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

In the matter of an application under Article 154(P) (6) and Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No: CA/PHC/187/2019
H.C. Ratnapura Case no: HCR/RA/20/2017
M.C. Kalawana Case No: 14955

Forest Officer
Range Forest Office, Kalawana.

Complainant

-V-

1. Udugodage Sunil Rodrigo
   Mawi Kumbura Addara, Miyanapalawa,
   Weddagala.
   And Others.

Respondent

AND THEN

Kamaradiwela Arachchige Thushari
Tharanga Perera,
Nedurana, Erepola, Eheliyagoda.

Petitioner

-V-

1. Forest Officer
   Range Forest Office, Kalawana.

2. The Hon. Attorney- General
   Attorney General Department,
   Colombo 12.

Respondents

AND NOW BETWEEN

Kamaradiwela Arachchige Thushari
Tharanga Perera
Nedurana, Erepola, Eheliyagoda.

Petitioner- Appellant

-V-

1. Forest Officer
   Range Forest Office, Kalawana.

2. The Hon. Attorney-General
   Attorney General Department,
   Colombo 12.

Respondent- Respondents

Before:	Sarath Dissanayake, J.
	Damith Thotawatte, J.
Counsels:	Keheliya Koralage for the Petitioner- Appellant
	Suharshie Herath, DSG for the Respondent-Respondents
Argued:	30.06.2025
Written submissions tendered on:	08.11.2024 by Petitioner- Appellant
	03.10.2024 by Respondent- Respondents
Judgment Delivered:	27.08.2025

Damith Thotawatte, J.

This is an appeal filed against the order of the Provincial High Court of Sabaragamuwa Province holden in Ratnapura dated 23.07.2019, which affirmed the order of the Learned magistrate of Ratnapura, dated 29.03.2017, to confiscate the Petitioner-Appellant's (hereinafter referred to as the "Appellant") lorry bearing registration No. SG DAA 4999 (hereinafter referred to as the "vehicle") under the Forest Ordinance (as amended by Act No. 65 of 2009). The appellant has preferred this instant appeal to this Court to set aside both said orders and thereby to vacate the order of confiscation made in respect of the vehicle in question.

On or about 14.07.2015, the vehicle was taken into custody with regard to a violation of the Forest Ordinance, for transporting Columba (කොහිවැල්ගැට) worth Rs. 38760/- without a valid permit. Udugodage Sunil Rodrigo, the driver of the said vehicle at the time of the wrongful act (hereinafter referred to as the "accused driver"), pleaded guilty, and a fine was imposed. Thereafter, the learned Magistrate of Ratnapura has permitted the registered owner of the vehicle, namely the appellant, to show cause as to why the vehicle in question should not be confiscated.

At the inquiry held in that regard, the appellant has given evidence and has stated that she resides in Eheliyagoda and has purchased the vehicle for the purpose of transporting tea leaves and fertilisers in the tea estates in Weddagala, owned by the appellant's son, and the accused driver has been working at the tea estate for about 19 years. Further, she has advised and instructed the accused to utilise the vehicle only for the activities related to the tea estate and not to use it for any illegal activity.

The appellant has further stated that on or about 14th July 2015, he asked permission to borrow the vehicle to go on a pilgrimage to Kataragama with his family, and as she had nothing to doubt, she allowed the accused to borrow the vehicle to go to Kataragama. After the incident in question, the accused informed the Appellant about the incident, and the vehicle is now in custody.

It is her position that, owing to the fact that she resides at a distance exceeding sixty kilometres from the location of the vehicle, she was unable to personally attend to it. Instead, she made inquiries regarding the vehicle and duly issued instructions to the accused over the telephone. She further avers that she had developed trust and confidence in the accused, who has been personally known to her for over nineteen years, during which period he had never engaged in any misconduct, until the instant occasion when the vehicle was entrusted to him for the purpose of undertaking a private

pilgrimage to Kataragama. She asserts that the revenue derived from her tea estate constitutes her sole source of livelihood, and accordingly, she prays that the order of confiscation be set aside and that the vehicle be released to her.

The Learned Magistrate, by her order dated 29.03.2017, ordered the confiscation of the aforesaid vehicle, holding that the Appellant's assertion, that she had instructed that the vehicle not be used for unlawful purposes, was insufficient to establish that she had taken adequate precautionary measures to prevent its illegal use. At the inquiry, the only evidence adduced on behalf of the Appellant was her own testimony. The Learned Magistrate further observed in her order that reliance could not be placed solely upon the uncorroborated testimony of the Appellant.

Being aggrieved by the order of the Additional Magistrate, the Appellant filed a revision application in the Provincial High Court of Sabaragamuwa-Province Holden at Ratnapura to revise the order of the Additional Magistrate of Ratnapura. The Learned High Court Judge of Ratnapura, agreeing with the assessment of the Learned Additional Magistrate, had also determined that the Appellant has failed to establish that she took all precautions to prevent the offence being committed as required by section 40(1) of the Forest Ordinance as amended, and further, the Learned High Court Judge had decided Appellant had also failed to corroborate her claims with supporting evidence (of the accused driver). The revision application has been dismissed accordingly.

The Appellant has preferred this instant appeal seeking to set aside the order of the Learned High Court Judge of Ratnapura dated 23.07.2019, as well as the order of the Learned Additional Magistrate of Ratnapura dated 29.03.2017

At the hearing of this application, the principal submission advanced by the learned Counsel for the Appellant was that the ability to take precautionary measures necessarily varies from person to person, depending on their individual capacity and place of residence. It was contended that the Appellant, within the limits of her capacity, had in fact taken all reasonable precautionary measures as contemplated under Section 40(1) of the Forest Ordinance (as amended) to prevent the use of the vehicle in question for any unlawful purpose. However, it was submitted that neither the Learned High Court Judge of Ratnapura nor the Learned Additional Magistrate of Ratnapura had duly considered this aspect of the matter.

Section 40(1) of the Forest Ordinance, amended by the Forest (Amendment) Act No. 65 of 2009, reads as follows.

40(1). Where any person is convicted of a forest offence-

(a) All timber or forest produce which is not the property of the state in respect of which such offence has been committed; and

(b) All tools, vehicles, implements, cattle, and machine used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate.

Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be made **if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence**." (emphasis is mine)

The proviso of Section 40(1) was introduced by the Forest (Amendment) Act No. 65 of 2009. According to Section 40(1) of the Forest (Amendment) Act No. 65 of 2009, the owner of the vehicle shall prove to the satisfaction of the court that he had taken all precautions to prevent the use of the vehicle for the commission of the offence if the vehicle is to be released to him. Prior to this amendment, the position of the court was that the owner of such a vehicle shall satisfy the court that he had taken all precautions to prevent such an offence or that the offence had been committed without his knowledge. This two-step formulation, rooted in Natural justice & protection of innocent third-party property, was introduced by ***Manawadu*** v. ***The Attorney General***[1] and thereafter consistently followed till the Forest (Amendment) Act No. 65 of 2009, from which the lack of knowledge factor was conspicuously absent.

His lordship Iddawala J in ***Rajapakse Dewage Asanga Kumara Chandrasena*** v. ***Officer-in-Charge, Police Station, Katugasthota and another***[2] 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.

[1] [1987] 2 SLR 30
[2] CA (PHC) 111/2018 Decided on 01.11.2022

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."

Her Ladyship Justice K. K. Wickremasinghe in ***Karunapedi Durayalage Sumana Kumara*** v. ***Officer-in-Charge, Police Station, Narammala and others***[3]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)."

Although initially a strict and narrow interpretation has been given by the Court of Appeal to Section 40(1) gradually a line of authorities has emerged which have taken a more liberal approach.

In the recently decided ***Nadeeka Vijithangani Assalla*** Vs. ***Officer-in-Charge, Police Station, Dedigama and Others***[4] considering the rationale of *Manawadu* Vs*. The Attorney General*[5], and citing *Orient Financial Services Corporation Ltd.* Vs*. Attorney General* His Lordship Justice Sampath B. Abayakoon, has stated;

"Although this is a judgement pronounced considering the relevant provisions of section 40(1) of the Forest Ordinance before it was amended by the Forest (Amendment) Act No. 65 of 2009, it is my considered view that the underlying principles that should be considered would be the same, since an offence of this nature can still take place even after taking necessary precautions to prevent a crime being committed without the knowledge of its owner."

Further, it has been stated;

[3]CA (PHC) 165/2014 Decided on 22.10.2019
[4] CPA 0004/23 Decided on 08.11.2023
[5] [1987] 2 SLR 30

> "I am of the view that **once the learned Magistrate formed the opinion that the registered owner had no knowledge of the offence being committed and not privy to it,** considering whether the registered owner had taken the necessary precautions to prevent the offence been committed should be considered in the light of the facts and the circumstances relevant to the given situation, and not by giving a strict interpretation to the words "all precautions to prevent the commission of the offence" as stated in the proviso of section 40(1) of the Forest Ordinance as amended." (emphasis is mine)

Although Act No. 65 of 2009 omitted "lack of knowledge" as a distinct defence, subsequent judicial interpretation demonstrates that the absence of knowledge has not been rendered entirely irrelevant. Rather, it has re-emerged in a different guise; while it cannot, standing alone, absolve the owner from liability, it is recognised as a material circumstance in evaluating whether the owner exercised all reasonable and necessary precautions under the statute. In this way, "lack of knowledge" now serves as a factor that strengthens and buttresses a submission that the owner acted diligently and fulfilled the statutory obligation to prevent the vehicle from being used in the commission of the offence.

In the case, ***W. M. Keerthi*** v. ***Office in Charge, Police Station, Kurunegala and Others***[6] Bandula Karunarathna J. has observed;

> "The vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. …"

In the same judgment, he has further stated:

> "At the arguments of this matter, the attention of this court was brought to the fact that the degree of precautions one can take would differ from case to case depending on the circumstances of the case…
>
> Due to those circumstantial differences, an equal level of precaution should not be expected from a vehicle owner. It is evident that the vehicle owner in this matter had a very limited control over the vehicle which in turn limits his capacity to take precautionary measures and the Learned Magistrate should not have expected higher degree of precautions which is impractical under these circumstances."

[6] CA (PHC) 199/2018 Decided on 13.11.2023

In the above case, the owner of the vehicle was a businessman, and the accused person was working as a driver for the past few years and had never been engaged in any legal activity. Hence, Karunarathna J. observed that the owner had no reason to suspect the accused driver.

In *Hettiarachchige Chathurika Maduwanthi* v. *The Officer-in-Charge, Police Station, Tissamaharama and Others*[7] and *Udugama Gamage Yasas Chamindha v. Attorney General and Others*[8]His lordship Justice Kumararatnam has taken the position that the court should have considered the facts that the vehicle has not been used for any illegal activities by the driver for the past years, the driver was not a habitual offender and the relationship between the driver and the owner.

Considering the position illustrated by the decisions referred to above, it appears that we are moving away from the position "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" as stated in *Rajapakse Dewage Asanga Kumara Chandrasena* v. *Officer-in-Charge, Police Station, Katugasthota and another*.[9]

Although, as per Section 40(1), a positive action on the part of the owner is necessary, what action of the owner of the vehicle will suffice to constitute "all precautions" envisaged in Section 40(1) of the act would necessarily depend on the circumstances under which the vehicle was given to another party. However, I am unable to agree with the Counsel for the appellant that the precautionary action that would need to be taken should depend on the owner's ability. If the person allows his/her vehicle to be used by someone else, that person should have the capacity to take "all precautions" necessary under the circumstances.

In the instant case, the Appellant, under cross-examination, has admitted that because of her situation, she had no ability to monitor or exercise control over the accused driver's usage of the vehicle. This admission is fatal to her application as it establishes that she has not been able to discharge the burden cast upon a vehicle owner by the Forest Ordinance.

[7]CA PHC 31/2018 Decided on 18.09.2023
[8] CA (PHC) APN 119/2022 Decided on 13.11.2023.
[9]*Supra*

Considering the above, I see no reason to interfere with the order of the Learned Magistrate dated 29th March 2017 and the order of the Learned High Court Judge dated 23rd July 2019. Therefore, I dismiss this appeal without cost.

Judge of the Court of Appeal

Sarath Dissanayake, J

I agree

Judge of the Court of Appeal