

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No. 587 of 2004

Order Reserved On : 10.03.2017

Order Passed On : 27.03.2017

Shekhar Sonkar, S/o Kalu Ram Sonkar, Aged about 32 years, R/o Newari
Kala, P.S. Balod, District Durg (C.G.)

---- Applicant

versus

State of Chhattisgarh, through Excise Police, Balod, District Durg (CG)

---- Respondent

For Applicant : Shri Praveen Durandhar, Advocate

For Respondent/State : Shri Sanjeev Pandey, Govt. Advocate

Hon'ble Shri Justice Anil Kumar Shukla

C. A. V. Order

1. This revision has been preferred against the judgement dated 18.11.2004 passed in Criminal Appeal No. 338 of 2003 by the First Additional Sessions Judge, Durg by which the judgement dated 08.07.2003 passed in Criminal Case No. 2369 of 2003 by the Chief Judicial Magistrate, Durg convicting the applicant for the offence under Section 34(1)(a)(2) of the Chhattisgarh Excise Act (for short, 'the Act') and sentencing him to undergo rigorous imprisonment for one year and to pay fine of

Rs.25,000/-, in default of payment of fine, to further undergo rigorous imprisonment for four months, has been affirmed.

2. Prosecution story, in brief, is that on 26.07.2001 Excise Sub-Inspector S. Acharya (PW-3) received information from an informant and thereafter Sub Inspector S. Acharya (PW-3) along with other witnesses conducted raid in the house of the applicant vide search panchanama (Ex.P-1). They found 290 quarters X 180 ML = 52.200 bulk litres of Royal Master Whisky (foreign liquor) from the house of the applicant which was seized vide (Ex.P-2) and on getting tested, it was found to be foreign liquor. The applicant was asked to produce valid licence regarding the seized liquor but the applicant failed to produce any document. A case was registered against the applicant under Section 34(1)(a)(2) of the Act and a charge-sheet was filed against him in the Court of Chief Judicial Magistrate, Durg. The Chief Judicial Magistrate registered Criminal Case No.2369 of 2003 against the applicant and by the judgement dated 08.07.2003 convicted and sentenced the applicant as mentioned in the first paragraph of this order.
3. Being aggrieved by the judgement of the trial Court, the applicant preferred an appeal, being Criminal Appeal No. 338 of 2003. In the appeal, the First Additional Session Judge, Durg by judgment dated 18.11.2004 dismissed the appeal and affirmed the judgement of conviction and sentence passed by the trial Court. Hence, this revision.
4. Learned counsel for the applicant argued that the applicant has been falsely implicated in the case and the findings arrived at by the Courts below are contrary to the facts and law. Learned counsel further argued that the Courts below have not properly appreciated the evidence and the

documents on record and the physical possession of the seized liquor has not been legally proved by the prosecution. Learned counsel further argued that the seized liquor was not seized from the exclusive possession of the applicant. No independent witness has supported the case of the prosecution. Learned counsel further argued that the person who made seizure and investigated the matter is one and same, therefore, there is basic infirmity in the case of the prosecution which strikes at the root of the trial. Learned counsel further argued that there is non-compliance of provisions of Sections 57 and 57A of the Act. It was contended that non-compliance of provisions of Sections 57 and 57A of the Act vitiates the case of the prosecution. Learned counsel in support of the case of the applicant placed reliance on **Umesh Vs State of M.P. 2012(II) MPWN 46, State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu Vs. Rajangam (2010) 15 SCC 369** and **Megha Singh Vs. State of Haryana AIR 1995 SC 2339.**

5. On the other hand, learned State counsel supported the impugned judgment of conviction and sentence and opposed the arguments advanced by learned counsel for the applicant.
6. I have heard learned counsel for the parties, perused the judgment impugned and the evidence available on record carefully.
7. The question for consideration before this Court is whether the findings of the Courts below suffer from any illegality and perversity?"
8. The prosecution examined Atmaram (PW-1), Bhuwaneshwar Lal (PW-2) and Excise Sub Inspector S. Acharya (PW-3). No evidence was led by the applicant in his defence.

9. Bhuwaneshwar Lal (PW-2) deposed that no any recovery of liquor was made from the house of the applicant before him but he signed the Search Panchanama (Ex.P-1), Seizure Panchanama (Ex.P-2) and Arrest Panchanama (Ex.P-3). He has turned hostile. He was not cross-examined.
10. Atmaram (PW-1) deposed that Excise Sub Inspector came near the house of the applicant and called him. At that time, Bhuwaneshwar Lal (PW-2) was present there. Excise Sub Inspector asked the applicant about the key of the lock of his house, the applicant replied that he had kept the key somewhere else. Thereafter, the Excise Personnel broke the lock of the house of the applicant and in presence of the applicant, 5 cartons of liquor were seized from inside of the house of the applicant. Excise Personnel had said at that time that paper formality would be done by him later on. Atmaram (PW-1) further deposed that he signed Search Panchanama (Ex.P-1), Seizure Panchanama (Ex.P-2), Arrest Panchanama (Ex.P-3) and After Search Panchanama (Ex.P-4). This witness in his cross-examination has supported the case of the prosecution.
11. The important witness of the case is Excise Sub Inspector S. Acharya (PW-3). He has deposed that on 26.07.2001, he received an information from the informant and on the basis of the said information, he went to the house of the applicant without search warrant. He further deposed that in presence of the witnesses he searched the house of applicant and seized 290 quarters X 180 ML = 52.200 bulk litres of Royal Master Whisky (foreign liquor) from the house of the applicant and tested the seized whisky with the help of litmus paper and hydro meter and after the test he found that the seized material was foreign liquor. But, this witness did not

send the seized liquor to the Laboratory for examination and also did not submit any report before the trial Court which was necessary in this case. From the statement of S. Acharya (PW-3) it is clear that the seized liquor was not immediately kept in Police Station and the information of the said seized liquor was not given to his senior officers by the Excise Sub Inspector S Acharya (PW-3). The seized liquor was not sealed and produced before the trial Court. In these circumstances, there appear no compliance of provisions of Sections 57 and 57A of the Act. Sections 57 and 57A of the Act read as under :

"57. Report by Excise Officer.—Where any Excise Officer below the rank of Collector makes any arrest, seizure or search under this Act, he shall, within twenty-four hours thereafter, make a full report of all the particulars of the arrest, seizure or search to his immediate official superior and shall, unless bail be accepted under Section 59, take or send the person arrested, or the thing seized, with all convenient dispatch, to a Judicial Magistrate for trial or adjudication.

57A. Police to take charge of articles seized.— An officer in charge of a police station shall take charge of and keep in safe custody pending the orders of a magistrate or an Excise Officer, all articles seized under this Act which may be delivered to him, and shall allow any Excise Officer who may accompany such articles to the police station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the police station."

12. A plain reading of the aforesaid provisions clearly shows that where an Excise Officer below the rank of Collector makes any search, seizure and arrest under the Act, he shall within 24 hours thereafter, make a full report of all the particulars of the search, seizure and arrest to his immediate superior officer. Section 57A of the Act also requires that an officer in charge of a police station shall take charge of and keep in safe custody pending the orders of a Magistrate or an Excise Officer, all the articles seized under this Act which may be delivered to him, and shall allow any Excise Officer who may accompany such articles to the police station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the police station.
13. Section 34 of the Act entails severe punishment of imprisonment which may extend to three years and fine which shall not be less than Rs.25,000/- but may extend to one lakh rupees upon conviction for an offence covered by clause (a) of sub-section (1), where the quantity of the intoxicant being liquor found at the time or in the course of detection of the offence exceeds twenty five bulk liters. Sections 57 and 57A of the Act protect the accused alleged of any offence under the Act from a false or a bogus prosecution. The intention of enacting Section 57A of the Act also appears to be that the articles seized should be proved by the prosecution to be country made liquor and to give an opportunity to the accused to prove otherwise by sending one of the samples so taken for analysis, if so desired. Section 57A of the Act further ensures that the articles seized and the samples taken therefrom are not tampered with. Needless to say that

it is also incumbent upon the Excise Officer who is making the arrest, seizure or search under the Act to produce the intoxicant seized and the samples so prepared in the Court so as to facilitate comparison of the seals as also verification of the quantity by the Court, if so desired. Thus, the provision of Sections 57 and 57A of the Act are mandatory and ensure the benefit of the accused to establish his innocence.

14. In the instant case, from the statement of Excise Sub Inspector S. Acharya (PW-3) it is clear that Excise Sub Inspector S. Acharya (PW-3) is the person who seized the material and investigated into the matter and thereafter filed the charge sheet before the trial Court. Learned counsel for the applicant has relied upon **Umesh case** (supra), wherein it has been observed thus:

11. The statement of PW-1 leaves no room for doubt that he was the seizing officer as well as the investigating officer. Thus, he was not only the complainant, but also the investigating officer.

12. Taking note of the judgement as referred above, it is apparent that the investigation of this case is illegal and therefore, the conviction of the petitioner cannot be sustained. Consequently, the judgement of the Sessions Court as well as of the Court of Chief Judicial Magistrate is set aside. The petitioner is acquitted forthwith. His bail bonds are discharged. If the petitioner is not wanted in any other case, the Jail Superintendent will release him from the custody. A copy of this order be sent to the Jail Superintendent.

15. In **Megha Singh case** (supra), it has been observed thus:

4.We have also noted another disturbing feature in this case, PW-3 Siri Chand, head constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under S. 161 Cr.P.C such practice, to say the least, should not

be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

16. In **Rajangam case** (*supra*), it has been observed thus:

8. The short question which falls for consideration of this Court is whether P.W.6 who registered the crime could have investigated the case or an independent officer ought to have investigated the case.

9. The learned Counsel appearing for the accused submitted that the controversy involved in this case is no longer *res integra*. In *Megna Singh v. State of Haryana* (1996) 11 SCC 709., this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

4.We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

10. The ratio of *Megna's* case has been followed by other cases. In another case in *Balasundaran v. State* 1999 (113) ELT 785 (Mad), in para 16, the Madras High Court took the same view. The relevant portion reads as under:

“16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person

who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated.

11. In this view of the legal position, as crystallized in Megna Singh's case (supra), the High Court was justified in acquitting the accused. We see no infirmity in the view which has been taken by the High Court in the impugned judgment. In our considered view, no interference is called for. The appeal, being devoid of any merit, is accordingly dismissed.”

17. There is nothing to show that Excise Sub-Inspector S. Acharya (PW-3), within 24 hours of making the seizure, had made a full report of all the particulars of arrest, seizure or search to his immediate superior officer as required under Section 57 of the Act. It is thus not established by the prosecution that the foreign liquor that was seized from the house of the applicant was about 52.200 bulk litres and there is complete non-compliance of the provisions of Sections 57 and 57A of the Act.
18. Having thus considered the evidence led by the prosecution, I am of the opinion that there is complete non-compliance of the provisions of Sections 57 and 57A of the Act which vitiates the case of the prosecution and renders the testimony of Excise Sub-Inspector S. Acharya (PW-3) doubtful since he did not produce the intoxicant alleged to have been seized by him from the house of the applicant in the trial Court. The independent witnesses Atmaram (PW-1) and Bhuwaneshwar Lal (PW-2) also did not corroborate the testimony of Excise Sub-Inspector S. Acharya (PW-3) relating to the seizure and test performed upon the intoxicant alleged to have been seized from the house of the applicant.
19. In the result, the revision is allowed. The impugned conviction and sentence of the applicant is set aside. The applicant is acquitted of the

charge framed against him. The amount of fine imposed upon him by the trial Court, if paid, shall be refunded to him within a period of one month from the date of receipt of a copy of this order in the trial Court. The seized article shall be destroyed in accordance with law.

20. It is reported that the applicant is on bail. His bail bonds are not discharged at this stage. His bail bonds shall remain operative for a further period of six months from today in accordance with the provision contained in Section 437A Cr.P.C.

Sd/-
(Anil Kumar Shukla)
JUDGE

santosh