MANAWADU

v.

THE ATTORNEY-GENERAL

SUPREME COURT.
SHARVANANDA, C.J., ATUKORALE, J. AND SENEVIRATNE, J.
S.C. No. 77/85.
C.A. No. 643/83.
M.C. NUWARA ELIYA No. 37665.
FEBRUARY 11, 1987.

Forest Ordinance, ss. 24(1) (b), 25(1), 40–Confiscation of lorry used for transport of 'illicit' timber–S. 7 of Act No. 15 of 1982–Natural justice–Forfeited means liable to be forfeited–Audi alteram partem.

Held (Seneviratne, J. dissenting):

By s. 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a "forest offence" without his (owner's) knowledge and without his participation. The word "forfeited" must be given the meaning "liable to be forfeited" so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. The amended subsection 40 does not exclude by necessary implication the rule of 'audi alteram

partem' The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry If he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him.

Cases referred to:

(1) *Inspector Fernando v. Marther – (1932) I CLW 249.*
(2) *Sinnetamby v. Ramalingam – (1924) 26 NLR 371*
(3) *Rasiah v. Thambiraj – (1951) 53 NLR 574.*
(4) *Wiseman v. Borneman – [1969]3 All ER 275.*
(5) *Cooper v. Wandsworth Board of Works – (1863) 14 CB NS 180, 194.*
(6) *Durayappah v. Fernando – (1966) 69 NLR 265, 269–Appd. by P.C. in (1970) 73 NLR 289.*
(7) *Commissioner of Police v. Tanes – (1957-58) 68 CLR 383, 385.*
(8) *Twist v. Rendwick, Municipal Council – (1976) 136 CLR 106, 109-110.*
(9) *In Re Hamilton – [1981] AC 1038.*
(10) *Abdul Rahuman v. Sarath Silva – CA 1810/79 CA minutes of 11.11.1979 (M. C. Amparai 17039).*
(11) *Wicks v. Firth – [1982]2 All ER 9, 14.*
(12) *Coutts & Co. v. I.R.C. – [1953] AC 267, 281.*
(13) *Re Morgan–Wilson's Will Trust–[1968] Ch. 268, 282.*
(14) *A. G. v. Parsons – [1956] AC 421.*
(15) *Re Lucy's Trust – (1885) 30 Ch. D. 119, 124-5.*
(16) *R v. Chief Immigration Officer – [1976]: 3 All ER 843, 847.*
(17) *Arumugamperumal v. Attorney-General – (1947) 48 NLR 510.*
(18) *De Keyzer v. British Railway Traffic and Electric Co., Ltd. – [1936] I KB 224.*
(19) *Attorney-General v. Nagamany – (1949) 51 NLR 149.*
(20) *Palasamy Nadar v. Lanktree – (1949) 51 NLR 520.*
(21) *D. L. Jayawardane v. V. P. Silva, Assistant Collector of Customs – (1969) 72 NLR 25.*

APPEAL from judgment of the Court of Appeal

H. L. de Silva, P.C. with *V. E. Selvarajah, Miss Lakmali de Silva, Chanaka de Silva, Shenaka de Livera* and *N. Sivendran* for appellant.

Nihara E. Rodrigo, S. C. for the Attorney-General

Cur adv. vult

March 26, 1987.

SHARVANANDA, C.J.

One Ekmon Wijesuriya was charged on 17 5 1983 in the Magistrate's Court, Nuwara Eliya with having on 15 5 83 at Gorden in Pussellawa transported out of this area a load of rubber timber to the value of Rs. 600 in lorry No. 26 Sri 2518, without a permit from an authorised officer, in contravention of Regulations made under section 24(1) (*b*) of the Forest Ordinance (Cap. 451) and with thus having committed an offence punishable under section 25(1) read with section 40 of the Forest Ordinance. The accused pleaded guilty to the said charge and was sentenced to a term of three months rigorous imprisonment suspended for five years and to a fine of Rs. 500. The Magistrate also ordered the confiscation of the lorry *No. 26 Sri 2518,* in which the timber was alleged to have been transported.

The appellant-petitioner (hereinafter referred to as the petitioner) is the owner of the said lorry bearing No. 26 Sri 2518. He was not a party to the proceedings in which the order of the confiscation of his lorry was made, nor was he given an opportunity by the Magistrate of showing cause against the order of confiscation. He states that the said lorry is worth approximately Rs. 350,000.

The petitioner moved the Court of Appeal to revise the order of confiscation made by the Magistrate, on the ground that he was not given an opportunity of showing cause against the confiscation of his lorry, that there was a violation of the principle of 'audi alteram partem' and consequential denial of justice to him. The Court of Appeal held that the order of confiscation by the Magistrate was valid in law in that section 40 of the Forest Ordinance as amended by section 7 of the Act No. 15 of 1982, provided that any vehicle used for the commission of a Forest Offence (whether such vehicle was owned by the person charged or not) shall by reason of his conviction be forfeited to the State and that the legislature had expressly withdrawn any right of the owner to show cause against forfeiture of the lorry. Accordingly, the petitioner's application for Revision was dismissed.

The petitioner has preferred this appeal against the judgment of the Court of Appeal. At the hearing before this Court counsel for the petitioner has urged that the order of confiscation was wrong for the reason that the confiscation of the petitioner's lorry was made without the observance of the rule of 'audi alteram partem' and that section 7

of the Amending Act No 15 of 1982 did not dispense with the principle of natural justice that the owner of the lorry should be heard before any judicial order causing loss of his property is pronounced against him.

Counsel for the state has submitted that there is a legislative history behind the various amendments made to section 40 of the Forest Ordinance, and that the legislature after addressing itself to the fact that the owner of the vehicle would be gravely prejudiced by the automatic forfeiture, deliberately provided for the order of forfeiture of the lorry, which was made use of for the transporting of illicit timber, automatic on the conviction of the accused, whether he was the owner or not of the vehicle.

To appreciate the contention of the State Counsel it is necessary to set out the provision of section 40 of the Forest Ordinance and the amendments thereto, made from time to time, to show the increasing concern of the legislature to arrest the illicit felling of timber from State lands. Section 40 of the Forest Ordinance (principal enactment) reads as follows (Cap. 451):

> "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."

Section 40 of the principal enactment was amended by section 12 of the Act No. 13 of 1966, by the substitution, for all the words form "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 the 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 proved to the satisfaction of the court that he had used all precautions to prevent the use of such tools, boats, cattle or motor vehicles, as the case may be for the commission of the offence."

Section 40 was later amended by section 9 of Act No. 56 of 1979 by the repeal of the proviso to that section. This amendment was later

repealed by Act No. 13 of 1982, and the following section was substituted by section 7 of Act No. 13 of 1982:

The *amended section 40* reads as follows:

"Upon the conviction of any person for 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, 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).

shall by reason of such conviction be forfeited to the State.

(2) Any property forfeited to the State under sub-section shall–

(*a*) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;

(*b*) if an appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

In this subsection, "relevant conviction" means the conviction in consequence of which any property is forfeited to the State under subsection (1).

The Court of Appeal has held that since the accused Ekmon Wijesuriya did not appeal against his conviction under the amended section 40, the forfeiture of the lorry bearing No. 26 Sri 2518 was automatic and that the lorry had vested absolutely in the State. It has so held on the assumption that the legislature had withdrawn the right of the owner to show cause against forfeiture of the lorry to the State, by section 7 of Act No. 13 of 1982.

The burden of Counsel for the petitioner's submission before this court was that the court should imply into section 40 as amended by section 7 of the Act No. 13 of 1982, the condition that a forfeiture of property can take place only after rules of natural justice have been observed in respect of the person whose property is sought to be forfeited.

In *Inspector Fernando v Marther* (1) Akbar, J., in construing section 51 of the Excise Ordinance, which corresponded to section 40 of the Forest Ordinance Cap. 451, quoted with approval the following statement of Schneider J., in *Sinnetamby v. Ramalingam* (2):

"Where an offence has been committed under the Excise Ordinance no order of confiscation should be made under section 51 of the Ordinance as regards the conveyance used to commit the offence e.g. a boat or motor car unless two things occur.

(1) That the owner should be given an opportunity of being heard against it; and

(2) Where the owner himself is not convicted of the offence, no order should be made against the owner, unless he is implicated in the offence which render the thing liable to confiscation."

The vehicle involved in that case did not belong to the accused but had been hired under an Hire-Purchase Agreement. Akbar, J., held that since the registered owner was not implicated in the commission of the offence, no order confiscating the car could be made. Though this opinion was expressed when construing the words "shall be liable to be confiscated" yet it highlights the principle of construction of confiscatory legislation.

In the case on *Rasiah v. Thambiraj,* (3) Nagalingam, J. stated:

"The main question is whether the learned Magistrate was right in ordering the confiscation of the cart without an inquiry having been held by him before making the order. The order in this case would appear to have been made in terms of section 40 of the Forest Ordinance. That section, it is true does not prescribe for an inquiry or for any special proceedings to be taken by the Magistrate before ordering the confiscation of the property. Learned State Counsel contended that an order of confiscation can automatically follow an order of conviction. This contention can be upheld if one limits the rule to property of the person who has been convicted of the offence..... In these cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without the previous inquiry would be tantamount to depriving the person of his property without an opportunity being given to him to show cause against the order being made."

Nagalingam, J. proceeded:

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

Maxwell Interpretation of Statutes 11th Ed. page 358, underlines the presumptions of fair procedure in connection with the exercise of judicial powers:

"In giving judicial powers to affect prejudicially the rights of persons or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance as that which requires that, before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself."

In *Wiseman v. Borneman* (4), the House of Lords underscored the inherence of rules of natural justice in the exercise of powers. Lord Guest said at page 279:

"It is reasonably clear from the authorities that where a statutory tribunal had been set up to decide the final question affecting party's rights and duties, if the statute is silent on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made on the basis that the *Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard* in their interest. In other words the Parliament is not to be presumed to act unfairly. The dictum of Byles J. in *Cooper v. Wandsworth Board of Works* (5) is clear to this effect and has been followed in many subsequent cases."

Lord Morris said at page 278

"That the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law "

Lord Reid said at page 277

"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances .... For a long time the courts have, without objection from Parliament, supplemented the procedure laid down in legislation where they have found that to be necessary for this purpose But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

Lord Upjohn in *Durayappa v. Fernando* (6) P.C. said:

".... upon the question of *audi alteram partem,* the statute can make itself clear upon this point and if it does *cadit quaestio.* If it does not, then the principle stated by Byles J., in *Cooper v. The Board of Works for the Wandsworth District,* 14 C.B.N.S. 180 at 194 (5) must be applied. He said–

> 'A long course of decisions beginning with *Bentley's* case and ending with some very recent cases establish that, although there are no positive words requiring that the parties should be heard, yet *justice of the common law will supply the omission of the legislature.'"*

Dixon C.J., in Commissioner of Police v. Tanls, (7) underlined this canon of interpretation:

> "It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard.... It is hardly necessary to add that its application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the country. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain references or equivocal considerations. The intension must satisfactorily appear form express words of plain intendment "

In *Twist v. Rendwick Municipal Council* (8) Barwick C.J., clarified the principles of construction:

"The common law rule that a statutory authority having power to affect the right of a person is bound to hear him before exercising the power is both fundamental and universal... But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded to the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear. In the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation by insisting that the *statutory powers are to be exercised only after an appropriate opportunity has been afforded the subject whose person or property is the subject of the exercise of the statutory power.* But, if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate... But if it appears to the court that the legislature has not addressed itself to the appropriate question, the court in the protection of the citizen and in the provision of natural justice may declare that statutory action affecting the person or property of the citizen without affording the citizen an opportunity to be heard before he or his property is affected is ineffective. *The court will approach the construction of the statute with a presumption that the legislature does not intend to deny natural justice to the citizen.* Where the legislature is silent on the matter, the courts may presume that the legislature has left it to the court to prescribe and enforce the appropriate procedure to ensure natural justice."

The principle that no man is to be condemned in his person or property without being heard is fundamental to justice. Parliament is presumed to act justly and reasonably, and not to intend injustice. The court should therefore strive to avoid a construction of enacted law which leads to injustice. It should further the ends of justice. The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. They do not supplant the law but supplement it. Unless the contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem;* this principle is basic to justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the

application of any or all of the rules of natural justice then the court cannot ignore the mandate of the legislature or read into the concerned provision the principles of natural justice.

The issue in this appeal relates to the proper construction of section 40 of the Forest Ordinance as amended by Section 7 of Act No. 13 of 1982. Does this amended section dispense with the maxim of *'audi alteram partem'* when it mandates the forfeiture of the vehicle used in committing the forest offence in the case where the said vehicle is not owned by the accused who is convicted of the offence? The House of Lords *in re Hamilton* (9) has stressed that:

> "One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting in his behalf, may make such representations if any, as he sees fit. This is the rule of *audi alteram partem* which applies to all judicial proceedings unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication."

There can be no doubt that the construction of the amended section 40 contended for by State Counsel and upheld by the Court of Appeal will grievously affect an owner of the vehicle who is not implicated in the commission of the offence. Principles of fairness and justice certainly militate against such construction; such construction should be avoided unless the legislative intention to impose an automatic forfeiture of the vehicle quite irrespective of the guilt or innocence of the owner in respect of the offence charged, is unambiguously clear. In the amended section 40 the rule of *'audi alteram partem'* has not been excluded by Parliament expressly; nor has that rule been excluded by necessary implication.

The basis of the decision in *Inspector Fernando v. Marthar (supra)* (1) and in *Rasiah v. Thambiraj (supra)* (3) is that an order of forfeiture of the vehicle used to commit the offence should not be made, where the owner himself has not been convicted of the offence, if (*a*) the owner of the vehicle was not given an opportunity of being heard against the forfeiture (*b*) the owner is not implicated in the offence which renders the thing liable to confiscation. Justice Akbar and Justice Nagalingam founded their decision on fundamental principles of constitutional importance and not on the narrow ground "shall be liable to confiscation." They emphasised that where the owner can

show that the offence was committed without his knowledge and without his participation in the slightest degree, justice demanded that he should be restored his property. The proviso in the Forest (Amendment) Act No. 13 of 1966 embodied in statutory form the above basic defence of the owner. But amendment Act No. 56 of 1979 repealed the said proviso. The effect of the repeal came up for consideration before the Court of Appeal in *Abdul Rahuman v. Sarath Silva* (10). The Court expressed the view that it is difficult to believe that a vehicle is to be confiscated regardless of the innocence of the owner and held that "the confiscation of the lorry without the owner being given a hearing was wrong." The court agreed with the submission of Counsel for the owner that the effect of the repeal of the proviso was that "when an owner is convicted of the offence of transport, when the proviso stood, he could yet urge that he should be heard before confiscation but now without the proviso he cannot make such a plea, but confiscation would be automatic." These decisions underscore the importance that the courts attached to the principle of *'audi alteram partem'* and to the interests of justice, that an innocent owner should not be penalised for the offence committed by a third party.

State Counsel relevantly pointed that section 7 of the Amending Act 13 of 1982 repealed amended section 40 of the Forest Ordinance and substituted a new section in terms of which –

> "Upon the conviction of any person for a forest offence..... the motor vehicle used in committing such offence (whether such motor vehicles are owned by such person or not), shall by reason of such conviction be forfeited to the State."

He submitted that the forfeiture of the vehicle is automatic on the conviction of the offender irrespective of the fact that the owner of the vehicle is innocent and the owner is no party to the commission of the offence. He referred to the espousal of the object that the Minister had in mind when introducing the Bill for effecting the Amendment No. 13 of 1982. Vide Hansard dated 25.2.1982, Vol. 9 Part 19 at pages 1558-1559 the Minister said:– "It is necessary in the situation that we are faced, where forest resources are fast depleting to see that strong and firm action is taken although in the process some innocent people might suffer." I see the force of Counsel's argument. However a construction which offends justice and is repugnant to the Rule of Law that permeates our Constitution should yield to an alternate construction which is harmony with justice and human rights. It is too much to believe that Parliament intended by this amendment to

jettison the in-built principles of natural justice highlighted in the judgments of our courts and of courts of other civilised countries. The Constitution assures justice to all people. Arbitrary forfeiture without reference to the owner's culpability is the negation of justice. The courts assume that the legislature does not intend injustice and seek to avoid a construction that produces or spells injustice. However it is the duty of the court to accept the prescription decided on by Parliament even though the court considers the result unjust, provided it is satisfied that Parliament did intend that result: Oliver L. J., correctly said in *Wicks v. Pirth* (11) "That is quite clearly the purpose and it is not for this court to question or to evaluate the social justification for the legislation."

But as *Lord Reid in Coutts & Co. v. I.R.C.* (12) said: "If it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results." "There are certain objects which the legislature any of them is therefore to be avoided." Maxwell interpretation of Statutes 12th Ed. at page 105.

"If the court is to avoid a statutory result that flouts common sense and justice it must do so, not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice." Per Ungood-Thomas J., in *Re Morgan-Wilson's Will Trust* (13). However, it should be borne in mind that a Judge's duty is to interpret and apply the law and not to change it to meet his idea of what justice requires.

There is some presumption that Acts passed to amend the law are directed against defects which have been disclosed about the time the amending legislation was enacted. An amendment is not passed in a vacuum, but in a framework of circumstances so as to cure a defect in a legislative scheme. The court has to take judicial notice of the previous state of the law to ascertain the intention of Parliament in amending the law.

Statutes will be construed to avoid absurdity or injustice. The courts are accustomed to act on certain basic rules which the text-writers call presumptions in applying canons of construction to statutes. A case where the meaning of a word was "stretched" occurred in *A. G. v*

Parsons (14) where the Mortmain and Charitable Uses Act 1888 provided that certain land transferred to the Irish Company "shall be forfeited to Her Majesty." The House of Lords considered the consequences of these words if they were mandatory, and held that "forfeited" meant "liable to be forfeited" in the context of the Act, and so avoided the absurdity. A construction was arrived at with reference to the consequences which must follow from it.

If the construction contended for by State Counsel is right the consequences of that interpretation are indeed far-reaching; it would follow that if a thief steals a person's vehicle and uses the vehicle to commit a forest offence, the owner of the vehicle will have his car forfeited for no fault of his. That appears to be a strange conclusion because the owner had done no act himself. Further such a construction will render the owner helpless against collusion or conspiracy between the prosecutor and the accused to deprive the owner of his vehicle. The admission of the accused or the finding against the accused that a certain vehicle had been used in connection with the commission of the offence does not bind the owner of the vehicle so as to divest him of the vehicle. The owner is a third party and he should not be precluded from showing that the admission or the finding is contrary to facts and that his vehicle was never used for the illegal purpose. The vehicle will be forfeited only if it was actually used to transport the prohibited timber. The owner should be afforded an opportunity to satisfy court that, in fact, his vehicle was not so used. On State Counsel's submission the owner would have no such opportunity as according to counsel on conviction of the accused, the vehicle vests automatically in the State. These eventualities throw into focus the arbitrariness of the law on the construction contended for by State Counsel.

In *Re Lucy's Trust* (15) Kay, J., explained the meaning of the word 'forfeited.' The word forfeit, the noun substantive is defined in Dr. Johnson's Dictionary to be "something lost by the commission of a crime:–

> something paid for the expiation of the crime, a fine, a mulct." By the same authority the verb "to forfeit" is defined to mean "to lose by some breach of condition, to lose by some offence....." "Forfeit", the principal adjective is defined to be 'liable to ..... seizure; alienated by crime..... clearly the word "forfeit" means not merely that which is actually taken from a man by reason of some breach of condition, but includes also that which becomes liable to be so taken..."

It is significant that Section 40 of the Forest Ordinance finds its place in Chap. VII which deals with Penalties and Procedure. It provides for the penalty when a person is convicted of a forest offence–a penalty in addition to the punishment provided for by section 25. If the offender happens to be the owner of the vehicle used, the forfeiture of the vehicle is a legitimate penalty. So also, if the owner participated in the commission of the offence by allowing it to be used with knowledge that it was going to be used for that purpose, forfeiture of the vehicle is a justifiable penalty. But if the owner had no role to play in the commission of the offence and is innocent, then forfeiture of his vehicle will not be penalty but would amount to arbitrary expropriation since he was not a party to the commission of any offence.

Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) of which states that everyone has the right to own property and Article 17(2) guarantees that 'no one shall be arbitrarily deprived of his property.' The contention of State Counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is uneqivocally manifest. When Parliament is enacting a statute, the courts will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly (Vide Lord Denning in *R v. Chief Immigration Officer* (16)).

In the light of the above principles, I am unable to accept the submission of State Counsel that the legislature by Section 7 of Act No. 13 of 1982 intended to deprive an owner of his vehicle that had been used by the offender in committing a forest offence without the owner's knowledge and without his participation. Having regard to the inequitable consequences that flow from treating the words 'shall by reason of such conviction be forfeited to the State' as mandatory. I am inclined to hold, as the House of Lords did in *A. G. v. Parsons* (supra) (14) that "forfeited" meant "liable to be forfeited." and thus avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. Having regard to the above rules of construction, I am unable to hold that the amended subsection 40 excludes by necessary implication the rule of *'audi alteram partem'*. On this construction the petitioner, as owner of lorry bearing No. 26 Sri 2518 is entitled to be heard on the question of

forfeiture and if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

I set aside the judgment of the Court of Appeal. I set aside also the Order of the Magistrate declaring lorry No. 26 Sri 2518 forfeited and direct him to hear the appellant-petitioner who is the owner of the said lorry on the question of showing cause why the said lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause so shown, he shall restore the said lorry to the appellant-petitioner. The Magistrate may consider the question of releasing the lorry to the petitioner, pending inquiry, on the petitioner entering into a bond with sufficient security to abide by the order that may ultimately be binding on him.

ATUKORALE, J.–I agree.

SENEVIRATNE, J.

The submission of the learned President's Counsel was that Section 40 of the Forest Ordinance as amended by Act No. 13 of 1982, Section 7 did not provide that the owner of the vehicle should not be heard; as such the rule of *audi alteram partem* applied and the owner must be heard before the forfeiture of the lorry. The learned State Counsel submitted that on the plain construction of this section the forfeiture must be automatic upon the conviction; that when the accused in this case pleaded guilty for the offence, by the operation of this section 41(*a*) & (*b*) forfeiture took automatic effect. My Lord the Chief Justice has agreed with the submissions made by learned President's Counsel with which view I very respectfully disagree. I will give the reasons for my view.

The rule of *audi alteram partem* is not an inflexible rule and in addition to that the rules of interpretation also provide that it is the duty of the Court to give effect to the plain meaning of a section whatever the consequences will be to a party. The dicta that the rule *audi alteram partem* is not an inflexible one and will have to be varied or not taken it into account are contained in the dicta of several cases referred to by My Lord the Chief Justice in support of this point of view. The exception to this rule is set out in the following cases cited by His Lordship the Chief Justice–

(1) *Commissioner of Police v. Tanes (supra)* (7). Having set out the principle that the other party must be heard as "a deep rooted principle", the judgment adds as follows –

"But the rule is subject to a sufficient indication of an intention of the legislature to the contrary..... The intention must satisfactorily appear from the express words of plain intendment".

(2) *Twist v. Rendwick, Municipal Council (supra)* (8): Barwick, C. J.:

"The common law rule that a statutory authority having power to affect the right of a person is bound to hear him before exercising the power, is both fundamental and universal..... But the Legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded to the affected person to oppose its exercise. However, if that is the Legislature's intention it must be unambiguously clear".

His Lordship the Chief Justice has cited in *Re Hamilton (supra)* (9) which laid down as follows:

"The rule *audi alteram partem* applies to all judicial preceedings ..... unless .... excluded by Parliament expressly or by necessary implication".

Having cited this dicta, His Lordship the Chief Justice states:

"unless the contrary intention appears an enactment by implication imports the principle of the maxim *audi alteram partem*. This principle is basic to justice".

Then, His Lordship the Chief Justice states:

"in the amended section 40 the rule of *audi alteram partem* has not been excluded by Parliament expressly", and His Lordship the Chief Justice poses the question "Has that rule being excluded by necessary implication?".

I shall now deal with the question whether–

(*a*) Section 40 the present amendment excludes the said rule unambiguously, or

(*b*) it does so by necessary unambiguous implication.

To determine whether the relevant amendment section 7 of Act No. 15 of 1982 expressly excluded the rule *audi alteram partem* section 40 of the principal enactment (Cap. 451) and the subsequent amendments have to be considered. Section 40 of the principal enactment had the phraseology ".... shall be liable ... to

confiscation". In the cases cited by His Lordship the Chief Justice the Supreme Court held that the phraseology "shall be liable" in section 40 of the principal enactment (Cap. 451), gave a discretion to the Magistrate as regards the confiscation of the vehicle. Thus, it follows that to use the discretion the Magistrate had to hear the parties. For this exercise, the Magistrate had necessarily to hear the owner of the vehicle, who was not a party to the offence, to determine whether the vehicle was liable for confiscation. Following from this interpretation, the Supreme Court also held that the said section 40 did not exclude the principal of *audi alteram partem*.

This Law was amended by the next amendment section 12 of Act No. 13 of 1966. The effect of the amendment was that the phrase "shall be liable" was deleted, and was substituted as follows:–"shall...be confiscated by the order of the convicting Magistrate". The necessary conclusion that can be drawn from this amendment is that this amending section cast an imperative duty on the Magistrate to confiscate the vehicle. Having so framed the section the Legislature for the first time added a proviso to bring this section in line with the Supreme Court decisions that a party must be heard before the vehicle was confiscated. The proviso was to the effect that no order of confiscation was to be made if the owner of the vehicle proved that he had used all precautions to prevent the commission of the offence. Thus, this Section made two provisions;

(1) it made the confiscation imperative,

(2) made provision to hear the owner of the vehicle before such an order was made.

Due to the problems created by this proviso section 40 was subsequently amended by section 9 of Act No. 56 of 1979. This was a simple amendment, which merely stated that section 40 of the principal enactment was amended by repeal of the proviso. This amendment, on the face of it, took away the statutory duty cast on the Court to hear the owner before confiscation. This amendment section 9 of Act No. 56 of 1979 was interpreted by the Court of Appeal in the Application – *Abdul Rahuman v. Sarath Silva* (10). In this case the learned Magistrate had confiscated the lorry without hearing the owner. The Court of Appeal set aside the order holding that this amendment did not remove the right of the owner of the vehicle who was not a party to the case to be heard, and directed the Magistrate to hear the owner before any order to confiscate the vehicle was

made. This interpretation in fact upset the law which the Legislature intended to frame when it dropped the proviso included in the 1966 amendment.

It is the above decision, and such other decisions which made the Legislature again to amend section 40, by the drastic Amendment Act No. 13 of 1982 Section 7. The amended section 40(1) (*a*) provided that "..... vehicles used in committing such offence (..... are owned by such person or not) shall by reason of such conviction be forfeited to the State." The important relevant phraseology in this section for its interpretation are the following limbs of this section:

(1) "Whether such ..... motor vehicles are owned by such person or not",

In this limb the term "such person" refers to "conviction of any person in Section 41".

(2) Shall by reason of such conviction be forfeited to the State.

Thus, whether the vehicle was owned or not by the person convicted it was made subject to forteiture. In the second limb the phrase in the original Section 40 "shall be liable", which words were interpreted as casting a discretion on the Magistrate have been dropped. The second limb is framed in a manner that the forfeiture by the Magistrate is made imperative and to take automatic effect from the conviction ipso facto. I hold that on the plain construction of this section in issue in this case this Court cannot, but come to the conclusion that this section expressly excluded the rule of *audi alteram partem*. An argument has been adduced in the present appeal before this Court, and in earlier appeals that such an interpretation to this section causes irreparable hardship to the "innocent owner" of a vehicle, and as such it cannot be contemplated that the Legislature intended to perpetrate such an injustice on a citizen, (in this particular instance to confiscate a vehicle allegedly of value Rs. 350,000/- without hearing its owner, the petitioner – appellant). His Lordship the Chief Justice has referred to the Hansard which contains the proceedings in the Parliament when this amendment was introduced. I am now referring to these proceedings in the Parliament, not with the purpose of assisting this Court in the interpretation of this amendment, which matter this Court cannot take into consideration on the accepted rules of interpretation of a statute. I am citing a portion of the speech of the Hon. Minister of Lands & Land Development, who has moved this amendment only to show that the State has taken into account the hardship that would be

caused to persons by amending the Law in this manner. The Hon. Minister has in his speech stated as follows: "Sir, the Hon. Members for ..... all being lawyers, made some representations about the possibility that some innocent persons, may suffer as a result of some provisions of this law. I am aware that it might happen. These amendments were discussed at length in the Cabinet But we felt that the situation was so serious ..... we must bring the law", and the Hon. Minister further developed this theme as follows: "so we felt that we can adequately monitor the type of prosecutions that will be launched. But it is necessary in the situation that we are faced, where the forest resources are fast depleting to see that strong and firm action is taken although in the process some innocent people might suffer".

I will now consider whether by implication also the relevant amendment under discussion has excluded the rule of *audi alteram partem*. It was held by the Supreme Court that the principal enactment section 40 gave a discretion to the Magistrate regarding the confiscation of the vehicle, and also that on the construction of the section the owner of the vehicle had a right to be heard before such an order was made. In view of the Supreme Court decisions the Law was amended in two respects. The first amendment section 12 of Act No. 13 of 1966 made the confiscation of the vehicle imperative, but with a proviso granting the third party a right to be heard. The history of this legislation shows that the State then discovered that the law pertaining to Forest Offences particularly illicit felling was not sufficiently stringent and severe to deter Forest Offences. As such the second amendment that of section 9 of Act No. 56 of 1979 was introduced. This amendment abrogated the proviso which gave a right to a third party to be heard before confiscation. The intention of the State in introducing this amendment seems to have been to make the confiscation of the vehicle imperative and remove the right of the owner of the vehicle to be heard in that exercise. But the Court of Appeal decision in *Rahuman's case* (10) (cited above) upset the intention, the Legislature seems to have had in introducing the 1979 amendment. In addition to that, it appears that the incidence of Forest Offences increased both in number, nature, and in intensity that the State contemplated further stringent measures to remedy this mischief. In introducing the 1982 amendment the Hon. Minister of Lands and Land Development has stated as follows:–Vide Hansard cited above–"it was felt by a Committee of Officials that very severe

and punitive measures had to be introduced to see that the meagre forest resources of our country are preserved in order to preserve the catchment areas of our forests and also to preserve the environment and the ecological balance of our country". As I see it because the amendment of 1979 did not have the desired effect due to the interpretation made in *Rahuman's case, (supra)* (10) to remedy the situation, the 1982 amendment has been introduced in its severity and stringency taking into account that innocent persons may suffer. In the earlier Supreme Court decisions and particularly is *Rahuman's case (supra)* (10) it has been stated how an innocent owner can suffer from the severity of the law. This argument was also brought forward in the present appeal before this Court. But this line of reasoning is looking only at one facet of the problem. Just as collusion between the driver of a vehicle, and a detecting officer can create mischief for the owner of the vehicle, it is also possible that an owner of a vehicle engaged in unlawful transport of timber can with the connivance of his own servant, the driver of the vehicle, connivance and assistance of the law enforcement officers save the vehicle from confiscation by concocting a false position that he was not a party to the offence. I hold that it is clear that even by implication the amendment which is the subject matter of this appeal has excluded the rule *audi alteram partem*.

The view I have taken regarding the scope and effect of the relevant 1982 amendment is fortified by a long line of decisions of the Supreme Court in interpreting similar (I should say like) sections in the Customs Ordinance to wit – Sections 34(1), 44, 47, 50, 107, 129, 120 and such like sections. All these sections deal with forfeiture of property on the commission of offences under the Customs Ordinance to wit:

Section 34 – "..... and all goods and unladen, landed, or removed ..... contrary to the directions ..... shall be forfeited"

Section 44 – "If any person exports or attempts to export or take out of Ceylon any goods ..... such goods shall be forfeited."

A long line of decisions of the Supreme Court have held that these sections provide for automatic forfeiture on the happening of the event, i.e the breach of the Customs Law or regulations. In the case of *Arumugaperumal, appellant and the Attorney General* (17), the Supreme Court considered the scope and effect of section 128 (A) to

(i) of the Customs Ordinance (presently sections 131(1) & (2) of the Customs Ordinance) – "any ship ..... knowingly used ..... of any goods prohibited of import or export, ... or conveyance of any goods with intent to defraud the revenue, shall be forfeited". In this case the Boat transported to Ceylon from South India a load of 88 bundles of beedies which were contraband goods. The Boat was in charge of the tindal Balasunderam. As such this Boat was seized by the Custom Officers. Later the boat was advertised for sale in the Government Gazette, then the owner of the boat Arumugaperumal gave notice to the Attorney General and filed action claiming the boat. Mr. Choksy appearing for the plaintiff-appellant contended that before a ship could be forfeited under sub section (1) of this section the guilty knowledge of the owner in the importation of prohibited goods must be established. There was no proof in the present case that the plaintiff had any knowledge that goods were being imported without payment of prescribed Customs duties. There was an absence of any intention to defraud the revenue. In meeting this argument Howard C.J. held as follows: "In the circumstances I am of opinion that the boat was forfeited under the provisions of Section 128(A), and that such a forfeiture was valid *irrespective of the guilty knowledge of the owner.* (The underlining is by me for emphasis). In this connection I would refer to the case of *De Keyzer v. British Railway Traffic & Electric Co. Ltd.* (18). His Lordship cited the headnote of this case and followed the principles laid down therein. As this English case has been referred to in the subsequent cases, I will later deal with this case in detail. In the Customs Ordinance which has several sections providing for the forfeiture of goods, in some sections the word "knowingly" has been used. It would be noted that Section 128(A) has the phrase "knowingly" used in the importation. Sections 34(1), 44, 47, 50 & 107(1) do not have the word "knowingly", whereas Section 129 has the phrase "knowingly harbour", "knowingly permit", "forfeit treble the value of the goods".

Section 130 states – "who shall be knowingly concerned in any fraudulent evasion shall forfeit treble the value of the goods".

The case of *Attorney General, appellant v. Nagamany respondent,* (19) – considered the provisions of Sections 128 and 128 (A)(1) of the Customs Ordinance (presently sections 131(1) & (2) of the Customs Ordinance). It is the same identical section considered in *Arumugaperumal's case (supra)* (17), where the term used in the

relevant section is "knowingly used in the importation ..... shall be forfeited". In this case Gratiaen, J. ruled that in order to justify the forfeiture of a sailing vessel under section 128(A)(1) of the Customs Ordinance, it is not essential to prove guilty knowledge on the part of the owner. Further, Gratiaen, J. ruled that the word "knowingly" is introduced only to ensure that the penalty of forfeiture shall not be exacted if, unknown to the owner or the person in control of a vessel, prohibited goods are surreptitiously smuggled on board. In both *Arumugaperumal's case (supra)* (17) and in this case the contraband goods were transported with the knowledge of the person in control of the vessel in question. In the case of *Palasamy Nadar and Lanktree* (20) – Gratiaen, J. considered the effect and scope of section 46 of the Customs Ordinance (presently section 44 of the Customs Ordinance) which is as follows:

> "If any person exports ..... any goods enumerated in the table ..... Schedule B in contravention of the prohibitions ..... such goods shall be forfeited".

Gratiaen, J. in course of the judgment has laid down as follows:–
"I am prepared to concede that the draftsman must be given credit for having intended the terms "forfeited" and "liable to forfeiture" to convey different meanings. If goods are declared "to be forfeited" as opposed to "liable to forfeiture" on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as seen as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture". His Lordship then refers to decisions in two cases in England in which these principles have been followed.

The leading case on the interpretation of these sections providing for forfeiture in the Customs Ordinance is the Judgment of the Court – by H. N. G. Fernando, C.J., Samarawickreme, J. and Weeramantry, J. in the case of *D. I. Jayawardane, petitioner and V. P. Silva, Assistant Collector of Customs* (21). This case dealt with forfeiture of property exported from Ceylon in contravention of Section 130 of the Customs Ordinance. This section laid down – who shall knowingly evade such duties shall forfeit treble value of the goods, and thereby the value of goods imposed as forfeiture in this case was Rs.5,010,504, not a mere 350,000/– as in the present appeal before this Court. This judgment of the Court firstly explained and adopted the principle decided in the case of *Palasamy Nadar v. Lanktree (supra)* (20) (cited

above) as follows:– "In the case of *Palasamy Nadar v. Lanktree (supra)* (20) this court considered the effect of a provision in section 46 (new section 44) of the Customs Ordinance and construed this provision to mean that on the happening of some event" the owner of the goods is automatically and by operation of law divested of his property in the goods as soon as the event occurs". The court further held that "no adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture". The decision in this case followed the construction placed in *De Keyzer v. British Railway Traffic & Electric Co. Ltd., (supra)* (18) on the language of section 202 of the English Customs Consolidation Act of 1876".

Section 130 of the Customs Ordinance provides that on the breach of this section the exporter shall "forfeit either treble the value of the goods or be liable to a penalty of Rs.1000 at the election of the Collector of Customs". The Judgment of the Court held that when the Collector of Customs uses his discretion regarding the alternative penalties to be imposed" the principle *audi alteram partem,* as discussed in *Durayappah v. Fernando (supra)* (6) does not apply in the case of election authorised or required by Section 130 of the Customs Ordinance. The Judgment of the Court at page 42 states–"We upheld the objection to the issue of the Writ which was taken by the youthful counsel who led for the Crown, and we express our appreciation of the assistance which we have derived from his able and lucid arguments". I regret that I am not persuaded by the submission made by the President's Counsel for the appellant the then youthful counsel in *Jayawardane's case, (supra)* (21) who has led for the appellants in this appeal. This decision was approved by the Privy Council in (1970) 73 NLR 289.

I will now deal with the English case *De Keyzer v. British Railway Traffic & Electric Co. Ltd., (supra)* (18) referred to in the Supreme Court cases (cited by me above). In this case the Court interpreted a like section in Customs Consolidated Act 1876 Section 202 "All ..... conveyances .....made use of in the importation, ... removal .....of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited .....". This case has considered the forfeiture of a conveyance–a

motor tank wagon seized by officers of the Customs under the Customs Act. In dealing with the submissions Lord Hewart, C. J. laid down as follows:–

> "there is no opportunity for mercy with regard to a conveyance which has been forfeited, ... All that was argued on behalf of the respondents was that they did not know of the wrongful use for which the lorry was being employed. That circumstance was wholly irrelevant to the proceedings before the justices. It did not affect the purpose for which the lorry had been used. If that sort of argument were to be open to the owner of a conveyance in such a case as the present, the result might be, in the case of two partners, where one was aware of the wrongful use to which the vehicle was being put and the other was not, that the vehicle might be excused from condemnation because of the innocent mind of one of the partners, that result enuring for the benefit of the guilty partner. In the present case the argument adduced before the justices, which was really an argument in mercy, that the owner of the vehicle was not aware of the illegal use to which it was being put, was wholly irrelevant to the only question which the justices had to consider".

The Universal Declaration of Human Rights (1948) Article 17(1) states–that everyone has the right to own property and Article 17(2) guarantees that no one should be arbitrarily deprived of property. The Human Rights Declaration as regards the rights to own property is not of that significance to Sri Lanka. But that limb of the Article, that no one should be arbitrarily deprived of property is nevertheless of great significance to us. The Article right to own property is more significant to the capitalist based economy of the United States of America, United Kingdom and such countries where the right to property is enthroned. What is of significance to Sri Lanka is that the Constitution Chapter 3–Fundamental Rights contains no Article guaranteeing the right to private property. The particularly relevant Articles 14(1)(*a*) to (i) guarantee several freedoms, but it has to be noted that such freedoms do not at all include the right to own property. The restriction on unrestrained right to property seems to be in accordance with the spirit of our Democratic Socialist Republic. It is also of much significance that the Constitution of India in its Chapter on Fundamental Rights does not have an article guaranteeing the right to private property. Our Constitution and other laws have provisions the implementation of which will result in no one being arbitrarily deprived of his private property guaranteed by Human Rights. In my view the

relevant section of the Forest Ordinance is not arbitrary deprivation of property, but the deprivation of property by due process of law, to deal with an economic crime.

My view of the interpretation of the relevant provisions of the Forest Ordinance is also supported by the rules of Interpretation of Statutes adopted in our courts. The following passages from the authority–Craies on Statute Law (7th Ed.) are relevant for consideration in the interpretation of the amendment in question–"But where the words of an Act of Parliament are plain the Court will not make any alteration in this because injustice may otherwise be done. Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequence, for in that case the words of the Statute speak the intention of the Legislature". (Page 87). Craies further states–"where the language is explicit, its consequences are for Parliament, and not for the Courts to consider. In such a case the suffering citizen must appeal for relief to the law giver and not to the lawyer". (Page 90).

In view of the reasons I have given above, I uphold the judgment of the Court of Appeal and dismiss this appeal in the Application in Revision with costs fixed at Rs. 1,500.

Appeal allowed.