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

In the matter of an appeal to the Court of Appeal from the Judgment of the High Court of the Western Province Holden in Colombo delivered in terms of Article 154 P (3)(b) Of the Constitution of the Democratic Socialist Republic of Sri Lanka

Nalaka Dayawansha

No.361, Park Road,

Colombo 05.

Case No: CA(PHC)149/13 **CLAIMANT-PETITIONER-APPELLANT**

H.C. Colombo Case No: HCRA 67/2013

M.C. Colombo Case No: B 9525/03 **Vs.**

Officer in charge
Colombo Crime Division
Dematagoda
Colombo 10.

COMPLAINANT-RESPONDENT-RESPONDENT

01. Ranasinghe Arachchige Sanjeewa
02. Kuruppu Mudiyanselage Samantha Priyantha Perera.
03. Kalugala Wattegedara Jayarathne
04. Werahara Liyanage Athula Chandrasiri
05. Upul Harischandra Kariyawasam
06. Chamil Ganesh Ayuhn Gunathilaka

SUSPECTS-RESPONDENTS-RESPONDENTS

Honorable Attorney General

Attorney General's Department
Colombo 12.

RESPONDENT-RESPONDENT

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Shanaka Ranasinghe P.C. with N. Abeysooriya for Claimant-Petitioner-Appellant

N. Wickremasekera S.C. for Respondent-Respondent

Written Submissions tendered on:

Claimant-Petitioner-Appellant on 23.05.2018

Respondent-Respondent on 06.07.2018

Argued on: 22.03.2018

Decided on: 19.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Western Province holden in Colombo dated 02.08.2013.

On or about 08.06.2011 one Ruwan Dhammika, a driver employed by the Claimant-Petitioner-Appellant (Appellant) made a complaint to the Narahenpita Police that a Land Rover Jeep bearing No. WP C11-6804 which was being driven by him was taken at gun point along Park Road whilst being driven to the house of the Appellant. This is not the true registered number of the said vehicle. It is one of three garage numbers issued to "Imperial Import and Export Company Pvt. Ltd." which is a company importing vehicles of which the Appellant is the Managing Director. In fact, the Appellant in his statement to the Police stated that this vehicle is an unregistered vehicle.

During the Police investigation six (6) suspects were arrested and the vehicle was recovered from the possession of the 5th Suspect-Respondent-Respondent who was a former employee of the Appellant's company. The said vehicle has since its recovery been in custody to the present day.

The Appellant made an application to the Magistrates Court of Colombo seeking the release of the said vehicle in terms of section 431 of the Code of Criminal Procedure Act (Code) on the basis that the jeep was taken into custody by the Police from his possession. Therefore, it is apposite to consider the principles applicable when section 431 of the Code is applicable.

In *Silva and another* v. *Officer-In-Charge, Police Station, Tambuttegama and Another* [(1991) 2 Sri. L.R. 83] it was held that section 431(1) and 431(2) of the Code gives three options to a Magistrate regarding property that has been seized by the Police. They are to decide:

1. Whether the property should be **kept in official custody** pending the conclusion of the inquiry or trial.

2. Whether the property should be **delivered to the person entitled to possession** pending the conclusion of the inquiry or trial **on conditions to be imposed**.

3. Whether the property **should be delivered to such person without conditions**.

The Court observed that the first two options should generally be taken by a Magistrate when a prosecution is pending or likely and that the third option should be taken when no prosecution is pending or likely. Elaborating further court stated that some of the factors which may persuade a Magistrate to decide that the property should be kept in the court's official custody will be (a) the necessity of identifying the property in evidence, (b) the liability of the seized property to confiscation[1] (c) the likelihood of speedy and natural decay of the property and (d) the facilities

[1] In *Mohammed Shakul Hameed* vs *The State Rep* [March 2,2018] the Madras High Court observed that the court should generally not order that the property be kept in the interim custody of a claimant pending trial when confiscation proceedings have been initiated in relation to that property by the appropriate authorities. The court in coming to this conclusion was following a previous decision of a Divisional bench of the Madras High Court: *David* v. *Shakthivel, Inspector of Police -cum- Station House Officer* reported in 2010(1) L.W. (Crl.)129

available to keep such property in the court's custody and (e) the security facilities available to court to safeguard the property.

In *Punchinona v. Hinniappuhamy* (60 N.L.R. 518) the court stated that an order that the seized property ought to be kept in the court's official custody could be made when the facts indicate that neutral custody of the property is likelier to ensure that it will be duly produced when required in a criminal proceeding. Such an order relating to official custody could also be made if the court was *prima facie* satisfied that a person making a claim on the property would be entitled to its delivery at the end of the trial by virtue of an order under section 413 of the Code. (Present section 425 of the Code)

There has also been a divergence of judicial opinion about the person to whom a Magistrate should deliver the property in the event court feels that such property need not be kept in the official custody of the court. The early position was that the phrase 'make such order as he thinks fit respecting the delivery of such property to the person **entitled to the possession thereof**...' only made it possible for the Magistrate to make an order delivering the property to the person from whom it was seized [*Costa v. Peiris* (35 N.L.R. 326), *Punchinona v. Hiniappuhamy* (60 N.L.R. 518), *Piyadasa v Punchi Banda* (62 N.L.R. 307)].

However, beginning with the decision in *Sugathapala v. Thambirajah* (67 N.L.R. 91) our courts began to carve out exceptions to this general position. In this case it was held that section 431(1) (or its equivalent under the Code) enables a Magistrate to use judicial discretion and deliver property to a party other than the party from whom the property was seized by the police i.e. even an individual who had the **right** to possess the property [*Balagalle v. Somaratne* (70 N.L.R. 38), *Thirunayagam v. Inspector of Police Jaffna* (74 N.L.R. 161)]. This was said to be a necessary power since the person from whose possession property was seized may have obtained possession of the property dishonestly, fraudulently or criminally [*Sugathapala v. Thambirajah* (67 N.L.R. 91, 95), *Balagalla v. Somarathne* (70 N.L.R. 382)]. However, a *bona fide* purchaser in possession of property that had previously been dealt with dishonestly/fraudulently has been held to be entitled to possession of the property seized [C.A. (PHC) 263/2006; CA (PHC)

168/2014]. It was only if an individual who had the right to possess the property could not be ascertained that the property should be delivered to the person from whom the property was seized.

In *Haswi v. Jayatissa and Two Others* [(2011) 1 Sri.L.R. 94] the property seized by the police did not come within the ambit of property that could be seized under section 431(1) of the Code. The Court nevertheless did not find the Magistrate to be divested of jurisdiction, but stated that the Magistrate was under a duty to handover the property to the true owner and not the person from whom the property was seized by the police unless the latter was the true owner himself.[2]

In the instant case the learned Magistrate after due inquiry into the application made by the Appellant in terms of section 431 of the Code held inter alia that:

(a) The Appellant has failed to establish that he is the owner of the vehicle in issue within the meaning of section 71 of the Motor Traffic Act;
(b) Appellant has failed to establish that permission from the Commissioner General of Motor Traffic was obtained to assemble the vehicle in terms of section 19(a)(1) of the Motor Traffic Ordinance,
(c) The engine number and chassis number of the vehicle have been tampered with

Accordingly, by his order dated 10.07.2012 the learned Magistrate rejected the application of the Appellant made under section 431 of the Code to release the vehicle to the Appellant before the conclusion of the trial. However, the learned Magistrate held that the Appellant is entitled to be heard as to why the vehicle should not be confiscated. This order is in conformity with the legal principles set out above.

The Appellant did not take any steps to challenge the said order dated 10.07.2012 of the learned Magistrate.

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[2] For a contrary interpretation see *De Alwis* v *De Alwis* (1979) 1 Sri LR 17 which dealt with section 102 of the Administration of Justice Law. (Roughly equivalent to section 431(1) of the Code of Criminal Procedure Act) The Supreme Court concluded that the property seized by the police did not fall within the ambit of section 102 of the Administration of Justice Law. Accordingly, since the Magistrate lacked jurisdiction to make an order, the Supreme Court stated that the property seized by the police had to be returned to the person from whom it was seized.

Instead after about three months from the said order, the Appellant made an application to the learned Magistrate to release the vehicle to the Appellant until the court makes an order under section 425 of the Code. The learned Magistrate by his order dated 21.02.2013 held that there was no provision for the Appellant to make such an application as the court had already made order dated 10.07.2012 against which Appellant had not taken any steps before a higher forum. The learned Magistrate further held that the Appellant has failed to show cause as to why the vehicle should not be confiscated although he was given that opportunity by order dated 10.07.2012. It is against this order that the Appellant filed a revision application before the High Court of the Western Province holden in Colombo.

The learned High Court Judge held that both orders made by the learned High Court Judge are justified for the reasons stated therein and refused to issue notice. It is against this order that the Appellant has appealed to this Court.

Section 431 of the Code deals with disposal of property the subject of offences prior to trial while section 425 of the Code deals with disposal of property the subject of offences after trial. The Appellant first made an application under section 431 Code which was rejected by the learned Magistrate by his order dated 10.07.2012. The Appellant failed to challenge the said order and therefore the findings made therein are to be taken as correct. In those circumstances, the learned High Court Judge was correct in refusing to issue notice on the revision application made by the Appellant. The second application made by the Appellant after about three months from the said order, to the learned Magistrate to release the vehicle to the Appellant until the court makes an order under section 425 of the Code is completely misconceived in law.

There is a further reason as to why this appeal is also misconceived in law. This appeal has been made in terms of Article 154P (6) of the Constitution which states that subject to the provisions of the Constitution and any law, any person aggrieved by a **final order, judgment or sentence** of any High Court, in the exercise of its jurisdiction under paragraphs (3)(b) or (3)(c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138. The question is whether the order by the learned High Court Judge refusing to issue notice on the revision application made by the Appellant is a final order.

The method of determining whether an order of a civil court is a final order or interlocutory order had given rise to two conflicting strands of judicial opinion. In *Siriwardena v Air Ceylon Ltd.* [(1984) 1 Sri L.R. 286] the Supreme Court adopted a test known as the 'order approach' to answer this question. In essence, the test was whether the order of the Court finally disposed of the rights of the parties. If an order did so, it could be regarded as a final order. The rival strand of authority adopted a test known as the 'application approach'. This approach is succinctly explained in the following judicial statements made in *Salaman v Warner* [(1891) Q.B.D. 734]:

> *"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties.* ***If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory***
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> *"I think that the true definition is this.* ***I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."*** (emphasis added)

The application approach which was initially adopted by a three judge bench of the Supreme Court in *Ranjit v Kusumawathi* [(1998) 3 Sri L.R. 232], has subsequently been followed in *Rajendra Chettiar vs. Narayanan Chettiar* [2011] 2 SLR 70 (5 judge bench) and *Padma Priyathi Senanayke v. H.G. Chamika Jayatha and others* [SC. Appeal No. 41/2015, S.C.M 04.08.2017] and *Mohamed Woleed Mohamed Zavahir v. Amana Takaful Company Limited* [SC/CHC Appeal 37/2008, S.C.M 04.08.2017] (7 Judge Bench).

Admittedly, the aforementioned tests have been used to decide whether an order of a court governed by the Civil Procedure Code is a final or interlocutory order. However, in *Pathirana v. Goonewardena and others* [CA (PHC) 15/2016, C.A.M 14.07.2016] the application approach was applied by a divisional bench of this court in order to determine whether an order of a Provincial High Court exercising its revisionary jurisdiction against an order of a Primary Court was a final or interlocutory order. In *Pathirana v. Goonewardena and others* (supra) this court had to deal with an identical legal issue as has come up in the present matter viz. whether an order of a Provincial High Court refusing to issue notice was a final or interlocutory order. The Court of Appeal observed that the High Court's order was made upon an application by the petitioner to issue notice on the respondents. It was held that although the order refusing to issue notice on the respondents finally determined the matter, if the High Court decided to issue notice, the matter would not have been finally determined. On this basis, the Court of Appeal regarded an order refusing to issue notice as an interlocutory order that did not come within the scope of Article 154P (6) of the Constitution.

I am inclined to adopt the approach taken in *Pathirana v. Goonewardena and others* (supra) and determine that the order of the learned High Court Judge of the Western Province holden in Colombo dated 02.08.2013 is an interlocutory order since if the High Court decided to issue notice, the matter would not have been finally determined. Therefore, I am of the view that the Appellant could not in any event have filed this appeal.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Western Province holden in Colombo dated 02.08.2013.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal