

[1999–00 Gib LR 449]

**FERRARY v. ATTORNEY-GENERAL**

SUPREME COURT (Schofield, C.J.): April 7th, 2000

*Sentencing—tobacco smuggling—unlawful transportation—value of tobacco starting point for fine if no previous convictions—up to half value of forfeited vehicle usually deducted before mitigation*

The appellant was charged in the magistrates' court with the unlawful transportation of cigarettes, contrary to the Tobacco Ordinance, 1997, s.13(3).

The appellant, who was unemployed and aged 20 at the time of his conviction, pleaded guilty to the transportation of 50,000 cigarettes, worth £1,315. He was fined £3,000 and the vehicle which he had used (worth £500) was forfeited to the Crown. A period of 80 days' imprisonment was imposed on default of payment of the fine. When arrested for non-payment, the appellant appealed against his sentence and was released pending his appeal. He submitted that the fine imposed was excessive, since the value of the cigarettes was the appropriate starting point.

**Held**, allowing the appeal:

The fine would be reduced to £900, on the basis that the value of the cigarettes was the appropriate starting point for sentencing when the accused had no previous convictions, and that it was the usual practice to deduct from that figure up to one-half of the value of a vehicle forfeited under the Ordinance. The appellant's youth and the fact that he had been unemployed at the time of his conviction were also to be taken into account. Since he was now earning £500 per month he would be ordered to pay the fine at a rate of £30 per week, and in default of payment 90 days' imprisonment would be imposed (paras. 3–6).

**Case cited:**

(1) *Hanley v. Att.-Gen.*, 1997–98 Gib LR N–7, applied.

**Legislation construed:**

Tobacco Ordinance, 1997, s.13(3):

“Any person who transports or carries tobacco in a commercial quantity in Gibraltar in contravention of subsection (1) above shall be guilty of an offence.”

*R. Pilley* for the appellant;  
*Ms. K.K. Khubchand* for the Crown.

1 **SCHOFIELD, C.J.:** This is the appeal by William Leslie Ferrary against the sentence imposed upon him by the learned Stipendiary Magistrate on October 12th, 1998, following his conviction on his own plea of guilty on June 17th, 1998 on a charge of the transportation of cigarettes, contrary to s.13(3) of the Tobacco Ordinance, 1997.

2 The appellant was found conveying 50,000 Chesterfield cigarettes across the frontier in a motor vehicle. The vehicle, which was his own, was forfeited to the Crown and the sentence of the Magistrate was a fine of £3,000, together with the forfeiture of the tobacco. The period of imprisonment imposed in default of payment was 80 days, and the appeal has arisen because Mr. Ferrary was arrested for non-payment of the fine and was released following his appeal to this court against the sentence, there being no other provision, I understand, for Mr. Ferrary to be released when imprisoned in default of payment of the fine.

3 I have been referred to my own decision in *Hanley v. Att.-Gen.* (1), in which I indicated that an appropriate starting point for sentencing in a case of this nature for a first offender was the value of the cigarettes. This has now been adopted as the starting point in the magistrates' court. The decision in this particular case was made prior to my decision in *Hanley*. The cigarettes involved in this case were valued at £1,315. The appellant has no previous convictions under the Tobacco Ordinance, so, in line with present-day sentencing practice, the starting point for the fine would have been £1,315.

4 However, there is a reduction to be made in view of the forfeiture of the motor vehicle. I understand the practice is that the value of the vehicle is to be ascertained and up to one-half of that value would normally be applied in reduction of the fine. In this case, the value is £500. It seems to me to be a very reasonable and just practice that the amount of the fine be reduced if the vehicle is forfeited. In those circumstances, the starting point for the fine would be just over £1,000. Also to be taken into consideration in this particular case is the fact that the appellant has already spent several days in prison for non-payment of the fine imposed.

5 My view is that in this particular case, this young man, who was only 20 years old and unemployed at the time of his conviction, and who is now working in gainful employment, should be fined £900. I allow the appeal to the extent of reducing the fine imposed to that amount.

6 The appellant is, as I say, in gainful employment and is earning approximately £500 net per month. He lives with his mother and he says he gives all his salary to her. It will not take anything like £500 a month

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to keep him, and no doubt he has spending money. My view is that he must pay £30 per week towards the fine. I must fix a period of imprisonment in default of payment and a reasonable period, to my mind, is one of 90 days.

*Order accordingly.*

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