

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

K. W. P. G. Samaratunga  
Ududeniya  
Nalanda  
Petitioner-Appellant

C.A. [PHC] NO.89/2013

H.C.ANURADHAPURA  
CASE NO.70/2012/REV  
M.C.ANURADHPURA  
CASE NO.31879

**Vs**

Range Forest Officer  
Anuradhapura.  
Plaintiff-Respondent-  
Respondent

Hon. Attorney General  
Respondent-Respondent

BEFORE : K.T.CHITRASIRI, J.

MALINIE GUNARATNE, J.

COUNSEL : Vidura Ranawaka for the Appellant  
Anoopa de Silva S.S.C. for the two Respondents

ARGUED ON : 17.09.2014

DECIDED ON : 16<sup>TH</sup> OCTOBER 2014

**CHITRASIRI, J.**

This is an appeal filed by the Applicant-Petitioner-Appellant seeking to set aside the order dated 02.11.2012 of the learned Magistrate of Anuradhapura.

By that order, the learned trial Judge confiscated the vehicle bearing No. CP LE 5340 in terms of the provisions contained in the Forest Ordinance as amended subsequently. The said confiscation of the vehicle had been a result of a conviction been imposed on the accused in the case bearing No.31879 under the said Forest Ordinance. Basically, the contention of the appellant is to obtain an order to have the said vehicle released to him.

Being aggrieved by the said confiscation order of the Magistrate, the appellant filed a revision application in the Provincial High Court to have the vehicle released relying upon the Proviso to Section 40 of the Forest Ordinance. Learned High Court Judge refused to grant the relief sought by the appellant. Being aggrieved by that decision, the appellant preferred this appeal seeking to have the vehicle released to him.

Aforesaid **Proviso** to Section 40 (1) of the Forest Ordinance stipulates thus:

40(1) *Where any person is convicted of a forest offence-*

*(a).....*

*(b).....*

*“Provided that in any case the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no of confiscation shall be made if such owners proves to the satisfaction of the court that he had been taken all precautions to prevent the use of tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.”*

As mentioned hereinbefore, the appellant being the owner of the vehicle alleged to have been used to commit an offence under the Forest Ordinance,

made an application to have the vehicle CP LE 5340 released to him relying upon the aforesaid proviso to Section 40(1) of the Forest Ordinance.

The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle.

In order to establish the aforesaid precautionary measures, the appellant and one of his relations has given evidence before the learned Magistrate. The appellant in his evidence has stated that he, having executed a Power of Attorney authorizing his brother namely, K.S.P.Gunawardane to take charge of the vehicle, has handed over the same and its control to the brother and has kept a blind eye thereafter. He has further stated that his brother has given this vehicle to a company by the name of "ICC Company" to spray water onto the roads that were being constructed. Admittedly, the offence had been committed while the vehicle was under the control of the ICC Company. Therefore, it is seen that the appellant being the owner of this vehicle has failed to exercise necessary control over the same, before or during the period in which the offence was committed. Hence, it is clear that the appellant being the owner of the vehicle has failed to establish that he has taken necessary precautions to prevent an offence being committed by using this vehicle.

Aforesaid K.S.P.Gunawardane, alleged to be the brother of the appellant also has given evidence before the Magistrate. In his evidence he has stated that the manager of the ICC Company informed him that the vehicle was taken into police custody. He too has failed to come out with any step that he has taken to prevent the making use of this vehicle to commit the particular offence till then. He has merely handed over the vehicle to the Company, probably as a source of income and seems to have kept quite afterwards. He has failed to supervise the manner in which the vehicle was being used by that company. Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore, it is evident that no meaningful step had been taken either by the owner or his power of attorney holder, of the vehicle that was confiscated in order to prevent an offence being committed by making use of this vehicle.

Therefore, it is my view that the appellant has failed to prove to the satisfaction of the Court that he had taken precautions to prevent using the vehicle for the commission of this offence under the Forest Ordinance. Both, the learned Magistrate and the learned High Court Judge were also of the same opinion as of this Court. In the circumstances, I am not inclined to interfere with the decisions of the two learned Judges.

However, the learned Counsel for the appellant submitted that nothing has been mentioned either in the report filed in the Magistrate's Court of

Anuradhapura or in the charge sheet filed in that court, as to the vehicle claimed by the appellant. Accordingly, he submitted that it is a matter which the Court should have considered before making an order to confiscate the vehicle. Hence, his contention is that the failure to mention in the “B” report and in the charge sheet, of the details in respect of the vehicle used in committing the offence should be a reason to release the vehicle to the appellant.

At this stage, it is important to note that it is for the first time that such a defence is being advanced on behalf of the appellant. It has not been taken up in the courts below though it is a question involving facts of the case. When matters arising out of the facts of the case are to be raised at the appeal stage, those should have been the matters taken up before the trial judge. As stated before, nothing had been mentioned before the trial judge in this instance, as to the failure to mention the details of the vehicle in the “B” report or in the charge sheet. Hence, the appellant is not in a position to take up the said issue as to the failure to refer the details of the vehicle involved in the “B” report or in the charge sheet, at this appeal stage. This position is supported by the following authorities.

In the case of **JAYAWICKREMA Vs. DAVID SILVA [76 NLR 427]** it was held that a pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done. In **Seetha Vs. Weerakoon [49 N L R 225]** it was held thus:

*“A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.*

In the case of **CANDAPPA Vs. PONNAMBALAMPILLAI [1993 (1) S L R 184]** G.P.S. DE SILVA, C.J. held as follows:

*“A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.”*

This position in law has been upheld even in the cases of **Gunawardena Vs. Deraniyagala [2011 B L R (Vol.XVII) at page 16]** and **Somawathie Vs. Wilmon [2011 B L R 54]**

In *Gunawardena Vs. Deraniyagala* (supra) it was held that the appellate courts may consider a point raised for the first time in appeal, where the point might have been put forward in the court below under one of the issues raised and where the Court has before it all the material that is required to decide the question. In the case of *Somawathie vs. Wilmon*, (supra) the Supreme Court has clearly set out the instances where the appellate courts could consider a point raised for the first time in an appeal. In that decision it was held as follows.

*The Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.*

- I).the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;*
- II).the question raised for the first time in appeal is an issue put forward in the court below under one of the issues raised; and*
- III).the Court which hears the appeal has before it all the material that required to decide the question.*

Be that as it may, it must be noted that the proviso to Section 40(1) of the Forest Ordinance does not allow considering the failure to mention the details of the vehicle that was used to commit the offence in the “B” Report and in the charge sheet, as a reason to release a vehicle used in committing an offence under the Forest Ordinance. However, the fact remains that it is the confiscated vehicle that was used to commit the offence in this instance. Indeed, the particular vehicle involved in committing the offence had been produced in courts as one of the items when the productions in connection with committing the offence were handed over to the custody of court at the time the plaint was filed. [Vide at page 45 in the appeal brief]. The identity of the vehicle that was used to commit the offence also had never been in dispute. Therefore, failure to mention the details of the vehicle in the “B” Report and in the charge sheet cannot be considered as a reason to release the vehicle to its owner. In the circumstances, I am not inclined to agree with the contention of the learned Counsel for the appellant.

For the aforesaid reasons, I do not wish to disturb the findings of the learned Magistrate as well as the decision of the learned High Court Judge. Accordingly, this appeal is dismissed.

In view of the aforesaid decision of this Court, learned Magistrate of Anuradhapura is directed to take the vehicle CP LE 5340 into the custody of the Court forthwith and to take further steps in respect of this vehicle upon completion of the period given for the appellant to file an appeal against this order.

Having considered the circumstances of the case, I make no order as to the costs of this appeal.

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL

**MALINIE GUNARATNE, J**

I agree

JUDGE OF THE COURT OF APPEAL