

Haswandy bin Osmadi

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Motion No. 22 of 2021)**

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

29th January 2022

Criminal law --- section 3(1) Motor Vehicle Insurance (Third Party Risk Act), Cap 90 --- section 8(2) of the Road Traffic Act, Cap 68 --- leave to appeal out of time allowed --- payment of fine by monthly instalments --- extension of time to pay fine

Appellant in person and unrepresented.

PO Mohammad Kamal Ariffin bin Ismail and PO Nur Hidayatul Aeny Alisah binti Hj Zullizam for Public Prosecutor/Respondent.

Cases referred to:

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

R v Olliver and Olliver (1989) 11 Cr App R(s)10

Aisah binti Mohd Zaini vs PP and Sepinah binti Haji Sa'at vs PP [2011] 2 JCBD 153

Ang Suat Goh vs PP (HCCA No.12 of 2011)

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

Khairul bin Haji Kula vs PP (CA No.24 of 2014)

Abdul Hadzi bin Haji Kula vs PP (CA No.25 of 2014)

Saharin bin Osman (HCCA No.42 of 2015)

Mohammad Wira Firdauzee bin Hj Md Azahar vs PP (HCCM No.9 of 2020)

JUDGMENT

Hj Abdullah Soefri, JC:

This is an appeal by the Defendant, Haswandy bin Osmadi, to have his grace period extended in order for him to pay the fine imposed by the Magistrate Court. The Applicant was convicted on his own guilty plea to one charge under section 3(1) of the Motor Vehicle Insurance (Third Party Risk Act) and one charge under section 8(1) of the Road Traffic Act.

The offences were committed on 25th December 2019 and the Applicant was sentenced on 18th May 2020.

Magistrate Mohammad Marzuqi bin Sabtu sentenced the Applicant to a total fine of \$1,750 in default 5 weeks' imprisonment. The Applicant was given a grace period of 12 months to settle the fine; until the end of May 2021.

The Applicant had a previous conviction in 2010 for the same offence under section 3(1) of the Motor Vehicle Insurance (Third Party Risk Act).

Before me, the Applicant applied for leave to appeal out of time for more time to make payments. Section 272(1) of the Criminal Procedure Code, Cap 7 states that:

“The appellant shall within 14 days from the time of such judgment, sentence or order being passed or made, file a petition in the Court of such Magistrate, paying at the same time the prescribed appeal fee”.

Further, section 278 of the Criminal Procedure Code, Cap.7 states that:

“The Judge may, on the application of any person desirous of appealing who may be debarred from doing so upon the ground that he has not observed some formality or requirement of this Code, permit an appeal upon such terms and with such directions to the parties as he shall consider desirable, in order that substantial justice may be done in the matter”.

The Notice of Appeal was filed out of time on 5th June 2021. There was delay of 1 year and 18 days. The Applicant explained that he was unable to settle the fine as he was unemployed due to Covid-19.

Taking into account the established principles in **Zulkifli bin Puasa & Others vs Public Prosecutor [1985] 1 MLJ 461**, there are two factors to be considered for an application for an extension of time, namely: (1) the length of the delay and whether it can be satisfactorily explained and (2) whether the out of time application 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. 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.”

I will deal with each factor in turn.

Here, a delay of 1 year and 18 days is considered to be substantial thus, an extension of time will not be granted without a satisfactory explanation. His reasoning behind the delay was his unemployment status due to Covid-19 and the absence of any transportation for him to commute to Bandar. I am in the view that the reasons put forward by the Applicant are unsatisfactory. The delay was too long and he was given ample time to find transportation to enable him to apply for a Notice of Appeal within the time period if he was aware that he would not be able to settle the fine on time.

Next, I will deal with whether the out of time application is likely to succeed.

In the present case, the Applicant is seeking for an extension of the grace period to enable him to pay by instalments. He was recently employed as a security guard at a private company and

he earns \$400 per month (\$300 during probation and \$450 after probation, excluding overtime). To allow him to pay \$50 per month would take 2 years and 9 months for him to settle the fine. To add to the 12 months grace period that has lapsed, it would be 3 years in total.

In the Court of Appeal in ***Aisah binti Mohd Zaini vs Public Prosecutor and Sepinah binti Haji Sa'at vs Public Prosecutor*** [2011] 2 JCB 153 it was stated that imposing a lengthy instalment period for a payment of fine will be undesirable for the Court. This would not only defeat the deterrent element of the sentence but would also be an administrative burden to the Court.

However, one of the objects of a fine is to remind the offender that what he has done is wrong, and the fact that he is being reminded of that over the months is no bad thing at all: see ***R v Olliver and Olliver*** (1989) 11 Cr App R (s) 10. Lord Lane, C.J., delivering the judgment of the Court of Appeal in ***R v Olliver and Olliver***, concluded that *"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 and this was adopted by DP Steven Chong who was Ag CJ then in the case of ***Ang Suat Goh vs Public Prosecutor*** (High Court Criminal Appeal No.12 of 2011) where the Lordship made reference to the case ***R v Olliver and Olliver*** above.

In their submission, the Prosecution submitted that a 12 months grace period to pay the fine with a total of \$1,750 is reasonable and sufficient for the Applicant and is more than generous.

Further, the Prosecution has submitted that the Applicant has made no efforts to settle his fine. However, the Applicant explained that his salary was deducted due to Covid-19 and he was only able to bring home \$100 from his previous employment as a security guard at the Airport. Following that, he was unemployed until 28th May 2021.

I refer to the case of ***Khairul bin Haji Kula vs Public Prosecutor*** (Criminal Appeal No.24 of 2014) and ***Abdul Hadzi bin Haji Kula vs Public Prosecutor*** (Criminal Appeal No.25 of 2014), where the Court of Appeal Justices stated that *"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 may be insignificant"*.

The Applicant also explained that it was difficult for him to find a job due to the constraints on his left arm from an operation. I take note of this but due to the absence of any medical evidence and by reason that it was not brought up before, the whole statement lacks weight or significance towards his defence.

I also take note that he is not a first-time offender under section 3(1) of the Motor Vehicle Insurance (Third Party Risk Act) and that it has not deterred him from his previous offence.

However, having regard to the Applicant's personal circumstances, especially his financial situation and new employment status, imposing in default imprisonment would apply a greater burden on the Applicant in the long run. Following the case of ***Saharin bin Osman*** (Criminal Appeal No.42 of 2015), imposing in default imprisonment would result in the Applicant being out of work and in a far worse position. However, it is still necessary for the Court to consider a reasonable proposal for payment by the Applicant when granting an extension of time.

In **Mohammad Wira Firdauzee bin Hj Md Azahar vs Public Prosecutor (Criminal Motion No.9 of 2020)**, Justice Pg Datin Paduka Hjh Rostaina binti Pg Haji Duraman, stated:

"I do not think it would serve the public interest to have him incarcerated without giving him adequate opportunity to pay fines. In these circumstances and as an act of clemency, I would give him the opportunity to pay the fines until fully settled and not suffer imprisonment as at the same time he would be reminded over the months ahead what he did was wrong and the deterrence objective of the sentence is preserved."

Court Order

Taking into account all the submissions and all circumstances, I allow the Applicant's application for leave to appeal as there is likelihood chance of success despite the delay in filing the Notice of Appeal. I allow the appeal and give him the opportunity to pay the total fine of \$1,750 in default of 5 weeks at \$150 per month to take effect from 1st March 2022 and to continue on the first day of each subsequent month until fully settled and if the Appellant fails to pay any of each instalment, the whole balance to be paid in one lump sum and failure of that the Appellant is to serve the default sentence.

The motion is allowed and appeal is allowed as per Court's order above.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner