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

In the matter of an application under section 7 of the Civil Procedure Code of the Democratic Socialist Republic of Sri Lanka

CA (PHC): 164/2014

H.CR 72/2012 72/2014

MC Kuliyapitiya 72692

OIC, Police Station, Pannala

Plaintiff

Vs

Alagiyawanna Mohottalage Indika

Harischandra,

Gonnula, Gonavila.

Accused

And Now

Muthuwardenage Kamalawathi,

Gonulla, Gonavila

Petitioner

Vs

1. The Hon.Attorney Genenral, Attorney Generals Department, Colombo 12
2. Officer in Charge, Police Station, Pannala

Respondents

Muthuwardenage Kamalawathi,

Gonulla, Gonavila

Petitioner-Appellant

1. The Hon.Attorney General, Attorney Generals Department, Colombo 12
2. Officer in Charge, Police Station, Pannala

Respondent-Respondent

Before : **K.K.Wickremasinghe, J.**

P.Padman Surasena, J.

Counsel : **Counsel AAL Anura Gunarathna for the Appellant**

DSG Varunika Hettige for the Respondent

Written submission of the Appellant submitted on 29.08.2017

Written submission of the Respondent submitted on 10.08.2017

Decided on : 23.11.2017

Judgment

K.K.Wickremasinghe

The Petitioner Appellant (herein after referred to as the Appellant) in this case has preferred this appeal to this court after being aggrieved by the order dated 27.08.2014 by the Learned High Court Judge of Kuliyapitiya and the order dated 21.06.2012 of the Learned Magistrate Court of Kuliyapitiya.

Facts of the case:

The vehicle in question was taken in to custody for transporting illicit timber by the lorry bearing No.42-2516. The accused was charged on 15.12.2011 the accused pleaded guilty and he was fined with a sum of Rs.50,000/- and the case was re-fixed for claiming inquiry of vehicle . The learned Magistrate held an inquiry and confiscated the vehicle on the basis that neither the finance company, nor the Appellant had taken satisfactory precautions to prevent an offence being committed. The Appellant made a revision application to the High Court of Kuliyapitiya who affirmed the order given by the Learned Magistrate of Kuliyapitiya.

It is submitted by the Learned State Counsel that at the inquiry held by the Magistrate the evidence given by the Appellant (registered owner) was steaming with contradictions.

At the inquiry the position of the registered owner was that the driver was a neighbour and like a son to her. In another occasion (page 72) she has referred to

the driver as her driver. However in cross examination the Appellant admits that the driver was in fact her own son. This contradictory evidence raises the issue of her knowledge of the accused committing the said offence.

It was submitted by the Respondent that the burden cast on the Appellant is to prove that her case on a balance of probability on the following:

1 the registered owner had no knowledge of the offence being committed.

2 The registered owner took all precaution to prevent the offence from taking place.

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 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) with approval and had stated 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 from 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 Respondent not only submitted that the Appellant has not proved on a balance of probability that she has taken all the precaution to prevent the offence from taking place but also that she had the knowledge of the offence being committed.

Considering the above mentioned circumstances, there is no reason to set aside the orders of the Learned Magistrate and the High Court Judge of Kuliyapitiya in respect of the confiscation of vehicle bearing No. 42-2516.

Therefore, the appeal is hereby dismissed without costs.

Judge of the Court of Appeal

P.Padman Surasena,J.

I agree

Judge of the Court of Appeal