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

In the matter of an Appeal in terms of the Provisions of the Rules 2 (1) (a) of the Court of Appeal (Procedure for Appeals from High Court) Rules 19 read with Provisions of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 to set aside the order of the Learned High Court Judge of Ampara dated 06.03.2007 in Case No. HC/AM/REV/294/2006

The Range Forest Officer,
District Forest Office,
Ampara.

Complainant

CA Appeal No. CA(PHC) 37/2007
High Court of Ampara
Revision Application
No. HC/AM/REV/294/2006
Magistrate's Court of Ampara
Case No. 19315/S

VS.

1. Herath Mudiyanselage Karunasundara
2. Sudu Hakuralage Chaminda Pushpakumara Senaretna,

3. Suraweera Mudiyanselage
   Amarasiri

Accused

AND

Mohamed Yoosuf Raufudeen
No.430, Main Street,
Maruthamunai.

Claimant

AND BETWEEN

Mohamed Yoosuf Raufudeen,
No.430, Main Street,
Maruthamunai.

Claimant – Petitioner

VS

1. The Range Forest Officer,
   District Forest Office,
   Ampara.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Mohamed Yoosuf Raufudeen
No.430, Main Street,
Maruthamunai.

Claimant-Petitioner-Appellant

VS.

1. The Range Forest Officer,
   District Forest Office,
   Ampara.

   Complainant-Respondent-Respondent

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

   Respondent-Respondent.

BEFORE:	:	**W.M.M. Malinie Gunaratne, J. and**
		P.R. Walgama, J
COUNSEL	:	Nizam Kariapper with M.C.M. Nawaz and M.I.M. Iynullah for the Appellant
		Varunika Hettige, S.S.C. for the Respondent
Argued on	:	01.12.2015
Written submissions filed on	:	06.01.2016 and 28.01.2016
Decided on	:	04.05.2016

Malinie Gunaratne, J.

In this Appeal the Claimant – Petitioner – Appellant (hereinafter referred to as the Appellant), amongst other reliefs is seeking to set aside the Order of the learned Magistrate dated 17.08.2006 and the Judgment of the learned High Court Judge dated 06.03.2007. By the Judgment, the learned High Court Judge of the High Court Ampara, has upheld the Order of the learned Magistrate by which it was decided that the lorry No.26 Sri 5790 should be confiscated as the Appellant had failed to show sufficient reasons against the confiscation of the said lorry.

Briefly, the facts relevant to this Appeal are as follows:

Herath Mudiyanselage Karunasundara, Sudu Hakuralage Caminda Pushpakumara Senarathne, and Suraweera Mudiyanselage Amarasiri who were the accused in Case No. 19315/S were charged in the Magistrate's Court of Ampara for transporting timber in a lorry bearing No. 26 Sri 5790 without a valid permit. All three accused pleaded guilty to the aforesaid charge leveled against them and accordingly the Magistrate imposed a fine of Rs.5000/- each.

In addition to the fine imposed, the learned Magistrate has proceeded to confiscate the vehicle after an inquiry which was held under Section 40(a) of the Forest Ordinance, on the basis that the Appellant 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.

Being aggrieved by the said Order the Appellant invoked the High Court of Ampara in revision but the learned High Court Judge, by his Judgment dated 06.03.2007, dismissed the Petition and affirmed the Order of the learned Magistrate.

This Appeal has been preferred by the Appellant against the said Judgment.

The learned Magistrate by his decision dated 17/08/2006 made Order in terms of Section 40 of the Forest Ordinance confiscating the aforesaid vehicle which bears the number 26 Sri 5790, that was used to commit the 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.

It is settled law that before an order for confiscation is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the Court that he had taken all

precautions to prevent the commission of the offence or the offence was committed without his knowledge nor was he privy to the commission of the offence then the vehicle has to be released to the owner.

In order to establish the aforesaid precautionary measures, in this case the Appellant has given evidence before the Magistrate. The Appellant in his evidence has stated that, on 20.10.2005 the Accused driver informed him that there is a hire to transport cement and sought his permission to take the lorry and he allowed the Accused driver to take the lorry.

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

Further he has stated, the Appellant was informed over the phone that the lorry was seized by the Forest Officers of the Forest Conversation Office. Further, he has stated that he had given instructions not to perform any illegal activities but the Accused driver had used the vehicle without his knowledge to transport the timber without a permit. It is important to note, that the Appellant 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.

In the oral and written submissions of the learned Counsel for the Appellant, it was contended that, the learned Magistrate had failed to consider the fact that there are no evidence placed before him to establish that the Appellant had the knowledge of the commission of the offence by his driver or that the Appellant had participated in the commission of the offence and thus misdirected himself.

It is the contention of the learned Counsel, that in evaluating the evidence placed before the learned Magistrate, he has misdirected himself and come to a wrong conclusion that the Appellant had not shown sufficient reasons against the forfeiture of the said lorry.

The learned State Counsel has been stressed that the mere verbal claim is vague and uncertain that he had instructed the Accused driver especially not to perform any illegal activity that would cease to come within the requirements of Section 40 (1) of the Forest Ordinance. She 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 Appellant cannot escape liability by stating that he was not aware or that he had any 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. The view of this Court is, giving mere instructions or stating that the vehicle had been used for the commission of the offence without his knowledge is not sufficient in order to discharge the burden embodied in the proviso to Section (40) (1) of the Forest (Amendment) Act.

Accordingly, when I consider the facts of this case and the evidence given by the Appellant, I am of the view that the Appellant has not established in a balance of probability any of the following matters:

(i) that he had taken necessary precautions to prevent an offence being committed by using the vehicle;
(ii) that the vehicle has been used for the commission of the offence without his knowledge.

The other ground on which the Appellant relied was the manner in which the learned Magistrate had come to a finding based on his own inspection of the vehicle that was confiscated.

The Counsel for the Appellant contended that, the learned Magistrate on his own discretion had decided to inspect the lorry at the conclusion of the inquiry and this has resulted in the appellant being denied the opportunity to show cause of the observation made by the learned Magistrate. It is the contention of the Counsel that, forming opinion based on inspection had completely prejudiced the learned Magistrate's mind in making his final conclusion.

The learned State Counsel has drawn the attention of this Court that, right throughout the case the Appellant was at all times represented by a Counsel, and even at the time of the inspection of the vehicle, the Appellant was represented by a Counsel.

It is to be noted, while inspecting the vehicle, the learned Magistrate has questioned the Appellant regarding certain repairs and additions done to the vehicle. The Appellant has failed to give any explanations. As the Appellant being represented by a Counsel, was in a position to make any submissions or even to call for further evidence. But the Appellant has not made any effort to do so.

It is to be noted that the burden is on the Appellant to establish that he had taken all necessary precautions to prevent the use of the vehicle for the commission of the offence.

Hence, I am not agreeable with the submissions made by the Counsel that the Appellant did not have the opportunity to show cause of the observations made by the learned Magistrate.

For the above mentioned reasons I am of the view that the Order of confiscation had correctly been made by the learned Magistrate and therefore I see no basis to set it aside. Hence, it is not necessary to interfere with the Judgment of the learned High Court Judge who affirmed the Order of the learned Magistrate.

Accordingly, no ground exists which justifies the intervention of this Court to set aside the Judgment of the learned High Court Judge dated 06.03.2007 and the Order of the learned Magistrate dated 17.08.2006.

Accordingly, I dismiss the Appeal.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL