

ARCHIE GALVAN SACE

AND

PUBLIC PROSECUTOR

(HIGH COURT OF BRUNEI DARUSSALAM)
(CRIMINAL APPEAL NO. 1 OF 2024)

Haji Abdullah Soefri bin POKSM DSP Haji Abidin, J.C.

16th April 2024

Criminal Law – Section 146(1)(ia) Excise Order – Appeal against fine imposed – miscalculation of excise duty – appeal allowed

Case cited:

Md Hisham bin Awang Mustaman vs Public Prosecutor (Criminal Appeal No. 34 of 2016)

Mr Czar Cabading Calabazon of Rudi Lee, Annie Kon & Associates for the Appellant.

PO Nurul Husna Aqilah binti Haji Abidin for the Respondent.

JUDGMENT

Haji Abdullah Soefri, J.C.:

This is an appeal filed by the Defendant hereafter known as the Appellant against the sentence imposed by the Magistrate below on the charges that were preferred against him which he had pleaded guilty to.

The Appellant had pleaded guilty to 3 charges for the possession of:

1st Charge

That you, on the 04th day of January 2024, at about 1245hrs, inside a Premise Seng Hoe Huat Auto Accessories at the vicinity of Unit 8 & 9 Lot 15212 Ground floor, Block A, Spg 235, Kg Kiarong, in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit:

- 1) 02 Cartons x 10 Packets x 20 sticks Era Black Menthol Cigarettes
- 2) 06 Cartons x 10 Packets x 20 sticks Era Premium Cigarettes
- 3) 01 Cartons x 05 Packets x 20 sticks Era Full flavor cigarettes
- 4) 01 Cartons x 08 Packets x 20 sticks Era premium cigarettes

- 5) 01 Cartons x 10 Packets x 20 sticks Era black menthol cigarettes
- 6) 05 Cartons x 10 Packets x 20 sticks Era premium cigarettes
- 7) 07 Cartons x 10 Packets x 20 sticks Era black menthol cigarettes
- 8) 01 Cartons x 02 Packets x 20 sticks Era premium cigarettes
- 9) 01 Cartons x 03 Packets x 20 sticks Era Full flavor cigarettes
- 10) 01 Cartons x 02 Packets x 20 sticks Era black menthol cigarettes

and you have thereby committed an offence under Section 146(1) (d) of the Excise Order 2006 and punishable under Section 146(1)(ia) of the same Order.

Penalty – Section 146(1)(ia) of the Excise Order 2006

In the case of unexcisable goods, such goods being dutiable goods consisting of wholly or partly of tobacco

(A) For the first offence, to a fine of –

(AA) not less than 8 times the amount of excise duty or \$5,000, whichever is greater amount; and

(AB) not more than 15 times the amount of excise duty or \$50,000, whichever is the greater amount; and

(B) For the second or any subsequent conviction, to a fine of –

(BA) not less than 20 times the amount of excise duty or \$10,000, whichever is the greater amount; and

(BB) not more than 30 times the amount of excise duty or \$100,000, whichever is the greater amount, imprisonment for a term not exceeding 3 years or both,

Except that when the amount of excise duty cannot be ascertained, the penalty may to a fine not exceeding \$100,000.00.

2nd Charge

That you, on the 4th day of January 2024, at about 1340hrs, inside a house at the vicinity of No. B58, Spg 107, Bangunan Hj Daud Complex, Jln Gadong, in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit:

- 1) 02 Cartons x 10 packets x 20 sticks Era Premium cigarettes
- 2) 01 Cartons x 10 packets x 20 sticks Era Full Flavor cigarettes
- 3) 01 Cartons x 10 packets x 20 sticks Era Black Menthol cigarettes
- 4) 01 Cartons x 08 packets x 20 sticks Era Full Flavor cigarettes
- 5) 01 Cartons x 08 packets x 20 sticks Era Premium cigarettes
- 6) 01 Cartons x 09 packets x 20 sticks Era Black Menthol cigarettes

and you have thereby committed an offence under Section 146(1)(d) of the Excise Order 2006 and punishable under Section 146(1)(ia) of the same Order.

Penalty – Section 146(1)(ia) of the Excise Order 2006

In the case of unexcisable goods, such goods being dutiable goods consisting of wholly or partly of tobacco

- (A) For the first offence, to a fine of –
 - (AA) not less than 8 times the amount of excise duty or \$5,000, whichever is greater amount; and
 - (AB) not more than 15 times the amount of excise duty or \$50,000, whichever is the greater amount; and
- (B) For the second or any subsequent conviction, to a fine of –
 - (BA) not less than 20 times the amount of excise duty or \$10,000, whichever is the greater amount; and
 - (BB) not more than 30 times the amount of excise duty or \$100,000, whichever is the greater amount, imprisonment for a term not exceeding 3 years or both,

Except that when the amount of excise duty cannot be ascertained, the penalty may to a fine not exceeding \$100,000.00.

3rd Charge

That you, on the 4th day of January 2024, at about 1340hrs, inside a house at the vicinity of No. B58, Spg 107, Bangunan Hj Daud Complex, Jln Gadong, in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit:

- 1) 02 Bottles x 1 Litre Label 5 Blended scotch whisky 40% Alc
- 2) 01 Bottles x 1 Litre Label 5 Blended scotch whisky 40% Alc
- 3) 02 Bottles x 1 Litre Smirnoff Vodka 37.5% Alc
- 4) 01 Bottles x 1 Litre Chivas Regal Blended Scotch Whisky 40% Alc

and you have thereby committed an offence under Section 146(1)(d) of the Excise Order, 2006 and punishable under Section 146(1)(iia) of the same Order.

Penalty – Section 146(1)(ia) of the Excise Order 2006

In the case of unexcisable goods, such goods being dutiable goods consisting of wholly or partly of tobacco

- (A) For the first offence, to a fine of –

(AA) not less than 8 times the amount of excise duty or \$5,000, whichever is greater amount; and

(AB) not more than 15 times the amount of excise duty or \$50,000, whichever is the greater amount; and

(B) For the second or any subsequent conviction, to a fine of –

(BA) not less than 20 times the amount of excise duty or \$10,000, whichever is the greater amount; and

(BB) not more than 30 times the amount of excise duty or \$100,000, whichever is the greater amount, imprisonment for a term not exceeding 3 years or both,

Except that when the amount of excise duty cannot be ascertained, the penalty may to a fine not exceeding \$100,000.00.

The Defendant was imposed a fine of \$32,000 i/d 14 months imprisonment for the 1st charge based on the excise duty of BND\$4,100.

For the 2nd charge, a fine of \$5,600 in default of 5 months based on an excise duty of \$700.

For the 3rd charge, a fine of \$5,000 in default of 5 months.

The Appellant submitted that the correct excise duty for the 1st charge on 4600 cigarette sticks at 50 cents per stick is \$2,300 and not \$4,100 and the appropriate fine with a multiplier of 8 is \$18,400 and the default sentence should be reduced accordingly to 9 months.

As to the 2nd charge, the Appellant submitted that the correct excise duty for 1300 sticks of cigarettes at 50 cents per stick is \$650 and not \$700 and the appropriate fine with a multiplier of 8 is \$5,200 or 5 months in default sentence.

The Appellant submitted that the default sentence should run concurrently rather than consecutively because it arose out of the same police raid and represents one course of criminal conduct and cited the High Court decision in *Md Hisham bin Awg Mustaman v Public Prosecutor (Criminal Appeal No. 34 of 2016)*.

The Respondent submitted to this Court that the Court should invoke Section 291 of the Criminal Procedure Code and order for a retrial and for the conviction to be quashed on the grounds that paragraph 4 of the Statement of Facts was amended whereby the cartons were increased from 2 to 12. This amendment was read to the Defendant and the Defendant agreed. However, this amendment was not made on the charge sheet for the 1st charge and the said charge was not read back to the Appellant with the amendment.

For this, the plea for the 1st charge was unsafe and his conviction should not have been entered. Section 175 of the Criminal Procedure Code has not been complied with.

As to the default sentence, the Respondent differentiated the present case and Md Hisham's case whereby in Md Hisham's case, all the contraband was found inside the house and inside two vehicles parked in the vicinity of the house and in the present case, the items were found at two different places.

As to the return of the cash money, the Respondent submitted that there is no clear order from the Magistrate on the seized cash and a retrial on this case has to be done.

Section 291 of the Criminal Procedure Code states:

"No judgment or order of a Court of a Magistrate shall be reversed or set aside unless it is shown to the satisfaction of the higher court that the judgment or order was either wrong in law or against the weight of the evidence, or, in the case of a sentence, inappropriate in the circumstances of the case."

Before me today, the Respondent submitted that there were amendments to the Statement of Facts and thus, with this amendment it will affect the 1st charge. However, the 1st charge was not amended and the amended charge was not read to the Defendant. This has made the plea not safe and they invite the Court to invoke Section 291.

The question is whether I am satisfied that the judgment or order was either wrong in law or against the weight of the evidence that I will revise the Magistrate's Court decision based on the Respondent's submission.

The Respondent has agreed that there is nothing in the Magistrate's Notes of Proceedings to show that there is an application to amend the Statement of Facts. There is nothing in the Notes of Proceedings to show that there was ever any application to amend the charge.

The only conclusion that I can reach is that there was no application to amend the Statement of Facts or even the charge and the application to invoke Section 291 to order for retrial is dismissed.

As to the Appellant's grounds of appeal, it is clear from Excise Duties (Amendment No. 2) Order 2017, page 4306 (2402.20.90.00) under description 'other' that the rate of Excise Duty is \$0.50 per stick.

The calculation of fines imposed by the Magistrate below was based on what was given by the Prosecution as in paragraphs 13 and 14 of the Statement of Facts as the excise duty to be paid.

Having recalculated again as in the Appellant's submission, the excise duty to be paid should be \$2,300 for the 1st charge and \$650 for the 2nd charge.

I agree with the Appellant that there is a miscalculation on the excise duty and this has resulted in the miscalculation of the fines imposed.

Having had said that and taking into account that there is a miscalculation, I agree with the Appellant's submission that the proper penalty for the 1st charge is a fine of \$18,400 or in default of 9 months' imprisonment, and the penalty for the 2nd charge is a fine of \$5,200 in default of 5 months' imprisonment and the 3rd charge is to remain the same.

As to whether the default sentence is to run concurrently or consecutively, I agree with the Respondent that Hj Hisham's case is different from the present case. Obviously, in *Hj Hisham's* case, all were involved in the same locality but not in the present case where the two places are very different localities.

This Court dismisses the Appellant's appeal to have the default sentence to run concurrently.

Therefore, the Defendant's appeal is allowed to the following extent:

- 1) 1st charge: Fine of \$18,400 in default of 9 months' imprisonment
- 2) 2nd charge: Fine of \$5,200 in default of 5 months' imprisonment
- 3) 3rd charge: Fine of \$5,000 in default of 5 months' imprisonment

Total sentence: Fine of \$28,600 in default of 19 months' imprisonment

As to the money amounting to BND\$3,500 and PHP1,750, the Statement of Facts has stated that this money is from his salary and not from the proceeds of any criminal activities as opposed to BND\$4,362 and SGD\$5 where he admitted that are from the sale of cigarettes.

In view of the above and since the money was admitted and agreed and highlighted in the Statement of Facts in paragraph 12, I believe the intention of the Court below was not to seize the salary and to have it returned to the Defendant.

I therefore allow the appeal for this money/salary of BND\$3,500 and PHP1,750 to be returned to the Defendant.

HAJI ABDULLAH SOEFRI BIN POKSM DSP HAJI ABIDIN
Judicial Commissioner