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

In the matter of an Appeal made under  
Section 331(1) of the Code of Criminal  
Procedure Act No.15 of 1979 read with  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

**Court of Appeal No:**  
**CA/HCC/0200-201/2018**  
**High Court of Nuwara Eliya**  
**Case No: HC/172/2010**

1. Jagath Kumara Samarahewa
2. Beddegama Jamila Lal Fernando

**ACCUSED-APPELLANTS**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

**COUNSEL** : **Saliya Peiris, PC with Chamara**  
**Wannisekera Appellants.**  
**Anoopa De Silva, DSG for the Respondent.**

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**ARGUED ON** : **12/09/2023**

**DECIDED ON** : **14/12/2023**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) with another were indicted in the High Court of Nuwara Eliya on following charges:

1. On or before the 02<sup>nd</sup> of April 2004 both accused committed an offence punishable under Section 386 of Penal Code to be read with Section 32 of the Penal Code and Section 5(1) of the offences against the Public Property Act by allegedly misappropriating a vehicle bearing registration No.WP HH 7294 and valued at Rs.3500,000/- belonging to the Ministry of Agriculture.
2. In the same transaction, the first accused did possess a revolver without legal authority which is an offence punishable under Section 22(3) read with Section 22(1) Of the Firearms Ordinance No.33 of 1916 amended by Act No.22 of 1996.

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After calling 05 witnesses the prosecution had closed their case. The learned High Court Judge had called for the defence and the Appellants had made dock statements and called three witnesses on their behalf. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them as follows:

For the 1<sup>st</sup> count each Appellant was imposed 10 years rigorous imprisonment. Further, the Appellants were imposed a fine of Rs.105,000,00/- each with a default sentence of 04-years rigorous imprisonment.

For the second count, the first Appellant was imposed 02 years rigorous imprisonment with a fine of Rs.7500/-. In default 06 months rigorous imprisonment was imposed.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court.

The Appellants are on bail at present.

**Background of the Case.**

According to the prosecution, the vehicle bearing No. WP HH 7294 is belongs to the Ministry of Agriculture. When the Appellants were arrested, the 1<sup>st</sup> Appellant was driving the vehicle while the 2<sup>nd</sup> Appellant was seated next to the driving seat. At the time of the arrest, the Appellants were using the vehicle without proper authority from the Ministry. Furthermore, the said date of the incident was an election day and the police had identified the area in which the arrest happened as an area with high rate of election violence. When searching the vehicle, posters printed for election propaganda were found and the 1<sup>st</sup> Appellant was in the possession of a revolver without a valid license.

The 1<sup>st</sup> Appellant in his dock statement stated that he was arrested on the said grounds due to his political involvements, and that he was using a

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vehicle which was given to him by the Minister of Agriculture and Livestock to whom he was supporting. Further, he stated that the revolver in his possession was issued to him in accordance with the law and that he received the bullets from the Kosgama Army Headquarters.

The 2<sup>nd</sup> Appellant in his dock statement stated that, on the said date he was given the key of a vehicle and was given orders to go with the 1<sup>st</sup> Appellant. He further said that he was unaware as to the ownership of the vehicle.

**At the hearing of this appeal the Learned President's Counsel for the Appellants had raised following grounds of appeal.**

1. The Learned High Court Judge had failed to consider that the person to whom the vehicle had been handed over was not called to as a witness and thereby the prosecution has failed to unfold the narrative leading to an adverse presumption under Section 114(f) of the Evidence Ordinance.
2. The Learned High Court Judge has not considered the fact that the prosecution has failed to establish the ingredients of Criminal Misappropriation of the vehicle beyond reasonable doubt.
3. The Learned High Court Judge had failed to consider the fact that the firearm had been issued to 1<sup>st</sup> Appellant under the approval of the Ministry of Defence.
4. The Appellants have been deprived of a fair trial.
5. That in any event the punishment imposed is excessive and unreasonable in the light of the evidence presented.

As all the grounds of appeal are interconnected, all ground will be considered together in this appeal.

According to PW4 Premadasa Weerakanda, he was the Secretary to the Ministry of Agriculture and Livestock at the time relevant to this case. The

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Minister in charge of the Ministry was Hon.S.B Dissananyake. The witness had faced some difficulty to assume his duty on 22.03.2004. The vehicle in question WP HH 7294 was belonged to his Ministry and was allocated to Minister's Private Secretary Thamara Dissananyake with an official driver for her official use. The witness had categorically said that all responsibility regarding the vehicle rested on the person to whom the subject matter was released. The witness further said that, there was no complaint received from the Private Secretary to the Minister, until the police investigation regarding this vehicle was commenced.

According to PW2, Somawathie Jayatunga, who was a director to the Ministry of Agriculture and Livestock, nobody can be use vehicle without the authorization of the Private Secretary.

In this case the investigator of the Special Investigation Unit of the Police Headquarters had not taken any endeavor to record statement from the Private Secretary to the Minister and had not named her as a witness to this case. She is an essential witness which had escaped the attention of the prosecution as well.

According to the dock statement of the 1<sup>st</sup> Appellant, the vehicle in question was given to him by the Minister of Agriculture and Livestock for Minister's election work. The prosecution had not cleared this doubt throughout the case.

In order to ensure a fair trial, the prosecution has a duty to call all necessary witnesses in a trial. Although the prosecution has a discretion to call and examine a witness or omit to call a witness, this direction must be used fairly in the interest of justice.

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In **Mohmood v Western Australia** [2008] 232 CLR 397 the Court held that:

*“...where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach a conclusion about issues of fact but whether, in the circumstances, they should be entertained a reasonable doubt about the guilt of the accused”.*

In **Walimunige John and Another v The State** 76 NLR 488, the Court held that:

*“The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such a witness constitutes a vital missing link in the prosecution case”.*

Considering the nature of this case and the circumstances under which the vehicle was used by the Appellants should have been elicited through proper witnesses in the trial. As long as there is no complaint from either the Minister or the Private Secretary to the Minister, the Private Secretary and the Minister should have been called by the prosecution in order to clear doubts raised by the Appellants in their dock statements.

Although, the prosecution argued that the evidence of the Private Secretary is not necessary or not relevant to prove the prosecution case, I conclude that she is an essential witness to this case. Not recording her evidence creates a serious doubt in the prosecution case.

Next, the Learned DSG in her written submission contended that the best evidence of the defense case would have been the Minister who authorized such taking of the vehicle. However, the defense at the High Court trial had

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failed to call the Minister as a witness and thus the case of the defense, that the Minister gave such vehicle is without any merit.

In a criminal trial the onus of proving the charge is on the prosecution beyond reasonable doubt which never shifts.

In **Dyers v The Queen** [2002] 210 CLR 285, the Court held that:

*“No comment should be made as to the failure of the defense to call a witness who might have been able to assist the defense....If any comment is to be given it is that the jury should not speculate about what a witness not called might have said”.*

Next, the Learned President’s Counsel strenuously argued that the Learned High Court judge had failed to consider the fact that the firearm in question had been issued to the 1<sup>st</sup> Appellant by the Ministry of Defence.

The 1<sup>st</sup> Appellant in his dock statement stated that he was in active politics for about 21 years. He was elected as the Chairman of Walapane Pradeshya Saba in the years 2000 and he functioned as the Opposition Leader of the Saba thereafter. For his security, a 0.38 revolver and ammunitions were issued to him by the Ministry of Defence in the year 2000. The defense had marked V7 a letter issued by the Sri Lanka Army to confirmed the same.

At this point, due to highly technical in nature, the Learned Deputy Solicitor General, in keeping with the highest tradition of the Attorney General’s Department, informed this Court that she is not contesting the count 02 in the indictment levelled against the 1<sup>st</sup> Appellant.

In this case the investigation was conducted by the Crimes Prevention Unit of the Director Crimes of the Police Head Quarters. The investigator had failed to record statements from the Private Secretary and the Minister of

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Agriculture and Livestock. These two witnesses are not only very important but are very essential witnesses for the prosecution. Due to unknown reason, the police had not taken any endeavor to recorded their statements and made them as witnesses in this case. Further, this has completely escaped the attention of the prosecution as well.

Considering all as discussed above, I conclude that prosecution had not proven their case beyond reasonable doubt.

Therefore, I set aside the convictions and the sentence and allow the Appeal of the Appellants.

The appeal is allowed and the Appellants are acquitted from the case.

The Registrar of this Court is directed to send this judgment to the High Court of Nuwara Eliya along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**Sampath B.Abayakoon, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**