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

In the matter of an Appeal made in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 and 154P(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No: **CA (PHC) 97/2015**

P.H.C. Chilaw Case No: **HCR 05/2015**

M.C. Marawila Case No: **97916**

The OIC,
Police Station,
Wennappuwa.

Complainant

Vs.

Rathugamage Sunil Damien Fernando,
Katukenda, Dankotuwa.

Accused

Liyanarachchige Sarath Vijaykumara,
No. 83/09, Godella,
Dankotuwa

Claimant

AND BETWEEN

Liyanarachchige Sarath Vijaykumara,
No. 83/09, Godella,
Dankotuwa

Claimant-Petitioner

Vs.

1. The Attorney General
   Attorney-General's
   Department,
   Colombo 12.
2. The OIC,
   Police Station,
   Wennappuwa.

Respondents

AND NOW BETWEEN

Liyanarachchige Sarath Vijaykumara,
No. 83/09, Godella,
Dankotuwa

Claimant-Petitioner-Appellant

Vs.

1. The Attorney General
   Attorney-General's
   Department,
   Colombo 12.
2. The OIC,
   Police Station,
   Wennappuwa.

Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : AAL Dimuthu Senarath Bandara with AAL Ramitha Dissanayake for the Claimant-Petitioner-Appellant

		Nayomi Wickremasekara, SSC for the Respondents-Respondents
ARGUED ON	:	12.03.2019
WRITTEN SUBMISSIONS	:	The Claimant-Petitioner-Appellant – On 29.10.2018 The Respondents-Respondents – On 29.10.2018 & 04.06.2019
DECIDED ON	:	20.09.2019

K.K.WICKREMASINGHE, J.

The 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 North Western Province holden in Chilaw dated 15.09.2015 in Case No. HCR 05/2015 and seeking to set aside the confiscation order made by the Learned Magistrate of Marawila dated 20.04.2015 in Case No. 97916.

Facts of the Case:

The accused-driver (hereinafter referred to as the 'accused') was charged in the Magistrate's Court of Marawila for transporting timber worth of Rs. 6463.34 on or about 13.02.2015, utilizing a vehicle bearing No. 68-5346 and thereby committed an offence punishable under the Forest Ordinance. The accused pleaded guilty to the charge and the Learned Magistrate convicted him and imposed a fine of Rs. 10,000/=.

Thereafter, a vehicle inquiry was held with regard to the vehicle bearing number No. 68-5346 and the claimant-petitioner-appellant (hereinafter referred to as the

'appellant') claimed the vehicle in the said inquiry. At conclusion of the inquiry, the Learned Magistrate confiscated the vehicle by order dated 20.04.2015.

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of North Western Province holden in Chilaw, which was dismissed by the Learned High Court Judge on 15.09.2015.

Thereafter, the appellant preferred this appeal.

The Learned Counsel for the appellant averred following grounds of appeal in the written submissions;

1. The Learned High Court Judge and the Learned Magistrate have failed to appreciate that the degree and limits of precautions an owner of vehicle could take depend on the prevailing circumstances of each case, and thereby erred in concluding that the appellant has failed to sufficiently show cause in the confiscation inquiry.
2. The Learned High Court Judge erred in refusing to follow the judgment of this Court in case No. CA (PHC) 03/2013, which is more fully appropriate under the circumstances of the present matter.
3. In any event the confiscation of the vehicle is bad in law due to the relevant charge being framed under a repealed and non-existing provision of law
4. The confiscation order is bad in law due to the failure of the Learned Magistrate to charge the accused under the specific penal provision which empowers liability of confiscation.

At the vehicle inquiry, the appellant and one Nilmini gave evidence. As per the evidence, said Nilmini was the registered owner from whom the appellant bought the vehicle in question, on a power of attorney. The accused was a close friend of

the appellant and the vehicle was given on a request of the accused. The appellant testified that he had no knowledge about an illegal transport of timber.

The Learned Counsel for the appellant contended that the Learned High Court Judge and the Learned Magistrate have failed to appreciate that the degree and limits of precautions an owner of vehicle could take depend on the prevailing circumstances of each case. It was argued that uniformity of an equal level of precautions should not be expected from every vehicle owner. It was further submitted that the appellant had a very limited scope in the precautions he could take and the Learned Magistrate should not have expected a higher degree of precautions from the appellant.

In answer to the above contention, the Learned SSC for the respondent submitted that village social background does not exclude criminal liability imposed upon a person and since the purpose of the Act is to ensure the forest is saved, the Act includes strict provisions to ensure that no person transports timber without a valid license.

As per section 40 of the Forest Ordinance (as amended) a vehicle owner in question is required to prove to the satisfaction of the Court that he had taken all precautions to prevent an offence being committed utilizing his vehicle.

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."* (Emphasis added)

In the case of **Ceylinco Leasing Corporation Limited V. M.H. Harison and others [SC Appeal No. 43/2012 – decided on 08.12.2016],** it was observed that,

"Forest Ordinance No.16 of 1907, is described in its long title as "an Ordinance to consolidate and amend the law relating to forests and felling and transport of timber". Some of the provisions of the Act reflects the choice of policy, in the instant case it is undoubtedly designed with a view to protect the environment."

I wish to express my agreement with the above observation. It is manifestly clear that the Legislature was trying to enact strict provisions with regard to the offences concerning the environment. This attempt was manifested through avoiding to mention about the knowledge of the vehicle owner, in the requirements under section 40 of the Forest Ordinance as well. In such a backdrop, I do not think that a vehicle owner can simply get away from the burden of proving the precautions taken by him, by stating that he had a limited control over the vehicle. Having a limited control over his own vehicle itself proves that the vehicle owner was not taking his responsibility of ensuring the vehicle was not used for any illegal purpose, in a serious manner.

The Learned Magistrate made the following observation is his order;

"ලියාපදිංචි අයිතිකාරියද හිමිකම්පාන්නාද සාක්ෂි ලබාදෙමින් ඔවුන් අයිතිවාසිකම් කියන රථය නීති විරෝධී කාර්යයක් සඳහා භාවිතා කිරීම වැළැක්වීමට ගනු ලැබූ කිසිදු පූර්වාරක්ෂණ ක්‍රමයක් සඳහන් කර නැත. ලියාපදිංචි අයිතිකාරිය සරත් විජය කුමාර යන අයට පැමිණිල්ලේ සඳහන් කැන්ටර් රථය පවරා දීමෙන් පසු ඒ

සම්බන්ධ සොයා නොබැලූ බව ඇයගේ සාක්ෂි අනුව තහවුරු වේ..." (Page 70 of the brief)

The Learned Magistrate further observed that the appellant had given his vehicle to a third party, without taking any precaution, just after 06 days he bought the vehicle. I think that the Learned Magistrate was very correctly evaluating the evidence to find out the precautions taken by the appellant as required by the Forest Ordinance. I am of the view that not mentioning any precautions taken by a vehicle owner, arguing that precautions could depend on circumstances, is not sufficient to satisfy Court on a balance of probability that the vehicle owner took precautions within his capability. It is clear that the Learned Magistrate was not expecting any higher degree of precautions, but was evaluating the evidence in order to find out whether the appellant had fulfilled the requirements stated in section 40 of the Forest Ordinance. Therefore, I do not see any merits in the first ground of appeal.

The Learned Counsel for the appellant argued that the Learned High Court Judge erred in refusing to follow the judgment of this Court in case **No. CA (PHC) 03/2013**, which is more fully appropriate under the circumstances of the present matter.

The Learned SSC for the respondent submitted that considering the value of timber and previous convictions would futile the purpose for which the Act was enacted.

The Learned High Court Judge has referred to several cases in his order, including;

1. **H.G. Sujith Priyantha V. OIC, Police Station, Poddala and others [CA (PHC) 157/2012 – decided on 19.02.2015]**
2. **A.M. Sadi Banda V. Officer-in Charge, Police Station, Norton Bridge [CA (PHC) 03/2013 – decided on 25.07.2014]**

However, the Learned High Court Judge stated that he decided to follow the decision in the case of **Sujith Priyantha (supra)**, since the Court is not prevented from following the said decision as per *Stare decisis* rule. Both these cases were decided by a bench consisting two Judges of this Court.

I observe that facts of the **A.M. Sadi Banda (supra) case** are quite different from the instant appeal. Further, I observe that the sole requirement of section 40 is 'proving precautions taken by the vehicle owner to prevent an offence being committed'. The Act does not specify about the value of timber. Therefore, it is understood that the purpose of section 40 is to confiscate a vehicle involved in an offence under Forest Ordinance regardless of the value of the timber. As I have already observed, the purpose of the Act would not be achieved if the Court decides to look into external factors like value of the timber and previous convictions against the same vehicle, since section 40 specifically lays down requirements to be fulfilled in order to avoid a vehicle being confiscated. Therefore, I am of the view that the Learned High Court Judge was not forbidden from following a different decision of this Court, other than Sadi Banda case, as he found it more relevant.

At this juncture, I wish to consider 3rd and 4th grounds of appeal together since both these grounds address a defect in the charge. The Learned Counsel for the appellant contended the confiscation of the vehicle is bad in law due to the relevant charge being framed under a repealed and non-existing provision of law and due to the failure of the Learned Magistrate to charge the accused under the specific penal provision which empowers liability of confiscation.

The Learned Counsel for the appellant submitted following cases in support of his contention;

1. **Abdul Sameem V. The Bribery Commissioner (1991) 1 Sri LR 76**
2. **Godage and others V. OIC, Kahawatte Police (1992) 1 Sri LR 54**
3. **David perera V Attorney General (1997) 1 Sri LR 370**
4. **Fernando V. Attorney General (1985 Srikantha Law Reports 1 CA)**
5. **Ebert V. Perera [23 NLR 362]**

I observe that case of Godage (supra) and Abdul Sameem (supra) had dealt with the issue of failure to frame a charge sheet by the Learned Magistrates. In the case of Godage, there was no charge sheet at all. In the case of Abdul Sameem, a written report was filed by the Bribery Commissioner, that the accused had committed two offences under the Bribery Act and the Magistrate adopted the said report by placing a seal. In the said case, there had been a failure to frame charge by the Learned Magistrate. Therefore, I find these cases to be very different from the instant appeal and they are not supportive of the argument raised by the Learned Counsel for the appellant.

Section 164(4) of the Code of Criminal Procedure Act stipulates that the law and section of the law, under which the offence said to have been committed is punishable, shall be mentioned in the charge. As per **Section 166 of the Code of Criminal Procedure Act,**

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

Accordingly, it is understood that a mere omission or defect in the charge sheet would not be regarded as material unless said defect has caused prejudice to the appellant. I observe that, the charge of the instant case contained relevant details of the offence such as the date of the offence, the place of offence committed, vehicle

number, value of the timber, section of the offence, relevant gazette notifications and relevant amendments. The charge refers to section 38(a), 40(a) and 25(2) of the Forest Ordinance. I am of the view that these particulars were reasonably sufficient to give the accused notice of the matter with which he was charged.

The Learned Counsel for the appellant submitted that there is no reference to the Amendment Act No. 65 of 2009 and section 40(1) in the charge sheet. Accordingly, it was contended that section 40(1) should have been expressly mentioned in the charge since confiscation is a punishment.

As per section 40(1)(b), all tools, vehicles, implements, cattle and machines used in committing an offence under the Forest Ordinance, shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate. I am of the view that section 40(1) has application to the whole Ordinance. Therefore, any vehicle involved in an offence under the Forest Ordinance shall be subject to confiscation upon a valid conviction regardless of the said section 40 being mentioned in the charge sheet or not. Accordingly, I am of the view that it is not mandatory to expressly mention section 40(1) in the charge sheet. Further, such non-mentioning would not cause any prejudice to a vehicle owner since only an accused is charged in such offences. The vehicle owner in question is not mentioned in the charge sheet and confiscation follows only after a valid conviction. Therefore, I am of the view that the section, under which the accused is charged, being mentioned is sufficient and confiscation is inevitable for the vehicle owner subsequent to a valid conviction arisen from the said charge.
Further, it is imperative to note that the accused-driver in the instant appeal had pleaded guilty to the charge of illegally transporting timber.

In the case of **H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]**, it was held that,

> *"The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in the case of Wickramasinghe Vs Chandradasa 67 NLR 550 is important. Justice Sri Skanda Rajah in the said case observed the following facts.*
>
> > *"Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned."*

His Lordship held as follows;

> *"The omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable."*

In the case of **H. G. Sujith Priyantha (supra),** it was held that,

> *"In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time. Indeed, an application under the aforesaid proviso to Section 40 in the Forest*

Ordinance could only be made when confiscation has taken place under the main Section 40 of the Forest Ordinance. Aforesaid main Section 40 of the Forest Ordinance imposes a duty upon the Magistrate who convicted the accused under the Forest Ordinance to confiscate the vehicle used in committing such an offence. Furthermore, the word "shall" is used in that main section and therefore the confiscation of the vehicle is automatic when the accused is found guilty. Accordingly, it is clear that the law referred to in the proviso to Section 40 is applicable only thereafter. Therefore, I conclude that the appellant who made the application relying upon the proviso to Section 40 is not entitled to raise an issue as to the defects in the charge after the accused have pleaded guilty to the charge under Section 40 of the Forest Ordinance.

In the case of **A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]**, it was held that,

"The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier the Accused-Appellant has failed to raise any objections to the charge at the trial. In this regard I rely on the judgment of ***the Court of Criminal Appeal in 45 NLR page 82 in King V. Kitchilan wherein the Court of Criminal appeal held as follows****:*

> *"The proper time at which an objection of the nature should be taken is before the accused has pleaded"*

It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception."

Accordingly, it is understood that a party is not allowed to raise an objection with regard to a defect in the charge sheet at a belated point of time. The appellant should have raised this objection as early as possible. Therefore, I am of the view that the allowing the appellant to stand on the ground of defective charge at this stage will lead to absurdity. Accordingly, last two grounds of appeal should necessarily fail.

Considering above, I see no reason to interfere with the findings of the Learned High Court Judge and the Learned Magistrate. Therefore, I affirm the order of the Learned Magistrate dated 20.04.2015 and the order of the Learned High Court Judge dated 15.09.2015.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]
2. Ceylinco Leasing Corporation Limited V. M.H. Harison and others [SC Appeal No. 43/2012]
3. H.G. Sujith Priyantha V. OIC, Police Station, Poddala and others [CA (PHC) 157/2012]
4. A.M. Sadi Banda V. Officer-in Charge, Police Station, Norton Bridge [CA (PHC) 03/2013]
5. H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]
6. A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]