

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 134 of 2015

28/07/16
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BETWEEN: R E X - Prosecution

AND: XIAO LONG FANG - Defendant

BEFORE THE HON. JUSTICE CATO

SENTENCE

[1] The defendant had pleaded guilty to one count of importing counterfeit goods contrary to section 94 (1) of the Customs and Management Act, 2007 on behalf of a company of which he was one of the shareholders and a director. The substance of the charge consisted of a large number of exercise books of various sizes. The amount that would be required to produce such a large number of books which the defendant had imported on the 28th January 2014 was a substantial sum namely about NZ\$40,000.00. This figure was supplied by Croxley Stationary Limited whose product the books were falsely represented to be.

[2] The defendant had plainly imported the books so as to be able to compete more profitably when they were sold in Tonga. The price that it cost to manufacture the goods in China was very significantly cheaper allowing the Company to have sold to retailers at a much lower price than it would have been able to do had they been from a legitimate source. Potentially Croxley and other suppliers could have been very seriously affected had the defendant succeeded in his object but Customs seized the

product on delivery in Tongatapu and hence the defendant was not able to sell them.

- [3] The prosecution suggested during the course of argument as to the appropriate sentence that the importation was an evasion of the Laws of Tonga applicable to manufacturing, were misleading of customers, had the potential to deprive the government, the manufacturer and private retailers of revenue, and in this case the importation was substantial. The suggestion was advanced that counterfeiting of goods was becoming prevalent in Tonga, although it seems this is one of the first, if not the first to come before this Court.
- [4] I accept however, the Crown's submissions that this is serious offending. The maximum penalty for this offending as reflected in section 94 (1) of the Customs and Excise Management Act 2007, renders a person liable upon conviction to a fine not exceeding \$100,000 or to a term of imprisonment not exceeding ten years, or both. For this reason, having heard counsel Mr William Edwards and Mr Lutui for the Crown as to penalty I adjourned the sentence to consider what that penalty should be and deliver a written judgment.
- [5] The defendant is a married man with no previous convictions, and he pleaded guilty. There were a number of shareholders of the corporate business but the defendant was the director and importer in this case. I was informed by Mr Edwards that the defendant was able to pay a reasonably substantial fine and could do so on sentence. It is plain that the offending has the potential to seriously harm the integrity of merchandising in Tonga, if as was suggested, this practice becomes prevalent. Such a practice would adversely affect retailers who source through legitimate channels and indeed it was as a consequence of such complaints that the matter has come before the Court,

the goods being seized by Customs. I accept that there was no question of duty being evaded in this case since the books are non-dutiable.

[6] This Court has to impose a fine that fairly reflects the seriousness of the offending. First the fine must reflect the retributive component and in my view also be sufficient as a penalty to deter and put on notice other importers who may be tempted to engage in this kind of activity. I inquired of both counsel what was considered by them to be an appropriate fine, and Mr Edwards suggested \$6000.00 Mr Lutui submitted an amount greater than \$10,000.

[7] Had the importation been successful and the product reached its market and been subject to a complaint of this kind, then my starting point would have been higher. Further had a complainant been able to demonstrate a loss of sales as a consequence of having to compete with counterfeit goods which had been on sold then I would have entertained a claim that this should be reflected in an increase in penalty with, in addition to an appropriate fine, a payment by way of compensation to an adversely affected claimant under section 25 of the Criminal Offences Act if that claimant could demonstrate a financial loss directly attributable to the importation and on sale into the market of counterfeit goods. As a consequence of the timely intervention of Customs, this was not required in this case.

[8] The fine I impose is intended to be one that reflects the seriousness of the offending and deter others from participating in such an activity which does undermine the integrity of merchandising in Tonga as well as affecting business. In my view, a starting point for this size of importation of a product which is in considerable demand in Tonga and probably a first to come before the Courts in Tonga, is \$13,000. That is a

substantial figure. As I have said it would have been higher if the object of the importation had been realized by on sale. I reduce this for the guilty plea and also because the defendant is a first offender to one of \$9000.00. That fine is to be paid within 48 hours of this judgment into Court following discussions with Mr Edwards, who agreed that his client could make payment into Court forthwith. In lieu of payment, the defendant is sentenced to imprisonment for 6 months. Leave is granted for Mr Edwards to apply for a further short extension of time for payment in the unlikely event that his client is unable to pay the fine within 48 hours



A handwritten signature in black ink, appearing to be "C. B. Cato", written in a cursive style.

C. B. Cato

J U D G E

DATED: 23 JUNE 2016