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

In the matter of an appeal against an Order of the High Court under Section 331 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.

CA PHC 73/22

HC Matara Case No: 29/2019 (Revision)

MC Matara Case No. 23459

Officer In Charge
Police Station
Kirulapana

Complainant

Vs.

1. Widanapathirana Gunasekara Manjula Manoj Pushpakumara
2. Matheshewa Samantha Dinesh
3. Bathige Dharmasena
4. Jagath Pradeep Siriwardhana
5. Rathnagodage Nihal Kumara'Geegabage Thushara Lal Rathnayaka

Accused

AND NOW BETWEEN

Lahandapurage Wijethunga
Moragasara, Delpamulla, Deyiyandara

Registered Owner

And

V.

Lahandapurage Wijethunga
Moragasara, Delpamulla, Deyiyandara

Registered Owner-Claimant

1. Officer In Charge
   Police Station
   Kamburupitiya

2. The Attorney General
   Attorney General's Department
   Colombo 12.

Complainant-Respondent

AND/Between

Registered Owner Claimant Petitioner

Vs.

Lahandapurage Wijethunga
Moragasara, Delpamulla, Deyiyandara

Registered Owner-Claimant

Vs.

1. Officer In Charge
   Police Station
   Kamburupitiya

2. The Attorney General
   Attorney General's Department
   Colombo 12.

Complainant-Respondent-Respondent

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel : Shabdika Wellappili for the Appellant
Malik Azeez, SC for the Respondent

Written Submission on: 23.09.2025 (by the Respondent)

Argued On : 08.09.2025

Judgment On: 07.10.2025

JUDGMENT

The Registered Owner-Petitioner-Appellant (hereinafter referred to as the "Owner") instituted this appeal against the order of the Learned High Court Judge of the Provincial High Court of Sothern Province holding in Matara in case No. 29/2019 where the Learned High Court Judge affirmed the order of the Learned Magistrate of Matara bearing No. 23459 where the Learned Magistrate has confiscated a tractor (hereinafter referred to as the 'vehicle') and a trailer bearing No. 27-3068 and SPGM 0977 respectively consequent to an inquiry.

On 8th July 2009, six individuals were taken into custody along with a vehicle and trailer in connection with a violation of the Forest Ordinance, for the unlawful transportation of ten jackfruit logs. Upon conclusion of the trial, the Learned Magistrate, on 8th September 2015, found the first and second accused guilty of the offence. Following their conviction, the Learned Magistrate initiated an inquiry into the confiscation of the vehicle and trailer, which had been seized due to their involvement in the commission of the offence.

At the inquiry, the registered owner, Lahandapurage Wijethunga and one Kahandapurage Wijesiri gave evidence. Thereafter, on 09.01.2019, the Learned Magistrate delivered an order and confiscated the vehicle and the trailer.

Aggrieved by the said order, Owner has filed the revision application in the High Court of Matara, where the Learned High Court Judge dismissed the said revision application. The Owner has preferred this instant appeal seeking to set aside the order of the Learned High Court Judge.

Upon examination of the order issued by the Learned Magistrate on 09.01.2019, it was his considered opinion that the Owner had failed to satisfy the court, on a balance of probabilities, to warrant an order preventing the confiscation of the vehicle and trailer. The Learned Magistrate concluded that the owner had failed to take adequate measures to prevent the use of the said vehicle in the commission of a subsequent offence.

It is noted that, in its original form, the Forest Ordinance lacked any provision empowering the learned Magistrate to conduct an inquiry concerning the confiscation of the vehicle. Consequently, the owner was deprived of an opportunity to present his case.

" 40. when any person is convicted of a Forest offence, all timber or forest produce which is not the property of the Crown in respect of which such offence has been committed and all tools boats, carts, cattle, motor vehicles used in committing such offence shall be liable, by order of the convicting Magistrate to confiscation. Such confiscation may be in addition to any other punishment prescribed for such offence."

Subsequently, Section 40 of the principal enactment was amended by Section 12 of Act No. 13 of 1966, thereby affording the owner an opportunity to protect his property from confiscation by demonstrating that he had exercised due diligence to prevent the use of the said vehicle in the commission of the offence.

Forest (Amendment) Act No. 13 of 1966

> *12. Section 40 of the principal enactment hereby amended by the substitution, for all the words*
> *shall be liable,"*
> *to the end of that section, of*
> *the following:-*
>
> *" shall, in addition to any other punishment prescribed for such offence, be confiscated by order of the convicting Magistrate:*
>
> *Provided that in any case where the owner of such tools, boats, carts, cattle or motor vehicles is a third party, no order of confiscation shall be made if such owner proves to he satisfaction of the court that he had used all precautions to prevent the use of such tools, boats, carts, cattle or motor vehicles, as the case may be, for the commission of the offence."*

This amendment granted the owner an opportunity to demonstrate that all necessary precautions had been taken to prevent the use of the vehicle in the commission of an offence, thereby safeguarding it from confiscation.

At this juncture, it is appropriate to reflect upon the views expressed by our Judges concerning the property rights of the innocent owner.

Akbar J in Excise Inspector Fernando Vs, Marther And Sons, The Ceylon Law weekly, Volume I-50, page 337 held that;

"That before confiscation of a vehicle used for transporting an excisable article without a permit is ordered the owner should be given an opportunity of being heard against the order."

Justice Nagalingam, J, in RASIAH V. TAMBIRAJAH (Divisional Forest Officer) 53 NLR 574;

"In cases where accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without a previous inquiry would be tantamount to depriving the person of his property without an opportunity being given him to show.: cause against the order being made.

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 7 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 to another without knowing that the borrower or the hirer intends to case it of the purpose of committing an offence, would it be right to confiscate the cart merely because it has been so used ? I think 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."

This amendment provided the innocent owner with an opportunity to prevent the confiscation of his vehicle. Subsequently, in the exercise of legislative wisdom, the said provision was repealed through the introduction of Section 7 of Act No. 13 of 1982. It is noteworthy that the section had already been repealed prior to this, by Act No. 53 of 1979.

For easy reference, I reproduced both amendments.

Forest (Amendment) Act No. 56 of 1979

9. Section 40 of the principal enactment is hereby amended by the repeal of the proviso to that section.

10. Section 41 of the principal enactment is hereby amended by the addition of the following new proviso at the end of that section:-

"Provided that, where any timber or forest produce is subject to speedy and natural decay the court may direct, at any stage prior to the conclusion of the trial, the sale of such timber or forest produce and that the proceeds of the sale be deposited in court to be dealt with at the conclusion of the trial in such manner as the court

may direct."

Forest Amendment) Act No. 13 of 1982

7. Section 40 of the principal enactment, as last amended by Act No. 56 of 1979, is hereby repealed and the following section substituted thereof;-

40.(1) Upon the conviction of any person for a forest offence-

a) all timber of 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 used in committing such offence (whether such tools, boats. carts, cattle and motor vehicles are owned by such person or not)"

As a result of these legislative changes, even an innocent owner was rendered powerless to contest the forfeiture.

The issue of participation by an innocent owner was judicially considered by Sharvananda, C.J., in *Manawadu v. Attorney General* (1987) 2 SLR 30. Until that decision, the Act provided no avenue for the owner to be heard, and forfeiture of the vehicle was automatic upon conviction for the offence.

In *Manawadu*, Sharvananda, C.J emphasized the fundamental principle that "no man is to be condemned in his person or property without being heard," citing with approval the dicta of Nagalingam J in *Rasiah v. Thambiraj*. Following this landmark judgment, courts have recognized the right of individuals to participate in vehicle inquiries, thereby restoring a measure of procedural fairness.

At present, pursuant to Act No. 65 of 2009, a statutory provision exists enabling vehicle owners to demonstrate that they took reasonable precautions to safeguard their vehicle and prevent the commission of any offence.

Section 40 (1) of the said Act , as amended by Act No 65 of 2009;

Section 26

Section 40 of the principal enactment is hereby amended by the repeal of subsection (1) thereof and the substitution therefore of the following.

"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 the 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 where the owner of such tools, 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, implement, cattle and machines as the case may be, for the commission of the offence."(emphasis added)*

Prior to this amendment, the courts required the owner to establish either that all necessary precautions had been taken to prevent the offence or that the offence was committed without the owner's knowledge.

In ***Finance Company PLC Vs. Priyantha Chandra and Five Others (2010) 2 SLR 220,*** after considering several judicial pronouncements, Dr. Shirani Bandaranayake, J. (as she was then) held:

> *"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, an order of confiscation shall not be made if that owner had proved to the satisfaction of the Court that he has 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 shows that the owner has to establish the said matter on the balance of probability."

Held further:

"As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence."

In **Range Forest Officer v. Duwa Pedige Aruna Kumara, SC Appeal No.120/2011,** decided on 10.12.2013, Priyasath Dep, PC. J, (as he was then) held that:

"The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore, it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner."

Following the enactment of this amendment, the courts now expect the owner to prove, on the balance of probabilities, that preventive measures were taken to avert the commission of the offence. This principle has been considered in the following judgments.

Her Ladyship Justice K. K. Wickremasinghe in *Karunapedi Durayalage Sumana Kumara v. Officer-in-Charge, Police Station, Narammala and others* has stated:

"Further, it is imperative to note that as per, section 40 of the Forest Ordinance (amendment Act No. 65 of 2009), it is mandatory to prove preventive measures taken by the vehicle owner in question. Even though the previous law allowed a vehicle owner to prove either he took precautions

or he had no knowledge of an offence being committed, the amended section 40 only focuses on the precautions taken by a vehicle owner in question. Therefore, I am of the view that mere denial of the knowledge about an offence being committed or denial of the control over his own vehicle is not sufficient for a vehicle owner to discharge the burden cast on him, under section 40 of the Forest Ordinance (as amended)."

His lordship Iddawala J in *Rajapakse Dewage Asanga Kumara Chandrasena v. Officer-in-Charge, Police Station, Katugasthota and another* has stated;

"By the amendment to the Forest Ordinance in 2009 by Act No. 65 of 2009, the legislature has determined that having no knowledge of the offence being committed is a not good enough a reason anymore to claim a confiscated vehicle.

Therefore, Counsel has to be mindful in citing cases decided prior to the 2009 amendment or cases decided under other legislations. The judiciary has to only discern whether the claimant being the owner of the vehicle, had taken all precautions to prevent the use of the vehicle for the commission of the offence. This entails positive actions on the part of the owner and not claiming mere ignorance."

Upon examining the Owner's evidence, it is evident that he has expressly stated having taken all necessary precautions to prevent the commission of the offence. It is therefore pertinent to reproduce the evidence presented before the Learned Magistrate on 03.07.2018.

Page 174 of the brief,

"ඔහුට වාහනයක් ධාවනය කරන්න සුදුසුකම් තිබෙනවාද කියලා බැලුවා. රියදුරු බලපත්‍රයක් තිබෙනවාද කියලා බැලුවා. මම එලෙස සොයා බැලුවේ මගේ වාහනය නිසියාකාරයෙන් ධාවනය කරන්න ඕන නිසා. වාහනය ඉදිරියටත් ඒ ආකාරයෙන් තිබෙන්න ඕන නිසා තමයි

සොයලා බැලුවේ. මෙම වාහනය කුමන කුමන කාරණා වලට යොදා ගන්නවද කියලා මම රියදුරු දැනුවත් කිරීමක් කලා.

මම කිව්වේ ගඩොල්, කළුගල්, ගොඩනැගිලි, ද්‍රව්‍ය යකඩ වගේ ද්‍රව්‍ය ප්‍රවාහනය කරන්න කියලා තමයි වාහනය ලබා දුන්නේ. ඔහුට අවශ්‍ය ඔහුට අදාළ හයර් යන්න අවසර දීලා තිබුණේ නැහැ. මම ඔහුට ඕනම ද්‍රවයක් ප්‍රවාහනය කරන්න කියලා අවසර දීලා තිබුණේ නැහැ. හයර් ගීයාම ගිය වෙලාව කොහෙද ගියේ එන වෙලාව සොයා බලනවා. එම රියදුරු කොහේ පදිංචිකරුවෙක්ද කියලා මම දන්නවා. ඔහුගේ ලිපිනය මම දන්නවා. ඔහු අවුරුදු අටක් දහයක් විතර දන්න හඳුනන කෙනෙක්. මම දන්න කෙනෙක් නිසා තමයි ඔහුට වාහනය හයර් කිරීම සඳහා ලබා දීමක් කලේ. වාහනය ආරක්ෂා කරගන්න පුද්ගලයෙක් කියල දන්නව. මම මෙම වාහනේ රියදුරුට ලබා දුන්නාට පස්සේ ඔහුගේ ගෙදර ගිහිල්ල තියාගෙන දුවන්න ඉඩ දුන්නේ නැහැ. මෙම වාහනය මගේ ගෙදර තමයි තිබුණේ. එම වාහනය ගාල් කරන්න ඉඩ පහසුකම් මගේ ගෙදර තිබෙනවා. මගේ වැඩවලට තමයි වාහනේ ගත්තේ හයර් එකක් ආවොත් දුවනවා. කුමන වෙලාවකවත් රියදුරුට වාහනය පත් කලේ නැහැ. මම එලෙස කළේ වාහනය වරදවල් වලින් ආරක්ෂා කර ගන්න. මෙම වාහනය රාත්‍රී කාලයේ තිබෙන්නේ ගෙදර. රාත්‍රී කාලයේදී රියදුරුට හයර් යන්න අවසර දීලා තිබුණේ නැහැ. එහෙම වැඩක් නැහැ වාහනේ ගෙදර තිබෙන අවස්ථාවලදී වාහනයේ යතුරු මා භාරයේ තමයි තිබෙන්නේ. ඔහුට හයර් එකක් ගියාම එයින් 25% තමයි ලබා දෙන්නේ.

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අවශ්‍යතාවය මත තමයි යන්නේ. දුර යන්නේ නැහැ. ඒ නිසා තමයි මම රියදුරුට කියලා තිබෙන්නේ ආසන්නයේ හයර් පමණක් යන්න කියලා තිබෙන්නේ. . හයර් එකක් ආවම රියදුරුට වාහනය භාරදීමක් කරනවා. එතකොට යන්නේ කොහෙද කියලා සොයලා බලනවා. මොකද්ද වුවමනාව කාරණය කියලා සොයලා බලනවා. ඇනවුම කරන කෙනාගෙන් සොයලා බලනවා. මම යන කාරනාව ගැන සොයනවා යන ගමනාන්තය ගැන සොයනවා. එම කාරණාවට අදාලව තමයි වාහනය ලබාදීමක් සිදු කරන්නේ. වාහනය ගිහිල්ලා එන දුර ප්‍රමාණය ගැන බලනවා. එන්න පුළුවන් වෙලාව සොයලා බලනවා. හයර් මගින් සොයා බැලීම් කරනවා. ඔහුගේ දුරකථන අංකය ඒ දවස්වල තිබුනා.''

From this evidence, it is clear that the owner has established that he has taken all the precautions to prevent the said vehicle from the commission of the offence and that the said vehicle was used for the commission of the offence without his knowledge. But both the learned magistrate and the Learned High Court judge did not consider this evidence. It should be noted that this evidence was not

contradicted. When the evidence is not contradicted, it becomes uncontradicted evidence.

This concept was considered by Justice **H.N.J. Fernando CJ in L.Edrick De Silva v. L. Chandrdasa de Silva, 40 NLR 169:**

"Where the petitioner has led evidence sufficient in law to prove his status, I.E, a factum probandum, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional "matter before the Court" which the definition in section 3 of the Evidence Ordinance requires the court", to take into account , namely that the evidence led by the petitioner is uncontradicted. The failure to take account of these circumstances is a non direction amounting to a misdirection in law."

But learned Magistrate and learned High Court Judge has failed to consider this fact.

It is pertinent to refer to the learned Magistrate's order with regard to the evidence placed before him.

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"මෙම නඩුවට අදාළ සිද්ධිමය තත්ත්වය යටතේ මෙම නඩුවේ සාක්ෂි ලබා දුන් නඩුවට අදාළ 27-3068 දරණ ට්‍රැක්ටරය හා ජී.එම් 0977 දරණ ට්‍රේලරයේ ලියාපදිංචි අයිතිකරුගේ සාක්ෂිය අනුව ට්‍රැක්ටරය සහ ට්‍රේලරයේ ලියාපදිංචි පොතෙහි නම සඳහන් අයිතිකරු මෙම නඩුවේ චූදිතයකු නොවන තෙවන පාර්ශ්වයක් බවට තහවුරු වන නමුත් නඩුවට අදාළ වරද සිදුකිරීම සඳහා චූදිත විසින් ප්‍රශ්න ගත ට්‍රක් රථය යොදාගෙන ඇත්තේ හා එසේ යොදා ගැනීම සම්බන්ධයෙන් ලියාපදිංචි අයිතිකාරීත්වයට කිසිදු දැනීමක් නිබී නැති බවත්, එවැනි වරදකට ට්‍රක් රථය යොදා ගැනීම වළක්වාලීම සඳහා අවශ්‍ය පියවර ලියාපදිංචි අයිතිකරු ගෙන ඇති බවත්, සනාථ කිරීමට ලියාපදිංචි අයිතිකරු අපොහොසත්ව ඇත.

ඒ අනුව ඉහත කරුණු අදාළ ට්‍රැක්ටර් රථය හා ට්‍රේලරයේ ලියාපදිංචි අයිතිකරු විසින් ස්වකීය නඩුවේදී වැඩි බර සාක්ෂි (ශක්‍යතා වැඩිබර) මට්ටමකින් තහවුරු කර නොමැති බවට තීරණය කරමි."

I hold that a learned magistrate failure to consider the evidence is a misdirection in law.

We are mindful that our courts require the owner to establish his claim on the balance of probabilities.

In the case of *Orient Financial Service Corporation Ltd. v. Range Forest Officer and One Other*, CA (PHC) APN 26/2011, decided on 28.04.2011, Sisira De Abrew J held that:

> "*It is therefore seen under the existing law a vehicle transporting timber cannot be confiscated if the owner of the vehicle on a balance of probability, establishes one of the following things.*
>
> *1. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence.*
>
> *2. That the vehicle has been used for the commission of the offence without his knowledge."*

I am mindful of the observations set out by His Lordship Justice Ranaraja, in *Officer in Charge, Nagoda v. Katuneliya Gamage Dilsha Theekshana Kumara*, CA PHC/59/2020, decided on 27.03.2025. held that;

> *"When considering the contents quoted above, it is clear that if indisputable evidence is provided by the appellant to satisfy the Court on a balance of probability of the precautionary measures taken by her to prevent the use of the particular vehicle to commit an offence, then evidence to corroborate the narrative of the appellant is not essential."*

Upon a comprehensive review of the evidence presented before the Learned Magistrate, we are satisfied that the owner, who is the registered owner of the vehicle, has placed his evidence on the balance of probability, which our courts require. The owner had known the accused for a period of 8 to 10 years and had entrusted the vehicle under clearly defined conditions, including instructions to undertake only nearby hires. Moreover, the vehicle had been in the owner's possession since 2010, with no prior record of involvement in any unlawful activity. Despite these consistent and credible safeguards, such factors were not adequately taken into account in either of the orders currently under review.

Moreover, it is noted that the Learned Magistrate and the Learned High Court Judge failed to consider the above factors into account in arriving at their determination.

When we peruse the learned High Court Judge's Order made on 10.02.2022, it is evident that the learned High Court judge has failed to analyse the evidence of the owner, which was placed before the learned Magistrate.

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"සියළු පුර්වාරක්ෂක ක්‍රියාමාර්ග ගනු ලැබූ බව වැඩිබර සාක්ෂි මත ඔප්පු කිරීමට වාචිකව රියදුරුට උපදෙස් දුන්නා යැයි ප්‍රකාශ කිරීම පමණක් ප්‍රමාණවත් නොවේ. ඉහත කි පරිදි එය ප්‍රයෝගිකව සිදුකල බව වැඩිබර සාක්ෂි මත ඔප්පු කර තිබිය යුතුය. උගත් මහේස්ත්‍රාත් තුමිය ලියාපදිංචි අයිතිකරුගේ සාක්ෂි හා අදාළ දින වාහනය සේවයේ යොදවා ගත් තැනැත්තාගේ සාක්ෂි මනාව සලකා බැලීමෙන් පසු එම සාක්ෂි ප්‍රතික්ෂේප කර ඇති අතර, ඒ සඳහා පිළිගත හැකි හේතූන් ද සඳහන් කර ඇත."

In my considered opinion, the learned High Court Judge either failed to evaluate the evidence presented by the owner or omitted any reference to it in the judgment.

As such, we allow the Appeal and set aside the orders dated 09.01.2019 and 11.02.2022 of the Learned Magistrate of Matara and the Learned Provincial High Court Judge of Matara, respectively.

In light of the foregoing facts, I am of the opinion that the confiscation of the vehicle is unjustified and cannot be upheld. Therefore, we direct to release of the tractor and the trailer bearing No. 27-3068 and SPGM 0977 to the Appellant.

The Registrar of this Court is directed to communicate this judgment to the Matara Magistrate's Court of Matara for compliance.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL