

Rapian bte Haji Roslan

and

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 11 of 2018)**

**Pg DP Hjh Rostaina Pg Hj Duraman, J.C.
23rd June 2018**

Criminal Law --- Section 146(1)(d) of the Excise Order 2006 --- Appeal for longer period of instalment payments --- Appeal for reduction in the in default of payment sentences.

Cases referred to:

Ang Suat Goh vs PP (Criminal Appeal No.12 of 2011)

Hj Ahad bin Adi vs PP (Criminal Appeal No.12 of 2016)

Khairol bin Awang Sabtu vs PP (Criminal Motion No.13 of 2016)

Md Hisham bin Awang Mustaman vs PP (Criminal Appeal No.24 of 2016)

Appellant in person.

DPP Qamarul Affyan bin Hj Abdul Rahman and DPP Sabrina bte Hj Mahmud for the Respondent/Public Prosecutor.

Pg DP Hjh Rostaina, JC

1. On the 30th April 2018, in the Magistrate's Court, the Appellant was convicted on her own plea to two counts under section 146(1)(d) of the Excise Order 2006. The charges were as follows:

1st charge

That you, on the 19th day of April 2018, at about 1727 hours, at the vicinity No. 6C, Jalan 2, Simpang 26, Kampong Perpindahan Lambak Kanan, in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit:

1. 08 cartons x 10 packets x 16 sticks of L.A Ice cigarettes
2. 13 cartons x 10 packets x 16 sticks of Extreme Mild Menthol cigarettes
3. 21 cartons x 10 packets x 20 sticks of Era Black Menthol cigarettes
4. 05 cartons x 10 packets x 20 sticks of Era Full Flavor cigarettes

5. 08 cartons x 10 packets x 20 sticks of Era Premium cigarettes
6. 04 cartons x 10 packets x 20 sticks of Era Ice Plus Flavor cigarettes
7. 04 cartons x 10 packets x 20 sticks of Raison Blue Cat 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.

2nd charge

That you, on the 19th day of April 2018, at about 1902 hours, inside a vehicle model Honda Civic bearing registration number BM7546 ,at the vicinity No. 6C, Jalan 2, Simpang 26, Kampong Perpindahan Lambak Kanan, in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit:

1. 01 cartons x 10 packets x 16 sticks of L.A Ice cigarettes
2. 06 cartons x 10 packets x 16 sticks of Extreme Mild Menthol cigarettes
3. 11 cartons x 10 packets x 20 sticks of Era Black Menthol cigarettes
4. 03 cartons x 10 packets x 20 sticks of Era Full Flavor cigarettes
5. 11 cartons x 10 packets x 20 sticks of Era Premium 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.

Penalty under section 146(1)(ia) of the Excise Order 2006

In the case of unexcisable goods, such goods being dutiable goods consisting of wholly of 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 the greater and 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 and 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 3 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 amount to a fine not exceeding \$100,000.

2. The Magistrate imposed the following sentences:- For the 1st charge a sentence of \$47,040 fine or 24 months' imprisonment in default of payment. For the 2nd charge a sentence of \$24,480 fine or 12 months' imprisonment in default of payment.
3. She was ordered to fully settle the total fines of \$71,520 within 6 months i.e until 31st October 2018 or 36 months' imprisonment in default of payment.

4. The Appellant appealed for a reduction in the amount of fines imposed on her; an extension of time in which to pay the fines and to be allowed to pay them by instalments of \$400 monthly; and before me this morning, she appealed for the total of 36 months' imprisonment in default of payments to be reduced.
5. It is clear with effect from 26th March 2018, the range of sentencing tariff involving contraband cigarettes meted out on a first time offender under section 146(1)(d) of the Excise Order 2006, has been amended from a minimum multiplier of 6 to 8 to the amount of excise duty evaded as the financial penalty to be imposed. In our present case, the duties evaded were \$5,880 for the 1st charge and \$3,060 for the 2nd charge.
6. Therefore, the Magistrate has the discretion to pass the total fines ranging from \$71,520 being the lesser amount or \$134,100 being the maximum amount and in this case, she had imposed on the Appellant the minimum penalty prescribed. I agree. The above fines are by no means manifestly excessive and are in accordance with the range of fines prescribed under section 146(1)(ia) of the Excise Order, 2006.
7. Before me, she said she has no means of income. She is unemployed and depended on her husband to take care of her and the rest of the family. That her youngest child is only aged 5. That in addition to the \$440 that her husband receives from his monthly pension, he is employed as a labourer at the Municipal Department and that earnings goes towards loans repayments.
8. The Appellant offered to pay monthly instalments of \$400 until fully settled. The DPP objected and submitted the Appellant is unemployed, a mother of five and has only made a single payment of \$1,000, an extension of grace period would not guarantee successful payment of the fines imposed on her. That allowing a longer period would dilute the deterrent element of the sentence and may cause an administrative burden on the courts. I agree. Her offer to pay \$400 monthly is unacceptable. It would take her 13 years to make full payment (***see Md Hisham bin Awang Mustaman vs PP [CA No.34 of 2016]***).
9. As to the in default imprisonment sentences, the DPP submitted and conceded that the total of 36 months' imprisonment in default of payment imposed on the Appellant is on the higher side and cited the following authorities. In ***Ang Suat Goh vs PP (CA No.12 of 2011)*** where DP Steven Chong, J, upheld the Appellant's fine of \$70,000 and in default of payment, 12 months' imprisonment. In the case of ***Hj Ahad bin Adi vs PP (CA No.12 of 2016)*** GJ Lugar-Mawson, J, upheld the Appellant's fine of \$81,000 with 12 months' imprisonment in default of payment. In the case of ***Khairol bin Awang Sabtu vs PP (CM No.13 of 2016)*** DP Hairol Arni

Majid, J, held the in default imprisonment of 2 years imposed for a fine of \$56,000 was manifestly excessive and varied it to 12 months.

10. I have taken into account the matters the Appellant has put before me. Balancing between the need to preserve the deterrence objective and the Appellant's personal circumstances, I extend the time she has to pay the fines to the end of February 2019. If she cannot pay, then she will have to serve the in default prison sentences.
11. In respect of the in default sentences and based on the cases cited, I vary the Magistrate's order and substitute 24 months' imprisonment in default of payment on the 1st charge with 12 months. On the 2nd charge, I substitute the in default sentence of 12 months to 8 months. However, as they all arose out of the same raid and represent one course of criminal conduct, and she is not a repeat offender, I further vary the Magistrate's order that they be served consecutively to one that they be served concurrently. This will make the Appellant's total in default of payment periods of imprisonment one of 12 months' imprisonment, not 36 months.
12. The appeal is allowed to the extent that the grace period for paying the fines is extended to the end of February 2019 and the total in default periods of imprisonment, if they have to be served, are to be served concurrently and not consecutively.

PG DP HJH ROSTAINA BTE PG HJ DURAMAN
Judicial Commissioner
23rd June 2018