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

In the matter of an Appeal under and in terms of Article 154P (6) of the Constitution read with Rule 2 (1) (a) of the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules 1988.

CA(PHC) 143/2017

PHC - Awissawella

Rev - 15/2015

MC – Awissawella

80769

Officer-in-Charge,

Police station,

Eheliyagoda.

COMPLAINANT

Vs.

Ranbandarage Hasitha Sulochana Priyarathne,

No. 264/A/3, Wijenayake Mawatha,

Eheliyagoda.

CLAIMANT

AND

Ranbandarage Hasitha Sulochana

Priyarathne,

No. 264/A/3, Wijenayake Mawatha,

Eheliyagoda.

CLAIMANT-PETITIONER

Vs.

1. Officer-in-Charge,

Police station,

Eheliyagoda.

COMPLAINANT-RESPONDENT

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Ranbandarage Hasitha Sulochana

Priyarathne,

No. 264/A/3, Wijenayake Mawatha,

Eheliyagoda.

CLAIMANT-PETITIONER-

APPELLANT

Vs.

1. Officer-in-Charge,

Police station,

Eheliyagoda.

COMPLAINANT-RESPONDENT-RESPONDENT

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Ranjan Mendis with Shyamantha Bandara and Ravinda for the Petitioner

: Jayalakshi De Silva, S.C. for the Respondent

Argued on : 08-06-2023

Written Submissions : 02-06-2023 (By the Respondent)

: 14-03-2022 (By the Petitioner)

Decided on : 02-08-2023

Sampath B. Abayakoon, J.

The claimant-petitioner-appellant (hereinafter referred to as the appellant) preferred this appeal being aggrieved by the order dated 24th August 2017, where the revision application filed by him before the High Court of the Western Province holden in Awissawella was dismissed by the learned High Court Judge of Awissawella by the impugned order.

The appellant is the registered owner of the vehicle bearing No- SG LD 0856. The said vehicle had been detained by the officers of Eheliyagoda police for allegedly transporting Jak and Nadun timber without a valid permit, which is an offence punishable in terms of the Forest Ordinance.

Accordingly, the driver of the vehicle had been charged before the Magistrate Court of Awissawella and he had pleaded guilty to the charge on 25-02-2015. He had been fined Rs. 20000/- with a default sentence of two months simple imprisonment, and the illegally transported timber had been confiscated.

The learned Magistrate of Awissawella, apparently, acting in terms of section 40 of the Forest Ordinance as amended by Forest (Amendment) Act No-65 of 2009, had ordered the owner of the vehicle to show cause as to why the vehicle involved in the offence should not be confiscated.

At the ensuring inquiry, the appellant who is the registered owner of the vehicle has given evidence claiming the vehicle, and the driver of the vehicle, who was the accused in the case, has also given evidence on behalf of the registered owner.

The appellant in his evidence has taken up the position that he used the vehicle for the purposes of his timber mill, but used to give the vehicle on hire on other occasions. He has employed the accused as his driver and had given specific instructions to him not to engage in illegal activities like transporting timber or sand without a valid permit. It had been his evidence that he used to be vigilant as to the activities of the driver, but on the day in question, he was

informed that the driver had been arrested for transporting timber without a permit. He had urged for the release of the vehicle on the basis that he took all the necessary precautions to prevent the offence and he had no knowledge of the offence been committed.

The driver of the vehicle in his evidence has stated that he had instructions form the owner of the vehicle not to engage in illegal activities like transporting of sand and it was he who accepted hires from others and earn money on behalf of the owner. He has explained the arrangement they had to share the earnings. He has claimed that on the day in question, while he was in Thalavitiya area expecting hires, he was engaged by a person to transport timber to a timber mill in Eheliyagoda. He has stated that he was arrested by the police in that process, and his employer discontinued his service after the incident.

The position of the prosecution had been that both the registered owner of the vehicle and the driver knew very well each other's actions and the timber was transported to the mill owned by the appellant on his instructions. The prosecution had moved for the confiscation of the vehicle in terms of the Forest Ordinance.

The appellant has preferred an application in revision to the High Court of the Western Province holden in Awissawella, challenging the order of confiscation by the learned Magistrate of Awissawella.

The main contention of the appellant in his revision application before the High Court had been that although the accused of the Magistrate Court action had pleaded guilty to the purported charge against him, there was no valid charge before the Court and there was no basis to confiscate the vehicle.

In addition, the appellant has claimed that the learned Magistrate failed to appreciate the evidence led at the inquiry in its correct perspective, and was misdirected in analyzing the evidence.

After hearing the parties, and giving an opportunity to file written submissions as to their respective stands, the learned High Court Judge of Awissawella by his order dated 24th august 2017 has dismissed the application of revision.

It had been determined that the appellant has no basis to contend that there was no valid charge against the accused in the Magistrate Court case, since the accused has pleaded guilty to the charge preferred against him, and he is not entitled to raise an objection to the charge at the stage of the inquiry held in terms of section 40 of the Forest Ordinance.

The learned High Court Judge has relied on the decided Court of Appeal case of **H.G.Sujith Priyantha Vs. The Attorney General CA (PHC) 157/12 decided on 19-12-2015,** where it was held that a claimant of a vehicle in terms of the proviso of section 40 of the Forest Ordinance cannot raise the defects of the charge preferred against the accused, once the accused in the case pleads guilty to the charge against him, preferred under section 40 of the Act.

The leaned High Court Judge has decided not to consider the Court of Appeal decision cited by the appellant at the inquiry, namely, the judgment in the case of **Abubackerge Jaleel Vs. The Attorney General CA(PHC) 108/2010 decided on 26-08-2014**, on the basis that it relates to a situation where there was no charge before the Magistrate when the accused in the case was found guilty, which was not the case in relation to the revision application before the High Court.

After considering the evidence placed before the Court by the appellant at the inquiry, the learned High Court Judge has decided that the appellant has failed to establish that he took all the necessary precautions to prevent the offence being committed, and he has no basis to interfere with the order of the learned Magistrate of Awissawella.

At the hearing of this appeal, one of the main grounds of appeal urged by the learned Counsel for the appellant was that there was no valid charge before the Magistrate Court for the accused to be found guilty, even on his own plea, and therefore, there was no basis for the learned Magistrate to call for the owner of the vehicle to show cause as to why the vehicle belonging to him should not be confiscated.

Apart from the above legal contention, it was the position of the learned Counsel that the appellant had adduced sufficient evidence before the Court to justify his claim, but the learned magistrate as well as the learned High Court Judge failed to appreciate the evidence in its correct perspective.

It was the position of the learned State Counsel that the evidence placed before the Court by the appellant at the inquiry held in terms of section 40 of the Forest Ordinance was wholly inadequate to come to a finding that the appellant had taken all the necessary precautions to prevent the offence being committed and that he was unaware of the offence committed by the driver of the vehicle. The learned State Counsel cited the discrepancies in the evidence adduced by the appellant and his driver to substantiate his claim to the vehicle, and moved for the dismissal of the application on the basis that it has no merit.

As this appeal involves questions of law as well as questions of facts, I will now proceed to consider the question of law raised by the learned Counsel for the appellant in relation to the facts of the matter under consideration.

The position taken on behalf of the appellant was that there was no valid charge before the Magistrate Court and hence, there was no basis to attract the provisions of Section 40 of the Forest Ordinance in relation to the vehicle, which was the subject matter of the inquiry.

For the better understanding of the above position, I would now procced to consider the Court of Appeal Judgments relied on by the learned High Court Judge in more detail.

In the judgment of **H. G. Sujith Priyantha Vs. The Attorney General CA (PHC) 157/12 decided on 19-12-2015,** the learned Magistrate of Galle, after an inquiry held in terms of section 40 of the Forest Ordinance, held that the claimant of the vehicle failed to show sufficient cause as to why the vehicle involved in the crime should be released to him, and confiscated the vehicle in terms of the Ordinance. At the consideration of the revision application filed before the relevant High Court challenging the order of the learned Magistrate, an objection was raised, apparently based on a technicality of the charge preferred against the accused of the Magistrate Court case on the basis that that there was no valid charge before the Magistrate Court against the accused and hence, no basis to hold an inquiry as to the vehicle involved.

It was held:

> *"The accused in the Magistrate Court case was convicted on their own plea under section 38(a) and 40(a) read with section 25(2)(b) of the Forest Ordinance as amended, for transporting timber in the relevant vehicle without a valid permit. After facing an inquiry in terms of the proviso of section 40 of the Forest ordinance, the owner of the vehicle cannot now challenge the conviction of the accused based on a defect of the charge preferred against them at the appeal."*

It is clear from the reasoning of the judgment that the rationally behind was that the owner of the vehicle who claimed the vehicle before the Court, or the accused, were not misled as to the charge against them as the relevant sections under which the accused were charged were known to them when the inquiry was held in terms of the proviso of section 40 of the Forest Ordinance, although there may have been technical defects in the charge.

The facts under which the Court of Appeal decided the case of **Abubackerge Jaleel Vs. The Attorney General CA(PHC) 108/2010 decided on 26-08-2014** were very much different to the facts of the matter considered earlier.

The police filed a report under section 136(1)(b) of the Code of Criminal Procedure Act informing the Court that the accused had committed the offences of causing cruelty to animals and transporting them without a permit, which are offences in terms of the Cruelty to the Animals Act and Animals Act respectively.

The Animals Act has similar provisions where a vehicle involved in a transportation of the Animals without a permit can be confiscated.

It was found at the hearing of the appeal against the confiscation of the vehicle, which transported the animals, that although the learned Magistrate had recorded a plea of guilty from the accused, there was no charge framed against them, but only a seal in the case record that the accused was found guilty on his plea.

A.W.A.Salam, J. (P/CA), after considering several judicial decisions on the necessity of framing a charge by a Magistrate, held;

> *"Thus, it would be seen that farming of a charge to give validity to a criminal prosecution or subsequent conviction is absolutely indispensable. The absence of a charge is fatal to the validity of the trial and the conviction as well. This principle has been exhaustively discussed in* ***Abdul Sameem Vs. The Bribery Commissioner (1991) 1 SLR 76*** *in reference to a long line of decided authorities including a full bench decision."*

Held Further;

“An order of confiscation is in fact a punishment which is imposed in addition to the ordinary punishment imposed on the offender. However, if the vehicle used in the commission of the offence belongs to a third party, it is confiscated only after the third party is afforded an opportunity of being heard.

The confiscation of the vehicle has to be based on a conviction which is acceptable in law. If there is no conviction, then there is no confiscation. In other words, a valid conviction is a condition precedent to proceed to call upon the owner of the vehicle, if he is not the offender, to explain himself.”

With the above judicial decisions in mind, I will now focus my attention to the purported charge preferred against the accused in the appeal under consideration.

The charge dated 25-02-2015, filed of record in the Magistrate Court case reads as follows;

චෝදනා පත්‍රයයි

2015.02.25 වැනි දින,

අවිස්සාවේල්ල මහේස්ත්‍රාත් අධිකරණයේදීය.

චූදිත:- විජේසුන්දර රණසිංහ පබලුවේ මොහොට්ටාලගේ චානක සංජීව,

අංක 664/1, පුවක්ගහවෙල වත්ත, කුරුගම්මෝදර, දොඩම්පේ.

ඉහත නම සඳහන් චුදිත වන නුඹ විසින් මෙම අධිකරණයේ බල ප්‍රදේශය ඇතුලත වූ ඇහැලියගොඩ, අමුහේන්කන්ද පාරේ දී 2015.02.10 දින හෝ ඊට ආසන්න දිනයක බලපත්‍ර නොමැතිව අංක SGLD - 0856 දරණ ලොරි රථයෙන් රුපියල් 34458/27 ක් වටිනා කොස් දැව කඳන් 03 ක් සහ රුපියල් 10982/76 ක් වටිනා නැදුන් දැව කඳන් 07 ක් ප්‍රවාහනය කිරීමෙන් 1966 අංක 13, 1979 අංක 56, 1982 අංක 13, 1988 අංක 84, 1995 අංක 23, 2009 අංක 65, දරණ කැළෑ සංශෝදන පනත් වලින් සංශෝදිත ශ්‍රී.ලං.නි.ප්‍ර.සං. 451 වන අධිකාරය වූ කැළෑ ආඥා පනතේ 24 (1) වගන්තිය ප්‍රකාර

අමාත්‍යවරයා විසින් 1986.11.26 වන දින අංක 429/08 දරණ අති විශේෂ ගැසට් පත්‍රයේ ප්‍රසිද්ධ කරන ලද හා 1979.12.26 වන දින අංක 68/14 දරණ අති විශේෂ ගැසට් පත්‍රයෙන් ප්‍රසිද්ධ කල 1979 අංක 02 දරණ කැළෑ නියෝග මාලාවේ 09 (1) නියෝගය සමග කියවිය යුතු 25 වන නියෝගය උල්ලංඝනය කිරීමෙන් දඬුවම් ලැබිය හැකි වරදක් කල බවට මෙයින් චෝදනා කරමි.

මහේස්ත්‍රාත්, අවිස්සාවේල්ල

It is clear from the above charge that the accused had been informed that he would be charged for an offence punishable in terms regulation 25 read with regulation 9(1) of the Forest Regulations promulgated by the subject Minister under the powers vested in him in terms of the Forest Ordinance as amended, and published in the Extraordinary Government Gazette No-68/14 dated 26-12-1979 and No-429/08 dated 26-11-1986.

It is therefore clear that when the accused was charged before the Magistrate Court for the alleged offence committed by him, he had been informed that he would be punished under the terms of the Forest regulations mentioned in the charge.

He has not been informed of any punishable section under the Forest Ordinance, which attracts the provisions of section 40 of the Forest Ordinance, if found guilty.

The relevant section 40(1) of the Forest Ordinance as amended by Forest (Amendment) Act No-65 of 2009 reads as follows;

40. (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 machine 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, vehicle, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall 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.

Interestingly, leave aside the fact that the relevant punishable section or sections in terms of the Forest Ordinance have not been mentioned in the charge, the mentioned regulation 9(1) and the regulation 25 of the Forest Regulation No 02 of 1979 refers to the conditions of the permits issued to a party to transport timber.

The Regulation 09(1) reads thus;

9(1). Where any permit issued for the transport of private timber from any area has expired before such timber has been so transported, the transport of such timber shall not be commenced or continued until the owner or other person time being in charge of the timber has obtained an extension of the time allowed for the permit.

The Regulation 25 reads thus;

25. Every permit issued under the preceding of these regulations shall be subject to such conditions as may be specified in such permit and any infringement of any such conditions shall be deemed to be an offence punishable under section 25 of the Ordinance.

This goes on to show that the two regulations mentioned in the charge are regulations that govern situations once a permit to transport timber has been issued and violation of the conditions attached to such a permit.

It is, therefore, amply clear that the purported charge upon which the accused of the case was found guilty was a charge without mentioning any of the penal provisions of the Forest Ordinance, which attract the provisions of section 40 of the Forest Ordinance, upon which a vehicle involved with the crime can be confiscated.

Under the circumstances, I am unable to find under what provisions of the law the learned Magistrate proceeded to convict the accused and impose a fine on him, and decided to hold an inquiry in relation to the vehicle, which was confiscated.

There is no doubt that the Magistrate Courts are inundated with work, and under normal conditions, it is the prosecution who tender the draft charge. However, since it is the paramount duty of a Magistrate to frame the charge against an accused, it is the duty of the Magistrate to make sure that a proper charge with the necessary ingredients of a charge is in place before recording a plea from an accused person.

It is the view of this Court that convicting a person under an imaginary penal provision, although there is a purported charge before the Court, amounts to convicting without a charge, and the owner of the vehicle whose vehicle that would be subjected to confiscation as a result of such a conviction is entitled to take up an objection in that regard, even at the appeal stage, as it is a matter that involves his property rights.

Salam, J. (P/CA) in the earlier considered case of CA (PHC) 108/2010 after considering whether the claimant of a vehicle has any *locus standi* to challenge the conviction when the accused has not elected to challenge the same observed;

"*It has to bone in mind that an order of confiscation of property whether movable or immovable leads to deprivation of property rights of a citizen. Inasmuch as the Court has to approach the issue relating to the liberty of the subject by giving a strict interpretation of the provisions of the law and the same approach has to be aimed at resolving the issues relating to the legality of the confiscation orders as well, since the confiscatory provisions in any enactment though it may not be strictly called a draconian measure, yet it has such a draconian flavour."*

Therefore, it is my considered view that the learned High Court Judge was misdirected as to the relevant principles of law when he decided not to follow the *stare decisis* of the case CA(PHC) 108/2010, and to follow the case of CA(PHC) 157/12.

I am of the view that the facts relevant to the case under appeal is not a situation where there was a proper charge, but with some technical defects, which has not caused any prejudice to the accused as well as the owner of the vehicle, as contemplated in the case considered by the learned High Court Judge to dismiss the application before him.

It is my view that there was no valid conviction of the accused under the provisions of the Forest Ordinance, and therefore, there was no basis for the owner to be called upon to show cause against a possible confiscation, which was an order based on illegality. I am of the view that consideration of the evidence adduced at the inquiry was not necessary for the learned High Court Judge, if the above legal requirement was considered in its correct perspective.

For the reasons considered above, I am of the view that there were sufficient exceptional grounds before the learned High Court Judge warranting the invoking of the revisionary jurisdiction of the High Court to set aside the order of confiscation of the vehicle owned by the appellant.

Accordingly, I set aside the order dated 04-11-2015 by the learned Magistrate of Awissawella where the vehicle No-SG LD 0856 owned by the appellant was ordered to be confiscated, and the order dated 24-08-2017 of the learned High Court Judge of Awissawella, as both the orders cannot be allowed to stand.

It is ordered that the relevant vehicle shall be released to the appellant.

The Registrar of the Court is directed to communicate this judgment to the relevant High Court as well as the relevant Magistrate Court for necessary action.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal