

PUBLIC PROSECUTOR
V.
RUIQI YAO

Coram: Daniel V. Fatiaki

Counsels: Mr. S. Blessings for the State
Mr. K. Loughman for the defendant

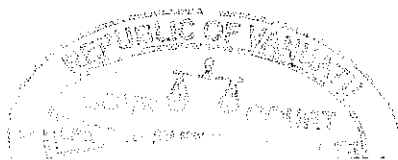
Date of Sentence: 11 March 2016.

SENTENCE

- On 7 December 2015 the defendant was charged with 12 counts comprised of a count of Attempting to Obtain Money or a Financial Advantage by Deception contrary to Section 28 and 130B of the Penal Code (Count 1) and eleven (11) counts of offences contrary to Customs Act No. 7 of 2013 as follows:
 - Failing to Make a Customs Entry contrary to Section 55(1)(a) - (Counts 2 and 5)
 - Declaration of Incorrect Entry contrary to Section 55(1)(b) - (Counts 3 and 6)
 - Knowingly Providing an Incorrect Entry to Customs contrary to Section 55(1)(C) - (Counts 4 and 7)
 - Making a False Declaration contrary to Section 170(a) - (Counts 8 and 9)
 - Knowingly Producing a False Declaration contrary to Section 107(b) - (Count 10)
 - Knowingly Producing an Incorrect Declaration contrary to Section 170(c) - (Count 11) and
 - Defrauding the Revenue of Customs contrary to Section 174. (Count 12)
- Attached to the Information are 2 attachments 1 and 2 containing a list of goods that were recovered from the defendant's container after several searches as follows:

ATTACHMENT 1: a list of Undeclared Goods

Item	Quantity	Conditions of Goods	Remarks
Ladies Dress	156 pcs + 39 pcs (195 pcs)	New	Undeclared
Ladies Top	4 pcs	New	Undeclared
Audio Speakers	9 ctn	New	Undeclared



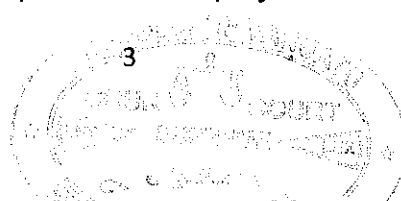
Cello Tape	248 pcs	New	Undeclared
Ear Piece	482 pcs	New	Undeclared
Ankle Socks	466 pcs	New	Undeclared
Assorted Speaker Parts	45 pcs	New	Undeclared
Toilet Brush	50 pcs	New	Undeclared
Washing Brush	240 pcs	New	Undeclared
Tooth Brushes	954 pcs	New	Undeclared
Tooth Brush Holder	30 pcs	New	Undeclared
Curtain (Window)	13 pcs	Used	Undeclared
Plastic Bags	10 Bundles	New	Undeclared
Shorts	5 pcs	New	Undeclared
Kitchen Utensils	7 pcs	New	Undeclared
Torch Pulp	25 pcs	New	Undeclared
Kids Dress	1 pcs	New	Undeclared
Water Gauge	13 rolls	New	Undeclared
Toilet Brush W/Handle	25pcs	New	Undeclared
Multiple USB Charger	529 pcs	New	Undeclared
Spoon	162 pcs	New	Undeclared
Fork	34 pcs	New	Undeclared
Kitchen Knife	37 pcs	New	Undeclared
Strainer	1 pc	New	Undeclared
Power Adapter	24 pcs	New	Undeclared
Men's Pants	20 pcs	Mew	Undeclared
Double Happiness Cigarettes	45 sleeves (450pkt) or (9,000 sticks)	New	Undeclared
Septwolves Cigarettes	249 sleeves (2,488pkt) or (49,760 sticks)	New	Undeclared

and ATTACHMENT 2: a list of Surplus Goods:

Item	Total Quantity imported as per invoice	Total Quantity inside container TCNU7284136	Total Quantity as being Surplus
Plastic Chairs	30 pcs	36 pcs	6 pcs
Plastic Round Table	6 pcs	12 pcs	6 pcs
Chainsaw Fuel Tank	35 pcs	41 pcs	6 pcs
Eski (Cooler)	13 pcs	16 pcs	3 pcs
Aluminium Pots	20 pcs	112 pcs	92 pcs
Universal Rust Lubricant	12 pcs	24 pcs	12 pcs
Nylon Trousers	2371 pcs	2814 pcs	443 pcs
Shirts	1110 pcs	1136 pcs	26 pcs
Slippers	2544 pairs	3606 pairs	1062 pairs
Umbrella	268 pcs	274 pcs	6 pcs
Gas Pipe	18 pcs	98 pcs	80 pcs
Plastic Food Storage Box	222 pcs	342 pcs	120 pcs
Brush Cutter	200 pcs	205 pcs	5 pcs
Torch	220 pcs	312 pcs	92 pcs
Ladies Skirt	260 pcs	268 pcs	8 pcs
Tape Measure	15 pcs	23 pcs	8 pcs
Hand Gloves	600 pairs	616 pairs	16 pairs

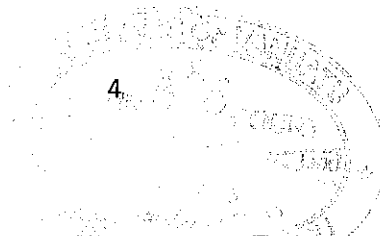


3. The "*undeclared goods*" comprised items that were not disclosed or declared at all in the import documentation provided to the Customs Department by the defendant's customs agent. The "*surplus goods*" were goods that were revealed during the physical inspection of the defendant's container that exceeded the number of items actually declared in the import documentation. In the case of the undeclared "*cigarettes*" numbering in excess of 58,000, these were concealed in hollow square-shaped galvanised pipes that were closed on the ends and were only uncovered after the pipe ends were cut off with a welding torch.
4. At his arraignment on 8 December 2015 the defendant who was represented by counsel entered guilty pleas ("*True*" and "*Yes*") to the first eleven counts in the Information and not guilty ("*No*") to the twelfth count of Defrauding the Revenue. In respect of this latter count 12 prosecuting counsel entered a verbal "*nolle prosequi*" and the defendant was discharged. The facts were then outlined by the prosecutor and the defendant agreed and accepted them. He was then convicted on Counts 1 to 11.
5. Before leaving the Information I make some general observations with a view to assisting future reform of the Customs Act and in the drafting of charges. If I may say so Section 174 which creates the sole offence of Defrauding the Revenue of Customs is unfortunately worded as a double negative *viz*: "*A person who does not act or omits to do any act ...*" and as such, completely fails to address the more usual circumstance where a person commits a positive act for the purpose of evading duty or for the purpose of obtaining a drawback or refund of duty that he or any other person is not entitled to receive. The section would be greatly improved in my humble view, by deleting the word: "*not*" in the first line and replacing it with the word "*any*" so that the line reads: "*A person who does any act or omits to do any act for the purpose of:*". Indeed this might well explain why the prosecution has had to resort to Section 130B of the Penal Code as its lead offence. It also explains why Count 12 as drafted is completely incomprehensible.
6. As for the drafting of the various charges, attention is drawn to the provisions of Sections 71 to 74 of the Criminal Procedure Code and to the general headings of the offence sections in the Customs Act and finally to the particular wording of the sections.
7. In the present Information, the Statement of Offence in Counts 4 and 7 refers to Section 55(1)(c) when there is no such paragraph "(c)" in the Section and the particulars appear to more closely relate to an offence under Section 55(2) which makes it an offence to knowingly make an entry that is incorrect or defective in a material particular. Having said that no objection was raised against this slight misdrescription and no prejudice could possibly have been



caused to the defendant who pleaded guilty to the charges and admitted the facts outlined by the prosecution. Convictions are accordingly entered under Section 55(2).

8. In respect of Counts 8 and 9 however, although the defendant pleaded guilty to both counts, I cannot ignore the fact that both counts are drafted in exactly identical terms and therefore presumably are the same offence. That should not have occurred and will, for sentencing purposes, be treated as alternative counts. Likewise Counts 10 and 11 although charged under different paragraphs of Section 170 of the Customs Act, the particulars are identical and therefore should have been drafted in the alternative. They too, will be treated as alternatives for sentencing purposes.
9. To prevent a recurrence of the above in future prosecutions under the Customs Act and avoid the possible injustice of the Court imposing double fines for essentially similar offences under the one section, and given that an "entry" is defined as a "declaration" and both documents are provided to Customs, consideration should be given to charging "entry" offences and "declaration" offences as alternatives and likewise for different offences within the same section.
10. To better understand the facts and the inspection process and documentation required by the Customs Department for the importation of goods into Vanuatu it is necessary to briefly describe the importation process limited to when the shipped goods arrive in Vanuatu. Importers of goods into Vanuatu are required in terms of Section 207 of the Customs Act to obtain the services of a local licenced customs broker or authorised agent who will prepare a "declaration" on the importer's behalf based on the information and documentation provided by the importer which usually comprises an Invoice from the foreign exporter or supplier of the goods; the Cargo Freight Manifest and the Bill of Lading which are issued by the shipping agent for the carriage of the goods.
11. The particular document prepared by the customs agent on behalf of the importer is called a Single Administrative Document ("**SAD**") to which is attached the Invoice, Cargo Manifest and Bill of Lading. Details of the importation (taken from the documents provided by the importer) are also entered by the custom agent into the Automated System for Customs Data ("**ASYCUDA**") which is a computerised automated system designed by UNCTAD to assist customs authorities throughout the world to automate and control their core processes, obtain timely accurate and valuable information as well as to enforce customs laws and regulations.
12. Once the importation details are entered in ASYCUDA the system automatically assesses the importer's tax liability, and profiles and categorises the



importation according to an established criteria and directs whether or not full physical inspection of the cargo is required to be undertaken.

13. In the defendant's case upon presentation of the SAD (Declaration "C948") the ASYCUDA system recommended a full physical inspection of the imported goods which were held in a 40-foot container located in front of Tapusia store in Luganville town, Santo.
14. The facts outlined and admitted by the defendant are as follows (with my highlighting):

"Factual basis upon which the forenamed accused is charged"

Sometimes between January and July 2015, the accused made an order to a supplier or suppliers in China who the State alleges are not licensed to export rather were persons who were known or had an existing relationship with the accused through business, familial connection or otherwise.

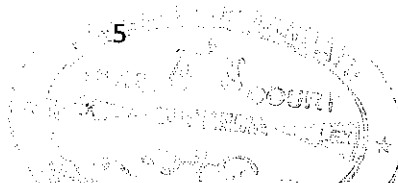
According to the Bill of Lading Number 1504SXMNSANL01, the accused's cargo was shipped on board the Kiribati Vessel on the 27th of May 2015. The accused was specified in the Bill of Lading as the consignee and the party to be notified in relation to the imported cargo and the Freight Manifest also specifically named the accused as the consignee and the person to be contacted and notified.

Sometimes in June 2015, before the accused left for China, he advised the Sales Officer and Cashier of Tapusia Store Ms Ellice Abel that cargo in the name of Shunfa Store will be arriving sometimes in July 2015. He instructed Ms Abel to obtain monies from Tapusia Store to pay for freight expenses.

Sometimes in July 2015, the accused obtained the services of Violet Customs Agent on Santo who has been facilitating his importations since 2014. As reflected in the accused's SAD (Declaration C948), his agent declared his import to Customs via the ASYCUDA on the 20th of July 2015 based on the information the accused provided. The agent provided the copy of the SAD C948, the Freight Manifest and the Bill of Lading and the invoice purported to be issued by Xiamen Sinsen Trade Co Ltd to the accused and the accused provided the same to Customs. The accused's SAD C948 specified the goods the accused's imported as reflected in the invoice he provided to his agent, and specifically named him in field 9 of the SAD as the person responsible for financial settlement or payment of import duties imposed on the imported goods.

Subsequent to the lodgement of the accused's declaration, the ASYCUDA assessed the accused's tax liabilities, automatically categorised and/or profiled the accused and automatically recommended Customs to effect full physical inspection of his goods. When the declaration of the accused was physically assessed by customs, they noted that the invoice that was provided by the accused contained obvious discrepancies and appeared to be a forgery. The invoice did not present the location of the exporters business and its business address under or together with the name of the exporter, phone contact, email address, Bankers details and it not have present a correct invoice date and invoice number.

In light of the discrepancies and the ASYCUDA's recommendation for physical inspection, Customs Compliance Officer Mrs Alice Tabe Wartive acting for Selectivity



Officer Mr Tom Pakoa, proffered an inspection act to Senior Customs Auditor Mr Jairus Linparus on the 20th of July 2015, the same day the accused lodged his declaration. Mr Linparus was assisted by Border Examining Officers Mr Reatly Lui, Mr Ritchie Tamata and Mr Terry Edwett.

On the 22nd of July 2015 at approximately 8.30am, the examining officers commenced with the physical inspection of the accused's 40 foot container which contained the imported goods declared. The container was located in front of Tapusia Store next to Espiritu Santo Hotel. Mr Linparus unlocked the container in the presence of the accused's wife Mrs Chen Xizhen, Mr Minhui She who introduced himself as the Assistant Manager of Tapusia Store and father of the accused and in the presence of several staff who were present at the time. The accused was overseas at the material time.

During the inspection, the examining officers discovered surplus goods or goods the quantity of which were under declared and goods that were undeclared. The inspection was suspended at approximately 1.50pm and the container was locked.

The following day the 23rd of July 2015, the same officers continued with physical examination of the goods. The inspection commenced at about 8.00am in the forenoon and was suspended at about 12.00pm. The container was unlocked in the presence of Mrs Chen Xizhen and the goods were impounded in accordance with the instructions of the inspection act. **Their examination uncovered further surplus and undeclared goods.**

At approximately 8.30am on the **27th of July 2015**, the examining officers went to Tapusia Store to proceed with inspection of the accused's goods. Upon arrival, Mrs Xizhen asked the examining officers if a Brush Cutter that has been accurately declared could be released to her and if further inspections could recommence after the independence celebrations. Mr Linparus responded in the affirmative and released the Brush Cutter and the next date for inspection was set to be on the 3rd of August 2015.

As agreed, the examining officers re-examined the accused's goods on the **3rd of August 2015**. Examination commenced at about 9.05am. Again, as per the procedure, the container was opened and inspected in the presence of Mrs Xizhen. **Again, the inspection uncovered surplus and undeclared goods.** The goods were impounded in accordance with the instructions of the inspection act and the inspection was suspended.

The same examining officers inspected the accused's goods against the following day the **4th of August 2015**. They started the inspection at about 8.00am again in the presence of Mrs Xizhen.

During the inspection, Mr Linparus noticed 14 pcs of galvanized bars which the accused declared in his SAD lodged with Customs as Iron Square Tubes. Both ends of the galvanized bars were welded.

Mr Linparus asked Mrs Xizhen and Mr She what they intend to the bars for and whether there was anything contained inside. They responded that the bars will be used for construction purposes and that there was nothing contained inside of them.

Be that as it may, during the previous inspections, Mr Linparus noticed that bars similar to the ones contained in the container were displayed in Tapusia Store and that both ends of the bars that were displayed in the shop were cut open and not welded. This aroused Mr Linparus's suspicion. **Mr Linparus immediately informed Mrs Xizhen and Mr She that he will need to cut open the ends of the bars.** As soon as Mr Linparus

informed them of this, they both made haste into the shop and immediately made calls on their cellular phones. They were both speaking in Chinese.

Mrs Xizhen and Mr She's reactions heightened Mr Linparus's suspicions. He then immediately borrowed an electric grinder belonging to the Department of Public Works and instructed Mrs Xizhen and Mr She to be present. A Mr Banga assisted in cutting open the welded ends of the bars. **When the first bar was cut open, Mr Linparus and the other examining officers discovered 21 sleeves of Double Happiness Cigarettes concealed inside the bar.** Mr Linparus asked them whether if he had not cut open the bars, they would have told him that the cigarettes concealed in inside the bars. Ms Xizhen responded to the effect that she was not sure whether or not she will tell him.

Mr Linparus then instructed Mr Banga to cut open the ends of remaining 13 bars. All of the 13 bars also contained sleeves of the aforementioned brand of cigarettes and Septwolves cigarettes. There were 45 sleeves of Double Happiness cigarettes and 249 sleeves of Septwolves cigarettes hence a total of 294 concealed cigarettes contained in the 14 pieces of the galvanized bars. 10 packets were contained in one sleeve and 20 cigarettes were contained in a packet. What is more, the cigarette packets did not display the "Smoking Kills" signage in Bislama, English and French, did not display required health messages and other information prescribed under the Tobacco Control Act No. 19 of 2008 and were not packaged and labelled in a manner that complied with the with the requirements of the aforementioned Act and regulations made under the Act. The cigarettes and other surplus and undeclared goods were hence impounded in accordance with the instructions of the inspection act.

Due to circumstances arising at the time, final examination of the accused's goods recommenced at approximately 8.00am on the **11th of August 2015** in the presence of the accused who had already returned from China and staff of Tapusia Store. **The examining officers again discovered surplus and undeclared goods. The goods were impounded and the inspection ceased at about 4.30pm.**

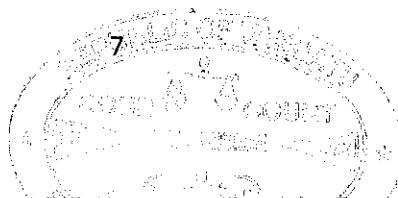
Total taxes on surplus and undeclared goods that should have been paid amounted to **VT2.5 million.**

Investigation, search and arrest

The accused was arrested on the 12th of August 2015. He was cautioned, searched and temporarily detained pending consideration of remand in the Magistrate's Court. He was re-cautioned and questioned on the 12th of August 2015. When the allegations were put to him, he accepted that worked as Manager of Tapusia but he denied any knowledge in relation to the operation of Shunfa Store.

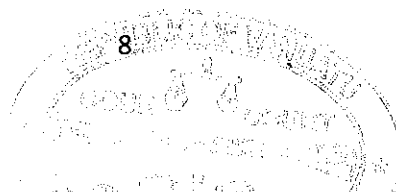
A search warrant was executed on the three Tapusia branches in Luganville on the 24th of August 2015. A laptop, 152 pornographic DVDs and certain documents were obtained."

15. During the course of investigations, statements were recorded from several long-serving employees of Tapusia store including the defendant's customs agent (Violet) who had submitted the documentation for the clearance of the relevant container on the defendant's behalf. The defendant was also interviewed under caution and, other than confirming his personal details



refused to answer any other questions as he was entitled to but, with such refusal, he cannot be said to have fully co-operated and assisted in the investigations and therefore can receive no discount in that regard.

16. Upon the defendant's conviction and at the request of defence counsel a pre-sentence report was ordered and submissions were directed to be filed by both counsels before sentencing was listed for 17 December 2015. The defendant was granted bail in the interim. Unfortunately, owing to time constraints and several unexpected and uncontrollable factors including the late-submission of the defendant's pre-sentence report, sentencing could not proceed and has only recently been finalised by the Court.
17. The defendant **RUIQI YAO** is a Chinese national of Fujian Province. The defendant is 39 years of age married to Chenxi Jhen. They have three children, a son attending Vila Central School in year 12, a daughter attending a Girls High School in Australia and their youngest who is in a kindergarten in Santo.
18. The defendant arrived in Vanuatu in 1998 and worked in the family's retail business in Port Vila before moving to Luganville, Santo. In 2006 "*Tapusia store*" was registered by the defendant's brother as a retail and wholesale business and the defendant was appointed its manager. Then in 2013 the defendant personally registered another retail/wholesale business "*Shunfa store*" in his mother's name also located in Luganville, Santo which the defendant managed on his mother's behalf. Besides managing the 2 businesses the defendant is also a trained chef who has worked in Belgium.
19. The defendant is an active member of the Chinese community in Luganville, Santo and participates well in community events and activities.
20. In June 2015 the defendant underwent an operation in China and on 31 July 2015 the defendant was reviewed by the Consultant General Surgeon at the Northern Provincial Hospital in Luganville. His general condition was described as "*unremarkable*" and his operation was "*healing well*". The defendant was recommended "*... at least 8 weeks maximum of rest with no strenuous activity or heavy lifting in order for his wound to heal satisfactorily*".
21. Additionally, defence counsel lists the following as mitigating factors in this case:
 - (a) *The defendant entered guilty plea at the earliest opportunity;*
 - (b) *He is a first time offender, no prior convictions;*
 - (c) *The defendant was not personally involved in packing the 40 feet container with its contents;*
 - (d) *The defendant personally did not produce or made the fake invoices. The invoices originated from China;*



- (e) *The defendant was not present in July 2015 so he personally did not produce the false declaration to custom;*
- (f) *Money used to pay for the customs clearance costs did not come from the defendant himself;*

22. On the basis of factors (c) to (f) above, defence counsel seeks to distance the defendant from the importation, documentation and contents of the container and counsel submits that:

"the defendant's involvement in the commission of the offence goes only as far as the container and the contents therein on behalf of Meriyuan Yao (the registered user) of Shunfa Store" ... (and) ... "the defendant's culpability must be reduced".

and further:

"... the defendant's culpability (must) be determined (and) the sentence must reflect the fact that the 40 ft container and the contents thereof belong to Shunfa store but received on behalf of Shunfa store by the defendant".

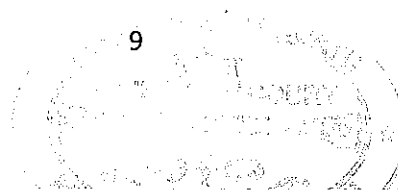
23. Viewed objectively, this was not the most serious offending of its kind and although the defendant may have had no actual hand in the packing of the container in China he is not charged as an exporter and his employee's evidence indicates that this was not the first consignment of galvanised steel pipes imported by the defendant into the country containing illicit cigarettes.

24. Having said that I cannot agree with defence counsel's submissions having regard to the extended definition of the terms: "*importer*"; "*owner*"; "*entry*" and "*declaration*". The submission also ignores and overlooks the facilitative provisions of Sections 173; 176; 177; 191 and especially Section 209 of the Customs Act which provides:

"A declaration authorised by this Act that is made by a broker, is deemed to be made with the knowledge and consent of the owner, so that in a criminal proceeding in respect of a declaration made by the broker, the owners are liable as if they had made the declaration themselves".

25. As to what is a suitable starting sentence for Count 1, defence counsel stresses the limited nature of the defendant's culpability in the commission of the offence(s) and submits "*a starting point of 4 to 5 years imprisonment would be appropriate*". Furthermore on the basis that the safety of the community would not be compromised by keeping the defendant in the community, defence counsel submits that a suspended sentence is appropriate.

26. For Counts 2 to 7 defence counsel proposes a fine of between VT20,000 to VT50,000 would be appropriate for each count and for Counts 8 and 9 a concurrent suspended sentence of 3 months imprisonment and a fine of



between VT400,000 and VT600,000. As for the remaining counts 10 and 11, counsel submits that any fine imposed "... must be concurrent with those fines imposed under Counts 2, 3, 4, 5, 6, 7, 8 and 9".

27. No authority is cited for imposing concurrent fines but, in any event, I disavow the existence of any such power in the Court. The "rule" for concurrent sentences is clearly set out in Section 52(1) of the Penal Code and is limited to: "... sentences of imprisonment". Furthermore Section 187 of the Criminal Procedure Code states that a judge who convicts an accused person "... upon any count of the information shall pass sentence according to law" and Section 55 of the Customs Act prescribes a penalty of "a fine not exceeding VT100,000" where a person is convicted of an offence against the section.
28. In my view imposing concurrent monetary fines would be in breach of the Court's mandatory duty under Section 187 and tantamount to imposing no sentence at all upon the defendant's conviction for Counts 10 and 11. Accordingly this submission of defence counsel is rejected.
29. I accept that the imposition of separate fines for offences arising out of the same importation albeit for different aspects or based on different documents could give rise to injustice when viewed as a whole. As was said by the Court of Appeal of Tonga in Vakameitangake v. R [1998] Tonga Law Rep 1 a case involving 2 cartons of cigarettes, where the Court ordered a stay on a more general count:

"Where a person, as the result of two or more separate and unrelated transactions has been found guilty of two or more offences under Section 210(1) (defrauding the revenue of duties) there can be no injustice for the offender to incur the triple penalty in respect of each offence. But where, as here, a person is found guilty of two or more offences under the subsection all of which relate to the same transaction, perhaps reflecting different aspects of it, for that person to incur the triple penalty for each of the offences, can, depending upon the circumstances of the case, cause a manifestly unfair result. In such circumstances, the court is justified in exercising the power to order a stay".
30. In the present case although there was just the one importation the prosecution as it is perfectly entitled to, has charged numerous offences under Section 55 and Section 170 of the Customs Act which deal with offences relating to entries and offences relating to declarations, respectively. However, the charges makes no differentiation between undeclared goods and surplus goods as it could have, (other than the smuggled cigarettes which are separately charged in Counts 6 and 7) nor are they charged in the alternative which would have been appropriate.
31. Be that as it may, prosecuting counsel in his sentencing submissions highlights the absence in this jurisdiction of any sentencing guideline in respect of revenue fraud or evasion of customs duty and counsel urges this court to consider the seriousness of the offences based on the maximum sentences as well as the defendant's culpability in arriving at a starting point in accordance

with the sentencing process outlined by the Court of Appeal in Public Prosecutor v. Kal Andy [2011] VUCA 14.

32. Counsel referred to numerous persuasive authorities and urges general and specific deterrence as a primary or paramount consideration in sentencing for offences of economic or benefit fraud or evasion of customs duty such as in the present case.
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***

34. 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)

and, using the maximum sentence for an offence under Section 130B of the Penal Code as a guide, counsel submits that for this lead offence "... *the appropriate starting sentence should be 6 years imprisonment*".

35. 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."

36. In respect of the documentary offences under the Customs Act counsel submits that an appropriate fine is VT50,000 for each count. For Counts 8, 9, 10 and 11 for offences of making and producing a false and incorrect declaration, counsel submits a starting point of 5 months imprisonment (concurrent with the sentence on Count 1) and a fine of between VT1,000,000 and VT2,000,000.

37. To begin the sentencing of the defendant I set out the maximum penalty for the offences charged:

- (1) Attempting to Obtain Money or a Financial Advantage by Deception contrary to Section 28 and 130B of the Penal Code – **Imprisonment for 12 years;**
- (2) Offences in relation to entries contrary to Section 55(1) of the Customs Act – **a fine not exceeding VT100,000;**
- (3) Offences in relation to entries contrary to Section 55(2) of the Customs Act – **imprisonment for a term not exceeding 6 months or a fine not exceeding VT1,000,000 or both;**
- (4) Offences in relation to declarations contrary to Section 170 of the Customs Act – **imprisonment for a term not exceeding 6 months or to a fine not exceeding VT5,000,000 or both.**



38. In determining the appropriate sentences in this case in the absence of a relevant sentencing guideline or similar precedent the Court has also considered cases in neighbouring jurisdictions including the following:

- The Republic v. Biketi [2002] KHC 100 (Kiribati) a case of fraudulent evasion of customs duty through the use of false invoices with incorrect valuations of imported goods – the defendant a first offender was fined \$54,000 and sentenced to 2 years imprisonment;
- Comptroller of Customs v. Lualaba [2015] WSSC 72 (Samoa) involving a single non-commercial incident of defrauding the revenue of customs where a fine of \$1,500 was imposed and costs of \$250 was ordered. The Court said: *"In passing sentence in a case of defrauding the revenue, general deterrence is a predominant consideration to be taken into account"*.
- Regina v. Koata [2012] SBHC 168 (Solomon Islands) which involved charges of making a false declaration and fraudulent evasion of customs duty on imported goods by creating false documents. The defendant a sole business proprietor was fined a total of \$94,000 and 77 packages of mixed goods were forfeited to the Crown. In passing sentence the Court said:

"Every business has a legal obligation to pay taxes to the State. Taxes are a necessary means by which the State raises the necessary funds to carry out its services to the nation. The State will not function effectively and without taxes the State won't be able to raise the needed money The accused had tried to evade payment of her taxes by designing a strategy which involved the creation of false documents in an attempt to deceive the State. It is dishonesty of a very high order. Such conduct would certainly deserve a very severe penalty. This is the view of the Courts in this jurisdiction ..."

39. Also of assistance are the judgments in the English, NZ, and Australian cases that have been considered by the Court including:

- Czyzewski v. R [2003] EWCA Crim 2139 (UK) which was a tobacco smuggling case where the Court provided very helpful sentencing guidance on aggravating factors, mitigating factors and starting points. The Court also considered: *"... that there is likely to be, in smuggling cases, a loss to the Revenue not just of excise duty but also of Value Added Tax"*;
- He v. Police [2011] NZHC 1830 (NZ) which concerned a private individual importing 150 GPS units into NZ and providing a false invoice that undervalued the goods by two thirds. In dismissing an appeal against a fine the Court said: *"Denunciation and deterrence are of particular importance. It is easy to import goods from overseas and providing misleading information about the value of goods undermines Customs' ability to carry out its function of protecting NZ's borders and gathering revenue"*;

- In similar vein is the judgment of the NZ Customs Appeal Authority in L v. Licensing Executive of the NZ Custom Service [2012] NZCAA 3 where clothes, shoes and a diamond ring were undeclared and undervalued upon the appellant's entry into NZ on a visitor's permit. The Court although considering the offence not particularly serious, nevertheless, said: "*I cannot overlook the strong need for the factor of deterrence in terms of protecting our borders and supporting the work of customs*"; and
- The Queen v. Findlay [2007] NZCA 553 where the Court of Appeal in a case of multiple charges of fraudulently or dishonestly using a document said:

"Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication; the type circumstances and number of the victims; the motivation of the offending; the amount involved; the losses; the period over which the offending occurred; the seriousness of breaches of trust involved and the impacts on victims ..."

And later the Court said:

"The amount of money lost is not determinative of the seriousness of the offence but there is obviously some connection when assessing the need for deterrence, especially when a breach of trust is involved or where the fraud takes advantage of friends or others who place their trust in the offender".

40. Of the Australian cases the Court has considered the most persuasive are:

- DPP v. Hamman [unreported but referred to and cited in R v. Kelvin (below)] where the NSW Court of Criminal Appeal (per Sheller JA) said:

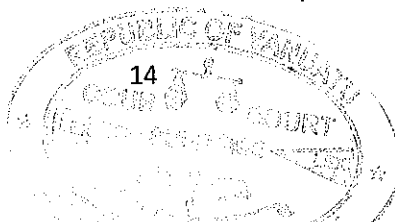
"General deterrence is a pre-dominant consideration when sentencing for offences of defrauding the revenue.

Appeal courts have discussed and emphasized the seriousness of frauds committed to the detriment of the public revenue. Inevitably the Australian system of tax collection depends upon the honesty of tax payers ... The effect of dishonesty and non-disclosure of income increases particularly those who have truly disclosed their gross income. This demonstrates the serious nature of the offences charges ... and the importance when punishing such offences to put in the forefront of the principles to be applied that of general deterrence.

... it is, in my opinion, of small account that when caught out the offender pays the tax due and additional tax by way of penalty ... according to the Commissioners discretion.

... past integrity and good character, devotion to family and work and contributions to the community, impeccable though they have been, carry little weight against the confession by a plea of guilty ...";

- R v. Kelvin [2000] NSWCCA 190 where the defendant pleaded guilty to 6 counts of defrauding the Commonwealth and was sentenced to 2½ years imprisonment. The Court referred to dicta in DPP v. Hamman (above) and in reducing the sentence to 18 months imprisonment the Court said (per Mason P):



"I am clearly of the view that a sentence of full time imprisonment was the only appropriate sentence having regard to the objective circumstances of the offences and the very limited degree to which the applicant co-operated with law enforcement agencies in the investigation of the offences".

- R v. Cappadona and another [2001] NSWCCA 194 which involved a systematic fraud over 5 years involving the creation of false business records and providing false information and documentation to the Australian Tax office. The sum involved was at least \$3,5 million. The court in allowing the state's appeal against a sentence of periodic detention for 2 years and substituting a sentence of 18 months full time imprisonment said:

"the (sentence) does not adequately recognise the fact that general deterrence is a predominant consideration when sentencing for offences of defrauding the revenue".

The Court also referred to the Hamman and Kelvin decisions (above) and set out the following relevant principles when sentencing for revenue fraud:

- "(a) in determining the sentence appropriate to any offence, regard must be had to its gravity viewed objectively;*
 - (b) the maximum sentence fixed by the legislature defines the limits of sentence for cases in the most grave category;*
 - (c) general deterrence is a predominant consideration when sentencing for offences of defrauding the revenue;*
 - (d) a sentence by way of periodic detention has a strong degree of leniency built into it and is outwardly less severe in its denunciation of the crime ...; (cf. a suspended prison sentence)*
 - (e) ... it is of small account that when caught out the offender pays the tax due and additional tax by way of penalty;*
 - (f) past integrity and good character carry little weight against systematic defrauding of the revenue over a significant period of time";*
- R v. Howe and McGown [2000] NSWCCA 405 which was a case of social welfare benefit fraud committed by a widowed pensioner where the Court affirmed:

"... that general deterrence is a predominant consideration when sentencing for offences of defrauding the revenue and that sentences of full-time custody is required unless there are special circumstances or, as is sometimes said exceptional circumstances or extraordinary circumstances".

(see also: R v. Caradonna [2000] NSWCCA 398 which was a case of defrauding the revenue by obtaining tax refunds for monies that were never paid by the tax payer in the first place.)

41. I can think of no good reason why similar sentencing principles and considerations should not apply in this jurisdiction to offences of defrauding the revenue through the use of false and misleading documentation. Indeed, in the context of Vanuatu which does not have an income tax system and where almost all of government's limited revenue is collected from indirect taxes, fees and excise duties, the defendant's offending must be considered particularly serious.
42. 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.
43. 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.
44. The fact that the legislation has seen fit to punish such behaviour by imposing a monetary penalty of treble the amount of any duty evaded (see: Section 104) reflects the ease with which such offences can be committed and how seriously it is viewed. Whatsoever detection and investigating customs fraud is not easy and the enactment of the facilitative provisions including a reversal of the normal burden of proof in Section 191 is recognition of that difficulty.
45. Needless to say if documents submitted by an importer cannot be trusted to be complete and accurate so that each and every container imported into the country had to be physically examined and inspected, imports would grind to a halt unless staffing in the Customs Department was trebled to the detriment of honest traders and consumers who would ultimately have to bear such increased costs.
46. 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:
 - Ct 1 – Attempting to Obtain a Financial Advantage by Deception – a sentence of 12 months imprisonment;
 - Cts 2 & 5 – Failing to Make a Customs Entry – A fine of VT250,000 for each count;
 - Cts 3 & 6 – Declaration of an Incorrect Entry – a fine of VT250,000 for each count;

- 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;
- Cts 8 & 9 – Making a False Declaration – a fine of VT350,000 and imprisonment for 2 months on each count;
- 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.

47. In respect of the fines, the defendant is given 28 days to pay them. Furthermore and to avoid the imposition of an unjust “*double penalty*” and subject to any appeal, the fines on Counts 8 & 9 and 10 & 11 are treated as alternatives for the reasons earlier discussed in paragraphs 9 and 10 (above).

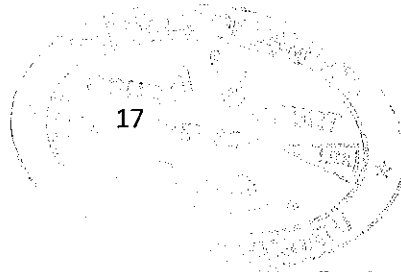
48. Summary:

- Count 1 - 12 months imprisonment with effect from 17 Dec. 2015
- Count 2 - VT250,000 fine;
- Count 3 - VT250,000 fine;
- Count 4 - VT350,000 fine and 2 months imprisonment (concurrent to Count 1)
- Count 5 - VT250,000 fine;
- Count 6 - VT250,000 fine;
- Count 7 - VT350,000 fine and 2 months imprisonment (concurrent to Count 1)
- Count 8 - VT350,000 fine and 2 months imprisonment (concurrent to Count 1)
- Count 9 - VT350,000 fine and 2 months imprisonment (concurrent to Count 1)
- Count 10 - VT500,000 fine and 3 months imprisonment (concurrent to Count 1)
- Count 11 - VT500,000 fine and 3 months imprisonment (concurrent to Count 1)

49. The total fines that the defendant must pay within 28 days are:

<u>Count 2</u>	–	VT250,000
<u>Count 4</u>	–	VT350,000
<u>Count 7</u>	–	VT350,000
<u>Count 8</u>	–	VT350,000
<u>Count 10</u>	–	VT500,000
TOTAL =		<u>VT1,800,000</u>

The remaining fines on Counts 3, 5 and 6 being for a total sum of VT750,000 (excluding alternative counts 9 & 11) are due and payable after the expiry of a further 28 days or after the determination of any appeal, whichever is later.



50. For completeness, I have also considered the defence submissions but reject the possibility of suspending the imprisonment sentences as inappropriate in this case.
51. The defendant has 14 days within which to appeal this sentence to the Court of Appeal.

DATED at Luganville, Santo this 11th day of March, 2016.

BY THE COURT



D. V. FATIAKI
Judge.

