

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

CA (PHC) No. 08/2009

HC Kurunegala Case No. HCR 28/08

Loku Balasuriyage Don Lili

No: 14,

Ganegoda,

Kandana.

Petitioner-Appellant

Vs.

OIC

Police Station,

Nikaweratiya.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondents

CA(PHC) No. 08/2009 -

High Court Kurunegala Case No. HCR 28/08

Before: : **Rohini Marasinghe, J &
Deepali Wijesundera, J**

Counsel: : **Neranja Jayasinghe for the Appellant.
Ms. Anooa de Silva SC for the Respondent**

Argued &

Decided on: : **29.01.2013**

Rohini Marasinghe, J

The Petitioner has filed this application in revision against the order of the High Court Judge dated 13.01.2009, and order of the Magistrate dated 26.08.2008, wherein the lorry bearing No. 43-3739 had been confiscated. The said order of confiscation had been made in terms of section 3A of the Animals Act No. 29 of 1958 as amend by Act NO. 10 of 1968.

The Petitioner is the owner of the said lorry. The lorry was detected transporting 19 heads of cattle without a permit. This was an offence in terms of section 3A of the said Act. The driver of the lorry and cleaner of the lorry at that time were charged with the offence, and they had pleaded guilty and had been fined. Thereafter the learned Magistrate had taken steps in terms of section 3A of the Animals Act for the confiscation of the lorry. The Petitioner sought to show cause against the confiscation and an inquiry had been held. The Petitioner had given evidence. The police officers who were engaged in the detection also had given evidence. According to the evidence of the petitioner he was engaged in hiring the lorry to transport hardware items, coconuts, plantains etc. On the day in question, the driver of the lorry was one Wasantha who was the 1st accused in the case. According to the evidence of the

petitioner, said Wasantha had taken the lorry to transport some plantains. The Petitioner in her evidence denied any knowledge in regard to the transport of cattle.

It was disclosed in the evidence of the petitioner that the lorry had been detected for a similar offence in 2007. It was also proved by the prosecution that there were certain fixtures in the lorry which suggested that the lorry had been used earlier for transport of cattle. The driver who used the lorry in the day in question was not the driver who had been employed when the lorry was detected in 2007 committing a similar offence, but the cleaner of the lorry was the same person on both detections. According to the petitioner the lorry had these fixtures when she purchased it.

In terms of the proviso to section 3A of the Animals Act, an order to confiscate cannot be made if the owner established one of two matters. They are :

- 1) That he has taken all precautions to prevent the use of the vehicle for the commission of the offence.
- 2) That the vehicle had been used for the commission of the offence without his knowledge.

Consequently, if the owner of the lorry establishes any one of these matters on a balance of probability, an order for confiscation should not be made.

(Vide Faris V Officer in Charge- Police Station Galenbindunuwewa, and another (1992) 1 SLR p. 168, at 167)

In this case the learned Trial Judge whilst holding that the petitioner had not taken any steps to prevent the commission of the offence attributed that fact to come to the conclusion that the petitioner had knowledge of the commission of the offence. In an inquiry of this nature the learned trial judge must take into consideration the fact that the owner had in her evidence had stated that she had no knowledge of the commission of this offence. The fact that the lorry had been used for an offence of similar nature is a highly relevant fact, which may be used with some other evidence to negative the defence that the owner had no knowledge of this offence. I am of the view that the trial judge had not considered the evidence of the petitioner with regard to her knowledge and this had resulted in the trial Judge to reach a conclusion unfavourable to the petitioner. The learned High Court Judge in his order also had committed the same error and had placed the burden on the petitioner to establish both the elements wherein the petitioner is required to establish only one of two matters mentioned above.

Therefore we allow the revision application . The case is sent back for fresh inquiry. We also do direct that the lorry be released to the petitioner (If it is not already released) on surety bail in a sum of Rs. 500,000/- on the condition that she does not alienate nor does any damage to the lorry so as to depreciate its present value until the conclusion of the inquiry.

The revision application is allowed.

Judge of the Court of Appeal

Deepali Wijesundera, J.

I agree.

Judge of the Court of Appeal

Kpm/-