

Public Prosecutor

AND

Bebatik Aquaculture Sdn Bhd

**(High Court of Brunei Darussalam)
(Criminal Revision No. 2 of 2022)**

Criminal law – Failure to furnish income tax return by company – Provisions as to sentences of fine – Discretion of court to order that in default of payment of the fine a warrant for the levy of the amount by distress and sale of any property of the offender be issued - s.78(1)(b) of the Income Tax Act – s.253(1) of the Criminal Procedure Code.

Steven Chong, C.J.
16 May 2022.

DPP Pg Hjh Nor’Azmeena Pg Hj Mohiddin for Public Prosecutor.
Adi Hasbi (Director) for the Defendant.

Case cited:

Mohammad Khairul Sukri Bin Haji Safar v Public Prosecutor [2011] 1 JCBD 259

Steven Chong, C.J.:

Introduction

On 9 April 2022 in the Magistrate’s Court Bebatik Aquaculture Sdn Bhd (“*the defendant*”) represented by one of its directors pleaded guilty to four counts of failing to furnish its income tax returns from 2017 to 2020 contrary to section 78(1)(b) of the Income Tax Act.

The Senior Magistrate imposed a fine of \$1,000 on each count and allowed the aggregate fine of \$4,000 to be paid within 6 months.

In the Senior Magistrate’s Reasons for Sentence she also made the following order:

“If the [defendant] fails to pay the fine the prosecutor may institute civil proceedings against the [defendant] to realise the fine.”

This is an application by the Public Prosecutor to the High Court for revision of the Senior Magistrate's decision "*not to order to issue a warrant for the levy of the amount by distress and sale of any property belonging to the defendant company upon failure to pay the fines imposed.*"

Preliminary points

Two preliminary points need to be made before dealing with the substantive issue of the correctness of the Senior Magistrate's decision.

First, there is a difference between the records of the Senior Magistrate and the Deputy Public Prosecutor on the Senior Magistrate's decision as to the consequences of a default in the payment of the fine. The court did not have the benefit of submissions on how this difference should be resolved and I leave aside the question of which record is conclusive. On either version the Senior Magistrate's decision is unsustainable.

The Senior Magistrate's record in her Reasons for Sentence referred to earlier was to the effect that the Public Prosecutor may sue the defendant for the amount of the fine not paid. Whereas the Deputy Public Prosecutor's record was that the "*Magistrate ordered for the Prosecution to return to the Magistrate's Court to make the application (for an order to issue a warrant for the levy of the amount by distress and sale of any property belonging to the defendant) at the end of the grace period if the fine has not been settled (para 6 of submissions).*"

Second, the Deputy Public Prosecutor seems to be of the opinion that no order as such was made by the Senior Magistrate and thus this is a proper case for revision rather than appeal.

I take the view that on either the Senior Magistrate's record or the Deputy Public Prosecutor's record there was in essence an order made that in the event of a default in the payment of the fine, in the former, the Public Prosecutor was to sue the defendant "*to realise the fine*" and in the latter, the Public Prosecutor was to "*return to the Magistrate's Court*" to apply for an order for the sale of the defendant's property to satisfy the fine.

It is noteworthy that the Deputy Public Prosecutor in her submissions (at para 6) acknowledges that "*the Magistrate ordered for the Prosecution to return to the Magistrate's Court to make the application (for sale of the defendant's property) at the end of the grace period if the fine has not been settled.*"

Therefore, in my judgment, this application for revision should instead have been an appeal against the order of the Senior Magistrate pursuant to section 271 of the Criminal Procedure Code on the ground of an error in law.

The correct order to be made

Insofar as material section 253 of the Criminal Procedure Code provides:

"(1) *Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may, in its discretion, make both or either of the following orders –*

(a) . . .

(b) *Issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender.”*

Plainly, the court below was wrong in the order made on both its own record and on the prosecution’s record relating to payment default of the fine for the following reasons.

In making the order that the Public Prosecutor “*institute civil proceedings against the [defendant] to realise the fine*” in the event of payment default of the fine the Senior Magistrate incorrectly equated the prosecution, conviction and punishment of a statutory offence as if it were a civil suit against the defendant. There is simply no legal basis for the Public Prosecutor to sue the defendant for non-payment of the fine.

As a matter of principle the Senior Magistrate, when she sentenced the defendant to pay the fine, ought to have made an order that a warrant be issued for the levy of the amount by distress and sale of any property belonging to the defendant in default of payment of the fine. Otherwise, there is no incentive for the defendant to pay the fine.

Turning to the Senior Magistrate’s order for the Public Prosecutor to return to the Magistrate’s Court to apply for the abovementioned warrant “*at the end of the grace period if the fine has not been settled*” this, too, is erroneous as it would be tantamount to revisiting the sentence imposed.

The Magistrate is *funtus officio* once sentence has been passed and the terms for payment of a fine fixed: *Mohammad Khairul Sukri Bin Haji Safar v Public Prosecutor* [2011] 1 JCBD 259. The exercise of the discretion to order a warrant to be issued for the levy of the amount by distress and sale of the property of the defendant in default of payment of the fine should be made at the time sentence is passed and not be contingent upon failure to make payment by the defendant.

Conclusion

For the foregoing reasons the order of the court below is quashed and substituted with an order that in default of payment of the fine on the due date a warrant for the levy of the amount by distress and sale of any property belonging to the defendant is to be issued forthwith without the need for the prosecution to make any application.

DATO SERI PADUKA STEVEN CHONG
Chief Justice