

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

In the matter of an application for
Revision Under and in terms of
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

**CA (PHC) APN No. 28/2013
H.C. Monaragala: 14/2011
M.C. Wellawaya 57700**

W.M.H. Wijithasiri
Forest Officer
The Forest Conversation Office
Thanamalwila

Complainant

Vs.

Arawawatte Mudiyansele Sudath
Wickramasuriya,
No.132/A, Tanjanatanna
Balangoda

Accused

And

Dabagahagedera Gamaralalage
Ubayaratna
Tanjanatanna
Balangoda

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Vs.

1. W.M.H. Wijithasiri
Forest Officer
The Forest Conservation Office
Thanamalwila.
2. The Manager
Commercial Bank of Ceylon Ltd.
Balangoda
3. Hon. Attorney General
Attorney General's Department
Colombo 12

Respondents

AND NOW

Dabagahagedera Gamaralalage
Ubayaratna
Tanjantanna
Balangoda

Claimant –Petitioner-Petitioner

Vs.

1. W.M.H. Wijithasiri
Forest Officer
The Forest Conservation Office
Thanamalwila.

2. The Manager
Commercial Bank of Ceylon Ltd.
Balangoda

3. Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent – Respondents.

BEFORE K.T. Chitrasiri J

W.M.M. Malinie Gunaratne, J.

COUNSEL: Saliya Pieris with Thanuka Nandasiri

For the Petitioner

Anoopa R. De Silva SSC

For the Respondents

Argued on : 03.12.2014

Decided on : 04.03.2015

Malinie Gunaratne, J.

This is a Revision Application against the Judgment of the learned

High Court Judge of Monaragala dated 17/01/2013, which affirmed the Order of the learned Magistrate of Wellawaya dated 29/09/2011 in Case No. 57700.

One Arawawatte Mudiyanseelage Sudath Wickramasooriya, who was the Accused in Case No. 57700, was charged in the Magistrate Court of Wellawaya, for collecting sand which is a forest produce, from the Welioya Forest which is a Conservation Forest, Reserve Forest or Village Forest situated in the Thanamalwila Divisional Secretariat, committed an offence under Section 20(1)(d) of the Forest Ordinance No.13 of 1966 as amended and thereby causing damage to the State in a sum of Rs.2000/- which offence is punishable under Section 40 and 40(a) read with Section 20 of the Forest Ordinance No.13 of 1966 as amended.

The accused pleaded guilty to the aforesaid charge leveled against him and accordingly the Magistrate imposed a fine of Rs.15,000/- on the accused. Thereafter an inquiry was held regarding the confiscation of the vehicle bearing Registration No. SG LD 5583 under Section 40 (a) of the Forest Ordinance and at the end of the inquiry the learned Magistrate confiscated the vehicle on the basis that the registered owner had not been able to prove and satisfactorily convince that he had taken all precautions to prevent the use of the vehicle for the commission of the offence.

In this case the Claimant – Petitioner – Petitioner is the registered owner of the vehicle. Being aggrieved by the said Order he moved the High

Court of Monaragala in revision of the aforesaid order, but the learned High Court Judge by his Order dated 17/01/2013, dismissed the Petition of the Petitioner affirming the learned Magistrate's Order dated 29.09.2011. Being aggrieved by the said Order of the learned High Court Judge the Petitioner has filed the present Petition.

The learned Magistrate by his decision dated 29/09/2011 made Order in terms of Section 40 of the Forest Ordinance confiscating the aforesaid vehicle which bears the number SG LD 5583, that was used to commit the said offence.

Aforesaid Section 40 in the Act No. 65 of 2009 reads thus:-

40(1) Where any person is convicted of 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, vehicles, implements, cattle and machines used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate.

Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use

of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.

It is relevant to note by the use of the words “all precautions”, the legislature expects the registered owner to take each and every necessary step / precaution to ensure that the vehicle is not being used to commit any offence under the Forest Ordinance. Accordingly, when an application is made to Court in order to have the vehicle released, it is the burden of the owner of the vehicle, which was used to commit an offence under the Forest Ordinance to establish that he had taken all necessary precautions to prevent the use of the said vehicle for the commission of the offence.

In order to establish the aforesaid precautionary measures, the Petitioner and one Wanasooriya Koralage Ravi Parakrama Danawardana, a Junior Assistant Executive of the Commercial Bank, Balangoda have given evidence before the learned Magistrate on behalf of the Petitioner. The Petitioner in his evidence has stated that, the Accused driver usually takes his lorry everyday in the morning from his house to let it for hires and returns the vehicle in the evening. Further, the Petitioner has stated that he had given special instructions not to perform any illegal activities. He has also stated that on the 8th of June 2010 morning the Accused driver informed him that there is a hire to transport some bricks and had sought his permission to take the lorry and he allowed the Accused driver to take the lorry.

It is significant to note that the Petitioner had not inquired from the Accused driver, any details such as, the name of the hirer, the place from which the bricks are to be transported and up to which point the bricks are to be transported, the time period, the amount for the hire that was agreed upon etc. Without asking any of these questions the Petitioner had just allowed the Accused driver to take the lorry.

Further he has stated, in the afternoon the Petitioner was informed by the Accused driver over the phone that his lorry was seized by the Forest Officers of the Forest Conservation office of Thanamalwila. He has also stated, he met the Forest Officers at the Forest Conservation Office to inquire about the incident and he had been informed that the Accused driver had transported sand without a permit and upon that charge the Accused driver had been arrested with his lorry. Further he has stated that he terminated the services of the Accused driver after he pleaded guilty to the charge.

The learned Counsel for the Petitioner submitted that the learned Magistrate and the learned High Court Judge failed to evaluate the evidence of the Petitioner that he had taken every possible step to prevent the committing of the offence in question. It is important to note that the Petitioner has not stated even a single word, that he had taken as to the necessary precautions, to prevent an offence being committed by using his

vehicle. The learned Counsel further submitted that the learned Magistrate and the learned High Court Judge failed to consider that the lorry had been used for commission of the offence without the knowledge of the Petitioner.

In the oral and written submissions of the learned State Counsel it has been stressed that the mere verbal claim in vague and uncertain terms by the Petitioner that he had instructed the Accused driver specially not to perform any illegal activity would cease to come within the requirements of Section 40(1) of the Forest Ordinance. Further submitted, that giving mere instructions is not sufficient to discharge the said burden.

Is it sufficient for the owner merely to say that he was not aware or that he had no knowledge that the vehicle was used in the commission of the offence and instructions had been given to the Accused driver not to use the vehicle for illegal purposes? The Answer to this question is purely in the negative. The Petitioner cannot escape liability by stating that he was not aware or he had no knowledge that the lorry was used in the commission of the offence. He must show that he had taken all precautions available to prevent the use of the vehicle for the commission of the offence. Giving mere instructions or stating that the vehicle had been used for the commission of the offence without his / her knowledge is not sufficient in order to discharge the burden embodied in the proviso to Section (40) (1) of the Forest (Amendment) Act.

In this regard I would like to refer to the following authorities:

- Mary Matilda vs. Inspector of Police, Habarana C.A. Minutes dated 08/07/2010 in C.A. (P.H.C) 86/97.
- K.W.P.G. Samaratunga vs. Range Forest Officer, Anuradhapura C.A. Minutes dated 16/10/2014 in C.A. (P.H.C) 89/2013.
- H.G. Sujith Priyantha Vs. Inspector of Police, Poddala C.A. Minutes dated 19/02/2015 in C.A. (P.H.C.) 157/12.

The learned Counsel for the Petitioner at the very outset of his submissions referred to an earlier decision pronounced by me in respect of the same issue. It is the case of CA (PHC) 03/2013 dated 25.07.2014. According to the material and the facts found in that case, the Court has decided that the claimant had no knowledge as to the commission of the offence committed in that case. Thus the said decision is not directly applicable in this case since the facts and circumstances of this case are quite different to the facts in that other case.

The learned Magistrate having considered the evidence of the Petitioner, has concluded that the Petitioner has failed to establish that he has taken the necessary precautions to prevent the offence being committed. Learned High Court Judge too has accepted the reasoning of the learned Magistrate and has affirmed the decision of the learned Magistrate.

When I consider the facts of this case and the evidence given by the Petitioner, I am of the view that the Petitioner has not established on a balance of probability that he had taken necessary precautions to prevent an offence being committed by using his vehicle.

In the circumstances, I am of the view, that the learned Magistrate of the Magistrate's Court Wellawaya and the learned High Court Judge of Monaragala have taken into consideration both the facts and the law when arriving at their respective orders and therefore I do not wish to disturb their findings.

For the above reasons I hold that there is no merit in this application and accordingly this Petition is dismissed.

JUDGE OF THE COURT OF APPEAL

I agree

JUDGE OF THE COURT OF APPEAL