

Junaidi bin Haji Besar

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Motion No. 6 of 2021)**

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

19th April 2021

Criminal Law – Excise Order 2006 – offence under section 146(1)(d) – appeal against sentence – and for monthly instalments dismissed and grace period extended to 19th May 2021 instead of 1st February 2021

Cases referred to:

Rhodes (R v Rhodes [1910] 5 Cr App R 35)

Zulkifli bin Puasa and Ors vs PP [1985] 1 MLJ 461

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

Aisah binti Mohd Zaini vs PP (HCCA No.28 of 2011)

Sepinah binti Haji Sa'at (A2) vs PP (HCCA No.29 of 2011)

Rosani binti Rabaha vs PP (HCCA 14 of 2013)

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

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

Muhammad Khairul Faiz bin Awg Bujang vs PP (HCC No.48 of 2019)

Appellant/Defendant in person and unrepresented.

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

JUDGMENT

Hj Abdullah Soefri, J.C.:

The Applicant was charged with an offence under section 146(1)(d) of the Excise Order 2006 for having in possession of un-excisable goods being dutiable goods consisting of tobacco. The Applicant pleaded not guilty to the charge on 14th December 2019 and trial was conducted.

On 25th November 2020, the Magistrate below found the Applicant guilty after a trial and sentenced him to a fine of \$27,000 in default of 13 months. He was given a grace period until 1st February 2021 (69 days) to pay in full and final settlement.

The Applicant filed in Notice of Appeal against sentence for him to pay the fine in monthly instalment on 28th January 2021.

Section 272(1) of the Criminal Procedure Code provides as follows:-

"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 a Magistrate, paying at the same time the prescribed appeal fee".

Section 278 of the Criminal Procedure Code states:-

"The judge may, on the application of any person desirous of appealing who may be debarred from doing so upon the ground of his not having 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".

In **Zulkifli bin Puasa and Ors vs Public Prosecutor [1985] 1 MLJ 461**, there are two questions that this Court needs to consider in determining whether leave should be granted:-

- a. the length of the delay and whether it can be satisfactorily explained; and
- b. whether the out of time application is likely to succeed.

In the same case, Sir Alan Huggins J.A. said:-

"There are two factors to be considered upon an application for an extension of time, (1) the length of the delay and whether it can be satisfactorily explained, and (2) whether the out of the time application is likely to succeed.

*Where, as here, the delay is of short duration the court may, if it thinks fit, disregard the delay, even in the absence of satisfactory reasons, but where a substantial interval of time (a month or more) has elapsed, an extension of time will not be granted, as a matter of course without a satisfactory explanation: see **Rhodes (R v Rhodes [1910] 5 Cr App R 35)**. Where the delay is minimal the court will still not grant an extension of time if the application for which the extension is sought is bound to fail: there must be an arguable case. Moreover, even though the subsequent application may be likely to succeed ... the court will not grant an extension of time as a matter of course: see *Rigby*. The entire circumstances will be considered".*

Appellant Reasons for Delay

The Applicant informs the Court that at first he did not know that the appeal need to be applied earlier.

He further informed the Court that he knew it later when he wanted to make payment in the Magistrate Court.

He want to make payment one week before the grace period ended and it is not a full payment. He told the Court that his friend informed him that he can pay by instalment. He confirmed that he did not ask or enquired the Court and he just relied on his friend.

He proposed to pay \$300 per month. He is engaged as part time driver earning around \$300 per month and has a business selling BBQ chicken from home.

He informed the Court that from 2002 until 2014, he worked as Immigration officer and was terminated in 2014 for leaving the country without permission.

Does the Appellant have an arguable case?

The fines imposed by the Magistrate below are not manifestly excessive. The grace period of 69 days is reasonable. The Respondent submit “that personal hardship should not be taken into account as basis to extend grace period imposed by the lower court. The Applicant himself is an author to his crime and he should be held responsible for whatever ramification that may incur as a result of his irresponsible acts.

The Respondent further submitted that the Applicant should not be granted a longer grace period for him to settle his fine on the following reasons:-

- a) The Defendant pleaded not guilty to the charge and should not be entitled to any leniency including this appeal.
- b) The lower court has imposed a minimum sentence for the Defendant despite of claiming trial.

The Respondent cited the case of **Rosani binti Rabaha vs Public Prosecutor (HCCA 14 of 2013)** where the Court states:-

“On the one hand, fines had to be of an amount which the appellant could reasonably pay given his financial means. On the other hand, the fines had to be fixed at a level which would be sufficiently high to achieve the dual objectives of deterrence, in terms of deterring both the appellant and other importers”.

I totally agree with the Prosecution that the purpose of handing down fines must have a deterrence element. The effect of allowing the extension in paying fine should be considered carefully by the Court and it must remain a priority that deterrence is paramount.

In **Aisah binti Mohd Zaini vs Public Prosecutor (HCCA No.28 of 2011)** and **Sepinah binti Haji Sa’at (A2) vs Public Prosecutor (HCCA No.29 of 2011)**, Steven Chong J, as he is known then cited “Sentencing Principles in Singapore” (Kow Keng Siong) under the heading “Advantages of paying fine by Instalments”.

“One obvious advantage is that by granting payment of fine by instalment, the Court spares the offender (and his family) the agony and hardship of having to serve jail time. It has been said that 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 not a bad thing at all: R v Olliver and Olliver (1989) 11 Cr App R (s) 10”.

Lord Lane, C.J in R v Olliver and Olliver, having reviewed the authorities, said that “a two-year period will seldom be too long and in an appropriate case 3 years will be unassailable”, depending on the nature of the offender and the nature of the offence.

In **Muhammad Khairul Faiz bin Awg Bujang vs Public Prosecutor (Criminal Motion No.48 of 2019)**, Pg DP Hjh Rostaina J, cited the case of **Khairul bin Hj Kula vs Public Prosecutor (CA No.24**

of 2014) and Abdul Hadzi bin Hj Kula vs Public Prosecutor (CA No.25 of 2014) the COA Justices on, “*fines 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”.

In the present case, the amount in his possession is large and it is obviously not for personal use. I have doubt that he is remorseful for what he had done. This can be seen in his own action whereby that he did not enquire much earlier of the appeal process and only take for granted that he will be allowed to pay by instalment only a week before the grace period expires.

Having had said the above and taking into account the matters that the Applicant has put forward before me, and the need to preserve the deterrence objective and so as not to diminish the seriousness of the offence and his personal circumstances, I, therefore, dismiss all the appeals and as an act of clemency, I order the following:

1. Applicant to pay the whole of the fine (\$27,000) by 19th May 2021 at 11 am and failure to pay the whole sum, the Applicant will serve the default imprisonment as ordered by the Court below of 13 months.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner