IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

Civil Appeal

Case No. 18/1693 CoA/CIVA

**BETWEEN:** **Christopher Karie and Sylvie Qenegeie**

Appellant

**AND:** **The Director of Customs**

Respondent

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| *Date of hearing:* | 18 February 2019 |
| *Before:* | Chief Justice V. Lunabek<br>Justice J. von Doussa<br>Justice J. Hansen<br>Justice D.V. Fatiaki<br>Justice G.A. Andrée Wiltens<br>Justice S. Felix |
| *Counsel:* | Mr N. Morrison for the Appellants<br>Mr S. Kalsakau for the Respondent |
| Date of Decision: | 22 February 2019 |

## JUDGMENT

### A. Introduction

1. This case concerns the importation into Vanuatu of over 68,000 kilograms of sandalwood from New Caledonia. The intention was apparently to re-export for a significantly higher price than originally available for that product in New Caledonia, so that the local growers received a fair price. The goods arrived in Vanuatu loaded into 6 containers on 25 April 2016. There followed a number of interactions between the importers and members of the Customs Department. Eventually, on 18 May 2017, the Director of Customs issued a second Seizure Notice under sections 180 and 181 of the Customs Act No. 7 of 2013 ("the Act") for all the sandalwood to be forfeited to the Republic of Vanuatu – an earlier Notice having been quashed under Judicial Review.

2. The second Notice stipulated the sandalwood had been forfeited due to there being reasonable cause to suspect that offences under sections 55, 64, 169, 170 and 174 of the Act had been committed in respect of the importation. If there was such reasonable cause, the goods were eligible to be forfeited under section 180 of the Act. A summary setting out those suspicions was

appended to and formed part of the Notice, which essentially alleged that the true value of the sandalwood had been under-declared on a number of Customs documents at only some VT 41 million instead of more than VT 374 million, after currency exchange calculations were made. Customs also pointed to a failure by the importers to post an acceptable security bond.

3. As provided for, in sections 187 and 188 of the Act, the second Forfeiture Notice was challenged in the Supreme Court by the importers. Following a 2-day hearing as to the merits of that challenge, the primary Judge issued a decision on 22 May 2018 upholding the forfeiture and awarding costs against the importers.

4. This is an appeal from that decision to uphold the forfeiture, on the basis that the primary Judge took into account matters he should not have and that he ascribed far greater prominence to other matters than was appropriate on the evidence.

5. There was also a cross appeal filed, but that was not advanced before us.

B. <u>The Background</u>

6. The price of sandalwood in New Caledonia was such that a group of growers from the Lifou area, out of frustration, determined to try and circumvent the perceived local perfume monopoly and an imminent embargo on the export of sandalwood. It was agreed to promptly send 68,000 kilograms of sandalwood to Vanuatu where it could be safely held as bonded stock pending re-export at a hoped-for much higher price to overseas buyers elsewhere. In that way the growers and exporters aimed to be paid more than XPF 600 per kilogram of sandalwood which was the standard in New Caledonia at that time.

7. The appellants became involved in the enterprise, even though they had no previous experience in such ventures and no knowledge of import/export requirements. Accordingly, when the goods landed in Vanuatu, they were heavily reliant on their agent and members of the Vanuatu Customs Department for advice as to what steps they needed to take to try and achieve their goal.

8. There is no dispute that a number of Customs forms were filled out in attempting compliance with Vanuatu Customs regulations, and that this was done with a large degree of assistance from members of the Customs service in the form of advice. Mr Morrison submitted that the appellants were not accustomed to dealing with these matters, but also that officers of the Customs Department had different views as to how to proceed, and what forms to complete, with such a large and valuable shipment being held in bondage pending re-export.
9. Effectively, it is in the manner of completing these Customs forms that suspicions formed within the Customs Department regarding the bona fides of the importers. In particular, the aspect of the various forms that contributed most heavily to those suspicions was the alleged enormous undervalues attributed to the imported goods.

10. As the various Customs forms are central to the case and the appeal, we set out the relevant forms and the particular features of each that are material:

Form IM9: This form, dated 10 May 2016, was used as Ms Qenegeie and Mr Karie advised Customs that they did not know the actual value of the goods. The form correctly sets out the particulars of the consignee and declarant as well as the weight of sandalwood in the 6 containers. The value ascribed to the imported goods is VT 41,004,000 – arrived at by multiplying the quantity by VT 600 per kilogram, and ignoring the exchange differential between Vanuatu Vatu and New Caledonian Francs. It was apparently signed by H Gauchet, the local agent for the importers. The Appellants say that while they knew the price they were to pay in New Caledonia, they did not know what value to ascribe to the shipment as its "true value". The Respondent argues that by saying they did not know the value of the sandalwood, the appellants were being untruthful. In support of that contention, reference is made to an invoice of 26 April 2016 signed by Ms Qenegeie which indicates the same figure as the purchase price for the sandalwood.

Form IM5: This form was dated 2 June 2016, and evidently signed by E Ishmael for the agents. The major difference is the value ascribed to the goods, namely VT 1,200,000. Mr Morrison submitted this figure was a simple mistake as stated by Mr Gauchet in his evidence, which was rectified by the appellants as soon as they learnt of it. He further submitted that nothing turned on the actual figure in any event - as the goods were permitted to enter Vanuatu for the purpose of re-export no duty was payable to Customs. Mr Kalsakau submitted the figure was further evidence taken into account by Customs in coming to their view that the transaction was dubious.

Form EX3: This form was dated 3 June 2016, again evidently signed by E Ishmael for the agents. This form was submitted by Mr Morrison to be a nonsense, as Mr Gauchet had said in evidence – it was unnecessary and should never have been created. It was intended to be used when goods held bonded under an IM5 were to be released for re-export out of Vanuatu; and it is unfathomable why Customs suggested that the appellants complete this form. The document reveals that Wild Operation Limited, a Vanuatu company associated with Mr Naupa, was sending the entire shipment back to New Caledonia – that was not the appellants' intent, nor Mr Naupa's. The mistaken value figure also appears in this document. Mr Kalsakau inferred that the dubious information in the form could only have added to the Custom's unease regarding the importation.

Forms IM4: There were 3 of these, dated 6, 14 and 23 June 2016. They were completed to achieve the release of small portions (2,000kgs, 400kgs and 1,800kgs) of the total imported goods from bondage and to assess the duty payable as the goods were to remain in Vanuatu. The values of these sample "sales" to test the market, were stated in the IM4s to also be VT 600 per kilogram. These ascribed values were also criticised by Mr Kalsakau. He also relied on some evidence to the effect that 2 of the sample lots were purchased for much more than the stated value, again adding to Custom's concerns regarding the bona fides of the enterprise.

11. Those factual matters need to be looked at in relation to the sections of the Act relied on by Customs to justify the Seizure Notice issuance and execution.

12. Section 55 deals with failing to make a required entry or knowingly making a materially defective or incorrect entry. Section 64 deals with offences in relation to the export of goods. Section 169 deals with false, forged or materially incorrect documents, statements and declarations. Section 170 deals with knowingly making or producing false or materially incorrect statements or declarations.

13. Section 180 permits forfeiture of goods in respect of which a Customs officer has reasonable cause to suspect an offence has been committed under sections 165, 55, 169, 68, 64, 174, 175, or 69.

C. Decision

14. The primary judge set out in his judgment the various aspects of the matter he considered supported his conclusion that the seizure by Customs was legitimate having regard to the provisions of the Act. He pointed to the following:

- (a) and (b) The fact that the importing company's business licence only permitted the importation of chicken feed, not sandalwood;

- (c) the contract produced in evidence purporting to evidence the original purchase of the sandalwood was in fact not a contract evidencing the sale of goods but a partnership document;

- (d) the sample sales evidenced by 2 of the IM4s involved actions by the appellants that were "...suspicious and in violation of their contract";

- (e) the fact that the appellant Qenegeie was intimately involved in the original purchase, as evidenced by the invoice of 26 April 2016, but failed to advise Mr Tarosa, a Customs officer, the value of the sandalwood. Had she done so at their first meeting the IM9, IM5 and EX3 documents would not have been advised or used;

- (f) In early May 2016, both appellants told Mr Tarosa they did not know the value of the sandalwood. Accordingly Mr Tarosa advised they complete an IM9, which was done indicating a value of XPF 41 million. Thereafter the IM5 was completed showing the sandalwood was valued at VT 1.2 million – "...an obvious inconsistency and undervalue";

- (g) On 5 August 2016 Wild Operations Limited tendered a signed cheque made out to the Vanuatu Government, but otherwise blank, to Customs [as security for the bonded goods], which was in contravention of section 184 of the Act;

- (h) The EX3 form also undervalued the goods at only VT 1.2 million;

- (i) and (j) On 25 June 2016, having paid VT 600 per kg for the sample goods purchased and released from bond, Wild Operations Limited on-sold the sandalwood to Taiwan at

much higher prices. Further, the EX3 indicated the re-export would occur within 6 months and it did not;

- (k) Customs Officer Linparus located an invoice for 69.7 tonnes of sandalwood which stated the purchase price was some VT 352.3 million, which raised a question about what happened to and where was the balance of the sandalwood; and

- (l) A lack of evidence to confirm the purchase price of VT 600 per kg – documents tendered by Mr Morrison from the bar table were not evidence.

D. The Appeal

15. Mr Morrison criticised each of the factors identified by the primary judge as justifying seizure. In his submission, many of those aspects were simply irrelevant, given too much weight and prominence, or erroneously referred to.

16. Mr Kalsakau did not address the issue in the same way. He submitted that there was obviously something unsavoury about the whole scheme, which he advised involved a Customs Officer now dismissed for his conduct relating to this matter. He maintained there was a criminal conspiracy on foot, and held out the prospect that criminal charges might yet be laid in relation to what had transpired. He sought to strongly uphold the primary judge's decision due to the non-compliance by the appellants and their agents with certain Customs regulations and went to some lengths to suggest this Court should dismiss the appeal and preserve the integrity of Vanuatu Customs.

E. Discussion

17. We consider that Mr Morrison's submissions have validity. The only evidence pointing to a value of some VT 374 million for the sandalwood came from Customs officer Linparus. Mr Morrison objected to parts of his evidence during the hearing, which included his evidence relating to the much greater value of the sandalwood. The primary judge acceded to the objection and ruled that evidence inadmissible. Mr Morrison's submission that the primary judge should not have relied on that evidence is therefore incontrovertible.

18. We further agree that the business licence of the importer has no relevance to the issue of whether the Customs suspicions were reasonable in the circumstances.

19. Mr Morrison pointed out that the contract not only showed the relationship between the parties but also gave a value for the imported goods, and submitted the document therefore had evidential value. We agree.

20. We share Mr Morrison's lack of understanding as to how the appellants' conduct in relation to the IM4s could properly be described as suspicious and in violation of their contract. The appellant's were working closely with customs officers and taking advice from them. The value ascribed to the goods in all 4 IM4s was consistent, and sits comfortably with the overall explanation of bringing the

goods to Vanuatu to try and get a better price for their goods by re-exporting. We cannot see how some sample sales can properly be said to be suspicious.

21. We consider the initial response by the appellants when asked what the value was of the sandalwood to be quite reasonable. They of course knew the going price in New Caledonia, but they considered that to be well below the true value. Their intent was to test the international market to see what the true value was – but they had no advance knowledge of that figure. To tell Mr Tarosa that they did not know the value is neither disingenuous nor dishonest in those circumstances. The appellants have consistently reported the value of the sandalwood to be VT 600 per kg – which is, according to all the evidence, the going price for the goods in New Caledonia. Having declared the value in the IM9 form, it is difficult to accept that the IM5 form was deliberately dishonest – it is much more likely that the VT 1.2 million figure was a simple mistake, one which was immediately owned up to by the appellants as soon as they became aware of it.

22. We also accept Mr Morrison's point that there was no consequence arising from the lower value being ascribed in the IM5. As there was no duty payable, whatever value was put down on the form, would have no onward consequence – for the appellants or Customs.

23. The signed blank post-dated cheque made out to the Vanuatu Government was given to Customs, not by the appellants, but by Wild Operations Limited. This was done at the request of Customs. This is said to be in contravention of section 184 of the Act, but that section deals with attempting to re-claim goods after forfeiture by paying for the full value of the goods and cannot therefore be relevant. It seems to this Court that it ill behoves Customs to later criticise or complain about something that was done at their behest. Not only does that negate the primary judge's use of this evidence to support his conclusion the seizure was appropriate, but further, the Seizure Notice does not set out section 184 as one of the sections alleged breached giving rise to Custom's reasonable suspicions. We would not have given this aspect of the case any weight in assessing Custom's reasonableness.

24. We agree that EX3 repeats the incorrect valuation of the sandalwood – we see it as a repetition of the original mistake and of little significance.

25. We frankly fail to see how the price that Wild Operations Limited achieved through on-selling its samples can have any bearing on the value that the appellants were asked to ascribe to the sandalwood in documents completed prior to the goods passing to Wild Operations Limited.

26. Apart from Mr Morrison's documents handed up from the bar table, we consider there is other acceptable evidence that the original price for the sandalwood in New Caledonia was XPF 600 per kg.

27. In summary, we consider that the primary judge has taken into account matters he ought not to have, and that he has given greater prominence to other factors than they truly warranted. We accept Mr Kalsakau's point as to the involvement of a possibly rogue Customs officer, but we do not consider that to impact on the issue before the Court. The sole issue for the primary Judge was

whether or not Customs' suspicions were reasonable. Looking at the provisions of sections 55, 64, 169, 170 and 174, it is immediately obvious that the Forfeiture Notice could not arise due to an alleged breach of section 170 of the Act – it is not one of the precursor sections. The other sections cited in the Notice have application; but, for the reasons explained above, in our view there is insufficient material for Customs to have reasonably formed the view that the appellants were acting contrary to any of those sections. There are other explanations, and we accept them.

F. Decision

28. The appeal is allowed.

29. The goods are to be returned to the appellants but held in bond until either they are returned to New Caledonia, or duty is paid on the goods remaining in Vanuatu, or they are re-exported elsewhere as originally planned.

30. The appellant is entitled to costs, for this appeal and for the earlier application. We fix those costs at VT 120,000. They are to be paid within 21 days.

**Dated at Port Vila this 22nd day of February 2019.**

**BY THE COURT**

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**Chief Justice V. Lunabek**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU