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

In the matter of an appeal in terms of Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/PHC/ 143/2018
PHC: Kurunegala: HCR 04/2017
MC Pilessa Case No. 79786

Officer-in-Charge,
Police Station,
Mawathagama

Complainant

Vs.

1. Sinhalage Thilina Asiri Ruwan Wella
2. Ambanwala Gedara Seneviratne Banda
3. Alla Pichchai Ameer
4. Roopassara Gedara Narada Jayasinghe

Accused

And

Hewa Pathirana Jayawickrama
Riversidewatte, Weuda

Registered Owner-Petitioner

Vs.

1. Officer-In-Charge,
   Police Station,
   Mawathagama

Complainant-Respondent

2. The Hon. Attorney General
   Attorney General's Department.
   Colombo 12.

02nd Respondent

AND Now Between

Hewa Pathirana Jayawickrama
Riversidewatte, Weuda

Registered Owner-Appellant

Vs.

1. Office -In-Charge,
   Police Station,
   Mawathagama
   Complainant-Respondent-Respondent

2. Hon. Attorney General
   Attorney General's Department.
   Colombo 12.
   02nd Respondent-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Asoka Weerasooriya AAL with Chamath Gamage AAL for the Claimant - Petitioner

Kanishka Rajakaruna, SC for the State

Written Submissions: By the Accused-Appellant on 28.02.2022

By the Complainant-Respondent 02.11.2022

Argued on : 16.12.2022

Decided on : **20.01.2023.**

N. Bandula Karunarathna J.

This is an appeal from the judgement of the High Court Judge of Kurunegala dated 03.09.2018. The appellant is the registered owner of Vehicle Number 226 - 8731. The said vehicle was taken into custody on 16.09.2016 for the offence that the vehicle was used to commit an offence under the Forest Ordinance by transporting timber valued at Rs. 16,974.35 without a valid permit.

The disputed vehicle bearing registration number 226-8731 had been taken into custody by Mawathagama Police Station on or about 16.09.2016 for transporting Mahagony timber without a valid license or a permit which is an offence under the section 25 of the Forest Ordinance as amended. The 1st complainant-respondent-respondent (hereinafter referred to as the Respondent) charged four suspects including the driver of the said vehicle. Thereafter, all suspects pleaded guilty to the charge on 28.09.2016 and accordingly they were sentenced by imposing a fine by the learned Magistrate of Pilessa.

Thereafter, the Magistrate fixed the case for inquiry in terms of section 425 of the Code of Criminal Procedure Act No.15 of 1979 where the appellant testified on 04.11.2016 about his

claim. The order was pronounced on 14.12.2016 confiscating the vehicle bearing No. 226-8731. Hence, the appellant challenged the order dated 14.12.2016 of the Magistrate's Court of Pilessa, in the High Court of North Western Province holding its jurisdiction in Kurunegala, by invoking revisionary jurisdiction in the case bearing No. HCR/04/17. The learned Trial Judge of the High Court of North Western Province, delivered the order dated 03.09.2018 and dismissed the said revision petition for want of exceptional circumstances and affirmed the order dated 14.12.2016 by the learned Magistrate of Pilessa.

The appellant has opted to challenge the order dated 03.09.2018 by the learned Trial Judge of the High Court of Kurunegala by appealing to this court.

The grounds of appeal are as follows;

(i) The learned Magistrate and the learned High Court Judge failed to consider the fundamental provisions of law as contained in the Forest Ordinance. That is, in the event the owner of the vehicle was aware of the offence he would have been charged under section 25(3) of the ordinance.

(ii) The learned Magistrate and the learned High Court Judge by their orders, have failed to give the constitutionally guaranteed Presumption of Innocence to the appellant.

(iii) Without prejudice to the above, the learned Trial Judge of the High Court and the learned Magistrate failed to recognize the degree of precautions taken by the appellant and the owner of the vehicle and erred in concluding that the appellant had failed to sufficiently show cause in the confiscation inquiry.

(iv) The learned Trial Judge of the Provincial High Court has erred in refusing to follow the judgement of the Court of Appeal in case number CA (PHC) Appeal No 03/2013, which is more fully appropriate under the circumstances of the present matter.

(v) The learned High Court Judge had not exercised her revisionary jurisdiction justifiably over the determination made by the learned Magistrate.

Learned counsel for the respondent submitted that the revisionary jurisdiction is a discretionary remedy based on exceptional circumstances. The appellant was not able to satisfy the learned High Court Judge of the North Western Province in respect of the existence of exceptional circumstances in order to interfere with the findings of the Magistrate's Court of Pilessa. He further argued that the appellant relied upon section 134 of the Evidence Ordinance, it does not preclude the necessity for corroboration. It is at the liberty of the parties to prove a fact with a sole witness.

The learned counsel for the respondent further says that the evidence of the appellant was that he gave oral instructions to the driver of the vehicle bearing No. 226-8731 not to engage in illegal activities. However, the appellant failed to state what action he took in respect of his driver when he got to know that his vehicle had been used for transporting timber, violating section 25 of the Forest Ordinance. He had failed to state that the driver was removed from the job due to this incident.

The attention of the Court is drawn by the learned counsel for the respondent, to the line of cross-examination, where he was challenged with regard to the payment of the fine. Hence, it has been severely challenged the credibility of the appellant. Hence, the counsel for the respondent further argued that the onus of proving the fact has shifted to the appellant. However, the appellant had failed to call evidence of the driver to prove the fact that he was warned and advised not to use the vehicle for illegal purposes.

The learned counsel for the respondent further says that the judgment of Sujith Priyantha vs. OIC Poddala CA/PHC/157/12 where it had been held that merely giving instructions to the driver not to use the vehicle for illegal activities does not satisfy the test of taking all precautions to prevent such things from happening. However, the appellant has failed to prove what steps or precautions were taken by him in order to avoid the driver engaged in illegal activities by using his vehicle. Similarly, the appellant had failed to establish that he had no knowledge with regard to the offence committed by the driver. In terms of his own testimony, the driver had informed him where he was going. Thus, it is the duty of the appellant to check the authenticity of the version of the driver as the said vehicle was taken on hire by a person known to him.

The Magistrate of Pilessa court had sufficient opportunity to examine and observe the demeanour of the witness. The Magistrate would have observed the demeanour of the witness under cross-examination. Hence, the appellant cannot rely on section 134 of the Evidence Ordinance in order to prove his case which requires corroboration. The respondent further prays that this appeal is dismissed for want of merits and affirms the order dated 03.09.2018 of the High Court of Kurunegala in the case number HCR/04/17and the order dated 14.12.2016 of the Magistrate's Court of Pilessa in case No. 79786.

Section 40 of the Forest Ordinance reads as follows;

> "When any person is convicted of a forest offence, all timber or forest produce which is not the property of the State in respect of which such offence has been committed, and all tools, boats, carts, cattle, and motor vehicles used in committing such offence, shall, in addition to any other punishment prescribed for such offence, be confiscated by order of the convicting Magistrate."

The proviso to section 40 of the Forest Ordinance (as amended by Act No.65 of 2009) reads as follows;

> "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."

Accordingly, it can be construed that the Legislature intended to cast the burden on the claimant to prove that he took all precautions to prevent the offence being committed and such burden needs to be discharged on a balance of probability.

The learned counsel for the appellant argued that the confiscation of the vehicle in question is bad in law because as the owner of the vehicle was not charged under section 25(2) and 25(3) of the Forest Ordinance.

Section 25 of Forest Ordinance is as follows;

25. (1) The breach of any of the provisions of, or regulations made under, this Chapter shall constitute an offence punishable, except as hereinafter provided, by a fine not exceeding one thousand rupees, or by imprisonment which may extend to six months:

Provided that any such regulation may, within the above limits, prescribe any punishment, or maximum or minimum punishment, for the breach of all or any of the provisions thereof;

Provided, further, that offences under this Chapter shall be punishable by a fine not exceeding two thousand rupees, or by imprisonment which may extend to one year in cases where the offences are committed after sunset and before sunrise, or after the offender shall have made preparations for resistance to lawful authority, or if the offender has been previously convicted of any offence under this Ordinance.

(2) Notwithstanding anything in the preceding provisions of this section, any person who transports timber, within, into or out of any specified local area in contravention of any regulation made under section 24 (1) shall be liable on conviction to imprisonment for a period which may extend to five years:

Provided that where the person so convicted proves to the satisfaction of the court that the timber in respect of which the offence was committed is private property, he shall be liable to a fine not exceeding one thousand rupees or to imprisonment which may extend to six months.

(3) Any person who abets the commission of an offence specified in this Chapter, or causes any such offence to be committed shall also be guilty of an offence and shall on conviction be liable to the same punishment provided for the offence.

The police filed charge sheet dated 28.09.2016 against the accused persons under section 25(2) and section 25(3) of the Forest Ordinance. However, the owner of the vehicle (the appellant) was not made a party when the law specifically provides for the culpability of the owner if in fact, he was culpable in the commission of the offence.

Amendment of section 25 of the principal enactment.

Section 25 of the principal enactment as last amended by Act No. 13 of 1982 is hereby further amended as follows;

Forest (Amendment) Act No 23 of 1995 is as follows;

(1) in subsection (1) of that section: -

(a) by the substitution for the word "by a fine not less than two hundred rupees and not exceeding one thousand rupees" of the word "by the fine not less than five thousand rupees and not exceeding fifty thousand rupees";

(b) by the substitution in the second proviso to that subsection for words "by a fine not less than two hundred rupees and not exceeding two thousand rupees or by imprisonment for a term not less than, three months and not exceeding one year" of the words "by a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees or by imprisonment for a term not less than six months and not exceeding two years or to both such fine and imprisonment";

(2) in subsection (2) of that section;

(a) by the substitution for the words " to imprisonment for a term not less than three months and not exceeding five years" of the words " to imprisonment for a term not less than six months and not exceeding five years, " ;

(b) by the substitution in the proviso to that subsection for the words "to a fine not less than two hundred rupees and not exceeding one thousand rupees or to imprisonment for a term not less than three months and not exceeding six months.", of the words " to a fine not less than two thousand five hundred rupees and not exceeding ten thousand rupees or to imprisonment for a term not less than three months and not exceeding one year or to both such fine and imprisonment ".

(3) by the insertion immediately after subsection (2) of that section, of the following new subsection;

" (2A) Notwithstanding anything in the preceding provision of this section, where any person referred to in subsection (2) is convicted of an offence referred thereto, any other person who allows any tool, boat, cart, cattle, or motor vehicle of which he is the owner or which is in his possession to be used for the commission of such offence, shall himself be guilty of an offence and shall on conviction be liable to a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees or to imprisonment for a term not less than three months and not exceeding two years.".

Act No 65 of 2009 Forest Ordinance (Amendment) is as follows;

Section 25 of the principal enactment is hereby amended as follows: -

(1) in subsection (1) of that section-

(a) by the substitution for the words "by a fine not less than five thousand rupees and not exceeding fifty thousand rupees, or by imprisonment for a term not less than three months and not exceeding six months", of the words "by a fine not less than rupees ten thousand and not exceeding rupees one hundred thousand, or by imprisonment for a term not exceeding four years";

(b) in the second proviso to that section by the substitution for the words "by a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees, or by imprisonment for a

term not less than six months and not exceeding two years", of the words "to a fine not less than rupees fifteen thousand and not exceeding rupees one hundred and fifty thousand, or by imprisonment for a term not exceeding four years";

(2) in subsection (2) of that section-

(a) by the substitution for the words "for a term not less than six months and not exceeding five years", of the words "for a term not exceeding five years or to a fine not less than rupees twenty thousand and not exceeding rupees two hundred thousand or to both such imprisonment and fine";

(b) in the proviso to that section by the substitution for the words "to a fine not less than two thousand five hundred rupees and not exceeding ten thousand rupees, or to imprisonment for a term not less than three months and not exceeding one year", of the words "to imprisonment for a term not exceeding two years" or to a fine not less than rupees five thousand and not exceeding rupees twenty-five thousand;

(3) by the repeal of subsection (2A) of that section and the substitution therefor of the following subsection: -

"(2A) Any person who allows any tool, vehicle or machine of which he is the owner or which is in his possession, to be used in the commission of an offence under this Chapter, shall be guilty of an offence and shall on conviction liable to imprisonment for a term not exceeding two years or to a fine not less than rupees ten thousand and not exceeding rupees one hundred thousand or to both such imprisonment and fine"; and

(4) in subsection (3) of that section by the substitution for the words "in this Chapter," of the words "in this Chapter or any regulation made thereunder,".

Act No 65 of 2009 Forest Ordinance (Amendment) Section 25 (2) A specially refers to “Any person who allows” the use of vehicles to be found culpable. It is my view that the prosecution did not in any manner find the appellant to have "allowed" his vehicle to be used in the commission of the offence. The prosecution did not deem him to be culpable resulting in him not being charged.

The appellant was not charged under section 25(3) of the said act for aiding and abetting in the commission of the offence. This in itself is *ex facie* evidence that the registered owner had no knowledge of the offence being committed.

As mentioned in Atapattu Mudiyanselage Sadi Banda and 3 others vs. Officer-in-Charge, Police Station, Norton Bridge CA(PHC) 03/2013, dated 25.07.2014;

> “I am of the view, before making the Order of confiscation learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to

this incident that the lorry had been used for any illegal purpose, that the appellant and the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the appellant did not have any knowledge about the transporting of timber without a permit. On these facts the court is of the view that the confiscation of the lorry is not justifiable,"

The learned Magistrate had failed to consider the above-mentioned judgement and the circumstances of this particular case and the previous conduct of the driver of the said vehicle and the owner, prior to delivering the order to confiscate the vehicle. If there had been any evidence against the owner of the lorry, the police could have charged him for aiding and abetting under section 25(3), and made him an accused person of the Magistrate's Court case, which, has not been the case. It is very clear that the Presumption of Innocence, therefore, accrues to the appellant.

It is important to note that the underlying principles of interpretation of statutes in specific cases such as this, were found in the case of Nizar vs. Inspector General of Police 1978 2 SLR 304 and in the case of Manawadu vs. Attorney General 1991 (1) SLR 209.

It enumerated the principles of making an order for confiscation wherein the underlying principle is that the property of a third party cannot be confiscated without hearing the third party. The ratio decidendi of the said decisions was the prevention of arbitrary confiscation of property of innocent persons and was not intended to provide a guideline as to how such confiscation should occur. The statute accordingly must be considered and interpreted strictly when an application to the loss of liberty and property of persons.

The learned Judge of the High Court and the learned Magistrate failed to recognize that degree of precautions taken by the owner of the vehicle could take defence on the prevailing circumstances of each case, and thereby have erred by concluding that the appellant has failed to sufficiently show cause in the confiscation inquiry. Present law requires an owner of a vehicle at the confiscation inquiry to satisfy the court that he has reasonably taken all precautions to prevent the vehicle being used in the commission of the relevant offence.

At the arguments of this matter, the attention of this court was brought to the fact that the degree of precautions one can take would differ from case to case depending on the circumstances of the case. The extent and the limitations of the precautions would vary between cases where the owner himself actively engages in the business for which the vehicle is used and the owner simply hires his vehicles for business purposes without actively engaging in such activities. The fact whether the vehicle is given for hire or used for private purposes or any other business purpose should also be taken into consideration.

Due to those circumstantial differences, an equal level of precaution should not be expected from a vehicle owner. It is evident that the vehicle owner in this matter had very limited control over the vehicle which in turn limits his capacity to take precautionary measures and the learned Magistrate should not have expected a higher degree of precautions which is impractical under these circumstances.

The learned counsel for the appellant submits that the owner of the vehicle is a farmer. He had purchased the vehicle for the purpose of his coconut trading business. The accused person was working as a driver for the past two years and never engaged in any illegal activity. Therefore,

there was no reason for the appellant to suspect the accused driver by any means. The accused driver takes the vehicle for external hires with the permission of the owner. This has been an ordinary practice, and therefore it raised no doubts in the mind of the appellant about such activity.

Page 46 of the appeal brief is as follows;

ප්‍ර : විත්තිකරුගේ නම මොකක්ද ?

උ : රුවන් කියා තමයි කියන්නේ.

ප්‍ර : ඔබ මේ රුවන් කියන තැනැත්තා දන්නා හඳුනන කෙනෙක්ද ?

උ : ඔහු මාවතගම හතේ කණුව ප්‍රදේශයේ පදිංචිකරුවෙක් .

ප්‍ර : සාක්ෂිකරු මෙම රියදුරු කුමන කාල සීමාවක මෙම ලොරි රථයේ රියදුරු ලෙස සේවය කළාද?

උ : 2012 වර්ෂයේ වගේ වැඩට ආවා.

ප්‍ර : දැන් ඒ සිද්ධිය වන තෙක් මෙම ලොරි රථයේ රියදුරු ලෙස සිටියේ මෙම රුවන් කියන පුද්ගලයාමද?

උ : ඔව්.

ප්‍ර : ලොරි රථය ගත්තේ කුමන කාර්යයක් සඳහාද?

උ : වත්තේ වැඩ සඳහා,

ප්‍ර : වත්තේ වැඩ නැති දවස්වලට මොනවද කරන්නේ?

උ : නිකම් තිබෙන දවස් වලට ඔය එක එක වැඩ කරනවා. ගඩොල් අදිනවා. මැටල් වගේ ඒවා ගෙනියන්න තමයි ලොරි රථය ලබා දෙන්නේ. එයාට නීති විරෝධී වැඩ කරන්න එපා කියා මම කියල තියෙනවා.

ප්‍ර : ඒ කියන්නේ තමුන් නීත්‍යානුකූල කටයුතු වලට යොදා ගන්න කියා තමයි ඔහුට ලොරි රථය බාර දුන්නේ?

උ : ඔව්.

On the day of the incident, the vehicle was given to the accused on hire as usual. Accordingly, it was borrowed for a specific purpose which is to transport bricks.

Page 47 of the appeal brief is as follows;

ප්‍ර : මෙම ලොරි රථයේ රියදුරු වන රුවන් විසින් ලොරි රථය අරගෙන ගියේ කීයටද?

උ : 09.30 ට පමණ.

ප්‍ර : කවදද ඒ දිනය ?

උ : 16 වන දින 09.30 ට.

ප්‍ර : 09.30 ට කලින් මෙම ලොරි රථය කුමන කටයුත්තක් සඳහා ද යොදවා ගත්තේ ?

උ : උදේ වත්තට ගියා පොහොර අරගෙන. ටික වෙලාවකින් තමයි කිව්වේ හයර් එකක් තියෙනවා යන්නද කියලා. පොහොර අරගෙන ගිහින් පොහොර දාලා ආවා. ඊට පස්සේ ලොරිය ගෙදර

ගෙනත් දාලා තමයි පස්සේ හයර් එකක් තියෙනවා යන්නද කියලා ඇහුවේ. මට කිව්වේ ගඩොල් වගයක් ගෙනියන්න තියෙනවා යන්නද කියලා. ඒ නිසා මම යන්න කිව්වා."

The learned counsel for the appellant says that the learned Magistrate should have taken into consideration the above circumstances in determining the level of precautions which should be expected from an ordinary farmer in a village who had given his vehicle in an ordinary course of business, to one of his most trustworthy drivers who had been working with him for the past 2 years. He further argued that there was no reason for the owner to suspect that his trusted driver would use this vehicle for an illegal purpose because the vehicle had been burrowed in a similar fashion on several occasions, but no such incident had been reported prior to this unfortunate event.

Therefore, in this particular instance, precautions that the appellant could have taken are very limited as similar incidents have happened in the ordinary course of business with the same driver several times. It is evident that the owner used to call the driver from time to time to check his location whenever he takes the vehicle for an external hire and he had given proper instructions to the driver before the hire.

Page 43 of the appeal brief is as follows;

"මගෙ වත්තේ වැඩක් නැති දවසට එම රියදුරු විසින් හයර් ගිහිං මට හවසට මුදලක් ගෙනත් දෙනවා. මගේ ඉඩමේ පොල් අඳින්න කෙසෙල් අඳින්න රියදුරෙක් ඉන්නවා....."

"කෘෂිකාර්මික ඉඩමේ පොල් ඇදීම වැනි වැඩ නැති දිනවලට හයර් යනවා, හයර් යන්න කලින් මෙහෙම වැඩක් තියෙනවා මොකද කරන්නේ කියා මගෙන් අහනවා, ඊට පස්සේ මම හොයලා බලලා යන්න දෙනවා. මෙම ලොරිය පොලීසියට අසුවුණ දිනයේ දී මගෙන් ඉල්ලගෙන ගියේ ගඩොල් වගයක් අදින්න තිබෙනවා කියලා. මෙම ලොරියේ රියදුරු ලෙස චිත්තිකරු යොදා ගන්නා අවස්ථාවේදී වැරදි වැඩ කරන්න එපා කියලත්, රාජ්‍ය විරෝධී වැඩ කරන්න එපා කියලත් මම කිව්වා. අහලා බලලා තමයි වැඩ කරන්න ඕන කියා මම උපදෙස් දී තිබෙනවා. ඔහු කිව්වා ගඩොල් වගයක් ගෙන එන්න තිබෙනවා කියා. මගේ රියදුරු සමග මෙම ලොරි රථයේ සමහර දවස් වලට මමත් යනවා, එහෙම නැතිනම් මුරට ඉන්න එක්කෙනා එක්කන් යනවා. රියදුරු මා විසින් පවරන කටයුතු තමයි කරන්නෙ. දුරකථන මාර්ගයෙන් මම කියන වැඩ ඔහු කරනවාද කියාලා මම සොයා බලනවා....."

Page 44 of the appeal brief is as follows;

"මම දන්නා පුද්ගලයන් ඉන්න ප්‍රදේශයක නම් ඒ සම්බන්ධයෙන් සොයා බලනවා. වසර 04 ක කාලය තුළ මෙම සිදුවීමට පෙර රියදුරු විසින් නීති විරෝධී කටයුතුවලට ලොරි රථය යොදාගත් බව මට දැන ගන්න ලැබුණේ නැහැ. වසර 04 ක කාලය තුළ මම මෙම රියදුරු සම්බන්ධයෙන් සොයා බැලුවා නමුත් නීති විරෝධී දෙයක් දැන ගන්න ලැබුණේ නැහැ."

"ලොරි රථය චිත්තිකරු අත්අඩංගුවට ගත්ත දිනය සම්බන්ධයෙන් මතක තිබෙන්නේ සැප්තැම්බර් 16 වන දින වගේ. මෙම කියන දිනයේ මගේ ලොරි රථය රියදුරු සමග කෘෂිකාර්මික ඉඩමේ කටයුතු සඳහා ගියා. උදේ පොල් ඉඩමට ගියා. උදේ 8.00 ට ගිහිං 9.15 ට විතර වගේ ආවා. ඉන් පසුව ලොරිය ගෙදර තිබුණා. මගේ කෘෂිකාර්මික ඉඩමට ගිහිං ආවට පස්සේ රියදුරු විසින් කිව්වා රිදීගමින් ගඩොල් වගයක් ගෙන එන්න යන්න තිබෙනවා යන්නද කියා. රිදීගම ගඩොල් පටවන්න යනවා කියා තමයි ලොරි රථය අරගෙන ගියේ. ආපසු එන කාලයක් ගැන මම විමසා සිටියා. මට කිව්වා 12.00 විතර වගේ වෙයි කියා. ලොරි රථයේ ගඩොල් ගෙන එන්න යනවා කියා රියදුරු ලොරිය රැගෙන ගියා."

“ඉන් පසුව මම 12.15 ට විතර කෝල් එකක් දුන්නා. ඒ අවස්ථාවේදී රියදුරුගේ ෆෝන් එක වැඩ කළේ නැහැ. ඉන් පසුව මම පරගහදෙණිය හන්දියට ගියා. ගිහිං ලොරිය ඒ පැත්තේ පැමිණියාද කියා විමසා බැලුවා. දන්නා අඳුරන අයගෙන් විමසා සිටියා. ඒ අවස්ථාවේදී ඒ පැත්තේ අය කිව්වා පොලීසියෙන් ලොරිය අරගෙන ගියා දැක්කා කියා. ඊට පසුව මම පොලීසියට ගියා. පොලීසියට යන අවස්ථාවේදී ලොරිය පොලීසියේ වත්තේ කොට වගයක් එක්ක තිබෙනවා දැක්කා. මම මගේ ලොරිය හඳුනා ගත්තා. ඊට පස්සේ මට වැඩිය දැනුමක් නැහැ ඒ නිසා මම පොලීසියෙන් ඇහුවා මේකට මොකද කරන්න ඕන කියා. මට පොලීසියෙන් කිව්වා උසාවි යන්න තමයි වෙන්නේ කියා.....”

The learned counsel for the claimant-petitioner-appellant argued that the learned Judge of the Provincial High Court has erred in refusing to follow the judgement of the Court of Appeal in case number CA (PHC) Appeal Number 03/2013, which is relevant to the circumstances of present matter.

The appellant urged the learned High Court Judge to follow the judgement of this court delivered in Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge CA (PHC) Appeal No 03/2013 decided on 25.07.2014 due to its factual similarity. In that case, the following circumstances have been considered by this Court on the order of confiscation:

1. Value of the timber transported.

2. Whether there are any allegations prior to this incident that the vehicle in question had been used for any illegal purpose?

3. Are the appellants and the accused habitual offenders and are there any previous convictions?

4. Evidence to prove that the appellant had any knowledge about the transporting of timber without a permit.

The facts of the present case are very much similar to the case of Atapattu Mudiyanselage Sadi Banda vs. OIC Police Station Norton Bridge (*supra)*. Accordingly, neither the lorry owner nor the vehicle had been subject to any previous convictions or suspicious activities.

The details of the stock of "Timber" alleged to have been transported in the vehicle had been produced by the police to the Magistrate’s Court and the following observations are important to consider.

1. The timber belongs to a specific kind namely Mahogany.

2. The total number of pieces transported is 21.

3. Most of such pieces are less than 2 meters in length and the average length is less than 1 meter.

4. The total value of the load is stated as Rs 16,974.35 which makes the average value of one piece close to Rs 808.30.

Although Mahogany wood which is suitable to make furniture or any other manufacturing purposes is normally of a high value. This particular stock is valued low this itself shows that this stock of wood was not of so good quality. It was stated in the judgement of Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge (*supra*), the value and the significance of the timber transported should be evaluated as against the value of the lorry worth Rs. 1,200,000.00 in 2014 which been confiscated.

The learned Trial Judge of the Provincial High Court has correctly observed the following judgements of this court;

i. H.G. Sujith Priyantha vs. OIC Police Station Poddala CA (PHC) No 157/12,
ii. Mary Matilda vs. Police Inspector, Habarana Police CA (PHC) No 86/97 dated 08.07.2010
iii. Aruna Pradeep Prasantha vs. OIC Special Investigation Division Peliyagoda CA 61/12 dated 28.11.2014
iv. Peoples Leasing Co Ltd vs. Forest Officer Monaragala CA 106/13 dated 22.01.2015.

However, the learned High Court Judge has refused to follow the latest judgement of Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge CA (PHC) Appeal No 03/2013 and had proceeded to follow the judgement of H.G. Sujith Priyantha vs OIC Police Station Poddala CA (PHC) No 157/12.

The learned Trial Judge of the High Court should have opted to follow the judgement, Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge CA (PHC) Appeal No 03/2013 instead of following other cases because it is the latest judgment among them and its facts closely resemble the facts of the present case.

The learned counsel for the appellant submits that the total value of the seized load of timber was Rs. 16,974.35 and the accused were sentenced to a fine according to the law. However, the registered owner of the vehicle who had no knowledge of the said offence has been given a severe punishment than the wrongdoer by confiscating his vehicle which is one of his income sources. The Value of the lorry was around Rs. 1,200,000/- in 2014 which is 75 times higher than the value of the alleged stock of timber.

The learned counsel for the appellant says that the learned High Court Judge has not exercised his revisionary jurisdiction justifiably over the determination made by the learned Magistrate. He had not exercised his revisionary jurisdiction justifiably, as the Court of Appeal Judgement Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge CA (PHC) Appeal No 03/2013 had not been considered by the learned High Court Judge when delivering his judgement.

It was clearly stated by this court in the above Judgement in CA(PHC) 03/2013 as follows;

> "The revisionary power of the court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the court and the grant of relief is entirely dependent on the discretion of the court. The grant of such relief is of course a matter entirely at the discretion of the court, and always be dependent on the circumstances of each case. The existence of exceptional circumstances is the process by which the court should select the cases in respect of which the extraordinary power of revision should be

adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked."

Based on the above judgement it is my considered view that the learned High Court Judge has not exercised his revisionary jurisdiction justifiably over the determination made by the learned Magistrate. It reflects that such emission has prejudiced the appellant in several ways, as he was denied proper justice.

Confiscation of the vehicle is bad in law as there is no evidence to establish that the appellant had knowledge of the offence. The appellant had given reasonable and acceptable explanations as to why he did not have any knowledge about this illegal act. The learned Provincial High Court Judge erred in law and fact to confiscate the vehicle when the claimant had taken all necessary precautions to the best of his capacity based on the facts of this matter to prevent the commission of the offence using the vehicle. The confiscation of the vehicle is not just and equitable in the circumstances of this case. The doctrine of proportionality is ignored by the order of the learned Magistrate as the value of the vehicle is completely disregarded.

It may arguably be said that the evidence of the appellant that he did not know that the relevant offence was committed without his knowledge is weak. But even assuming that it is so, such weak evidence must prevail when, as in this case, no other evidence is available to counterbalance it. It is important to note that section 3 of the Evidence Ordinance contemplates or provides for two conditions of mind with regard to the matter of proof of a fact namely;

i. That in which a man feels absolutely certain of a fact, that is believed to exist;
ii. That in which though he may not feel absolutely certain of a fact yet he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption or basis of its existence.

In the present case, before an order of confiscation can be made, the Court has to be satisfied not merely that the appellant had a general idea or that he vaguely knew that the lorry was usually used for the purpose of transporting timber illegally but that the particular offence on the relevant date on 16.09.2016 was committed with his knowledge. If one can accuse the appellant of anything it is that he had accepted the inevitable with resignation and unconcern. One must not be content to reach decisions by looking at the mere surface of things. When there are various possibilities, one must be wary of and cautious in accepting one possibility as being more probable than the other.

Against such a factual background, it is not quite logical and even unfair to draw the inference from the fact that the driver continued to drive the vehicle before the conviction, that the relevant offence was committed with the appellant's knowledge for it is common knowledge that in such a society as that in which the appellant lived. To balance the evidence on either side, the facts relied on in the Courts below, to impute knowledge of the commission of the offence are not such as to make the fact that the offence was committed with the knowledge of the appellant more probable than the fact that the offence was committed without his knowledge because, to say the least, all those facts, as explained above, admit of the

interpretation that there was an equal possibility that the offence was committed without the knowledge as with knowledge.

Notwithstanding all this, one may say that the appellant may well have known of the commission of the offence. But that is a mere hypothesis which does not have the support of the evidence. It may arguably be said that there is a doubt or a feeling of uncertainty as to the truth of the appellant's version that the offence was committed without his knowledge. But, if the truth must be told, in my own mind, there is even a greater doubt as to whether it was committed with his knowledge. Of the two versions, viz that the offence was committed with the knowledge and without knowledge, the latter version is more probable even though there may be, perhaps, a doubt in regard to the truth of it. In general, of the two versions of events, one version can be accepted as the more probable version even when there is doubt in regard to the very version that is upheld as the more probable version for if there is not even a doubt in regard to it, that version must be held to be proved beyond a doubt which high degree of proof is not cast, by the law, on the appellant in this case.

The facts designated above are not, by their very nature, the sort of facts which of themselves exclude or imply distinctly the existence of the fact sought to be proved - the fact sought to be proved by means of these facts being that the appellant had knowledge of the commission of this particular offence of which his driver was convicted in the Magistrate's Court of Pilessa, for that matter, the said facts particularized or designated above are, so to say, natural facts in that they neither imply nor exclude the fact sought to be proved - the fact sought to be proved is, as stated above, that the appellant had knowledge.

Both the learned Magistrate and the learned High Court Judge had clearly drawn the inference that the said facts showed that the relevant offence was committed with the knowledge of the appellant. It is true that the burden was on the appellant to prove that the offence was committed without his knowledge, but the facts enumerated above from which both the learned Magistrate and the learned High Court Judge had concluded that the appellant had knowledge had, at best, some remote conjectural probative force, if any. Those facts may, perhaps, make the evidence of the appellant to the effect that the offence was committed without his knowledge somewhat doubtful or suspenseful but they do not possess the force or probative value even cumulatively, of making the fact that the offence was committed without the knowledge of the appellant less probable than that it was committed with the appellant's knowledge for those facts have no clear bearing on the disputed question of knowledge or lack of it on the part of the appellant and do not enable one to draw a firm or decided inference in regard thereto - one way or the other.

As would appear from the sequel each one of these facts relied on by the Judges in the Courts below does not even when amalgamated exclude lack of knowledge on the part of the appellant although those facts enumerated above and relied on by the Judges in the Courts below to attribute knowledge to the appellant may, perhaps, leave the matter in some doubt although the probability of the veracity of the appellant's evidence that he had no knowledge does not disappear in consequence thereof.

Although the burden of proving that the owner of the vehicle had no knowledge is on the appellant, he being the owner, yet that question of whether or not he had knowledge, needless to say, has to be decided on the totality of the evidence available to Court. As stated above,

the Courts below had taken the view that because the driver of the vehicle at the time of detection of the offence was the normal driver of the appellant, the particular offence in question ought to be held to have been committed with the knowledge of the appellant.

There is no essential inconsistency between any of those facts made use of by the Courts below to come to a finding that the relevant offence was committed with the knowledge of the appellant with the fact that the offence in question was committed without the knowledge of the appellant. There is an equal possibility that the offence in question was committed with the knowledge of the appellant as without his knowledge because both the said inferences could legitimately be drawn from the facts relied upon in the Courts below to impute knowledge to the appellant.

What circumstances are sufficient to "prove" a fact will not admit of easy definition or generalization? One has to use one's own judgment and experience of human conduct and cannot be bound by rules except by one's own discretion. The inferences drawn by the learned Magistrate and the learned High Court Judge more or less, presuppose that everything done or rather every offence committed by the driver must be necessarily known to the owner. That is a rather naive assumption for the inferences that the Courts draw must be founded on the experience of day-to-day life. Any common imagination can adequately conceive that the driver in question is so little versed in the refinements of civilized life as to take the owner too much into confidence.

It is to be observed that the above facts deposed to by the appellant are not contradicted although one must be conscious of the fact that the nature of those facts is such that it would be almost practically impossible for the prosecution to disprove them for such facts are virtual although, perhaps, not exclusively within the personal knowledge of the appellant.

The vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. If, as contended by the learned Counsel for the respondent, the Magistrate was given the discretion to consider whether to confiscate or not - the Magistrate could confiscate even when the offence was committed without the knowledge of the owner taking into consideration other damnable circumstances apart from the knowledge or lack of it on the part of the owner. The arguments too can recoil on the more profound. That argument was an invitation to confiscate for that would have been the necessary and inexorable consequence of the acceptance of that argument.

It is important to note that the judgement of the learned Magistrate and the learned High Court Judge had caused a higher loss to the appellant who is not even a part of the case, than the punishment prescribed for those who engaged in the offence and to those who aided and abetted. Therefore, the order confiscating the said vehicle is unreasonable and unjust in the face of it, as it had caused an undue loss for an innocent third party.

It is my view that the said order is contrary to the principles of natural justice due to its inequitable nature. At the same time, it is not proportionate to the offence, since the value of the vehicle exceeds both the maximum value of the fine prescribed in the Forest Ordinance and the value of the alleged stock of timber. Considering the above facts, the order of the Learned Magistrate is erred in fact as well as erred in law.

I decide to make that on the totality of the evidence led at the inquiry before the learned Magistrate it ought to have been held, in the least, that it was more probable than not that the relevant offence was committed without the appellant's knowledge. One cannot let one's prejudices influence the judgment of the case. They may be sinners; perhaps, of that, there is no mistaking of course, according to my thinking. But a Judge has to recompense even evil with justice.

The appeal is allowed and the order made by the learned High Court Judge on 03.09.2018 upholding the learned Magistrate's order dated 14.12.2016 is hereby vacated. The lorry numbered 226-8731 is ordered to be returned to the appellant.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal