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IN THE COURT OF APPEAL
AT SUVA, FIJI ISLANDS

CRIMINAL JURISDICTION

[Criminal Appeal No. AAU002 of 2010]

Before the Acting President of Court of Appeal:

Hon. Mr. Justice John Byrne

BETWEEN : **SHEIK MOHAMMED**
APPELLANT/APPLICANT

AND : **STATE**
RESPONDENT

COUNSEL : **Mr. A. Kholi for the Appellant**
: **Ms S. Puamau for the Respondent**

Date of Hearing
and Submissions : **2nd July 2010**

Date of Ruling : **14th July 2010**

RULING ON APPLICATION FOR LEAVE TO
APPEAL AGAINST CONVICTION AND SENTENCE

- [1] On the 15th of October 2009 after a trial in the High Court at Labasa the applicant was convicted on one count of possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act No. 9 of 2004 and sentenced to 10 years imprisonment.
- [2] A Notice containing Grounds of Appeal was filed and served on the Respondent on the 13th of November 2009.
- [3] On the 1st of April 2010 he applied to Justice of Appeal Priyantha Fernando for bail pending appeal but Judge Fernando quite properly declined to hear the application until such time as the applicant were given leave to appeal against his conviction and sentence. That application is now before me.

THE LAW GOVERNING THIS APPLICATION

- [4] The law governing this application is stated in Section 21 (1)(b) of the Court of Appeal Act as repealed and replaced by Section 2 of the Court of Appeal (Amendment) Decree 1990.
- [5] The amended section states that any person convicted on a trial held before the High Court may appeal to the Court of Appeal seeking leave of that Court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, unless there is a prior certificate from the Trial Judge.
- [6] Leave of this Court is also required under Section 21(1)(c) for an appeal against sentence unless the sentence is one fixed by law.

- [7] Although six grounds of appeal have been filed the applicant for the purposes of this application relies on only one ground namely Ground 4 which reads:

That the Learned Judge erred in law in that:

- (a) he allowed the prosecutor to make an application to declare Mashi Bi as a Hostile witness in front of assessors.*
- (b) That the Learned Judge declared Mashi Bi as hostile witness without allowing the defence the right to make the submissions.*
- (c) Erred in law regarding the procedure in declaring a witness hostile.*

- [8] The applicant submits that the Learned Trial Judge did not follow the correct procedure when he declared hostile a witness for the prosecution without following the proper procedure for such a declaration which is stated by this Court in Armogam v. State (2003) FJCA 32 in a judgment delivered on the 30th of May 2003.
- [9] The Court held that before a witness can be declared hostile in a criminal trial the defence has to be given an opportunity to make submissions before the Judge makes his or her ruling and that the ruling should be recorded with reasons stated for it.
- [10] The Court further held at page 5 of its judgment that before a witness can be declared hostile by the Court the prosecutor must inform the Judge before the assessors that he or she wishes to make an application for a witness to be declared hostile. The Judge should then ask the assessors to retire while he considers the application in the absence of the assessors but in the presence of the accused.
- [11] In the instant case pages 142 to 144 of the Court record which has now been provided to me indicate clearly that the above procedure was not followed.

- [12] The respondent really has no answer to this argument except to say, perhaps with more hope than conviction in paragraph 34 of its submissions, that it is highly unlikely that a Judge of the "Learned Trial Judges", calibre would have made such a fundamental mistake".
- [13] I remind myself that even two of the great Judges of the last century Lord Denning and Lord Diplock were at times over-ruled by an Appellate Court although the occasions were comparatively few.
- [14] In the present case the Prosecutor failed to remind the Judge of *Armogam v. the State*. Had he done so the Judge may well have followed the correct procedure. This of course is only speculation but it illustrates the protection an accused person is given by the Law in a trial.
- [15] I am satisfied that leave to appeal on this ground should be granted to the applicant and accordingly I grant his application.

Dated at Suva this 14th day of July 2010.



John E. Byrne
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JOHN E. BYRNE, Acting President