

Muhammad Khairol Faiz bin Awg Bujang

vs

Public Prosecutor

**High Court of Brunei Darussalam
(Criminal Motion No. 48 of 2019)**

Pg DP Hjh Rostaina binti Pg Hj Duraman, J
19th February 2020.

Criminal Law --- possession of contraband cigarettes --- section 146(1)(d) of the Excise Order 2006 --- leave to appeal for longer period of instalment payments

Cases cited:

Zulkifli bin Puasa and Others vs PP (1985)1 MLJ 461
R v Olliver and Olliver (1989) 11 Criminal Appeal R(s) 10
Ang Suat Goh vs PP (CA No.12 of 2011)
Aisah binti Mohd Zaini v PP (HCCA No.28 of 2011)
Sepinah binti Hj Sa'at v PP (HCCA No.29 of 2011)
Khairul bin Hj Kula vs PP (CA No.24 of 2014)
Abdul Hadzi bin Hj Kula vs PP (CA No.25 of 2014)

Applicant in person.

PO Siti Nurjauinah binti Haji Kula for Respondent/Public Prosecutor.

Pg DP Hjh Rostaina, J

1. On 30th May 2019, the Applicant was convicted on his own plea to one count under section 146(1)(d) of the Excise Order 2006. The charge was as follows:-

Charge

That you, on the 6th day of May 2019 at about 1725 hours, inside a vehicle with registration number BAT 6993 (Suzuki Swift) at the vicinity of Simpang 2302, Kampong Junjungan in Brunei Darussalam, did knowingly have in your possession unexcisable goods, to wit

1. 9 cartons x 10 packets x 20 sticks of Era Premium cigarettes
2. 2 cartons x 10 packets x 20 sticks of Era Black Menthol cigarettes
3. 2 cartons x 10 packets x 20 sticks of Raison (blue) 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 under section 146(1)(ia) of the Excise Order 2006

In the case of un-excisable 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, which 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.

2. Magistrate Kamaliah Fadhilah binti Hj Ibrahim ordered him to pay a fine of B\$10,400 or 10 months' imprisonment in default of payment. He was given a period of about 6 months that is until 26th December 2019 to fully settle the total fine. He has not made any effort towards the reduction of the fine since the date of his sentence.

3. The admitted facts were that on 6th May 2019, during a police operation his vehicle was stopped and contraband cigarettes were found. He had purchased them from an unknown Malaysian man for a total price of B\$120. He intended them for his own consumption and for sale. The excise duty evaded was B\$1,300 and the fine was at 8 times the duty evaded.

4. Before granting leave, the Court must be satisfied both that there is a satisfactory explanation for the delay and that the appeal has a reasonable good prospect of success: see ***Zulkifli bin Puasa and Others vs PP (1985)1 MLJ 461***.

5. The Notice of Motion for leave to appeal out of time was filed on 16th December 2019. He explains he is not aware of the time provisions of 14 days to lodge an appeal. See **section 272(1) of the CPC, Cap7**. The Prosecuting Officer argues that the substantial delay of about 6 months is not a satisfactory explanation for the delay. I agree.

6. However, even if I am to hear his appeal, more importantly, has he an arguable case? The Prosecuting Officer submitted that the fine of B\$10,400 is not manifestly excessive. It is within the range of sentences normally imposed by the court below for similar offences. That the 6 months grace period allowed by the Magistrate to pay the fine is reasonable. It is clear from the authorities cited to me by the Prosecuting Officer and further, she submits if the court is minded to allow the extension of time, *it should be between 2 to 3 years and any failure to pay in any one of the instalments then the in default term of imprisonment need to be served as ordered*. See: **Aisah binti Mohd Zaini v PP (HCCA No.28 of 2011) and Sepinah binti Hj Sa'at v PP (HCCA No.29 of 2011)**.

7. I turn to the Applicant's case. It is clear from the facts put forward by the Applicant, he has financial difficulties and is a person of limited means. He is 23 years old. He is employed, he only earns B\$500 a month. He is also supporting a wife, two children and another child is due by April 2020. He accepts he cannot pay the fine within the grace period of 6 months granted to him and ask for a longer period of instalment payment. He is a first offender.
8. To allow him to pay the fine in the amount he proposed and to allow for a longer grace period to pay the fine would not only defeat and dilute the deterrent element of the sentence but would also be an administrative burden to the court.
9. In **Ang Suat Goh v PP (CA No.12 of 2011)** DP Chong, J then made reference to the case of **R v Olliver and Olliver (1989) 11 Criminal Appeal R(s) 10**, where Lord Lane, CJ said, "a two-year period will seldom be too long and in an appropriate case three years will be unassailable" depending on the nature of the offender and the nature of the offence.
10. In the case of **Khairul bin Hj Kula vs PP (CA No.24 of 2014)** and **Abdul Hadzi bin Hj Kula vs PP (CA No.25 of 2014)** the COA Justices on, "*finer as a punishment*" said the following: "*The severity of such a sentence depends upon the ability of the accused to pay. A small fine on a poor man may be severe punishment whereas a substantial fine to a wealthy man may be insignificant*".
11. Balancing between the need to preserve the deterrence objective and his personal circumstances, the Applicant is a first offender, as an act of clemency, I will give him the opportunity which he seeks to pay the fine. I extend the time he has to pay and settle the total fine by **19th February 2022**, failing which he is to serve the default prison sentence. He will be reminded over the months ahead what he did was wrong and so the deterrence objective of the sentence is preserved. The appeal is allowed to that extent.

PG DP HJH ROSTAINA BTE PG HJ DURAMAN
Judge, High Court
19th February 2020