

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

CR NO. 514/18

POLICE

v

WENYAN DONG

Date: 18 September 2018
Counsel: Ms J Epati for the Crown
Mr M Mitchell for the Defendant

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[9:42:33]

[1] Wenyan Dong, you are a Chinese national, a foreign fishery agent, and you appear for sentence for a potentially significant commercial forgery.

[2] Your offence lies in making a false document, a Ministry of Marine Resources access agreement, between 19 March and 25 June 2018, intending that it should be used or acted on as genuine.

[3] In February 2018 you asked the Ministry of Marine Resources (Ministry) whether, in principle, it would be prepared to grant a fishing licence and quota to Shenzhen Shuiwan Pelagic Fisheries Co Ltd (Shenzhen) for six longline vessels which had entered the MSC (Marine Stuard Certification) program and were about to be certified.

[4] On 19 March 2018, after the Ministry had responded favourably in principle, you applied formally, on behalf of Shenzhen for a foreign fishing licence for two

fishing vessels – Zhong Yang 16 and 29 – not for the six to which the Ministry had agreed in principle.

[5] On 21 March 2018 the Ministry invoiced you, as Shenzhen's agent, in respect of the application, and you asked the Ministry whether Shenzhen was able to pay the sum invoiced in American as opposed to New Zealand currency.

[6] On 27 March 2018 you asked the Ministry to stamp the invoice with its common seal because Shenzhen's Chinese bank had requested this. Then on 6 April you advised the Ministry that payment was still pending because Shenzhen had opened a New Zealand currency account.

[7] On 3 May 2018 the Ministry sent you a marine resources access agreement, dated 2 May 2018, confined to the two fishing vessels applied for, signed by the Minister of Fisheries, Hon. Henry Puna, to be countersigned by Shenzhen, and returned to the Ministry.

[8] By 14 June 2018 Shenzhen had still to pay the invoice and the Ministry advised you that the licence application would remain suspended until the payment was made.

[9] On 20 June 2018 the Ministry received from you an access agreement, signed by Shenzhen, which differed materially from that sent to you. First, the signature of the Minister of Fisheries had been removed and replaced by the Ministry's common seal. Secondly, four further fishing vessels had been added.

[10] On 26 June 2018 the Ministry confronted you with these discrepancies, and you accepted that you were responsible. In an email you apologised and explained that you had prepared the agreement yourself to assist Shenzhen to obtain immediate finance.

[11] In March, you said, Shenzhen's bank was not willing to advance finance on the Ministry's invoice alone. It wanted an access agreement, which the Ministry had still to supply. Also, you said, Shenzhen told you that its two vessels – Zhong Yang 16 and

29 – were soon to enter the Cook Islands waters. It needed its licence. Your response was to counterfeit the agreement.

[12] That explanation leaves unanswered, firstly, how you were able to prepare an agreement in March, when the Ministry did not supply one until May. As your presentence report says, and your counsel has confirmed, you used an earlier access agreement as a precedent. You got the Ministry's common seal off the fresh invoice from the Ministry.

[13] It leaves unanswered, secondly, why despite this stratagem, Shenzhen had still not met the Ministry's invoice by 14 June 2018 and I gather from your counsel that by then Shenzhen had repented of the bargain. It leaves unanswered, finally, and most significantly, why you returned to the Ministry the counterfeit, not the Ministry's agreement.

[14] The radical difference between the two was this. The Ministry's agreement, on which Shenzhen was invoiced, was confined to two vessels. The counterfeit, which you say you had prepared in March, extended to six. The Ministry's invoice for the two vessels was NZD \$90,000. The sum for six vessels would have been NZD \$270,000. The scale on which Shenzhen would have been licenced under the counterfeit was three times greater.

[15] This has proved the pivotal issue. I am told by your counsel, and the Crown accepts, that on 20 June 2018, you sent the Ministry the counterfeit unintentionally. You had, by then, the Ministry's agreement executed by Shenzhen. You sent the wrong agreement.

Probation report

[16] You have the benefit of a very complete and sympathetic presentence report which recommends a short sentence of imprisonment of 2 months followed by 12 months supervision on probation, subject to the condition that you not leave the Cook Islands without the consent of this Court.

[17] Since 2009 you have worked throughout the Pacific as a fishery agent for China Southern Shenzhen Company Ltd. Between September 2013 and November 2015 you lived here in the Cook Islands, and you were well regarded. In February 2018 you were promoted to supervisor at head office in China, and became responsible for the South Pacific.

[18] Shenzhen was not, you say, a fishing company with whom you had dealt formally before. You assisted it as a favour to a friend, with whom you had been to university. You acted as a middleman.

[19] For the reasons I outlined earlier, you prepared the counterfeit, using as a precedent an agreement relating to another company, and the invoice copy of the Ministry's common seal. You did not, you say, understand how serious this was until your superiors told you that you had acted criminally and could be imprisoned.

[20] To be balanced against your offence, which your report rightly says is serious, is, as your report then says, that you did not benefit and that it was completely out of character. Also that you will, in all likelihood, lose your job, ending what has proved to be a highly promising career. Also that you have ceased your engagement to marry and are now at a remove from your parents, which you find distressing.

[21] Very importantly, your presentence report says, you accepted responsibility the moment you were confronted by the Ministry and you returned to the Cook Islands to do so. It was while you were back here, from China, that you were charged. That could not easily have happened otherwise.

[22] Your report commends that as both responsible and brave. You were rated as unlikely to offend again.

Sentencing principles

[23] The maximum sentence for your offence is imprisonment for 10 years, and two Cook Islands statutes govern what sentence within that maximum your particular

offence warrants – the Criminal Procedure Act 1980-81 and the Criminal Justice Act 1967.

[24] In sentencing you, assisted also as I am by the Sentencing Act 2002 (NZ), I must impose on you a sentence which denounces and deters you, holds you accountable for the harm you have done, induces you to accept responsibility, assists you, and recognises the interests of any victim of your offending.

[25] In doing so I must take account equally of the gravity of your offence, and its seriousness, and take into account as well what is known about the effect of your offence on the integrity of the statutory fishing regime in the Cook Islands and on the resource itself.

[26] In the Cook Islands, notwithstanding your counsel's careful submission, there is no tariff for your offence. Sentences for forgery have ranged from community service and supervision to imprisonment, the highest of which involved theft as a servant. It was 18 months imprisonment. Everything depends on the offence and the offender.

Crown and Defence submissions

[27] The Crown contends for a sentence of imprisonment. Aggravating your offence, the Crown contends is that you forged an official government document, using the Ministry's common seal. You did so to secure release of funds from the Bank of China.

[28] A sentence of imprisonment is called for, the Crown contends, to demonstrate that the Cook Islands will not tolerate any erosion of its sovereignty or reputation, or being used as a medium for fraud.

[29] Your counsel accepts that forgery is a serious offence, but contends that the circumstances of your offence, coupled with your own, make a sentence of imprisonment disproportionate.

[30] He contends that you were stupid rather than criminal. You could not and did not benefit from counterfeiting the agreement to obtain Shenzhen's funds from China. The funds were for the Ministry, to answer its invoice. You did not appreciate that what you were doing was criminal.

[31] As importantly, he says, the only reason that you are confronted today with this offence is that you sent the wrong agreement back to the Ministry on or about 20 June 2018. You had by then, as the Crown accepts, the genuine agreement signed by Shenzhen but that is not the one you sent.

[32] He too emphasises that you accepted immediate responsibility. You deeply regret what you have done. You are deeply concerned about your elderly parents in China. At most, he contends, you ought to be required to pay a fine.

Conclusion

[33] As I said at the outset, of these remarks on sentence, I regard your offence as a potentially serious commercial forgery; very fortunately stillborn.

[34] In their submissions counsel have focussed why you say you counterfeited the agreement, to secure funding on Shenzhen before the real agreement was entered into. That was serious enough. You used the Ministry's common seal in the counterfeit. You could indeed be answerable in China.

[35] As potentially important, to my mind, is that you then sent the counterfeit to the Ministry, as if it were the real agreement, increased from two to six vessels; an aggravating factor which we have explored extensively this morning.

[36] You are very fortunate that your counsel has been able to explain how that came about, and that the Crown accepts his account. I am going to give you the benefit of that explanation. But I must still emphasise that, to my mind, the offence you have admitted and the reason for it is serious in itself.

[37] Your offence, had you returned the counterfeit agreement as genuine to the Ministry, could have attracted a sentence with a starting point of imprisonment, considerably higher than the one that I now have in mind.

[38] For the offence you do admit and accept, and for the reasons the Crown outlined, I take a starting point of 12 months imprisonment.

[39] The discount, usual these days for a plea at the earliest opportunity, 25 percent, does not recognise that you returned to the Cook Islands to accept responsibility. That, to my mind, is hugely important. I increase the discount to 40 percent.

[40] You are entitled also to discounts for your previous good character, and the difficulty you will face serving a prison sentence in the Cook Islands. I give you a further discount of 10 percent. In short, I reduce my starting point by half.

[41] You will be sentenced to imprisonment for 6 months, commencing at 9am on 19 September 2018.



Patrick Keane, J