

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL MISC. NO. HAM 186 of 2024**

**BETWEEN** : **THE STATE** **APPLICANT**  
**A N D** : **MOHAMMED SHAHEED KHAN** **RESPONDENT**

**Counsel** : Ms. S. Swastika and Ms. L. Tabuakuro for the  
Applicant.  
: No appearance by the Respondent.  
**Date of Submissions** : 22 July, 2024  
**Date of Ruling** : 22 July, 2024

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**R U L I N G**  
[TRIAL IN ABSENTIA]

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**BACKGROUND INFORMATION**

1. The respondent was charged with another for one count of unlawful importation of illicit drugs contrary to section 4 (1) of the Illicit Drugs Control Act 2004.
2. The respondent pleaded not guilty and after trial in the High Court on 10<sup>th</sup> September, 2015 the respondent was acquitted.

3. On 16<sup>th</sup> September, 2015 the respondent being an Australian citizen left the country for Australia. The state being dissatisfied with the acquittal appealed to the Court of Appeal. During the leave hearing in the Court of Appeal the respondent was represented by counsel. However, before the full bench of the Court of Appeal could hear the substantive appeal leave was granted to the respondent's counsel to withdraw as counsel for the respondent.
4. The Court of Appeal was satisfied that the respondent had voluntarily absented himself from attending court and exercising his right to be heard. In the circumstances, the Court of Appeal proceeded to hear the appeal filed in the absence of the respondent. By judgment dated 28<sup>th</sup> July, 2023 the order of acquittal was set aside and a retrial was ordered.
5. On 13<sup>th</sup> December, 2023 the office of the Director of Public Prosecutions filed a new consolidated information in this court as follows:

#### **Count One**

#### ***Statement of Offence***

**UNLAWFUL IMPORTATION OF ILLICIT DRUG:** Contrary to section 4(1) of the Illicit Drugs Control Act, 2004.

#### ***Particulars of Offence***

**MOHAMMED SHAHEED KHAN** between the 1<sup>st</sup> day of December 2014 and 21<sup>st</sup> day of December 2014 at Lautoka in the Western Division, imported 29.9 kilograms of illicit drugs namely HEROIN without lawful authority.

**Count Two**  
***Statement of Offence***

**UNLAWFUL IMPORT OF ILLICIT DRUG:** Contrary to section 5(b) of the Illicit Drugs Control Act, 2004.

***Particulars of Offence***

**ETHAN KAI** between the 1<sup>st</sup> day of December 2014 and 21<sup>st</sup> day of December 2014 at Lautoka in the Western Division, without lawful authority engaged in dealing with MOHAMMED SHAHEED KHAN for the import of 29.9 kilograms of illicit drugs namely HEROIN.

6. The matter in the High Court was called on numerous occasions and it was only the other accused Mr. Kai who was present in court. There was no appearance by the respondent. On 23<sup>rd</sup> February, 2024 this court with the concurrence of the state counsel and the other accused counsel assigned a hearing date for two weeks from 22<sup>nd</sup> July, 2024.
7. On 16<sup>th</sup> July, 2024 the state counsel filed amended information in the substantive action as follows:

**Count One**  
***Statement of Offence***

**UNLAWFUL IMPORTATION OF ILLICIT DRUGS:** Contrary to section 4(1) of the Illicit Drugs Control Act, 2004.

### ***Particulars of Offence***

**MOHAMMED SHAHEED KHAN & ETHAN KAI** between the 1<sup>st</sup> day of December 2014 and 21<sup>st</sup> day of December 2014 at Lautoka in the Western Division, imported 29.9 kilograms of illicit drugs namely HEROIN without lawful authority.

### **APPLICATION IN THE HIGH COURT**

8. This is the second miscellaneous application filed by the state counsel in respect of the respondent. This application is filed on the day the substantive file is listed for pre-trial conference hearing and trial proper. The first miscellaneous application for a bench warrant against the respondent was dismissed by this court as frivolous and an abuse of court process. The current application is made pursuant to section 14 (2) (h) of the Constitution of the Republic of Fiji. The notice of motion is supported by the affidavit of A/IP Mohammed Shamim sworn on the 22<sup>nd</sup> July, 2024 is seeking the following order:

*a). That the respondent be tried in absentia.*

### **SUBMISSIONS BY THE STATE COUNSEL**

9. The state counsel submitted that when the matter was scheduled for hearing in the Court of Appeal the respondent on 10<sup>th</sup> July, 2023 was in the country as per the respondent's travel history.
10. Counsel further stated that the respondent was aware of the appeal filed against him in the Court of Appeal and he deliberately did not appear to be heard. Counsel is also asking this court to infer the fact that since the

respondent was aware of the appeal he was also aware of the Court of Appeal decision. On this basis counsel is asking this court to allow for a trial in absentia in respect of the respondent. Upon questioning by the court the state counsel stated that the Court of Appeal decision has not been brought to the attention of the respondent.

### **DETERMINATION**

11. Section 14 (2) (h) of the Constitution of the Republic of Fiji states:

*Every person charged with an offence has the right-*

...

*(h) to be present when being tried, unless-*

*(i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; ...*

12. The above provision of the Constitution is specific about the presence of an accused person in the court where he or she will be tried. The only exception is if the court is satisfied that the accused has been served with a summons or similar process but has chosen not to attend.
13. In this case the respondent was served with the information filed and he had gone through due process of a trial. After the trial the respondent was acquitted of the charge. On appeal the order of acquittal was set aside and a retrial ordered. In compliance with the above, on 13<sup>th</sup> December, 2023 the state counsel filed information which has not been served on the respondent.
14. On 16<sup>th</sup> July, 2024 the state filed amended information which has also not been served on the respondent. The state counsel also argued that this court

still has the jurisdiction to proceed with trial in absentia against the respondent even though he has not been served with any information filed in this court.

15. There is no dispute that the respondent was aware of an appeal filed against his acquittal, however, was the respondent aware of the outcome of the appeal. There is nothing before this court in this respect. Furthermore, the filing of fresh information and disclosures in this court means the presumption of innocence and other rights available to an accused is well and truly intact for the respondent.
16. The state cannot rely on the fact that the Court of Appeal had proceeded in absentia in respect of the state's appeal as being sufficient for this court to proceed against the respondent without the respondent being served with the information filed in this court. It is to be noted that the respondent was tried on a separate single count which resulted in his acquittal whereas the amended information now filed is based on joint enterprise between the respondent and another.
17. First and foremost the information filed in this court must be served on the respondent so that he is aware of the allegation against him. There is nothing to show that the respondent has been served. It is too far-fetched to say that this court should proceed on the basis that the respondent was aware of the state appeal in the Court of Appeal and therefore it can be inferred that he is aware of the retrial.
18. The words *to be present when being tried* in section 14 (2) (h) of the Constitution refers to the presence of an accused in the court in which the information or the charge has been filed. The exception uses the words *summons or similar process* includes information filed in the court the accused person is to be tried.

19. The criminal justice system jealously protects the court process including the rights and liberties of either a detainee or an accused person hence it is incumbent upon the prosecuting agency to serve the accused person with the information in this case. The office of the Director of Public Prosecutions is entrusted with the responsibility of fairness and justice which must be upheld at all times.
20. There are no short cuts in the justice system it is mandatory that the respondent be served with the information filed so that he is aware of the allegation raised and can defend the same if he wishes. It will be chaotic to have a system where a prosecuting agency can proceed on the basis of an inference of knowledge on the part of a respondent about the outcome of an appeal without the service of the judgment of the appellate court or information filed in the court where he or she is to be tried.
21. In my considered judgment to avoid injustice and unfairness on an accused person section 14 (2) (h) of the Constitution has been worded in that manner. This is also the reason why in a retrial fresh information and disclosures are filed and served.
22. Once the accused has been served with the information and if he or she fails to attend court, the court upon being satisfied that the person in question has chosen not to attend court proceed in the absence of that person.
23. The law is clear on what needs to be done, this court is not satisfied that the respondent has been served with any information filed in this court for which the respondent is being tried.

**ORDER**

1. The application for a trial in absentia is refused due to lack of merits.



**Sunil Sharma  
Judge**



**At Lautoka**  
22 July, 2024

**Solicitors**

**Office of the Director of Public Prosecutions for the Applicant.  
Respondent not in attendance.**