

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

**CRIMINAL MISC. NO. HAM 175 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** : 16 July, 2024  
**Date of Ruling** : 18 July, 2024

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**R U L I N G**

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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 of the charge.

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 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 dealings 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.

**APPLICATION IN THE HIGH COURT**

7. On 10<sup>th</sup> July, 2024 the state counsel filed a notice of motion supported by the affidavit of A/IP Mohamed Shamim sworn on the same day seeking the following orders:
  - a. *That a bench warrant be issued on the respondent.*
8. 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.

**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 had arrived in the country on 6<sup>th</sup> July, 2023 and departed on 10<sup>th</sup> July, 2023 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 or instruct counsel. On this basis counsel is asking this court to issue a bench warrant against the respondent so that a trial in absentia application can be made.

**DETERMINATION**

11. At the outset it is observed that the affidavit filed in support of the notice of motion is not complete. The facts deposed are only limited to what happened

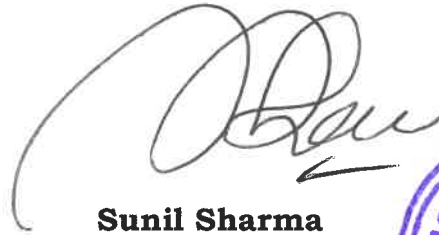
in the Court of Appeal. There is nothing in the affidavit to show to this court about the service of the information filed.

12. It is obvious to this court that the respondent has not been served with any of the information filed after the retrial was ordered does not blend in with the order sought. There is nothing cogent before this court that the respondent is aware of the retrial ordered by the Court of Appeal or about the consolidated information or the amended information now filed in court. The affidavit in support is silent in respect of the above and also about the service of the information on the respondent.
13. Section 14 (2) of the Constitution of the Republic of Fiji provides specific protection to every person charged with an offence namely the right to be informed of the nature of and reasons for the charge, to defend himself or herself and to be present when being tried unless the court is satisfied that the person has been served with a summons or similar process requiring his attendance and has chosen not to attend.
14. Here there is also an amended information filed by the office of the Director of Public Prosecutions which is differently worded than the information on which the respondent was initially tried. It is trite law that an accused person is to be made aware of the allegation raised against him or her. The consolidated information or the amended information filed has not been served on the respondent yet the state counsel is seeking a bench warrant is so unusual that it defies the fundamentals of fairness and justice.
15. On 2<sup>nd</sup> February, 2024 this court was faced with a similar oral application by Mr. Singh and it is after five months a formal application is made when the trial is around the corner.

16. The law is clear on what needs to be done, no one is above the law or exempt from due compliance of the service requirement before a bench warrant can be issued against the respondent.

**ORDER**

1. The application for the issuance of a bench warrant against the respondent is dismissed as frivolous and an abuse of court process.



**Sunil Sharma  
Judge**



**At Lautoka**

18 July, 2024

**Solicitors**

**Office of the Director of Public Prosecutions for the Applicant.**

**Respondent not in attendance.**