

IN THE SUPREME COURT OF
THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

*In the matter of an Appeal in terms of Section 9 of
the High Court of the Provinces (Special Provisions)
Act No. 19 of 1990 read with Article 128(4) of the
Constitution of the Republic of Sri Lanka.*

SC Appeal No. 89/2022

Special Leave to Appeal
Application:

No. SC/SPL/LA/46/2021

High Court of Kegalle Case No.
5604/Appeal

MC Kegalle Case No.

7900/PE/17

1. The Officer in Charge
Police Station,
Kegalle.

COMPLAINANT

Vs.

1. Rajapaksha Gamaralalage
Chathuranga Harshana,
No. 132A,
Andurapotha,
Devalagama.

ACCUSED

AND THEN BETWEEN

1. Rajapaksha Gamaralalage
Chathuranga Harshana,
No. 132A,
Andurapotha,
Devalagama.

ACCUSED-APPELLANT

Vs.

1. The Officer in Charge
Police Station,

Kegalle.

COMPLAINANT-RESPONDENT

2. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

AND NOW BETWEEN

1. Rajapaksha Gamaralalage
Chathuranga Harshana,
No. 132A,
Andurapotha,
Devalagama.

**ACCUSED-APPELLANT-
APPELLANT**

Vs.

1. The Officer in Charge
Police Station,
Kegalle.

**COMPLAINANT-RESPONDENT-
RESPONDENT**

2. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT-RESPONDENT

Before : **P. Padman Surasena, J**
Yasantha Kodagoda, PC, J
Mahinda Samayawardhena, J

Counsel : Hafeel Faris with Ms. Nilusha Dissanayake for the Accused-Appellant-Appellant.
Madawa Tennakoon DSG for the Attorney General.

Argued on : 12-09-2023

Decided on : 31-05-2024

P. Padman Surasena, J

The Accused-Appellant-Appellant (hereinafter referred to as the Accused) was charged in the Magistrate's Court of Kegalle; the charge stated that on or about 23-05-2017, he had in his possession, an excisable article, an offence punishable under section 47(1) of the Excise Ordinance. As the Accused had pleaded not guilty, he was tried. After the case for the prosecution was closed, evidence of the Accused as well as the evidence of three more witnesses on his behalf had been led as the case for the defence. After the trial, the learned Magistrate by his judgment dated 28-10-2019, had proceeded to convict the Accused for the offence in the Charge Sheet. The learned Magistrate had imposed a fine of Rs. 25,000/= with a default sentence of one-month imprisonment. The Magistrate has also sentenced him to a term of three months' imprisonment the operation of which was suspended for five years.

Being aggrieved by the conviction and the sentence imposed on him, the Accused had appealed to the Provincial High Court of Sabaragamuwa Province.

Before the Provincial High Court, the Accused had raised the issue that the police officers had no power to institute the instant proceedings in the Magistrate's Court which led to his conviction and sentence. He relied on section 52(1) of the Excise Ordinance. The learned High Court Judge, having held that there was no bar for the Accused to have raised that issue in the appeal as a preliminary issue, had proceeded to reject the said argument advanced on behalf of the Accused in the High Court. Thereafter the learned High Court Judge, having also considered the merits of the appeal, had proceeded to affirm the conviction and the sentence imposed on the Accused by the learned Magistrate. It is against that conclusion that the Accused had filed the instant appeal before this court.

This Court when the Leave to Appeal application pertaining to the instant appeal was supported before it, having considered the arguments of the learned Counsel for the Accused as well as the submissions for the learned Deputy Solicitor General, had granted Special Leave to Appeal on the following questions:

- 1) *Did the Learned High Court Judge err in law in failing to follow the ratio of Udagama and two others Vs. Chandra Fernando, Inspector General of Police and five others (2011 (1) SLR 192)?*
- 2) *Did the learned High Court judge err in law in analyzing the objection of the Accused contrary to the dicta of the Supreme Court?*

When considering the afore-stated questions of law, it is clear that the central issue to be decided by this court revolves around the interpretation of Section 52(1) of the Excise Ordinance which is as follows:

- (1) *No Magistrate shall take cognizance of an offence punishable-*
 - a) *under sections 46, 47, or 50, except on his own knowledge or suspicion, or on the complaint or report of an excise officer; or*
 - b) *under section 48 or section 49, except on the complaint or report of the Commissioner General of Excise, Government Agent, or an excise officer authorized by either of them on that behalf.*

Since the charge against the Accused is under Section 47(1) of the Excise Ordinance, it is Section 52(1)(a) that would apply in the instant case. According to section 52(1)(a), it is not open for any Magistrate to take cognizance of an offence punishable under Section 47 of the Excise Ordinance upon a complaint of a police officer.

Perusal of the Magistrate courts proceedings clearly shows that the Officer in Charge of Police Station Kegalle who is the Complainant-Respondent-Respondent in the instant case had reported facts pertaining to the alleged detection under section 136(1)(b) of the Code of Criminal Procedure Act to the Magistrate's Court. It is from that step that the proceedings against the Accused had been instituted before the Magistrate's Court. Thus, it is clear that there was no involvement of any excise officer in launching and conducting the prosecution in the instant case against the Accused.

Learned Counsel for the Accused relied on the judgment of this court in Udagama and two others vs. Chandra Fernando, Inspector General of Police and five others (hereinafter referred to as Udagama's Judgment). This is a judgment which this Court had pronounced in the exercise of its Fundamental Rights Jurisdiction under Article 126 of the Constitution. The Petitioners in that case had complained to this Court that certain police officers attached to Pussellawa Police Station had arrested the 3rd Petitioner in that case for allegedly selling arrack

to a customer to be consumed on the premises. In that case, the primary complaint made to this Court was based on the argument that the sale of liquor for consumption in the premises is not an offence for which the police officers are empowered by law to arrest any offender or to take any action under the Excise Ordinance. It is on that basis that the Petitioners in that case had complained to this court that their Fundamental Rights for equal protection of law guaranteed under Article 12(1) of the Constitution had been infringed by the relevant Police Officers. Thus, the issue that this Court had to decide in that case was whether it was lawful for those police officers to institute proceedings before the Magistrate's Court for that offence against the Petitioners in that case.

In the said Udagama's case, Gamini Amaratunga, J (with Thilekawardhena, J and Marsoof, J agreeing), has held as follows:

"For the reasons set out above I am unable to accept the proposition put forward by the petitioners that police officers do not have power to detect sales of excisable article in contravention of the conditions of a license issued under the Excise Ordinance. As I have already stated in this judgment, as a result of the combined effect of clause 1(1) of the Excise Notification 509 read with sections 35 and 46(g) of the Excise Ordinance, police officers have the power to detect the offence of selling an excisable article in contravention of a condition of the licence issued to a wine store.

However, in terms of section 52 (1)(a) of the Excise Ordinance, no Magistrate shall take cognizance of an offence punishable under section 46, 47 or 50 except on his own knowledge or suspicion or on the complaint or report of an excise officer. Although the police have the power to detect and apprehend a person who has committed an offence under section 46(g), in view of the provisions of section 52(1)(a), the police have no authority to initiate proceedings before a Magistrate against the offender. Such offences, commonly called technical offences, have to be referred to an excise officer for appropriate action."

This court had decided this case on 21st July 2011. The relevant portion of the Excise Notification No. 509 referred to above in Udagama's Judgment, (as found in an extract from the Ceylon Government Gazette No 13, 529 of February 22nd 1963), is as follows:

The Excise Ordinance
Excise Notification No. 509

By virtue of the powers vested in me by sections 2, 8 and 10 of the Excise Ordinance (Chapter 52), I, Maithripala Senanayake, Minister of Industries, Home and Cultural Affairs, do by this notification, with effect from 9th February, 1963—

(1) Appoint—

- (i) All Divisional Revenue Officers, and Village Headmen to perform the acts and duties mentioned in sections 33, 35 and 48(a) of the Excise Ordinance within their respective Districts or areas;*
- (ii) All officers of the Police Force to perform the acts and duties mentioned in sections 33, 35 and 48(a) of the Excise Ordinance throughout the Island.*

I observe that this Court had taken into consideration the afore-stated Excise Notification No. 509 in its judgment in Udagama's Judgment to establish that the Minister had appointed all officers of the police force to perform the acts and duties mentioned in section 35 of the Excise Ordinance throughout the island. It was on that basis that this Court in that judgment (Udagama's Judgment) held that a member of the police force had been empowered by Excise Notification No. 509 to detect and apprehend a person who has committed an offence under section 46 of the Excise Ordinance.

Having considered the material adduced in this case and the submissions made by the learned Counsel for the Accused, Mr. Madhawa Tennakoon DSG too, in the best traditions of the Attorney General's Department, agreed with this position. The correctness of this position is buttressed by the Excise Amendment Act No. 18 of 2019 which had proceeded to amend the original Section 52 of the Excise Ordinance to read as follows:

Section 52 of the principal enactment is hereby amended in subsection (1) thereof as follows:-

- 1) by the repeal of paragraph (a) thereof and the substitution therefor of the following:-*
 - a) under section 46, section 47 or paragraph (a) of section 48, except on his own knowledge or suspicion or on the complaint or report of an excise officer or a police officer:*

Provided however, where a police officer makes a complaint or produces a report under paragraph (a) of section 48, such officer shall be an officer not below the rank of a sub inspector and shall obtain the written sanction of the Commissioner-General of Excise or any other officer authorized by the Commissioner General of Excise;”

Thus, it is only with the Excise Amendment Act No. 18 of 2019 that hitherto non-existent new category ‘police officer’ was introduced to Section 52(1)(a) OF the Excise Ordinance. This in turn proceeds to further confirm the position taken up by Gamini Amaratunga, J in Udagama’s case.

In view of the above positions, I conclude that the proceedings instituted and conducted against the Accused in the Magistrate’s Court is a proceeding which had been illegally instituted. Therefore, the whole proceeding against the Accused in the Magistrate Court is *ab initio* void. The learned High Court Judge has failed to appreciate this aspect of the law in its correct perspective. Thus, I would proceed to answer the questions of law in respect of which this Court has granted Special Leave to Appeal, in the affirmative.

For the foregoing reasons, I proceed to set aside the conviction and the sentence imposed on the Accused. I direct that the Accused be acquitted and discharged from the charge filed against him.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT