

Mohammad Nor Aliffullah Hakiki bin Hj Abd Bakar Ahmad

and

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Motion No. 60 of 2018)**

Pg DP Rostaina bte Pg Hj Duraman, J
4th February 2019

Criminal Law --- section 146(1)(d) of the Excise Order 2006 --- Notice of Motion ---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 v Public Prosecutor (Criminal Appeal No.12 of 2011)

Azri bin Ramlee vs PP, HCCA 22 of 2011

Hjh Dara binti Yusup vs PP HCCA 23 of 2011

Applicant in person.

DPP Dr Mohammad Hussin Ali bin Idris for Respondent/Public Prosecutor.

JUDGMENT

Pg DP Hjh Rostaina, J

1. On 19th July 2018, 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 7th day of July 2018 at about 1000 hours, inside a vehicle model Mitsubishi Lancer bearing registration number BAE 9546 at the vicinity Kuala Lurah Control Post in Brunei Darussalam, did have in your possession un-excisable goods, to wit:

- 1. 04 cartons x 10 packets x 20 packets of Era Black Menthol cigarettes*
- 2. 08 cartons x 10 packets x 20 packets of Era Premium cigarettes*
- 3. 02 cartons x 10 packets x 20 packets of Era Menthol cigarettes*
- 4. 02 cartons x 10 packets x 20 packets of Era Full Flavor cigarettes*
- 5. 03 cartons x 10 packets x 16 packets of Extreme Mild Menthol cigarettes*
- 6. 02 cartons x 10 packets x 16 packets of Era L.A Ice 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 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.

2. Senior Magistrate Hajah Azrimah bte Haji Abdul Rahman sentenced him a fine of B\$16,000 or 13 months' imprisonment in default of payment. He was given 5 months grace period to settle the fine that is until 31st December 2018.
3. The admitted facts were that on 7th July 2018, the Kuala Lurah's customs officers inspected his vehicle and found contraband cigarettes concealed inside the speaker box at the vehicle's bonnet. He admitted he purchased them in Limbang at B\$114 for his own consumption and for sell. The excise duty evaded was B\$2,000 and the fine was at 8 times the duty evaded.
4. He sought leave to appeal out of time for a longer period of instalment payment. DPP Dr Mohammad Hussin Ali bin Idris objected to his application and referred to section 272(1) of the CPC, Cap 7. He submitted the Notice of Motion was not filed until 15th December 2018, more than 4 months (135 days) out of time. The explanation given for the delay was his lack of awareness of the time provisions for appealing.
5. He submitted the 5 months grace period is reasonable and to allow for a longer grace period at a monthly payment ranging between B\$200-B\$500 would take more than 2 years. This would defeat and dilute the deterrent element of the sentence and would be an administrative burden to the Court. (*See Azri bin Ramlee vs PP, HCCA 22 of 2011 and Hjh Dara binti Yusup vs PP, HCCA 23 of 2011.*)
6. However, before considering if the applicant's explanation is satisfactory I will deal with the merits of the appeal. The applicable principles in considering such an application are well established in ***Zulkifli bin Puasa and others vs PP (1985)1 MLJ 461***, where Sir Alan Huggins JA, delivering the judgment of the court said at page 462, "*there are two factors to be considered for an extension of time; (i) the length of the delay and whether it can be satisfactorily explained, and (ii) whether the out of time application is likely to succeed.*"
7. I turn to the applicant's case. He is aged 28. He just got married in November 2018. Currently, his wife is undergoing medical treatment and needs an eye transplant at Singapore hospital soon. He has no prior conviction. He earns B\$500 monthly as a general helper with SCCB Company. His remorse is reflected in his regular efforts towards paying the fine. There is no evidence to suggest he is a member of a syndicate involved in the smuggling of contraband cigarettes.

8. In ***Ang Suat Goh v Public Prosecutor (Criminal Appeal No.12 of 2011)*** Dato Paduka Steven Chong, as Ag. CJ 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.
9. In the case of ***Khairul bin Haji Kula vs Public Prosecutor, (CA No.24 of 2014) and Abdul Hadzi bin Haji Kula vs Public Prosecutor, (CA No.25 of 2014)*** the COA Justices on, “*finis 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.*”
10. Balancing between the need to preserve the deterrence objective and his personal circumstances, I will give him the opportunity to pay the total fine as he will be reminded over the months ahead what he did was wrong and so the deterrence objective of the sentence is preserved. I allow him to pay and settle the total fine within 1 year i.e. by 4th February 2020. The appeal is allowed to that extent.

PG DP HJH ROSTAINA BTE PG HJ DURAMAN
Judge, High Court
4th February 2019