



HIGH COURT OF KIRIBATI

Criminal Case N° 16/2019

THE REPUBLIC

v

JINGUI JAMES LU

*Tewia Tawiita for the Republic
Kiata Kabure-Andrewartha for the prisoner*

Date of sentencing: 4 September 2019

SENTENCE

[1] Jingui James Lu has pleaded guilty to failing to declare that he was carrying more than \$5000 cash on departure from Kiribati, contrary to section 115A(2) of the *Proceeds of Crime Act 2003*.

[2] Section 115A provides as follows:

115A Currency reporting when leaving or entering Kiribati

- (1) A person leaving or entering Kiribati with an amount of cash (in any currency) exceeding the equivalent of \$5000 (or such higher amount as may be prescribed by regulation for this section) shall, immediately before leaving or entering Kiribati, as the case may be, declare such amount in the prescribed form to an authorised officer stationed at the port of departure or arrival.
- (2) A person who fails to comply with subsection (1) commits an offence punishable by a fine of \$12,000 or imprisonment for two years, or both.
- (3) Authorised officers shall send all declarations made under subsection (1) to the Financial Intelligence Unit.

[3] On 17 January this year the prisoner was at the Bonriki International Airport. He was departing on a flight to Nadi, Fiji. As part of the departure formalities, the prisoner was required to complete and submit an immigration departure form. The form is in English. As the prisoner has limited fluency in English, he sought the assistance of an immigration officer. One of the questions on the form was as follows:

Are you taking out of Kiribati more than \$5000.00 in Australia (*sic*) or foreign currency equivalent?

- [4] If a person answers the question in the affirmative, they must then complete a border currency declaration form. The prisoner initialled the form next to the word 'No'. He signed the form and gave it to the immigration officer.
- [5] As the prisoner underwent a security check prior to entering the departure lounge, he was found to have in his possession \$19,550 in United States currency.¹ A purse in his bag contained US\$5000, US\$4550 was interleaved between the pages of a diary, and US\$10,000 was inside his jacket pocket. The cash was confiscated and the prisoner left on the flight to Fiji. The money has since been returned to the prisoner.
- [6] An information was filed on 7 June 2019. In addition to the offence under section 115A(2) of the *Proceeds of Crime Act*, the prisoner was also charged with giving false information to a public servant (section 122(a) of the *Penal Code*) and knowingly misleading an immigration officer (section 23(1)(d) of the *Immigration Ordinance*). The prisoner was away from Kiribati at the time the information was filed. He made his first appearance in Court on 9 August. On 23 August counsel for the prisoner informed the Court that her client would plead guilty to count 1 on the information, and prosecution counsel advised that she would not be proceeding on the other counts. Submissions on sentence were heard on 2 September, during which the services of a Mandarin interpreter were provided for the prisoner.
- [7] The prisoner is 57 years of age and is married, with 1 child. He is a naturalised citizen of Kiribati, of Chinese descent. He first came to Kiribati in 1997, and has been residing here permanently since 2002. In partnership with his wife he operates a store (Betio Mini-Market) and a shipping agency (Lu Marine). By all accounts the businesses are successful, generating an after-tax profit in 2018 of roughly \$350,000. The prisoner has no previous convictions.
- [8] It is not unlawful to take cash out of Kiribati; the offence only arises if a person carrying \$5000 or more fails to make the required declaration. Counsel for the prisoner explained that her client was taking the money to his daughter in China, for her school fees and living expenses. It was in a foreign currency because the clients of the shipping agency paid their debts in United States dollars. Due to his limited understanding of English, the prisoner had failed to fully understand the question on the form about any currency he was carrying.
- [9] There is no suggestion that the cash in the prisoner's possession that day was in any way tainted property or the proceeds of crime. As such, I am of the view that his offending does not warrant a custodial sentence. A fine is an appropriate penalty in this case. In determining the amount of the fine, I must

¹ The equivalent of approximately \$27,500 in Australian dollars at the prevailing exchange rate.

have regard for the prisoner's ability to pay.² Does that mean that a court, in dealing with a wealthy offender, should impose a larger fine than it would have had the offender been a person of lesser means? In my view, the answer to that question is 'yes'. The Court should endeavour to fix the amount of the fine so that its impact is proportionately similar. I find support for this proposition from the Tongan Court of Appeal decision in the *Shipping Corporation of Polynesia* case.³ There the Court said as follows:

[T]here is no doubt that the financial position of the company is a relevant factor to take into account in sentencing. In the United Kingdom the *Criminal Justice Act 2003*, section 164, provides for the financial circumstances of a defendant to either increase or decrease the amount of the fine so that a wealthy defendant may pay a larger fine than a poor one. There is no such statutory provision in Tonga but the principle has been generally adopted. Obviously the means of the offender are relevant to the impact that a fine will have. The 5th edition of *Banks on Sentence* at page 556 notes, referring to the Magistrates Court sentencing guidelines in the United Kingdom, that defendants in cases of corporate manslaughter and health and safety offences are frequently companies with huge annual turnovers and the aim should be for any fine to have an equal impact on rich and poor.

- [10] As far as I am aware, the only other matter involving a contravention of section 115A(2) is the case of *Wenjung Yu*.⁴ There the offender failed to declare, on departure from Kiribati, that he was carrying \$4935 in Australian currency and \$4000 in United States currency. As in the present case, there was nothing to suggest that the money was tainted. The offender was an employee and the money was comprised of his wages and terminal pay. He was fined \$500. The Court also ordered that \$1000 of the seized cash be forfeited to the Republic.
- [11] I note here that no application has been made in this case for an order under Part 3 of the *Proceeds of Crime Act*. Without such an application I have no power to make an order for forfeiture or to impose a pecuniary penalty.
- [12] The prisoner has been a frequent international traveller since taking up residence in Kiribati. He would have been required to complete the departure form every time he left the country. While it is unfortunate that the form is not provided in languages other than English, that is not an excuse for the prisoner's failure to appreciate the import of the question.
- [13] As far as mitigating factors are concerned, the prisoner is of previous good character. He pleaded guilty at the earliest possible opportunity.

² *Yang Xueqiang v Republic; Tsai Ching Shan v Republic* [1997] KICA 16, and *Tebuangui Biketi v Republic* [2003] KICA 3.

³ *Shipping Corporation of Polynesia Limited v R* [2011] TOCA 13.

⁴ *Republic v Wenjung Yu* [2013] KHC 14.

- [14] Taking all of the above matters into account, I fine the prisoner \$4000, to be paid no later than 4 October 2019. In default of payment of the fine, the prisoner is to be imprisoned for 1 month.


Lambourne J
Judge of the High Court

