

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 4514 of 2020 : Umer Zahid Malik vs.
Federation of Pakistan & Others

SCRA 557 of 2019 : Director Intelligence & Investigation
(Customs) vs. Umer Zahid Malik &
Another

For the Petitioner : Ms. Dil Khurram Shaheen, Advocate

For the Applicant : Mr. Muhammad Bilal Bhatti, Advocate

For the Respondent : Mr. Khalid Rajpar, Advocate

Mr. Kafeel Ahmed Abbasi
Deputy Attorney General

Date of hearing : 17.02.2021

Date of announcement : 17.02.2021

JUDGMENT

Agha Faisal, J. In scrutiny before us is the Judgment of the learned Customs Appellate Tribunal Karachi dated 23.05.2019 in Customs Appeal K-1023 of 2018 (“Impugned Judgment”), whereby a confiscated motor vehicle, stated to be a *Toyota Corona*, was ordered to be released, upon satisfaction of the learned Tribunal that it was a lawfully acquired *Toyota Premio*. SCRA 557 of 2019 (“Reference”) was preferred to assail the Impugned Judgment; whereas CP D 4514 of 2020 (“Petition”) was filed seeking implementation thereof. Since the matters are interconnected, hence, they shall be determined vide this common judgment.

2. Briefly stated, a vehicle, ostensibly a *Toyota Premio*, was intercepted in Karachi on suspicion of being smuggled / non duty paid. The occupant of the vehicle, petitioner herein, presented registration documents of a *Toyota Corona*, instead of the vehicle in question, hence, the vehicle was detained for verification and the petitioner was directed to furnish the pertinent import documentation, a task he failed to accomplish.

3. The department submitted the vehicle to a forensic examination and the report ("Forensic Report") in such regard, found the vehicle to be tampered, is reproduced herein below:

"Examination Report

Category: Vehicle

IMPORTANT NOTICE: WHEN SUMMON IS ISSUED THE FD NO.MUST BE MENTIONED
SERIAL NO.FD/Veh-181/2018

01. GENERAL:

The vehicle examined at Regional office of Intelligence & Investigation FBR ASO P.E.C.H.S. Karachi, Details are:

Maker:	Toyota Premio Car
Registration No:	LWQ-953
Received on:	26/04/2018
Chassis serial before chemical process:	(AZT240-0015162)

02. OPINION: The chemical examination of vehicle has led that:

(i). CHASSIS NO.: The present chassis serial (AZT240-0015162) is fake digits. However, the piece of present chassis sheet is welded & replaced at the site of original chassis number."

4. In consequence thereof the department issued a show cause notice to the petitioner, dated 21.05.2018, operative constituents whereof are reproduced herein below:

"7. And whereas, in view of the forensic examination report of the Assistant Inspector General of Police, Forensic Division, Sindh Karachi, non submission/non provision of any import documents by the possession holder/registered owner and investigation conducted by the Directorate General, with PRAL, it is quite evident that the piece of present chassis sheet of the subject vehicle, bearing registration No.LWQ-0953 (Lahore), Chassis No.AZT240-0015162 is welded & replaced at the site of original chassis number and as such found to be smuggled into the country, without payment of duty & taxes, and the vehicle after welding & replacing the present chassis frame bearing chassis serial AZT240-0015162, was plying on roads, therefore, the Toyota Premio Car, bearing Registration No.LWQ-0953 (Lahore), Chassis No.AZT240-0015162 (welded & replaced chassis frame), was seized under section 168 of the Customs Act, 1969, for violation of Section 2(s), 16, & 178 of the Customs Act, 1969, punishable under clauses (8), (77) & (89) of sub Section (1), read with Section (2) of Section 156 ibid. Notice under Section 171 of the Customs Act, 1969, was sent to Umer Zahid Malik (possession holder/Registered Owner) and a copy thereof was pasted on the Notice board of the Directorate General, Regional office, Karachi. (Value of the seized vehicle: Rs.1,746,913/- (Approx) Duty & Taxes involved: Rs.4,624,700/- as determined by the seizing agency in Seizure Report).

8. Now therefore, in the light of above report facts, Umer Zahid Malik (Possession holder / Registered Owner) CNIC No. 42301-1248384-1 S/o Zahid Atiq R/o H.No. 366-367 Moh Block G Johar Town, Lahore is called upon to show cause as to why the seized Vehicle "Toyota Premio Car, bearing Registration No.LWQ-0953 (Lahore), Chassis No.AZT240-0015162 (Welded & Replaced Chassis frame), Engine No.1AZ4595770, Model: 2003" should not be confiscated and penal action as warranted under the aforementioned provisions of law should not be taken against them. The written reply to the Show Cause Notice accompanied by supporting documents should reach this office within (14) days of the issuance of this notice.

9. Hearing, in this case has been fixed for ... to defend the above charges. If no reply to the Show Cause Notice is received or no one appears on the aforesaid date and time, it shall be presumed that the respondents do not want to defend the charges and the case shall be decided on merit on the basis of the available record."

5. The petitioner failed to respond to the show cause notice and also failed to appear before the adjudication proceedings. An Order in Original dated 05.07.2018 was rendered ordering the outright confiscation of the vehicle. The operative conclusion of the said order is reproduced herein below:

"I have examined the case record and considered the facts of the case. The owner / possession holder of the seized vehicle neither attended the proceedings of adjudication nor bothered to provide any reply to prove that this impugned seized vehicle was imported on proper Customs documents after payment of leviable duties & taxes. He was afforded repeated opportunities of hearings but in vain. As per verification conducted by the detecting agency with PRAL database, no record has been found with respect to the import of the seized vehicle. The narrated position leads me to conclude that the charges leveled in the show cause notice are established beyond any shadow of doubt. I, therefore, order outright confiscation of the seized vehicle "Toyota Premio Car, bearing Registration No.LWQ-0953 (Lahore), Chassis No. AZT240-0015162 (Welded & Replaced Chassis frame), Engine No. 1AZ4595770, Model: 2003" under Section 168 of the Customs Act, 1969 for violation of Section 52(s), 16 & 178 of the Customs Act, 1969,

punishable under clauses (8), (77) & (89) of sub Section (*1), read with Section (2) of Section 156 ibid, read with preamble to SRO 499(I)/2009 dated 13.06.2009 dated 13.06.2009.”

6. The petitioner assailed the aforesaid order in appeal, which was allowed directing the release of the vehicle. The findings of the Impugned Judgment are reproduced herein below:

“13. After going through the available record and hearing verbal arguments from both sides, I have reached to the conclusion that certain legal requirements were not complied with by the seizing/reporting agency which shows their lack of interest to pursue the case at this forum. The noteworthy point in this case is that the seizing agency has verification the particles of vehicle from MRF which found as per seizure report moreover The Excise & Taxation Officer, Motor Registration Authority, (Lahore), was also approached by the seizing agency vide officer letter No.350/DET ASO/2018/2199 dated 25-04-2018 to supply the copies of import documents / information on the basis of which the detained Toyota/Corona bearing Registration No.LWQ-0953 (Lahore), Chassis No.AZT240-0015162, Engine No.1AZ459S770, Model 2003 was got Registered with MRA, Lahore, No response was received, however, Appellant supplied the computer printout of Motor Vehicle Tax Position Register (Personal Ledger) showing registration of Toyota/Corona bearing Registration No.LWQ-0953 (Lahore), Chassis No.AZT240-0015162, Engine No.1AZ4595700, Model 2003 in the name of One Ch Siraj Ud Din S/o Fakhar Ud Din holding CNIC No 12201-5784053-1 R/o House No C-1574, Devan Sahib Dera Ismail Khan (Registered Owner) later on purchased by Umer Zahid Malik (Possession holder) CNIC No. 42301-1248384-1 S/o Zahid Atiq R/o H.No. 366-367 Moh Block G Johar Town, Lahore. This vital issue has not been denied by the DR, hence, burden of proof under section 187 of the Customs Act, 1969 stands shifted on the seizing agency. Moreover, registration of confiscated vehicle with concerned MRA Lahore on the basis of relevant documents also make it lawful and its subsequent sale/purchase also fall within lawful transactions. It is also pertinent to quote here, two very relevant Orders of this Tribunal i) dated 13.07.2009 in Customs Appeal No. K-86/2006 passed in case of M/s. Orix Leasing Pakistan Ltd and ii) dated 29.10.2003 in Customs Appeal No.Q-197/203. Both these orders have held that lawfully registered vehicles cannot be treated as smuggled. Hence, the appellant being innocent buyer / purchaser of confiscated vehicle stands its lawful possession holder.

14. Without knowledge of the Appellant vehicle was sent to Assistant Inspector General of Police, Forensic Division, Karachi for verification of the chassis number of the seized Toyota Corona Car, bearing Registration No.LWQ-0953 (Lahore), vide letter C.No.Det/ASO/2018/2198, dated 25.04.2018, for general examination of its Chassis No.AZT240-0015162. In response, thereof, the Assistant Inspector General of Police, Forensic Division Sindh, Karachi, conducted the forensic examination and submitted Report No.AIG/FDNeh/OR/184/2018 dated 30-04-2018, conveying that the present chassis serial (AZT240-0015162) is fake digits. However, the piece of resent chassis sheet is welded & replaced at the site of original chassis number, however FSL department miserably fail to point out any concealed no which was his sole duty hence could not relay on the said report.

(Underline added for emphasis)

15. I would like to discuss the applicability of Section 2 (s) of the Customs Act, 1969 which clearly depicts that smuggling means bringing into or taking our Pakistan in breach of any prohibition or restriction for time being in force or evading payment of customs duties & taxes leviable thereon. In the instant case import of impugned vehicle is not banned nor there is any concrete evidence to establish that same were brought into the country through unauthorized routes, therefore, invoking of Section 2 (s) of the Customs Act, 1969 is unwarranted in this case. Likewise, Section 16 of the Customs Act, 1969 there seems no grounds for its violation by the appellant as the referred section of law deals with placing prohibition and restrictions on the importation of items to be notified in the Official Gazette by the Federal Government. The penal clause (8) of Section 156 (1) of the Customs Act, 1969 so invoked in this case is not attractable because the Seizing Agency could not proved that the Impugned vehicle was smuggled by any standard.

16. Now coming to clause (89) of section 156 (1) of the Customs Act, 1969, I am convinced that it was the responsibility of the person seizing the impugned goods to come up with logical conclusion with concrete material evidence that impugned vehicle were smuggled. The question arises if the impugned vehicle were smuggled, the seizing officer should have proved as to how they were smuggled i.e. whether from non-notified routes or through a notified custom stations without payment of duties and taxes. Perusal of show cause notice, in the instant case is silent about these two vital aspects.

17. With regard to lawful rights of owner/claimant of such vehicles allegedly smuggled into the country, I would also like to gain support from reported Judgment 2014 PTD (Trib.) 865 which enshrines the rights of owner/claimant of vehicle. For better understanding the theme of above referred Judgment, replication of relevant portion is imperative, which is as under:-

“I also noticed that the appellant is the fifth buyer of the instant vehicle and he purchased the said vehicle after due verification from the respective authority i.e. MRA and as such is an innocent buyer and in support of his stance produce the copies of registration book of the previous four buyers, the veracity of the said fact has not been disputed by either of the respondent. Instead the respondents are of the opinion that the appellant is plying the vehicle on the chassis number of the vehicle imported in the year 1996.....The appeal before the Appellate Tribunal was accepted, the confiscation order set aside and, the customs authority were directed to release the vehicle.”

18. In this regard I am also fortified with the detailed judgments passed by the Honourable High Court of Sindh in SCRA No.258/2010, SCRA No.253/2008, SCRA No.245/2008, SCRA No.263/2010, SCRA No.110/2014 dated 22.11.2015 and CP No.D-1255/2017 dated 07.04.2017. Reliance is also placed upon judgment passed by the Honorable Supreme Court of Pakistan in Civil Petition No.381 of 2013 titled as The Director of Intelligence & Investigation, FBR, Regional Office, Karachi v/s Muhammad Gul and another which attend his finality and vehicle was released by the seizing agency to the respondent accordingly.

19. On the basis of foregoing discussions and minute scrutiny of available record coupled with referred case laws, I am of the considered view that the appellant did not commit any offence, which could warrant

for outright confiscation of his vehicle, which he purchased registered vehicle from local market in good faith. Under the circumstances discussed herein above it is believed that charge of smuggling of vehicle against the appellant is based on assumptions & presumptions for the reasons that vital issues, which should have been probed into, were left untouched by the seizing agency. In such cases of identical nature, the claimant/owner of vehicles becomes victim of circumstances and is deprived from their lawfully acquired property while the administration of justice is to help and not to thwart the grant to the people of their rights (PLD 1963 SC-382).

20. It is an admitted position that the Department has failed to prove their case based on admissible evidences that the confiscated vehicle is smuggled or non-duty paid. Appellant successfully discharge burden of prove under section 187 of the Customs Act, 1969 and registration of vehicle was not proved as fake till-to-date as per record. Moreover appellant produce computer print issued by the MRA, Lahore which was match seized vehicle. Taking into consideration the prescribed law, precedents, observations, and in absence of admissible evidence, the show cause notice suffered from legal infirmity, now therefore, I vacate it and all subsequent proceedings stand nullified. I hereby allow unconditional release of confiscated vehicle with directions to hand over it to its lawful owner/possession holder, if not required in any other case. Appeal is allowed."

Hence, the present proceedings.

7. We have appreciated the respective arguments and have considered the documentation to which our attention was solicited. It is considered expedient to consider the questions of law, framed in the Reference, at the onset as the answer thereto would have a consequential impact upon the fate of the Petition.

8. It is apparent from the documentation, on file, that the seized vehicle was a *Toyota Premio*, however, the documentation relied upon in the Impugned Judgment pertained to a *Toyota Corona*. The Forensic Report categorically stated that the chassis number on the vehicle is *fake digits*; as the present chassis sheet is welded and replaced at the site of the original chassis number.

9. Learned counsel for the petitioner placed on record a statement, dated 02.02.2021, along with *purported* documentation to bulwark the plea of the petitioner. Perusal of the documentation leads us to observe as follows:

a. The copy of the goods declaration contains the *typed* description stating *Toyota Corona Premium*. However, the word *Premium* appears to have been overwritten in ink to masquerade as *Premio*. No authorization for such overwriting is apparent from the record and even otherwise the word *Corona* remains therein, thus, calling the veracity of such modification in question even otherwise.

b. The copy of the Form F, presumably for the initial registration of the vehicle, states the chassis number of the vehicle is *240015665*; and the year of manufacture is *2004*. However, the copy of the registration booklet, relied upon by the petitioner, stipulates that the relevant chassis number is *AZT2400015162* and the year of manufacture is

2003. The registration booklet further stipulates that the vehicle is a *Toyota Corona*, and not *Toyota Premio*.

c. The copies of the application for transfer of ownership and the certificate of registration issued in Punjab also denote the vehicle in question to be a *Toyota Corona*, and not *Toyota Premio*.

Learned counsel for the petitioner was confronted with the *prima facie* contradiction in the very documents relied upon; however, she failed to articulate any grounds in justification and submitted that these were the very documents provided thereto by the petitioner.

10. The apparent contradiction in the aforesaid documentation appears not to have been appreciated by the learned Tribunal and the Forensic Report, in itself, appears to have been dealt with in the Impugned Judgment in a rather perfunctory manner, which cannot be appreciated. Mere reliance on registration of a vehicle, unsubstantiated by the record, cannot absolve a subsequent purchaser from liability.

11. The honorable Supreme Court has held in the *Sarfaraz case*¹ that while initial responsibility lies with the person tampering with a vehicle, however, a subsequent purchaser ought to have taken due care towards ensuring compliance with the requirements of law; in the absence whereof he cannot claim to be a bona fide purchaser. It was further illumined that the purchaser's remedy lied in a claim for damages against the person from whom he purchased the vehicle.

12. In a leave refusal order in the *Chaudhry Maqbool case*², the honorable Supreme Court observed that a smuggled vehicle with an apparent tampered chassis frame, as denoted from uncontroverted forensic report/s, merited outright confiscation.

13. In *Noor Muhammad*³ the august Court maintained that a forensic report was to be given due credence and it was incumbent upon a person aggrieved to challenge / discredit the same in the proceedings concerned.

¹ Per *Mushir Alam J* in the judgment dated 28.05.2020 *Government of KPK & Others vs. Sarfaraz Khan & Another (Civil Petition 800-P of 2019)*.

² Per *M Javed Buttar J* in *Ch. Maqbool Ahmed vs. Customs, Federal Excise & Sales Tax Appellate Tribunal & Others* reported as 2009 PTD 77.

³ Per *Ijaz ul Ahsan J* in *Noor Muhammad vs. Customs Appellate Tribunal & Others* reported as 2020 SCMR 246.

In the present facts and circumstances the Forensic Report was relied upon in the initial show cause notice issued by the department, however, the petitioner did not challenge the same in the adjudication proceedings. It is apparent from the petitioner's memorandum of appeal, filed before the learned Tribunal, that no cogent effort was pleaded to call the Forensic Report into question.

14. In the Impugned Judgment, the Forensic Report has not been considered appropriately. Notwithstanding the fact that the same was not controverted by any additional report or otherwise, the learned Tribunal appears to have erred in not having given it due weightage. On the contrary, the learned Tribunal denigrated the report by observing that it failed to identify the particulars, ostensibly implying the original chassis particulars, that had been concealed / replaced. Such callous disregard for primary evidence cannot be sustained by this Court.

15. It is a presumption that items coming in to the country have been sieved through the customs barrier and the pertinent levies have been paid⁴, in the absence of any indication to the contrary. The law places the initial burden upon the owner / possessor to show that the items are in accordance with lawful authority; and such a burden may only be displaced once evidence is demonstrated to discharge this initial burden⁵. In the present case no cogent evidence was provided at the time of the detention of the vehicle and none was adduced in the original proceedings at all. Therefore, the learned Tribunal erred in holding that the entire onus of proof was upon the department.

16. The learned Tribunal *prima facie* failed to consider the un-assailed Forensic Report in its proper perspective; did not appreciate that the petitioner unjustifiably failed to participate in the original adjudication proceedings; gave unwarranted precedence to registration document/s, notwithstanding the apparent fact that the same were contradictory *inter se* and even otherwise never produced in the original adjudication proceedings; and finally incorrectly predicated its findings upon the registration of a vehicle, without appreciating whether the registered vehicle and the seized vehicle were one and the same.

17. The following questions of law were framed for determination in the Reference before us:

⁴ *Abdul Razzak vs. DG I&I & Others* reported as 2016 PTD 1861; in reliance upon *AC Central Excise vs. Qazi Ziauddin* reported as PLD 1962 Supreme Court 440, *Sikander A Karim vs. The State* reported as 1995 SCMR 387.

⁵ Division Bench, of which one of us (*Muhammad Junaid Ghaffar J*) was a member, judgment of this Court in *Abdul Razzak vs. DG I&I & Others* reported as 2016 PTD 1861; *Muhammad Gul vs. Member Judicial Customs Appellate Tribunal & Others* reported as 2013 PTD 765; *Kamran Industries vs. Collector Customs & Others* reported as PLD 1996 Karachi 68.

1. "Whether the learned Appellate Tribunal was justified in holding the production of the subject vehicle's Registration Book as a "lawful excuse", under clause 59 of Section 156(1) of the Customs Act, 1969, especially in view of the subject vehicle's chassis being confirmed to have been tampered without so much as mentioning, much less analyzing, such aspect of the case?"
2. Whether the fact of tampering of Chassis number of the subject vehicle does not prove wrong any contention on the part of the alleged owner/possession-holder of the subject vehicle as to its legal importation into the country? Whether by ignoring to dilate upon such germane and relevant issue the learned Appellate Tribunal did not arrive at a conclusion, which, not being in line with the guidance laid down by the Honourable superior courts, is erroneous, to say the least?"
3. Whether the impugned order is sustainable and warranted under the law and whether, on the basis thereof, a vehicle, established to have tampered chassis, could be allowed to be used freely in view of the Honourable Supreme Court's Judgment passed in Civil Petition NO. 657 of 2007 reported as 2009 PTD 77 (Ch. Maqbool Ahmed V/s. Customs, Federal Excise and Sales Tax Appellate Tribunal & 3 others)?"
4. Whether by producing registration book in respect of the vehicle having tampered chassis, the burden of proof of lawful possession in terms of clause (89) of Sub Section (1) read with Sub Section (2) of Section 156 and Section 187 of the Customs Act, 1969, stand discharged?"

18. In view of the reasoning and rationale herein contained, the aforesaid questions are answered in favour of the Applicant (Department) and against the Respondent. The reference application stands allowed in the above terms. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, as required by section 196(5) of the Customs Act, 1969.

19. As a consequence of the aforesaid, the Petition, and listed application/s, is hereby dismissed.

JUDGE

JUDGE