

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.

C.A. Case No: **CA (PHC) 197/2013**

P.H.C. Rathnapura Case No:
HCR/RA/60/2013

M.C. Balangoda Case No: **40643/12**

W.P. Wanigasinghe,
Area Forest Officer,
Balangoda.

Complainant

Vs.

Chamira Heshan Samarasinghe,
No. 106, Pettigala Road,
Bombuwa, Balangoda.

Hodamunilage Asanka,
No. 13A, Saraswathi Road,
Uda Ellepola, Balangoda

Accused

Samarasinghege Dharmasena,
No. 54, Main Street,
Balangoda

**Vehicle Claimant (Registered
owner)**

AND BETWEEN

Samarasinghege Dharmasena,
No. 54, Main Street,
Balangoda

Vehicle Claimant-Petitioner

Vs.

W.P. Wanigasinghe,
Area Forest Officer,
Balangoda.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Samarasinghege Dharmasena,
No. 54, Main Street,
Balangoda

**Vehicle Claimant-Petitioner-
Appellant**

Vs.

W.P. Wanigasinghe,
Area Forest Officer,
Balangoda.

**Complainant-Respondent-
Respondent**

Hon. Attorney General

Attorney-General's Department,
Colombo 12.

Respondent-Respondent

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

COUNSEL : AAL D. Gunawardena for the Vehicle
claimant-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the
Respondent-Respondent

INQUIRY ON : 14.11.2018

WRITTEN SUBMISSIONS : The Vehicle Claimant-Petitioner-Appellant
– On 05.09.2018
The Respondent-Respondent –
On 24.08.2018

DECIDED ON : 22.01.2019

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 Sabaragamuwa Province holden in Ratnapura dated 09.12.2013 in Case No. HCR/RA/60/2013 and seeking to set aside the confiscation order made by the Learned Magistrate of Balangoda dated 11.10.2013 in Case No. 40643/2012. At the stage of inquiry, both parties agreed to abide by the written submissions which were already filed.

Facts of the case:

The complainant-respondent-respondent (hereinafter referred to as the 'respondent') had arrested above named two accused on or about 10.04.2012 for illegally transporting 'Mahogany timber' valued at Rs. 73737.93. The accused were charged before the Learned Magistrate of Balangoda under section 40, 40A, 40B and 52 read with section 25(2) of the Forest Ordinance (as amended). The accused had pleaded guilty to the charge and the Learned Magistrate had convicted them and imposed a fine of Rs. 25,000/=. Thereafter a vehicle inquiry was held with regard to the vehicle registered under SG LB 3270 which was allegedly used for the commission of offence. After concluding the inquiry the Learned Magistrate of Balangoda confiscated the vehicle by order dated 11.10.2013.

Being aggrieved by the said order the vehicle claimant-petitioner-appellant (hereinafter referred to as the 'appellant') preferred a revision application to the Provincial High Court of Sabaragamuwa Province holden in Rathnapura. On 09.12.2013, the Learned High Court Judge of Rathnapura dismissed the said revision application.

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 Learned High Court Judge has failed to consider the evidence of the appellant which goes to the root of the matter
2. The Learned High Court Judge has failed to apply the principle of probability and improbability in deciding the matter in dispute

3. The Learned High Court Judge has failed to consider that the appellant had given specific instructions to the accused not to use the vehicle for illegal activities
4. The judgment dated 09.12.2013 is inequitable in the facts and circumstances of the action, and may cause irremediable damage and prejudice to the appellant
5. The findings of the Learned High Court Judge are erroneous and contrary to the weight of the evidence

It is well settled law that in a vehicle inquiry the claimant has to discharge his burden on a balance of probability. According to section 40 of the Forest Ordinance (as amended) it is mandatory to prove on a balance of probability that the owner took every possible precaution to prevent the vehicle being used for an illegal activity.

In the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]**, 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.”

In the case of **Manawadu V. The Attorney General (1987) 2 Sri L.R. 30**, it was held that,

"By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. The amended sub-section 40 does not exclude by necessary implication the rule of 'audi alteram partem'. The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture..."

In the case of **K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura [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 case law it is observed that our Supreme Court and the Court of Appeal, in certain instances, had considered the knowledge of the vehicle owner about an offence being committed. However we are of the view that Court should particularly look into the preventive measures taken by the vehicle owner whose vehicle is involved in an offence under Forest Ordinance since it is now required by the amendment made to the section 40 of the Forest Ordinance in 2009. The proviso to **Section 40(1) of the Forest Ordinance (as amended by Act No.65 of 2009)** reads that;

“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.”

Therefore it is understood that the Legislature has particularly stressed on the preventive measures taken by a vehicle owner whose vehicle is involved in an offence under the Forest Ordinance.

We perused the evidence given by the registered owner of the instant appeal (appellant) at the vehicle inquiry. The appellant had handed over the vehicle to his younger brother's son for hiring purposes and had instructed the driver to refrain from using the vehicle for illegal transportations. Further the appellant had admitted that he did not have time to check the vehicle frequently due to his business. The appellant had testified in the vehicle inquiry as follows;

“උ: ඔව්. මගේ වැඩ කටයුතු අධික නිසා මේ කටයුතු සම්බන්ධයෙන් සොයා බැලීමක් වුණේ නැහැ. මා කියා සිටියා නිතරම නීති විරෝධී වැඩවලට මෙම රථය

යොදා ගන්න එපා කියා. මේ රථය සම්බන්ධයෙන් මට නිතරම සොයා බලන්න වුණේ නැහැ, ව්‍යාපාර කටයුතු නිසා.

ප්‍ර: තමාගේ වැඩ බහුලතාවය නිසා තමාට මේ රථය සම්බන්ධයෙන් සොයා බැලීමට වෙලාවක් තිබුණේ නැහැ කිව්වා?

උ: ඔව්” (Page 60 and 61 of the brief)

It demonstrates that the appellant was not in a position to regularly inquire about his vehicle and he had no control over the vehicle.

The Learned SSC for the respondent contended that the appellant stated in the examination in chief that the vehicle would be parked at the accused's place and however during the cross examination he stated that the vehicle would be parked at his place. The Learned SSC further contended that since the appellant lied over the matters whilst giving evidence, such evidence was not corroborated. Accordingly we observe that the appellant had taken two different positions in the examination in chief and cross examination (Page 56 and 62 of the brief). We further observe that the appellant had only given instructions to the accused not to use the vehicle for illegal activities.

However 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..."

In light of the above it is amply clear that simply giving instructions to the driver is insufficient to discharge the burden cast on a vehicle owner. Therefore merely

giving instructions alone will not fall under the possible preventive measures ought to be taken by a vehicle owner.

The appellant, in the petition submitted to the High Court, has contended that the Learned Magistrate of Balangoda has confiscated the vehicle after an inquiry that was not conducted according to the proper procedure. However the Learned Counsel for the appellant neither in the High Court nor in this Court has explained what was the exact irregularity in the procedure adopted by the Learned Magistrate.

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.”

We observe that the Learned Magistrate had cited the aforesaid Manawadu case (supra) in the order dated 11.10.2013 and correctly followed the principles of natural justice by allowing the appellant to show cause in a vehicle inquiry. Accordingly we find that the Learned Magistrate had followed the right procedure.

It is trite law that the revisionary power of Court shall be invoked only upon the demonstration of exceptional circumstances. This position was upheld in following series of authorities;

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 **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..."

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..."

These authorities manifest that it is mandatory to demonstrate the existence of exceptional circumstances to the satisfaction of Court in order to invoke the revisionary jurisdiction. We observe that the appellant has failed to establish

exceptional circumstances to the satisfaction of the High Court and therefore the Learned High Court Judge was correct in refusing to interfere with the confiscation order made by the Learned Magistrate of Balangoda.

Considering above, we see no reason to interfere with the order of the Learned High Court Judge of Rathnapura dated 09.12.2013 and the confiscation order of the Learned Magistrate of Balangoda dated 11.10.2013. Therefore we affirm the same.

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

1. The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]
2. Manawadu V. The Attorney General (1987) 2 Sri L.R. 30
3. K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura [CA (PHC) 89/2013].
4. Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]
5. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]
6. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284 Dharmaratne and another V. Palm Paradise Cabanas Ltd. and others (2003) 3 Sri L.R 24
7. Rasheed Ali V. Mohamed Ali and others (1981) 2 SLR 29