

BETWEEN SHEM RARUA

Appellant

**A N D THE ELECTORAL COMMISSION OF
THE REPUBLIC OF VANUATU**

Respondent

Coram: **Acting Chief Justice Vincent Lunabek
Mr Justice J Bruce Robertson
Mr Justice John von Doussa
Mr Justice Daniel Fatiaki**

Counsel: **Robert Sugden for the Appellant
George Boar for the Respondent and for the
Attorney-General**

Hearing: **27 September, 1 and 7 October 1999**

Judgment: **7 October 1999**

ORAL JUDGMENT OF ROBERTSON J

I am grateful to my colleague Justice von Doussa for his comprehensive and helpful assessment of the issues in this appeal. I respectfully agree with each of my brother Judges that the appeal must be dismissed but regrettably I am unable to agree entirely with their reasoning.

I am particularly conscious that this will be the first time in the history of the Court of Appeal of Vanuatu that a Judge has dissented but the issue is one of particular

importance. Although I agree with all that has been said about most of the issues I am unable to accept their reasoning with regard to the constitutionality of s 63(2) of the Representation of the People Act (CAP 146).

I agree with the other Judges that Article 53 does not provide a fetter to this Court considering the constitutional issues which arise.

In any country (not least in this Republic) the Constitution is the fundamental law of the land. Where its terms are clear and unambiguous, even if the interpretation of them leads to a conclusion about which there may be a degree of discomfort, in my view a Court has no option but to apply the plain words of the Constitution in any particular case.

The real difference of opinion between my learned colleagues and myself is the meaning to be given to the word "original" in Article 50 of the Constitution.

Article 49(1) of the Constitution provides :

"The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law."

It is clear that a jurisdiction or power conferred by the Constitution is contained in Article 54. It is in the following terms :

"The jurisdiction to hear and determine any question as to whether a person has been validly elected as a member of Parliament, the national Council of Chiefs, and a Local Government Council or whether he has vacated his seat or has become disqualified to hold it shall vest in the Supreme Court."

Article 50 of the Constitution is in these words :

"Parliament shall provide for appeals from the original jurisdiction of the Supreme Court and may provide for appeals from such appellate jurisdiction as it may have to a Court of Appeal which shall be constituted by two or more Judges of the Supreme Court sitting together."

The issue is whether the jurisdiction which is vested in the Supreme Court under Article 54, and which is part of the jurisdiction referred to in Article 49(1), is original jurisdiction for the purposes of Article 50.

Mr Sugden has assisted with a useful analysis of the meaning of the term "original jurisdiction". He has referred particularly to Garner:- A Dictionary of Modern Legal Usage 2nd Ed. which contains the following definition of "original jurisdiction" :

"Jurisdiction to take cognisance of a case at the outset, to try it, and to decide the issues, is usually contrasted with appellate jurisdiction.

He has also referred to Jowitt's Dictionary of English Law 2nd Ed which notes :

"A court is said to have original jurisdiction in a particular matter when that matter can be initiated before it; while a Court is said to have appellate jurisdiction when it can only go into the matter on appeal after it has been adjudicated on by a court of first instance."

I acknowledge and accept the careful and historical analysis undertaken by Justice von Doussa about the traditional jurisdiction of Parliament in western communities with regard to election petitions and the relatively recent move to give Courts jurisdiction in this area. I acknowledge that there are good and sensible policy reasons why a decision may be taken to limit rights of appeal in respect of election petitions.

But none of that in my judgment is sufficient to overcome the clear and unambiguous words of the Constitution of this Republic. Article 50 on its face is clear. There is a duty imposed on Parliament to provide for appeals from the original jurisdiction of the Supreme Court. That must encompass all cases which have begun or had their first judicial consideration in the Supreme Court.

I agree that the election jurisdiction under Article 54 is a special jurisdiction, but it requires a serious violation of the clear words of the Constitution to interpret Article 50 (which is so plainly of general application) to exclude from its ambit an area of jurisdiction and power conferred by the Constitution as anticipated by Article 49.

If the provisions of s 63(2) are accordingly declared to be unconstitutional, the normal provisions with regard to appeal must apply. Although there is no right of appeal specifically legislated for with regard to Election Petitions, the duty has been met in the general law which applies to appeals from the Supreme Court to the Court of Appeal.

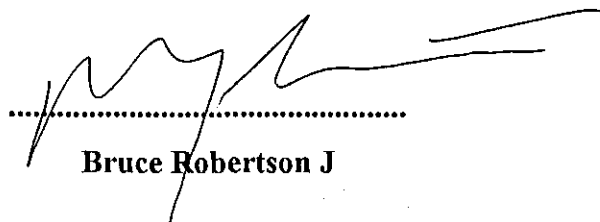
Because I take the view that the Constitution is to be given its full and clear meaning and as the Court is the ultimate guardian of the Constitution the Court must ensure the clearest adherence to its dictates. Accordingly I am unable to accept the line of reasoning which has persuaded my brother Judges that s 63(2) is constitutional.

As indicated previously I concur however in all that has been said on the issue of the outcome of an appeal in this particular case. I would accept the jurisdiction to hear the case but because the petition was (as amply and convincingly demonstrated by Justice von Doussa) fundamentally flawed, the appellant cannot succeed.

The Court being unanimously of the view that the appeal cannot succeed, even if the jurisdiction to hear the case exists, the appeal must be dismissed.

Because of the important constitutional issues which have been raised, Mr Boar for the respondent and on behalf of the Attorney-General, has properly not sought any order as to costs against the appellant.

Dated at Port Vila, this 7th day of October 1999



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Bruce Robertson J