

**(1994) 01 GAU CK 0009****Gauhati High Court****Case No:** Criminal Appeal No. 2 (K) of 1993

State of Nagaland

APPELLANT

Vs

K.Adaso Mao

RESPONDENT

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**Date of Decision:** Jan. 13, 1994**Acts Referred:**

- Nagaland Excise Act, 1967 - Section 53, 53

**Citation:** (1994) 1 GLJ 113**Hon'ble Judges:** W.A.Shishak, J**Bench:** Single Bench**Advocate:** R.K.Singh , I.Jamir, Advocates appearing for Parties

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**Judgement**

1. This appeal is directed against order of acquittal dated 16.12.92 passed in Criminal Revision No.40 (10) 92 by the learned Additional Deputy Commissioner (J), Phek. The appellant (the State of Nagaland) had made an application for condonation of delay in preferring the present appeal. This appeal was filed on 16.4.1993. Notice was issued to the respondent, On 19.5.93 the prayer for condonation to file this appeal was allowed and the appeal was admitted.

2. The respondent was put on trial in connection with GR Case No. 17/90 under section 53 (a) Nagaland Excise Act. At the time of trial the respondent was not defended by any lawyer. The State was represented by PSI. The allegation was that the respondent had kept eight (8) pots of rice beer at his house for selling at New Town, Phek. Charge was framed under the aforesaid section of law and read over and explained to the respondent on 23.2.90. It is stated that respondent admitted his guilt and he had begged for mercy. On his own plea of guilty, the respondent was convicted under section 53(a) Nagaland Excise Act and sentenced him to pay a fine of Rs.50/ (Rupees fifty) in default to undergo simple imprisonment for ten (10) days. The poized articles were confiscated to the Government. This order was passed on 14.3.90.

3. The respondent joined service as Constable in 1974. At the time of conviction and dismissal consequent on conviction, the respondent was Naik.

4. The said order of conviction passed by Magistrate, Second Class, Phek came to be set aside by the learned Additional Deputy Commissioner (J) by his order dated 16.12.92 passed in Criminal Revision No. 40 (10) 92 as stated above.

5. The appellant (State of Nagaland) takes a ground in the present appeal that order of acquittal passed by the learned Additional Deputy Commissioner (J) is not sustainable inasmuch as the respondent filed revision petition before the learned Additional Deputy Commissioner (J), Phek after more than two years of the passing of order of conviction.

6. As I have mentioned above, this appeal against acquittal was filed by the State on 16.4.93 although the order of acquittal was passed on 16.12.92. The appellant State had also approached this Court belatedly. However, in the interest of justice the delay was condoned. I have heard Mr. I. Jamir, learned counsel for the appellant as well as Mr. RK Singh, learned counsel for the respondent. Mr. RK Singh submits that in view of the provision under section 375 CrPC the respondent could not file regular appeal. However, it is submitted that there is no specific provision that would forbid the respondent to approach the Court of Additional Deputy Commissioner (J) at Phek for revision of the order of conviction passed by the Second Class Magistrate. It is also further submitted that it is a matter of life and death as far as the respondent is concerned in view of the fact that because of the order of conviction the respondent would lose his service altogether and this would bring about starvation to the respondent and the members of his family. In this view of the matter, it is submitted that although the respondent had approached the learned Court of Additional Deputy Commissioner (J) rather late, in the interest of justice the learned Additional Deputy Commissioner (J) had accepted the petition for revision. It is also further submitted that even on merit the order of conviction could not be sustained inasmuch as no plea of guilty was recorded separately, vibration by the learned Second Class Magistrate, Phek while convicting the respondent on the plea of guilty. It is further submitted that even assuming that the respondent had admitted that he was in possession of some pots of "Modhu" this would not amount to plea of guilty because under the provisions of law possession of "Modhu" is no offence in terms of the provision of the Excise Act under which the respondent was tried. The submission of Mr. I. Jamir that the learned Additional Deputy Commissioner (J) had erred in law in accepting the revision petition and setting aside the order of conviction inasmuch as the respondent had approached the Court below belatedly cannot be accepted. In my view, delay, if any, could certainly be condoned by the learned Additional Deputy Commissioner (J) in the interest of justice. Even the present appellant State has approached this Court belatedly although the State cannot satisfactorily explain the circumstances under which the delay was caused. It is for the Court to see whether it would be for the ends of

justice to allow an appeal or a revision to be filed after the period of time prescribed in this regard.

7. Section 69 of the Nagaland Excise Act of 1967 prescribes that no Magistrate shall take cognizance of an offence punishable under sections 53, 54, 55 or 61 except on his own knowledge or suspicion or on complaint or report of an Excise Officer etc. and also except with the special sanction of the State, no Magistrate shall take cognizance of any offence punishable under this Act unless the prosecution is instituted within six months after the commission of the offence. Apparently the, prosecution was launched within the prescribed time. However, it appears there is no complaint as such in the present case. If that is so the very prosecution appears to be defective. Section 70 of the Act prescribes that the offences under this Act shall be tried only by Magistrates exercising powers not less than those of a Magistrate Second Class. It is contended that specific conferment of power is necessary under this provision. It cannot be ascertained whether or not such conferment of power has been made in the present case. However, in view of the fact that the order of conviction was passed by Second Class Magistrate, in the absence of specific averment that no power was conferred, it appears Second Class Magistrate could have tried the case inasmuch as minimum power is of Magistrate Second Class.

8. It is further contended that in terms of section 53 "Modhu" is not included as one of the items, possession of which would be an offence. "Intoxicant" is at definition No. 15 of the Act. It is defined as follows :

"15. "Intoxicant" means any liquor other than the Zu and Rohi or intoxicating drug."

In this also no word "Modhu" is used,

At definition No. 17 "Liquor" means intoxicating liquor and includes all liquid consisting of or containing alcohol but does not include Zu and Rohi, also any substance which the State Government may, by notification, declare to be liquor for the purposes of this Act. Here also "Modhu" is not mentioned. At definition 19 of the Act Zu and Rohi mean any rice, millet, or other grain fermented naturally from itself or with some foreign or artificial substances, whether mixed with any liquid or not and any liquid obtained therefrom, whether diluted, or undiluted, but does not include beer. No mention of "Modhu" is made here.

9. It is also further contended on behalf of the respondent that no complaint whatsoever was filed before Collector in terms of section 46 of the Act. This according to the learned counsel is an infirmity in the prosecution.

10. It is contended by the learned Senior Govt. Advocate that by amendment of the Act in 1980 "Modhu" has also been defined as intoxicant. I have seen the amendment. It appears the submission is incorrect.

11. I have gone through the order passed by the learned Additional Deputy Commissioner (J) and I do not find infirmity in the impugned order. As stated earlier

the delay in filing the revision petition was condoned by the learned Additional Deputy Commissioner (J) apparently for the ends of justice.

12. In view of my findings above, this appeal preferred by the State of Nagaland is rejected.