

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

In the matter of an Appeal under Article 154(P) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 19 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

C.A.(PHC)Appeal No. 08/2015

P.H.C. Chilaw Case No. HCR 02/2015

M.C. Marawila Case No. 93720/C

Wijesinghe Niluka Sajeewani

No.107,

Bujjampola,

Dankotuwa

Registerd Owner Claimant-

Petitioner-Appellant

Vs.

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

Respondent- -Respondents

BEFORE : **ACHALA WENGAPPULI, J.**
K. PRIYANTHA FERNANDO, J.

COUNSEL : Anil Silva P.C. with T. Rukshan for the Registered Owner Claimant-Petitioner-Appellant
Anoopa de Silva SSC for the Respondent-Respondents.

WRITTEN SUBMISSIONS

TENDERED ON : 14.05. 2020 (by the Petitioner)
24.06. 2020 (by the 1st and 2nd Respondents)

DECIDED ON : 30.09. 2020

ACHALA WENGAPPULL, J.

This is an appeal preferred by the Registered Owner Claimant-Petitioner-Appellant (hereinafter referred to as the Appellant) invoking appellate jurisdiction of this Court, in seeking to set aside the order of dismissal made by the Provincial High Court of Western Province in case No. HCRA 02/2015 dated 23.02.2015, of her revision application by which she sought to revise an order of confiscation of her vehicle bearing number NWPC - 6302, made by the Magistrate's Court of *Marawila*, in case No. 93720/C on 17.12.2014. She also seeks to set aside the said order of the Magistrate's Court.

Subsequent to a detection of being in possession of and transporting of 1170 bottles of illicit liquor in vehicle bearing number NWPC - 6302, the

Dankotuwa Police arrested and produced one Warnakulasuriya Lasnatha Sanjeewa Fernando before the Magistrate's Court of Marawila upon an allegation of committing offences punishable under Section 47 of the Excise Ordinance. He was duly charged by the Court and on 01.09.2014, the said accused pleaded guilty and was convicted upon his own plea and sentenced.

The Appellant, being the registered owner of the said vehicle sought that the vehicle involved in the commission of the offence be released to her. After an inquiry, the Magistrate's Court made order confiscating the said vehicle. The Appellant had thereafter, in addition to filing an appeal against the said order of confiscation under HAC 04/2015, also invoked revisionary jurisdiction of the Provincial High Court, seeking to set aside the said order of confiscation by petitioning the said Court under HCRA 2/2015.

In its impugned order, the Provincial High Court had dismissed her revision application. Her appeal too had been dismissed by the same Court.

Being aggrieved by the dismissal of her revision application, the Appellant sought intervention of this Court to have these two orders set aside.

It was contended by the learned President's Counsel who appeared for the Appellant that the Magistrate's Court, in confiscating her vehicle, "*... has proceeded to confiscate the vehicle on the basis that the owner had not taken all due and reasonable precautions to prevent the commission of the offence*" when in fact no such burden was placed on her by the applicable

provisions of the Excise Ordinance, under which the order of confiscation was made. It was submitted that the Provincial High Court too had proceeded to dismiss her application for revision upon adoption of an identical approach as the Magistrate's Court had taken. Therefore, the Appellant contends that both the Courts have taken irrelevant material into consideration, while failing to consider the very relevant option available under Section 55(1) of the Excise Ordinance, in favour of the Appellant.

In support of her contention, the Appellant heavily relied on the unreported judgment of this Court in *Pradeepa Prasanna v Officer-in-Charge, Special Crimes Investigation Unit, Peliyagoda & Another* - C.A.(PHC) No. 61/2012 - decided on 28.11.2014, where it is stated as to the criterion on which an order of confiscation could be made under Section 54(1) of the Excise Ordinance is “ ...whether the appellant in this instance was successful in establishing whether he in fact had no knowledge whatsoever of the act of transporting illicit liquor making use of the vehicle he owns, on a standard of balance of probabilities” and not whether “ ...the owner had not taken all due and reasonable precautions to prevent the commission of the offence” as applied by the Magistrate's Court as well as the Provincial High Court.

In view of the contention advanced by the learned President's Counsel, it is incumbent upon this Court to consider the applicable statutory provisions as well as judicial precedents that had been pronounced by the Superior Courts in relation to orders of confiscation, subsequent to commission of offences under Excise Ordinance.

Section 54(1) of Excise Ordinance states;

"Whenever an offence has been committed under this Ordinance, the excisable article, materials, still, utensil, implement, or apparatus in respect of or by means of which such offence has been committed shall be liable to confiscation.

Since the accused was convicted for committing offences under Excise Ordinance, upon his own plea of guilt, there is no dispute that the vehicle owned by the Appellant is "*liable to confiscation*" under Section 54(1) of the said Ordinance. The question is the applicable criterion, in making an order of confiscation.

The earliest reference to an applicable criterion that must be applied by the trial Court, in making an order under Section 54(1) of the said Ordinance could be found in *Sinnetamby v Ramalingam* 26 NLR 371, where Schneider J being guided by the judgment of *GolapSaha v. Emperor* identified the following principle. His Lordship states;

"... before an order of confiscation is made, the owner should be given an opportunity of being heard, and that an order of confiscation should not be made, unless the owner is in some way implicated in the offence which renders the thing liable to confiscation."

In that instance, the then Supreme Court considered the applicable criterion in determining the question of confiscation upon applicability of the test whether the "*owner is in some way implicated in the offence*". The

judgment indicates the factual basis on which the order of confiscation was made by the Court below, as it states;

"... the Magistrate came to the conclusion that it was proved that Chelliah was absent, being in Jaffna, at the time the arrack was dispatched from Trincomalee. He drew the inference that Chelliah was not altogether innocent in regard to the transport of the arrack, because Chelliah admitted that Ponniah and Ramalingam were both in his employment even at the time he gave evidence before the Magistrate. The Magistrate then made order that the car should be confiscated unless Chelliah paid a fine of Rs. 200 by the 3rd of July last. From this order Chelliah has now appealed.

Schneider J then decides that;

"The learned Magistrate's order would be unimpeachable if there was evidence to support his finding that Chelliah was not altogether innocent in regard to the offence committed by his servants. It seems to me that the evidence is altogether insufficient to support the finding that Chelliah was in any manner concerned with the transport of the arrack in his car."

Thus, it is apparent from the above that the Court in that instance had employed a criterion by which, an order of confiscation could be made. If the confiscation inquiry revealed that the owner of the vehicle that had been used to commit an excise offence is "*in any manner concerned with*" the commission of the offence, his vehicle is made liable to be confiscated.

This judgment was followed in the judgment of *Fernando v. Marther* (1932) 1 CLW 249. In *Rasiah v Thambiraj* 53 NLR 574, Nagalingam J reiterated the said principle of law, in relation to an order of confiscation made under Forest Ordinance, as it was stated that;

"It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made. To take a case, which cannot be regarded as an extreme one, where an owner lends or hires his cart without knowing that the borrower or hirer intends to use it for the purpose of committing an offence, would it be right to confiscate the cart merely because it has been so used ? I think that if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree, justice would seem to demand that he should be restored his property."

Thus, these judicial precedents have imposed a requirement on a registered owner of a vehicle, who was not charged with an offence under the Excise Ordinance to satisfy Court that "*the offence was committed without his knowledge and without his participation in the slightest degree*", if his vehicle is not to be confiscated.

The Supreme Court, in its judgment of *Manawadu v Attorney General* (1987) 2 Sri L.R. 30, quoted these principles that are enunciated in the above mentioned judgments, with its approval. This is the often cited authority, which had laid down the applicable principles of law, in relation

to the question of confiscation, under Forest Ordinance. Its reasoning is reflected in the already cited judgment of *Pradeepa Prasanna v Officer in Charge, Special Crimes Investigation Unit, Peliyagoda & Another* (supra) cited by the Appellant, in relation to the order of confiscation was under Section 54(1) of the Excise Ordinance.

In view of the Appellant's contention, the next consideration before this Court is whether both the Magistrate's Court as well as the Provincial High Court had applied the said criterion in relation to confiscation of the Appellant's vehicle ?

Upon perusal of the impugned order of the Magistrate's Court, it is evident that the confiscation was made by that Court on the following basis;

“ සුරුඛද ආභා පනතේ 54(2) වගන්තිය අනුව එම පනතේ විධිවිභානය ප්‍රකාරව දෙපාටමේ ලැබිය ගැනී වරදක් සිදු කිරීමට වාහනයක් යොදා ගෙන ඇති විට රාජ්‍යක්ෂක කිරීමට අධිකරණයට බලය ඇති. එයේ වුවද එම වරද සිදු කර ඇත්තේ වාහනයේ අයිතිතරු නොවන තෙවන පාර්ශ්වයක් වන විට එම අයිතිකරුට එම නීති විරෝධී ක්‍රියාව සම්බන්ධව දැනුමක් තිබුනේද යන්නත් එවැනි නීති විරෝධී ක්‍රියා සිදු කිරීමට වාහනය යොදා ගැනීම වැළැක්රීමට ගත ගැනීම තිබෙන පූර්ව ආරක්ෂණ ක්‍රියා මාර්ග ගෙන තිබුනේද යන්නත් රාජ්‍යක්ෂක කිරීමට ප්‍රථමයෙන් විමසා බැලිය සුතුය. එවැනි අවස්ථාවකදී අයතිකරුට වරද සම්බන්ධයෙන් දැනුමක් නොමැති බවට සහ එවැනි වැරදි වැළැක්රීමට පූර්ව ආරක්ෂණ ක්‍රියා මාර්ග ගෙන ඇති බවට සැහීමකට පත්වේ නම් වාහනය රාජ්‍යක්ෂක නොකළ සුතුය. ඒ අනුව අපගේ උපරිමාධිකරණය විධින් ලබා දී ඇති මාර්ගෝපදේශකත්වය මත පිහිටීම් මෙම නඩුවේ සාක්ෂි සඳහා බලමි.”

It appears that the Magistrate's Court had placed the applicable criterion of confiscation under Excise Ordinance, when the owner is not an accused of committing an offence under the said Ordinance as laid down in *Pradeepa Prasanna v Officer in Charge, Special Crimes Investigation Unit, Peliyagoda & Another* (supra) only up to the point it had stated " දැනුමක් නොමැති බවට". The remaining consideration that had been applied by the Magistrate's Court as indicative from the segment that " එවැනි වැරදි වැළක්වීමට පූර්ව ආරක්ෂණ කියාමාර්ග ගෙන ඇති බවට සැහීමට පත්වේ නම් වාහනය රාජක්‍යතාක නොකළ යුතුය" is not a criterion applicable to confiscations made under Excise Ordinance, in the absence of specific reference to imposition of such a condition in the said Ordinance, upon an owner of a vehicle.

Therefore, the Appellant's contention that the Magistrate's Court "... has proceeded to confiscate the vehicle on the basis that the owner had not taken all due and reasonable precautions to prevent the commission of the offence", when in fact no such burden was placed on her by the applicable provisions of the Excise Ordinance, under which the order of confiscation was made, appear to be a valid complaint.

If the applicable criterion is the one referred to in *Pradeepa Prasanna v Officer in Charge, Special Crimes Investigation Unit, Peliyagoda & Another* (supra), it appears that the same reasoning had crept into the reasoning of the Provincial High Court, when it refused to issue notice on the basis that the alleged illegality did not shock its conscience.

The Provincial High Court, in refusing to issue notice on the Respondents, on the Appellant's application for revision of the order of confiscation however relied on the ratio of the judgment of the Supreme

Court in *The Finance Company PLC vs. Priyantha Chandana and Others* (2010) 2 Sri. L.R. 220, where it has been stated 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 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."

Having quoted the portion reproduced above from the judgment of the apex Court, the Provincial High Court had stated that;

"ප්‍රියන්ත වත්දන නඩ තීත්දවේ නිගමනයට එළඹීමේදී ශේෂකාධිකරණය විසින් සුරාඛ ආදා පනත යටතේ තීත්ද රිජිස්ත්‍රුක්ෂන උපකරණ මානර් (ICLW) සින්නතමබ් එදිරිව රාමලිංගම (26 NLR 371) නඩ තීත්දවලට අවබාහය යොමු කර තිබීම වාර්තා කර තබමි."

It appears from the said statement, the Provincial High Court, had taken the *ratio decidendi* of the Supreme Court judgment of *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra) as the authority which had laid down the applicable law in relation to confiscation of vehicles involved with the commission of offences under the Excise

Ordinance as well. The Court cites an article where a learned author had indicated a similar view.

According to the Appellant, in adding to the onus already placed on the Appellant of establishing that the accused committed the offence without her knowledge, the Provincial High Court had imposed an additional burden on the Appellant, to prove to the satisfaction of the Court that she has taken all precautions to prevent the use of her vehicle, adopting the view expressed in the said article.

The applicable judicial precedents including *Manawadu v Attorney General* (supra) and *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra) already referred to in this judgment however does not support imposition of such an additional burden on the Appellant.

Section 54(1) of the Excise Ordinance, which remained unchanged since 1912, confers a discretion on a Magistrate's Court as the section states that "*whenever an offence has been committed under this Ordinance, the excisable article, materials, still, utensil, implement, or apparatus in respect of or by means of which such offence has been committed shall be liable to confiscation*".

Plain reading of this section indicates that upon the mere fact that if "*an offence has been committed under this Ordinance*" the "*excisable article, materials, still, utensil, implement, or apparatus*" shall be liable for confiscation if such excisable article, materials, still, utensil, implement, or apparatus is "*in respect of or by means of which such offence has been committed*".

There is no mention in the said Ordinance as to how a person could prevent such "*excisable article, materials, still, utensil, implement, or apparatus*" being confiscated by a Court. The judgment of *Sinnethamby v*

Ramalingam (supra) provided the means by which an owner could satisfy Court not to confiscate his property “*in respect of or by means of which such offence has been committed*”. But the Court had imposed a burden on such an individual to satisfy Court that he is not “*in some way implicated in the offence which renders the thing liable to confiscation.*”

Similarly, Section 40(1) of the Forest Ordinance (as amended by Act Nos. 56 of 1979, 13 of 1982 and 23 of 1995) states that Upon the conviction of any person for a forest offence, in addition to all timber or forest produce, all tools, boats, carts, cattle, motor vehicles, trailers, rafts, tugs or any other mode of transport motorised or otherwise and all implements and machines used in committing such offence, whether such tools, boats, carts, cattle, motor vehicles, trailers, rafts, tugs or other modes of transport motorised or otherwise are owned by such person or not; shall, by reason of such conviction, be forfeited to the State.

The Legislature, with the amended statutory provisions that had been introduced through the Forest (Amendment) Act of 13 of 1966, did eventually provide for a statutory mechanism by which a person, whose property was used in the commission of a forest offence, could prevent it being forfeited. But, the subsequent amendments of Act Nos. 56 of 1979, 13 of 1982 and 23 of 1995, had effectively taken away this opportunity. In remedying any injustice that may have resulted in from an order of forfeiture to an individual, the Supreme Court, in its judgment of *Manawadu v Attorney General* (supra) nonetheless stated that, by satisfying Court that “*the accused committed the offence without his knowledge or participation*” such person could prevent his property being forfeited. The judgment of the Supreme Court in *The Finance Company PLC v Priyantha*

Chandana & 5 Others (supra) had added on to this criterion, when it states “... if the owner had proved to the satisfaction of Court that he had taken all precautions to prevent...”. With the subsequent passing of Forest (Amendment) Act No. 65 of 2009, the Legislature had re-introduced the said identical mechanism, with the insertion of a proviso to Section 40(1), by which a third party owner could satisfy Court as to why his property should not be forfeited to the State.

It is significant to note that the judgment of the Supreme Court in *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra) was pronounced on 02.07.2009 whereas the said Act No. 65 of 2009 was certified on 16.11.2009, a fact indicative of that the Legislature had ensured that the law is amended to incorporate the reasoning of the apex Court.

In spite of the transformation of Section 40 of the Forest Ordinance, which had changed its character in relation to confiscation of properties of third parties over the years, no such change was made in the provisions of Exercise Ordinance.

Section 3A of the Animals Act too has similar provisions empowering Courts to confiscate vehicles used in the commission of offence under the Act, in addition to imposition of any other punishment prescribed for such offence.

However, in the proviso to the said section, the Legislature had provided a statutorily prescribed mode of relief from confiscation, It states that if the “owner of the vehicle is a third party” and if he “proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such

vehicle or that the vehicle has been used without his knowledge for the commission of the offence".

It is significant to note that the Legislature has introduced an additional option to a third party owner of a vehicle, by way of a proviso to Section 3A of the Animals Act. The said proviso states that such person could prove to the satisfaction of Court; either that "*he has taken all precautions to prevent the use of such vehicle*" or "*the vehicle has been used without his knowledge for the commission of the offence*", a method already provided by judicial activism as per the judgment of *Sinnethamby v Ramalingam* (supra). The consideration that "... *he has taken all precautions to prevent the use of such vehicle*" had been introduced for the first time by the amendment made to Section 3A of the Animal Act, by Section 3 of the Act No. 10 of 1968.

It is indicated in the judgment of *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra) that the apex Court granted special leave on the question of law as to "...*the scope of the inquiry in terms of Chapter XXXVIII of the Code of Criminal Procedure Act before the Magistrate's Court, was limited to ascertain whether or not the appellant was aware or that the said vehicle has been used in connection with or participated in the commission of the offence.*" In this instance, the appellant before their Lordships had sought to impugn the judgment of the Provincial High Court in dismissing an appeal against the confiscation of a vehicle, upon commission of offences under the Sections 24(1)(b) and 25(2) of the Forest Ordinance.

The Supreme Court, in the said judgment, cited *Manawadu v Attorney General* (supra) where Sharvanada CJ has stated that "*the owner of*

*the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the Court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture" and **Faris v OIC, Galenbindunuwewa** (1992) 1 Sri L.R. 167, where it is held;*

"... in terms of section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of the following:

- (a) *that he has taken all precautions to prevent the use of the vehicle for the commission of the offence;*
- (b) *that the vehicle had been used for the commission of the offence without his knowledge."*

It is in the light of several other judicial precedents and principles enunciated on the above quoted judgments, the Supreme Court holds thus;

"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."

Effectively, with the pronouncement of the judgment of **The Finance Company PLC v Priyantha Chandana & 5 Others** (supra), the apex Court

had altered the nature of the applicable criterion on confiscation as laid down in *Manawadu v Attorney General* (supra), by inclusion of the phrase "*he had taken all precautions to prevent the use of the said vehicle for the commission of the offence*" in respect of Forest Ordinance. In *Manawadu v. Attorney General* (supra) Sharvanada CJ has stated that "*the owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the Court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture*".

The impugned confiscation order made by the Magistrate's Court carry the identical phrase without making any reference to the judgment *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra), while the Provincial High Court, in its order had explicitly stated that it acted on the principle laid down in the said judgment.

By doing so, both the Courts below have adopted a criterion laid down in respect of confiscations under Forest Ordinance by the Supreme Court, to confiscate the Appellant's vehicle, acting under the provisions of the Excise Ordinance, as complained by the learned President's Counsel for the Appellant.

The approach taken by the Courts below, identified by this Court earlier in this judgment, by raising the question whether both the Magistrate's Court as well as the Provincial High Court had applied the said criterion in relation to confiscation of the Appellant's vehicle, should therefore be answered in the affirmative. The said answer itself then raises another issue, especially in the light of the submissions of the Appellant. This new issue is whether the Courts below, in adopting the said criterion,

had taken into irrelevant considerations, in the confiscation of the Appellant's vehicle?

Clearly the criterion for confiscation had undergone an evolutionary process over the years with each judicial pronouncement, coupled with the changes made to the statutory provisions by the Legislature. It is apparent that from the statement of law by Schneider J to the effect that "*unless the owner is in some way implicated in the offence*", followed by Nagalingam J's statement "*that the offence was committed without knowledge and without his participation in the slightest degree*" and then to the Sharvandna CJ's statement that "... if he satisfies the Court that the accused committed the offence without his knowledge or participation", the Superior Courts have presented the applicable criterion for confiscation with different wordings, with expanded scope, an exercise that culminated with the latest of such statements by Dr.Bandaranayake CJ that "... 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".

In the circumstances, it is reasonable to assume that the Court of final appeal was mindful that slightly different considerations were applied by the Courts below in determining the issue of confiscation under different statutes should be changed and perhaps therefore thought it is appropriate to bring about some uniformity to such considerations. The confiscations made under the Animals Act and the Forest Ordinance are accordingly brought under the identical consideration by the said judgment, while confiscations made under Excise Ordinance remain somewhat static since *Sinnetamby v Ramalingam* (supra) as indicative by

Pradeepa Prasanna v Officer in Charge, Special Crimes Investigation Unit, Peliyagoda & Another (supra).

In this context, the question arises whether the Magistrate's Court and the Provincial High Court, by applying a criterion that had been laid down in relation to confiscations under Forest Ordinance, in relation to a confiscation under Section 54(1) of the Excise Ordinance on the basis that the judgment of *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra) had laid down a consideration which could be universally applicable, have acted on irrelevant consideration?

No doubt the *dicta* of the said judgment made specific reference to Section 40 of the Forest Ordinance as it clearly stated that "... *in terms of section 40 of the Forest Ordinance*" and therefore had laid down the criterion on which an order of confiscation could be made under Section 40 of the Forest Ordinance.

The Section 40(1) of the Forest Ordinance as amended states;

"Upon conviction of any person for 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 boats, carts, cattle and motor vehicles, trailers, rafts, tugs, or any other mode of transport motorised or otherwise and all implements and machines used in committing such offence whether such tools, boats, carts, cattle, motor vehicle, trailers, rafts, tugs or other modes of

transport motorized or otherwise are owned by such person or not

shall, by reason of such conviction be forfeited to the State."

Section 54(2) of the Excise Ordinance states;

- "(1) Whenever an offence has been committed under this Ordinance, the excisable article, materials, still, utensil, implement, or apparatus in respect of or by means of which such offence has been committed shall be liable to confiscation.
- (2) Any excisable article lawfully imported, transported, manufactured, had in possession, or sold along with, or in addition to, any excisable article liable to confiscation under this section, and the receptacles, packages, and coverings in which any such excisable article, materials, still, utensil, implement, or apparatus as aforesaid is found, and the other contents, if any, of the receptacles or packages in which the same is found, and the animals, carts, vessels, or other conveyance used in carrying the same, shall likewise be liable to confiscation."

The Appellant's vehicle was confiscated by the Magistrate's Court acting under Section 54(2) of the Excise Ordinance, where it specifically stated "*shall likewise be liable to confiscation*".

Plain reading of these two parallel provisions of the Forest and Excise Ordinances, it would seem that Section 40 made provisions for an

automatic confiscation with the wording “... shall, by reason of such conviction be forfeited to the State” while Section 54(2) of the Excise Ordinance only made it liable for confiscation.

But the Supreme Court, in *Manawadu v Attorney General* (supra) has held in relation to the words “... shall be forfeited to the State” should be interpreted as “*liable to be confiscated*”. The judgment reads as follows;

“In the light of the above principles, I am unable to accept the submission of State Counsel that the legislature by Section 7 of Act No. 13 of 1982 intended to deprive an owner of his vehicle that had been used by the offender in committing a forest offence without the owner's knowledge and without his participation. Having regard to the inequitable consequences that flow from treating the words 'shall by reason of such conviction be forfeited to the State' as mandatory. I am inclined to hold, as the House of Lords did in A. G. v. Parsons (supra) that "forfeited" meant "liable to be forfeited. " and thus avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused.”

Thus, a commonality between the two provisions, Section 40 of the Forest Ordinance and Section 54(2) of the Excise Ordinance is established. The resultant position is upon a conviction for an offence under these Ordinances, a vehicle used in relation to the commission of such offence, as in this instance, is made “*liable to be confiscated*” under these two situations.

In the judgment of *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra), it was laid down by the Supreme Court that when the issue of confiscation under Section 40 of the Forest Ordinance arises before a Court, the applicable criterion would be ““... 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”.

Similarly, when the identical words “*liable to be confiscated*” appear in Section 54(2) of the Excise Ordinance, is reasonable and logical to conclude that the same criterion referred to in the above judgment should be made applicable to the issue of confiscation under Excise Ordinance as well. A reference to an instance where a similar approach was adopted could be found in the authoritative text of *Bindra, Interpretation of statutes*, 9th Ed, p.657, following the reasoning of the judgment *Beaman v ARTS Ltd* 1 All ER 465.

It is stated that;

“*where a word has been construed judicially in a certain legal area, it is right to give it that same meaning if it occurs in a statute dealing with the same general subject matter, unless the context makes it clear that the words must have a different construction*”.

Therefore, this Court is not inclined to agree with the contention of the learned President’s Counsel that the Courts below had taken into irrelevant considerations in the confiscation of the Appellant’s vehicle. The Appellant had placed heavy reliance on the statement of law made by Chitrasiri J in *Pradeepa Prasanna v Officer in Charge, Special Crimes*

Investigation Unit, Peliyagoda & Another (supra) that “that he in fact had no knowledge whatsoever of the act of transporting illicit liquor making use of his vehicle” which in turn is apparently a re-statement of Sharvanda CJ’s statement that “... if he satisfies the Court that the accused committed the offence without his knowledge or participation”. But the Supreme Court had added on to this criterion by the judgment of *The Finance Company PLC v Priyantha Chandana & 5 Others* (supra).

On the other hand, the contention that were placed before this Court for determination was not placed before Court in *Pradeepa Prasanna v Officer in Charge, Special Crimes Investigation Unit, Peliyagoda & Another* (supra) and therefore could be distinguished on that basis.

The resultant position is that the first of the two aspects that were highlighted in the Appellant’s grounds of appeal fails.

Moving on to consider the other aspect of the Appellant’s contention, that the failure of the Magistrate’s Court to exercise its discretion conferred under Section 55(1) of the Excise Ordinance, before this Court ventures any further with this consideration, it is necessary to consider the applicable statutory provisions at this stage, in order to ascertain as to the nature of the discretion imposed on the inquiring Magistrate.

Section 55(1) of the Excise Ordinance states;

“When in any case tried by him the Magistrate decides that anything is liable to confiscation under the foregoing section, he may order confiscation, or may give the owner of the thing

liable to be confiscated an option to pay, in lieu of confiscation, such fine as he thinks fit.

The section in its construction had covered two situations in its scope. The Court is left with two options in relation to Section 54(2). The Court either make an order to confiscate the item or to impose a fine on its owner, in lieu of confiscation. But the exercise of the discretion conferred on Court under Section 55(1) could only be exercised if it already had decided that the item mentioned in Section 54(2) of the Excise Ordinance, is "*liable for confiscation*". If the owner is given an "*option*" to pay a fine, and if he fails in exercising that "*option*" made available to him, then, necessarily the order of confiscation follows.

Clearly, this particular provision, apparently based on the principle of proportionality, provides an opportunity to the Court, instead of making a more drastic order of confiscation, to offer an "*option*" to the owner of the thing that had been decided by that Court as to be liable for confiscation, to pay a fine imposed by the Court. The section does not specify the range of the quantum, a Court could impose as a fine. The Court could guide itself with considerations such as the nature of the offence, the manner in which it was committed, value of the thing liable to be confiscated and the extent to which an order of confiscation affects its owner.

It is clear from the perusal of the impugned order that the Magistrate's Court had failed to consider this aspect in confiscating the Appellant's vehicle.

This Court has already concluded that the criterion on which the Magistrate's Court had applied in the confiscation is a valid one. That made the decision to confiscate the Appellant's vehicle valid. But then, the Court should have considered the discretion conferred on it under Section 55 of the Excise Ordinance. Admittedly it had failed.

Could then this Court consider this question in appeal and impose a fine?

In this particular instance, the answer would clearly be in the negative. This is due to the fact that the Magistrate's Court had, having evaluated the evidence placed by the Appellant and her witnesses, decided to reject that evidence on the basis they are not credible. The Court justified the said conclusion with reasons. Credibility of a witness is essentially a question of fact and the determinations made on such questions of fact are rarely interfered with by an appellate Court. In this instance, the Appellant and her witness gave evidence before the learned Magistrate, who made the impugned order, which indicate he did have the benefit of observing their demeanour and deportment in assessing their credibility.

The Appellant, in her evidence claimed that the accused, who is a friend of her brother, had borrowed the vehicle on the pretext of using it for sightseeing on Vesak day. She said the vehicle was handed over to the accused on 28th June at about 9.00 p.m.. He promised to return the vehicle on the same night, but did not return as he had consumed alcohol. She had lent the vehicle previously to the accused but only this time he had breached her trust by resorting to illegal activities.

Witness *Nirmala Dasun*, the Appellant's brother, too gave evidence on her behalf. Contrary to the claim of the Appellant, the witness said that the accused was employed as a driver for well over 4 years and since the detection, his services were discontinued with. According to him, the accused borrowed the vehicle on 28th August contradicting the Appellant's claim of it was on 28th June, and reason for borrowing was to attend a wedding and not for sightseeing as claimed by the Appellant.

The Appellant did not call the accused, who could have explained his side of the sequence of events which led to the detection and the Appellant's conduct that she had taken "*... all precautions to prevent the use of the said vehicle for the commission of the offence.*"

Thus, the Appellant's claim of the accused had acted in breached of the trust she had placed on him, remains only a verbal assertion, in the absence of any specific details of her role. The acceptance of her claim is therefore totally dependant on her credibility.

In view of the obvious inconsistencies that exist between the evidence of the Appellant and her brother, her assertion that the accused surprised her by using the vehicle to transport illicit liquor, fails due to the vital credibility issue. If the accused was employed as a driver for over 4 years as her witness claims, the Appellant's claim that he is only a "friend" who used to borrow the vehicle on occasions and that too on trust becomes a deliberate lie on her part. Why did she choose to suppress the important relationship between her and the accused could not be gathered from the evidence placed before the Court. The Appellant must prove her claim on balance of probabilities by credible evidence. When she even failed to

place credible evidence before Court for it to act upon, the question whether she had proved her claim to the required degree of proof, must be answered in the negative.

In *Kumara de Silva & Others v Attorney General* (2010) 2 Sri L.R. 169, it was held that;

"Credibility is a question of fact, not of law. Appeal Court Judges repeatedly stress the importance of the trial Judge's observations of the demeanour of witnesses in deciding questions of fact. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge, since he or she is in the best position to hear and observe witnesses. In such a situation the Appellate courts will be slow to interfere with the findings of the trial Judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility."

This Court, having perused the evidence carefully concurs with the conclusion reached by the Magistrate's Court as to the credibility of the Appellant.

In *Sinnetamby v. Ramalingam* (supra), Schneider J referred to the judgment of Sampayo J, delivered on the appeal preferred by the same

appellant by which he had challenged an order of confiscation made in his absence. It is stated that;

"The Magistrate is given a discretion by section 52 either to confiscate the car or conveyance, or to require the owner to pay a fine. It stands to reason that the owner, if he were present on the occasion when the question of confiscation was being considered, might show cause, which would induce the Court to award a fine instead of making the serious order of confiscation, especially in the case of such a valuable vehicle as a motor car."

However, in this particular situation, the consideration of remitting this appeal back to the Magistrate's Court for inquiry, in order to consider the question of whether to offer the Appellant an "option" of an imposition of a fine instead of confiscation, does not arise as it did before Sampayo J, since the Appellant did offer evidence but there was no credible evidence before Court. The resultant position is that, even if the Magistrate's Court were to exercise its discretion under Section 55(1) of the Excise Ordinance, there were no credible material placed by the Appellant to determine the issue whether it is appropriate in the circumstances to impose a fine or to proceed with an order of confiscation. The failure to consider the "option" under Section 54(2), in this instance, did not cause any prejudice to the Appellant.

Therefore, this Court holds that there is no merit in the appeal of the Appellant. The orders of the Provincial High Court and the Magistrate's Court are accordingly affirmed.

The appeal of the Appellant is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL