

**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.*

Officer-in-Charge
Police Station,
Katugasthota.

Complainant

Vs.

Court of Appeal Application No:
CA (PHC) 111/2018

High Court of Kandy Case No:
RA 86/2016

Magistrate's Court of Kandy Case
No: **7063/2016**

Abdul Majeed Mohamed Marsook
No 36/747, Nikatenna,
Katugasthota.

Accused

Rajapakse Dewage Asanga Kumara
Chandrasena,
Wentharagoda, Doratiyawa,
Kurunegala.

Claimant

AND NOW

Rajapakse Dewage Asanga Kumara
Chandrasena,
Wentharagoda, Doratiyawa
Kurunegala.

Claimant- Petitioner

Vs.

1. Officer-in-Charge
Police Station,
Katugasthota.

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

Respondents

AND NOW BETWEEN

Rajapakse Dewage Asanga Kumara
Chandrasena,
Wentharagoda, Doratiyawa
Kurunegala.

Claimant- Petitioner-Appellant

Vs.

1. Officer-in-Charge
Police Station,
Katugasthota.

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

Respondents-Respondents

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Rushdie Habeeb with Rizwan Uwais for the
Claimant-Petitioner-Appellant
Indika Nelumini SC, for the Respondents.

Argued on : 20.09.2022

Written Submissions on : 14.12.2021 by the Appellant
24.03.2022 by the Respondents

Decided on : 01.11.2022

Iddawala – J

This is an appeal filed against the judgment of the learned High Court Judge of Kandy in case No. RA 86/2016 delivered on 02.07.2018 which affirmed in revision an order of confiscation of a vehicle under the Forest Ordinance delivered on 03.08.2016 by the learned Magistrate of Kandy. The petitioner has exercised the appellate jurisdiction of this Court to set aside both orders and thereby to release the confiscated lorry bearing registration No. 226-1448.

The said vehicle was taken into custody for illegal transportation of 62 logs of bamboo in violation of the provisions of Forest Ordinance on 12.01.2016. The accused who drove the vehicle at the time of the arrest pleaded guilty before the Kandy Magistrate, and a fine was imposed. An inquiry was held under section 40 of Forest Ordinance (as amended) in which the registered owner of the said lorry (*hereinafter referred to as the appellant*) gave evidence and was cross-examined by the prosecution. After the conclusion of the inquiry, the learned Magistrate ordered the vehicle to be confiscated. Aggrieved by the said decision, the appellant filed a revision application in the High

Court, which dismissed the revision application and reaffirmed the order of the learned Magistrate.

Section 40 of the Forest Ordinance, No. 16 of 1907, as amended by Forest (Amendment) Act, No. 65 of 2009 stipulates confiscation of vehicles connected with a forest offence as follows:

(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)

This Court has well-analysed this provision in prior cases such as **Warnakula Dehiwalage Ajith Kostha Vs. Officer in Charge, Excise Department, CA/PHC/119/18**, CA minutes dated 15.03.2022 and **Dewapurage Kamal Deshapriya Vs. Officer in Charge, Police Station of Pannala, CA/PHC/139/2015** CA minutes dated 20.09.2022 delivered by the same bench. It is plainly clear in law that a claimant of a vehicle inquiry under the Forest Ordinance has to prove to the satisfaction of the Court that he/she, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. By the amendment to the Forest Ordinance in 2009 by Act No. 65 of 2009, the legislature has determined that having no knowledge of the offence being committed is a not good enough a reason anymore to claim a confiscated vehicle.

Therefore, Counsel has to be mindful in citing cases decided prior to the 2009 amendment or cases decided under other legislations. The judiciary has to only discern whether the claimant being the owner of the vehicle, had taken all precautions to prevent the use of the vehicle for the commission of the offence. This entails positive actions on the part of the owner and not claiming mere ignorance.

In this case, the appellant has stated in evidence that he bought the vehicle for his coconut business, and employed the driver (accused) one month prior to the incident. He had given the accused verbal instructions not to engage in any illegal activities, and the vehicle which was usually parked at his premises was used by the accused to transport timber without his knowledge. In the case at hand, while these actions might constitute precautions taken by the appellant, the learned Magistrate had to deliberate whether the appellant was the *de facto* owner in control of the vehicle. The appellant in cross-examination had mentioned one Sirajudeen who he was associating for his coconut business and that he was using the vehicle on payment basis. When perusing the evidence given by the appellant, this Court notes that the appellant has stated in his evidence that he was the registered owner and has completed the installments owed to the finance company. However, in the cross-examination it has transpired that, as the appellant could not pay the installments of the finance facility taken to purchase the vehicle, he gave it to one Sirajudeen and thereby the vehicle at times was in the custody of Sirajudeen. Furthermore, even though the appellant stated in the cross-examination that the vehicle was in his control after being released by the Magistrate, it was revealed in the cross-examination that the vehicle was indeed with Sirajudeen after release on bond, and that the vehicle was brought to Court for the inquiry by the said Sirajudeen, and not by the appellant.

This Court observes that the learned Magistrate is unequivocally right to doubt the ownership of the vehicle by appellant, due to the contradictions in his evidence. At this juncture, it is pertinent to make reference to the case cited by the learned Magistrate in his order. In ***Orient Financial Services Corporation Ltd. Vs. Range Forest Officer, Ampara and Hon. Attorney General [2013] 1 S.L.R. 208*** Justice Priyasath Dep (as he was then) has iterated that, “*When it comes to*

showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence.”

Therefore, the same doubt in ownership relied upon by the learned Magistrate and the learned High Court Judge to confiscate and affirm the confiscation of the vehicle has been established before this Court as well. The appellant has contradicted himself in proving the control and possession of the vehicle during the cross-examination. From the evidence given by the appellant, it is unclear whether the appellant was in actual possession and control of the vehicle, to regard him as the owner under the Section 40 of the Forest Ordinance.

Therefore, this Court finds no reason to intervene with the order of confiscation delivered by the learned Magistrate dated 03.08.2016 and the judgment affirming the same delivered by the learned High Court Judge of Kandy.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL