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

Appeal under 154(G) and 138 of the constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Act number 19 of 1990

CA PHC 33/15

HC Chilaw HCRA 14/14

MC Chilaw 57105

OIC, anti Corruption Unit,

Chilaw

Complainant

Vs

Rankoth Pedige Stanly Chinthaka Kumara,

Walpothuyaya,

Mugunuwatawana.

Accused

Rankoth Pedige Anil Saman Kumara,

Kongasyaya,

Mugunuwatana.

Claimant Registered Owner

And

Rankoth Pedige Anil Saman Kumara,

Kongasyaya,

Mugunuwatana.

Claimant Registered Owner Petitioner

Vs

OIC, Anti Corruption Unit,Chilaw.

Complainant Respondent

Hon Attorney General,

Attorney Generals Department,

Colombo 12.

Respondent

And

Rankoth Pedige Stanly Chinthaka Kumara,

Walpothuyaya,

Mugunuwatawana.

Accused Respondent

And Now

Rankoth Pedige Anil Saman Kumara,

Kongasyaya,

Mugunuwatana.

Claimant Registered Owner Petitioner Appellant

Vs

OIC, Anti Corruption Unit,Chilaw.

Complainant Respondent Respondent

Hon Attorney General,

Attorney Generals Department,

Colombo 12.

Respondent Respondent

Rankoth Pedige Stanly Chinthaka Kumara,

Walpothuyaya,

Mugunuwatawana.

Accused Respondent Respondent

Before : K.K.Wickremasinghe, J.

P.Padman Surasena, J.

Counsel : Counsel AAL Neranjan Jayasinghe for the Petitioner Appellant

DSG Varunika Hettige for the Respondent

Argument Concluded on 26/09/2017

Written Submission of the Petitioner was submitted on 12.10.2017

Written Submission of the Respondent was submitted on 09.11.2017

Decided on : 21.11.2017

Judgment

K.K.Wickremasinghe

The Claimant Registered Owner Petitioner Appellant (herein after referred to as the Appellant) has preferred this case before court of appeal after being aggrieved by the order dated 28.08.2014 by the Learned Magistrate of Chilaw and the learned High Court Judge of Chilaw dated 24.02.2015.

The driver of the vehicle One Chinthaka Kumara had pledged guilty the charge of transporting Kohombe wood without a permit.

The Learned High Court Judge has dismissed the case before him due to the contradictory evidence given by the Appellant, Accused Driver and the finance Company Representative.

The Appellant had given evidence that;

a) Gave the vehicle to the accused 7 moths back
b) Every evening he saw the vehicle, once a week he saw the vehicle, once in two days he saw the vehicle
c) Had instructed the accused not to use the vehicle for illegal purpose,
d) In cross examination he stated that once the vehicle as he didn't have time
e) Sand and stones were transported in the vehicle

The Accused driver has given evidence that ;

a) He was permanently employed with anyone and that he would find work on a daily basis
b) On the day of the incident he worked in the appellant's vehicle but not on a permanent basis
c) The inquiries the Appellant made regarding the vehicle was to ask if he worked on the vehicle
d) From 01.02.2013 the Appellant hadn't inquired about the vehicle
e) Black granite was transported therein.

The finance Company representative has given evidence that;

a) He had never seen the vehicle when on inspections
b) Had not inquired what the vehicle was used for

However, it was submitted by the Appellant's counsel that the learned Magistrate has rejected the evidence of the registered owner taking into consideration following three contradictions that do not go to the root of the matter.

In the case of **Manawadu Vs Attorney-General ((1987) 2 SLR 30)** Sharvananda, CJ, held that;

" By section 7 of Act No.13 of 1982 it was not intended to deprive an owner if 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 s 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 sub-section 0 does not exclude by necessary implication the rule of 'audi ulteram 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.

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."

In the same case of **Mudankotuwa Vs Attorney General ((1996) 2 SLR77)** the Court of Appeal referred to the case of **Manawadu Vs AttorneyGeneral** (supra) *"The principle has been clearly established that the owner of the vehicle, who is not a party to the case, is entitled to be heard on the question of forfeiture of the vehicle and if he satisfies the court the accused committed the offence without his knowledge of participation, then his vehicle will not be liable to forfeiture"*

In the case of **Nazir Vs I.P Wattegama (1978-79) 2 SLR 304)** Vythyaligam,J. considered the implications of the proviso to sec.3A of the Animals Act, No29 of 1958 as amended. Section 3A of the Act states as follows;

"Where a person is convicted of an offence under this part or any regulations made thee under, any vehicle used in the commission of the offence shall, in

addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate to confiscation:

Provided however, that in any case where the owner if the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the court that he had taken all precautions to prevent the use of vehicle or that the vehicle has been used without his knowledge for the commission of the offence"

In the case of **Fariz Vs OIC , Police Station, Galenbindunuwewa ((1992) 1 SLR 167)**

It was stated that in terms of proviso to sec.3A of the Animals Act, an order for confiscation cannot be *made if the owner establishes one of the following;*

"That he has taken all precautions to prevent the use for the vehicle for the commission of the offence

That the vehicle had been used for the commission of the offence without his knowledge"

The Counsel for the Respondent took up the position that the burden of proof casted on the Appellant is to prove that on a balance of probability , the registered owner, took all precautions to prevent the offence taking place.

In the case of **Mary Matilda Vs OIC Habarana CA (PHC) 86/87** it was held that;

" the owner of the vehicle to discharge the burden (1) that he/she had taken all precautions to prevent the use of the vehicle for commission of the offence (2) that the vehicle had been used for the commission of the offence without his/her knowledge, mere giving instructions is not sufficient..... She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions."

The Appellant in this case though says he informed the accused driver not to use the vehicle for any illegal purpose, the evidence is not corroborated and in any event such mere verbal instruction do not constitute taking all precautions as per the above mentioned cases.

Considering the above mentioned circumstances there is no reason to set aside the orders of the Learned Magistrate and the High Court Judge of Chilaw in respect of the vehicle bearing No. 42-2555.

Therefore the Appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena,J.

I agree

JUDGE OF THE COURT OF APPEAL