IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

P. Aruna Pradeepa Prasanna
No.120/5, Medawella Road
Pethiyagoda
Kelaniya.

Claimant-Petitioner-Appellant

C.A.(PHC) N0.61/2012
PHC NEGOMBO
CASE NO.HCRA 152/2012
M.C.WATTALA CASE N0.62564

Vs.

1.The Officer-In-Charge
Special Crimes Investigation Unit
Western Province (North)
Peliyagoda

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE	:	**K.T.CHITRASIRI, J.** **MALINIE GUNARATNE, J.**
COUNSEL	:	Anuja Premarathna for the Appellant Anoopa de Silva, S.S.C. for the two Respondents.
ARGUED ON	:	15.10.2014
WRITTEN SUBMISSIONS FILED ON	:	28.10.2014 by the Claimant-Petitioner-Appellant 21.10.2014 by the Respondent-Respondents
DECIDED ON	:	28TH NOVEMBER 2014

CHITRASIRI, J.

One W.Rohan Prasad De Mel was charged in the Magistrate's Court of Wattala under Section 47 read with Section 57 of the Excise Ordinance as amended subsequently. The charge leveled against him was for transporting illicit liquor in the car bearing No.17-2209 belonging to P.Aruna Pradeepa Prasanna who is the appellant in this appeal. The accused De Mel was convicted for the aforesaid offence found in the Excise Ordinance on his own plea. Pursuant to the conviction imposed on the accused, the claimant-Petitioner-Appellant, (hereinafter referred to as the appellant) he being the registered owner of the vehicle 17-2209, made an application to have the said vehicle released to him relying upon Section 54(2) of the Excise Ordinance.

Learned Magistrate, on a direction by the learned High Court Judge in Negombo held an inquiry into the application made by the appellant in order to make an order under the aforesaid Section 54(2) of the Excise Ordinance in respect of the vehicle 17-2209. The appellant, he been the only witness in the said inquiry gave evidence on 15.07.2011. Learned Magistrate having considered the evidence so recorded, made order confiscating the vehicle 17-2209 refusing the claim of the appellant.

Learned Magistrate, in his decision has stated that the registered owner (appellant) has failed to establish that he had no knowledge as to the commission of the offence to which the accused has pleaded guilty. Accordingly, he has decided to confiscate the vehicle. Being aggrieved by the aforesaid decision, the appellant filed a revision application in the High Court

of Negombo. High Court Judge, having considered the evidence of the registered owner, affirmed the order of the learned Magistrate and dismissed the revision application filed in that Court. Being aggrieved by the aforesaid decision of the learned High Court Judge, the appellant preferred this appeal. Hence, it is necessary to ascertain whether or not the learned judges in the Courts below have implemented the law referred to in Section 54(2) of the Excise Ordinance, correctly.

The aforesaid Section 54(2) of the Excise Ordinance reads thus:

54(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.***

(emphasis added)

The law referred to above shows that the vehicle claimed by the appellant is liable to be confiscated since the said vehicle had been used to commit an offence under Section 47 read with Section 54 of the Excise Ordinance. However, it must be noted that the words **"be liable to confiscation"** is specifically being mentioned therein. Therefore, in such a situation the Court should take into account, those words mentioned in that Section before making

an order for confiscation of a vehicle under the provisions contained in the Excise Ordinance.

The impression that comes to a judicial mind by looking at the manner, in which those words are being used in that Section 54(2), is that it is to ensure holding of an inquiry by the trial judge before he makes an order. Then only the trial judge becomes entitled to make an appropriate order. However, such a decision should be made only after having addressed his mind to the material before him in a judicious manner. **[Inspector Fernando Vs Marther (1932) 1 CLW 249, Sinnetamby Vs. Ramalingan 26 NLR 371]**

Necessity to hold an inquiry before making an order for confiscation have been upheld not only when it comes to the provisions contained in the Excise Ordinance but also in the applications made under the provisions found in the:

- ✓ Excise (Special Provisions) Act No.13 of 1989;

  [Kaluthota Financial Services (Pvt) Limited Vs. The Attorney General CA (PHC) 91/2011 CA minutes dated 07.06.2012]

- ✓ Forest Ordinance as amended; and

  [The Finance Company PLC vs. A.M.P.Chandana and others S.C.Appeal 105A/2008 dated 30.09.2010, Manawadu Vs. Attorney General 1987 (2) SLR 30]

- ✓ The Animals Act.

  [Faris Vs. O I C Police Station Galenbindunuwewa 1992 (1) SLR 167]

In the circumstances, it is clear that holding of an inquiry before making an order for confiscation has become a *sine qua non* even under the Statutes referred to above though the words "liable to be confiscated" is not found in those other statutes, as it is seen in the Excise Ordinance. Such a requirement namely holding of an inquiry has been made necessary since it is trite law that a person should not be deprived of his property without an opportunity being given for that person to show cause, before making an order for confiscation. I made those observations since holding of such an inquiry by the learned Magistrate in this instance too had taken place only after the intervention of the High Court Judge in a revision application filed by the appellant. However, such a question is not an issue in this appeal.

I will now turn to consider whether the learned Magistrate has correctly evaluated the available evidence when he decided to confiscate the vehicle claimed by the appellant. As referred to earlier in this judgment, in Section 54(2) of the Excise Ordinance the words "be liable to confiscation" are found. Therefore, the manner in which the confiscation of a vehicle used to commit an offence under the Excise Ordinance is not the same, as it found in the aforesaid other enactments such as Forest Ordinance in which confiscation of vehicles used to commit offences has been made mandatory, if the claimants fail to establish the matters, as required in those statutes. It is so, since the word "shall" is used in the Sections found in those other statutes.

As for an example when it comes to Excise (Special Provisions) Act No.13 of 1989:

"the vehicle used in connection with, the commission of the offence ***shall,*** *by virtue of such conviction, be forfeited to the State."*

The words mentioned in the Forest Ordinance as amended read as:

"all.....motor vehicles.....owned by such person or not ***shall,*** *by reason of such conviction be forfeited to the State."*

In the Animals Act as amended it is mentioned thus:

"where any person is convicted of an offence under this part or any regulations made there under, any vehicle used in the commission of such offence ***shall,*****.....***be liable, by order of the convicting Magistrate, to confiscation:"*

In the circumstances, confiscation of the vehicle used in the commission of an offence under the Excise ordinance is not automatic but it is liable to be confiscated after affording an opportunity to the person who claims the vehicle under Section 54(2) of the Excise Ordinance, enabling him to present his claim before the trial judge. Hence, the yardstick used in the cases coming under those other enactments cannot be made applicable as authoritative to the issue at hand and therefore the decisions pronounced in relation to those statutes should not be made strictly applicable when it comes to the offences under the Excise Ordinance.

Then the question arises as to the criteria applicable to the confiscation of vehicles under Section 54(2) of the Excise Ordinance. My considered view in

this connection is that it is the objective test that should be applied in such a situation. Accordingly, this Court should decide the issue in a manner; that is similar to the way in which a reasonable and a prudent man look at the issue in such a situation.

In the circumstances, it is necessary to ascertain 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 that he owns, on a standard of balance of probabilities. This is to be ascertained after looking at the evidence recorded at the inquiry held before the learned Magistrate. The only available evidence in this regard is the evidence of the appellant. He has given evidence claiming the vehicle in the capacity as the registered owner of the vehicle.

The relevant evidence in that regard is as follows:

> " මම මෙම වාහනය දවසක් විදානලාගේ රොහාන් ප්‍රසාද් මෙල් කියන පුද්ගලයාට ලබා දුන්නා. පාරියකට යන්න තියෙනවා කියලා මගෙන් ඉල්ලුවා. 2011 .04.25 වන දින රෑ කෝල් කරලා ඉල්ලුවා. පාරියකට යන්න තියෙනවා කියලා. විදානලාගේ රොහාන් ප්‍රසාද් මෙල් කියන අයව මම හඳුනනවා. රොෂාන් ගේ නංගී මගේ බිරිඳගේ යාළුවෙක්. අවුරුදු 7, 8 ක් තිස්සේ හඳුනනවා. මම මීට කලින් වාහනය දීලා නැහැ. මම මෙම දුන්න පලමු වතාව. මෙම වාහනය මම දුන්නේ 25 වන දින රෑ මගෙන් ඉල්ලුවා 26 වන දින ඕනා කිව්වා."
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> *[vide proceedings at page 30 in the appeal brief].*

Having considered the totality of the evidence of the claimant-appellant, the learned Magistrate has concluded that the registered owner has failed to establish that he took precautionary measures to prevent an offence being

committed making use of this particular vehicle. In coming to the said conclusion, he has relied upon the two decisions namely **Manawadu *v. The Attorney General [1987] 2 S.L.R. at page 30*** and ***Mary Matilda Silva v. Inspector of Police, Habarana (C. A. Minutes dated 08.07.2010 in C.A.(PHC) 86/97).***

Learned Counsel for the appellant submitted that it is wrong to have relied upon the said two decisions since both those decisions have been made in respect of an offence committed under the Forest Ordinance. Admittedly, those two decisions have been pronounced in cases involving the offences committed under the Forest Ordinance. As referred to earlier in this judgment, the law referred to in the Forest Ordinance in respect of the vehicles involved in committing offences under the said Ordinance is different to the law referred to in Section 54(2) of the Excise Ordinance. Section 54(2) of the Excise Ordinance, does not impose a burden on a claimant to establish that he has taken all the precautions to prevent an offence being committed as found in the Forest Ordinance. Therefore, I too agree with the contention of the learned Counsel for the appellant as to the application of the decisions referred to by the learned Magistrate to the case at hand. However, I am not inclined to discuss in this judgment, the manner in which confiscations should take place under those other enactments since it is not a matter that was argued before this Bench.

I will now look at the evidence of the claimant-petitioner-appellant to ascertain whether he has successfully shown valid reasons to establish that he

had no knowledge or has nothing to do with the transport of illicit liquor making use of the vehicle that he claims.

Upon a request been made by way of a telephone call, the appellant has handed over his vehicle to the accused De Mel on the 25th night without any further queries been made. Thereafter, on the 26th, the appellant was informed by the Police that his car was taken into their custody. Merely on a telephone call, the claimant has given the car to the accused for him to attend a party. The appellant in his evidence has said that he knew accused for number of years because his wife is a friend of the sister of the accused. It is the reason for the appellant to allow the accused De Mel to take charge of the vehicle. Even though the appellant has stated that he knew the accused for over 7 to 8 years, no evidence is forthcoming to support that he has closely associated the accused. In such a situation, the appellant should at least have inquired as to the place where the alleged party was to be held. The evidence available does not show that the claimant has taken the matter seriously. He has merely allowed the accused to take charge of the vehicle to attend a party. Particulars of the said party had not been elicited by the appellant before the vehicle was handed over to the accused.

Looking at the said evidence of the claimant-appellant, it is clear that he has failed to reveal fully, the facts that are necessary to establish whether he had any idea or knowledge as to the commission of the offence in this instance. Moreover, a reasonable person who owns a vehicle does not allow his vehicle to be used by another person unless he has made meaningful queries though that

other person is known to him. In such a situation usually the previous character and of the behavioral pattern of the person who needed the vehicle is carefully being considered by a reasonable person. Unless the person who takes charge of the vehicle is reliable and possesses a good repute, a reasonable man would not think that the person who takes charge of the vehicle will have proper control over the same particularly in the present day context. All those matters will take into consideration by a reasonable and prudent person before handing over a vehicle to another person. No such evidence is forthcoming in this instance.

Under those circumstances, it is my considered view that the claimant-appellant has failed to show that he has no knowledge as to the commission of this offence under the Excise Ordinance to which the accused has pleaded guilty. Neither had he shown any other particular reason for the Magistrate or for the High Court Judge to consider in order to have the vehicle released.

For the aforesaid reasons, I am not inclined to interfere with the order of the learned Magistrate or of the learned High Court Judge.

Accordingly, this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J

I agree

JUDGE OF THE COURT OF APPEAL