

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

*In the matter of an appeal made in terms  
of Article 154 P (6) of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.*

Officer-in-Charge,  
Anti – Vice Unit,  
Head Quarters Police,  
Avissawella.

**Complainant**

**Vs.**

Court of Appeal Application  
No **CA (PHC) 144/2017**

High Court of Avissawella  
No: **Rev 14/2015**

Magistrate's Court of  
Avissawella  
No: **76404**

Kaludewa Padmini De Silva  
No: C/84,  
Ihala Talduwa,  
Avissawella.

**Claimant**

**And**

Kaludewa Padmini De Silva  
No: C/84,  
Ihala Talduwa,  
Avissawella.

**Claimant - Petitioner**

**Vs.**

Officer-in-Charge,  
Anti – Vice Unit,  
Head Quarters Police,  
Avissawella.

**Complainant – Respondent**

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

**Respondent**

**And Now**

Kaludewa Padmini De Silva  
No: C/84,  
Ihala Talduwa,  
Avissawella.

**Claimant – Petitioner - Appellant**

**Vs.**

Officer-in-Charge,  
Anti – Vice Unit,  
Head Quarters Police,  
Avissawella.

**Complainant-Respondent-Respondent**

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

**Respondent -Respondent**

**BEFORE** : Menaka Wijesundera J  
Neil Iddawala J

**COUNSEL** : R.G.Piyadasa for the Appellant  
Jayalakshi De Silva SC for the state

**Argued on** : 09.02.2023

**Decided on** : 28.03.2023

**Iddawala – J**

This is an appeal filed against the order of the Provincial High Court of Western Province holden in Avissawella dated 24.08.2017 which affirmed the Avissawella Magistrate's Court order dated 03.11.2015 to confiscate the claimant – petitioner -appellant's (hereinafter the appellant) vehicle under the Forest Ordinance, (as amended by Act No. 65 of 2009). The appellant has preferred this appeal to this Court to set aside both orders and thereby disallow the confiscation of the vehicle bearing registration No. 48-6996 (hereinafter the vehicle).

On or about 11.10.2014 the vehicle was taken into custody with regards to a violation under Forest Ordinance, for transporting wood logs worth Rs. 69,956.77/- without a valid permit. On 14.10.2014 R.M. Sumith Priyantha-driver of the said vehicle at the time of wrongful act (hereinafter the accused) pleaded guilty and a fine was imposed. An inquiry was held on 17.03.2015 by the learned Magistrate to show cause as to why the vehicle in question should not be confiscated.

At the inquiry the appellant who is the registered owner of the vehicle gave evidence. After the conclusion of inquiry, the learned Magistrate on 03.11.2015 ordered the vehicle to be confiscated as the appellant had failed to satisfy the court with regard to proving she had taken all precautions to prevent the commission of the offence as per Section 40 of the Forest Ordinance.

Aggrieved by the said decision, the appellant filed a revision application in the Provincial High Court of Western Province holden in Avissawella, which affirmed the order of the learned Magistrate and dismissed the application. The appellant now seeks the Court of Appeal to set aside the order dated 03.11.2015 delivered by the Avissawella Magistrate

Court and the order dated 24.08.2017 delivered by the Western Province High Court holden in Avissawella.

Before embarking upon the merits, the law pertinent to the application merits being reproduced in the following manner: Section 40 of the Forest Ordinance (as amended) –

*“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 the order of the convicting Magistrate:*

*Provide that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offense, 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 tool, vehicles, implements, cattle and machines, as the case may be, for the commission of the offense.” (Emphasis added)*

Accordingly, the Act has cast an indispensable burden on the third party to an offence coming within the purview of Section 40 of the Forest Ordinance, to dispense the burden of proving to the satisfaction of the court that he/she, as the owner of the vehicle in dispute, has taken all necessary precautionary measures to preclude the vehicle from being used in acts of crime. Therefore, this court will primarily look into the

contention whether the learned Magistrate has correctly applied the relevant legal provisions and evaluated the evidence presented before the court, in arriving at the final determination that the appellant has failed to dispense the said burden.

While making submissions by the counsel for the appellant relied on two grounds, namely, appellant has taken all precautions to prevent the use of her vehicle for the commission of such offence to the satisfaction of the court and there exists a fatal defect in the charge sheet where accused pleaded guilty.

The learned Magistrate in delivering the order has examined whether the appellant has sufficiently established ownership to the vehicle, which was followed by an evaluation of the evidence given by the appellant in relation to the precautionary steps taken by her.

Through an examination on the evidence given by the appellant it is stated that the vehicle was used for transporting firewood as per the request of companies such as Damro, Lalan, Hirdaramani & Prime Polymers and stated that the lorry was also given for hiring purposes. However, during the cross examination the appellant had admitted to the fact she was not aware about the whereabouts of the transportation of wood on the day of the incident. This indeed raised the concern over why the appellant did not keep close monitoring on activities the lorry was engaged in, on a daily basis. Thereby this can be considered contrary to her claim of having taken all precautionary measures to avoid the act of crime.

Furthermore, the appellant had also stated that the accused generally comes to the appellant's house each morning and takes the lorry for hiring or work purposes and returns the vehicle back each evening after the designated work. Nevertheless, there is no evidence brought forward

that could establish, on the day of the specific incident the appellant had taken any measures to look out to why the vehicle has not reached home by the evening, as the alleged charge was claimed stating the lorry was taken to custody at 'night'.

This too draws the courts attention to consider that the appellant has not taken any satisfactory precautionary measures to prevent the use of the vehicle for the commission of the said offence.

His Lordship Chief Justice Priyasath Dep, PC in **Orient Finance Service Corporation Ltd. v Range Forest Officer, Ampara and Another**, SC Appeal No.120/2011 Minutes dated 10.12.2013, opined that "the registered owner...who has the control over the vehicle is required to satisfy court that he had taken precautions to prevent the commission of the offence and that the offence was committed without his knowledge."

It is apparent that in the present case even if the appellant had no knowledge of the use of her vehicle to commit the offence, she should be successful in establishing on a balance on probability that she had taken all possible precautions to prevent the act of crime. Yet it is clearly evident through the examined evidence that the appellant has not been able to successfully establish on a balance of probability that she took the necessary measures of precautions to prevent the said offence.

In **Jalathge Surasena v Officer in Charge, Police Station of Hikkaduwa** CA (PHC) APN 100/2014 Minutes dated 30.06.2015, it was held that a mere denial of not having knowledge of the offence committed is not sufficient to discharge the burden cast on a registered owner of a vehicle.

Thus, this Court is of the opinion that the appellant as the registered owner stating that she had no knowledge of the commission of the offence does not suffice to dispense the burden cast on her by Section 40 of the Act, to establish to the satisfaction of the court that she had taken all necessary precautionary measure to prevent the offence committed by the accused.

In the circumstances this court does not find any error in the reason assigned and the determination arrived at, by both the learned Magistrate and the learned High Court judge. However, during inquiry the learned counsel for the appellant contended that the order to confiscate the vehicle cannot be sustained when the charge to which the accused had pleaded guilty is defective.

To support the said argument the counsel stated the charge sheet claims: *“The vehicle bearing 48-6996 was involved in illegally transporting 21 wood logs in Avissawella in the Colombo district and thus was charged under Section 40 of the Forest Ordinance read with Section 26 (1) & (2)”* however, the counsel argues that the Forest Ordinance No. 65 of 2009 (as amended) (herein after the Act) does not include a subsection as such. Thereby raised the claim that the charge sheet is not valid and the accused was misled.

In response the Complainant-Respondent-Respondent (hereinafter the respondent) made a written submission admitting that the correct Section should be Section 25 of the Act, but further stated the charge is clear and that the accused have not been misled.

The appellant also further stated during the inquiry that the charge sheet had not been signed and that though the offence committed was stated it was not correctly mentioned that the offence was committed during the night time.

Considering the above claim intending to bring forward the matter of charge sheet being defective and there by the alleged charge being invalid, is not a steady ground of logical argument. This is because though the appellant claims there has been minor defects in the charge sheet the accused had been pleaded guilty of the offence and had paid the fine imposed on him. Nevertheless, it can be said that charge is not completely defective as the wording of the charge is clear and thus the accused is not misled. And it is evident that on 14.10.2014 during the trial at the Avissawella Magistrate Court the accused had been represented by an Attorney-at-law, when the accused had admitted committing of such offence and thereafter pleaded guilty for the charge without any dispute or challenge .

Nevertheless, in **CA (PHC) NO. 157/12** order dated 19.02.2015, His lordship Justice K.T. Chitrasiri discussing the effect of a defective charge sheet in a matter culminating in a confiscation of vehicle stated:

*“In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time. Indeed, an application under the aforesaid proviso to Section 40 in the Forest Ordinance could only be made when confiscation has taken place under the main Section 40 of the Forest Ordinance. Aforesaid main Section 40 of the Forest Ordinance imposes a duty upon the Magistrate who convicted the accused under the Forest Ordinance to confiscate the vehicle used in committing such an offence. Furthermore, the word "shall" is used in that main section and therefore the confiscation of the vehicle is automatic when the accused is found guilty. Accordingly, it is clear that the law referred to in the proviso to Section 40 is applicable only*



*thereafter. Therefore, I conclude that the appellant who made the application relying upon the proviso to Section 40 is not entitled to raise an issue as to the defects in the charge after the accused have pleaded guilty to the charge under Section 40 of the Forest Ordinance”.*

*“Furthermore, the person who makes a claim under the proviso to the said Section 40 could not have made such an application unless and until the accused are found guilty to a charge framed under the Forest Ordinance. Hence, it is clear that he is making such a claim, knowing that the accused were already been convicted for a particular charge under the Forest Ordinance. Therefore, the appellant is estopped from claiming the cover relying on the defects in the charge sheet, in his application made under the proviso to Section 40 of the Forest Ordinance. Moreover, in the event this court makes a determination on the issue as to the defects in the charge sheet at this late stage, it may lead to raise questions as to the conviction of the accused as well. Such a position is illogical and certainly it will lead to absurdity. Such an absurdity should not be allowed to prevail before the eyes of the law”.*

Similarly in **CA (PHC) 95/2012** order dated 04.09.2018, Her Ladyship Justice K. K. Wickremasinghe stated:

*“Accordingly, we are of the view that appellant should have raised his objection with regard to the legality of the charge before the accused pleaded guilty. We cannot allow the appellant to stand on the ground of defective charge at this stage of appeal especially when the accused-driver had pleaded guilty to the charge. Further we find that the accused-driver could have availed his right of appeal separately against the said conviction on the ground of defective charge when an appellant court could have considered the merits of such case. We are not inclined to interfere with the conviction of the accused-driver in an appeal that was*

*emerged from a revision application made to the Hight Court against an order of vehicle confiscation”.*

Thereby, for the aforesaid reasons and owing to the failure of the appellant to prove on a balance of probability that the necessary precautionary measures taken by her, this Court is of the view that the learned Magistrate has duly delivered the order and the learned High Court Judge has correctly dismissed the revision application.

Accordingly, this Courts finds no reason to interfere with the order of the learned Judge of the Provincial High Court of Western Province holden in Avissawella dated 24.08.2017 and the confiscation order of the learned Magistrate of Avissawella dated 03.11.2015. Thereby, this Court affirms the same.

The appeal is hereby dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Menaka Wijesundera J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**