

In the District Court of Nauru Criminal Case No. 30 of 2015
Criminal Jurisdiction

Republic

V

Chen Jian Ping

Date of hearing: 17, 18, 19, 21, 23 and 24 March 2016

Date of Judgment: 31st March 2016

Mr. Livai Sovau for the Republic

Mr. Vinci Clodumar for the defendant

JUDGEMENT

1. The defendant is charged with 1 count of making a false declaration contrary to section 243(4) (a) of the Customs Act 2014. Section 243(4) (a) of the Customs Act 2014 reads:

*"A person commits an offence who...makes a false declaration under this Act knowing it to be false"*¹

The particulars of the offence charged read:

*"Chen Jian Ping between the 15 September 2015 and 14 October 2015 at Nauru made a false declaration under the Customs Act 2014 in declaring the description and statement of goods in Bill of Lading No. MATCAN 00349 from China containing only sanitary napkins, commodity and other mixed general goods which he knew to be false as it contained 1009 sleeves of Chinese cigarettes"*²

2. The defendant is also charged with 1 count of defrauding the revenue of customs contrary to section 252(1) (a) of the Customs Act 2014. Section 252(1) (a) of the Customs Act 2014 reads:

¹ Section 243(4)(a) of the Customs Act 2014

² Particulars of the offence charged as contained in the charge filed with the court on the 15 October 2015

*"A person commits an offence who does any act or omits to do any act for the purpose of...evading or enabling any other person to evade, payment of duty or full duty on goods"*³

The particulars of the offence charged read:

*"Chen Jian Ping between the 15 September 2015 and 14 October 2015 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"*⁴

3. Following the close of the prosecution case the court found that the defendant has no case to answer in respect of the charge count one regarding the charge of making a false declaration contrary to section 243(4)(a) of the Customs Act 2014. The court found that the defendant had a case to answer for the charge of defrauding the revenue of customs contrary to section 252(1)(a) of the Customs Act 2014.

Prosecution Case

4. The evidence presented by the prosecution in this matter comprised the following:-
 - i) Customs declaration of imports(dutiable) form signed by the defendant on the 15 September 2015⁵
 - ii) Bill of lading no. MATCN003494⁶
 - iii) Commercial invoice numbers 15006161,15006162,15006163,15006164 and 15006165 all dated 6 June 2015⁷
 - iv) Commercial invoice numbers 15006166 dated 16 June 2015⁸ pertaining to the 1009 sleeves of cigarettes.
 - v) The audio recording of the interview between Mr. Richard Brenan, with Mr. Asterio Appi as the interpreter and the defendant on the 14 October 2015 was admitted by the court with the court noting that

³ Section 252(1)(a) of the Customs Act 2014

⁴ Particulars of the offence of the charge as filed with the court on the 19 March 2016

⁵ Exhibit PE1

⁶ Exhibit PE2

⁷ Exhibit PE3

⁸ Exhibit PE4

it will give what weight it can to the contents of the interview as part of the evidence.⁹

5. The prosecution also called five witnesses and closed its case.

The audio recording of the interview between the defendant, Mr. Richard Brenan on the 14 October 2015.

6. I have listened to the audio recording. It is not disputed that the interview was conducted by Mr. Richard Brenan with Mr. Asterio Appi as interpreter. It is also not disputed that at least three languages have been interchangeably used during the course of the recorded interview. The three Languages are English, Chinese Mandorin, Nauruan, pidgin (broken English used to communicate with members of the Chinese Community in Nauru).
7. The prosecution has not provided the court with a certified transcription and translation of the content of the audio recording. It is not for this court to go out of its own way to find someone to transcribe and translate the contents of the audio recording which is a prosecution document. The duty is on the prosecution to have the transcription and translation of the contents of the audio recording done, certified and presented to the court. I attach no weight to the contents of the audio recording for the simple reason that I do not speak Chinese Mandorin, Nauruan or Nauruan pidgin. But even if I do speak any of these languages, the Language of the court in this jurisdiction is English and Nauruan. It would have been obvious to the prosecution that the magistrate, the prosecutor and the defense counsel do not speak Chinese Mandorin. It is therefore not open to this court to only take into account the parts that are spoken in English and ignore the parts that are spoken in Nauruan, Chinese Mandorin and Nauruan pidgin. To be able to understand the whole context of the audio recording of the interview, one must be able to understand the whole of the conversation. I attach no weight to the contents of the audio recording of the interview between Mr. Brenan and the defendant with Mr. Asterio Appi as the interpreter on the 14 October 2015.

⁹ Exhibit PE5

Facts not disputed

8. The following facts as presented by the prosecution are not disputed.

- i) Bill of lading no. MATCAN00349 shows that the goods were loaded from on vessel XIE Hang 908 V150619 on 21st June 2015. On the bill of lading the freight was prepaid and therefore the 1009 cigarettes the subject of the charge against the defendant would have been loaded and shipped on 21 June 2015. The 1009 sleeves of cigarettes the subject of the charge against the defendant were not listed in the column for description of packages and goods in the bill of lading. Commercial invoice numbers 15006161, 15006162, 15006163, 15006164 and 15006165¹⁰ were presented by the defendant to the customs department with the Bill of lading¹¹ when he signed the Customs declaration of imports (dutiabale) on 15 September 2015. No cigarettes were declared in the said declaration by the defendant.
- ii) The named importer in the bill of lading, commercial invoices and customs declaration form is Mr. Clifton Dabwadauw as proprietor of Clifton's Import Denig District Republic of Nauru. Mr. Clifton Dabwadauw's evidence that his name and the name of his company Clifton's Imports have been used as a conduit by the defendant to import the goods is not disputed by the defendant.
- iii) Ms. Chantel Bill's evidence is that she attended to the defendant on the 15 September 2015 when he signed the customs declaration of imports dutiabile form and she asked him if he was importing cigarettes or alcohol and he said no.
- iv) The cigarettes were packed in boxes of ladies sanitary napkins in such a way that the said 1009 sleeves of cigarettes were amongst the ladies sanitary napkins in the boxes of sanitary napkins.

¹⁰ Exhibit PE3

¹¹ Exhibit PE2

- v) 1009 sleeves of cigarettes not declared were amongst the goods in container number: GESU: 3186491 containing the goods imported by the defendant.
- vi) Container No. GESU3186491, containing the goods imported by the defendant was opened and inspected on the 13 October 2015. 1009 sleeves of cigarettes not declared were found in the said container by customs officers who opened and conducted the inspections. On the 14 October 2015, the defendant went to Ms. Bill with commercial invoice no. 15006166 dated 16 June 2015, and attempted to have the 1009 sleeves of cigarettes declared but Ms. Bill referred the defendant to the Deputy Secretary for customs Mr. Richard Brennan.

Analysis of the prosecution case

- 9. The upshot of the evidence presented by the prosecution is that the defendant omitted to declare to the customs department that he was importing 1009 sleeves of cigarette which are dutiable goods.

The defense case

- 10. The defendant made an unsworn statement from the dock and called evidence. The defendant said that he is only working in Nauru as an agent for a company in China. The Chinese Company is the owner who decides what to order and his job is just to receive the goods. The defendant said that on the 15 September 2015 when he received the invoice note from China, there was no invoice for cigarettes. The defendant further said that on the 28 September 2015 he knew there were cigarettes in the container. After that he went to check how much tax was going to be imposed and it came to \$56.50 per carton so he contacted his company in China and informed them that the duty is about \$50,000.00 plus and further told the company that as long as the container is not opened that it would be fine but the other goods in the container which include food and oil that can't last long urging them to give advice. The company did not give advice so he suggested to the Chinese Company to reject the cigarette. The defendant further said that on 13 October 2015, the Deputy Secretary for customs Mr. Brennan informed him that there were solutions to the cigarettes meaning that he can pay duty by installment and remove a

certain number of cigarettes at a time. He said that on the 14 October 2015 he was supposed to discuss all these with Mr. Brennan when he went to the customs office but he had no idea why he ended up at the police station.

11. Ms. Liang Bijiao gave evidence for the defence. Her evidence is in relation to exhibit DE1. She said that she received an email on behalf of the defendant from a Mr. Jiangmen Kamei in China. She said the email was sent to her on 28 September 2015 at 8:44pm and she received the email on about 12:44pm Nauru time on 29 September 2015. It was late so she told the defendant the next day that she had received the email but it took her another few days to give the email to the defendant because of problems with internet connections and that she was too busy with other things and she did not realize the importance of the email to the defendant. She is unable to recall when she gave the email to the defendant.

12. On the evidence on or about the 28 of September the defendant knew that he had an email regarding the cigarettes.

Exhibit DE 1

13. Exhibit De 1 is the email received by Ms. Bijiao on behalf of the defendant. It has 3 separate commercial invoices bearing the same invoice number 15006166 and dated 16 June 2015 and identifying container number: GESU3186491 but each containing different quantity of cigarettes but with no purchase price being quoted for the said cigarettes. This includes exhibit PE4 attached to email which the defendant presented to the customs department on the 14 October 2015.

14. There is no explanation from the defendant why 3 commercial invoices bearing the same invoice number, date and quoting the container number: GESU3186491 containing the 1009 sleeves of cigarettes not declared and the goods imported by the defendant but bearing different quantities of cigarettes with no values quoted.

Assessment of the defense case

15. The defendant said he was just acting as agent and his job is therefore to just receive the goods. The owner of the company in China for which he acts as agent makes the orders and sends the goods. The defendant has not told the court of the name of the company in China. Secondly in terms of the documentary evidence, it is clear that the named importer is Clifton's importer and the proprietor is Mr. Clifton Dabawadau whose uncontested evidence is that the defendant had used his name and the name of his company Clifton Dabwadau was used as a conduit to order the said goods. If as he says he is only acting as an agent, why would he need to use Clifton Dabwadau's name and Company name to import the goods? Nothing was put to Mr. Dabwadau during cross-examination that Clifton's import is an agent in Nauru for any company in China.

Burden of proof

16. Section 286(1) of the Customs Act 2014 deals with the burden of proof and it reads:

"In any proceedings under this Act instituted by or on behalf of or against the Republic, an allegation made on behalf of the Republic in a statement of claim, statement of defence, plea or information, is presumed to be true unless the contrary is proved, if the allegations relates to: (a) the identity or nature of goods; or (b) the value of any goods for duty; (c) the country or time of exportation of goods; or (d) the place of manufacture, production or origin of any goods; or (f) the payment of duty on goods;"¹²

Section 286(2) of the Customs Act 2014 reads:

"The presumption in (1) is not excluded by the fact that evidence is produced on behalf of the Republic in support of the allegations"¹³

Section 286(3) of the Customs Act 2014 reads:

"This section extends and applies to proceedings in which the existence of intent to defraud the revenue of the Republic is in issue"¹⁴

¹² Section 286 (1) of the Customs Act 2014

¹³ Section 286(2) of the Customs Act 2014

Section 286(4) of the Customs Act 2014 reads:

*"Despite subsections (1) to (3), in any proceedings for an offence against this Act if it is alleged that the defendant intended to commit the offence, the prosecution has the burden of proving that intent beyond reasonable doubt"*¹⁵

17. In discussing the burden of proof, Datuk Dr. Hj. Hamid Sultan Bin Abu Backer observed:

*"As a general rule, 'proof' must be adduced through oral or documentary evidence. It may also be established by conduct or statutory presumption or provisions such as judicial notice or admitted facts"*¹⁶

18. The effect of the provision of section 286(1)(2)(3) of the Customs Act 2014 would be that issues in relation to the identity of nature of goods, the value of any goods for duty, the country or time of exportation of goods; the fact or time of exportation of goods; or the place or manufacture, or production of any goods, or the payment of any duty on goods the presumption by law is that as long as these allegations are made on behalf of the Republic the law presumes that it is true unless the contrary is proved.

19. In this case before me the fact that 1009 sleeves of cigarettes were imported by the defendant and not declared is not in dispute. The only issue for this court to determine is whether or not by omitting to declare the said 1009 sleeves of cigarettes the defendant did so for the purpose of evading the payment of duty or full duty on the goods.

20. On or about the 28 September 2015 the defendant knew there were cigarettes in the said container. He did go to the customs to check on how much the duty will cost. He himself gave evidence that upon checking on how much the duty will cost him he found out that it was about \$50,000.00 plus. In his own unsworn statement he said he went to check for the duty payable on the cigarettes. At

¹⁴ Section 286(3) of the Customs Act 2014

¹⁵ Section 286(4) of the Customs Act 2014

¹⁶ Datuk Dr. Hj. Hamid Sultan Bin Abu Backer, *The Law on Evidence*, revised by Dato Mah Weng Kwai, 4th edition. 2014 at page 106

that time he went to check for the duties payable he had the opportunity to declare the said goods. He chose not to do so. He only made the attempt to declare and produce exhibit PE4 to the Customs department after the said container was opened on the 1009 sleeves of cigarette were found. I have heard the defendant gave his sworn statement from the dock. Everything he said shows that he is a business man who knew what he was doing. His claim that he was only acting as an agent contradicts his signing of the declaration form, and using Clifton's Imports as a conduit to import the said cigarettes.

21. Based on the evidence as presented in the circumstances of this case, the only reasonable conclusion to draw is that the defendant omitted to declare the 1009 sleeves of cigarettes to evade payment of duty for the said cigarettes. I find that the prosecution has proven its case beyond reasonable doubt. I find the defendant guilty of defrauding the revenue of customs.

Dated this 31st day of March 2016



Emma Garo
Resident Magistrate

