



Md Hisham bin Awang Mustaman

.... Appellant

AND

Public Prosecutor

.... Respondent

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 34 of 2016)**

Before Hon. Judicial Commissioner Gareth John Lugar-Mawson in Court
Date of Hearing: 20th May 2017

Criminal Law - section 146(1)(d) of the Excise Order 2006 - possession of un-excised cigarettes - time to pay fine - consecutive or concurrent default sentences.

Appellant in person.

DPP Kamaliah Fadhilah binti Haji Ibrahim for the Respondent.

J U D G M E N T

On 17 October 2016, the Appellant was convicted after trial in the Magistrates Court of 3 charges of possession of un-excised goods contrary to section 146(1)(d) of the Excise Order 2006. Each charge related to the possession of cigarettes on which duty had not been paid. The first charge related to possession of 66 cartons of cigarettes, containing a total of 12,120 cigarettes, found in his home on 1 September 2012. The second charge related to possession of 1 carton of cigarettes, containing 200 cigarettes in total, found in Toyota Avanza parked at his home on the same day. The 3rd charge related to possession of 1 carton of cigarettes, containing 200 cigarettes in total, found in a Ssanyong Rexton



parked at his home, also on the same day. The excise duty evaded in respect of all the 12,520 cigarettes was BND\$3.130.

On conviction, the Appellant was sentenced on the 1st charge to a fine of BND\$27,000, with 14 months imprisonment in default of payment, on the 2nd charge to a fine of BND\$500, with 2 months imprisonment in default of payment and on the 3rd charge to a fine of BND\$500, with 2 months imprisonment in default of payment. The fines total BND\$28,000, the default periods of imprisonment total 18 months and, if they are to be served, the Magistrate ordered them to be served consecutively. The Appellant was ordered to pay the fines at the rate of BND\$3,500 per month over a period of 8 months. To date he has not paid any instalments in reduction of the fines.

The Appellant's appeal against conviction was dismissed by Findlay J on 24 January 2107; he now, by a letter to the Court of the same date, appeals against his sentences.

In his appeal letter, the Appellant asks for an extension of the time in which to pay the fines, asking that he be allowed to pay them at the rate of BND\$100 to BND\$200 per month rather than the BND\$35,000 per month ordered by the Magistrate.

Before me this afternoon, he says that monthly payments are too high and he just cannot afford to meet them. He is destitute and has been dismissed from his employment. When employed, he only earned BND\$500. He says that he is responsible for looking after his wife and his mother, who suffers from high blood pressure and has a heart condition, as well as his 3 children, who all attend primary school. One child, he says, receives treatment at the KACA Centre in Kiulap. He accepts that, as he can't pay the fines, he will have to serve the default prison sentences, but asks that I reduce their period.



The penalty for a first-time offender under section 146(1)(d) of the Excise Order is a fine of not less than 6 times the amount of the excise duty evaded or BND\$40,000, whichever is the greater amount, subject to a maximum fine of not more than 20 times the amount of duty evaded or BND\$40,000, whichever is the greater amount. For a repeat offender, the penalty is a liability to pay the same fine and to serve 2 years' imprisonment.

It is clear from the many cases involving contraband cigarettes that have been heard before the High Court that there is an established tariff sentencing range based on a multiplier of 8 to 10 to the amount of duty evaded as the financial penalty to be imposed on a first-time offender, after an early guilty plea, for an offence under section 146(1)(d).

In this case the Appellant was convicted after trial. He is not a repeat offender. The duty evaded on all the 12,520 cigarettes was BND\$3,130, the total amount of fines imposed of BND\$28,000 is just less than 9 times the amount of the duty evaded. The fines are by no means manifestly excessive and are in accordance with the range of fines commonly imposed for these offences. Indeed, they are rather lenient given that the Respondent did not plead guilty and took the matter to trial.

Similarly the default prison sentences are in line with those passed in similar cases for this offence.

The Appellant's offer to pay by installments is just not acceptable. If he paid at the rate he offers of BND\$200 to BND\$100 per month it would take him at least 140 months - 11 years - and at most 280 months - over 23 years - to make full payment.

I have taken into account the matters the Appellant has put before me. As an act of clemency, I extend the time he has to pay the fines by 2 months from today's date. They



must be paid by 29 July 2017. This is to give him a final opportunity to raise money, by legal means, to pay them. If he can't pay, then he will have to serve the default prison sentences. However, as they all arose out of the same police raid and represent one course of criminal conduct, I vary the Magistrate's order that they be served consecutively to one that they be served concurrently. This will make the Appellant's total period of imprisonment one of 14 months imprisonment, not 18 months.

The appeal is allowed to the extent that the grace period for paying the fine is extended to 29 July 2017 and the default periods of imprisonment, if they have to be served, are to be served concurrently, not consecutively.

Hon. Gareth John Lugar-Mawson
Judicial Commissioner