



IN THE SUPREME COURT OF NAURU

AT YAREN
[CRIMINAL JURISDICTION]

Case No. 42 of 2016

IN THE MATTER OF a referral for sentence from
the District Court Case No 30 of 2015 pursuant to
section 161 *Criminal Procedure Act 1972*

Between **THE REPUBLIC OF NAURU**

v.

CHEN JIAN PING

Before: Crulci J

For the Prosecution: F. Lacanivalu
For the Defence: V. Clodumar

Date of the Hearing: 15 August 2016
Date of Judgment: August 2016

Case may be cited as: Republic v Chen

CATCHWORDS

CRIMINAL – Sentence – *Customs Act 2014* – Defrauding Revenue of Customs -
Sentence

BACKGROUND

1. The defendant appeared before District Court on the 17 March 2016 and entered not guilty pleas to two offences contrary to sections 243(a) and 252(1)(a) of the *Customs Act* 2014 ('the Act'). At trial the prosecution called five witnesses.
2. Counsel for the defendant made a submission of 'no case to answer' at the end of the prosecution case, which succeeded in respect of section 243(4)(a) of the *Customs Act* 2014 and the defendant was discharged on that count.
3. In respect of the count contrary to section 252(1)(a) the District Court found that he had a case to answer. The defendant elected to make an unsworn statement. On the 31 March 2016 the Resident Magistrate found the defendant guilty of the offence of defrauding the Revenue of Customs.
4. The matter was transferred to the Supreme Court for sentence pursuant to section 181 of the *Criminal Procedure Act* 1972.
5.

Count One
Statement of Offence (a)
Defrauding the Revenue of Customs contrary to section 252(1)(a) of the
Customs Act 2014
Particulars of the Offence (b)

CHEN JIAN PING between the 15 September 2014 and the 14 October 2014 at Nauru omitted to declare to the Department of Customs and Revenue that he was importing 1009 sleeves of Chinese cigarettes which were dutiable to evade payment of duty on the said cigarettes.
6. The defendant signed the Customs Declaration of Imports (Dutiable) dated 15 September 2014¹ in relation to Airway Bill No. MATCAN000349, Container No. GESU3186491. The Port of Departure is listed as Huangpu, China. Mr Clifton Dabwadauw is listed as the importer/ consignee.
7. The Description of Goods lists: "Type, sanitary napkin, Commodity, all other mixed general goods". Value given as AUD\$12,818.80, at 10% rate of duty, amount to pay \$1,281.90.
8. The declaration on the form reads as follows:

I hereby declare that the particular description and particulars of the goods as stated in this declaration of imports are true and correct in every respect and in accordance with the Nauru Customs Ordinance and Regulations. I also declare that this is a complete statement of all

¹ District Court Exhibit PE1

goods subject to duties of Customs consigned to and delivered to me ex above aircraft and ship.²

9. When the container was inspected by Customs Officers on the 13 October 2015, packed in amongst the boxes of ladies sanitary napkins were 1009 sleeves of cigarettes. No cigarettes were declared Customs Declaration of Imports (Dutiable) dated 15 September 2014.
10. In the defendant's unsworn evidence he stated that initially he was unaware of the existence of any sleeves of cigarettes in the shipment, however on the 28 September 2015 he came to know that there were cigarettes in the container. As a result he made enquiry with Customs and was informed that the tax payable was \$56.60 per carton/sleeve. This would result in duty owing around \$50,000.00.
11. The container was opened by Customs officers and when searching the contents 1009 sleeves of cigarettes were found packed within the declared sanitary items. At this point the defendant made an offer to pay duties owed.
12. The cigarettes have been destroyed.

Relevant statutory provisions of the Act

13. PART 6 - ENTRY AND ACCOUNTING FOR GOODS

Division 1 – Importation of goods

60. Entry of imported goods

- (1) Subject to any order made under section 63, goods that are imported or that are to be imported must be entered by the importer:
 - (a) in a prescribed form and manner (including by electronic means into a computer or other device); and
 - (b) within a prescribed time or any further time as the Chief Collector may allow.
- (2) If an entry required by this section relates to goods that are dutiable under the volume of alcohol present in the goods, the person making the entry must, in the prescribed manner, specify the volume of alcohol.
- (3) A person entering goods under this section must:
 - (a) answer any question asked by a Customs officer with respect to the goods; and
 - (b) on the request of a Customs officer, present the goods to the officer, remove any covering from the goods, unload any conveyance or open any part of it, or open and unpack any package that the officer wishes to examine.

² ibid

- (4) If:
 - (a) default is made in the entry of goods under this section; or
 - (b) the goods are not claimed within a prescribed period, duty becomes due and payable on the goods, and the goods may be sold or otherwise disposed of by the Chief Collector.

14. **61. Provisional entries**

- (1) If the importer:
 - (a) cannot immediately supply the full particulars for making an entry; and
 - (b) makes (by himself or herself or the importer's agent) a declaration to that effect before the Chief Collector or other Customs officer,— the importer or agent must make a provisional entry in the prescribed form.
- (2) A provisional entry, on being passed by the Chief Collector, is warrant for the landing and examination of the goods by the importer.
- (3) The importer of the goods included in a provisional entry:
 - (a) must make a complete entry within 7 days after the passing of that entry or within any further time allowed by the Chief Collector; and
 - (b) if the importer makes default in so doing, the goods may be dealt with by the Chief Collector as if no provisional entry had been made.
- (4) A complete entry of the goods included in a provisional entry must be made in the same manner as if the provisional entry had not been made.

15. **62. Delivery of goods on provisional entry**

- (1) The Chief Collector may, if the Chief Collector thinks fit, deliver goods from the control of the Customs for home consumption pursuant to a provisional entry but only on receiving any security as he or she thinks sufficient to cover the full amount of duty.
- (2) A complete entry of the goods for home consumption must be made by the importer within any time appointed by the Chief Collector.

16. **64. Production of invoice and declaration**

- (1) On the first entry (other than an entry for removal of any goods,) the importer or the importer's agent must:
 - (a) produce to the Chief Collector or other Customs officer the invoice for the goods; and
 - (b) make, and deliver to the Chief Collector or other Customs officer, a declaration in the prescribed form verifying that invoice and setting out the true value for duty purposes of the goods and any other prescribed particulars.
- (2) The Chief Collector may direct, in relation to any class or classes of goods or transactions, that a Customs officer, must retain the invoice so produced, or a legible copy made by carbon or other duplicating process by or on behalf of the seller or consignor of the goods.

- (3) If any failure to produce the invoice as required by this section is accounted for to the satisfaction of the Chief Collector or Customs officer, proof of its contents by a copy or otherwise may be received instead of its production.

17.252. Defrauding the revenue of Customs

- (1) A person commits an offence who does any act or omits to do any act for the purpose of:
- (a) evading, or enabling any other person to evade, payment of duty or full duty on goods; or
 - (b) obtaining or enabling any other person to obtain, money by way of drawback or a refund of duty on goods to which that person or that other person is not entitled under this Act; or
 - (c) conspiring with any other person (whether or not that other person is in the Republic) to defraud the revenue of Customs on goods; or
 - (d) defrauding in any other manner the revenue of Customs on goods.
- (2) A person convicted of an offence under subsection (1) is liable:
- (a) for an individual, to a fine not exceeding \$300,000 or to imprisonment for a term not exceeding 5 years, or both; and
 - (b) for a body corporate, to a fine not exceeding \$500,000; and
 - (c) in either case, to a fine of an amount not exceeding 3 times the value of the goods to which the offence relates, in addition to any penalty imposed under paragraph (a) or (b).

Value of the goods

18. Each sleeve or carton of cigarettes contains 10 packets of cigarettes. Each cigarette packet contains 20 cigarettes. 1009 cartons or sleeves or 10,090 packets of cigarettes were seized. If the defendant had declared the 1009 sleeves of cigarettes the taxable duty payable by him would have been \$56.60 per carton, or \$57,109.40 owed to the Revenue of Customs.
19. In Nauru the retail cost of a packet of cigarettes is approximately \$10 per packet of twenty cigarettes. The defendant paid \$30,000.00 for the cigarettes. The estimated retail value of the cigarettes is \$100,900.00.

Submissions on sentence

20. Counsel for the defendant submitted to the Court that in mitigation the defendant is a 40 year old man, married with two children, and has no previous convictions. The defendant's children live with their grandparents overseas and the defendant tries to visit them once a year.
21. The defendant is the sole breadwinner for the family and supports them through his work at a garage that he co-owns with a friend in the Denig district. Counsel informs that the automotive repair shop is in on land owned by Clifton

Dabaduaw. Mr. Dabaduaw owns the company called Clifton's Imports. As a result of his business the defendant has imported goods from China on many occasions. Prior to this importation he had an agreement with Patrick Imports. The matter subject of this offence was the first time the defendant imported goods via Clifton Imports.

22. After the container was opened and the goods discovered, the defendant offered to declare and pay the duty. Although the defendant was aware of the presence of cigarettes in the container prior to the container being opened he couldn't afford to pay the duty so did not declare their existence. After the presence of the 1009 cartons of cigarettes was discovered the defendant wished to pay the duty by instalments, however he was subsequently arrested and charged for the offence.
23. Counsel submits that the defendant deeply regrets the situation he is now in and is fearful of the impact a heavy fine and possible term of imprisonment will have on his family here and overseas. He pleads on the defendant's behalf that this is not a systematic process of defrauding the Revenue of Customs over a period of time and that the defendant did not fully appreciate the consequences of his actions.
24. Counsel submissions in this regard are in accordance with the Pre-sentence report prepared at the request of the Court by A/Chief Probation Officer Ms. R. Daoe, who states that the defendant:

"...appeared to be truly remorseful of having committed the offence, he appeared to be deeply concerned for his family's wellbeing, seeing as he is the only breadwinner and should he be kept from work there would be no income for them."³
25. The Pre-sentence Report informs the Court of the defendant's working hours being 10:00am to 7:00pm daily and as such a Community Service Order would not be appropriate. The Court has heard from both counsel in relation to the pre-Sentence Report and on the question of time to pay substantial fines. The defendant's average net income per month is \$5,000. He is offering an amount of up to \$3,000 per month to pay off a financial penalty. His approaches for assistance from the company who sent the cigarettes have to date not been successful.
26. Counsel for the defendant further submits that this matter and the other case⁴ heard by the Court on the 15th August 2016 are the first prosecutions of this type in Nauru. Prior to this, defence counsel submits in this case as he did in

³ Pre-sentence Report dated 16 August 2016, at para 4

⁴ *Republic of Nauru v Liu Fu Quang*, 41 of 2016

that one, the practice of Customs was to seize any goods that were not declared and upon payment of duty the goods were released to the consignee.

27. Counsel suggests that this practice alleged may have led heretofore to a certain laxity in completing documentation on behalf of the importers, in particular those whose grasp of the English language may be limited. Counsel states that there are other remedies available to the Controller of Customs, which have been previously used.
28. The cases submitted to the Court in *Republic v Liu Fu Quang*⁵ from other jurisdictions were placed before the Court in this case as a guide for sentencing. The tariff for these extend in range from a fine of two thousand dollars to substantial fines and terms of imprisonment. Counsel for the defendant urged the Court to consider the case of *Comptroller of Customs v Lelua*⁶ as a guide in sentencing the defendant.
29. Counsel for the defendant had initially asked the Court to consider a fine in the region of \$5,000. The goods subject of the charge having been destroyed. The defendant initially sought 30 days to pay such a fine. Subsequent to this matter being heard the Court handed down a decision in *Liu*⁷,, and in light of that decision in counsel has discussed the matter with the defendant and determined that repayment of a doubling of the duty evaded is beyond his means of repayment and in effect would render him as unable to care for his family as a term of imprisonment. Counsel urges the Court in this case to consider a calculation along the lines of 1.25 to 1.5 times the duty evaded.
30. In responding to the prosecution submission for a term of imprisonment defence counsel argues that this would be a harsh and disproportionate sentence taking into account the defendant's personal circumstances with his children overseas and being the sole source of financial support for the wider family. The defendant was found guilty of and convicted of one offence, not a number of offences over an extended period of time.
31. The prosecution highlights that it is the importer who is responsible for the declaration and payment of duty to the Revenue of Customs. The prosecutor emphasises that amount of undeclared goods was extensive - 1009 sleeves of cigarettes. All of which were hidden within boxes packed with ladies sanitary items. Another aggravating feature is that although the defendant became aware of the existence of the cigarettes, he made a determination in full knowledge that duty was owed, not to declare the items. No costs sought.

⁵ Ibid

⁶ *Comptroller of Customs v Lelua* [2015] WSSC 72

⁷ *Republic of Nauru v Liu Fu Quang*, 41 of 2016

32. The defendant is not a first-time importer. The evidence before the Court is that he has completed this process on many occasions. The prosecution draws the Courts attention to the case of *Public Prosecutor v Yao*⁸ in which His Honour Justice Fatiaki laid down guidelines on sentencing such offences based in part on that recommended by the consultation paper on 'Sentencing for Fraud Offences (2007)' in the United Kingdom.

Considerations

33. This Court takes judicial notice that on average six shipments of goods arrive in Nauru each year; each of which has around 300 containers which in the main are twenty feet long; the Customs department has between ten and twelve staff to process imports.
34. The Court is grateful for the comprehensive written and oral submissions made on behalf of the defendant and the prosecutor for offences not previously before the Court. The Court notes that whilst authorities are cited from other jurisdictions such as Australia and New Zealand there is a significant distinction to be made in the Nauruan context in relation to income tax and general revenue-raising. In Nauru there is no tax on wages for Nauruans, so services such as education, medical, transport and other infrastructure have to be funded from revenue raised elsewhere.
35. In relation to the case of *Comptroller of Customs v Lelua*⁹ mentioned above, it can be distinguished from this case in a number of ways. In that matter the two vehicles imported without declaration were ten and fourteen years of age and hence the value and duty payable was low. The container was presented to customs for inspection and the vehicles were not observed, it was only upon attempting to register them that the absence of declaration and duty was realised. The defendant in that matter made an early guilty plea and paid the duty she owed, apologising to Customs. Her goods were seized and forfeited and in her circumstances a low fine was determined as suitable.
36. The Court notes that the Supreme Court case of *Yao* referred to in paragraph 34 above, was heard this year in the Vanuatu Court of Appeal. In his judgement Chief Justice Vincent Lunabek upheld the term of actual imprisonment stating that '*those who defraud the revenue in this way can expect deterrent sentences*'¹⁰. This Court again agrees with and adopts the reasoning expressed by that court in that case in relation to offences of defrauding the revenue.

⁸ *Public Prosecutor v Yao* [2016] VUSC 21

⁹ *Comptroller of Customs v Lelua* [2015] WSSC 72

¹⁰ *Ruiqi Yao v Public Prosecutor* [2016] VUCA 25, at 12

37. In assessing the appropriate sentence and level of gravity of the offence before the court, and in consideration of the general principles referred to above¹¹, this Court will have regard to:
- i. The amount of duty evaded
 - ii. Whether a single offence or systemic offending over time
 - iii. Efforts made to conceal the offence
 - iv. Sophisticated nature of offence
 - v. Were others involved/ corrupted by the offender
 - vi. The personal circumstances of the offender
 - vii. Cooperation by the offender
 - viii. Any amounts recovered
38. The Republic of Nauru is a small island nation and the ratio of containers processed to the number of officers of the Customs department, necessitates heavy reliance upon the honesty of those importing goods. A failure to declare the correct value and pay the duty owed reduces the country's ability to provide services. In addition there is an unfair handicap placed upon honest businesspeople who declare and pay duty as their profit margins would be less than those importers who evade the duty payable.
39. If Customs officers were required to check each and every package on each and every container this would render much of the perishable goods transported unfit for use or sale; and the consequences of the resultant rise in costs for all importers would mean very few people being able to afford to import goods via shipping containers. That would have a direct negative impact on the average Nauruan as the only other avenue for importation is by air.
40. It is the consignee's responsibility to know what is in the container as they are responsible for making the declaration to Customs. The Court notes that section 61 of the Act is a mechanism whereby an importer is able to make a Provisional Entry in terms of section 61 of the Act; in so doing the goods can be landed and examined by the importer prior to a complete entry being made and declaration signed for Customs Declaration of Imports (Dutiable).
41. Deterring people from committing offences of this sort is principal factor in sentencing consideration, and fines need to be of sufficient magnitude to encourage those to pay the correct customs duty rather than taking a risk of not being caught. A system of 'Russian Roulette' where payment is offered only upon discovery of undeclared items is to be strongly discouraged.

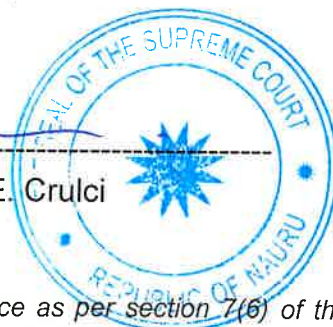
¹¹ Paragraph 32

42. The defendant owed duty in the sum of \$57,109.40 for the 1009 sleeves of cigarettes imported. His counsel argues that the cigarettes have been destroyed; the defendant has already suffered in losing revenue from their sale.
43. The defendant has been found guilty after trial in the District Court of an offence of defrauding the revenue of customs. This Court notes the offence carries significant penalties under section 252(2) of the Act sentences which include terms of imprisonment and substantial financial penalties and 'a fine of an amount not exceeding 3 times the value of the goods to which the offence relates'. This Court is, as was the court in *Yao*¹², of the view that sentences of a deterrent nature are warranted for those who defraud the revenue.

Decision

44. For this offence the Court was minded to impose a term of imprisonment and apply the calculation referred to earlier of doubling the duty evaded. The Court's determination is that merely fining the amount evaded is of little deterrent.
45. Having regard to all that has been said on the defendant's behalf in mitigation by his counsel, and the Pre-Sentence Report prepared by the A/Chief Probation Officer, the defendant will not serve a term of imprisonment but will be released on Probation for a period of two years following the provisions of the *Criminal Justice Act 1999*. In addition the defendant will pay a fine of \$75,000.00, within the next twenty four months.
46. The fine was arrived by doubling the duty evaded, then reducing the amount by a combination of the monies paid for the purchase of the cigarettes and consideration of the defendant's circumstances and means.
47. In addition to complying with the terms of a Probation Order the Court orders that, under the supervision of the Probation Officer, the defendant make regular monthly payments in respect of fine imposed.
48. No order for costs.

Justice J. E. Crulci



Dated this 18 day of August 2016

The Registrar of the Court shall notify the Secretary for Justice as per section 7(6) of the Criminal Justice Act 1999 that a Probation Order has been made in respect of the defendant by the Court.

¹² *Ruiqi Yao v Public Prosecutor* [2016] VUCA 25