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

C.A. Case No: **CA (PHC) 165/2014**

P.H.C. Kurunegala Case No: **HCR 06/2013**

M.C. Narammala Case No: **78601**

Officer in charge,
Police Station,
Narammala.

Plaintiff

Vs.

Jayakody Mudiyanselage Wijayakumara,
No. 32, Ruwangiri Sewana,
Kadahapola.

Accused

AND BETWEEN

Karunapedi Durayalage Sumana Kumara,
No. 61, Galkatigedara Watta,
Dampalassa.

Petitioner

Vs.

Officer in charge,
Police Station,
Narammala.

1st respondent

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

2nd Respondent (Complainant)

Jayakody Mudiyanselage Wijayakumara,
No. 32, Ruwangiri Sewana, Kadahapola.

3rd Respondent (Accused)

AND NOW BETWEEN

Karunapedi Durayalage Sumana Kumara,
No. 61, Galkatigedara Watta,
Dampalassa.

Petitioner-Appellant

Vs.

Officer in charge,
Police Station,
Narammala.

1st Respondent-Respondent

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

2nd Respondent-Respondent (Complainant)

Jayakody Mudiyanselage Wijayakumara,
No. 32, Ruwangiri Sewana, Kadahapola.

3rd Respondent-Respondent(Accused)

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	B. Gamage for the Petitioner-Appellant Nayomi Wickremasekara, SSC for the 1st and 2nd Respondents-Respondents
ARGUED ON	:	25.03.2019
WRITTEN SUBMISSIONS	:	The Petitioner-Appellant – 21.11.2018 The Respondents-Respondents – On 19.10.2018
DECIDED ON	:	22.10.2019

K.K.WICKREMASINGHE, J.

The 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 Kurunegala dated 01.10.2014 in Case No. HCR 06/2013 and seeking to set aside the confiscation order made by the Learned Magistrate of Narammala dated 21.11.2012 and 05.12.2012 in Case No. 78601.

Facts of the Case:

The 3rd respondent-respondent (hereinafter referred to as the 'accused') was charged in the Magistrate's Court of Narammala for transporting timber worth of Rs. 42870.52 on or about 12.06.2012, utilizing a tractor bearing No. 25 Shri 9744 along with a trailer, and thereby committed an offence punishable under section 25(2) of the Forest Ordinance. As per the order dated 21.11.2012, the accused pleaded guilty to the charge and the Learned Magistrate convicted him (relevant journal entries or proceedings are not available in the brief).

Thereafter, a vehicle inquiry was held with regard to the tractor and the trailer and the 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 21.11.2012. The appellant made an application for trailer, subsequently. The Learned Magistrate refused the said application and confiscated the trailer on 05.12.2012, stating that the previous confiscation order of the tractor in fact included the trailer as well.

Being aggrieved by the said orders, the appellant filed a revision application in the Provincial High Court of North Western Province holden in Kurunegala. The Learned High Court Judge released trailer by the order dated 01.10.2014 and affirmed the order of the Learned Magistrate with regard to the confiscation of tractor.

Thereafter, the appellant preferred this appeal.

The Learned Counsel for the appellant has submitted following grounds of appeal, in written submissions;

1. The Learned Magistrate and the Learned High Court Judge erred in law by not considering the fact that the 3rd respondent took the vehicle beyond control of the appellant and the offence was committed without knowledge of the appellant.
2. The Learned Magistrate and the Learned High Court Judge erred in law by not considering the fact that appellant has taken all precautions to prevent the offence being committed.
3. The Learned Magistrate and the Learned High Court Judge erred in law by not considering the fact that absence of a charge is fatal to the validity of the

trial and conviction. Therefore, if there is no conviction, there is no confiscation.

In the written submissions for the appellant, it was stated that "the Learned Magistrate and High Court Judge as well as Honourable Judges of Court of Appeal were erred in law..." in all three grounds of appeal. Since this is an appeal against the orders of the Learned Magistrate and the Learned High Court Judge, mentioning about this Court appears to be an error committed by the Attorney-at-Law who made written submissions. Therefore, I ignore it as it appears to be a mistake.

The Learned Counsel for the appellant contended that the Learned Magistrate and the Learned High Court Judge did not consider the fact that the 3rd respondent-respondent (hereinafter referred to as the 'accused') took the vehicle and committed the offence without the knowledge of the appellant. It was submitted that the appellant testified in the vehicle inquiry, about the accused taking the vehicle beyond the control of the appellant (Page 61 of the brief).

It is trite law that a vehicle owner in question is required to prove preventive measures taken by him to prevent an offence being committed, on a balance of probability.

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 **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..."

In light of above, it is understood that the appellant need to discharge the burden cast on him by placing sufficient evidence before the Court. I think that merely stating that the owner did not have control over his vehicle certainly will not discharge said burden and it would rather establish the fact that the owner was not taking any measures to prevent an offence being committed.

In the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that,

"...A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose..."

Further, it is imperative to note that as per section 40 of the Forest Ordinance (amendment Act No. 65 of 2009), it is mandatory to prove preventive measures taken by the vehicle owner in question. Even though the previous law allowed a vehicle owner to prove either he took precautions or he had no knowledge of an offence being committed, the amended section 40 only focuses on the precautions taken by a vehicle owner in question. Therefore, I am of the view that mere denial of the knowledge about an offence being committed or denial of the control over his own vehicle is not sufficient for a vehicle owner to discharge the burden cast on him, under section 40 of the Forest Ordinance (as amended). Therefore, the 1st and 2nd grounds of appeal should necessarily fail.

Now I consider the 3rd ground of appeal which argued that the Learned Magistrate and the Learned High Court Judge erred in law by not considering the fact that absence of a charge is fatal to the validity of the trial and conviction. In the petition, it was averred that the recent amendment to the Forest Ordinance was not mentioned in the charge and therefore, the amended section 40 should not be applied to the instant case. It was further submitted that Gazette notifications mentioned in the charge are non-existing. The Learned SSC for the 1st and 2nd Respondents-Respondents submitted that no objection has been taken at the outset when the accused pleaded guilty nor such objection as to the validity of the vehicle inquiry was taken up at the stage of the inquiry. It was further submitted that the charge sheet clearly makes reference to all the requirements under section 164 of the Code of Criminal Procedure Act and the accused was not misled in any manner.

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

that 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.

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

In the case of **H.G. Sujith Priyantha V. OIC, Police Station, Poddala and others [CA (PHC) 157/2012 – decided on 19.02.2015],** 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..."*

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."

In light of above, 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. This Court has held in numerous occasions that it would be absurd to allow an appellant in a vehicle confiscation case to stand on the ground of defective charge, at the stage of appeal. I am of the view that above said defect was not material to the conviction, especially given the fact that the accused pleaded guilty to the charge. Therefore, the 3rd ground of appeal too should fail.

Considering above, I see no reason to interfere with the order of the Learned High Court Judge of Kurunegala. Therefore, I affirm the same.

Accordingly, 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. K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013]
3. W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]
4. H.G. Sujith Priyantha V. OIC, Police Station, Poddala and others [CA (PHC) 157/2012]
5. A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]