



IN THE SUPREME COURT OF NAURU

AT YAREN
[CRIMINAL JURISDICTION]

Case No. 41 of 2016

IN THE MATTER OF a referral for sentence from
the District Court Case No 44 of 2015 pursuant to
section 161 *Criminal Procedure Act 1972*

Between **THE REPUBLIC OF NAURU**

v.

LIU FU QUANG

Before: Crulci J

For the Prosecution: F. Lacanivalu

For the Defence: V. Clodumar

Date of the Hearing: 15 August 2016

Date of Judgment: 16 August 2016

Case may be cited as: Republic v Liu

Medium Neutral Citation: [2016] NRSC 15

CATCHWORDS

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

BACKGROUND

1. The defendant appeared before District Court on the 21 March 2016 and entered not guilty pleas to one count of making a false declaration contrary to section 243 and not guilty to one count of defrauding the revenue of customs contrary to section 252 of the *Customs Act 2014* ('the Act'). At trial the prosecution called seven witnesses and the defendant made an unsworn statement. On the 2 April 2016 the Resident Magistrate found the defendant guilty of both counts.
2. The matter was transferred to the Supreme Court for sentence pursuant to section 181 of the *Criminal Procedure Act 1972*.

3.

Count One

Statement of Offence (a)

Making a False Declaration contrary to section 243(4)(a) and (5)(a) of the *Customs Act 2014*

Particulars of the Offence (b)

LIU FU QUANG trading as **Break of Dawn** on the 16th December 2014 at Nauru made a false declaration under the *Customs Act 2014* in declaring the description and statement of goods in the Customs Declaration of Imports (Dutiable) Form containing only bicycle and other goods which he knew to be false as it also contained 203 sleeves of Chinese cigarettes and no bicycles.

Count Two

Statement of Offence (a)

Defrauding the Revenue of Customs contrary to section 252(1)(a) and (2)(a) of the *Customs Act 2014*

Particulars of the Offence (b)

LIU FU QUANG trading as **Break of Dawn** on the 16th December 2014 at Nauru omitted to declare to the Department of Customs and Revenue that he was importing 203 sleeves of Chinese cigarettes which was to evade payment of duty in the sum of \$11,278.68

4. The defendant and his wife run a retail store called 'Break of Dawn'. They import goods from China and the goods ordered are purchased and packed by the wife's brother in China. The defendant and his wife have resided in Nauru for more than twenty years and in that time have imported goods from China on many occasions.
5. The defendant is the consignee for a Neptune Pacific Line Bill of Lading No. CF40046H1250¹ dated 7 December 2014 relating to Container number

¹ District Court Exhibit PE2

TRHU1524104 2059497, a 20 foot container with 308 packages, transhipped ex Shanghai via Honiara to Nauru.

6. A Sanyu International Limited Commercial Invoice² and Packing List³ both numbered 1408028 and dated 28 August 2014 refer to container number TRHU1524104 and list 'Break of Down, Anabare District, Liu Fu Qiang' as the consignee.
7. The defendant signed the Republic of Nauru Customs Declaration of Imports (Dutiable)⁴, Airway bill No. CF4004BH1250 in relation to container number TRHU1524104 which listed the description of goods as 'Bicycle and All other Goods' value \$15,937.48, with a 10% duty being payable of \$1,593.74. The declaration is signed and dated 16 December 2014.
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 goods subject to duties of Customs consigned to and delivered to me ex above aircraft and ship.⁵
9. When the container was inspected by Customs Officers on the 20 and 21 January 2015 about one-third of the container held undeclared goods, including 203 sleeves of cigarettes. These were secreted in various ways for example inside mini-fridges, folded beds and large buckets. There were no cigarettes declared in the Bill of Lading, Commercial Invoice, Packing List or Customs Declaration of Imports (Dutiable).
10. The cigarettes have been destroyed and the other undeclared items auctioned.

Relevant statutory provisions of the Act

11. 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:

² District Court Exhibit PE4

³ District Court Exhibit PE3

⁴ District Court Exhibit PE1

⁵ *ibid*

- (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.
- (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.

12. **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.

13. **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.

14. **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.

15 **243. Offences in relation to declarations and documents**

- (4) A person commits an offence who:
- (a) makes a false declaration under this Act, knowing it to be false; or
 - (b) produces or delivers to a Customs officer any document that is not genuine, knowing that it is not genuine; or
 - (c) produces or delivers to a Customs officers any document that is erroneous in any material particular, knowing that it is erroneous.
- (5) A person convicted of an offence under subsection (4) is liable:
- (a) for an individual, to a fine not exceeding \$30,000 or to imprisonment for a term not exceeding 6 months, or both;
 - (b) for a body corporate, to a fine not exceeding \$50,000; 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 the penalties under paragraph (a) or (b).

16. **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).

Enquiry made by the Supreme Court

17. Upon its own enquiry, (pursuant to its powers under section 161(2)(a) *Criminal Procedure Act 1972*), this Court took sworn evidence from Principal Customs Officer Brennan Dillon Harris as follows: there are usually six shipments each year to Nauru; shipments average about one every two months depending on the time it takes to unload and any delays due to bad weather; approximately 300 containers, the majority being 20 foot long are offloaded on each occasion; there are 10-12 Customs Officers who clear the shipments; on occasion five to six may be needed to clear a single container.

The witness was unfamiliar with the wording of section 61 of the Act. He agreed with counsel for the defendant that on some occasions in the past importers have been allowed to refile with further declarations and pay for goods.

Value of the goods subject of the offences

18. Each sleeve or carton of cigarettes contains 10 packets of cigarettes. Each cigarette packet contains 20 cigarettes. 203 cartons or sleeves were seized. That is 2,030 packets of cigarettes or 40,600 cigarettes. If the defendant had declared the 203 sleeves of cigarettes the taxable duty payable at \$55.56 per carton, is a sum of \$11,278.68 in duty due to the Revenue of Customs.

19. In Nauru the retail cost of a packet of cigarettes is approximately \$10 per packet of twenty cigarettes. An estimation of the retail value of the cigarettes to the defendant is \$20,300.00

Submissions on Sentence

20. In mitigation counsel for the defendant told the Court that the defendant is a 53 year old married man with three children. The defendant and his wife have lived in Nauru for over 24 years and together run a retail store called 'Break of Dawn'. They have three children who live with their grandparents in China for educational purposes and visit their parents in the school holidays. The defendant and his wife support their children and the grandparents.

21. This is the defendant's first offence. The goods have been seized and either destroyed or disposed of. No benefit from the goods has accrued to the defendant. The defendant and his wife rely on imports from China and use the services of the defendant's brother-in-law to purchase their supplies. These are then sent to a freight-forwarder who packs and ships the consignments to Nauru. It is the defendant's wife who orders the goods and her brother, his brother-in-law, who does the buying. Despite the defendant having been found guilty of both offences in the District Court it is submitted on his behalf that he was unaware that one-third of the container held undeclared goods and that these included 203 sleeves of cigarettes
22. Once the container was opened and the goods discovered, counsel puts to the Court that the evidence of prosecution witnesses in the District Court supports his submissions that the defendant was very upset and appeared to be having a disagreement with his wife.
23. After the discovery of the undeclared good counsel submits that the defendant offered to declare and pay the duty. These are the first prosecutions of this type in Nauru. Prior to this defence counsel submits, 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. This previous practice is what counsel believes lay behind the defendant's offer to pay.
24. Defence counsel opines that this alleged practice 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 used previously.
25. As there have been no previous matters of this nature before the courts in Nauru, cases from other jurisdictions were placed before the Court. The tariff for these extending in range from a fine of a couple of 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.
26. The Court is asked to consider a fine in the region of \$5,000 being the total made up of \$2,000 for count one and \$3,000 for count two. The defendant seeks 30 days to pay the fine. The Court asked to consider six months if the fine is significantly higher.

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

27. When considering the prosecution submission for a term of imprisonment defence counsel argues that this would be a harsh and disproportionate sentence upon a man who is in his fifties, who has no previous convictions, is the supporter of his wider family, and that the allegation is of a single offence, rather than a system of systemic offences over a period of time.
28. The prosecution draws the Court's attention to the fact that it is the importer who is responsible for the declaration and payment of duty to the Revenue of Customs and the District Court has found the defendant guilty on both counts.
29. Not only were the 203 sleeves of cigarettes hidden (inside mini-fridges, folded beds and large buckets) so as not to be seen on a cursory inspection of the container, but one-third of the contents of the container were undeclared. Counsel for the prosecution submits that the way in which the cigarettes were packed points to a level of sophistication and planning which belies lack of knowledge.
30. The defendant is not a first-time importer. The evidence before the Court is that he has completed this process on many occasions. Therefore he cannot plead ignorance as to the procedures and requirements. The prosecution draws the Courts attention to the case of *Public Prosecutor v Yao*⁷ 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. This case also involved the importation of undeclared goods, including cigarettes which were concealed and the court noted that the legislature provides for a trebling of the amount of duty evaded.

Considerations

31. This Court is grateful for the comprehensive written and oral submissions made on behalf of the defendant and the prosecution. This Court notes firstly that when authorities are cited from other jurisdictions such as Australia and New Zealand the distinction is 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.
32. In relation to the case of *Comptroller of Customs v Lelua*⁸ 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

⁷ *Public Prosecutor v Yao* [2016] VUJC 21

⁸ *Comptroller of Customs v Lelua* [2015] WSSC 72

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.

33. The Court notes that the Supreme Court case of *Yao* referred to in paragraph 30 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*'⁹. This Court agrees with and adopts the reasoning expressed by that court in that case in relation to offences of defrauding the revenue.
34. In assessing the appropriate sentence and level of gravity of the offence before the court, and in consideration of the general principles referred to above¹⁰, 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
35. 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. Not to declare the correct value and pay the duty owed reduces the country's ability to provide services; furthermore non-payment of duty gives an unfair advantage to dishonest importers over honest business owners.
36. If Customs officers were required to check each and every package on each and every container not only would this render much of the perishable goods transported unfit for use or sale, but 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.
37. 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

⁹ *Ruiqi Yao v Public Prosecutor* [2016] VUCA 25, at 12

¹⁰ Paragraph 30

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).

38. 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. Any system of 'Russian Roulette' where payment is offered only upon discovery of undeclared item is to be strongly discouraged.
39. The defendant evaded duty in the sum of \$11,278.68 for the 203 sleeves of cigarettes imported. His counsel argues that as the goods have been forfeited and destroyed, the defendant has already suffered in losing revenue from their sale. The way the goods were packed indicates to this Court that they were never intended to be disclosed to Customs.
40. The defendant has been found guilty after trial of two offences before the District Court. This Court notes that both offences carry sentences which include terms of imprisonment and substantial financial penalties. This Court is, as was the court in *Yao*¹¹, of the view sentences of a deterrent nature are warranted for those who defraud the revenue.

Decision

41. Taking all the circumstances into account and cognisant of the sentencing principles discussed above, this Court sentences as follows: for count one the defendant is sentenced to six months imprisonment; for count two the defendant is sentenced to a fine of twenty-two thousand five hundred dollars (\$22,500). This amount is twice the duty evaded.
42. Mindful of the strong mitigation put on behalf of his client in relation to a term of imprisonment the Court orders that in all the circumstances of this case it will suspend the whole of the term of imprisonment for a period of twelve months in accordance with the provisions of section 656 of the *Criminal Code* 1899.
43. The term of six months imprisonment be wholly suspended for a period of twelve months if:
 - (a) The defendant enters into a recognisance in the sum of ten thousand dollars (\$10,000.00); and
 - (b) The defendant is of good behaviour from the date of this sentence for twelve months; and

¹¹ Ibid

- (c) The defendant does not during the twelve month period do or omit to do any act whereby the recognisance would become liable to be forfeited under the provisions of section 656 *Criminal Code* 1899; and
- (d) The defendant must at least once in every three month period during the twelve months recognisance report his address and occupation to the principal officer at the Yaren police station.

44. If the defendant fails to comply with the recognisance and is brought before the court for any of the matters under the provisions of section 656 *Criminal Code* 1899, he is liable to forfeit the recognisance and may be committed to prison to serve his original sentence six months imprisonment.

45. This sentence ^{sends} is ~~as~~ a strong message to the community that such offending will likely attract punishments that outweigh the duty payable, serving as a deterrent to the offender and others from committing similar offences.

Order

46. On Count One the defendant is sentenced to six months imprisonment wholly suspended for a period of twelve months on his own recognisance of \$10,000.00.
47. On Count Two the defendant is fined the sum of twenty-two thousand five hundred dollars (\$22,500) to be paid within six months of today's date 16 August 2016.

Justice J. E. Crulci

Dated this 16th day of August 2016

