

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

An Appeal under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Article 154(P)(6) of the Code of Criminal Procedure Act No. 15 of 1979.

**Court of Appeal**

**Application No:**

**CA (PHC) 0143/2019**

**High Court of Kandy**

**Case No. HCR 99/18**

**MC Kandy**

**Case No.20590/17**

The Officer-in-Charge

Police Station

Alawathugoda.

**Complainant**

**Vs.**

1. Arifdeen Mohamed Anfaz

288, Telembugewatta, Akurana.

2. Hasan Ali Gedera Mohammed Faris

Mohamed Fazmil

103, Bulugahatenna, Akurana.

**Accused**

**AND**

Mohamed Mubarak Mumthas Mohamed

348, Matale Road, Akurana.

**Registered Owner-Claimant-**

**Petitioner**

**Vs.**

1. The Officer-in-Charge  
Police Station  
Alawathugoda.
2. The Attorney General  
Attorney General's Department  
Colombo-12.

**Respondents**

**AND NOW BETWEEN**

Mohamed Mubarak Mumthas Mohamed  
348, Matale Road, Akurana.

**Registered Owner-Petitioner-**

**Appellant**

**Vs.**

1. The Officer -in-Charge  
Police Station  
Alawathugoda.
2. The Attorney General  
  
Attorney General's Department  
Colombo-12.

**Respondent-Respondents**

**BEFORE** : **Sampath B. Abayakoon, J.**

**P. Kumararatnam, J.**

**COUNSEL** : **Nizam Kariapper, PC with Ahamed  
Ilham N. Kariapper and Chathurika  
Perera for the Appellant.  
Malik Azeez, SC for the Respondents.**

**ARGUED ON** : **03/09/2024.**

**DECIDED ON** : **18/12/2024.**

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### **JUDGMENT**

**P. Kumararatnam, J.**

The Respondent-Respondents (hereinafter referred to as the 1<sup>st</sup> Respondent) filed a charge sheet Under Section 23(2) read with Sections 38(a), 40, 40(a) and 25(2) of the Forest Ordinance against the Accused in the Magistrate Court of Kandy for illegally transporting timber without a valid permit on 05.08.2017. As the Accused persons pleaded guilty to the charge sheet, the Learned Magistrate of Kandy had convicted the

Accused persons as charged and imposed a fine of Rs.10,000/- each with a default sentence and fixed for an inquiry whether to confiscate or not the vehicle bearing No. 251-9353 which had been used for the transportation of the timber mentioned above.

At the conclusion of the inquiry, the Learned Magistrate had decided to confiscate the aforesaid vehicle by his order dated 26.09.2018. At the inquiry, the Registered Owner-Petitioner-Appellant (Hereinafter referred to as the Appellant) and two witnesses gave evidence and marked seven documents.

Being aggrieved by the order of the Magistrate, the Appellant filed a Revision Application in the Provincial High Court of Kandy to revise the order of the Learned Magistrate of Kandy. After an inquiry, the Learned High Court Judge of Kandy by her order dated 26.09.2019 dismissed the revision application on the basis that the 2<sup>nd</sup> Accused who admittedly had the possession and control of the vehicle had pleaded guilty to the charge.

Now the Appellant filed this appeal to set aside the order of the Learned High Court Judge of Kandy dated 26.09.2019 and the order of Learned Magistrate of Kandy dated 26.09.2018.

**The Appellant submitted following grounds of appeal:**

- i. The Learned High Court Judge erred in law in holding that the 'owner' for the purpose of section 40 of the Forest Conservation Ordinance as amended was the 2<sup>nd</sup> Accused;
- ii. The Learned High Court Judge failed to appreciate the factual differences between the judgment in *Ceylon Leasing Corporation Limited v. M. H. Harrison*, OIC Kuttigala (SC Appeal 43/2012) and the facts before the Learned High Court Judge and thereby erred in fact and in law;

- iii. The Learned High Court Judge erred in fact and in law in holding that the registered owner had failed to prove that he had taken all precautions to prevent the use of the vehicle for the commission of the offence;
- iv. The Learned High Court Judge has failed to consider that the motor van was not a vehicle usually used for transporting timber and thereby has erred in fact and in law;
- v. The Learned High Court Judge has wrongly applied the concept of 'possession and control' of the motor vehicle and thereby has erred in fact and in law; and,
- vi. The Judgement is bad in law and contrary to the evidence placed before the Learned Magistrate of Kandy.

In this case the Learned High Court Judge considering the order of the Magistrate Court of Kandy decided to dismiss the revision application on the basis that as the "Owner" mentioned in the Section 40 of the Forest Ordinance is the person who had the possession and control of the vehicle on the agreement marked X9, was the 2<sup>nd</sup> Accused who had pleaded guilty to the charge.

In this case a van had been confiscated for transporting timber worth about Rs.49,319.45 illegally.

The Appellant giving evidence admitted that he was not in the country when the offence was committed. According to him he had given the vehicle to a friend called Safrin on rent, by virtue of an agreement later formalised which was marked as 'X5'. Further the Appellant had no knowledge to whom the vehicle had been given by Safrin. He only came to know that the vehicle had been apprehended by police.

Although the Appellant claimed that he is the registered owner of the vehicle and got it released to him on a bond by the Court, failed to produce the Certificate of Registration or even a copy of the same during the inquiry.

Although Safrin had claimed that he had given the vehicle to 1<sup>st</sup> Accused on rent after signing an agreement which was marked as 'X9', but in the agreement the 1<sup>st</sup> Accused had only placed his signature as a witness not as transferee or hirer. Further, 1<sup>st</sup> Accused in his evidence admitted that he was unaware as to the owner of the vehicle.

In this case, although the 2<sup>nd</sup> Accused to whom the vehicle had been given on rent as per 'X9' and pleaded guilty to the charge, failed to give evidence at the inquiry.

Now I am going to consider whether the grounds of appeal raised on behalf of the Appellant have any merit. As the appeal grounds mentioned above are interconnected, all appeal grounds will be considered together hereinafter.

As the law stands today, the Claimant in a vehicle confiscation inquiry should prove that he or she had have taken all preventive measures on a balance of probability. Hence, the Learned Magistrate should consider all the evidence very carefully before coming to a conclusion.

In **The Orient Financial Services Corporation Ltd v The Range Forest Officer, Ampara and Hon. Attorney General [2013] 1 SLR 208** the Court held that:

*"1. Before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance probability 209 satisfies the Court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor, was he privy to the commission of the offence, the vehicle has to be released to the owner.*

*2. When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the*

*offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence.”*

In **Mudankotuwa v Attorney General [1996] 2 SLR 77** the court held that:

*“As seen from the evidence the vehicle was taken over by the driver from the Petitioner’s house in the morning and it was returned to him in the evening with the collections. Further, clear instructions had been given by the Petitioner to the driver, not to transport timber or use the vehicle for any illegal purpose.....Therefore, the Magistrate was in error when he came to the conclusion that the Petitioner had exercise no control or supervision over the driver regarding the use of the tractor”.*

Although the Appellant, as the owner of the vehicle had given evidence and explained to the Court that he had taken all the possible and necessary precautions to prevent the vehicle being used for illegal purposes, but the evidence placed by the Appellant clearly establishes the fact that the Appellant did not know who had in fact been in possession and control of the vehicle in question when the police apprehended the vehicle with timber. This clearly shows that the Appellant had not taken any precaution to prevent the use of the impugned vehicle for commission of the instant offence.

Further, not calling 2<sup>nd</sup> Accused to give evidence certainly affect the root of the case. Thereby the Appellant had failed to adduce cogent evidence that the offence committed without his knowledge.

Hence, the Learned High Court Judge dismissing the application on the basis that the Appellant had failed to show that he took all necessary precautions to prevent a crime being committed is correct in this case. Therefore, I affirm the order of the High Court Judge Kandy dated

26.09.2019 and the order of the Learned Magistrate of Kandy dated 26.09.2018. Therefore, this appeal is dismissed.

The Registrar of this Court is directed to send this Judgement to the High Court of Kandy and the Magistrate Court of Kandy for information.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**