

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

In the matter of an Appeal under and in terms of Section 154P (6) of the Constitution together with the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

**Court of Appeal Case
No.CA (PHC) 134/2023
Kurunegala HC Case No. HCR 15/2021
Mahawa MC Case No.07047/MISC**

Officer-In-Charge,
Police Station,
Polpithigama.

PLAINTIFF

Vs.

Subasinghe Arachchilage Akila Niroshana
Sanjeewa,
Weligalla,
Nikadalupotha.

ACCUSED

Subasinghe Sanjeewa, Weligalla, Nikadalupotha.	Arachchige	Susantha
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OWNER

AND

Subasinghe Arachchige Susantha
Sanjeewa,
Weligalla,
Nikadalupotha.

OWNER-PETITIONER

Vs.

1. Officer-In-Charge,
Police Station.
Polpitigama.

PLAINTIFF-RESPONDENT

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

AND NOW BETWEEN

Subasinghe Arachchige Susantha
Sanjeewa,
Weligalla,
Nikadalupotha.

OWNER-PETITIONER-APPELLANT

Vs.

1. Officer-In-Charge,
Police Station,
Polpithigama.

PLAINTIFF-RESPONDENT-RESPONDENT

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT-RESPONDENT

Before: **Amal Ranaraja J.**

&

Dr. Sumudu Premachandra J.

Counsel: Sandeepani Wijesooriya with Isuru Jayawardena for the
Registered Owner-Petitioner-Appellant.

Shezan Mahboob, SC for the 2nd Respondent.

Written Submissions: By the Respondent-Respondent filed on 24/06/2026.
By the Owner Petitioner Appellant filed on
14/05/2026.

Argued On: 30/06/2026.

Judgement On: 07/08/2026.

Dr. Sumudu Premachandra J.

1] The Accused, the Petitioner's brother, was charged on or about 22/11/2017 at Ponnilawa within the Jurisdiction of this Court for carrying out soil excavation (මරන්නි මඩ-silt) using a backhoe machine under a permit issued only for a lorry, thereby committing an offence punishable under Section 28(1) of the Mines and Minerals Act No. 33 of 1992, read with Section 63(3) of the Act as amended by Act No. 66 of 2009.

2] On 28/11/2017, the Accused pleaded guilty before the Mahawa Magistrate's Court and was fined Rs. 10,000/-. Thereafter, an inquiry was conducted regarding the confiscation of the backhoe machine. The Appellant, claiming ownership of the machine, produced oral and documentary evidence to establish his ownership and lack of involvement in the offence.

3] The learned Magistrate, by order dated 30/03/2021 (pronounced on 31/03/2021), ordered the forfeiture of the backhoe machine to the State. The Appellant thereafter filed a Revision Application before the Provincial High Court of the North Western Province, Kurunegala, which initially restrained the auction of the machine but ultimately dismissed the Revision Application with costs and affirmed the Magistrate's order of forfeiture.

4] The Appellant now contends that the High Court erred in law and fact by misinterpreting the provisions of the Mines and Minerals Act relating to the confiscation of a backhoe machine, failing to consider evidence that the offence was committed without his knowledge or consent, and disregarding evidence that he had instructed the Accused not to use the machine for illegal activities and had taken reasonable precautions to prevent such misuse.

5] The Appellant further submits that the High Court failed to apply the principles laid down in CA (PHC) Appeal No. 03/2013 (**Athapattu**

Mudiyanselage Sadi Banda v Officer in Charge, Police Station, Norton Bridge) regarding the proportionality of forfeiture. Accordingly, the Appellant seeks to set aside the High Court and Magistrate's Court orders, vacate the order for costs, prevent the auction of the backhoe, and secure its release together with such further relief as the Court of Appeal deems just and equitable.

6] In **Sadi Banda vs. Officer-in Charge, Police Station, Norton Bridge**, [2014] 1 SLR 33, Her Ladyship Malinie Gunaratne, J. held few factors to be taken before confiscation of the vehicle as follows;

“Before making the order of confiscation the learned magistrate should have taken into consideration, value of the timber transported, allegations prior to this incident that the lorry was being used for any illegal purpose – that the appellant and or the accused are habitual offenders in this nature – and no previous convictions – and the acceptance of the fact that the petitioner – appellant did not have any knowledge about the transporting of timber without a permit. In the instant case confiscation of the lorry is not justifiable.”

7] Under the Mines and Mineral, Act, No. 33 of 1992 as amended by ACT NO. 66 OF 2009, the section 63B gives discretionary powers for confiscation to the Magistrate. It says;

*“63B. (1) Where any person is convicted of an offence under this Act, the **Magistrate may make order** that any mineral, machinery, equipment or material used in, or in connection with, the commission of that offence or the proceeds of the sale of any such mineral, or material deposited in court under the proviso to section 63A, be forfeited to the State”. Emphasis is added]*

8] However, in **Ranbandaraghe Hasitha Sulochana Priyaratne vs Officer-in-Charge, Police Station, Eheliyagoda**. Decided on 16/01/2026,

SC/Appeal/56/2024 K. KUMUDINI WICKREMASINGHE, J, and **Karunadhipathi Mudiyansele, Karunathilaka vs Officer in Charge, Police Station,** Pannala, SC/Appeal/103/2021, Decided on 31/03/2026, Her Ladyship MENAKA WIJESUNDERA J.,

*“While the Respondent has a right to his property, namely his vehicle, it is incumbent upon him to establish that he had no knowledge of, and had taken all reasonable precautions to prevent, the commission of the offence. The Respondent has failed to discharge this burden. The Respondent claims that he had given verbal instructions to the Accused Driver not to transport timber without a permit. **I am of the view that merely giving verbal instructions is not sufficient to discharge the burden cast upon him by law to take all necessary precautions to prevent the commission of the offence.** Moreover, he cannot now seek to rely upon an alleged defect in the charge sheet as a defence at the appellate stage.”* Emphasis is added]

9] In relation to Mines and Minerals Act, in **Karunadhipathi Mudiyansele, Karunathilaka, vs Officer in Charge, Police Station, Pannala,** SC/APPEAL/103/2021, Decided on: 31/03/2026, Her Ladyship MENAKA WIJESUNDERA J considered the word “may”, use of discretionary powers by the Magistrate as;

“Under section 63B (1) the use of the word ‘may’ indicates that forfeiture of the machinery any mineral equipment used in connection with the commission of the offence is discretionary and not mandatory. But the said judicial discretion must be exercised reasonably specially to avoid penalizing non-culpable parties. There is also no expressed provision laid down exempting non guilty 3rd party owners unlike in other statutes, but this discretion of forfeiture has to be exercised after a proper inquiry has been held to ascertain whether the parties claiming the vehicles or the machinery had any knowledge of the offences that were going to be committed.

The knowledge on the commission of the offence and taking necessary precautions to prevent the commission of the offence, stated by His Lordship S.N. Silva as he was then, in the case of Faris v The Officer-In-Charge, Police Station, Galenbindunuwewa and Another [1992] 1 SLR 167.

“... Furthermore, there is the evidence of the Petitioner that he had warned the driver not to transport anything that requires a permit without such permit. In the light of these contradicted items of evidence it would be not possible to infer that the petitioner has knowledge of the commission of this particular offence. The presence of some special facility in the lorry for the transporting of animals does not per se establish that the owner had knowledge of the commission of the particular offence... ”

A person's knowledge is contained within their mind and must be inferred based on the specific circumstances of each case. This includes situations where someone deliberately ignores the truth

...

Under the Mines and Minerals Act, forfeiture is not mandatory, as the provision employs the permissive term “may”. This wording indicates that the court retains judicial discretion in determining whether forfeiture should be ordered. Although the Act does not explicitly provide for an exemption in favour of third parties, the discretionary nature of the provision enables the court to take such interests into account where appropriate....

Therefore, as per the above analysis, the forfeiture of a machinery or an equipment or a vehicle used for an offence under Mines and Minerals Act gives a discretion for the Magistrate to confiscate the same upon conviction for the offence. But that confiscation, according to laws of natural justice, has to be done upon inquiry as to whether the party claiming the

vehicle/machinery had knowledge with regard to the commission of the machinery.

As such, upon the consideration of the materials submitted above, the matter in issue is whether the Magistrate and the learned High Court Judge were correct in confiscating the excavator under section 63B (1) of the Mines and Minerals Act.

The law above stated has clearly laid down that section 63B (1) of the said Act gives a discretion for the magistrate to decide whether machinery used in the commission of the offence should be confiscated. In the instant matter, there was an offence committed and a man was convicted. Then the question arose whether the Appellant, who claimed to be the owner of the excavator, should be confiscated or not, after the inquiry was held.”

10] The Learned State Counsel objected that mere oral instructions are insufficient to establish "reasonable precautions" and that owners are required to implement effective monitoring measures. In this case the detection was done in Maho, a rural area. I don't think, a peasant man (rural) can give written instruction on hiring a vehicle. My considered view is that liberal interpretation should be given by considering the evidence on the facts of the case, not the strict interpretation.

11] The Appellant submits that he entrusted the backhoe to his brother solely to dig coconut pits on the land of P.W. 01, Ms. Malani, after falling ill (fever) on the day of the incident. The evidence shows that the Appellant was inspecting the site where coconut pits were to be dug at the morning and gave verbal instruction to his brother. After taking medicine, he was asleep by 2.30pm, he got a call from his brother, that the vehicle was seized. It is an admitted fact, when the detection was done, the Registered Owner, the Appellant was not at the vehicle. The Appellant asserted, that after completing the authorized work, his brother independently and without his knowledge, consent, or authority diverted the

machine to another location where it was used for illegal soil excavation and subsequently seized by the authorities.

12] It is seen that the lower courts placed undue emphasis on minor inconsistencies concerning the cause of his illness while overlooking the undisputed evidence that he was genuinely unwell and that P.W. 01, Malani, corroborated the lawful purpose for which the machine had originally been engaged. The case is to be proved on the balance of probabilities, that there was no obligation to call witnesses from the Farmers' Association because the Appellant's defense was that he had no knowledge whatsoever of the unauthorized activity.

13] When the standard of proof entangles with balance of probability that the lower courts cannot adopt an excessively strict interpretation of the requirement to take "all necessary precautions" and failed to give proper effect to authorities. It has to be decided on substantive evidence, the evidence comes from the witness box, non-other than.

14] In **The Officer-in-Charge , Anti-Corruption Unit, Badulla v Dissanayake Mudiyanseelage Pradeep Pushpakumara** (CPA/0161/2022), Decided on: 12/06/2024, His Lordship Sampath B. Abayakoon, J. considered in depth this aspect as below;

“I find that despite the evidence being not materially challenged, the learned Magistrate has determined that he cannot be satisfied that the registered owner has taken all necessary precautions to prevent the offence being committed, which had been the basis for the confiscation of the vehicle.

It appears that the learned Magistrate had decided to give a strict interpretation to the words, “had taken all precautions to prevent the use”,

stated in the proviso of section 40(1) of the Forest Ordinance in his determination.

Our Superior Courts have preferred the strict interpretation of the relevant words in several judgments pronounced in this regard, while the same words had been given a liberal interpretation at other instances in relation to the mode of proof to the satisfaction of a Magistrate as required in the proviso.

In the case of The Range Forest Officer, Ampara Vs. The Attorney General, CA (PHC) 37/2007 which was the judgment that was considered by the learned High Court Judge in his determination, it was held;

“The view of this Court is, giving mere instructions or stating that the vehicle had been used for the commission of the offence without his knowledge is not sufficient in order to discharge the burden embodied in proviso of section 40(1) of the Forest amendment Act.”

Although a strict interpretation has been preferred in earlier judgments in this regard, I find that our Superior Courts have lately moved away from the strict interpretation rule and had thought it fit to interpret the relevant words in a fact sensitive manner, considering the uniqueness of each case under consideration before the Court....

A.W .A Salam, J. in the case of CA-PHC-108-2010 decided on 26-08-2014, considering the mode of proof of the words “all precautions to prevent” as stated in the proviso of section 40(1) of the Forest Ordinance observed as follows;

“Even assuming that the owner of the vehicle was under a duty to show cause against a possible order of confiscation, I find it difficult to accept the basis on which the learned Magistrate has entered an order for confiscation

on the merits of the inquiry. It was the evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit.

The testimony of the owner has not been discredited under cross-examination. There have been no previous instances where the driver has been charged for similar offences. When someone is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used. In an order of confiscation of the vehicle, then however much the owner comes forward and says that he gave instructions not to make use of the vehicle for illegal purposes, by reason of the fact that he is on the monthly payment, the vehicle has been confiscated. This approach does not appear to be reasonable and acceptable in law. In an inquiry of this nature what the owner has to prove is that he took every measure to ensure that the vehicle was not used for illegal purposes....

It is my considered view that the mode of proof being on the balance of probability, when considering the evidence in a case where an inquiry was held allowing the owner of a vehicle subjected to confiscation under the provisions of the Forest Ordinance or under any statutory provisions of similar nature for that matter, such evidence should be considered in a more pragmatic manner as considered in the above judgments, from which I would like to take guidance from...

Needless to say, that when an inquiry is held to decide whether to confiscate a vehicle or not, the Court is considering the evidence against a 3rd party who was not the accused in the case. **Therefore, the Court will have to**

be mindful about the property rights of such a third party before depriving his rights for an offence committed by someone else, although the relevant vehicle belongs to him.

When it comes to the fact relevant to this case, the registered owner of the vehicle has given uncontradicted evidence as to the circumstances under which he used to give the vehicle to his driver, trusted by him as a long-standing employee.

According to his evidence, this was a vehicle not used for hiring purposes or any other purposes than transporting fruits purchased from outstation areas to Badulla to be sold at the fruit stall of the petitioner.

Under the circumstances, whether the petitioner has taken all necessary precautions to prevent the offence being committed needs to be considered in that context. The petitioner has given evidence stating that he used to give instructions to his driver not to use the vehicle for any other purpose. It was also his evidence that he was in the habit of contacting the driver when he goes away to purchase fruits from outstation areas. The petitioner has well explained the circumstances under which he used to allow the driver to take the vehicle to his home stating that when the vehicle returns late or when the vehicle has to be sent early in the day for purposes of purchasing fruits, he used to allow the driver to take the vehicle home, which cannot be seen as an unusual practice when considering the business, the petitioner is engaged in.

As considered earlier, the evidence of the petitioner in that regard has not been challenged at any material point. The only suggestion made to the petitioner had been that he has used the vehicle for illegal purposes in order to pay the monthly finance rental to the finance company. The petitioner has replied that he has no such need...

There was no material before the Magistrate's Court to show that the vehicle or the driver had been involved in any offences previously, which should have been considered in favour of the petitioner.

In a setting where drivers of vehicles often get changed or leave their employment, it is impossible to expect the owner of a vehicle to enter into written agreements or to give written instructions to a driver. What an owner can do at his best is to give proper oral instructions and rely on the driver employed by him to follow the instructions...

Therefore, I am of the view that when assessing the evidence placed before a Court in an inquiry of this nature, a Judge should consider the relevant factors unique to each circumstance under which the offence has been committed and consider them in the balance of probability to find whether the owner of a vehicle has discharged his duty of safeguarding his property rights. I am of the view that expecting an owner to take all the precautions possible should not be the norm in an inquiry of this nature but to consider whether such an owner has taken precautions that can be expected of him under the given circumstances...

I am of the view that since it was the uncontradicted evidence that the vehicle which was the subject matter of the inquiry before the learned Magistrate had been used only for the purposes of transporting fruit, the instructions given by the owner of the vehicle to his driver should come within the meaning of all precautions he could have taken under the given circumstances.” [emphasis is added]

15] In the case of **Sadi Banda v Officer in Charge of the Norten Bridge Police Station** (2014) 1 SLR 33, which recognize the rights of innocent owners and acknowledge that continuous supervision of a vehicle or machine is not always reasonably practicable. In that value of timber, previous convictions relating to

the Accused and to the vehicle should be considered by the learned Magistrate before forfeiture.

16] The learned trial judge has the discretionary power to consider releasing the equipment under section 63B of the said Act. But he has put strict interpretation and standard of proof, that is balance of probabilities, has not been considered. In that sense, the learned trial judge must consider the evidence comes from the witness box and decided whether the story is probable or not. In this case, not only mere verbal instructions, the Appellant had stayed with the original work and supervise the vehicle till noon. This evidence corroborated by the evidence of Malani, the owner of coconut land. Thus, there cannot be mere assertion that verbal instruction was given not to do any illegal thing. The learned trial judge has denied the situation and evidence of the Appellant stating that the Appellant has not produced a medical certificate. But Malani confirmed that he was unwell, however he stayed till 12 noon and went to get medicine. Mere suggestion by the Prosecution to the witness that witness is stating an untruth, is not enough to dismiss the testimony of the witness. We are in the adversarial system, facts should be proved and/or disproved by the parties which relies on under section 3 of the Evidence Ordinance.

17] Further in deciding, on a balance of probabilities by establishing the lawful purpose of the machine immediate to the incident, the limited engagement in the offence of the registered owner, the absence of any knowledge or financial benefit, and his clean record, can be considered.

18] In the above circumstances. I decide that the learned Magistrate has misdirected the standard of proof in this case and considered strict compliance by not considering, has the story of registered owner is probable or not according to evidence adduced.

19] Thus, I set aside the confiscation order dated 30/03/2021, the release of the backhoe to the Registered Owner. Thus, application is allowed. No costs.

JUDGE OF THE COURT OF APPEAL

AMAL RANARAJA J.

I agree

JUDGE OF THE COURT OF APPEAL