

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

Officer in Charge
Special Crimes Investigation
Division,
Police Station,
Avisawella.

Complainant

**CA (PHC) 168/2014
PHC Kegalle 4728 Rev.
M.C. Ruwanwella B/134/13**

VS.

M.B.M. Musees,
No. 1067A,
St. Reeta Avenue,
Maeliya,
Ja Ela.

Accused

Watagala Gamaralalage Nihal
Premathilaka,
No.48/1, In front of
Malmaduwa Temple,
Kotiya Kumbura.

1st Claimant

Ranawaka Arachchilage
Kushan Maduranga Nawaratna,
No. 120/3, Aliwalapalla,
Walgammulla,
Veyangoda.

2nd Claimant

VS.

Ranawaka Arachchilage Kushan
Maduranga Nawaratna,
No. 120/3, Aliwalapalla,
Walgammulla,
Veyangoda.

2nd Claimant- Petitioner

VS.

1. Hon Attorney General,
Attorney General's Department,
Colombo 12.
2. Officer in Charge
Special Crimes Investigation
Division,
Police Station,
Awissawella.

Respondents

Watagala Gamaralalage Nihal
Premathilaka,
No.48/1, In front of Malmaduwa
Temple,
Kotiya Kumbura.

1st Claimant- Respondent

AND NOW

Watagala Gamaralalage Nihal
Premathilaka
No.48/1, In front of Malmaduwa
Temple,
Kotiya Kumbura.

**1st Claimant-Respondent -
Appellant**

VS.

Ranawaka Arachchilage Kushan
Maduranga Nawaratna,
No.120/3,
Aliwalapalla,
Walgammulla,
Veyangoda.

**2nd Claimant-Petitioner -
Respondent**

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. Officer in Charge
Special Crimes Investigation
Division,
Police Station,
Abyssinawa.

Respondents- Respondents.

BEFORE : **W.M.M. Malinie Gunaratne, J. and
P.R. Walgama J.**

COUNSEL : Athula Perera with Chathurani de Silva
for the 1st Claimant-Respondent-Appellant

Dammika Basnayake
for the 2nd Claimant-Petitioner Respondents.

Argued on : 08.09.2015

Written submissions
filed on : 12.11.2015 and 27.11.2015

Decided on : 16.02.2016

Malinie Gunaratne, J.

This is an appeal against an Order made by the learned High Court Judge of Kegalle in the following circumstances.

On 28.10.2013, a van bearing No. 50 Sri 7295 was produced by the Officer in Charge Special Criminal Investigation Bureau of Avissawella, before the Magistrate of Avissawella, together with a report stating, that one W.G. Nihal Premathilaka had made a complaint that he is the owner of vehicle bearing No. 50 Sri 7295 and at the end of April, he handed over the said vehicle to a Car Sale namely Y.J. Enterprises at Aluthgama, Dehiowita and requested to sell it for Rs.1,250,000/-. The said Y.J. Enterprises informed him that there is a Dolphin van bearing No. 250-2649, brought

there by a person called Mohamed Musees and there is an offer to exchange his van 50 Sri 7295 with the Dolphin van. The complainant agreed to exchange his vehicle with the Dolphin van and agreed to pay Rs.500,000/- to said Musees in addition to the handing over of his vehicle. After settling the money, Musees handed over the Registration Book of the said Dolphin van bearing No. 250 – 2649 to the complainant. Thereafter he submitted the Registration Book to the Department of Motor Traffic; he found that the said Registration Book was a forged document. Subsequently, Badulla Police came to the house of the complainant with Musees and had taken the said van into the custody of the Police. It was revealed that the said Musees had obtained the said Dolphin Van from its owner namely Thota Hewage Chanaka Prasanna de Silva on an undertaking to pay its Hire Purchase installments. Thereafter Musees had changed the Engine No. and the Chassis No. and fabricated a fraudulent Vehicle Registration Book and sold it to the complainant. The correct Number of the said Dolphin Van is 54 – 3654 and forged number is 250 – 2649. Fraudently, Musees had obtained the possession of the van bearing No. 50 Sri 7295 belonging to the Appellant and cheated Rs.1,850,000/- from the complainant.

In the 3rd B Report filed by the Police it was stated that, after the van bearing No. 50 Sri 7295 was taken from the complainant, by the said Musees, had sold the van to one M.A. Priyanga Moris Perera for Rs.850,000/- and said Priyanga Moris Perera had sold the van to one R.A. Kushan Maduranga Nawaratna for Rs.1,025,000/-.

The said van had been subsequently produced at the Avissawella Police Station by the said Kushan Maduranga Nawaratna who claimed to be the owner of the van having bought it from M.A.P. Moris Perera.

In accordance with an application made on that behalf by the Officer in Charge of the Special Criminal Investigation Bureau, Avissawella, the Magistrate ordered the van to be returned to W.G. Nihal Premathilaka, (hereinafter referred to as the Appellant). Since, R.A. Kushan Maduranga Nawaratna also claimed the vehicle, the learned Magistrate had held an inquiry before making the aforesaid order.

Aggrieved by the said Order R.A. Kushan Maduranga Nawaratna (hereinafter referred to as the Respondent) sought to move in revision against the said Order by Revision Application filed before the High Court of Kegalle.

The learned High Court Judge, after having considered the submissions and the documentary evidence produced before the Magistrate's Court, set aside the learned Magistrate's Order allowing the Revision Application filed by the Respondent; made an Order on 14.11.2014, that the vehicle be handed over to the Respondent. Aggrieved by the said Order the Appellant has preferred this Appeal seeking to set aside the judgment of the learned High Court Judge and seeking to affirm the order made by the learned Magistrate.

When this Appeal was taken up for argument on 08.09.2015, Counsel for both parties made oral submissions and subsequently tendered written submissions.

It is relevant to note, that the submissions made by both Counsel involve an application of Section 431 (1) and (2) of the Code of Criminal Procedure Act.

Once a property is produced; which is a subject matter of criminal offence, it is the duty of the learned Magistrate in terms of Section 431 of the Criminal Procedure Code to make an order with regard to the possession of the property. The Magistrate should decide whether the property should be handed over to the person from whom the property was taken into the custody of Court or whether the property should be given to any other party other than the party from which the property is taken into the custody of the Court, or the learned Magistrate could decide whether the property should be kept under the custody of the Court.

Section 431 (1) and (2) reads as follows:-

431 (1). The seizure by any Police Officer of property taken under Section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.

(2) If the person entitled is known the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown the Magistrate may detain it and shall in such case publish a notification in the Court notice – board and two other public places to be decided on by the Magistrate, specifying the articles of which such property consists and requiring any persons who may have a claim thereto to come before

him and establish his claim within six months from the date of such public notification.

Sub-section (1) deals with three categories of property seized by a police officer namely;

- (i) Property taken under Section 29 of the Code relating to the search of persons who are arrested;
- (ii) property alleged or suspected to have been stolen;
- (iii) property found under circumstances which create a suspicion of the Commission of any offence.

The learned Counsel for the Appellant submitted that the main complaint in the present case was, that the Accused (Musees) fraudently had obtained the possession of the vehicle belonging to the Appellant together with money, whereby had cheated Rs.1,850,000/- from the complainant. The Counsel submitted that the offence has been committed by using the van and the money of the complainant and the subject matter of the offence is the van bearing No.50 Sri 7295. It is the stance of the learned Counsel that although the van in question was taken into the custody of the Police from the Respondent, before the offences referred to in B report were committed, the van was in the custody of the Appellant. The learned Counsel for the Appellant contended that, the learned Magistrate having taken into consideration all these facts and the decision of *Silva vs. O.I.C. Thambuttegama* (1991) 2 S.L.R. 83, correctly made an order to release the vehicle to the Appellant subject to a Surety Bond of Rs.2,000,000/-.

It is the stance of the learned Counsel for the Appellant, when allowing the Revision Application filed by the Respondent the learned High

Court Judge had not considered the relevant law and the authorities cited before him in the correct perspective; thereby had erred in law.

The learned Counsel for the Respondent contended, it is an undisputed fact that the vehicle bearing No. 50 Sri 7295 was taken over by the police from the Respondent and he was the registered owner of the vehicle at the time Police seized it; had been subject to leasing facility from the Senkadagala Finance Limited who was the absolute owner of the vehicle which is the subject matter of this case. It is the stance of the Counsel that the learned Magistrate has misinterpreted and misconceived the judgment in *Silva vs. O.I.C. Thambuttegama*; but the learned High Court Judge has correctly analysed and interpreted it and pronounced his judgment.

It is important to realise that Section 431 is not a provision which confers jurisdiction to decide disputed claims to possession. Its object to provide for the Magistrate being brought with the least possible delay into official touch with the property seized by the Police (*Binduwa vs Tyrrell* 4 C.A.C.1)

It is conceded that Section 431 sub section (1) is the section under which the learned Magistrate was empowered to make an order in these circumstances. That section enacts that the “Magistrate shall make such order as he thinks fit respecting the delivery of such property to the person entitled to *the possession thereof...*”

A further aspect in Section 431 which is significant, is the element of discretion vested in the Magistrate. However, the discretion thus given to

the Magistrate should be exercised judicially. This element of discretion is manifest from the use of the words “as he thinks fit” in sub section (1) and the words “the Magistrate may order the property to be delivered to him” in sub section (2).

On the basis of the aforesaid analysis, Section 431 (1) and (2) give a discretion to the Magistrate to decide with regard to property, the seizure of which is reported to him.

Initially, the view of the Court was that property be delivered to the person who had possession of it at the time of seizure.

Punchinona vs. Hinniappuhami 60 N.L.R. 518.

K Piyadasa vs. R.M. Punchi Banda 62 N.L.R. 307.

In these cases it has been laid down that the Magistrate has no power to deliver Articles taken from the possession of one person to any other person on the ground that he and not the former possessor is entitled to possession.

However, later, certain modifications of this principle were evolved. In the case of Sugathapala vs. J.K. Thambirajah 67 N.L.R. 91, it was held, that while, as a rule, property should be delivered to the person in whose possession it was at the time of seizure by the Police, it is open to the Magistrate to order it to be delivered to some other person where there were special circumstances. This decision has been followed in the cases of W. Balagalla Vs. Somarathne 70 N.L.R. 382, Thirunayagam Vs. Inspector of Police, Jaffna 74 N.L.R. 161, Frudenberg Industries Ltd. Vs. Dias

Mechanical Engineering Ltd; C.A. Application No. 69/79 C.A. Appeal No. 182/82, Court of Appeal Minutes of 14/07/1983.

A principle had been observed in these cases that the property be delivered to the person who had possession of it at the time of seizure will not apply if there is an “unlawful” or “criminal” element in such possession.

In the case at hand, the learned Magistrate and the learned High Court Judge, both referred and have relied on the case of *Silva Vs. O.I.C. Thambuttegama* (1991) 2 S.L.R. 83. In the said case Sarath Silva J. held that Section 431 (1) and (2) give a discretion to the Magistrate to decide the matter with regard to property, the seizure of which is reported to him.

The learned High Court Judge has taken the view that the learned Magistrate has not correctly and judicially exercised his discretion when he made the order to release the vehicle to the Appellant of this case. At this juncture, it is relevant to draw the attention to the written submissions filed by the Counsel for the Appellant.

It is stated “The simple test for the Magistrate is to decide whether any party claiming a production before Court has come to possess such productions through legal means or otherwise. If possession has been obtained through legal means his possession would not be disturbed. However, if possession has been obtained through illegal means there is no fetter in the discretion of the Court to hand over such property to any other person who in the opinion of the Court would be the person entitled to the possession of such production”.

It seems, that the learned High Court Judge having taken into consideration the above principles has made the impugned order and therefore, I see no basis to interfere with it.

In *D. Jayasuriya Vs. H. Warnakulasooriya* 61 N.L.R. 189 – H.N.J Fernando said, the Section 419 (the same as Section 431 of the Criminal Procedure Code) cannot be utilised by a “complainant” in order to obtain an order of possession from the Magistrate of any article seized from the possession of another as being stolen property, if the other person denies the theft and claims the property as his own”.

In the case at hand, it is an undisputed fact that the vehicle bearing No. 50 Sri 7295 was taken over by the Police from the Respondent and he is the registered owner of the vehicle and the absolute owner is Senkadagala Finance Ltd. at the time the Police seized it. The Respondent has bought the vehicle in good faith and therefore he is a bonafide purchaser. At the time he bought the vehicle he did not have any knowledge that a criminal offence had been committed in respect of the said vehicle. As such he claims the vehicle as his own.

A Magistrate’s Court should not be turned into a forum for the settlement of civil disputes, yet, a Magistrate making an order under Section 431 must exercise his judicial discretion in ascertaining the person entitled to possession. The learned High Court Judge has taken the view that the learned Magistrate had not exercised his discretion judicially and set aside the order made by the learned Magistrate.

Apart from that, it is relevant to note that the learned High Court Judge has taken into consideration the Section 433 (a) (1) of the Criminal Procedure Act amended by Act No. 12 of 1990 also when he made the said Order.

Section 433 (a) (1) reads as follows:

“In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter”

A closer scrutiny of this section reveals, by the said amendment the Legislature has intended to protect the rights of the Absolute Owner.

In the instant case, the Senkadagala Finance Company Ltd. as the absolute owner of the vehicle has issued a letter (P 5) stating that they have no objection to release the vehicle to the Respondent, as there is a hire purchase agreement between them and the Respondent.

On perusal of the judgment of the learned High Court Judge, it is apparent that the learned High Court Judge has taken into consideration the affidavits and documents filed by both parties in the Magistrate's Court and has made his Judgment dated 14.11.2014.

As such, I do not see any wrong in the manner in which the learned High Court has considered the facts and the way in which he has applied the law in this instance.

For the above stated reasons, I see no basis to interfere with the Judgment made by the learned High Court Judge. Accordingly, I affirm the Judgment of the learned High Court Judge dated 14.11.2014 and dismiss the Appeal with costs.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed.