

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

In the matter of an Appeal in terms of Article 138 (1)(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with the section 154P(6) of the Constitution and the High Court of the Provinces (Special Provisions) Act, No.19 of 1990.

Range Forest Officer
Range Forest Officer - Bellanwila

Complainant

Court of Appeal Application **Vs.**
No: **CA-PHC-APN**
CPA/111/2021

High Court of Colombo
No: **HCRA/13/2021**

Magistrate's Court of
Nugegoda
No :**34764**

1. Kalanchige Gamini Thilakarathne
No 16/3, Pokuna Road, Kaudana,
Dehiwala
2. Kalanchige Kalum
Udadheniya, Walasmulla
3. Walimunuge Premathilake
40/2, Tharuka Niwasa, Malgashena
Udadheniya.

Respondents

AND NOW

Chandrani Wijerama
No. 16/3, Pokuna Road, Kaudana
Dehiwala.

Claimant-Petitioner

Vs.

1. Range Forest Officer
Range Forest Officer – Bellanwila
2. The Hon. Attorney General
Attorney General’s Department,
Colombo 12.

Complainant -Respondents

AND NOW BETWEEN

Chandrani Wijerama
No 16/3, Pokuna Road, Kaudana
Dehiwala

Claimant-Petitioner-Petitioner

Vs.

1. Range Forest Officer
Range Forest Officer – Bellanwila
2. The Hon. Attorney General
Attorney General’s Department,
Colombo 12.

**Complainant-Respondent-
Respondents**

Before : Menaka Wijesundera J
Neil Iddawala J

Counsel : Sandamal Rajapaksha and Sachira
Andrahennadi for the Claimant-
Petitioner-Petitioner.

Ridma Kuruwita SC for the State.

Argued on : 27.09.2022

Written Submissions on : 11.10.2022 By the Petitioner

Decided on : 15.11.2022

Iddawala – J

This is an appeal against the order dated 22.10.2018, delivered by the Provincial High Court of the Western Province holden in Colombo, where it acted in revision and affirmed the vehicle confiscation order dated 23.03.2021 delivered by the Magistrate Court of Nugegoda under the Fauna and Flora Protection Ordinance, as amended (*hereinafter the Act*). The claimant-petitioner-petitioner (*hereinafter the appellant*) has preferred the instant appeal to this Court in order to have both the orders set aside, and thereby disallow the confiscation of the vehicle bearing registration no. WP GU- 9190.

The facts of the case are briefly as follows. The 1st accused-respondent (*hereinafter the accused*) was charged in the Magistrate Court of Nugegoda for using the above-named vehicle for committing following offences,

- I. Permanent or temporary building being constructed or allowed to be constructed in the vicinity of Bellanwila Sanctuary, without the permission of Relevant Authorities of Government of which the said land belongs to the government.
- II. Temporary or constructed road being used in Bellanwila Sanctuary without permission of relevant authorities,

As in commission of such offences, the said vehicle was employed without a valid permit, the accused was charged with contravening the Fauna and Flora Protection Ordinance (as amended). The Magistrate Court of Nugegoda framed charges against the accused on 19.08.2020. The accused pleaded guilty to the charges, upon which, the learned Magistrate imposed a fine of Rs 15000/=.

An inquiry was held by the learned Magistrate on 21.10.2020, allowing cause to be shown as to why the vehicle in question should not be confiscated, pursuant to which the appellant gave evidence. After the conclusion of the evidence adduced to by the appellant, the learned Magistrate ordered the vehicle to be confiscated for want of due diligence on the part of the registered owner of the vehicle, as per the proviso to Section 64(1) of the Fauna and Flora Protection Ordinance, as amended by Act No. 22 of 2009.

It is therefore pertinent to produce the relevant law at this juncture, which is as follows:

Section 64(1) - *“Except as hereinbefore expressly provided in regard to the disposal of any elephant or of the carcass of any elephant or the tusks or tushes of any elephant, on the conviction of any person for an offence under this Ordinance, any animal, plant or part of such animal or part which is the property of the State under this Ordinance and any gun, vehicle, boat, artificial light, snare, net, trap or any other instrument, contrivance, appliance or thing used in or for the*

commission of any offence, shall by reason of that conviction, in addition to any other punishment specified for such offence, be forfeited to the State:

*Provided however, where the owner of such gun, vehicle, boat, artificial light, snare, net , trap or other instrument, contrivance, appliance or thing used in or for the commission of any offence is a third party, **no forfeiture shall be made if such owner proves to the satisfaction of the court that he had used all due diligence to prevent the use** of such gun, vehicle, boat, artificial light, snare, net, trap or other instrument, contrivance, appliance or thing used in or for the commission of any offence." (Emphasis added)*

Accordingly, the above provision casts the burden upon the owner of a vehicle to prove to the satisfaction of the court, on a balance of probability, that he has exercised 'due diligence' in order to ensure that the said vehicle would not be employed for any activities contravening the law. There is no objectively-determined threshold to reach in exercising due diligence, as it would be decided through judicial discretion according to the circumstances of each individual case.

The legal term '*due diligence*' has not been predefined in the Ordinance itself, however, by looking into the objectives of the legislation, specifically the preamble, it is evident that the it caters towards the conservation of the biodiversity of Sri Lanka by imposing laws to prevent any hindrance caused to the fauna and flora of Sri Lanka, while protecting the rights of the people connected to incidents therein. Thus, as per Section 64(1) of the Act, the law delivers the opportunity to an owner of a vehicle which was employed in committing such offences to prove to the satisfaction of the court, that due diligence has been exercised by him/her to prevent the commission of such offences. This law is aligned with the principle of natural justice where every person has a natural right to his property and thus must be heard before having their property forfeited.

The House of Lords in **re Hamilton** on 1981 AC 1038 has stressed that:

"One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he or someone acting on behalf may make such representations if any, as he seems fit. This is the rule of audi alteram partem which applies to all judicial proceedings..."

Thus, it is evident that the above Ordinance, while preserving the fauna and flora of Sri Lanka, has also delivered importance to an individual's rights over his/her property. As such, Section 64(1) allows an owner of a vehicle to make his/her case and to show cause as to why such vehicle should not be forfeited.

Accordingly, the appellant has submitted evidence to the court during the inquiry. However, she has merely narrated the events preceding the commission of the said offence, without attempting to convincingly establish the measures she had taken as a responsible owner. The appellant has averred that she asked the accused not to engage the vehicle in illegal activities as it provides for her only source of income. However, the evidence submitted during the inquiry revealed that the said vehicle had also been employed in an offence prior to the instant matter, and that the appellant has failed to mention such a pending case during the cross-examination. The discrepancies and inconsistencies in the evidence of the appellant and her failure to prevent the commission of such an offence for a second time, prove that she has not acted with due diligence to prevent the use of the vehicle to commit an offence.

The Black's Law Dictionary expounds due diligence as *"The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."* As such, the requisite of due diligence on the part of an owner of a vehicle, necessitates

the owner to take measures as an ordinary, reasonable person to discharge the obligation of ensuring that her vehicle is not employed in any illegal activities, which she has failed to do for the second time.

Similar to the Fauna and Flora Ordinance, the Animals Act, No. 29 of 1958 and the Forest Ordinance, as amended by Act No. 65 of 2009, under Section 3A and Section 40 respectively, provide for the power of confiscation to the Magistrate Court of vehicles used in committing offences stipulated under those laws, unless otherwise proved to the satisfaction of the court that the owner of the vehicle has taken the all necessary precautions to prevent it. All such similar legal provisions have cast the burden upon the owner of a vehicle to prove on a balance of probability that precautionary measures were taken to prevent the commission of offences. However, the Fauna and Flora Protection Act goes beyond and casts a burden on the owner to establish on a balance of probability that diligence has been duly exercised in order to prevent such offences.

This Court observes that the appellant has failed to dispense such burden in this instant matter as evident from the fact that the matter at hand is the second time the said vehicle has been employed in illegal activities. The accused being the husband of the appellant, there exists a close relationship between the driver and the owner, where due diligence can be easily exercised with regards to a vehicle which is often used by both the parties in the ordinary course of conducting the appellant's alleged "*pol roti*" business. Hence merely instructing the accused does not satisfy this court that due diligence on the part of the appellant as a responsible owner of a vehicle has been met.

Therefore, this court is of the view that the appellant has not proved on a balance of probability that she has exercised due diligence in order to prevent the use of her vehicle in committing such offences, and as such the court agrees with the conclusion of the learned Magistrate. Further,

this court observes that the Learned High Court Judge has correctly dismissed the revision application.

Accordingly, we see no reason to interfere with the order of the learned High Court Judge dated 23.03.2021, and the confiscation order of the learned Magistrate dated 18.11.2020. Therefore, this Court affirms the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL