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

In the matter of an Appeal in terms of Section 11(1) of the Act no.19 of 1990 and Rule 2(1) of the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules 1988.

Officer-in-charge,
Police Station,
Ahungalla.

Plaintiff

Vs.

Court of Appeal Application
No: **CA/PHC/76/2017**

High Court of Balapitiya
No: **Rev 927/2016**

Magistrate's Court of
Balapitiya
No :**66363**

Siriwardena Anil De Silva,
Pathiraja Place,
Uragasmanhandiya

Accused

Bolandahewa Disna Priyanthie,
Pathiraja place,
Uragasmanhandiya
(Registered Owner)

Respondent

AND BETWEEN

Bolandahewa Disna Priyanthie,
Pathiraja place,
Uragasmanhandiya
(Registered Owner)

Respondent-Petitioner

Vs.

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

Respondent

2. Officer – in- charge,
   Police Station,
   Ahungalla

Plaintiff-Respondent

AND NOW BETWEEN

Bolandahewa Disna Priyanthie,
Pathiraja place,
Uragasmanhandiya
(Registered Owner)

Respondent Petitioner Appellant

Vs.

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

Respondent Respondent

2. Officer – in –charge,
   Police Station,
   Ahungalla

Plaintiff Respondent Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Elisha Fernando for the Respondent Petitioner Appellant. Chathurangi Mahawaduge SC for the Respondents
Argued on	:	10.11.2022
Decided on	:	15.12.2022

Iddawala – J

This is an appeal against the order dated 27.06.2017, delivered by the learned High Court Judge of the Provincial High Court of the Southern Province holden in Balapitiya which acted in revision and affirmed the vehicle confiscation order dated 08.12.2015, delivered by the learned Magistrate of Balapitiya under the Forest Conservation Ordinance. The respondent-petitioner-appellant (*hereinafter referred to as the appellant*) has preferred this instant appeal to this Court in order to have both the orders set aside, and thereby to disallow the confiscation of the vehicle bearing registration no. 43-1188 (hereinafter the vehicle).

The following are the facts of the case. The accused was charged in the Magistrate Court of Balapitiya for the offence of transporting Jack and Mahagoni timber worth Rs. 63812.32 without obtaining a valid permit from the authorized body, thereby contravening Sections 51(1)(a), 49(b), and 23 (2)(b) read with Section 25(2) of the Forest Conservation Ordinance as amended by laws, inter alia, Act no.65 of 2009 (hereinafter the Act). The accused pleaded guilty to the charge and

the Magistrate convicted the accused on 27.12.2013, upon which the accused was imposed a fine of Rs. 35, 000/- with a default sentence of 3 months. The conviction of the accused ensued the confiscation of the vehicle in relation to the offence which was released temporarily to its registered owner, the appellant, on the same day on a bond and the learned Magistrate fixed the vehicle inquiry for 08.12.2015. After an inquiry into the matters of the complicity of the vehicle in question and whether the petitioner has taken sufficient precautionary measures to prevent such an offence, the Magistrate set out the order dated 08.12.2015 to confiscate the vehicle. Aggrieved by the said order, the petitioner filed for revision in the High Court of Balapitiya. Consequently, the learned High Court Judge issued notices on the respondents and a stay order against the impugned order dated 08.12.2015 of the Magistrate Court. Thereby, the vehicle in question was released to the appellant for the second time.

However, subsequently at the final determination at the conclusion of the inquiry, the revision application was dismissed by the learned High Court Judge in his final order dated 27.06.2017 and affirmed the confiscation order of the learned Magistrate.

Hence, the appellant has preferred the instant appeal to the Court of Appeal, seeking to set aside the impugned Order dated 27.06.2017 of the High Court of Balapitiya.

The appellant has averred, inter alia, the following as grounds for appeal before this Court:

1. The learned trial judge has failed to consider that a proper inquiry had not been conducted by the Magistrate Court as an inquiry has been recommenced and withdrawn subsequently on 17.11.2015.
2. The learned trial judge has not considered the exceptional circumstances of the revision application.
3. The learned trial judge has failed to consider the proviso to Section 40 (b) of the Act.

Counsel for the appellant in the course of oral submissions further stressed the application of Section 439 of the Criminal Procedure Code (CPC). However, this Court is of the observation that, by virtue of Section 439 of the CPC-

> *"Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re- examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case".*

Accordingly, the learned Magistrate has the power to recall, re-examine and to summon any person in attendance, although not summon as a witness. Nonetheless, the Section 439 does not grant the power to hold a re-inquiry or a fresh inquiry. However, the learned Magistrate has authorized a fresh inquiry by the order dated 01.09.2015, which is bad in law as it is not provided for by Section 439.

Therefore, on 17.11.2015, the same learned Magistrate vacated his own order dated 01.09.2015, stating that it was done *per incuriam*.

In the case **Jayeraj Fernando Pulle Vs.Premachandra de Silva & others 1996 1 SLR 70**, it was held that: *"However all Courts have inherent power in certain circumstances to revise an order made by them such as – ……*

> *(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously"*

Therefore, the learned Magistrate vacated his order to hold a re-inquiry which erred in law, and restored the previous order which was achieved through a perusal of the evidence led before him.

Moreover, the learned Magistrate by the order dated 01.09.2015, intended to call upon witnesses to which the petitioner's counsel objected and it was upon

such refusal that the re-inquiry was ordered by the learned Magistrate. (Appeal Brief 100 and 101 pages)

Nonetheless, the contention of the counsel of the appellant that such re-inquiry has been subsequently withdrawn by the learned Magistrate, thereby denying the appellant the right to a fair trial, is futile and thus does not amount to a ground for appeal as the learned Magistrate has acted within the law provided by Section 439.

Counsel for the appellant further states that the appellant had no knowledge of the offence being committed by the accused and that she took all precautionary measures as necessitated within the purview of the proviso for Article 40(1) (b) of the Act, in order to prevent the vehicle from being employed in illegal activities.

Section 40 of the Act reads 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)

As such, the legislature has unequivocally cast a burden on the third party of an offence within the ambit of Section 40 to dispense the burden of proving to the satisfaction of the court that s/he, as the registered owner of the vehicle in

dispute, has taken all necessary precautionary measures to prevent the vehicle from being employed in acts of crime.

Therefore, it is evident through the above law that the most imperative burden cast upon a vehicle owner, who is a third party to a forest offence under the Act, is to show cause as to why the vehicle should not be confiscated by ensuring that s/he has taken all necessary precautions to the prevent the vehicle from being engaged in offences. Thus, the appellant's contention that she did not have knowledge of the offence being committed is immaterial as the said burden is properly dispensed, only when it is established that the necessary precautionary measures have been taken by the vehicle owner, regardless of the knowledge of the said offence.

This position is clearly analyzed in a recent case before this Court, **Rajapakse Dewage Asanga Kumara Chandrasena v Officer in Charge, Police Station, Katugasthota and another,** CA(PHC) 111/2018, Minute dated 01.11.2022, where it was held that:

> *"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 […] 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. (*Emphasis added)

This case very clearly highlights that not possessing knowledge of the vehicle being used for illegal activities does not constitute a ground to disallow the confiscation of a vehicle. The burden cast upon a vehicle owner requires the owner to have taken necessary precautionary measures, to the satisfaction of the court, to prevent the employment of one's vehicle in acts of crime. Therefore, the

contention of not possessing knowledge has no bearing in dispensing the said burden as positive actions on the part of the vehicle owner are necessitated.

However, the appellant, despite her petition, has not taken any precautionary measures, there is no evidence revealed in her evidence before the Magistrate Court to affirm that the appellant had taken any measures to be precautious with the employment of her vehicle. The mere fact that she did not possess the knowledge of the commission of such an offence does not satisfy the said burden. Hence this Court is of the view that the appellant has not adequately dispensed on a balance of probability the burden cast upon her by Section 40 of the Act.

For the above reasons, it is considered the view of this Court, since the appellant has failed to dispense the burden cast on her, that the learned Magistrate has duly concluded the matter at hand and 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 27.06.2017 and the confiscation order of the learned Magistrate dated 08.12.2015. 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