grievous harm was indeed overwhelming.

As noted the appeal was well out of time, and the reasons advanced to excuse a delay of this length were unconvincing. However, the applicant's major difficulty is the absence of any tenable ground of appeal. In this respect we have reached the same conclusion as the President and, it seems, the Legal Aid Commission. The proposed appeal has no prospect of succeeding. Accordingly it is not a case where we should consider exercising the power available under s.30 of the Court of Appeal Act, to assign counsel to assist the applicant. The application for leave to appeal out of time is dismissed.

Formal order

Application dismissed.

Eichelbaum, JA

Tompkins, JA

Penlington, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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