

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal arising from section 320 of Code of Criminal Procedure Act read together with Section 68 (5) (a) of Motor Traffic (Amendment) Act, No. 08 of 2009.

Officer in Charge,

Court of Appeal Case No:
CA / MISC / 01/2020

Police Station,
Wellampitiya.

High Court of Colombo Case No:
HCMCA 12/2019

Petitioner

Magistrate Court of Colombo
Case No: **51501/02**

Vs.

Weliwita Kankanamalage Saman Karunadasa,
No.142/12,
Mahabuthgamuwa,
Angoda.

Accused

W.G. Nalinda Priyankara,
No. 6/1
Idigolla,
Gampaha.

Party Claiming rights to the vehicle.

Claimant – Appellant

Vs.

01. Officer in Charge,

Police Station,

Wellampitiya.

Complainant – Respondent

02. Hon. Attorney General

Attorney General's Department

Colombo 12.

2nd Respondent

03. Director General of Motor Traffic,

Department of Motor Traffic,

Narahenpita.

3rd Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Nevil Abeyratne, PC with Kaushalya Abeyratne, Asanka

Dayaratne and Duleesha Wijesooriya for the Appellant.

Chathurangi Mahawaduge, SC for the state.

Argued on: 29.08.2022

Decided on: 14.09.2022

MENAKA WIJESUNDERA J.

The complainant appellant has filed the instant application to set aside the Order dated 13.12.2018 of the Magistrate of Colombo. The said Order of the Magistrate had confiscated the vehicle bearing number 250/7475. The claimant appellant (hereinafter referred to as the appellant) is supposed to have purchased the above mentioned vehicle from the accused who had been acquitted from the substantive case.

The accused from whom the appellant had purchased the vehicle had been charged in the Magistrate's Court under Section 2A (2) of the Motor Traffic Act (altering the chassis and engine numbers in the vehicle) and acquitted, and as such the appellant had made a claim for the above mentioned vehicle in terms of Section 425 of the Code of Criminal procedure Act No 15 of 1979, an inquiry had been held and upon the conclusion of the same magistrate had forfeited the vehicle.

The submission of the appellant is that as per Section 431 of the Code of Criminal Procedure Act, he is the registered owner of the vehicle and is a bona fide purchaser, and as such he is entitled to the possession of the vehicle. He further stated that although the government analyst report had stated that the chassis number and the engine number has been altered, the appellant had no knowledge of the same and the

vehicle had been first registered in Sri Lanka in 1997 and the appellant had purchased the vehicle in 2007. Therefore, he has no knowledge of the said alternation and the government analyst report does not specify as to when the alternations had been made.

The State Counsel appearing for the respondent objected to this application and stated that the alternations of the chassis and engine numbers is common ground to both parties and the date of alternation is also not known but the Magistrate has very wisely said according to the state counsel that, ***“the ambiguity pertaining to the date of alternations does not make this vehicle a legal automobile registered in Sri Lanka”***.

The appellant had pleaded further that the documentation being prima facie legitimate, the vehicle had been registered in terms of provisions in the Motor Traffic Act. This submission has been substantiated by the evidence given in the inquiry of the Assistant Commissioner, Department of Motor traffic who say that the documentation produced by the appellant tally with the details in the computer system but the engine and chassis numbers had been tampered with upon examination by the Government Analyst.

Having considered the submissions of both parties, this Court draws its attention to Chapter 38 of the Code of Criminal Procedure Code which deals with the disposal of property being the subject matter of offences before trial and after trial. **Section 431 of the Code deals with disposal of property being the subject matter of the offences before trial and Section 425 of the Code deals with disposal of property being the subject matter of offences after trial.** In this instance as the appellant

had claimed the vehicle after the conclusion of the trial, it is appropriate to consider Section 431 of the Code at this point of time. We draw our attention to a case decided by another division of this bench, in the case of **CA (PHC) 149/13** in which the case of *Silva and another v OIC Thabuththegama Police Station and another* (1991) 2 SLR 83 has been considered and where it had been held that, **Section 431 (1) Section 431(2) gives three options to a Magistrate regarding the property that has been seized by the Police. They are;**

- (1) Whether the property should be kept in official custody pending the conclusion the inquiry or the trial,***
- (2) Whether the property should be delivered to the person entitled to the possession pending the conclusion of the trial on conditions to be imposed,***
- (3) Whether the property should be delivered to such persons without conditions.***

The above quoted judgment further says that ***“there has 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 to deliver the 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.”*** to the Magistrate to deliver the property to a party other than the party from whom it was seized. The said judgment also refers to the case of *Sugathapala v Thabiraja* 67 NLR 91 which had given the discretion to the Magistrate to deliver the property to a person other than the party from whom it was seized. The above quoted judgment had further observed that the discretion vested is a necessary power

to the Magistrate since the person from whose possession property was seized may have obtained possession of the property dishonestly, fraudulently or criminally. But it further says that *“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.”*

In the case of *Hasvi v Jayathissa and two others* 2011 1 SLR 94 it has been held that, *“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”*. But a contrary view had been held in the case of *De Alwis v De Alwis* 1979 1 SLR 17 where it has been held that, *“the property seized by the police should be returned to the person from whom the property has been seized.”*

In the instant matter, at the inquiry the appellant has not cross examined the witnesses put forward by the prosecution and neither has he given evidence. But the fact that the chassis and engine numbers have been altered is common ground to both parties. The Magistrate had confiscated the vehicle on the basis that although the accused that were charged for the alternation were acquitted because the date of alternation is not proven by the prosecution, the subject matter of the instant case has been subject to an illegal activity. But as the date of alternation is not known and as the prosecution has failed to establish the same, the substantive case has failed. The appellant had claimed the vehicle because as per the documentation he had duly registered the vehicle in terms of the Motor Traffic Act. Therefore the question

arises as to whether the Magistrate is justified in forfeiting a vehicle if the owner as claimed is unaware of the alleged alteration.

At this point this Court draws its attention as to what should be considered when a vehicle is confiscated which had been the subject matter of an offence.

In the case of *Manawadu v AG (Supra)* it has been held that, “..... ***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 subsection 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)***

In the instant matter the offence committed is the alternation in the chassis and engine numbers, the Magistrate has held in the Order according to the government analyst report, the alteration has been done locally, and according to the Motor Traffic Commissioner, at the

point of registration the chassis and engine numbers are physically not tallied but whatever number that appears on the chassis and engine, if it tallies with the importation documents, the vehicle is duly registered. Therefore, as the government analyst has detected a tampering of the chassis and engine numbers the Magistrate has held that it is the subject matter of an offence and as such it has to be forfeited.

Therefore, in view of the material stated above, the vehicle in question has been imported to Sri Lanka in 1997. The current appellant had been registered as the owner in 2007. Thereafter, there is no change of registration with regards to ownership. The government analyst has detected a tampering with regards to the chassis and engine numbers. But the date of the said tampering is not known. The Motor Traffic Commissioner had not detected any illegality in the documentation submitted by the appellant at the time of registration. Therefore, it is a duly registered vehicle in view of the provisions in the Motor Traffic Act. But it is very clear that the chassis and engine numbers in the vehicle has been tampered with, even though as pleaded by the appellant, he has been a bona fide purchaser of the vehicle, the fact that the vehicle has altered chassis and engine numbers is an offence in terms of the Motor Traffic Act and as such under section 425 of the CPC the subject matter is liable for forfeiture.

In the case of ***Manawadu v AG***, which is cited above “the owner of the vehicle has to satisfy the Court that he had taken all precautions to avoid any illegal activity”. In the instant case, although the vehicle has not been used for illegal activity, there had been some illegal activity committed on the vehicle as per the government Analyst report.

Therefore, at the time of the purchasing of the vehicle, the appellant has an opportunity of checking all details about the vehicle. But, he has failed to give any reason or explanation with regards to that. He has pleaded ignorance. But, according to Section 114 (F) of the Evidence Ordinance, casts a responsibility on the appellant to explain as to whether he had any opportunity of examining the vehicle at the time of purchase. In the absence of such explanation, this Court is unable to agree with his mere denial of existence of any tampering in his vehicle being truthful.

As such, this Court sees no illegality in the Order dated 13/12/2018 of the Learned Magistrate of Colombo. As such, the instant appeal is dismissed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.