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

In the matter of an appeal in terms of section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Excise Department
Colombo

Complainant

Court of Appeal Application No: **CA/ PHC/119/18**

Vs.

High Court of Negombo No: **HRCA/230/18**

Kodimarakkalage Benedict Fernando

Accused

Magistrate's Court of Negombo No: **L 46580**

And

Warnakula Dehiwalage Ajith Kostha
14/5, Perera Mawatha, Kelaeliya
Ja Ela

Petitioner

Vs.

1. Officer in Charge
   Excise Department
   Colombo

2. The Hon Attorney General
Attorney General's Department
Colombo 12.

Respondents

And now

Warnakula Dehiwalage Ajith Kostha
14/5, Perera Mawatha, Kelaeliya
Ja Ela

Appellant - Petitioner

Vs.

3. Officer in Charge
Excise Department
Colombo

4. The Hon Attorney General
Attorney General's Department
Colombo 12.

Respondent - Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Asela Serasinghe for the petitioner.
		Priyani Abeygunawardena SC for the respondents.
Argued on	:	15.02.202
Decided on	:	15.03.2022

Iddawala – J

This is an application by the appellant to have the order of the learned High Court Judge dated 12.07.2018, which affirmed the order of confiscation of vehicle No. WP PA 9676 by the learned Magistrate on 22.03.2018, be set aside.

The facts of the case are briefly as follows – On 18.08.2017, a plaint was filed against an accused under the provisions of the Excise Ordinance as amended by Act No. 37 of 1990 (*Hereinafter Excise Ordinance*). On the same day, the said accused pleaded guilty, and the learned Magistrate imposed a fine of Rs. 125,000. Among the productions at the trial was the vehicle bearing Registered No. WP PA 9676, which is the subject matter of this application. An inquiry ensued to confiscate the said vehicle where at its conclusion, the learned Magistrate made an order dated 22.03.2018 to confiscate the vehicle. Against such order, a revision application was preferred to the High Court where on 12.07.2018, the appellant's application was dismissed, and order of the learned Magistrate affirmed. Aggrieved, the appellant has invoked the appellate jurisdiction of this Court impugning both orders.

During oral submissions, the Counsel for the appellant contended that the order of the Magistrate Court amounted to a grave misdirection of the law as the learned Magistrate has relied on legal principles irrelevant to the Excise Ordinance. It was Counsel's submission that, while both the Excise Ordinance and the Forest Ordinance deal with confiscation issues, the law as it stands today provides completely different confiscation procedures under the two laws. It was further contented that, while the Forest Ordinance may have previously had similar provisions as the Excise Ordinance, as of the Forest (Amendment) Act, No. 65 of 2009, the framework for confiscation under the Forest Ordinance the Excise Ordinance are distinctly different. Hence, Counsel submitted that the Magistrate's reliance on case law under the Forest Ordinance is highly irregular.

A perusal of the impugned Magistrate order reveals that the confiscation of the appellant's vehicle has been ordered on the principle that the appellant has failed to dispense the burden of proving, on a balance of probability, that he took all precautionary measures to prevent the use of his vehicle for the commission of

an excisable offence and that he had no knowledge. In order to arrive at such a principle, the learned Magistrate has had recourse to a series of judgments pronounced under Section 40 of the Forest Ordinance. The learned Magistrate, at page 4 of the order, holds the following:

> "ඒ අනුව මෙම නඩුවේද සුරාබදු ආඥා පනත යටතේ වරදක් සඳහා යොදා ගත වහනය සම්බන්ධව වාහන විමසීමකදී ඉල්ලුම්කරු විසින් ඔප්පු කළ යුතු කාරණා මොනවාදැයි පැහැදිළිව දක්වා නොමැති නිසා ඉහත කී නඩු තීන්දු වල දක්වා ඇති නෛතික සිද්ධාන්තය ගුරු කොට ගැනීමේදී ඉල්ලුම්කරු විසින් ප්‍රශ්නගත වාහනය සුරාබදු වරදක් සඳහා යොදා ගැනීම වැළක්වීමට ගත හැකි සියලු පූර්වාරක්ෂණ ක්‍රියාමාර්ග ගත් බවත්, තමන්ගේ දැනුමකින් තොරව එම වරද සිදු කර ඇති බවත්, සකාර්‍යතා වැඩිබර සාක්ෂි අනුව අධිකරණය හමුවේ තහවුරු කළ යුතුය."

To arrive at this conclusion, the learned Magistrate refers to several case law which deals with confiscation under the Forest Ordinance: **Manawadu v The Attorney General (1987)** 2 SLR 30, **The Finance Company PLC v Agampodi Mahapedige Priyantha Chandna** (SC Appeal No 105A/2008), **Orient Financial Services Corporation v Range Forest Officer Ampara (**SC Appeal No**.** 120/2011 – SCM 10.12.2013). While all these judgments deal with confiscation under the Forest Ordinance, the law relating to the same has undergone legislative amendment. When examining the law relating to confiscation under the Excise Ordinance, an amendment concurrent to the Forest Ordinance has not been made. Therefore, a question arises whether the judgments relied on by the learned Magistrate can be utilised as interpretative guides in the instant matter. In order to ascertain the same, an examination of the Forest Ordinance and its amendment is warranted.

Forest Ordinance Prior to 2009

Manawadu v The Attorney General (supra) refers to Forests (Amendment) Act No 13 of 1982 which stipulates forfeiture of vehicles in Section 40 as follows:

(1) upon the conviction of any person for 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, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not),*

shall, by reason of such conviction, be forfeited to the State. (Emphasis added)

In applying the said provision, the Supreme Court in **Manawadu v The Attorney General** (supra) observed the following:

> *"….by Section 7 of Act No 13 of 1982 (which amends section 40) it was not intended to deprive an owner of his vehicle used by the offender; in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. the amended sub-section 40 does not exclude by necessary implication 'the rule of audi alteram partem'. The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfied the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable for forfeiture. The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner…"* (at page 43).

Forest Ordinance After 2009 (Forest Conservation Ordinance)

Section 40 of the Forest Conservation Ordinance as it stands today was affected by the Forest (Amendment) Act No 65 of 2009 *(certified on 16.11.2009)* which stipulates the following

(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." (Emphasis added)

Hence, it is clear that confiscation under the Forest Ordinance has changed since 2009. The position prior to 2009 was that a vehicle involved in a forest offence is liable for confiscation and that a third party may make a claim against such confiscation. After 2009, the legislature has delineated a specific burden on such a party making a claim. He must prove he took all precautions to prevent the use of such vehicle for the commission of the forest offence. Let us now examine the position on confiscation under the Excise Ordinance.

Section 54 of the Excise Ordinance stipulates the following.

(1) Whenever an offence has been committed under this Ordinance, the excisable article, materials, still, utensil, implement, or apparatus in respect of or by means of which such offence has been committed shall be liable to confiscation.

(2) Any excisable article lawfully imported, transported, manufactured, had in possession, or sold along with, or in addition to, any excisable article liable to confiscation under this section, and the receptacles, packages, and coverings in which any such excisable article, materials, still, utensil, implement, or apparatus as aforesaid is found, and the other contents, if any, of the receptacles or packages in which the same is found, and the animals, carts, vessels, or other conveyance used in carrying the same, shall likewise be liable to confiscation. (Emphasis added)

When comparing the position of the Forest Ordinance to the Excise Ordinance, it is evident that the position in the Forest Ordinance prior to 2009 is the most comparable to the present law on confiscation under the Excise Ordinance. Therefore, it is the considered view of this court that out of the series of judgments

referred to by the learned Magistrate, only the judgment in **Manawadu v The Attorney General** (supra) is applicable in terms of an interpretive guide under the Excise Ordinance, seeing that the rest were pronounced after Forest (Amendment) Act No 65 of 2009.

The learned Magistrate has artificially imported a requirement to 'prove precautionary measures' into Excise Law in complete disregard that an Amendment akin to Forest (Amendment) Act No 65 of 2009 has not been made to the Excise Ordinance. The legislative intention behind the Excise Ordinance is quite clear. In such a context, courts cannot insist or otherwise force a claimant to dispense a burden that is not set out in law. At this juncture, it is pertinent quote from the Book titled 'Judicial Conduct, Ethics and Responsibilities' by Justice Dr. A.R.B. Amerasinghe. (at page 284)

> *"The function of a judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic processes must be used to bring about the change. This has been unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years."*

The learned Magistrate has correctly upheld the principles laid out in **Manawadu v The Attorney General** (supra) and afforded an opportunity for the owner to make a claim in the confiscation inquiry. This was done with due regard to natural justice, even when the scheme of the excise law does not stipulate such an opportunity. It is in line with the observations made by Justice Nagalingam in **Rasiah v Tambiraja** 53 NLR 574:

> *"It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made…I think if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree justice would seem to demand that he should be restored his property."*

Matters of confiscation has been dealt with by other laws as well. The forfeiture of the vehicle used to commit the offence as an additional punishment is provided

in Animals Act No 29 of 1958 (Section 3A), Poisons, Opium and Dangerous Drug Ordinance (Section 79), Offensive Weapons Act No 18 of 1966 (Section 14). Section 3A of the Animals Act no 29 of 1958 is quite similar to that of the Forest Ordinance. However, the position under the Excise Ordinance is not comparable. The legislature has fashioned a unique scheme for the Excise Ordinance where Section 55 states the following:

> *When in any case tried by him the Magistrate decides that anything is liable to confiscation under the foregoing section, he may order confiscation, or may give the owner of the thing liable to be confiscated an option to pay, in lieu of confiscation, such fine as he thinks fit.* (Emphasis added)

Therefore, it is the considered view of this Court that the learned Magistrate has erroneously insisted the appellant to dispense a burden that is not set out in law under the Excise Ordinance by requiring him to prove the existence of precautionary measures taken by him to prevent the use of his vehicle for an excisable offence.

Now, this Court will examine the applicable legal requirements an owner must prove when his vehicle is liable to be confiscated under the Excise Ordinance. The statutory inception of the present excise law dates to Excise Ordinance No 8 of, 1912 in which Section 51 dealt with confiscation.

In **Sinnetamby v Ramalingam 26 NLR 371**, Schneider J held:

> *"Our Excise Ordinance was borrowed from the Bengal Excise and Licencing Act (VII. B. C. of 1878) …drew my attention to the vase Golap Saha v Emperor [12 Cat- Weekly Notes 139.]. In that case it was held that the boat in which the excisable article was carried should not be confiscated under the provisions of section 75 of the Bengal Act (which correspond to Section 52 of our Ordinance) unless it is found that the owner of the boat was in some way implicated in the offence. The learned Judges who decided that case said in their judgments that although the section empowers the Court to confiscate the boat, yet, as a matter of sound judicial discretion, such an order should not be passed in the absence of the owner of the boat. If I may say so with all respect, I approve the principle to b deduced from that case,*

which is that before an order for confiscation is made, the owner should be given an opportunity of being heard, and that an order of confiscation should not be made, unless the owner is in some way implicated in the offence which renders the thing liable to confiscation" (Emphasis added)

In **Excise Inspector v Ponnadurai 31 NLR 508** decided in 1930 referring to the Same Ordinance No 8 of 1912 held:

"In regard to the appeal of the owner of the car against the fine in lieu of forfeiture, the real question, as pointed out by Schneider J in Sinnetamby v Ramalingam [26 NLR 371] is whether the owner was a willing party to the offence, whether he knew that his car was being used for this purpose, and acquiesced in its use" (at page 511) (Emphasis added)

In **Veronica v W. A. N. Perera** 58 NLR 549 refereed to both the previous judgments to observe the following:

"…It was also contended that, although the appellant is the registered owner, the Police have not been able to establish that she was in any way implicated in the offence of unlawful transport of toddy…. I was referred in this connection to the judgment of Schneider J. in Sinnetamby v Ramalingam [919240 26 NLR 371]. While this judgment lays down the correct test to be employed in making an order of confiscation under section 52(2) of the Excise Ordinance (No 8 of 1912), I would like to refer to the following observation of Lyall-Grant J in the unreported case of Dissanayake v Vellupillai Sanmugam et al. which appear to be peculiarly appropriate to the case now before me: "the real question, as pointed by Schneider J. in Sinnetamby v Ramalingam, is whether the owner was a willing party to the offence, - whether he knew that his car was being used…It was argues that there is no direct evidence against the owner, but in cases of this sort, it is possible for very strong presumptions to arise which can only be defeated by a clear and candid statement". (at pages 551 – 552)

In **Mercantile Credit Ltd v Sub Inspector of Police** 66 NLR 479 it was held that *"… the confiscation of a motor car under section 51(2) of the Excise Ordinance*

should not be made unless there is evidence that implicates him in the offence." (Emphasis added)

The current provision of Section 54 of the Excise Ordinance dealing with confiscation was referred to **in B. P. Perera v M. B. Abrahams (S. I. Police)** 64 NLR 456 where Abeysundera J observed the following:

> *"The only section in the Excise Ordinance enabling the confiscation of things is section 54 (old section 51). According to sub-section (1) of that section, the excisable article, materials, still, utensil, implement or apparatus in respect of or by means of which an offence has been committed under the Excise Ordinance shall be liable to confiscation. Sub-section (2) of that section provides for the confiscation inter alia, of any conveyance used in carrying any excisable article lawfully imported, transported, manufactured, had in possession, or sold along with, or in addition to, any excisable article liable to confiscation under that section. The aforesaid section does not apply to the present case and the motor car in question cannot be confiscated thereunder. Moreover, as contended by counsel for the appellant, there is no evidence of the implication of the owner of the motor car in the offence with which the accused were charged. Nor is there any evidence to show that the driver of the motor car was an employee of the owner..."* (Emphasis added)

Even more recently, His Lordship Justice Chithrasiri in **Aruna Pradeep Prasanna Vs. OIC, Special Crime Investigation Unit (Western Province)** CA PHC No 61/2012 CA minute dated 15.10.2014, a similar opinion was expressed.

An extrapolation of the above judgments reveals that for an owner of a vehicle, which has been used to commit an offence under the Excise Ordinance, to prevent the confiscation of the same, the following grounds must be proved:

1. That he is not the accused of the excisable offence
2. His ownership to the Vehicle.
3. He is in no way implicated in the excisable offence by being a willing party to the offence, or by having knowledge that the vehicle will be used for such purpose, or otherwise acquiesced the use of the vehicle for the commission of the excisable offence

In the absence of any amending law to the Excise Ordinance, the principles enunciated by early case law under the Excise Ordinance must be used as guidance. Importation of principles from different laws must be discouraged. It has always been accepted as axiomatic that judges administer justice according to the prevailing law of the land. As His Lordship Justice Maartensz observed in **Alice Kothalawala Vs. W.H. Perera and another** (1937)1 CLJ 58p *'Justice must be done according to law. If hardship results from the law in force the remedy must be affected by legislation. There would be chaos if a judge was entitled to create a procedure to meet the exigencies of every case in which he considers the law would work injustice'.*

Having thus set out the law relating to confiscation under the Excise Ordinance, this court will now examine the factual circumstances of the instant appeal to determine whether the appellant's vehicle ought to be confiscated.

The appellant is the registered owner of the vehicle concerned. He contends that the vehicle was parked at his brother-in-law's residence on the day in question and that he was elsewhere. Appellant claims that he received a phone call from excise officers requesting him to hand over the vehicle's keys. He states that he, along with another (independent witness who later gave evidence), went to the residence and handed over the key, after which liquor bottles were loaded on to the vehicle and driven off. He claims that the illicit liquor was stored in the brother-in-law's house and later loaded onto the vehicle after he handed over the keys. The Accused of the case is not known to the appellant. The evidence given by the independent witness narrates the same version as the appellant. The claim that the appellant was requested to hand over the key to the vehicle was not disputed.

On a perusal of the brief, a suggestion put forward by the prosecution to the independent witness is that the appellant and the witness arrived after the illicit liquor was unloaded from the vehicle for inspection. This suggestion is in line with the version of the prosecution, which states that while the excise officers pursued the vehicle transporting liquor, the driver (accused) has misled them and driven the vehicle to dispose of the bottles. However, this position is contradictory to the undisputed fact that the appellant was asked to hand over the key to the

vehicle, without which the vehicle cannot be accessed in the first place. When analysing these circumstances, it is evident that the petitioner has sufficiently established that he had no knowledge or otherwise consented to the offence being committed by the use of his vehicle. The accused in the case was not known to the appellant, and there is no evidence to prove that the appellant had any knowledge or otherwise consented to his vehicle being used for the commission of an excisable offence.

For the above reasons, this court sets aside the order of the Magistrate court dated 22.03.2018 and order of the High court dated 12.07.2018 and set aside the order of confiscation of the appellant's vehicle.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL