IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Pallaras J)
COURT FILE NUMBER:	Criminal Appeal Case No.25 of 2021 (On Appeal from High Court Criminal Case No.47 of 2011)
DATE OF HEARING:	28 JUNE 2022
DATE OF JUDGMENT:	8 JULY 2022
THE COURT:	Goldsbrough P Palmer CJ Hansen JA
PARTIES:	WALTER MANI -V - REGINA
ADVOCATES: APPELLANT: RESPONDENT:	 Hou D Olutimayin R
KEY WORDS	Jurisdiction for Court of Appeal to reopen an appeal procedures to be adopted.
EXTEMPORE/RESERVD	Reserved
ALLOWED/DISMISSED	Dismissed
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JUDGMENT OF THE COURT

1. The appellant was convicted of murder and sentenced to life imprisonment. His appeal to this Court was unsuccessful.

2. The parties to this appeal were offered the choice of a virtual or paper hearing. Presently the borders to the Solomon Islands are closed and the Court of Appeal is thus constrained. In the event the parties chose to have the appeal dealt with by the circulation of papers. We reserved the right to call a virtual hearing should any matter arise on which we sought to ask questions of counsel. No such matters arose.

3. This is an unusual application, being an application for leave to appeal to a differently constituted Court of Appeal. This Court on this application is seized only with the leave application.

4. We also note that Mr Hou, previously the Solomon Islands' Public Defender, is now a lecturer at the University of the South Pacific, Vanuatu, and is advancing this matter pro bono. He is to be commended for this.

5. There is one other, broader, background matter that should properly be mentioned at this stage. Mr Hou obviously has a fervently held belief that the right of appeal to the Privy Council from decisions of the Solomon Islands Court of Appeal still exists. His first unsuccessful attempt to persuade the Privy Council of this was *Bade v The Queen.*[1] The second was this case[2], cited as JCPC Case № 0059/2019 (14 Oct 2020). Both applications were dismissed.

6. This matter has had a long history. The events giving rise to the appellant being charged with murder occurred in June 2010, and he was charged on 9 June. He was tried between 19 August and 21 August 2013 and was convicted on 3 September 2013. His appeal was lodged, and the matter was heard by this Court on 7 May 2014. In a judgment dated 9 May 2014,[3] his appeal against conviction was dismissed. Mr Hou, in his pro bono role, lodged an application for special leave to appeal to the Privy Council as long ago as 2014. The Privy Council briefly noted that this was no more than an

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1 *Bade v The Queen* [2016] UKPC 14.
2 *Mani v The Queen* (Solomon Islands) JCPC 2019/0059.
3 *Mani v R* SICOA-CRAC 25 of 2013 (9 May 2014).

attempt to re-argue their decision in *Bade* and advised Her Majesty to dismiss the appeal which was done on 14 October 2020. This application was then filed in 2021. We have no real information to explain this delay.

7. The events in question occurred in the late afternoon when the deceased and two companions approached a taxi. They had drunk a considerable amount of beer and were intoxicated. They wished to go in the taxi to buy more beer. There is a dispute as to what next occurred, the appellant stating he ordered the men out of the taxi because they were intoxicated. The deceased's two companions said it was because the taxi driver did not want to travel the short distance to the liquor store. Whatever the truth of that, the two companions stood towards the rear of the car, and the deceased became obnoxious and aggressive and kicked the taxi. The appellant got out of his taxi and then returned to it, holding the keys in his hand, and locking the doors. The deceased punched him in the face twice. The appellant's response to the punches was to take an eight inch long knife from a hidden cavity in the car door and to stab the deceased in the chest. The knife penetrated right through the heart, causing death. The Judge noted that the onus lay on the Crown throughout but found they had discharged that onus including in relation to self-defence and provocation that had been relied on by the appellant.

8. The appellant appealed on the grounds, as set out in paragraph 1 of the judgment of the Court:

> 1. The verdict is unsafe or unsatisfactory on the basis that it is unreasonable or it cannot be supported having regard to the evidence and occasioned a miscarriage of justice by reason of the failure of the learned trial judge to take into account the totality of all the circumstances or evidence and relevant inferences open thereto pertaining to provocation.
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> 2. The learned trial judge erred in law in failing to recognise the fact that provocation in pursuance of subsection 204(a) and section 205 of the Penal Code does not require the defendant to have acted from such terror of immediate death or grievous bodily harm as a precondition.

3. The learned trial judge erred in law in holding that there was no provocation since the appellant had the intention because he knew that what he did would probably kill or cause grievous bodily harm.

4. The learned trial judge erred in law and/or in fact in holding that the appellant did not stab the deceased under provocation to reduce the murder conviction down to manslaughter pursuant to sections 204 and 205 of the Penal Code.

With leave, counsel has added another ground:

That the learned judge erred in ruling out excess self-defence or harm in excess of justified harm by failing to direct himself and give any weight to whether the defendant is entitled to use some force at all to repel his assailant (deceased) in self-defence but for the use of excessive force and failed to consider that in such circumstances a conviction of manslaughter pursuant to section 204(b) of the Penal Code is open rather than murder.

9. This Court noted that it was clear the Judge was aware of all three lines of defence, and noted the Judge correctly directed himself on self-defence. This Court went on to say that the finding the accused did not believe he was in imminent danger of death or grievous bodily harm was relevant to both self-defence and the consideration of excess harm relaying to provocation in section 204(b) of the Penal Code. It is unnecessary to set out the relevant passages here in full, but this Court was satisfied as set out in paragraphs 11–15 of the verdict that this meant there was a misdirection in relation to provocation, with both counsel agreeing that was so. This Court found the judge had confused the two paragraphs of s:204 of the Penal Code. At 12 this Court stated:

[12] That was a misdirection and both counsel agree it was incorrect. It confuses the ingredients in section 204. For extenuation to be established under paragraph (b) the evidence must show that the accused was justified in causing some harm to the deceased, that the violence he used exceeded that which was justified but he used that force because he was so terrified of immediate death or grievous harm and that terror actually deprived him of the power of self control at the time he used the excessive force.

10. This Court upheld ground 2 but considered the totality of the evidence and concluded that the Judge's findings on the remaining ingredients of paragraphs (a) and (b) were sufficient to deny the accused the benefit of matters of extenuation on the charge of murder. This Court concluded:

> [25] The first ground of appeal was that the verdict was unsafe and unsatisfactory because it is unreasonable or cannot be supported by the evidence. Despite the judge's misdirection, this was a case where the evidence of the accused's guilt of murder was so overwhelming and the evidence to support the accused's claims of reasonable self-defence, provocation and excess harm so lacking that he could come to no other conclusion.
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> [26] We are satisfied that, apart from the misdirection, the judge clearly applied the right tests and was correct to find that the prosecution had proved that neither provocation nor excess harm were available as extenuation of the offence of murder. The judge's finding on the lack of loss of self-control and the consequent effect on both provocation and excess harm also negates any incorrect effect on the verdict of the misdirection.

Discussion

11. The first point to consider is whether this Court has any jurisdiction to grant leave to reopen an appeal. In the Solomon Islands we are satisfied that an appeal must be authorised by statute. As Dixon J said in *Grierson v The King*:[4]

> Appeal is not a common-law remedy, and proceedings at law are only subject to that remedy by statute (*Attorney-General v Sillem*).[5]

12. Counsel for the respondent has usefully set out the relevant legislation relating to the Court of Appeal at paragraph 12 and following of the submissions. We do not consider it necessary to set out those statutory provisions in full. What they make clear is the Court of Appeal is a creature of statute, and the right to appeal is created by the relevant statutes. (We will return to the point involving section 10 of the Constitution in due course.)

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4 *Grierson v The King* [1938] HCA 45 – 60 CLR 431.
5 *Attorney-General v Sillem* (1864) 2 H. & C. 581, at pp. 608, 609; 159 E.R. 242, at p. 253.

13. Decisions such as *Grierson* hold that a Court of Appeal has no jurisdiction to reopen an appeal that it heard upon the merits and finally determined. What is clear, as the respondent had submitted, is that there are powerful public policy considerations for this that are well known.

14. However, we are satisfied based on authority cited by Mr Hou that there is not an absolute bar and appellate Courts have the jurisdiction to reopen matters in the most exceptional of circumstances. We find it unnecessary to canvas all the authorities relied by Mr Hou.

15. The starting point, and the need for certainty, can be seen in the decision of the House of Lords in *The Ampthill Peerage Case* [1977] AC 547,[6] where Lord Wilberforce at 569A-E:

> English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions

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[6] The Ampthill Peerage Case [1977] AC 547,

to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

16. In the case of *Taylor v Lawrence*, Lord Woolf CJ stated:[7]

> 55. One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. ***What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy.*** The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave. (*our emphasis*)
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> 56. Today, except in a few special cases, there is no right of appeal without permission. The residual jurisdiction which we have been considering, is one which should only be exercised with the permission of this court. Accordingly a party seeking to reopen a decision of this court, whether refusing permission to appeal or dismissing a substantive appeal, must apply in writing for permission to do so. The application will then be considered on paper and only allowed to proceed if after the paper application is considered this court so directs. Unless the court so directs, there will be no right to an oral hearing of the application. The court should exercise strong control over any such application, so as to protect those who are entitled reasonably to believe that the litigation is already at an end.

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[7] *Taylor v Lawrence* [2001] EWCA Civ 119,[2002] EWCA Civ 90.

17. Clearly that case was dealing with questions of bias, but it makes clear that there must be truly exceptional circumstances where it has clearly been established "that a significant injustice has probably occurred and that there is no alternative effective remedy"

18. *Taylor v Lawrence* was a civil case, but we see no reason why the principles should not extend to the criminal jurisdiction. In other jurisdictions there have been, over the years, highly publicised reopened criminal appeals, such as those involving the alleged so-called IRA bombers in the United Kingdom. Almost all such cases involve new material discovered after the trial and appeal process has been exhausted.

19. We would adopt the *Taylor v Lawrence* principles and procedures as appropriate in the Solomons Islands. What is clear, however, is the need to "clearly establish that a significant injustice has probably occurred and that there is no alternative effective remedy".

20. What is required to "clearly establish" will depend on individual cases. In *Taylor v Lawrence* it is clear from the judgment that there was substantial evidence presented to the Court. It is hard to envisage an application of this sort that would not require supporting evidence, although it could be possible. There needs to be evidence so that the other side (the Crown in Criminal proceedings as here) has the proper opportunity to challenge what is putting forward. Without this, the process would be very one-sided.

21. Adopting the approach of *Taylor v Lawrence* means the application would need to be supported by sworn statements, with the opportunity for the other party to respond. Depending on what the papers revealed that may include a hearing and determination of disputed facts.

22. However, it needs to be clear to the legal profession that this would be applicable only in the most truly exceptional cases and is not the opportunity for "another bite of the cherry". It is a significant and high bar to cross. So, we are satisfied that this Court does have that limited jurisdiction to grant the leave that is sought in this case.

23. That brings us to the question of whether or not leave should be granted.

24. In this case there is no evidence. Numerous complaints are made by way of submission, including such matters as counsel's intention if an adjournment had been granted, the pressure of work counsel was under and interchanges with the Judge that would form the basis of a challenge to the verdict. The applicant argues that he was not given a "fair hearing" in contravention of section 10(4) of the Constitution of the Solomon Islands. But there is simply no evidence as to any of these matters making it impossible for the Crown to challenge them.

25. In relation to the matters raised in submissions without evidence, Mr Hou was aware of the appeal being set down in the session, and the normal notice was given We understand from the list Mr Hou had two appeals in the session. That is not an unreasonable burden for the Public Solicitor. In relation to this matter, he was trial counsel and would have been well familiar with all aspects of the trial and the appeal. It is not correct that he did not have the transcript. He already had a transcript but was seeking what he considered was appropriate additional matters that he believed would have been recorded. According to submissions, this transcript would have founded an argument of bias against the trial Judge. Firstly, there is no evidence of a challenge to any inadequacy of the Appeal book. Secondly, there is reference to wanting the transcript relating to exchanges between counsel and the Judge, and we have already noted that Mr Hou was counsel at trial. As experienced counsel, we have no doubt he would have taken a full note. He should have been able on appeal to put the exchanges that concerned him before the Court. Even at this stage we have no idea what the complaint exactly is nor the contents of the purported exchanges. But nowhere is there any material from the applicant, or indeed Mr Hou, that clearly established that a significant injustice has properly occurred. There is nothing to assist us, or to suggest that these matters would have changed the outcome in any way. We are at a loss to understand his reference to agreed statements, which would have been readily available, being produced at trial.

26. All the matters put forward in this application are commonplace appeal points. They could, and should, have been raised at the hearing of the appeal. This appears to be no more than an attempt to relitigate the unsuccessful appeal.

27. To meet the high threshold of the test to grant leave in these exceptional cases, there must be much more than has been put forward in this case simply by way of submission.

The Court of Appeal canvased the evidence and determined that, notwithstanding the misdirection relating to provocation, there was ample evidence to satisfy the Court that the prosecution had proved beyond reasonable doubt that self-defence of provocation should succeed.

28. We set out above paragraphs 25 and 26 of our judgment on the appeal in this case. We have reviewed all the voluminous material put before us which leads us to agree with the conclusions of this Court set out above. There has been no breach of the appellant's constitutional right to a fair trial. All but the adjournment point are matters commonly raised on appeal. The matters could have readily been raised on appeal.

29. We reiterate what we said earlier that this is a limited right to be exercised only in exceptional circumstances. In criminal appeals that will usually require fresh material being discovered after the trial and appeal process has been spent.

30. Leave is refused.

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Goldsbrough

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Palmer CJ

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Hansen JA