



container arrived in Luganville the agent provided Customs with a declaration known as a Single Administrative Document (SAD), a freight manifest, a bill of lading and an invoice from Xiamen Sinsen Trading Co Ltd in China. This is the usual process which allows the goods to be assessed for duty and tax. The details from those documents were entered into the Automated System for Customs Data (ASYCUDA). As a result of discrepancies detected by the system, a recommendation was generated by ASYCUDA for a full physical inspection of the goods. The inspection was carried out by Customs officers over several days starting on 27<sup>th</sup> July and being completed on 11<sup>th</sup> August. The customs officers discovered a quantity of goods which had not been declared (the undeclared goods) and a quantity of goods of the same type in excess of what had been declared (the surplus goods). Of particular note were 14 hollow galvanised bars with welded end caps. The officer in charge of the inspection was suspicious and arranged for the ends to be cut off and discovered a total of 294 sleeves of cigarettes hidden in the bars. Each sleeve contained 10 packets of 20 cigarettes. The cigarettes had not been declared or even mentioned in any documentation provided to Customs.

3. The total excise duty and VAT that would have been payable on the undeclared and surplus goods amounted to over 2 million vatu. Those goods have been forfeit to the State. The appellant has not been required to pay penalties on the duty he evaded which, in accordance with section 104 of the Customs Act, would have been treble the amount of the unpaid duty. The items properly declared by the appellant have been released by Customs on payment of the duty and VAT amounting to some VT 663,701.

4. In respect of sentencing, Justice Fatiaki heard submissions by the Public Prosecutor and by counsel for the appellant. He also received a pre-sentence report from the probation officer. In his decision His Lordship drew attention to difficulties presented by certain wording in the Customs Act and indicated that he was treating some counts as alternatives for sentencing purposes as they were drafted in identical terms. His Lordship also commented on the lack of sentencing guidelines in this jurisdiction with regard to revenue fraud and/or tax evasion. He considered cases from the neighbouring jurisdictions of Kirbati <sup>1</sup>, Samoa <sup>2</sup> and Solomon Islands <sup>3</sup> and was also assisted by decisions from the United Kingdom, New Zealand and Australia <sup>4</sup>.

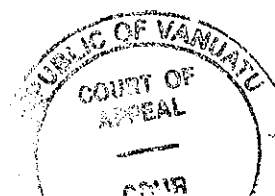
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<sup>1</sup> *The Republic v. Biketi* [2002] KHC 100

<sup>2</sup> *Comptroller of Customs v Lalua* [2015] WSCC 72

<sup>3</sup> *Regina v Koata* [2012] SBHC 168

<sup>4</sup> *Czyzewski v R* [2003] EWCA Crim 2139; *He v Police* [2011] NZHC 1830; *L v Licensing Executive of the NZ Custom Service* [2012] NZCAA 3; *The Queen v Findlay* [2007] NZCA 553; *DPP. Harman* (Unreported); *R v Kelvin* [2000] NSWCCA 190; *R v Cappadona & Anor* [2001] NSWCCA 194; *R v Howe & McGowan* [2000] NSWCCA 398



5. The Judge also referred to the guidelines of the Sentencing Advisory Panel from the United Kingdom. He said, at paragraph 33:

*“Particular reference was also made to the recommended guidelines of the Sentencing Advisory Panel (UK) in its consultation paper on Sentencing for Fraud Offences (2007) which counsel helpfully summarises as follows:*

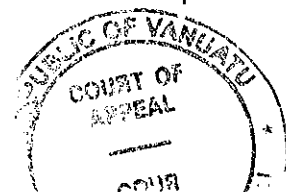
“In undertaking an assessment of an offender's culpability, the Panel has recommended that Sentencing Judges begin by assessing the amount of money the offender intended to obtain as a starting point and then adjust to take account of the actual loss suffered by the victim. The Panel considered that where over a period of time an offender has evaded tax, they must not only pay the tax and pay a financial penalty but a custodial sentence should also be imposed although at the end scale of gravity non-custodial sentences or shorter sentences may be appropriate. The length of sentence or whether the only custodial sentence should be imposed should depend on a number of factors including, but not limited to:

- **The amount of tax evaded;**
- **The period of time during which the evasion took place;**
- **The effort made to conceal the fraud**
- **Whether others were drawn in and corrupted**
- **The character of the offender;**
- **The extent (if known) of his personal gain;**
- **The amount recovered “**

6. His Lordship noted the comments by the prosecutor in relation to those considerations:

*“Prosecuting counsel advances the following factors as exacerbating the defendant's offending in this particular case namely:*

- **”The amount of import duties and other taxes payable on the value of goods the accused evaded.** A total of 28 items were undeclared and a total of 17 items were surplus hence a total of 48 were contained in the accused's 40 foot container. Customs established the value of goods via the fall back valuation rule which established that the **accused evaded import duties in the total amount of VT2,494,291;**
- **The responsibility of declaring the goods to Customs is that of the importer who is the accused.** His name was on the invoice, the packing list, the freight manifest the bill of lading and he was also specified in field 9 of his Single Administrative Document lodged with Customs for declaration purposes as the person



responsible for financial settlement or payment of import duties. **The accused's offending displayed a callous indifference to his obligation to voluntarily comply with Customs laws;**

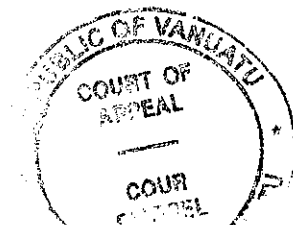
- **Use of a legitimate business as a front.** The accused was at all material times the Manager of Tapusia Store which is partly owned by his father and two other Ni- Vanuatu individuals. According to the evidence, Shunfa Store although owned by his mother, is managed by the accused. The accused was the person who applied for the Business Licence of Shunfa Store and the only person who has applied for its renewal in 2013, 2014 and 2015. **At all material times, the accused was importing goods in the name of Shunfa Store of Tapusia Store in order to obscure his liability in the event that he gets caught by Customs.** His effort to disguise his attempt to obtain a financial advantage or his effort to conceal the fraud under the identity of Shunfa Store is a serious aggravating factor;
- **The degree of control exercised by the accused in the commission of the offence.** The accused was the Manager of Tapusia and the person primarily responsible for business dealings and arraignments of Shunfa Store. He was the person who authorised his Officer Ms Elise Abel to obtain money from Tapusia to pay import duties payable on the value of the goods he imported; and
- **The method of concealment.** The goods were concealed within commercial packages. The cigarettes were concealed within galvanized bars. The concealment was ... effected underhandedly and professionally;"

*(my highlighting)"*

7. The Judge added:

*"In opposing any suspension of the sentence of imprisonment counsel emphasises the need to impose a deterrent sentence and submits:*

"The Court must clearly and unequivocally signal to the public particularly the business community in Vanuatu that the evasion of import duties and other taxes will not be tolerated. The Government of the Republic of Vanuatu requires a good and stable financial resource to manage the country and its citizens and the revenues from taxes provides this. Without it, the services offered to all citizens could not be effectively managed. The accused attempted to obtain a financial advantage for himself by cheated the revenue of Customs. His actions not only reflected a callous



indifference on his part but was unfair to honest and hardworking businessmen in the community."

8. Fatiaki J pointed out that Vanuatu does not have income tax and that most of government revenue comes from indirect taxes, fees and excise duty. For that reason he considered the appellants offending to be particularly serious. He went on to say:

*"In sentencing the defendant the court needs to send a clear message that these offences will not be tolerated or condoned. The importation of goods into the country is a relatively easy matter and the collection of customs duties depends to a large extent on the co-operation and honesty of the importer as well as the reliability of his documentation provided to Customs for the assessment of the correct duties due and payable.*

*A dishonest importer who provides false and incorrect documentation undermines that trust and gives himself an unfair advantage over his honest competitors. The sentences imposed must therefore be severe enough to not only deter him but also ensure that resort to such unlawful behaviour or activity does not pay."*

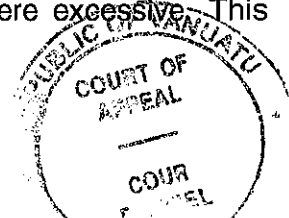
9. His Lordship then proceeded to pass sentence:

*"Bearing in mind the maximum sentences and the relevant sentencing principles and considerations and making every allowance for the mitigating factors including the defendant's guilty pleas, the sentences of the Court are as follows:*

- o Ct 1 – Attempting to Obtain a Financial Advantage by Deception – a sentence of 12 months imprisonment;
- o Cts 2 & 5 – Failing to Make a Customs Entry – A fine of VT250,000 for each count;
- o Cts 3 & 6 – Declaration of an Incorrect Entry – a fine of VT250,000 for each count;
- o Cts 4 & 7 – Knowingly Providing an Incorrect Entry to Customs – a fine of VT350,000 and imprisonment for a term of 2 months on each count;
- o Cts 8 & 9 – Making a False Declaration – a fine of VT350,000 and imprisonment for 2 months on each count;
- o Cts 10 & 11 – Knowingly Producing an Incorrect and False Declaration – a fine of VT500,000 and imprisonment for 3 months on each count;

*All sentences of imprisonment are ordered to be served concurrently making a total effective sentence of 12 months imprisonment with effect from 17 December 2015 the date when sentence was to have been passed by the Court."*

The appellant does not argue that the monetary penalties imposed by the Court were wrong or even that the sentences of imprisonment were excessive. This



appeal is on the very narrow point that the sentences of imprisonment should be suspended.

10. In that regard, it was argued the Judge, in assessing the culpability of the appellant, had not taken into account the fact that the appellant had played no part in actually packing the container. It was also said His Lordship had taken note of "unfounded allegations" concerning the previous importation of galvanised pipes containing cigarettes. The remaining ground of appeal was that the appellant was a first time offender and a responsible member of the community in Luganville. Before this court it was suggested that the value of the undeclared and surplus goods and the fines to be paid should have led to any sentence of imprisonment being suspended.

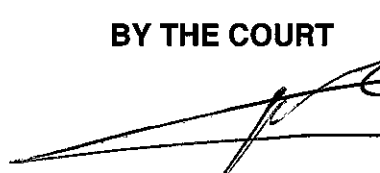
11. The Judge in his sentencing remarks took into account the personal circumstances of the appellant. Who packed the container containing the undeclared and surplus goods does not affect the appellant's culpability. He was responsible for the importation of the goods and the false documentation designed to defraud the Revenue. This was a serious revenue fraud involving over VT 2,000,000 worth of goods. The appellant had gone to considerable trouble to hide the presence of the cigarettes. While this was only a single importation it involved a wide range of goods.

12. The system of import duty and VAT on those goods relies upon the honest declaration of the importers. As the Judge said, Vanuatu is reliant on the payment of those taxes to provide the essential services for its citizens. Accordingly those who defraud the revenue in this way can expect deterrent sentences.

13. In those circumstances we are satisfied the Judge was correct not to suspend the sentence of imprisonment. The appeal is dismissed.

**DATED at Port Vila this 15<sup>th</sup> day of April, 2016**

**BY THE COURT**

  
**Hon. Vincent LUNABEK**  
**Chief Justice.**

