

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

In the matter of an application for appeal in terms of section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154 P (3) (b) of the Constitution of Sri Lanka.

Court of Appeal No:

CA (PHC) 0008/21

HC Ampara Case No.

HC/AMP/REV/508/19

MC Ampara Case No.

82290/S

Officer-in-Charge,

Police station, Damana.

COMPLAINANT

Vs.

1. Mohommed Kaleel Mohommed Azam,

No. 22, Jummah Mosque Road,

Nainakadu, Samanthurai.

2. Kamurdeen Hizbulla,

No. 218, Konawatte,

Atdalachchena 08.

ACCUSED

Ahamed Lebbe Mohommed Saleem,
No. 44/72, Kirulapone,
Colombo 06.

CLAIMANT

AND NOW BETWEEN

Ahmed Lebbe Mohommed Saleem,
No. 44/72, Kirulapone,
Colombo 06.

CLAIMANT-PETITIONER-APPELLANT

Vs.

Officer-in-Charge,
Police station, Damana.

**COMPLAINANT-RESPONDENT-
RESPONDENT**

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

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Chathura Galhena with Dharani Weerasinghe and
Devmini Bulegoda for the Claimant-Petitioner-
Appellant
: Ridma Kuruwita, SC for the Respondent-Respondent

Argued on : 09-03-2023

Written Submissions : 10-01-2023 (By the Claimant-Petitioner-Appellant)

Decided on : 06-04-2023

Sampath B Abayakoon, J.

This is an appeal by the claimant-petitioner-appellant (hereinafter referred to as the appellant) on being aggrieved by the judgement pronounced by the learned High Court Judge of Ampara on 09-03-2021, wherein the Revision Application preferred by him challenging the Order dated 16-01-2019 by the learned Magistrate of Ampara had been dismissed.

At the hearing of this appeal, the learned Counsel for the appellant intimated to the Court that he is not contesting the facts of the matter, but making submissions purely on two questions of law, Namely;

1. Whether the confiscated item comes within a meaning of a vehicle or not.
2. Was the interpretation given by the learned High Court Judge in that regard correct.

Accordingly, this Court heard the submission of the learned Counsel for the appellant as well as the submission of the learned State Counsel. This Court also had the opportunity of scrutinizing the written submissions tendered by the appellant in determining this appeal.

Facts that led to the confiscation of the vehicle bearing registration number EP ZA-5559 by the learned Magistrate of Ampara are, briefly as follows.

On 27th August 2017, the Officer-in-Charge of Damana police station reported the facts to the learned Magistrate of Ampara in MC Ampara Case Number B-5035-17, producing two suspects who allegedly have engaged in digging soil using a loader machine and transporting the soil in a tipper truck without a permit. Along with the B-report, he has produced the mentioned loader as well as the tipper truck used in the transportation of the soil, along with the other productions.

Subsequently, the two accused had been charged in MC Ampara Case Number 82290/S on following counts.

The charge against the first accused was that he, on 25th August 2017, used the loader numbered EP ZA-5559 to dig soil without a permit, and thereby committed an offence punishable in terms of section 63 (1) of the Mines and Minerals Act No. 33 of 1992 as amended by the Amendment Act No. 66 of 2009.

The charge against the 2nd accused was that he, at the same time and at the same transaction, transported the soil that was digged, using a lorry numbered EP LL-44168 without a permit, and thereby committed an offence punishable in terms of section 63 (1) of the Act mentioned above.

Both the accused had entered an unconditional plea of guilt before the learned Magistrate when they were charged, and the learned Magistrate has imposed sentences on both the accused.

Thereafter, the learned Magistrate has proceeded to release the vehicle which was the subject matter of the 2nd count preferred against the 2nd accused, but has decided to allow the parties to show cause as to why the loader used in the commission of the 1st count should not be confiscated.

Accordingly, the appellant who was the owner of the loader has claimed the vehicle and had given evidence before the learned Magistrate. He has called witnesses to support his claim. The learned Magistrate of Ampara by his Order dated 16-01-2019 has determined that the appellant failed to show sufficient cause as to why the mentioned loader should not be confiscated and had ordered the confiscation of the said loader.

It is against this Order that the appellant has preferred an application in revision to the High Court of Ampara.

I find that the main contention at the hearing the revision application before the learned High Court Judge of Ampara had been that the loader which was the subject matter of this claim by the appellant would not fall within the meaning of machinery or equipment that would be subjected to confiscation in terms of the Mines and Minerals Act, since a loader is classified as a vehicle in terms of the Motor Traffic Act. It had been the contention that since 'vehicle' has not been mentioned as an item that can be confiscated in terms of the Act, the learned Magistrate was misdirected when he ordered an inquiry and decided to confiscate the loader.

I find that the learned High Court Judge, after having considered the legal principles, the intention of the legislature when the amended Act was passed, as well as the decided cases in this regard, and other relevant facts and circumstances into consideration, has agreed with the Order of the learned Magistrate in dismissing the revision application of the appellant.

At the hearing of this appeal, the learned Counsel for the appellant strenuously contended that although the learned High Court Judge has very correctly identified the points of determination, the determination that the loader used in the commission of the offence would fall under the category of an equipment or machinery used in the commission of the offence, although it had been registered as a vehicle under the terms of the Motor Traffic Act, was a misdirection.

It was the position of the learned State Counsel that the decided cases pointed out are cases where the vehicles used in transportation of soil or sand were confiscated. It was her contention that the decided Court of Appeal cases which determined that a vehicle used in the transportation of any material that falls within the interpretation of the Mines and Minerals Act, would not be subjected to a confiscation order, is different to the facts and the circumstances of the case under appeal. It was her view that the facts and the circumstances reveal that the loader used in the commission of the offence had been used not for the purpose of transportation but as a machinery to dig earth soil and to load the same to the vehicle which transported the soil. It was her position that it was the very reason why two separate charges have been framed against the two accused before the learned Magistrate, for which they have pleaded guilty.

For the better understanding of this judgement, I would now reproduce the section 63 B (1) of the Mines and Minerals Act as amended by Amendment Act No. 66 of 2009.

63 B (1). Where any person is convicted of an offence under this Act, the Magistrate may make order that any mineral, machinery, equipment or material used in or in connection with, the commission of that offence or the proceeds of the sale of any such material, or material deposited in Court under the proviso to section 63 A, be forfeited to the State.

Although it was the contention of the learned Counsel for the appellant that any vehicle registered as a vehicle in terms of the Motor Traffic Act would not be subjected to confiscation in terms of section 63 B (1) of the Act, I am in no position to agree with such a contention.

I am in no position to disagree with the determination of his **Lordship Salam, J.** in **Nishantha and Three Others Vs. The State (2014) 1 SLR 2005** and the determination by **His Lordship Dehideniya, J.** in **Punchirala Danapala Vs. OIC Police Station Horowpathana and two Others CA (PHC) APN 106/15 decided**

on 19-02-2016, given the facts and the circumstances relevant to the appeals considered by their lordships.

In both the above-mentioned instances, the vehicles that had been used for transportation of mines and minerals had been confiscated, whereas the facts and the circumstances in the matter under appeal is very much different.

As determined by **Salam, J.** in **Nishantha and Three Others Vs. The State (supra)**, there is no provision that has specifically mentioned that a vehicle used in the commission of an offence in terms of the Mines and Mineral Act can be confiscated. His Lordship has made this determination after well considering the provisions of similar Acts where the vehicle confiscation has been permitted.

However, it is my considered view that there should be a distinction between an Act which specifically mentions that a vehicle used in commission of a crime is subjected to confiscation and an Act which has omitted the term 'vehicle' but has specifically mentioned that any mineral, machinery, equipment or material used in or in connection with the commission of that offence would be subjected to be forfeited to the State.

It is my view that even a vehicle registered in terms of the provisions of the Motor Traffic Act that has been used as machinery or equipment to commit an offence under the Act, other than transporting the mineral can, fall under the category of a machinery or equipment, which would be subjected to confiscation.

It is abundantly clear that from the very outset of this action, the Officer-in-Charge of Damana Police had been well aware of the distinction between a vehicle and machinery or equipment used in the commission of an offence under the provisions of the Act. That may be the very reason why he has formulated two separate charges against the two accused charged before the learned Magistrate of Ampara. He has preferred the first charge only against the first accused for digging earth soil without a valid permit using the loader vehicle mentioned in the charge sheet. The second charge preferred against the second accused had been on a different basis of transporting the soil in a truck without a valid permit.

It is also very much evident that the learned Magistrate of Ampara was also knowledgeable of the distinction and the cases decided by the Court of Appeal in that regard, when he decided to release the vehicle used in transporting the illegally cut soil while ordering the show cause relating to the loader used in the offence of digging earth soil as to why it should not be confiscated.

I find that the learned High Court Judge in his well-considered judgement has considered all the angles of the arguments presented on behalf of the appellant in coming to his finding that he has no basis to interfere with the order of the learned Magistrate.

Although the learned Counsel for the appellant contended that a loader is a vehicle and a vehicle cannot be confiscated under the terms of the Act, as I have stated before, it is a matter that has to be considered subjective to the facts and the circumstances of each case.

The learned Counsel for the appellant stated at the very outset of the appeal that he is not contesting the facts of the matter. It is clear from the charge against the 1st accused in the Magistrate Court of Ampara, that he had been charged for digging soil using the mentioned loader for which he has pleaded guilty. Although a loader is a vehicle that needs registration in terms of the provisions of the Motor Traffic Act, it becomes necessary to consider the literal meaning of a loader in order to determine whether it falls under the strict interpretation of a vehicle or though it may have registered as a vehicle under the Motor Traffic Act, it can fall under a different definition.

The meaning attributed to the word loader in the Oxford dictionary is that **“a machine or a person that loads something.”**

The meaning given in the Cambridge dictionary is that **“a machine used for putting heavy goods onto a vehicle so they can be transported, or the vehicle used to transport them.”**

In the Longman dictionary of Contemporary English, the meaning given to the word loader is ***“a machine used for loading the goods onto trucks or ships.”***

The above definitions clearly demonstrate that the loader used in the commission of the offence can under no circumstances be determined as a vehicle used in the transportation of the illegally mined minerals but used only as a machinery used in the offence.

I am in no position to agree with the contention of the learned Counsel for the appellant that the learned High Court Judge has gone on a voyage of discovery to give a different meaning to the intention of the legislature when the legislature in its wisdom omitted the name vehicle under the category of the items that can be subjected to forfeiture in the Act. On the contrary, I find that the learned High Court Judge has well considered the intention of the legislature in its correct perspective to come to his determinations, for which I have no reason to disagree with.

Accordingly, the appeal is dismissed as it is devoid of merit. The judgement dated 09-03-2021 of the learned High Court Judge of Ampara and the order dated 16-01-2019 by the learned Magistrate of Ampara affirmed.

The Registrar of the Court is directed to forward this judgement to the High Court of Ampara along with the original case records, if any, and also to the Magistrate Court of Ampara for necessary information and action.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal