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 Criminal Procedure Code read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Court of Appeal Application No: **CA/PHC/158/2015**

Sarath Rathnayake

High Court of Balapitiya No: **HCR 133/2009**

Accused

AND NOW

Vitharanage Shiromala Priyadarshani
No : 330,
Arabekema, Hambegamunuawa,
Tanamalwila

Registered-Owner Claimant

Vs.

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

Claimant Respondent

AND NOW IN BETWEEN

Vitharanage Shiromala Priyadarshani
No: 330,
Arabekema, Hambegamunuawa,
Tanamalwila.

Registered Owner Claimant
Appellant

Vs.

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

Claimant Respondent Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Amila Palliyage with S.Udugampola for the Appellant. Madhawa Thennakoon D.S.G for the Respondents
Argued on	:	28.11.2022
Decided on	:	24.01.2023

Iddawala – J

This is a revision application filed by the registered owner claimant appellant (hereinafter referred to as the appellant) to revise and set aside the order dated 07.10.2015, delivered by the Provincial High Court of the Sabaragamuwa Province holden in Rathnapura which ordered the confiscation of a lorry bearing the registration number UP-LE-4552 which was employed in transporting cannabis, thereby acting in contravention of the Poisons, Opium and Dangerous Drugs Ordinance as amended (hereinafter referred to as the Ordinance).

The facts of the case are briefly as follows. The accused, one Sarath Rathnayake, who is the driver employed by the appellant has transported 45 Kilograms of Cannabis in the aforementioned vehicle which is the subject matter of this appeal and was charged with an offence under the Ordinance. The accused pleaded guilty to the charges on the 25.08.2010 and upon conviction of the accused, the vehicle was forfeited in line with Section 79 of the Ordinance. The instant appeal is against the order of the learned High Court Judge which issued the confiscation of the said vehicle.

In quoting the relevant law, Section 79 of the Act, as amended, can be reproduced as follows:

> *(1) Where any person is convicted of an offence against this Ordinance or any regulation made thereunder the court shall order that all or any articles in respect of which the offence was committed and any boat, vessel, vehicle, aircraft or airborne craft or equipment which has been used for the conveyance of such article shall, by reason of such conviction, be forfeited to the State. (2) Any property forfeited to the State under subsection (1) shall*
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> *(a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;*

(b) if an appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

Literally, Section 79 automatically comes into operation in the event of an offence being committed in contravention of the law promulgated in the Ordinance. In this instant scenario, the application of Section 79 is triggered because the vehicle in question has been used to transport cannabis which is an illegal and an illicit activity, committed in contravention of the law, thereby the court is empowered to forfeit the said vehicle according to the powers bestowed therein.

It is pertinent to note that Section 79 does not provide for the release of the vehicle upon satisfaction of the Court of the owner's innocence in the said offence. This is contrary to the laws promulgated in the Forest Ordinance, Flora and Fauna Act and the Animal's Act where the release of a vehicle is enabled where the criterion to prove innocence on the part of the owner of the vehicle is established.

Section 40 of the Forest Ordinance, as amended by the Forest (Amendment) Act No.65 of 2009 provides that a vehicle owner has the burden of proving before a court, on a balance of probability, that s/he has taken all the necessary precautions to prevent the commission of any illegal activities by engaging his/her vehicle. The Forest Ordinance following the amendment has cast a burden on the owner of a vehicle to claim the vehicle in the event of a confiscation by proving to the satisfaction of the court that when perusing the adduced evidence, s/he has taken all the necessary precautions as a reasonable registered owner of a vehicle to prevent the commission of any offences with the employment of the vehicle.

Similarly, under Section 3A of the Animals Act, there is a burden cast upon the registered owner of a vehicle to prove to the satisfaction of the court, on a balance of probability, that s/he as the registered owner of a vehicle has taken all necessary precautions to prevent any illegal activities from being committed with the use of the vehicle or to prove that s/he had no knowledge of the said vehicle being engaged in illegal activities. The difference between the aforementioned burden cast by the Forest Ordinance and the Animals Act is that the latter

provides for a choice between either proving that necessary precautions were taken or that there was no knowledge of the offence being committed. Similarly, yet minutely different stance is adopted by the Fauna and Flora Protection Act no. 22 of 2009, where under Section 54 of the Act, Section 64 of the principal enactment is amended to hold that where an owner of a vehicle proves to the court on a balance of probability that s/he has exercised all due diligence to prevent the use of the vehicle in any offences, the burden casted therein shall be dispensed.

However, section 79 of the Act does not cast such a burden upon the registered owner of vehicle where the application of Section 79 is automatically triggered wherever, any offence is committed with the use of the vehicle. Therefore, the learned Deputy Solicitor General stance that the appellant has not taken the necessary precautions to prevent the commission of an offence by using the vehicle, does not have any legal grounding as such a burden is not casted on the owner by the Poisons, Opium and Dangerous Drugs Ordinance. Thus, the contention of the learned D.S.G in this regard is not acceptable. This Court decided in **CA-PHC-119-18** C.A Minute dated 15.03 2022 "*In the absence of any amending law to the Excise Ordinance, the principles enunciated by early case law under the Excise Ordinance must be used as guidance. Importation of principles from different laws must be discouraged. It has always been accepted as axiomatic that judges administer justice according to the prevailing law of the land. As His Lordship Justice Maartensz observed in* ***Alice Kothalawala Vs. W.H. Perera and another*** *(1937)1 CLJ 58 p 'Justice must be done according to law. If hardship results from the law in force the remedy must be affected by legislation. There would be chaos if a judge was entitled to create a procedure to meet the exigencies of every case in which he considers the law would work injustice".*

Nonetheless, even though the law stipulated under Section 79 does not provide for an opportunity to the registered owner a vehicle to establish on a balance of probability that s/he is not a party to the offence and therefore by reason of his innocence to have his/her vehicle released to the owner, Nonetheless, the law still enables a party to establish his/her innocence on a balance of probability before the court through the application of principles of Natural Justice.

It is settled law that in any vehicle inquiry, the principles of Natural Justice must be applied to give the parties a fair opportunity to be heard and to show cause as to why his/her vehicle should not be confiscated as every person has natural rights over their property and such rights cannot be denied to a person without giving him the opportunity to show cause against such order made. Even in instances where such a stance is not couched within the applicable law, the principles of natural justice do come into operation where a person's rights to one's property is in question. This position of the law is further cemented by the observations made by **Justice Nagalingam, in Rasiah v Tambirajah** 53 NLR 574, where it was held that:

> *"It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made…I think if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree justice would seem to demand that he should be restored his property"*

Therefore, the owner of a vehicle must be given an opportunity to prove on a balance of probability to the satisfaction of the court that:

1. S/he is not the accused of the said offence.
2. Her/His ownership to the vehicle
3. S/he has in no way abetted, condoned, commissioned or directly or indirectly involved in committing any illicit or illegal activities with the employment of the vehicle.
4. S/he had no knowledge of the offence being committed or the employment of the vehicle and its space for any illegal illicit activities.

As such, although no burden has been casted upon the registered owner of a vehicle by the Act, the principles of Natural Justice come into operation to give the parties an opportunity to prove his/her innocence, based on the natural entitlements of a person to his or her property.

The primary contention of the appellant is that the learned High Court judge has failed to consider the evidence which, as purported by the appellant, manifests

the appellant's lack of involvement in the said offence. The appellant further contends that she has taken all the necessary precautions in order to ensure that the vehicle will not be employed in illegal or illicit activities and that she did not bear any knowledge of the commission of the said offence as evinced through the evidence submitted before the Court.

The aforementioned averments of the appellant resonate with Section 40 of the Forest Ordinance, where the proviso to the Section enables the registered owner of a vehicle to establish his innocence in the said offence by proving with the adduced evidence, that s/he did not have any knowledge of the offence committed and that s/he has taken all the necessary precautions to prevent the commission of any offence.

Although as elaborated above, such a burden need not be dispensed as such is not required by the law promulgated in Section 79. However, according to the principles of Natural Justice the claim to her vehicle ownership and her innocence in the event has to be proved on a balance of probability, to the satisfaction of the court, to warrant a release of her vehicle.

In perusing the adduced evidence, the ownership of the vehicle is sufficiently established as the appellant is the registered owner of the vehicle, however with regards to her claims of lack of knowledge and little to no involvement in the offence cannot be sufficiently proved in looking in to the accurate observations made by the learned High Court Judge in his analysis of the evidence. The learned High Court Judge has observed that the appellant, albeit, claims to have no knowledge of the offence committed, when questioned on the use of the concealed compartment of the lorry, has provided that the concealed space was used to transport chicken and eggs though it was not a cooling compartment. The learned High Court judge has thoroughly ruminated over this fact and has observed that it manifests dishonesty on the part of the owner for the transportation of chicken and eggs while transporting other goods like sand on the lorry strikes as an odd combination and an impractical use for the compartment. Therefore, it was the observation of the learned High Court judge that the appellant's averments on the said use for the compartment cannot be accepted before the court as it does not show honesty on the part of the appellant.

This Court affirms the observation of the learned High Court Judge and in furtherance to the above observation, states that the appellant, in any case has not proved to the satisfaction of the court that she had no knowledge and had no involvement in the said offence as she has not provided any reasonable explanation to convince this court of her innocence. The nature and the purported use of the concealed compartment suggests that the appellant should have, as a reasonable owner of a vehicle, inquired more and be vigilant with regards to the use of the concealed space of her lorry and as she has not acted accordingly, this Court is not convinced of her innocence in the event. Therefore, such a lackadaisical attitude coupled with her improbable explanation of the use of the concealed compartment, fails to prove on a balance of probability, to the satisfaction of the court that she indeed had no knowledge and no involvement whatsoever in the said offence.

Therefore, this Court observes that the learned High Court Judge has correctly ordered the confiscation of the vehicle based on an accurate analysis of the evidence and this Court affirms the same. Accordingly, we see no reason to interfere with the order of the learned High Court Judge dated 07.10.2015.

The application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL