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

In the matter of an Appeal under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Range Forest Officer,
Forest Office,
Kappetipola, Welimada.

Complainant

C.A. Case No: **CA (PHC) 94/2017**

P.H.C. Badulla Case No: **REV 100/2015**

M.C. Welimada Case No: **18701**

Vs.

1. Mohaideen Thasali Mohammadu Hussain
   Kurundugolla, Guruthalawa.
2. Bawa Mohadeen Samsutheen
   Guruthalawa

Accused

And

Cadar Bawa Jennathul Farida
Boralanda Road, Ampitithenna,
Dambawinna, Welimada.

Registered Owner

AND BETWEEN

Cadar Bawa Jennathul Farida
Boralanda Road, Ampitithenna,
Dambawinna, Welimada.

Registered Owner-Petitioner

Vs.

1. Range Forest Officer,
   Forest Office,
   Kappetipola, Welimada.
2. The Attorney General,
   Attorney General's Department,
   Colombo 12.

Complainant-Respondents

AND NOW BETWEEN

Cadar Bawa Jennathul Farida
Boralanda Road, Ampitithenna,
Dambawinna, Welimada.

Registered Owner-Petitioner

Vs.

1. Range Forest Officer,
   Forest Office,
   Kappetipola, Welimada.
2. The Attorney General,
   Attorney General's Department,
   Colombo 12.

Complainant-Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : M. Nizam Kariappar, PC with AAL M.I.M. Iyunullah for the Registered Owner-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the Complainant-Respondents-Respondents

ARGUMENT ON	:	25.03.2019
WRITTEN SUBMISSIONS	:	The Registered Owner-Petitioner-Appellant – On 13.03.2019 The Complainant-Respondents-Respondents – On 17.10.2018
DECIDED ON	:	05.07.2019

K.K.WICKREMASINGHE, J.

The Registered Owner-Petitioner-Appellant filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Uva Province holden in Badulla dated 22.06.2017 in Case No. REV 100/2015 and seeking to set aside the confiscation order made by the Learned Magistrate of Welimada dated 11.11.2015 in Case No. 18701.

Facts of the case:

The accused persons in the instant case were arrested for illegally transporting eucalyptus timber valued at Rs. 144,910.86 using a lorry bearing No. UPHX - 1846, without a valid permit. The accused persons were charged before the Learned Magistrate of Welimada under section 25(1) read with section 40A and 40(b) of the Forest Ordinance. Both accused persons had pleaded guilty and accordingly the Learned Magistrate convicted them and imposed a fine of Rs.15,000/= on each accused with a default sentence of one month simple imprisonment. Thereafter a vehicle inquiry was held with regard to the vehicle used for committing of the offence. The registered owner-petitioner-appellant (hereinafter referred to as 'the appellant') gave evidence in the said inquiry and had

called the accused driver to testify on her behalf. The Learned Magistrate after evaluating the evidence, confiscated the vehicle by the order dated 11.11.2015.

Being aggrieved by the said order, the appellant preferred an application for revision to the Provincial High Court of Uva Province holden in Badulla. The Learned High Court Judge dismissed the said application by the order dated 22.06.2017.

Being aggrieved by the said dismissal, the appellant preferred this appeal.

Following grounds of appeal were averred in the petition of appeal;

1. The Learned High Court Judge erred in law when holding that the order of the Learned Magistrate was correct
2. The Learned High Court Judge failed to consider that the permit for timber transportation is given only after loading the timber to the vehicle
3. The Court failed to consider that the appellant had acted faithfully in renting her vehicle

Following grounds were averred as exceptional circumstances in the application of revision submitted to the High Court;

1. The Learned Magistrate failed to consider that the appellant had proved that she took precautions to prevent an offence being committed.
2. The charge sheet did not contain the provisions to confiscate the vehicle under the Forest Ordinance and therefore it was a defective charge sheet
3. The Learned Magistrate had made the order disregarding the provisions of the Forest Ordinance.
4. The order of the Learned Magistrate is illegal, erroneous and contrary to principles of natural justice.

I observe that the Learned Counsel for the appellant in the High Court has made submissions with regard to the fact that the lorry was parked after loading the

timber load on the date of offence, which was a Sunday, until the owner of timber obtained the permit on next day. It was submitted that the loading of timber was done on that day due to the limited-availability of movers and there were five more Lorries which were loaded with timber at the same time due to the same reason. The accused-driver, in the vehicle inquiry, testified that he went home and slept after loading the timber to the Lorry, leaving the Lorry in the yard. The driver further testified that he received a message next morning around 5.30am that the Special Task Force and the Range Forest Officers had detained the vehicle and therefore he went to the yard around 9.30 in the morning. The owner of timber, one Samsudeen, had arrived there around 12.00pm and showed documents relevant to the timber and informed Forest officers that he was obtaining a permit for transportation. Upon perusal the evidence of the accused-driver, it is understood that the permit for transporting of timber was to be issued on Monday and the load of timber was to be transported, subsequently on Tuesday. However due to the non-availability of equipment necessary for lifting and moving of timber on Monday, the load of timber was loaded on Sunday to the Lorry in question.

At this juncture, it is noteworthy that the accused persons had pleaded guilty to the charges levelled against them. I think the fact that the Lorry was not transporting the timber at the time of detection, should have been challenged at the time of conviction and not subsequently at the vehicle inquiry or the appeal. The Learned Magistrate addressed the said issue in following manner;

> "ඔහු වැඩිදුරටත් සාක්ෂි දෙමින් දැව පටවා තිබූ බව පමණක් පිළිගෙන ඇති අතර ප්‍රවාහනය නොකළ බවට සාක්ෂි දී තිබේ. එහෙත් ඔහු මුල් අවස්ථාවේදීම බලපත්‍ර නොමැතිව දැව ප්‍රවාහනය සම්බන්ධයෙන් වරදකාරිත්වය පිළිගෙන ඇති අතර, දැව පටවන අවස්ථාවේ හෝ බලපත්‍රයක් තිබී නොමැති බව පෙනී යයි..."(Page 128 of the brief)

I am of the view that the above reasoning of the Learned Magistrate is well within law.

The Learned Counsel for the appellant submitted that charge sheet did not contain the provisions to confiscate the vehicle under the Forest Ordinance and therefore it was a defective charge sheet. In the written submissions, it was submitted that the charge sheet refers to non-existing sections 14(a) and section 14(b) of the Forest Ordinance. However in the petition of appeal it was submitted that there is no reference to section 40(1) (a) in the charge sheet and it refers only to section 40(a) and section 40 (b). Therefore I disregard the reference to section 14(a) in the written submissions since it appears to be of typographical error. The Learned SSC for the respondent contended that the appellant cannot be allowed to stand on the ground of defective charge at this stage of appeal especially when the accused driver had pleaded guilty to the charge. I observe that the appellant had raised this question at the High Court as well. **Section 456A of the Code of Criminal Procedure Act** reads that;

> *"The failure to comply with any provision of this Code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice."*

I wish to reproduce **Section 166 of the Code of Criminal Procedure Act** that reads;

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

Accordingly the question to be considered is whether the said defect has caused prejudice to the appellant. I observe that the charge sheet states that "...an offence

punishable under section 25(1) read with section 40(a) and 40(b) of the Forest Ordinance." Therefore it is manifestly clear that the section under which the accused were punished was section 25(1) of the Forest Ordinance. Section 40(1) reads that;

> *"(1) where any person is convicted of a forest offence—*
>
> *(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and*
>
> *(b) all tools, vehicles, implements, cattle and machines used in committing such offence, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:*
>
> *Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.".*

As per section 40(1)(b), all tools, vehicles, implements, cattle and machines used in committing an offence under the Forest Ordinance, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate. Therefore it is understood that any vehicle involved in an offence under the Forest Ordinance is subject to confiscation upon a valid conviction. Since section 40(1)(b) has application to the whole Ordinance, it is not mandatory that section to be specified in the charge sheet and such non-mentioning would not cause any injustice to a vehicle owner.

In the case of **H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]**, it was held that,

"The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in the case of ***Wickramasinghe Vs Chandradasa 67 NLR 550*** *is important. Justice Sri Skanda Rajah in the said case observed the following facts.*

> *"Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned."*

His Lordship held as follows;

> *"The omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable."*

In the case of **H. G. Sujith Priyantha V. OIC, Police station, Poddala and others [CA (PHC) 157/2012]**, it was held that,

> ***"In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time. Indeed, an application under the aforesaid proviso to Section 40 in the Forest Ordinance could only be made when confiscation has taken place under the main Section 40 of the Forest Ordinance.*** *Aforesaid main*

Section 40 of the Forest Ordinance imposes a duty upon the Magistrate who convicted the accused under the Forest Ordinance to confiscate the vehicle used in committing such an offence. Furthermore, the word "shall" is used in that main section and therefore the confiscation of the vehicle is automatic when the accused is found guilty. Accordingly, it is clear that the law referred to in the proviso to Section 40 is applicable only thereafter. Therefore, I conclude that the appellant who made the application relying upon the proviso to Section 40 is not entitled to raise an issue as to the defects in the charge after the accused have pleaded guilty to the charge under Section 40 of the Forest Ordinance. Furthermore, the person who makes a claim under the proviso to the said Section 40 could not have made such an application unless and until the accused are found guilty to a charge framed under the Forest Ordinance. Hence, it is clear that he is making such a claim, knowing that the accused were already been convicted for a particular charge under the Forest Ordinance. Therefore, the appellant is estopped from claiming the cover relying on the defects in the charge sheet, in his application made under the proviso to Section 40 of the Forest Ordinance..., (Emphasis added)

In light of above it is understood that a party is not allowed to raise an objection with regard to a defect in the charge sheet at a belated point of time since it will lead to absurdity. It is imperative to note that the accused-driver in the instant matter was convicted on his own plea. Therefore the said ground of appeal should necessarily fail.

It was contended on behalf of the appellant that she is entitled to have the lorry released as she has established the offence has been committed without her knowledge. However as per the amended section 40 of the Forest Ordinance,

burden is cast on a vehicle owner to prove that he in fact took all precautions to prevent an offence being committed utilizing his vehicle.

In the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that,

> *"...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..."*

Our Courts have constantly held that a vehicle owner in question under the Forest Ordinance is required to prove what steps he has taken in order to prevent an offence being committed and such requirement would not be fulfilled by a mere denial of knowledge.

On an evaluation of evidence, it is apparent that the appellant has not taken necessary precautions restricting the accused from using the vehicle for illegal purposes.

In the case of **K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013],** it was held that,

> *"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...*

It is trite law that mere giving instruction is not sufficient to discharge the burden cast on a vehicle owner under the Forest Ordinance. I observe that the Learned Magistrate had evaluated the evidence before him and concluded that the appellant had failed to discharge the said burden cast on her. The confiscation order was made well within law. Therefore the Learned High Court Judge was correct in dismissing the revision application due to lack of exceptional circumstances.

Considering above, I see no reason to interfere with the findings of the Learned Magistrate dated 11.11.2015 and the Learned High Court Judge dated 22.06.2017 and therefore I affirm the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL