

Chong Foh Hin

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Motion No. 16 of 2022)**

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

24th August 2022

Criminal law --- Section 146(i)(d) Excise Order, 2006 --- possession of contraband cigarettes and contraband liquors --- application for leave to appeal --- no satisfactory explanation for delay --- grounds of appeal no likelihood of success --- sentence --- not excessive application dismiss.

Cases referred to:

Zulkifli bin Puasa and Others vs PP (1985) 1 MLJ 461

Jason Toh Han Heng vs PP (HCCA No. 4 of 2012)

Mohammad Ezam bin Tuah vs Public Prosecutor (2015) 2 JCBD 185

Mohd Zurimi bin Haji Junaidi and PP (HCCA No.36 of 2018)

Narziral Faiqah binti Adnini vs PP (HCCA No.3 of 2020)

PP vs Nooryanto bin Mohd Noor (HCCA No.13 of 2020)

Applicant In Person.

DPP Nor'adliatul Hidayah binti Haji Mohd Zaidi for Public Prosecutor.

JUDGMENT

Hj Abdullah Soefri, JC:

This is a Criminal Motion filed by the Applicant to seek leave to appeal against sentence.

On 13th January 2022, the Applicant was convicted on his own guilty pleas to two charges under section 146(1)(d) of the Excise Order 2006 for having in possession of unexcisable goods. He also admitted to the Statement of Facts unreservedly after it was read and explained to him in Mandarin by Mr Sun.

For the first charge, the Applicant was charged with knowingly have in his own possession of unexcisable goods a total of 153 cartons of contraband cigarettes of different brands pursuant to section 146(1)(d) of Excise Order 2006 and punishable under section 146(1)(ia) of the same.

As for second charge, the applicant was charged with knowing to have in his possession unexcisable goods a total of 409 bottles of contraband liquors of different brands pursuant to section 146(1)(d) of the Excise Order 2006 and punishable under section 146(1)(ia) of the same.

Magistrate Nur Eleana binti Dato Seri Paduka Haji Hairol Arni in imposing the sentence took into account that the applicant has pleaded guilty, first offender in the applicant's favor, and also took into account of the serious nature of the offence and to impose a deterrence sentence so as to deter like-minded others from committing such offence.

The learned Magistrate imposed a sentence of a fine on both charges. She imposed a fine of \$126,900 in default of 20 months for the first charge where the tax evaded was \$14,180 and a fine of \$23,300 in default of 13 months where the tax evaded was \$2,524.

The total sentence of \$150,200 in default of 33 months was to be paid on the 13th January 2022 which he failed to do so.

Before me now, the Applicant is applying leave to appeal the said sentence.

The Notice of Appeal was filed on 27th June 2022 and there was a delay of about 6 months from the date of sentencing to the filing of the Notice of Appeal.

In ***Zulkfli bin Puasa and Others vs Public Prosecutor (1985) 1 MLJ 461***, the Court of Appeal stated that there are two factors that need to be considered for an application of an extension of time:-

1. the length of the delay and whether it can be satisfactorily explained; and
2. whether the out of time is likely to succeed.

In ***Jason Toh Han Heng vs Public Prosecutor***, Court of Appeal application for leave No.4 of 2012, 10th May 2012, it was held as follows:-

“The Application must demonstrate that the delay can be satisfactorily explained and that he has an arguable case likely to succeed on the appeal. Much the most important of these is showing that there is an arguable case and the appeal has at least a reasonable chance of success. Leave will not be granted in the absence of an arguable case even if the delay is excusable or it is so short that it is just to overlook it.”

The Applicant informed to this court that the reason why the Notice of Appeal was only filed 6 months after was because:-

“I was thinking to see whether my wife can support the family but she could not.”

What he was telling to this court was that he wanted to check if the wife can support the family without him and after 6 months it was found that she could not and thus filed the Notice of Appeal.

Is this a satisfactory explanation for the delay? I am satisfied that it is not a satisfactory explanation for the delay.

The next question for this court to decide is whether there is an arguable case and the appeal has at least a reasonable chance of success?

The Applicant's grounds for appeal is that his family depends on him and would like to earn for the family and thus would like for the sentence to be reduced and to be released as soon as possible.

Turning to the sentence imposed by the learned Magistrate below, the Magistrate used a multiplier of 8.9 for the first charge and a multiplier of 9 for the second charge.

The learned DPP highlighted two cases before this court where the charges are under the same provisions and made up of the same items which are contraband cigarettes and liquor.

In ***Narziral Faiqah binti Adnini vs Public Prosecutor, High Court Criminal Appeal No.3 of 2020*** whereby the items were contraband cigarettes, the multiplier of 10 imposed by the Magistrate was upheld.

In ***Public Prosecutor vs Nooryanto bin Mohd Noor, High Court Criminal Appeal No.13 of 2020***, where the items were contraband liquors, a multiplier of 9 was upheld.

In the present case, the Magistrate used a multiplier of 8.9 for the contraband cigarettes and 9 for the contraband liquors.

The sentence imposed by the Magistrate and the default sentence and no grace period to pay the time is definitely not excessive. It is also a reflection of the seriousness of the offence and in order to deter others from committing the such offence.

As to the hardship to the family, it was held by the Honorable Chief Justice, Steven Chong, in ***Mohd Zurimi bin Haji Junaidi and Public Prosecutor (High Court Criminal Appeal No.36 of 2018)***, where the Lordship quoted ***Mohammad Ezam bin Tuah vs Public Prosecutor (2015) 2 JCB 185*** that *"Hardship to an offender's family because of a custodial sentence is not normally considered a mitigating factor since it is a consequence of his criminal act"*.

The Applicant admitted that he committed these offences because he wants to sell them to earn income. This is a blatant disregard of the law in order.

Having said all the above, I am satisfied that the explanation given by the Applicant for the delay in filing the Notice of Appeal are not a satisfactory explanation and that there is no chance of success for this appeal as the sentence imposed by the Magistrate is definitely not excessive.

I hereby dismiss the application for leave to appeal against the sentence and upheld the sentence and order of the Magistrate below. Before I take my leave, I would like to highlight the penalty for this offence as provided by the law.

As for a first offender, the penalty provided is a fine only.

As for a second offender, is a fine or imprisonment of not more than 3 years.

The question is whether these penalties are a sufficient deterrence?

In other offences such as immigration offences, a first offender who is charged with overstaying is faced with imprisonment and whipping.

If the statistics show an increase of this type of offence, it would be prudent for the penalties to be revisited.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner