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

In the matter of an Appeal in terms of Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Officer in Charge,
Police Station,
Pannala.

Complainant

C.A. Case No: **CA (PHC) 180/2014**

P.H.C. Kurunegala Case No:
HCR 143/2012

M.C. Case No: **74729**

Vs.

R.M. Suneth Udayasiri Ranathunga,
Makadura, Gonawila.

Accused

AND BETWEEN

H.M. Lilanthi Kumari Herath,
No.38, Nelum Pokuna,
Eliwila, Gonawila.

Aggrieved Petitioner

Vs.

1. Officer in Charge,
   Police Station,
   Pannala.
   Complaint-1st Respondent
2. The Attorney General
   Attorney-General's
   Department,
   Colombo 12.

2nd Respondent

3. R.M. Suneth Udayasiri Ranathunga,
   Makadura, Gonawila.
   Accused-3rd Respondent

AND NOW BETWEEN

H.M. Lilanthi Kumari Herath,
No.38, Nelum Pokuna,
Eliwila, Gonawila.
Aggrieved Petitioner-Appellant

Vs.

1. Officer in Charge,
   Police Station,
   Pannala.
   Complaint-1st Respondent-Respondent
2. The Attorney General
   Attorney-General's Department,
   Colombo 12.
   2nd Respondent-Respondent
3. R.M. Suneth Udayasiri Ranathunga,
   Makadura, Gonawila.
   Accused-3rd Respondent-Respondent

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

COUNSEL : AAL Sumudu Hewage for the Aggrieved Petitioner-Appellant

		Nayomi Wickremasekara, SSC for the 2nd Respondent-Respondent
ARGUED ON	:	05.03.2019
WRITTEN SUBMISSIONS	:	The Aggrieved Petitioner-Appellant – 12.06.2018 The Respondent-Respondent – On 08.01.2019
DECIDED ON	:	05.11.2019

K.K.WICKREMASINGHE, J.

The Aggrieved Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kurunegala dated 05.11.2014 in Case No. HCR 143/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Kuliyapitiya dated 20.09.2012 in Case No. 74729.

Facts of the Case:

The Accused-3rd respondent-respondent (hereinafter referred to as the 'accused') was charged in the Magistrate's Court of Kuliyapitiya for transporting timber on or about 22.02.2012, utilizing a Lorry bearing No. 41 Shri 4134, and thereby committed an offence punishable under section 25(2) of the Forest Ordinance. The accused pleaded guilty to the charge and the Learned Magistrate convicted him accordingly. The accused was ordered to pay a fine of Rs.50, 000/= with a default sentence of 2 months imprisonment.

Thereafter, a vehicle inquiry was held with regard to the Lorry and at the inquiry, the aggrieved petitioner-appellant (hereinafter referred to as the "appellant") and another witness gave evidence.

At conclusion of the inquiry, the Learned Magistrate confiscated the vehicle by order dated 20.09.2012.

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of North Western Province holden in Kurunegala. The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the revision application.

Thereafter, the appellant preferred this appeal.

The Learned Counsel for the appellant has submitted following grounds of appeal, in written submissions;

1. The charge is defective
2. The Learned Magistrate has failed to frame a charge
3. The appellant had taken precautions to prevent the commission of an offence
4. The Learned Magistrate failed to consider that the offence was committed without the appellant's knowledge
5. The appellant had no knowledge of the offence
6. Additional matters that ought to be considered before confiscating a vehicle.

I wish to consider the 1st and 2nd ground of appeal in which challenged the validity of the charge. The Learned Counsel for the appellant contended that the charge does not specify the type of timber alleged to have been transported. It was argued that since not all types of timber need a permit for transportation, the mere transportation of 'timber' without a permit is not an offence. In support of his contention, the Learned Counsel submitted the case of **Abubackerge Jaleel V. OIC, Anti-Vice unit, Police Station, Anuradapura [CA (PHC) 108/2010].**

In reply to the above contention, the Learned SSC for the 2nd respondent-respondent (hereinafter referred to as the 'respondent') submitted that defectiveness of the charge was not taken up as a ground of appeal in the petition, but it was raised for the first time in written submissions. The Learned SSC further argued that legality of the charge has to be questioned or raised before the accused had pleaded guilty. Therefore, it cannot be taken up as a ground of appeal at this stage.

In the case of **K. W. P. G. Samaratunga V. Range Forest Officer, Anuradhapura [C.A (PHC) No. 89/2013 – decided on 16.10.2014]**, it was held that,

> *"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.*
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> *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...."*

It is settled law that an appellant is not allowed to raise fresh grounds, which are mixed questions of fact and law, at the appeal stage against a revision application filed in the High Court. I observe that the appellant had not raised any objection to the charge at the Magistrate's Court or the High Court.

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.*

In the case of **A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]**, it was held that,

> *"The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier the Accused-Appellant has failed to raise any objections to the charge at the trial. In this regard I rely on the* ***judgment of the Court of Criminal Appeal in 45 NLR page 82 in King V. Kitchilan*** *wherein the Court of Criminal appeal held as follows:*
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> > *"The proper time at which an objection of the nature should be taken is before the accused has pleaded"*

It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception."

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...*" (Emphasis added)

In light of above judgments, it is obvious 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. Further, in the instant case, the appellant had not raised this issue at the stage of revision application in the High Court. That reason too will stop the appellant from relying on these two grounds of appeal, at the later stage in this Court. Therefore, the said two grounds of appeal should necessarily fail.

Now I wish to consider the 3rd ground of appeal in which it was argued that the appellant had taken precautions to prevent the commission of an offence and she had been vigilant about whereabouts and the activities committed using her vehicle.

The appellant testified that she bought the Lorry to transport goods for her shop and occasionally, the Lorry was given on hire to transport bricks. On the date of the incident, the appellant had given the vehicle for a hire to transport bricks. The appellant had inquired about the hire from the bricks owner and he had informed her that 4000 bricks had been transported and further 6000 bricks were to be transported. Thereafter, the appellant had fallen asleep around 10pm and later she was informed that the Lorry was taken into Police custody.

I observe that both the Learned Magistrate and the Learned High Court Judge were of the view that merely inquiring about the vehicle from the brick owner was not sufficient and the appellant had not proved to the satisfaction of Court that she in fact took all precautions to prevent an offence being committed. I observe that the Learned Magistrate had come to a correct conclusion after considering the evidence available and I do not see any erroneous conclusion of the Learned Magistrate or the Learned High Court Judge, as alleged by the Learned Counsel for the appellant. Therefore, I see no merits in the 3rd ground of appeal.

In 4th and 5th ground of appeal, the Learned Counsel for the appellant contended that the appellant had no knowledge of the offence.

Now it is trite law that, a vehicle owner whose vehicle was involved in an offence under the Forest Ordinance is required to prove preventive measures taken by him, in order to avoid his vehicle being confiscated, as per section 40 of the Forest Ordinance (amendment Act No. 65 of 2009). Even though the previous law allowed a vehicle owner to prove either he took precautions or he had no knowledge of an offence being committed, the amended section 40 only focuses on the precautions taken by a vehicle owner in question.

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..."*

Therefore, I am of the view that mere denial of the knowledge about an offence being committed is not sufficient for a vehicle owner to discharge the burden cast on him, under section 40 of the Forest Ordinance (as amended). I do not think that a vehicle owner, under the present law, can submit the absence of knowledge as a ground to avoid a vehicle confiscation, anymore. Therefore, the above two grounds of appeal too should fail.

The Learned Counsel for the appellant submitted that there are additional matters that ought to be considered before confiscating a vehicle. The Learned Counsel submitted the case of **A.M. Sadi Banda V. Officer-in Charge, Police Station, Norton Bridge [CA (PHC) 03/2013 – decided on 25.07.2014],** in support of his contention.

However, I observe that in the case of **Ceylinco Leasing Corporation Limited V. M.H. Harison and others [SC Appeal No. 43/2012 – decided on 08.12.2016],** it was observed that,

> *"Forest Ordinance No.16 of 1907, is described in its long title as "an Ordinance to consolidate and amend the law relating to forests and felling and transport of timber". Some of the provisions of the Act reflects the*

choice of policy, in the instant case it is undoubtedly designed with a view to protect the environment."

It is manifestly clear that the Legislature was trying to enact strict provisions with regard to the offences concerning the environment. As I have already mentioned, the sole requirement of section 40 is 'proving precautions taken by the vehicle owner to prevent an offence being committed'. There is no statutory requirement about considering the value of timber or any other additional matter like whether there are previous convictions against the same vehicle, before confiscating a vehicle under the Forest Ordinance. Therefore, it is understood that the purpose of section 40 is to confiscate a vehicle involved in an offence under the Forest Ordinance regardless of the value of the timber or any other additional matter. Accordingly, there is no merit in the final ground of appeal as well.

Considering above, I see no reason to interfere with the order of the Learned Magistrate dated 20.09.2012 and the order of the Learned High Court Judge dated 05.11.2014. 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

Cases referred to:

1. K. W. P. G. Samaratunga V. Range Forest Officer, Anuradhapura [C.A (PHC) No. 89/2013]
2. H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]
3. A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]
4. H. G. Sujith Priyantha V. OIC, Police station, Poddala and others [CA (PHC) 157/2012]
5. W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]
6. Ceylinco Leasing Corporation Limited V. M.H. Harison and others [SC Appeal No. 43/2012]