

ཆེ་མཐོ་ཁྲིམས་ཀྱི་འདུན་སྐྱོད་



HIGH COURT, BHUTAN

ལྷན་དུ་འདུག་པའི་ཁྲིམས་ཀྱི་འདུན་སྐྱོད་  
ROYAL COURT OF JUSTICE

*Sonam Tshering Vs. Office of Attorney General*

Press Release

Judgement rendered

19 May 2011

**Re: Case concerning the Smuggling of tobacco products under the Tobacco Control Act of Bhutan, 2010**

*(Note: This is a summary translated version of the main Judgement handed down in Dzongkha for the purpose of press. The judgement in the main text must be enforced in its entirety)*

The High Court hereby upholds the Thimphu District Court conviction of three years prison term awarded to the 23 year old defendant Sonam Tshering for smuggling of tobacco products as just and appropriate in interpreting section 52 of the Tobacco Control Act, 2010. The Bench notes that the particular section is so implicit and explicit provision that any person found smuggling tobacco or tobacco products shall be guilty of an offence of smuggling and be punishable with minimum sentence of felony of fourth degree thereby giving very limited scope for the judges to show any leniency.

The definition of smuggling is the cross border imports or exports of prohibited or restricted goods when the defendant secretly and illegally imports or exports. The court notes that section 2 of the Sales Tax, Customs and Exercise Act, 2000, too, defines imports and exports of goods as any goods brought into from a place outside the Kingdom by land, sea or air or accordingly exports out of the Kingdom by land, sea or air. Therefore, section 52 of the Tobacco Control Act and its intent of the legislation convey very clear and unambiguous message to categorize those illegal imports of tobacco or tobacco products as the offence of the felony of fourth degree to be sentenced with minimum of three to five years.

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HIGH COURT, BHUTAN

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The reviewed decision of the Bench overrules the argument of the defense counsel that the defendant should have been instead charged under section 51 read with section 11 (c) of the Act as the source of supply has been revealed in Jaigoan (India) so that the defendant could have been punishable with misdemeanor (one year to three year prison term). The Bench rules that the sovereign function of Parliament of any country is to make laws applicable to its own territorial jurisdiction and cannot extend beyond ones own country. The argument that the source has been revealed in Jaigoan in India is in contravention to the established application of municipal or domestic law and the principle of *Lex Loci* (law of the sate or nation). Upholding the argument of the prosecution, the Bench rules that when one reveals the source of supply, it means that such source must be within the territorial jurisdiction of the Kingdom and not beyond the reach of the Kingdom's law. Thus, the very essence of the meaning of section 11 (c) is to be applied when the source apprehended is within the territorial sovereignty of Bhutan. Our Parliament has no scope to make laws that are applicable to another sovereign country. Thus, the nature of the case is within the scope of section 52 as the offense is of smuggling tobacco and tobacco products.

Moreover, the Bench notes that section 52 of Act might not have been legislative oversight for the judiciary to go beyond its scope. The passing of Bills under our Constitution guarantees enough mechanism of vertical checks and balances before a Bill becomes an Act. The particular section is devoid of any probable confusion. It is very clear. And such explicit and implicit provision of laws does not allow courts and judges to go beyond (except in case where the particular provision of law is in direct contravention to the Constitution) the will of the people which is expressed through their representatives (Members of Parliament). Laws are made and unmade in Parliament and not in the street. Therefore, to condone such laws made by the Parliament as "draconian" or "harsh" needs deeper introspection as it may undermine the whole process of law making under any democratic set up.

The defense counsel argued and submitted that the punishment awarded to the defendant is degrading in contravention to Article 7, section 17 of the Constitution. Further the counsel argued that the sentence is disproportionate to the crimes committed. However, the Bench rules that there is no direct



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contravention to the Constitution as cited and the purpose of section 52 of the Act is to prohibit an act of smuggling of tobacco and tobacco products into the Kingdom. The very basic fact of the prescription of minimum and maximum sentence within the particular section of the law for the judges is to weigh the degree of crimes committed. Therefore, the three year sentence awarded by the trial court was within the defined will of the people through that particular section. However, the counsel argued that the will of the people will not apply to religious personalities as they are not qualified to vote in the elections and are not represented in Parliament. He argued that the defendant being a monk will not be subjected to the will of the people in knowing the provisions of the laws and there was also no notification of such existence of the laws to the monk body and enough dissemination as required by the provisions of the Act was not done. Therefore, the counsel prayed that the defendant be allowed to plead ignorance under the principle of the "IGNORANTIA FACTI EXCUSAT": "IGNORANCE JOF FACT EXCUSES OR IS A GROUND OF RELIEF" and relief be grated to the defendant. To this the Bench rules that the defendant cannot seek shelter and plead ignorance of law. Having committed crime and then to plead the ignorance of the laws will be the most convenient and easiest way of getting away from the arms of law. That is why the ignorance of law is not allowed as defense before the courts as "ignorance of the law does not excuse" or "ignorance of the law excuses no one". Hence, the Court upholds the decision of the trial court that no defendant can plead ignorance of law as defense to be liberated from the offence that one has committed. And that the role of the Judiciary is to interpret and uphold the laws made by the Parliament. This mechanism of check and balance between these two arms of the government ensures that the act of the Parliament is respected as the sovereign function to legislate laws and that the profound duty of the Courts are to uphold those laws and administer justice independently without fear, favour, or undue delay in accordance with the rule of law. Thus, the status of one being a monk is a classification against the principle of equality and effective protection of laws under our Constitution when common law crimes are committed. The very essence of the electoral laws to disqualify our religious personalities from voting in election is in keeping with the original intent of the Constitution under Article 3, section 3 to ensure that our religious personalities and institutions remains separate and above politics. But this does not guarantee impunity to commit common law crimes. Further, the monk has not only violated the law of



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the land but it is morally wrong for him to smuggle tobacco products even if it was otherwise for person consumption. It is totally incorrect against the principle of Buddha dharma for which he has taken refuge being in the *Sangha*.

The Bench notes that the Act does not ban total imports of tobacco and tobacco products for personal consumption. It, therefore, does not breach an individual right and personal choice to consume tobacco and its related products. In accordance with section 12, an individual can import tobacco and tobacco products for personal consumption as per the quantity approved by the Tobacco Control Board and pay relevant duties and taxes as per section 13 of the Act. The Act, as per section 54 states that any person found with more than the permissible quantity for personal consumption under section 12 shall be guilty of the offense for smuggling and shall be punishable with minimum sentence of felony of fourth degree. Hence, there can be no immunity if a person smuggle the tobacco and tobacco products illegally into the country.

However, the Bench notes that the minimum and maximum sentencing policy restricts judges in sentencing and the limited exercise of discretionary powers as vested by a particular statute. The necessity to go beyond legislative control by the Judges is often criticized of mismatching justice with leniency or overzealous prison terms. This norm often leads to legislations that are very restrictive and give little scope for the judges a room to exercise their discretion. Therefore, the delicate choice between giving rooms for the courts to exercise their due diligence in weighing crime and punishment are also proportionate to how much trust and confidence that is interposed to the Justice System because the intricacies of crime and punishment are multidimensional.

The judges are often left to balance public confidence and its efficacy of the law with that of undue compassion or sympathy when awarding prison terms within the limits of the sentencing parameter. Extreme compassion would pose more harm to the justice system and may endure palpable threat to the society while improper sentencing will breed contempt and disproportionate attributes of mismatching between crime and punishment.

However, the duty of the courts is to award appropriate sentence having regard to the laws of the land and to what actually the specific provision underlines for a particular crime. To go beyond that limitation would encourage legislation

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from the Bench and that is not the delineated function of the courts as per our Constitution.

The Bench notes that the Tobacco Control Act as it is explicitly provided in the Preamble is *concerned* with the physical health and well being of the people of Bhutan. Further it states that the need for the Act was in recognition of the harmful effects of tobacco consumption and exposure to tobacco smoke, from a point of spiritual and social health and its mandate for the adoption of domestic legislation of the WHO Framework Convention on Tobacco Control (FCTC) as it was ratified by the Parliament. Thus, the specific law was enacted to ensure the effective control of tobacco and tobacco related products by the Parliament. Accordingly, Section 2 had repealed any laws, rules or notification and hence, the provision of Penal Code shall not apply as argued by the defense counsel in this particular case.

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Lungten Dudgyur  
Justice  
Bench I

Tshering Namgyel  
Justice  
Bench I