GUNARATNE AND ANOTHER

v.

COMMISSIONER OF EXCISE

COURT OF APPEAL.
RAMANATHAN, J. AND WIJETUNGA, J.
C.A. 218 – 219/80.
M.C. KALUTARA 39025.
NOVEMBER 3, 1986.

Excise Ordinance ss. 17 and 49 – Failure by Excise Officer to report detection of possession of excess quantity of arrack – Measurement of excess – Death of 1st accused pending appeal – Widow prosecuting appeal as aggrieved person – S. 358. Code of Criminal Procedure Act – S. 16 of Judicature Act.

The detection was of the possession of 2 1/2 bottles of arrack regarding the equivalent of which in relation to the permitted limit of 1/3 of an imperial gallon there was no evidence. A bottle is not a standard measure and may be of any size and capacity. It was for the prosecution to establish that the bottles contained more than the permitted amount of 1/3 of an imperial gallon of arrack. Even though the widow of the deceased 1st accused–appellant in this case cannot be treated as an aggrieved person, still the Court can act in revision where as here, the interests of justice make it appropriate.

Case referred to:

Paulickpulle v. Pedrick – (1914) 17 NLR 350.

APPEAL from conviction in the Magistrate's Court of Kalutara.

D. S. Wijesinghe for the accused-appellants.

S. K. Gamalath, State Counsel for the Attorney-General.

Cur. adv. vult.

January 20, 1987.

RAMANATHAN, J.

The two accused-appellants in this appeal were charged in the Magistrate's Court of Kalutara on the following charges:

1. That on or about the 12th day of April, 1976 within the jurisdiction of this Court at Kalamulla, the 1st accused being an Excise Officer, viz. an Excise Inspector, wilfully failed to report a detection made by him, to wit, Maddage Don Pabilis having in his possession some quantity of arrack which comes under the

Excise Ordinance, in excess of the permitted quantity that could be sold retail, in contravention of section 17 of the Excise Ordinance read with Excise Notification No. 484, published in Government Gazette No. 1182 of 7.8.1959, and thereby the 1st accused has committed an offence punishable under section 49 of the Excise Ordinance.

2. That at the same time and place aforesaid and in the course of the same transaction the 2nd accused being an Excise Officer, viz. an Excise Corporal connived in the commission of the offence set out in charge (1) above and thereby committed an offence punishable under section 49 of the Excise Ordinance.

After trial both accused-appellants were convicted and sentenced to a fine of Rs. 750 and Rs. 450 respectively. The 1st accused died pending his appeal and his widow had availed herself of section 358 of the Code of Criminal Procedure Act and was permitted by another Division of this Court to intervene as an aggrieved person and allowed to prosecute this appeal. This is an appeal from the conviction and sentence.

The prosecution case was briefly as follows. The virtual complainant had on the 12th of April, 1976 purchased 2 1/2 bottles of arrack from a tavern. He was waiting for a lorry to take him back home. When he was waiting for the lorry the two accused had come and inspected his bag with the 2 1/2 bottles of arrack. The 1st accused had informed the vitrual complainant that he was in possession of a quantity of arrack in excess of the amount permitted by law and taken away the 2 1/2 bottles of arrack from the complainant and informed him that a case would be filed.

There had been no case filed against the virtual complainant by the accused. The virtual complainant had informed the authorities who had filed charges against the two accused in the Magistrate's Court.

Although the virtual complainant has in his evidence stated that he had purchased 2 1/2 bottles of arrack from the tavern, there is no satisfactory evidence that 2 1/2 bottles of arrack was more than 1/3 of an imperial gallon which is the relevant quantity prohibited by law.

There is also no evidence of the type of bottles sold and that what was sold was in fact eight dram bottles and a four dram bottle. The tavern keeper has not given evidence and stated the type of bottle sold

and the quantity in each bottle. In the absence of such evidence one cannot assume that what was sold in fact was in excess of the permitted amount.

I am grateful to learned State counsel who has brought to my notice the case of *Paulickpulle v. Pedrick*. In this case it was held that a person is entitled to possess without a licence a quantity of arrack not exceeding a third of an imperial gallon and that a bottle is not a standard measure. It merely means a hollow vessel of a particular shape for holding liquids. It may be any size and capacity. The possession of the bottles was not by itself an offence. It is for the prosecution to establish that the bottles contained more than the permitted amount.

The virtual complainant has merely stated that he had purchased 2 1/2 bottles of arrack from a tavern. The learned Magistrate has gone on the basis that this was in excess but there is no evidence that the bottles were in excess of 1/3 of an imperial gallon. The question is, do the contents of the bottles amount to over 1/3 of an imperial gallon of arrack.

Learned counsel for the appellants has submitted that there is no evidence to show that the virtual complainant possessed a quantity exceeding a third of an imperial gallon, which is possession of the quantity of arrack which the accused is alleged to have failed to report. Karunaratne, the Commissioner of Excise, has merely enunciated the law relating to the Excise Ordinance but has not given evidence that the quantity possessed by the virtual complainant was a quantity exceeding a third of an imperial gallon.

We are of the opinion that there is no satisfactory evidence of the actual quantity of arrack the virtual complainant possessed at the time of the detection. In the circumstances, the prosecution has failed to establish that the virtual complainant had committed an offence under the Excise Ordinance. The charges against the two accused must, therefore, fail.

We, therefore, set aside the conviction and sentence of the 2nd accused and acquit him.

As regards the 1st accused, we find that he died pending his appeal and another division of this court has already granted leave under section 358 of the Code of Criminal Procedure Act to the widow of the deceased, as a person aggrieved, to intervene and prosecute the appeal.

We have examined section 358 of the Criminal Procedure Code which states–

> "Every appeal and application for leave to appeal to the Court of Appeal under this Code shall abate on the death of an accused. Provided that where the appeal is against a conviction, a person aggrieved may with leave of the court hearing the appeal intervene and prosecute the appeal only in so far as the finding of guilt is concerned."

The expression "person aggrieved" is to have the same meaning as in section 16 of the Judicature Act which states–

> "A person aggrieved shall mean any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed under this chapter and shall, if such person be dead, include his next of kin, namely his surviving spouse, children, parents or further descendants or brothers or sisters."

It is clear that the widow of the 1st accused does not fall into any category of 'aggrieved person' as defined by section 16 of the Judicature Act.

However, in the special circumstances of this case and also as the conviction cannot be supported, we are of the view that in the interests of justice this is an appropriate case for this Court to act in terms of Article 145 of the Constitution–

> "The Court of Appeal may, ex mero motu or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require."

Therefore, acting in revision, we set aside the conviction and sentence of the 1st accused also and acquit him.

WIJETUNGA, J. – I agree.

Conviction set aside.
Accused acquitted.