

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

An application for revision in terms
of Article 138 of the Constitution
read with the Provisions of the
High Court of (special provisions)
Act No. 19 of 1990.

Case of Appeal No:
CA(PHC)APN
100/2014

Galle Additional
Magistrate Court
No:63912

Officer in Charge,
Police station,
Hikkaduwa.

Plaintiff

Galle High Court No.
HC/Re/38/12

-Vs-
Disanayaka Thialina Madusanka,
No.104/2, Lawalugahaduvawatta,
Idurathwela,
Waihena,
Galle.

Accused

Wedawasam Jalathge Surasena,
Idurathwila,
Waihena,
Galle.

Registered Owner Appellant.

People's Leasing PLC,
No.67, Chiththampalam A Gardner
Mawatha,
Colombo 02.

Absolute Owner Company.

AND
Wedawasam Jalathge Surasena,
Idurathwila,
Waihena,
Galle.

Registered Owner Petitioner.

Vs.

1. Officer in Charge,
Police station,
Hikkaduwa.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

1st & 2nd Plaintiff Respondents.

3. Disanayaka Thialina Madusanka,
No.104/2,
Lawalugahaduvawatta,
Idurathwela,
Waihena
Galle.

Accused Respondent

4. People's Leasing PLC,
No.67, Chiththampalam A
Gardner Mawatha,
Colombo 02.

Absolute Owner Respondent

And Between Now

Wedawasam Jalathge Surasena,
Idurathwila,
Waihena,
Galle.

Registered Owner

Petitioner - Petitioner

Vs.

1. Officer in Charge,
Police station,
Hikkaduwa.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

1st & 2nd Plaintiff Respondent...-

Respondents.

3. Disanayaka Thialina Madusanka,
No.104/2,
Lawalugahaduvawatta,
Idurathwela,
Waihena,
Galle.

**Accused Respondent -
Respondent**

4. People's Leasing PLC,
No.67, Chiththampalam A
Gardner Mawatha,
Colombo 02.

**Absolute Owner Respondent ::
Respondent**

**Before : W.M.M.Malanie Gunarathne, J
: P.R.Walgama, J**

**Counsel : Mr. Darshana Kuruppu for the Petr with
Nimali Chandrasakera.
: Ms. Himali Jaauanerri SC for A.G.
Saman Galappathi for the 4th Respondent.**

Argued on : 26.03.2015

Decided on: 30.06.2015

CASE-NO- CA-(PHC) PAN- 100/2014- JUDGMENT 08.07.2015

P.R.Walgama, J

By the instant appeal the Appellant invites this Court to exercise its Revisionary powers, and revise/ set aside the order of the

Learned Magistrate dated 26.07.2012, and to revise/ set aside the order of the Learned High Court Judge dated 24.06.2014. In addition for the release of the said vehicle to the Petitioner.

The Petitioner was the Registered Owner of the vehicle bearing No.S.P.LH 6227 Canter Lorry, and the Peoples Leasing (PLC) was the absolute owner of the said vehicle.

On or about 03/12/2010 one Dissanayeke Thilina Madusanka was arrested for transporting timber worth of Rs. 8477/88 without a valid permit and was charged in the Magistrate Court of Galle for committing an offence punishable under Section 37(a), 40(a) and 25(2)(b) of the Forest Ordinance (as amended by Acts No. 15 of 1996, No. 23 of 1995, No. 84 of 1988 and No. 56 of 1979.)

The Accused had pleaded guilty to the afore said charge and thereupon the Learned Magistrate has confiscated the said timber and imposed a fine of Rs.10,000/.

Subsequently the Learned Magistrate gave an opportunity to the Petitioner to show cause why the alleged vehicle should not be confiscated. In the above inquiry the Petitioner and the Accused adduced evidence, and after the said inquiry the Learned Magistrate by his order dated 03.08.2012, confiscated the said vehicle.

Being aggrieved by the above impugned order the Petitioner lodged a petition in the Provincial High Court Galle by way of Revision to have the said order of the Learned Magistrate set aside / to be vacated.

The Learned High Court Judge considering the reasons set out in determination of the Learned Magistrate was inclined to uphold the said impugned order and had dismissed the application of the Petitioner accordingly.

The Petitioner has challenged the above order of the Learned High Court Judge dated 24.06.2014, and lodged the present petition seeking inter alia, to set aside the above orders of the Learned Magistrate and the Learned High Court Judge as stated above.

The facts unraveled in the present application are as follows;

The Petitioner contends that he never had knowledge of the committing of the said offence, and the Accused has informed him that he will be transporting some lodges purporting to be Albesia. But in fact he had been transporting lodges of Jack and Donga.

The present issue before this Court revolves entirely on Section 40 of the Forest Ordinance.

“when any person is convicted of a forest offence, all timber or forest produce which is not the property of the crown in respect of which such offence has been committed, and all tools, boats, carts, cattle and motor vehicles used in committing such offence, shall in addition to any other punishment prescribed for such offence, be confiscated by order of the convicting Magistrate, Provided that in any case where the owner of such tools, boats, carts, cattle or motor vehicles is a third party, no order of confiscation shall be made if such

owner proves to the satisfaction of the Court that he had used all precautions to prevent the use of such tools, boats, carts, cattle or motor vehicles as the case may be, for the commission of the offence."

In view of the above Section the Learned Magistrate held an inquiry, and as he was not satisfied with the reasons adduced by the Petitioner the Learned Magistrate confiscated the above vehicle.

It is the stance of the Petitioner that he is an owner of a tea estate and the said vehicle was purchased on a hire purchase Agreement from the People leasing PLC. The vehicle was used for the transportation of the tea leaves to the tea factories. Further it is stated that the Petitioner used to hire the vehicle to others in order to gain an additional income to settle the above lease.

It also transpired at the inquiry that the Accused (driver) had obtained permission from the Petitioner to transport few Albiciya logs for one Ranasinghe, but in fact it was Jak and Donga, which fact was not known to the driver nor to the Petitioner. Further it is alleged by the Accused (driver) that, at the time the said timber was loaded to the lorry he was not there, but had gone to a bouquet to have a cup of tea. Further it was the version of the driver that the Petitioner has adequately given advice not to use the vehicle for illegal purposes.

The Counsel for the Petitioner has adverted Court to the case of ABUBAKARGE JALEEL .VS. ANTI-VICE UNIT- CASE NO. (CA-PHC-108/2010) wherein Justice Salam has held thus;

“it was the evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross examination. There has been no previous instance where the driver has been charged for a similar offence. When some one is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all time in the lorry to closely supervise for what purpose the lorry is used.”

By formulating the above principle that should be adopted in deciding the alleged vehicle to be confiscated or not his Lordship arrived at the conclusion that the vehicle should be released to the Registered owner for the following reasons; that,

There is no valid conviction of the Accused and therefore the owner cannot be called upon to cause against a possible confiscation,

As there is no valid confiscation, the confiscation cannot stand on its own,

Assuming the owner was under a duty to show cause his evidence cannot be simply rejected,

The fact that the accused was in the permanent employment of the owner per se does not give rise to an automatic confiscation.

Therefore it is apparent His Lordship was of the view that there is no valid conviction, and as such there cannot be a confiscation in respect of the alleged vehicle.

In citing the above case the Appellant, contends that in the present case there cannot be a valid conviction as the alleged charges were not properly framed. In that it is stated that the charges have not been framed in terms of Section 40(1) of the Forest Ordinance (Amendment) Act No. 65 of 2009.

But it is salient to note that the said position has not been taken up by the Appellant in the inquiry in to the confiscation of the vehicle.

It is intensely relevant to note the observation of His Lordship Justice Sarath N. Silva (as he was then) in the case of FARIS.VS. OIC. GALENBUNDUNUWEWA - 1992(1) SLR-167, which states thus;

"An order of confiscation should not be made if the owner establishes one of two matters.

1. that he has taken all precautions to prevent the use of the vehicle for the commission of the offence.
2. That the vehicle has been used for the commission of the offence without his knowledge.

It is said that above matters could be established by the owner on a balance of probability.

It was further held in the case of MARY MATILDA .VS. OIC HABARANA- CA (PHC) 86/97

“That the owner of the vehicle to discharge the burden that she had taken all precautions to prevent the use of the vehicle for the commission of the offence, mere giving instructions is not sufficient.”

Although the above cases had laid down certain principles, it also envisages a greater responsibility on the part of the Registered owner.

In the instant matter it was the testimony of the Registered owner in the claim inquiry that the alleged vehicle was kept at his brother's residence and when ever the vehicle is taken for a hire the driver will inform him of the hire and take the vehicle. The above situation is an indicative of the fact that the Registered Owner did not have the full control of the alleged vehicle and had not exercise due diligence in giving the said vehicle for hire. A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient, as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose.

It was admitted by the petitioner that the key of the alleged lorry was not always with him, but at times it is left at his brother's house under nobody's care.

In the above context it is crystal clear that the petitioner has not taken any precaution to keep the alleged vehicle under his control, and there by acted in a negligent manner.

For the forgoing reasons I see no reason to interfere with the orders of the Learned Magistrate and the Learned High Court Judge as stated above. Hence the appeal is dismissed subject to a cost of Rs. 5000/.

Accordingly appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malanie Gunarathne, J

I agree,

JUDGE OF THE COURT OF APPEAL