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

CA No. CA (PHC) 199/2018

HC Kurunegala Case No. 21/2018 HCR

Magistrate Court Kurunegala Case No. 2736/MISC

In the matter of an Appeal in term s of Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

W. M. Keerthi,
Ambalawa,
Dematałuwa.

Applicant Petitioner Appellant

Vs

1. Office in Charge,
   Police Station,
   Kurunegala.

Complainant 1st Respondent Respondent

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

2nd Respondent Respondent

3. B.W.D. Priyantha Pushpakumara
   lhakawatta,
   Kanotuwa, Dematałuwa.

Accused 3rd Respondent Respondent

Before: **N. Bandula Karunarathna J. P/CA**

&

M. Ahsan R. Marikar J.

Counsel: Anil Silva, PC with Isuru Jayawardana, AAL for the Applicant-Petitioner-Appellant.

Jehan Gunasekara, SC for the State

Written Submissions: By the Applicant-Petitioner-Appellant – 18.07.2022

By the Respondent – 11.11.2023

Argued on : 29.08.2023

Decided on : **13.11.2023**

N. Bandula Karunarathna J. P/CA

This is an appeal from the judgement of the High Court Judge of Kurunegala dated 25.10.2018. The appellant is the registered owner of the vehicle number 47- 8525. The said vehicle was taken into custody on 24.01.2018 for the offence that the vehicle was used to commit an offence under the Forest Ordinance by transporting timber valued at Rs. 57,652.87 without a valid permit.

The disputed vehicle bearing registration number 47-8525 has been taken into custody by Kurunegala Police Station on or about 24.01.2018 for transporting different types of timber without a valid license or a permit which is an offence under the section 25 (1) and 30(1) and 36 (1) and 36 (2) and 40 and 40 (a) of the Forest Ordinance as amended. The Complainant-1st Respondent-Respondent (hereinafter referred to as the Respondent) charged the accused 3rd Respondent-Respondent, who is the driver of the said vehicle. Thereafter, the accused person pleaded guilty to the charge on 09.02.2018 and accordingly he was fined Rs. 25,000/- by the learned Magistrate of Kurunegala.

Thereafter, the Magistrate fixed the case for inquiry in terms of section 425 of the Code of criminal Procedure Act No.15 of 1979 where the appellant testified on 04.11.2016 about his claim. The order was pronounced on 14.12.2016 confiscating the vehicle bearing No. 47 - 8525. Hence appellant challenged the order dated 31.08.2018 of the learned Magistrate of Kurunegala, in the High Court of North Western Province holden its jurisdiction in Kurunegala by invoking Revisionary jurisdiction in the case bearing No. HCR/21/2018. The learned judge of the High Court of North Western Province delivered its order dated 25.10.2018 and dismissed the said Revision petition for several reasons including want of exceptional circumstances and affirmed the order dated 31.08.2018 by the learned Magistrate of Kurunegala.

The appellant has opted to challenge the order dated 25.10.2018 by the learned judge of the High Court of Kurunegala, by appealing to this Court.

The grounds of appeal are as follows;

(i) The learned Judge of the High Court and the learned Magistrate failed to recognize that degree of precautions taken by the appellant and the owner of vehicle and erred concluding that the appellant has failed to sufficiently show cause in the confiscation inquiry.

(ii) The learned Magistrate and the learned High Court judge failed to consider the fundamental provisions of law as contained in the Forest Ordinance. That is, in the event the owner of the vehicle was aware of the offence he would be have been charged under Section 25 (3) of the ordinance.

(iii) The learned Judge of the Provincial High Court has erred in refusing to follow the judgement of Court of Appeal in case number CA (PHC) Appeal No 03/2013, which is morefully appropriate under the circumstances of the present matter.

(iv) The learned High Court Judge has not exercised her revisionary jurisdiction justifiably over the determination made by the learned Magistrate.

The case for the prosecution was that the vehicle in question is a Lorry bearing No. 47-8525 was produced to the Magistrate court for transporting timber without a license under the provisions of the Forest Ordinance. The Accused had pleaded guilty for the charge, and he was convicted on his own plea. For the said Count he was sentenced for a fine of Rs. 25000.00 and a default sentence. Thereafter at the conclusion of the proceedings the Learned Magistrate has called for a vehicle inquiry. The Learned Magistrate having evaluated the case presented on behalf of the Petitioner had ordered the vehicle in question (the lorry) to be confiscated on the ground that the Petitioner has failed to discharge his duties to the satisfaction of the Court.

The Appellant sought to revise the said order in the High Court of Kurunegala. The Revision application was dismissed on several reasons mentioned. The Appellant filed this Appeal against the order of the Learned High Court Judge delivered on 2018.10.25 and the order of the Learned Magistrate dated 2018.08.31.

The Learned Counsel for the respondent in the present appeal submits that the learned High Court judge has analysed the evidence of the Petitioner, given at the claim inquiry, and has come to the conclusion that the Petitioner has failed to establish that he took all precautions to prevent the alleged offence being committed. Therefore, has come to the conclusion that the learned Magistrate is correct in law in coming to the same conclusion. On behalf of the respondents, it was argued that in order to come to a finding on the above, it is necessary to peruse whether the counsel for the petitioner has submitted any exceptional circumstances, which warrants exercising the revisionary jurisdiction of the High Court.

Power of revision is an extraordinary power of the court and this jurisdiction to be exercised carefully by the courts. Revisionary jurisdiction is distinct and independent from the appellate jurisdiction. The object of revisionary jurisdiction is to ensure the due administration of justice and the correction of all errors in order to avoid miscarriage of justice.

The above position was clearly stated in Marian Bee Bee vs Seyed Mohomad 69 CLW 34 by Sansoni CJ and has been followed by our courts for well over a century and was cited with approval in many latter pronouncements such as Soysa vs Silva 2000 (2) SLR 235.

In the case of Perera vs Muthalib 45 NLR 412 it was held that "the court would exercise revisionary powers where has been a miscarriage of justice owing to the violation of a fundamental rule of procedure, but this power would be exercised only when a strong case is made out amounting to a positive miscarriage of justice".

In the case of Vanik Inc Ltd vs Jayasekera 1997 (2) SLR 365 it was held that court will only concern about the "Legality and the Propriety of the order and regularity of the proceedings. If the order of the original court is legal and if the correct procedure has been followed court will not interfere with the decision".

It is very clear from the aforementioned judgements that the revisionary jurisdiction should be exercised with due diligence and utmost care only where a miscarriage of justice has occurred consequent to the order made by the lower court. Thus, the courts of law, which are vested with the revisionary jurisdiction, always stress the submission of exceptional circumstances.

In the case of Dharmaratne vs Palm Paradise Cabanas 2004 (3) SLR 24, it was held by His Lordship Justice G. Amaratunga 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 their revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the grab of a revision application or to make an appeal in situation where the legislature has not given a right of appeal".

At the same time these exceptional circumstances should be of such nature that it would shock the conscience of the court.

In the case of Jayakodige Punchirathna Banda Vs Attorney General CA (PHC) APN 119/2016 decided on 01.11.2017, it has been held that;

> "The Petitioner has not at any point alleged that the impugned judgement is illegal, irregular, capricious or arbitrary. In such an event where the petitioner fails to point out there that the judgement that is being challenged to be illegal, the revisionary jurisdiction cannot be revoked".

The learned High Court judge has addressed her mind to consider whether the petitioner has presented any exceptional circumstances to invoke the revisionary jurisdiction of the High Court and after a careful analysis has come to the finding that, the petitioner has failed to submit any exceptional circumstances which would warrant the intervention of the High Court by way of Revision.

It is important to focus on Provisions of law governing, confiscation of the vehicle in question.

Proviso to Section 40(1) of the Forest Ordinance provides that;

> “Provided that in any case 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.”

It is settled law that, an owner of a vehicle that has been used to commit an offence punishable under section 40(1) of the Forest Ordinance, has to satisfy the court that, he took all precautions to prevent the use of his vehicle to commit the offence, in order to prevent the vehicle being confiscated.

The Appellant in his evidence, has stated that he gave instructions to the Accused not to use the vehicle for any illegal purposes. The Appellant has also taken up the position that, Accused was his driver of the Lorry and he is known to the Appellant. He has affirmed that he had orally advised the Accused not to engage the vehicle in any type of illegal activities and exercised

precautions by contacting the Accused through phone whenever the vehicle was taken away on a trip by the Accused.

In the case of Mary Matilda vs OIC Habarana CA (PHC) 86/97 it was held that;

> "In my view, for the owner of the vehicle to discharge the burden that he/she had taken all precautions to prevent the use of the vehicle for the commission of the offence or that the vehicle had been used for the commission of the offence without his/her knowledge, mere giving instructions is not sufficient. In order to discharge the burden embodied in the proviso to section 3A of the Animals Act is it sufficient for the owner to say that instructions not to use the vehicle for illegal purpose had been given to the driver? If the courts of this country are going to say that it is sufficient, then all what the owner in a case of this nature has to say that he gave the said instructions. "
>
> "Even for the second time this is all that he has to say. Then there is no end to the commission of the offence and to the use of the vehicle for the commission of the offence. Every time when the vehicle is detected with cattle all what he has to say that he has given instructions to the driver? Then the purpose of the legislature in enacting the proviso to section 3A of the Animals Act frustrated".

Therefore, it is quite clear that merely giving verbal instructions to the driver will not be sufficient to discharge the burden on the Appellant. As pointed out by his Lordship Justice Sisira de Abrew, if the court accept that the mere verbal instructions given by a registered owner of a vehicle not to use a vehicle for illegal purposes, to discharge the burden cast on an owner of a vehicle, under the Forest Ordinance, it is clearly frustrating the intention of the legislature. Such contention of a court would allow the offenders to commit offences without impunity.

The Respondents state that, when the Law expects an owner of a vehicle that has been used to commit an offence under the Forest Ordinance, to take all precautions to prevent his vehicle being used to commit an offence under the Ordinance, such owner cannot stay idle after merely giving verbal instructions to the Accused. It is very clear that law expects from an owner is something more than giving verbal instructions. At the same time, his evidence does not disclose as to what precautionary steps he took on the day the offence was committed. Moreover, his evidence also does not disclose that, he has repeatedly instructed the accused not to use the vehicle for any illegal purpose. Similarly, he has admitted that he got to know that his vehicle has been taken into custody by the police, only when he received the call from the Accused.

Thus, when the evidence of the appellant is evaluated, it is vehemently clear that, the appellant has not taken all precautions to prevent his vehicle being used to commit the offence.

In the case of Faris vs OIC Galenbindunuwewa 1992 (1) SLR 167 justice S N Silva, as he was then held that in terms of the proviso to section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters.

They are;

i. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;
ii. That the vehicle has been used for the commission of the offence without his knowledge.

In terms of the proviso, if the owner establishes any of these matters on a balance of probability, an order for confiscation should not be made.

There had been a tendency by the courts including the apex courts to apply the above dicta in respect of vehicle confiscation inquiries held under the proviso of section 40(1) of the forest Ordinance. It is the contention of the respondents that in a vehicle inquiry held under the Forest Ordinance, that court has to only take in to consideration whether the claimant has taken all the precautions to prevent the vehicle been used to commit the alleged offence, as unlike section 3A of the Animals Act proviso to the section 40(1) of the Forest Ordinance provides only for that. Hence the alleged offence has been committed without the knowledge of the claimant does not become a ground to release the vehicle to the claimant.

In the case of Jalathge Surasena vs Officer in charge police station of Hikkaduwa CA (PHC) APN 100/2014 decided on 30.06.2015 it was held that;

> "A mere denial by the 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 had been used for a commission of an offence for an unauthorized purpose."

In the case of Vajira Kalyani Kumudapperuma vs OIC of Hikkaduwa CA (PHC) 13/2018 decided on 17.09.2019 stated that;

> "As law stands today, it is mandatory to prove preventive measures taken by a vehicle owner in question, on a balance of probability. Undoubtedly such burden would not be discharged merely because the owner in question did not have knowledge about an offence being committed or because the vehicle was not involved in an offence previously."

Therefore, the fact that the offence has been committed without the knowledge of the owner cannot be regarded as ground to release a vehicle used to commit an offence under the Ordinance. Absence of any evidence to show that the appellant has taken any measures to prevent his vehicle been used to commit an offence punishable under the Forest Ordinance, the fact that the offence has been committed without her knowledge cannot be a defence for the appellant.

It is clear that Court of Appeal does not intend to go on a mathematical calculation to see the value of timber and the value of the confiscated vehicle but intended to consider;

- value of the timber transported allegations prior to this incident that the lorry was being used for any illegal purpose that the appellant and or the accused are habitual offenders in this nature no previous convictions.

- acceptance of the fact that the petitioner appellant did not have any knowledge about the transporting of timber without a permit.

As such, the legislature has unequivocally cast a burden on a claimant of a vehicle inquiry under the Forest Ordinance to dispense the burden of proving to the satisfaction of the Court that he, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. It must be noted that the requirement of proving that all precautionary measures have been taken by such third party making a claim against a confiscation, is unique to the Forest Ordinance in comparison with other legislations with similar provisions at this juncture, the following observation in Samarasinghe Dharmasena vs. W. P. Wanigasinghe CA(PHC) 197/2013 CA Minute dated 22.01.2019 is applicable;

> "..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....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" CA-PHC-139-15 Page 8 of 10, dated 20/09/2022.

As held in S. D. N. Premasiri vs. Officer in Charge, Mawathagama CA (PHC) 46/2015 Court of Appeal Minute dated 27.11.2018 "...it is imperative to prove to the satisfaction of Court that the vehicle owner in question has not only given instructions but also has taken every possible step to implement them".

In Cadar Bawa Jennathul Farida vs Range Forest Officer and Others C.A PHC 94/2017 minute dated 05.07.2019, it was held that;

> " it is trite law that mere giving instruction is not sufficient to discharge the burden cast on a vehicle owner under the Forest Ordinance."

The Act does not mean that the owner of vehicle should sit beside the vehicle round the clock and should control all the activities of the driver. The burden cast upon the owner is to prove to the satisfaction of the Court that he had taken all precautions to prevent the use of such vehicle for the commission of the offence.

As stated by this division in Kuttiali Mohommadu Marshooq Mohommadu Niyaz Vs Officer-inCharge, Police Station, Pannala CA/PHC/203/17 minute dated 21.06.2022

> "A vehicle owner employing a driver to carry out transportation of goods cannot reasonably be expected to physically visit each and every site to ensure that illegal activities are not carried out using his vehicle".

Under these circumstances, the respondent submits when the evidence given by the Appellant is considered, it is apparent that the learned Magistrate is correct in law in confiscating the vehicle in question.

The respondents, submit that the present appeal has no merit and therefore should be dismissed. The respondent further prays that this Court be pleased to;

(a) Dismiss the appeal of the Appellant
(b) Affirm the order of the Learned judge of the High Court dated 2018.10.25
(c) Affirm the order of the Learned Magistrate dated 2018.08.31
(d) Grant such relief other and further relief as to Your Lordship's Court shall seem to meet

At this stage it is important to focus about the effect of a conviction under the Forest Ordinance, as amended.

Section 40 of the Forest Ordinance as amended by Act Nos. 13 of 1966, 56 of 1979, 13 of 1982, 23 of 1995 and 65 of 2009 states as follows.

> "(1) Where any person is convicted of a forest offence-
>
> (a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and
>
> (b) all tools, vehicles, implements, cattle and machines used in committing such offence, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

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.".

In this case the owner of the vehicle bearing Registration Number 47-8525 was given an opportunity to show that he had "taken all precautions to prevent the use of such vehicle for the commission of the offence".

At the inquiry the Registered Owner gave evidence and stated that;

> "ඊට පසු ප්‍රියන්ත පුෂ්පකුමාරට බාර දුන්නා ගඩොල් වැඩ කරන්න. කුලී ගමන්වල ගෙනියන්න කියා. නීති විරෝධී කිසිම දෙයක් කරන්න එපා කිව්වා. "

It is pertinent to note that His Lordship Salam J in Abubakarge Jaleel vs Anti Vice Unit CA PHC 96/80 decided on 29.05.2020; held as follows;

> "It was the evidence of the owner that he had given instructions to the employee (Driver) not to engage the Lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross examination. There has been no previous instance where the driver has been charged for a similar offence. When someone is under a duty to show cause that he had taken all precautions against the commission of similar offence, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used."

In the present case there was evidence that the Registered Owner of the vehicle had supervised the driver in respect of the purpose of which he used the vehicle.

Vide Pages 4 and 5 of the Magistrate Court Proceedings dated 13.07.2018 is as follows;

ප්‍ර : අද දින මෙන්න මේ වැඩේ කරන්නේ අහවලාගේ වැලි අදින්නේ අහවලාගේ කියා දැනුවත් කරලාද අරගෙන යන්නේ?

උ : එහෙම කියලා තමා අරන් යන්නේ.

ප්‍ර : එහෙම කෙනෙකුගේ වැඩකට ගියාට පසු තමුන් ඒ ගැන සොයා බලනවද?

උ : මොහුගෙන් අහලා බලනවා.

ප්‍ර : ප්‍රියන්ත කියනවානම් කෙනෙකුගේ ගඩොල් අද අදිනවා කියා, ඒ සම්බන්ධයෙන් තමුන් සොයා බලනවාද?

උ : සොයා බලනවා.

ප්‍ර : කොහොමද?

උ : විස්තර අහලා බලනවා.

ප්‍ර : ඒ අහන්නේ ප්‍රියන්තගෙන්?

උ : ඔව්.

ප්‍ර : උදාහරණයක් ගත්තොත් පියදාසගේ ගඩොල් අදින්න යනවා කියලා කියනවා. තමුන් ඒ පියදාස කියන පුද්ගලයාගෙන් සොයා බලනවාද?

උ : ලඟ අහල පහල එකක් නම් සොයා බලනවා. දුර එකක්නම් බලන්නේ නැහැ.

ප්‍ර : එදා දවසේ මොනවට අරගෙන යනවාද කියා ගියේ?

උ : නිකවැරටියේ ගඩොල් අදින්න.

ප්‍ර : කාට ගේන්නද කියා දන්නේ නැහැ?

උ : පිළිතුරු නැහැ.

ප්‍ර : ඒ කියන්නේ තමුන් ප්‍රියන්තට ඕනෑ දෙයක් කර ගන්න ලොරිය දෙන එකනෙ කරන්නෙ?

උ : එහෙම දෙන්නේ නැහැ. විස්තර සොයා බලනවා.

Thus, it is clear that in addition to the giving of instructions there was some supervision as well. The Registered Owner in his evidence also categorically stated that he did not know that Priyantha was using this vehicle to transport timber on that day. This was not contradicted. The Driver had no previous convictions. It appears from the evidence of the Registered Owner that the driver was a known person. These are matters favourable to the appellant. They have not been considered by the Learned Magistrate. The Learned Magistrate should have considered these matters which are favourable to the Appellant before coming to a conclusion. Similarly, the judgments in favour of the Appellant have also escaped the consideration by the Learned Magistrate.

At this stage it is my view that this court should look into the question of the rejection of the Revision Application by the Provincial High Court. The Learned High Court Judge of the

Provincial High Court of Kurunegala had rejected the Revision application of the Appellant on the basis that there were no exceptional circumstances.

In a case where there is no right of appeal, the fact that there are fundamental errors in the order of the Learned Magistrate has been considered as an exceptional circumstance by this Court. The Learned High Court Judge was in error when she refused Notice on the basis that there were no exceptional circumstances.

Therefore, the learned counsel for the petitioner Appellant requests to consider this application on its merits and set aside the order of the Learned Magistrate dated 31.08.2018 and direct the Learned Magistrate to handover the vehicle bearing Registration Number 47-8525 to the Appellant.

The Revisionary jurisdiction is a discretionary remedy totally based on exceptional circumstances. The appellant was not able to satisfy the learned High Court Judge of the North Western Province in respect of existence of exceptional circumstances in order to interfere with the findings of the learned Magistrate Court of Kurunegala.

The learned counsel for the respondent says that the judgment of Sujith Priyantha vs. OIC Poddala CA/PHC/157/12 where it has been held that mere giving instructions to the driver not to use the vehicle for illegal activities does not satisfy the test of taking all precautions to prevent such thing happen. However, the Appellant has failed to prove what step or precautions taken by him in order to avoid the driver engaged in illegal activities by using his vehicle. Similarly, the appellant has failed to establish that he had no knowledge with regard to the offence committed by the driver. In terms of his own testimony the driver has informed him where he was going. Thus, it is the duty of the Appellant to check with the authenticity of the version of driver as the said vehicle was taken on hire by a person known to him.

The Magistrate of Kurunegala Court had sufficient opportunity to examine and observe the demeanour of the witness. The Magistrate would have observed the demeanour of witness under cross-examination. Hence the appellant cannot rely on section 134 of the Evidence Ordinance in order to prove his case which requires corroborations. The respondent further prays that this appeal be dismissed for want of merits and affirm the order dated 25.10.2018 of the High Court of Kurunegala in the case number HCR/021/2018 and the order dated 31.08.2018 of the Magistrate Court of Kurunegala in the case No. 2736/MISE.

Learned counsel for the appellant focus the attention of this court to Section 40 of the Forest Ordinance, which reads as follows;

> “When any person is convicted of a forest offence, all timber or forest produce which is not the property of the State in respect of which such offence has been committed, and all tools, boats, carts, cattle, and motor vehicles used in committing such offence, shall, in addition to any other punishment prescribed for such offence, be confiscated by order of the convicting Magistrate.”

The proviso to Section 40 of the Forest Ordinance (as amended by Act No.65 of 2009) reads as follows;

> "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."

Accordingly, it can be construed that the Legislature intended to cast the burden on the claimant to prove that he took all precautions to prevent the offence being committed and such burden needs to be discharged on a balance of probability.

The learned counsel for the appellant argued that the confiscation of the vehicle in question is bad in law because as the Owner of the Vehicle was not charged under section 25(2) and 25(3) of the Forest Ordinance.

Section 25 of Forest Ordinance is as follows;

25. (1) The breach of any of the provisions of, or regulations made under, this Chapter shall constitute an offence punishable, except as hereinafter provided, by a fine not exceeding one thousand rupees, or by imprisonment which may extend to six months:

Provided that any such regulation may, within the above limits, prescribe any punishment, or maximum or minimum punishment, for the breach of all or any of the provisions thereof;

Provided, further, that offences under this Chapter shall be punishable by a fine not exceeding two thousand rupees, or by imprisonment which may extend to one year in cases where the offences are committed after sunset and before sunrise, or after the offender shall have made preparations for resistance to lawful authority, or if the offender has been previously convicted of any offence under this Ordinance.

(2) Notwithstanding anything in the preceding provisions of this section, any person who transports timber, within, into or out of any specified local area in contravention of any regulation made under section 24 (1) shall be liable on conviction to imprisonment for a period which may extend to five years:

Provided that where the person so convicted proves to the satisfaction of the court that the timber in respect of which the offence was committed is private property, he shall be liable to a fine not exceeding one thousand rupees or to imprisonment which may extend to six months.

(3) Any person who abets the commission of an offence specified in this Chapter, or causes any such offence to be committed shall also be guilty of an offence and shall on conviction be liable to the same punishment provided for the offence.

The Police filed charge sheet dated 09.02.2018 against the accused persons under section 25(2) and Section 25(3) of the Forest Ordinance. However, the owner of the Vehicle (The

Appellant) was not made a party when the Law specifically provides for the culpability of the owner if in fact, he was culpable in the commission of the offence.

Amendment of section 25 of the principal enactment.

Section 25 of the principal enactment as last amended by Act No. 13 of 1982 is hereby further amended as follows;

Forest (Amendment) Act No 23 of 1995 is as follows;

(1) in subsection (1) of that section: -

(a) by the substitution for the word "by a fine not less than two hundred rupees and not exceeding one thousand rupees" of the word "by the fine not less than five thousand rupees and not exceeding fifty thousand rupees".

(b) by the substitution in the second proviso to that subsection for words "by a fine not less than two hundred rupees and not exceeding two thousand rupees or by imprisonment for a term not less than, three months and not exceeding one year" of the words "by a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees or by imprisonment for a term not less than six months and not exceeding two years or to both such fine and imprisonment";

(2) in subsection (2) of that section-

(a) by the substitution for the words " to imprisonment for a term not less than three months and not exceeding five years" of the words " to imprisonment for a term not less than six months and not exceeding five years, ";

(b) by the substitution in the proviso to that subsection for the words "to a fine not less than two hundred rupees and not exceeding one thousand rupees or to imprisonment for a term not less than three months and not exceeding six months.", of the words " to a fine not less than two thousand five hundred rupees and not exceeding ten thousand rupees or to imprisonment for a term not less than three months and not exceeding one year or to both such fine and imprisonment. " ;

(3) by the insertion immediately after subsection (2) of that section, of the following new subsection: -

" (2A) Notwithstanding anything in the preceding provision of this section, where any person referred to in subsection (2) is convicted of an offence referred thereto, any other person who allows any tool, boat, cart, cattle, or motor vehicle of which he is the owner or which is in his possession to be used for the commission of such offence, shall himself be guilty of an offence and shall on conviction be liable to a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees or to imprisonment for a term not less than three months and not exceeding two years.".

Act No 65 of 2009 Forest Ordinance (Amendment) is as follows;

Section 25 of the principal enactment is hereby amended as follows: -

(1) in subsection (1) of that section -

(a) by the substitution for the words "by a fine not less than five thousand rupees and not exceeding fifty thousand rupees, or by imprisonment for a term not less than three months and not exceeding six months", of the words "by a fine not less than rupees ten thousand and not exceeding rupees one hundred thousand, or by imprisonment for a term not exceeding four years";

(b) in the second proviso to that section by the substitution for the words "by a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees, or by imprisonment for a term not less than six months and not exceeding two years", of the words "to a fine not less than rupees fifteen thousand and not exceeding rupees one hundred and fifty thousand, or by imprisonment for a term not exceeding four years";

(2) in subsection (2) of that section -

(a) by the substitution for the words "for a term not less than six months and not exceeding five years", of the words "for a term not exceeding five years or to a fine not less than rupees twenty thousand and not exceeding rupees two hundred thousand or to both such imprisonment and fine";

(b) in the proviso to that section by the substitution for the words "to a fine not less than two thousand five hundred rupees and not exceeding ten thousand rupees, or to imprisonment for a term not less than three months and not exceeding one year", of the words "to imprisonment for a term not exceeding two years" or to a fine not less than rupees five thousand and not exceeding rupees twenty-five thousand;

(3) by the repeal of subsection (2A) of that section and the substitution therefor of the following subsection: -

"(2A) Any person who allows any tool, vehicle or machine of which he is the owner or which is in his possession, to be used in the commission of an offence under this Chapter, shall be guilty of an offence and shall on conviction liable to imprisonment for a term not exceeding two years or to a fine not less than rupees ten thousand and not exceeding rupees one hundred thousand or to both such imprisonment and fine"; and

(4) in subsection (3) of that section by the substitution for the words "in this Chapter," of the words "in this Chapter or any regulation made thereunder,".

Act No 65 of 2009 Forest Ordinance (Amendment) Section 25 (2) A specially refers to “Any person who allows” the use of vehicles to be found culpable. It is my view that the prosecution did not in any manner find the Appellant to have "allowed" his vehicle to be used in the commission of the offence. The prosecution did not deem him to be culpable resulting in him not being charged.

The Appellant was not charged under section 25(3) of the said act for aiding and abetting in the commission of the offence. This in itself is *ex facie* evidence that the Registered owner had no knowledge of the offence being committed.

As mentioned earlier in Atapattu Mudiyanselage Sadi Banda and 3 others vs. Officer-in-Charge, Police Station, Norton Bridge CA(PHC) 03/2013, dated 25.07.2014;

> “I am of the view, before making the Order of confiscation learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the Appellant did not have any knowledge about the transporting of timber without a permit. On these facts the Court is of the view that the confiscation of the lorry is not justifiable,”

The Learned magistrate had failed to consider the above-mentioned judgement and the circumstances of this particular case and the previous conduct of the driver of the said Vehicle and the owner, prior to delivering the order to confiscate the vehicle. If there had been any evidence against the owner of the lorry, the police could have charged him for aiding and abetting under section 25(3), and made him an accused person of the Magistrate Court case, which has not been the case. It is very clear that the Presumption of Innocence therefore accrues to the appellant.

It is important to note that the underlying principles of interpretation of statutes in specific cases such as this, was found in the case of Nizar vs. Inspector General of Police 1978 (2) SLR 304 and in the case of Manawadu vs. Attorney General 1991 (1) SLR 209.

It was enumerated the principles of making an order for confiscation wherein the underlying principle is that the property of a third party cannot be confiscated without hearing the third party. The *ratio decidendi* of the said decisions was the prevention of arbitrary confiscation of property of innocent persons and were not intended to provide a guideline as to how such confiscation should occur. The statute accordingly must be considered and interpreted strictly when in application to the loss of liberty and property of persons.

The learned Judge of the High Court and the learned Magistrate failed to recognize that degree of precautions taken by the owner of the vehicle could take defence on the prevailing circumstances of each case, and thereby have erred by concluding that the appellant has failed to sufficiently show cause in the confiscation inquiry. Present law requires an owner of a vehicle at the confiscation inquiry to satisfy court that he has reasonably taken all precautions to prevent vehicle being used in commission of the relevant offence.

At the arguments of this matter the attention of this court was brought to the fact that the degree of precautions one can take would differ from case to case depending on the

circumstances of the case. The extent and the limitations of the precautions would vary between cases where the owner himself actively engages in the business for which the vehicle is used and the owner simply hires his vehicles for business purposes without actively engaging in such activities. The fact whether the vehicle is given for hire or used for private purposes or any other business purpose should also be taken into consideration.

Due to those circumstantial differences, an equal level of precaution should not be expected from a vehicle owner. It is evident that the vehicle owner in this matter had a very limited control over the vehicle which in turn limits his capacity to take precautionary measures and the Learned Magistrate should not have expected higher degree of precautions which is impractical under these circumstances.

The learned counsel for the appellant submits that the owner of the vehicle is a businessman. He had purchased the vehicle for the purpose of his business. The accused person was working as a driver for the past few years and never have engaged in any illegal activity. Therefore, there was no reason for the appellant to suspect the accused driver by any means. The accused driver takes the vehicle for external hires with the permission of the owner. This has been an ordinary practice, and therefore raised no doubts on the mind of the appellant about such activity.

The learned Judge of the Provincial High Court has erred in refusing to follow the judgement of Court of Appeal in case number CA (PHC) Appeal Number 03/2013, which is relevant to the circumstances of the present matter.

The appellant urged the learned High Court judge to follow the judgement of this Court delivered in Atapattu Mudiyanselage Sadi Banda vs OIC Police Station Norton Bridge CA (PHC) Appeal No 03/2013 decided on 25.07.2014 due to its factual similarity. In that case following circumstances have been considered by this court on the order of confiscation

1. Value of the timber transported.

2. Whether there are any allegations prior to this incident that the vehicle in question been used for any illegal purpose?

3. Are the appellant and the accused habitual offenders and are there any previous convictions?

4. Evidence to prove that the appellant had any knowledge about the transporting of timber without a permit.

The facts of the present case are very much similar to the case of Atapattu Mudiyanselage Sadi Banda vs. OIC Police Station Norton Bridge (*supra)*. Accordingly, neither the lorry owner nor the vehicle had been subject to any previous convictions or suspicious activities.

Based on the above Judgements it is my considered view that the learned High Court judge has not exercised her revisionary jurisdiction justifiably over the determination made by the learned Magistrate. It reflects that such emission has prejudiced the appellant in several ways, as he was denied of proper justice.

Confiscation of the vehicle is bad in law as there is no evidence to establish that the appellant had knowledge of offence. The Appellant had given reasonable and acceptable explanations as to why he did not have any knowledge about this illegal act. The learned Provincial High Court judge errored in law and fact to confiscate the vehicle when the claimant had taken all necessary precautions to the best of his capacity based on the facts of this matter to prevent the commission of the offence using the vehicle. The confiscation of the vehicle is not just and equitable in the circumstances of this case. The doctrine of proportionality is ignored by the order of the learned magistrate as the value of the vehicle is completely disregarded.

The evidence of the appellant that he did not know that the relevant offence was committed without his knowledge is weak. But even assuming that it is so, such weak evidence must prevail when, as in this case, no other evidence is available to counterbalance it. It is important to note that section 3 of the Evidence Ordinance contemplates or provides for two conditions of mind with regard to matter of proof of a fact namely;

i. That in which a man feels absolutely certain of a fact, that is believe it to exist;

ii. That in which though he may not feel absolutely certain of a fact yet he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption or basis of its existence.

In the present case before an order of confiscation can be made the Court has to be satisfied not merely that the appellant had a general idea or that he vaguely knew that the lorry was usually used for the purpose of transporting timber illegally but that the particular offence on the relevant date was committed with his knowledge. If one can accuse the appellant of anything it is that he had accepted the inevitable with resignation and unconcern. One must not be content to reach decisions by looking at the mere surface of things. When there are various possibilities, one must be wary of and cautious in accepting one possibility as being more probable than the other.

Against such a factual background it is not quite logical and even unfair to draw the inference, from the fact of the driver continuing to drive the vehicle before the conviction, that the relevant offence was committed with the appellant's knowledge for it is common knowledge that in such a society as that in which the appellant lived. To balance the evidence on either side, the facts relied on in the Courts below, to impute knowledge of the commission of the offence are not such as to make the fact that the offence was committed with the knowledge of the appellant more probable than the fact that the offence was committed without his knowledge because, to say the least, all those facts, as explained above, admit of the interpretation that there was an equal possibility that the offence was committed without the knowledge.

The facts designated above are not, by their very nature, the sort of facts which of themselves exclude or imply distinctly the existence of the fact sought to be proved - the fact sought to be proved by means of these facts being that the appellant had knowledge of the commission of this particular offence of which his driver was convicted in the Magistrate's Court of Kurunegala, for that matter, the said facts particularized or designated above are, so to say, natural facts in that they neither imply nor exclude the fact sought to be proved - the fact sought to be proved being, as stated above, that the appellant had knowledge.

Both the learned Magistrate and the learned High Court Judge, had clearly drawn the inference that the said facts showed that the relevant offence was committed with the knowledge of the appellant. It is true that the burden was on the appellant to prove that the offence was committed without his knowledge, but the facts enumerated above from which both the learned Magistrate and the learned High Court Judge had concluded that the appellant had knowledge, at best, some remote conjectural probative force, if any. Those facts may, perhaps, make the evidence of the appellant to the effect that the offence was committed without his knowledge somewhat doubtful or suspect but they do not possess the force or probative value even cumulatively, of making the fact that the offence was committed without knowledge of the appellant less probable than that it was committed with the appellant's knowledge for those facts have no clear bearing on the disputed question of knowledge or lack of it on the part of the appellant and do not enable one to draw a firm or decided inference in regard thereto - one way or the other.

As would appear from the sequel each one of these facts relied on by the Judges in the Courts below does not even when amalgamated exclude lack of knowledge on the part of the appellant although those facts enumerated above and relied on by the Judges in the Courts below to attribute knowledge to the appellant may, perhaps, leave the matter in some doubt although the probability of the veracity of the appellant's evidence that he had no knowledge does not disappear in consequence thereof.

Although the burden of proving that the owner of the vehicle had no knowledge is on appellant, he being the owner yet that question, whether or not he had knowledge, needless to say, has to be decided on the totality of the evidence available to Court. As stated above, the Courts below had taken the view that because the driver of the vehicle at the time of detection of the offence was the normal driver of the appellant, the particular offence in question ought to be held to have been committed with knowledge of the appellant.

There is no essential inconsistency between any of those facts made use of by the Courts below to come to a finding that the relevant offence was committed with the knowledge of the appellant with the fact that the offence in question was committed without the knowledge of the appellant. There is an equal possibility "that the offence in question was committed with knowledge of the appellant as without his knowledge because both the said inferences could legitimately be drawn from the facts relied upon in the Courts below to impute knowledge to the appellant.

What circumstances are sufficient to "prove" a fact will not admit of easy definition or generalization. One has to use one's own judgment and experience of human conduct and cannot be bound by rules except by one's own discretion. The inferences drawn by the learned Magistrate and the learned High Court Judge more or less, presuppose that everything done or rather every offence committed by the driver must be necessarily known to the owner. That is a rather naive assumption for the inferences that the Courts draw must be founded on the experience of day-to-day life. Any common imagination can adequately conceive that the driver in question is so little versed in the refinements of civilized life as to take the owner too much into confidence.

It is to be observed that the above facts deposed to by the appellant are not contradicted although one must be conscious of the fact that the nature of those facts is such that it would

be almost practically impossible for the prosecution to disprove them for such facts are virtually although, perhaps, not exclusively within personal knowledge of the appellant.

The vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. If, as contended by the learned Counsel for the respondent, the Magistrate was given a discretion to consider whether to confiscate or not - the Magistrate could confiscate even when the offence was committed without the knowledge of the owner taking into consideration other damnable circumstances apart from the knowledge or lack of it on the part of the owner. The arguments too can recoil on the profounder. That argument was an invitation to confiscate for that would have been the necessary and inexorable consequence of the acceptance of that argument.

It is important to note that the judgement of the learned Magistrate and the learned High Court Judge had caused a higher loss to the appellant who is not even a part to the case, than the punishment prescribed for those who engaged in the offence and to those who aided and abetted. Therefore, the order confiscating the said vehicle is unreasonable and unjust on the face of it, as it had caused an undue loss for an innocent third party.

It is my view that the said order is contrary to the principles of natural justice due to its inequitable nature. At the same time, it is not proportionate to the offence, since the value of the vehicle exceeds both the maximum value of the fine prescribed in the Forest Ordinance and the value of the alleged stock of timber. Considering the above facts, the order of the Learned Magistrate is errored in fact as well as errored in law.

I decide to make that on the totality of the evidence led at the inquiry before the learned Magistrate it ought to have been held, in the least, that it was more probable than not that the relevant offence was committed without the appellant's knowledge. One cannot let one's prejudices influence the judgment of the case. They may be sinners; perhaps, of that there is no mistaking of course, according to my thinking. But a Judge has to recompense even evil with justice.

The appeal is allowed and the order made by the learned High Court judge on 25.10.2018 upholding the learned Magistrate's order dated 09.02.2018 is hereby vacated. The lorry numbered 47-8525 is ordered to be returned to the appellant immediately.

Appeal allowed. No order for cost.

President of the Court of Appeal

M. Ahsan R. Marikar J.

I agree.

Judge of the Court of Appeal