

Lau Chik Chiong

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 26 of 2019)**

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

2nd March 2021

Criminal law --- section 144(1) Excise Order 2006 --- Appeal --- sentence not manifestly excessive --- appeal dismissed

Cases referred to:

Tan Kee Tai vs Public Prosecutor (1988) 1 MLJ 13

Ang Suat Goh vs Public Prosecutor [2011] 2 JCBD 11

Mr Hj Mansur bin DP Dr Hj Abdul Latif of m/s Ho & Lenny Rahman for Appellant/Defendant.
DPP (Dr) Mohammad Hussin Ali bin Idris for Respondent/Public Prosecutor.

RULING

Hj Abdullah Soefri, JC:

Appeal by the Defendant against sentences imposed by the Magistrate's below on 26th November 2019.

Appeal is against sentences to charges 2nd, 4th, 6th and 7th on the ground that the penalties imposed are manifestly excessive. The Charges 2nd, 4th, 6th and 7th are charges under section 144(1) of the Excise Order 2006.

The charges are as follows:-

2nd Charge

That, on the 6th day of March 2019, at about 1832 hrs, using a rental truck Nissan Diesel bearing registration no. BQ4318 at the vicinity Rasau Toll, Kuala Belait in Brunei Darussalam, did make incorrect particular to wit by failing to declare in Custom Declaration Form of the following goods:

1. 1 box Aladdin lighter (1000 pcs)

and you have thereby committed an offence under section 144(1)(a) of the Excise Order 2006 and punishable under section 144(1) of the same Order.

4th Charge

That, on the 6th day of March 2019, at about 1916 hrs, being the owner of a Prime Mover Nissan Diesel bearing registration no. BN5218 and trailer registration no. BR2178 at the vicinity Inland Container Depot (ICD), Sungai Tujoh in Brunei Darussalam, did make incorrect particular to wit by failing to declare in Custom Declaration Form of the following goods:

1. 50 cartons x 12 bottles x 1.5 litre Mirinda cream flavour (sugar 10.8g/100ml)
2. 70 cartons x 12 bottles x 1.5 litre Mirinda strawberry flavour (sugar 10.8g/100ml)
3. 100 cartons x 12 bottles x 1.5 litre Coca-Cola classic (sugar 10.6g/100ml)
4. 20 cartons x 24 bottles x 500 ml Pokka Premium teh susu (sugar 7.6g/100ml)

and you have thereby committed an offence under section 144(1) of the Excise Order 2006 and punishable under section 144(1) of the same Order.

6th Charge

That, on the 6th day of March 2019, at about 1918 hrs, being the owner of a Prime Mover Nissan Diesel registration no. BQ5866 and trailer bearing registration no. BR3470 at the vicinity Inland Container Depot (ICD), Sungai Tujoh in Brunei Darussalam, did make incorrect particular, to wit by failing to declare in Custom Declaration Form of the following goods:

1. 137 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Blackcurrant (sugar 9.6g/100ml)
2. 47 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Lemon (sugar 9.6g/100ml)
3. 93 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Guava (sugar 9.6g/100ml)
4. 30 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Yuzu (sugar 9.6g/100 ml)
5. 149 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Apple (sugar 9.6g/100ml)
6. 117 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Strawberry (sugar 9.6g/100ml)
7. 146 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Freeze (sugar 9.6g/100ml)
8. 135 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Extreme (sugar 9.6g/100 ml)
9. 43 cartons x 24 bottles x 500ml – SOSRO Fruit Tea Markisa (sugar 9.6g/100ml)
10. 252 cartons x 24 bottles x 450ml – Teh bottles (Original Flavor)

and you have thereby committed an offence under section 144(1) (a) of the Excise Order 2006 and punishable under section 144(1) of the same Order.

7th Charge

That, on the 6th day of March 2019, at about 1926 hrs, being the owner of a Prime Mover Nissan Diesel registration no. BN2825 and trailer bearing registration no. BL6147 at the vicinity Inland Container Depot (ICD), Sungai Tujoh in Brunei Darussalam, did make incorrect particular, to wit by failing to declare in Custom Declaration Form of the following goods:

1. 1000 cartons x 24 bottles x 320ml – Coca-Cola classic (sugar 10.6g/100ml)
2. 256 cartons x 12 bottles x 1.5 liter – Coca-Cola classic (sugar 10.6g/100ml)
3. 250 cartons x 24 bottles x 500ml – Coca-Cola classic (sugar 10.6g/100ml)

and you have thereby committed an offence under section 144(1)(a) of the Excise Order 2006 and punishable under section 144(1) of the same Order.

The penalty provided for the offence as provided for under section 144(1) of the Excise Order, 2006 is as follows:

“Fine not exceeding \$40,000 or the equivalent of the amount excise duty payable, whichever is the greater, imprisonment for a term not exceeding one year or both”.

The Defendant was convicted on his own plea to a total of 8 charges. 4 charges under the Customs Order, 2006 and 4 charges under the Excise Order 2006.

The Magistrate on 26th November 2019 imposed fines on the Defendant to all the charges that he was convicted on.

For the purpose of this appeal, we will only deal with charges 2nd, 4th, 6th and 7th and the Magistrate imposed the following sentence:

For 2nd Charge: a fine of \$1,000.

For 4th Charge: a fine of \$4,300.

For 6th Charge: a fine of \$13,500.

For 7th Charge: a fine of \$15,300.

The Appellant cited the case of ***Ang Suat Goh vs Public Prosecutor, [2011] 2 JCBD 11*** where Justice Dato Steven Chong (as he was known then) considered four essential factors in determining the appropriate sentence to be imposed for offences of this nature:

1. The amount of duty evaded;
2. The quality of goods involved;
3. Repetition of the offence; and
4. Whether the offender was acting on his own or involved in a syndicated operation.

The Appellant also submitted that the penalty stated under section 144(1) of the Excise Order provides *“a clear meaning on how the fines should be calculated, the equivalent of the amount of duty payable”*.

In para 30 of the Appellant’s submission, they further state:

In the present case, we humbly submit that this Honourable Court adopts Macdougall J’s view in ***Tan Kee Tai vs Public Prosecutor (1988) 1 MLJ 13*** whereby in constructing the penal provision of section 144(1) of the Excise Order *“strictly and not extended beyond their clear meaning”* the fines impose on the Appellant’s company should be the equivalent of the amount of duty payable.

In para 34, the Appellant submit *“that the loss of revenue to the government should be the amount of excise duty payable and in accordance to the penal provision of section 144(1) of the Excise Order, we reiterate that the fines payable by the Appellant’s company should be the equivalent of the amount of the duty payable as stated at paragraph 30 of the above”*.

Respondent Submission

The Respondent in their submission in para 19 submitted that sentence imposed by the Court must have a deterrent element so that it will prevent other offenders to be not to commit the same offence.

As to the penalty, Respondent submitted that the Court can impose a fine range between the maximum sentences of \$40,000 to the amount of excise duty payable, as a minimum sentence.

The Respondent contended that the suggestion by the Appellant for the lower Court should impose a fine based on the excise duty payable is not the correct reading of the penalty and indeed not the intention of the drafters. The Respondent further question what deterrence effect does \$11.00 fine towards a company that has been running since 2010. If so, this will cause a mockery of our criminal legal system and no party will take seriously of our criminal law.

Discussion

The Appellant contended that the Magistrate should have imposed the amount equivalent to the amount of duty payable.

Section 144(1) is not ambiguous. It provides the Court a discretion to impose a sentence up to the maximum. How the maximum is to be calculated is either not exceeding \$40,000 or the amount of Excise Duty payable whichever is the greater. For instance, if the excise duty payable as in the 2nd Charge is \$11.00 since \$40,000 is greater than \$11, the maximum amount that the Court can impose must not exceed \$40,000.

On the other hand, if the Excise Duty is \$100,000, then the maximum fine the Court can impose is \$100,000. Section 144(1) did not stipulate that it is the specific Excise Duty that to be imposed on the Defendant and if to do so it will defeat the purpose of deterrence.

If the amount of Excise Duty is \$100,000, what deterrence will it have if the Court impose the exact amount? \$100,000 is the amount of Excise Duty that is supposed to be paid to the Government and he is convicted of the offence. The Court could either impose both the fine of \$100,000 and imprisonment not exceeding one year or straight to impose imprisonment of not exceeding one year.

Even if the amount is less than \$40,000 and if the Defendant is a repeat offender, the Court can impose imprisonment straightaway.

It is one of the principles of sentencing that the sentence imposed will act as a deterrent to others from committing such offence or for the Defendant not to commit the offence again.

If the sentence is equivalent to the value of Excise Duty, where is the deterrence factor?

I am satisfied that when the Magistrate imposed the sentences, she had taken full consideration of all the mitigating, aggravating factors and in the circumstances of this case, I do not think the fines imposed for the 2nd, 4th, 6th and 7th Charges can be said to be excessive.

For these reasons, the Appeal is dismissed.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner