

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

In the matter of an Appeal under
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Officer-in-charge,
Police Station,
Malwathuhipitiya.

Complainant

Vs.

C.A. Case No: **CA (PHC) 138/2014**

P.H.C. Gampaha Case No:
49/2013/Rev

M.C. Attanagalle Case No: **72431**

D.M. Sanath kumara Abeyratne,
No.108/4, Pasgammuna,
Buthpitiya.

Accused

Wickramarachchi Appuhamilage
Ashoka Priyantha,
No. 28/2, Malwathuhipitiya,
Buthpitiya.

**Vehicle Claimant (Registered
owner)**

AND BETWEEN

Wickramarachchi Appuhamilage
Ashoka Priyantha,
No. 28/2, Malwathuhipitiya,
Buthpitiya.

Vehicle Claimant-Petitioner

Vs.

Officer-in-charge,
Police Station,
Malwathuheripitiya.

Complainant-1st Respondent

D.M. Sanath kumara Abeyratne,
No.108/4, Pasgama,ma,
Buthpitiya.

Accused-2nd Respondent

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

3rd Respondent

AND NOW BETWEEN

Wickramarachchi Appuhamilage
Ashoka Priyantha,
No. 28/2, Malwathuheripitiya,
Buthpitiya.

**Vehicle Claimant-Petitioner-
Appellant**

Vs.

Officer-in-charge,
Police Station,
Malwathuheripitiya.

**Complainant-1st Respondent-
Respondent**

D.M. Sanath kumara Abeyratne,
No.108/4, Pasgama,ma,

Buthpitiya.

**Accused-2nd Respondent-
Respondent**

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

3rd Respondent-Respondent

BEFORE : K. K. Wickremasinghe, J.
Janak De Silva, J

COUNSEL : A.M.L. Amerasinghe for the Vehicle
Claimant-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the 3rd
Respondent-Respondent

WRITTEN SUBMISSIONS : The Vehicle Claimant-Petitioner-Appellant
– On 25.10.2018
The 3rd Respondent-Respondent – On
28.11.2018

DECIDED ON : 29.01.2019

K.K.WICKREMASINGHE, J.

The Vehicle Claimant-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Western Province holden in Gampaha dated 29.09.2014 in Case No. 49/2013/Rev and seeking to set aside the confiscation order made by the Learned Magistrate of

Attanagalle dated 02.09.2013 in Case No. 72431. Both parties agreed to conclude this case by way of written submissions.

Facts of the Case:

The Accused-2nd Respondent-Respondent (hereinafter referred to as the 'accused') was arrested on or about 27.11.2012 for illegally transporting jack timber valued at Rs.45,483/= using the vehicle bearing No. 43-7400. The accused was charged before the Learned Magistrate of Attanagalle under section 38(a), 40, 40A and 25(2)(a) read with section 25(2) of the Forest Ordinance (as amended). The accused had pleaded guilty to the charge and the Learned Magistrate had imposed a fine of Rs. 10,000/= with a default sentence of 6 months imprisonment. Thereafter a vehicle inquiry was held with regard to the lorry bearing number No. 43-7400 and the vehicle claimant-petitioner-appellant (hereinafter referred to as the 'appellant') had given evidence in the said inquiry. After concluding the inquiry, the Learned Magistrate had confiscated the vehicle by order dated 02.09.2013.

Being aggrieved by the said order the appellant filed a revision application in the Provincial High Court of Western Province holden in Gampaha. The Learned High Court Judge has dismissed the same on 29.09.2014 due to lack of exceptional circumstances.

Being aggrieved by the said dismissal the appellant preferred an appeal to this Court.

The Learned Counsel for the appellant has submitted following grounds of appeal;

- 1) The order of the Learned High Court Judge was against the weight of the evidence and facts of this case

- 2) The Learned High Court Judge erred in law in the interpretation of the exceptional circumstances
- 3) The Learned High Court Judge failed to take into account that the Learned Magistrate erred in the interpretation of the authorities referred to in the confiscation order
- 4) The Learned High Court Judge erred in law in the assessment of facts of the case in the Magistrate's Court.

We will consider the facts of the case before going in to the merits of this appeal. According to the evidence led in the vehicle inquiry, the accused was employed by the appellant as a driver in his vehicle to transport vegetables. The vehicle was arrested while transporting jack timber valued at Rs. 45,483/= without a valid permit. The appellant had testified that such timber was transported for a work in the temple and he had no knowledge of such transportation.

The Learned Counsel for the appellant has contended that the Learned Magistrate erred in the interpretation of the authorities referred to in the confiscation order and the Learned High Court Judge has failed to consider the said error. Accordingly the Learned Counsel further contended that Justice Sisira de Abrew, in the case of **L.B. Finance PLC V. OIC, Police station of Beliatta and others [CA (PHC) APN 41/2009]**, has not made any observation as stated by the Learned Magistrate. In the said **L.B. Finance case** it was held that,

"...Surely a finance company cannot participate in a commission of an offence of this nature when the vehicle was not with it. Then the owner envisaged in the law cannot be the absolute owner. If the Court is going to release the vehicle on the basis that the owner of the vehicle is the absolute owner, then after the release it is possible for the absolute owner to give the

vehicle again to the registered owner who can use it for the same purpose...If the Courts of this country take this attitude, the purpose of the legislature enacting the said provision of law would be defeated...

It was further held that,

“...For these reasons I hold that section 433 of the CPC does not apply to an application for confiscation of a vehicle where the allegation is that the vehicle was used to transport animals. The above view is further strengthened by the recent Forest Amendment Act No 65 of 2009 which of course was not in operation at the time of the impugned order was made...”

The Learned Magistrate had referred to the above case as follows;

“...එසේම ඉහත නඩුවේදී ප්‍රශ්නගත කාරණය ලෙස ඉදිරිපත් වූ වාහනයේ අයිතිකරු පිළිබඳ ගැටළුවේදී අධිකරණය දක්වා ඇත්තේ අයිතිකරු ලෙස අර්ථ නිරූපණය කළයුතු වන්නේ, පරම අයිතිකරු නොව ලියාපදිංචි අයිතිකරු බවයි...එසේම වන සංරක්ෂණ පනතට 2009 අංක 65 දරන සංශෝධිත පනතින් කර ඇති සංශෝධනයන්ට අනුව 1979 අංක 15 දරන අපරාධ නඩු විධාන සංග්‍රහ පනතේ 433(A) වගන්තියට අදාළ විධිවිධාන ද අදාළ නොවන බව දක්වා ඇත...” (Page 106 of the brief)

We observe that the Learned Magistrate has correctly summarized the decision of the said LB Finance case (supra). The Learned Magistrate was not forbidden from referring to the said decision even though it was dealing with a confiscation matter under the Animals Act.

The Learned Counsel for the appellant further contended that both orders of the Learned High Court Judge and the Learned Magistrate were against the weight of evidence and facts of the case.

In the case of **Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]**, it was held that,

“The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner.”

The Learned Magistrate had held the vehicle inquiry in which the appellant had testified that he had no knowledge about an offence being committed utilizing his vehicle. However we are of the view that after the amendment No. 65 of 2009 made to the Forest Ordinance, it is mandatory to prove preventive measures taken by a vehicle owner in question. Further such burden should be discharged on a balance of probability. This requirement was emphasized in the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]**, in which it was held that,

*“On a consideration of the ratio decidendi of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest Ordinance, as amended, if the owner of the vehicle in question was a third party, **no order of confiscation shall be made if that owner had proved to the satisfaction of the Court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence.** The ratio decidendi of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability.”* (Emphasis added)

In the case of **K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013]**, it was held that,

“The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle... Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore, it is evident that no meaningful step had been taken either by the owner or his power of attorney holder, of the vehicle that was confiscated in order to prevent an offence being committed by making use of this vehicle.”

In light of the above it is abundantly clear that any vehicle owner whose vehicle is involved in an offence under the Forest Ordinance is bound to prove, on a balance of probability, the preventive measures taken by him. This statutory requirement was correctly observed by the Learned Magistrate of Attanagalle as follows;

“...ඉහත දක්වා ඇති මානවඩු නඩු තීන්දුව සහ මුදුන්කොටුව නඩු තීන්දු සියල්ල වන සංරක්ෂණ ආඥා පනතට 2009 වර්ෂයේ අංක 65 දරන සංශෝධිත පනතින් කරන ලද සංශෝධනයට පෙර තීන්දු කරන ලද නඩු තීන්දු වන අතර ඒ අනුව තවදුරටත් එම නඩුතීන්දුවල හරය මෙම නව නීතිය යටතේ යොදාගත නොහැකි බවට නිරීක්ෂණය කරමි. ව්‍යවස්ථාදායකය නව සංශෝධනය සිදු කරන විට ඉහත නීතිමය තත්වයන් කෙරෙහි පැහැදිලි අවබෝධයෙන් යුතුව අදාළ සංශෝධනයන් කර ඇති බවටද නිරීක්ෂණය කරමි.” (Page 107 of the brief)

We observe that the appellant had not satisfied Court that he took every possible precaution to prevent his vehicle being used for an illegal activity but he had merely testified that he did not have knowledge of an offence being committed. A vehicle owner cannot discharge the burden cast on him by simply denying such knowledge.

The Learned SSC for the 3rd respondent (hereinafter referred to as the '3rd respondent') contended that the appellant admitted in the vehicle inquiry that the accused used to take the vehicle even without informing him and it proves the lack of control the appellant had over his vehicle.

In the case of **Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]**, it was held that,

"For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions..."

We observe that the appellant had not testified at least he gave instructions to the accused to refrain from using the vehicle for illegal activities but had constantly denied his knowledge about an offence being committed.

Further we observe that the appellant in his petition submitted to the High Court had averred that the appellant already filed an appeal against the confiscation order of the Learned Magistrate but proceeded to file a revision application as well. Further the appellant had pleaded that the revisionary jurisdiction to be invoked since the process of appeal might take a longer time period and that would defeat the results of the said appeal (Paragraph 7 of the petition at page 60 of the brief). Therefore the appellant had pleaded said ground to be considered as an exceptional circumstance together with the grounds averred in paragraph 06 of the petition.

However it is imperative to note that the Forest Ordinance does not grant a right of appeal against confiscation orders made in terms of the said Ordinance. This question of law was correctly addressed by the Learned High Court Judge of Gampaha in the order dated 29.09.2014 (At page 49 – 51 of the brief).

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. and others (2003) 3 Sri L.R 24**, it was held that,

“Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal...” (Emphasis added)

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L.R. 284**, it was held that;

“In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court.”

In the case of **Rasheed Ali V. Mohamed Ali and others (1981) 2 SLR 29**, it was held that,

“The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However this discretionary

remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."

In light of above, we decide to agree with the conclusion arrived by the Learned High Court Judge of Gampaha which was well within law. Therefore we see no reason to interfere with the findings of the Learned Magistrate of Attanagalle and the Learned High Court Judge of Gampaha. We affirm the confiscation order dated 02.09.2013 and the order of the Learned High Court Judge dated 29.09.2014.

Accordingly the appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree.

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. L.B. Finance PLC V. OIC, Police station of Beliatta and others [CA (PHC) APN 41/2009],
2. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]
3. The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]
4. K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013]
5. Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]
6. Dharmaratne and another V. Palm Paradise Cabanas Ltd. and others (2003) 3 Sri L.R 24
7. Bank of Ceylon V. Kaleel and others [2004] Sri L.R. 284
8. Rasheed Ali V. Mohamed Ali and others (1981) 2 SLR 29