IN THE SUPREME COURT OF NAURU

Criminal Appeal No. 8/1999

Chen Feng Qun Appellant

and

Director of Public Prosecutions Respondent

Criminal Appeal No. 9/1999

Xu Chen Pao Appellant

and

Director of Public Prosecutions Respondent

P. MacSporran for Appellants

Director for Public Prosecutions for Respondent

Appeal conducted by written submissions in accordance with orders of Supreme Court dated 31 July 2002 and 10 December 2002.

Decision of Connell C.J.

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1. Both these appeals have a common base. They arise from judgments in the District Court of Nauru of the then Magistrate, G. L. Chopra, under which the Appellants were found guilty of offences under section 204 of the Criminal Code, and section 100 of the Customs Ordinance both read with Customs Proclamation No. 1. The Court has accepted, pursuant to section 6(5) of the Appeals Act 1972-74 that the Appeals are to be heard together.

2. Upon the application of the Appellants and with the consent of the then Acting Director of Public Prosecutions, I allowed the Appeal to proceed by way of written submission based on the grounds of appeal filed by the Appellants on 16 April 1999. (See my order dated 31 July 2002).

3. In the course of the hearing before the Magistrate, there was an appeal by the defendants to the Supreme Court on a Constitutional question which was the subject of a judgment by Dillon J. dated 16 December 1998 which resulted in the matter being returned to the Magistrate for the completion of the trials.

4. The cases have been a long time in reaching this stage of final judgment, in the course of which, there has been a change of counsel and have been handled or not, as the case may be, by many from the

prosecution until the arrival of the present Director of Public Prosecutions.

5. The Court now has before it –

1. A submission on behalf of the Appellants dated August 16, 2002
2. A submission in reply by the Respondent dated October 23, 2002
3. A reply by Appellants to the submission of Respondent dated November 14, 2002
4. A further reply by the Respondent to the Appellants reply dated January 2, 2003

Nature of Appeal

6. The Appeal under S.35(1) Appeals Act 1972-1974 is by way of re-hearing and, as such, it is not a hearing de novo. An Appeal by way of a rehearing is to be distinguished from an appeal in the strict sense. In this latter case, the appellate court cannot receive further evidence and its function is to determine whether the decision was right or wrong on the evidence and the law as it stood when that decision was given. However, in the case of an appeal by way of re-hearing, the appeal court may receive further evidence, and is conducted by reference to the evidence given at first instance. But a de novo hearing is where the Appeal Court hears the matter afresh and the decision is given on the evidence presented at that hearing. (Coal and Allied Operations v

Australian Industrial Relations Commission 174 A.L.R. 585 at 590 (H.C.).

7. These distinctions necessarily have a marked effect on the manner in which an appellate body undertakes its work.

8. It is clear from the Appeals Act 1972-74 that the Nauru Supreme Court acting as an appellate court is concerned with the correction of error. An appellate hearing de novo, however, may exercise its powers whether or not there was error at first instance. The appeal in this court is by way of rehearing on the evidence before the District Court and on such further evidence as the Court admits pursuant to a statutory power so to do (See Sect. 17(1) Appeals Act 1972-74).

9. The Respondent, the Director of Public Prosecutions, also alludes to the question of estoppel by judgment arising from the earlier Supreme Court appeal. To what extent, has the earlier judgment on appeal estopped the appellants? Essentially issues that were litigated upon appeal and determined cannot be the subject of further appeal to the same court. It is one of the submissions of the Respondent that the issues on appeal were canvassed in the Supreme Court previously and dealt with in the judgment of Dillon J., dated 16 December 1998.

10. But, what was the nature of the earlier appeal? The then counsel for the Appellants, part way through the hearing in the District Court, made an application seeking an adjournment pursuant to proviso three of section 38 of the Courts Act 1972 that as a question involving the interpretation or effect of the Constitution had arisen, the matter involving that question should be transferred to the Supreme Court for its determination. He had alleged that the matter before the District Court infringed Article 8 of the Constitution, which provides protection from deprivation of property. He was granted an order by the District Court to pursue this matter before the Supreme Court. Counsel for the Accused, before the Supreme Court raised four issues in support of his contention, none of which met with favour in the Supreme Court. Dillon J. held that the reference to the Supreme Court under S.38 of the Courts Act 1972 was misconceived, and he added 'Mr. Audoa's clients are still protected by the normal appeal provisions if there should be any future challenge to the procedure at the trial or the penalties if in fact any are imposed' (page 3). The matter was then sent back to the District Court for the completion of the trials.

11. However, besides the judgment, Dillon J. later, on 23 December 1998, distributed a Minute to both the Resident Magistrate, conducting the trial, and both to counsel for the Republic, the Director of Public Prosecutions, and the accused in explanation of his judgment and to provide assistance to all parties. In submissions to the Court, the

respondent puts some store on this Minute while the appellants submit that the Minute was simply a note to counsel and not a part of the court record of trial and that the Respondent has no right to make reference to it. In my view, the Minute constitutes directions by the Appeal court both to the Magistrate and to Counsel as to the future conduct of the trial. The mention in the Minute of the Proclamation goes no further than to state that the submission that the Proclamation was ultra vires because it breached Article 8 of the Constitution had no substance. Such a finding does not prevent an appeal, following the judgment of the Magistrate, on other issues not involving the Constitutional issue regarding the Proclamation. I regard the Minute, even if unusual, as supplementary to the decision of the Court on appeal and part of the record.

Sentences under Magistrate's Order dated 8 April, 1999

12. Criminal Case No. 77/98 - Chen Feng Qun

1. Under S.204 Criminal Code read with Customs Proclamation No. 1 — Fine $1000
2. Under S.100 Customs Ordinance Read with Customs Proclamation No. 1 — Fine $100

In addition currency amount $31,400 (being In excess of $1000 legally permitted) shall be

Confiscated to the Republic under Clause c of the Proclamation

Court costs $100

Criminal Case No. 78/98 – Xu Chen Pao

1. Under S.204 Criminal Code read With Customs Proclamation No.1 Fine $1000
2. Under S.100 Customs Ordinance Read with Customs Proclamation No. 1 Fine $100

In addition currency amount $18,940 (being in excess of $1000 legally permitted) shall be confiscated to the Republic under Clause C of the Proclamation

Court Costs $100

The Proclamation

/3. Customs Proclamation No. 1 was made by the President on 29 May 1996 pursuant to powers granted him under section 101 of the Customs Ordinance, 1922-1967 hereinafter referred to as 'the Ordinance'. Originally a New Guinea Ordinance, which was adopted by the territory of Nauru, the Ordinance remained the law of Nauru

following independence under the transitional provisions of the Constitution. Under the aforesaid provisions a reference to the Administrator, a common form both for the Territories of New Guinea and Nauru at the time, is to be read as a reference to the President.

14. It would not be amiss for the Court to add that with the increasing importance of customs regulations and duties derived from imports that this Ordinance, however much it has served its purpose, has become antiquated and is ripe as a candidate for legislative reform and redrafting.

15. Nevertheless, the Proclamation in its terms is clear enough. Acting under section 101, the President prohibited the export of Australian currency, legal tender of Nauru, over and beyond one thousand dollars unless written permission had first been obtained from the Bank of Nauru.

16. Certain objections were made by the Appellants to the validity of this Proclamation. First, the appellants submitted that currency could not be represented as goods under section 101 of the ordinance. Goods are defined in the Ordinance to include 'all kinds of movable personal property'. Bank notes are certainly, in this case, movable personal property. It may be that the Proclamation could have been more felicitously drawn had the term' Australian bank notes' been used rather

than 'Australian Dollars'. However, currency import and export restrictions are not uncommon as an economic measure amongst various nation states, and the Court of Appeal decision in R v Goswami [1968] 2 All E.R. 24 would give some credence to the use of such economic measures and the use of the term 'goods' to encompass export of bank notes in a section of the United Kingdom Customs and Excise Act not dissimilar to section 101 of the Ordinance.

17. The second submission involved whether the Proclamation was made without an opinion of harm being expressed and the legality of the condition that to export more than $1000 written permission of the Bank of Nauru is to be first obtained. On this question, the defendants have cited the Queen v. McLennan : ex parte Carr (1952) 86 C.L.R. 46. The Appellants, frankly, are not assisted by the decision of the High Court.

18. Under Section 112 of the Customs Act 1901-1950 (Australia), a provision in similar form to that of S.101 of the Ordinance, the Governor-General had prohibited as harmful to Australia the export of 'metals, non-ferrous, scrap' but with a condition or instruction that 'the intending exporter shall produce to the Collector of Customs a covering approval issued by the Department of Supply and Development'. The attack was made in this case upon the 'condition or restriction'.

19. The High Court stated at p.59 as follows: -

> 'The fact that the regulation prohibits exportation of the goods unless the department approves does not mean that the decision of the question whether exportation is harmful is delegated. Nor does it mean that the Governor-General must have been of opinion that to export the goods would be harmful subject to the department not thinking otherwise. It is quite consistent with an opinion that it would always be harmful but justice or wisdom required or made it desirable to permit exceptions pursuant to an administrative discretion. It is also consistent with the view that uncontrolled exportation would be harmful but that the harmful tendencies would be sufficiently reduced or mitigated by an administrative control by a system of permits. The Order in Council by which the regulation inserting item 65 was made (S.R. 1946 No. 138, 21st August 1946), recited that the Governor-General was of opinion that the exportation specified in the regulation, except with the consent of the Minister of Trade and Customs, would be harmful to the Commonwealth. An opinion in this form is within s. 122 (1)(b) (2) and (3). It is within these provisions because, construing them together they seem clearly enough to contemplate a prohibition which is not absolute but is conditional or is restrictive only, restrictive that it is the sense that it is less than a complete prohibition, and because the opinion need go no further than "the extent to which the prohibition extends", to use the words of sub-s. (3).'

20. The Court has no disagreement, with respect, with what the High Court there expounds. The Appellants, however, attempt to distinguish the case on various grounds. First, there was no regulation but a Proclamation. I do not see the relevance of this. The Proclamation was the accepted form under the Ordinance. It constituted subsidiary legislation and with the Schedule to the Regulations, the various

Proclamations under the Ordinance were maintained in a table. There really is no point to the distinction, if it be one. Secondly, the regulation, so says the submission of the Appellants, was an absolute prohibition of all goods in the class unless a permit was produced but in the Appellants case, as the argument runs there was no absolute prohibition, and this produces uncertainty. The prohibition, as expressed in the Proclamation, was exportation of 'Australian Dollars of the sum exceeding A$1,000'. There was no prohibition over export below the sum of $1000. I see no difficulty in that. Absoluteness is not a necessary factor, as the High Court states, and there can be no doubt as to the extent of the prohibition in the words expressed.

21. The third distinction is that it requires the written permission of the Bank of Nauru to export goods, that is, Australian Dollars that are prohibited, namely that in excess of A$1000. The decision of the High Court above, that is quoted, covers this point in the final sentence. There is, as the High court states, a contemplation of a prohibition that is not absolute but conditional or restricted only. In fact, there is no material difference with 'the condition or restriction' in the Australian case from that in the case of the Appellants.

22. It was not argued in the Appellants case, for there had been no attempt to seek a permit from the Bank of Nauru, but the question may arise whether the Administrative discretion allowed to the Bank of Nauru

is reviewable. An earlier case, March 1997, in the District court, Edgar Rapisora, raised the issue before another Magistrate, B.L. Sachdeva. The then Resident Magistrate made some obiter remarks regarding the absence of guidelines for the Bank, possible regulations, and the matter of review but the question was not further considered.

23. However, the matter has had some consideration in Australia in a High Court decision Murphyores Incorporated Pty. Ltd. V The Commonwealth of Australia (1976) 136 C.L.R.1. In that case, a question arose where the Appellant was seeking a permit to export but was denied a decision until an enquiry had been held into certain environmental aspects of mineral extraction from Fraser Island, the subject of the prohibition and application. Mason J, as he then was, expressed concurrence in principle with a statement of Kitto J. in Reg. V Anderson: ex parte Ipec – Air Pty. Ltd. (1965) 113 C.L.R. at 189. The majority of the Court, of which Kitto J. was one, stated that, in such a case as the Appellants where application was to be made to the Bank, it created a duty to consider such an application. In explaining such a duty, Kitto J said: -

> 'It is a general principle of law, applied many times in this Court and not questioned by anyone in the present case, that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself:

> *Sharp v. Wakefield* [1891] A.C. 173, at p. 179. The courts, while claiming no authority in themselves to dictate the decision that ought to be made in the exercise of such a discretion in a given case, are yet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed. Even then a court does not direct that the discretion be exercised in a particular manner not expressly required by law, but confines itself to commanding the officer by writ of mandamus to perform his duty by exercising the discretion according to law."

24. Whilst the above principle is clear enough, the ability to review the decision, outside of the canons stated, may be a matter of some argument.

25. The fourth distinction drawn by the Appellants was that the Proclamation did not recite that the President was 'of the opinion' that the prohibition specified would be harmful to the Republic. Proclamation No. 1 as published in Gazette No. 33 on 10 June 1996, has three recitals leading to the operative part of the instrument. The first two recitals state the fact that Australian currency is legal tender and that it is the Government intention to prohibit exportation of such currency. The third recital, introduces the relevant section of the Ordinance and choosing its words carefully picks up those parts of S.101 that are to operate under the proposed prohibition.

26. The recital spells out that part of Section 101, namely subsection (1)(b), that is to operate together with sub-section (2). The operative

part of the Proclamation then prohibits expressly, together with the possible conditional release of that which is prohibited. Given the nature and wording of the third recital there can be little doubt that the President had formed the opinion that exportation would be harmful to Nauru in the construction of the operative part of the Proclamation. It may have been a better course to have repeated the formula words, demonstrating more clearly the exercise of the opinion, in the operative part but, in the circumstances, their absence does not constitute a vitiating factor. Indeed, where the recitals in a deed are clear and the operative part is ambiguous, the recitals govern the construction. In regard to the Proclamation, the recitals are clear and display the clear intent of the President such that the operative part is constructed based on his opinion of harm.

27. A further objection, raised by the Appellants in their submission, to the Proclamation is that it may not impose penalties as the power only extends within S.101 of the Ordinance to prohibit the exportation of goods. This is clearly correct and the extent to which the learned Magistrate alluded in his judgments to a penalty 'prescribed' or 'laid down' by the Proclamation, he is in error.

28. Indeed, the part of the Proclamation, which deals with penalty, is more of an information list of what penalty may be incurred in the event that a person transgresses the prohibition. There are no new penalties

stated in the Proclamation and none of the penalties are dependent on the Proclamation itself except in so far as the Proclamation itself brings into being a new prohibition under section 101, the transgression of which may result in the prosecution and ultimate penalizing of the transgressor under existing penalties in the Ordinance and the Criminal Code. The fact that the information here on penalties may be a little astray does not affect the validity of the Proclamation itself, which has only to comply with Section 101. In some ways, it would have been better if the information on penalties, which really appears to be placed in the Proclamation for some 'in terrorem' effect, had been excised from the body of the Proclamation and boxed below the proclamation under some warning sign indicating the penalties that could be imposed under the Ordinance and Criminal Code.

29. So far as the penalties are concerned, the first refers to the Criminal Code s.204. This is a general provision applicable across the broad spectrum of statute law, and something of a 'catch-all' provision. It is significant, however, because it carries a possible custodial sentence up to one year. One must add, however, that Part XIII of the Customs Ordinance carries considerable penal provisions, and there may be some argument that the extensive Part XIII of the Customs Ordinance encompasses the whole range of penalty and is intended, though not expressed as such, to be exclusive of all other punishment. However, I am not convinced on the arguments advanced that the

Ordinance is exclusive of other punishment and am prepared to allow a charge under s. 204 as an additional charge.

30. Both Sections 100 and 218 provided a penalty of $200 for the exportation of prohibited exports. Under S.224 of the Ordinance any attempt to commit an offence against the Ordinance is an offence against the Ordinance punishable as if the offence had been committed. It is noted that in the charge of exporting prohibited goods both Appellants in the particulars of the offence were charged that or on about 19 January 1998, at Nauru without lawful excuse attempted to export the amount of (sum stated) from the Nauru International Airport, contrary to Section 100 of the Customs Ordinance 1922-1967. I add, as well, that under the Criminal Procedure Act 1972, Section 130, where a person is charged with an offence, he may be convicted of having attempted to commit that offence, although he is not charged with the attempt. Clearly, the facts disclose that there was an abortive attempt to export prohibited exports. There was no necessity under the Ordinance and criminal procedure to charge specifically as attempt though the particulars of the offence correctly state that it was an attempted export.

31. As to the third penalty mentioned in the Proclamation, 'forfeiture of currency' this is a shorthand reference to S.214 of the Ordinance.

S.214 (a) reads as follows –

214. The following goods shall be forfeited to the Administration -

(a) all goods which are smuggled or unlawfully imported, exported or conveyed:

.....

32. This is a common provision in customs acts and I am surprised that the matter appears to have engendered so much controversy though, it seems the reason for this has been the erroneous view that the penalty derives from the Proclamation rather than the Ordinance itself. It has always been an important factor in contributing to obedience of the customs rules. In regard to S.214, of course, read 'Republic of Nauru' for 'Administration'. The effect of S.214 is that upon conviction under section 100 or section 218, apart from the penalties under these sections, forfeiture of the goods are to be ordered pursuant to section 214. The goods had already been seized by Customs under S.189 of the Ordinance.

33. The Appellants submitted that the appellants were in some ignorance of the prohibition, and that was in itself sufficient to set aside the convictions. The appellants had been living in Nauru, for some years and were in business, the prohibition had been in operation for two years, and there had been earlier prosecutions. Also, on each Declaration form signed by each Appellant, the appellant had signified that there was no export beyond $1000. That Declaration form carried a clear warning of severe penalty under the Customs laws. Admittedly,

this was in English but that is the commercial language of the community within which the appellants both lived. There was some evidence to show that the appellants had gone to some lengths to hide the money. One of the appellants volunteered evidence that before 1996 she had sent the money by telegraphic transfer and had not taken money like this before. The learned Magistrate was entitled to take the view that the Proclamation and its exercise at the airport would be common knowledge within such a small community such as Nauru. Whether or not further advertisement in the air terminal would be beneficial is beside the point.

Grounds of Appeal:

34. The grounds of appeal for each of the appellants were submitted in identical form. I make my findings on appeal on the numbered grounds accordingly in conformity with the judgment. I, for convenience and ease of reference, list seriatim each ground and my finding.

1. That the District Court erred in holding or in assuming that the alleged offence of section 204 of the Criminal code was an offence separate from the other offences charged.

I find that section 204 of the Criminal Code was a separate offence and that the District Court was not in error in convicting on this charge.

2. That the District Court erred in holding or in assuming that the second offence charged disclosed an offence.

I find that forfeiture is a concomitant of the penalty under both sections 100 and 218. It therefore follows that goods the subject of a charge under s.100 of the Ordinance are forfeited to the Republic upon conviction of the accused pursuant to s.214(a) of the Ordinance. Such goods would have been initially seized under s.189 of the Ordinance. To the extent that it was treated as a separate offence, there was error by the District Court, however, the penalty, as explained, derived from the establishment of the third charge.

3. That the District Court erred in holding or in assuming that the third offence charged was established.

I find that the offence as charged was established, and there was no error by the District Court.

4. That the District Court erred in holding or in assuming that that the charges were not bad for duplicity.

I find that given my findings to grounds 1, 2, and 3 it is not necessary to make a finding on this ground.

5. That the District Court erred in holding or in assuming that the Proclamation No. 1 of 1996 was validly made under section 101 of the Customs Ordinance 1922-1967 and that under that section a Proclamation could impose any penalty, and, in particular, a penalty greater than that provided by section 100 of that Ordinance.

I find that the Proclamation was validly made, and that the questions of penalty were not imposed by the Proclamation but were derived from the Ordinance and the Criminal Code as explained in the body of the judgment. To the extent that the explanation of the findings was otherwise in the District Court there was error but it did not have an effect upon the ultimate result.

6. That the District Court erred in holding or in assuming that the alleged breach of section 204 of the Criminal Code had application to a breach of statute where the statute already has an offence applicable in respect of its breach, and a procedure for dealing with it, despite the clear indication that section 204 only has application to breach of a statute where that statute has as penalty attached to breach or procedure to deal with it.

It is not necessary further to canvas this ground given my finding to ground 1.

7. That the District Court erred in holding or in assuming that the offence of attempting to export prohibited goods was found despite the fact that the law specifically relied upon applied only to the actual export of such goods.

I find that the District Court did not err. As explained in the judgment, the attempt provisions contained in s.224 of the Ordinance and s.130 of the Criminal Procedure Act 1972 cover the question.

8. That the District Court erred in holding or in assuming that the attempted export of the currency, the property of the accused, had an effect on the revenue of the Republic.

This is not a matter that requires judicial consideration.

9. That the District Court erred in holding or in assuming that the penalty of forfeiture was not a wrongful taking of property contrary to the Constitution and was not manifestly unjust, and failed to take account of the possibility that were the money returned it could have

been sent out of the country in any event by following the procedures the prosecution claimed should have been followed.

The question of the penalty of forfeiture constituting a wrongful taking of property pursuant to Article 8 of the Constitution was denied in a decision of Dillon J. in the Supreme Court and is one with which I respectfully agree, and will not be reopened. In the latter part of the above ground, no legal matter arises.

10. That the District Court erred in holding or in assuming that the lack of knowledge and understanding of the accused of the offence charged was not a defence or a matter to be taken into account in particular by failing to have regard to the necessary corollary of Article 10(3)(b) that if a person charged must be notified of the charge in a language he understands, he must also be made aware in a language he understands of the prohibitions of the law – particularly of such a law as is referred to in these proceedings.

I do not find any merit in this ground, given the revealed circumstances, and that the District Court did not err in dealing with the question as it did.

11. That the District Court erred in holding or in assuming that the search of the belongings of the accused was lawful and not contrary to Article 9.

I find that there was no evidence that the search of both the person and luggage was undertaken other than with the consent of that person. In any event, once under the control of Customs in Section 24, there is a right of examination under section 26, and a right to search the person s.182.

12. That the District Court erred in holding or in assuming that the accused was not entitled to the benefit of sections 191 and 192 of the Ordinance.

S.191 does not require notice of a seizure where the owner is present at the seizure and S.192 is not applicable to the circumstances.

13. That the District court erred in holding or in assuming that the Proclamation was valid when it is void for uncertainty and ultra vires the powers in the Ordinance and the Interpretation Act.

I do not find that the Proclamation was void for uncertainty nor ultra vires pursuant to s.101 of the Ordinance, nor in conflict with S.19(1) of the Interpretation Act 1971-1975.

Conclusion –

35 The issues in these two matters have been painstakingly put, and every possible avenue explored by the Appellants. Some of the issues had more merit than others, and some issues may well have been avoided with more care in drafting whether of the Proclamation or the charges. In the end, however, I find some difficulties in the judgments of the District Court but not so as to disturb the convictions.

36. Fundamental to the cases are the charges. As to charge 1, Disobedience to Statute Law: s.204 Criminal Code Act of Queensland 1899 (First Schedule) adopted. I found that this was a properly constituted separate charge, though I entertain some doubt that it should be used where there are extensive penal provisions provided by the Ordinance. I do not accept the submission of the Director of Public Prosecutions of his distinction between general punishment provisions such as s.100 and his use of the Proclamation as a specific infringement. The Proclamation does no more than prohibit the export of Australian dollars in excess of A$1000. Being a listed prohibited export arising from the Proclamation, one must proceed for an infringement to s.101 within the context of the Ordinance. The Proclamation cannot and does not create an infringement over and beyond the Ordinance itself. Nevertheless, in the course of the trial in the District Court, counsel for

the Director of Public Prosecutions looked to the use of s.204 as a deterrent punishment in order to deter the possible flight of the currency. The learned Magistrate took the view that a fine set at $1000 would be sufficient and I will not disturb that.

37. In regard to Charge 2, Forfeiture of Prohibited Goods : S.190 Customs Ordinance 1922-1927, Adopted read with clause © of Customs Proclamation No. 1 of 1996. It is clear to the Court that this charge cannot stand. I have indeed said why in the earlier part of this decision. Put simply no offence has been created under the Ordinance. It appears, however, that this may have exercised the concern of the learned Magistrate, for it is apparent that he did not proceed to convict on the charge.

38. In regard to Charge 3, Exporting Prohibited Goods, S.100 read with S.189 Customs Ordinance 1922-27, Adopted, was a properly constituted charge and was established against the appellants on the evidence. The particulars of this offence raised the question of attempt, which is governed by S.224 of the Ordinance and S.130 of the Criminal Procedure Act. Upon conviction, there is not only a monetary penalty but forfeiture of the goods, the subject of the charge, pursuant to s.214 of the Ordinance.

39. I accept the submissions of both the Appellants and the Director of Public Prosecutions that there is no power to levy Court Costs.

40 As a result, whilst the convictions under s.204 of the Criminal Code, and under Section 100 of the Ordinance stand I vary the Sentence Orders made by the learned Magistrate which, following this appeal, will now read –

Xu Chen Pao

1. Under Section 204 Criminal Code	Fine $1,000
2. Under Section 100 Customs Ordinance	Fine $100 together with forfeiture of goods, namely, Australian money in amount of $18,940 to the Republic of Nauru.

Chen Feng Qun

1. Under Section 204 Criminal Code	Fine $1000
2. Under Section 100 Customs Ordinance	Fine $100 together with

forfeiture of goods, namely, Australian money in amount $3[illegible],400 to the Republic of Nauru.

41. I understand that the amount of $1,000 which, in each case, the appellants were permitted to export has been returned to them, and, further, that the fines have already been paid. If the Court Costs, $100 in each case, have been paid then the Republic is to return the amount of $100 to each appellant. The convictions entered by the learned Magistrate upon each of the Appellants with respect to Charges one and three stand with the variations to penalty as above stated, otherwise, the Appeals are dismissed.

42. I shall hear the parties on costs.

BARRY CONNELL
CHIEF JUSTICE

Date: 25/2/2003