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

In the matter of an Appeal under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Wellawaya.

Complainant

C.A. Case No: **CA (PHC) 117/2013**

P.H.C. Monaragala Case No: **02/2012 REV**

M.C. Wellawaya Case No: **62804**

Vs.

Nawaneliye Kondasingha Patabendi Gedara Sarath Gamini,
No. 317, Pitahaliyadda,
Kumbalwela, Ella.

Accused

Palanisamy Indresan,
No. 43/1, Senanayaka Mw,
Bandarawela.

Applicant

AND BETWEEN

Palaniyam Indresan,
No. 43/1, Senanayaka Mw,
Bandarawela.

Applicant-Petitioner

Officer-in-Charge,

Police Station,
Wellawaya.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Palaniyam Indresan,
No. 43/1, Senanayaka Mw,
Bandarawela.

Applicant-Petitioner-Appellant

Vs.

Officer-in-Charge,
Police Station,
Wellawaya.

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE : K. K. Wickremasinghe, J.

Mahinda Samayawardhena, J.

COUNSEL	:	Saliya Peiris, PC with AAL Thanuka Nandasiri for the Applicant-Petitioner-Appellant Nayomi Wickremasekara, SSC for the Respondent-Respondent
WRITTEN SUBMISSIONS	:	The Applicant -Petitioner-Appellant – On 21.11.2018 The Respondent-Respondent – On 29.10.2018
DECIDED ON	:	21.06.2019

K.K.WICKREMASINGHE, J.

The Applicant-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Uva Province holden in Monaragala dated 20.06.2013 in Case No. 02/2012 Rev and seeking to set aside the confiscation order made by the Learned Magistrate of Wellawaya dated 08.12.2011 in Case No. 62804. At the stage of argument, both parties agreed to dispose this case by way of written submissions and to abide by the same.

Facts of the case:

A lorry bearing Registration No. UPLK-5686, with its driver, was arrested by Police, Wellawaya on or about 29.01.2011 for transporting Halmilla timber without a valid permit. The accused-driver was charged before the Learned magistrate of Wellawaya for the alleged offence punishable under section 25(2) read with sections 25(2)(a), 38(a), 40 and 40A of the Forest Ordinance as amended. On 01.02.2011, the driver pleaded guilty to the charge leveled against

him and accordingly the Learned Magistrate imposed a fine of Rs.20, 000/= with a default sentence of 4 months rigorous imprisonment.

Thereafter a vehicle inquiry was held with regard to the Lorry bearing registration no. UP LK 5686. The applicant-petitioner-appellant (hereinafter referred to as the "appellant") being the registered owner of the said vehicle, claimed the vehicle in said inquiry. Accordingly the appellant testified in the inquiry.

After concluding the inquiry, the Learned Magistrate confiscated the vehicle by order dated 08.12.2011.

Being aggrieved by the said order, the appellant moved in revision to the Provincial High Court of Uva Province holden in Monaragala. The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the application of the appellant.

Being aggrieved by the said dismissal, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal;

1. The Learned Magistrate failed to observe that the appellant has established that he has taken all precaution to prevent any offence being committed utilizing his vehicle.

2. The judgment of the Learned High Court Judge and the Learned Magistrate of Wellawaya are erroneous.

3. The Learned High Court Judge failed to consider that the Learned Magistrate's conclusion on the Appellant ought to have called further corroborative evidence is contrary to section 134 of the Evidence Ordinance.

4. The Learned Magistrate and the Learned High Court Judge should have been mindful of the fact that both of them were considering a fact directly linked with the property right of a citizen.

At the inquiry held, the appellant in his evidence stated that the vehicle was given to the accused-driver on rent. The driver used to take the lorry every morning and return in the evening. It was further testified that this was the 1st instance the driver was found guilty of such offence and the service of the driver was terminated after this incident.

The Learned President's Counsel for the appellant contended that the degree of proof cast on a 3rd party applicant in terms of section 40 of the Forest Ordinance is on a balance of probability and no court of law requires him to satisfy the judge beyond reasonable doubt that he had taken all the precautions to prevent the crime. It was further contended that the test that should be applied is from the point of view of an ordinary reasonable man i.e. whether the owner took precautions that an ordinary reasonable man found in similar circumstances will take.

Accordingly the Learned President's Counsel submitted that in the present case the appellant has given evidence and explained the precautions he took as follows;

1. Cautioning the driver and giving necessary directives.
2. Has directed to inform if he going outside the city limits
3. Ensuring that each evening that the vehicle was returned home.

However I observe that nowhere in his evidence, the appellant had stated that he ensured the vehicle was returned home each evening. The appellant had simply stated that the driver used to take the vehicle in the morning and return in the evening. The appellant had further testified that he instructed the driver to inform

him if the driver goes out of Wellawaya town and instructed to refrain from doing any illegal activity. The appellant took up the position that the offence had been committed without his knowledge.

In the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that,

> *"...A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose..."*

In the case of **K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013],** it was held that,

> *"The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle... Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore, it is evident that no meaningful step had been taken either by the owner or his power of attorney holder, of the vehicle that was confiscated in order to prevent an offence being committed by making use of this vehicle."*

It is noteworthy that the procedure relevant to confiscating a vehicle under Forest Ordinance was amended by Act No.65 of 2009. Accordingly section 40 specifically requires a vehicle owner to prove that he in fact took all precautions to prevent an offence being committed utilizing his vehicle. I observe that the law pertaining to confiscating a vehicle under Forest Ordinance had been correctly applied by the Learned Magistrate. The Learned Magistrate has held as follows;

> ඒ අනුව ඉතා පැහැදිලිව පෙනී යන කාරණයක් වන්නේ, වන අපරාධයට යොදාගත් වාහනයක අයිතිකරු තෘතීය පාර්ශවයක් වන අවස්ථාවක එකී අයිතිකරුගේ දැනුම හා සහභාගීත්වය යන කාරණා වාහනයක් රාජසන්තක කිරීමෙදී 2009 අංක 65 දරණ සංශෝධන පනත ප්‍රකාරව සලකා බැලීම අවශ්‍ය නොවන බවයි. එහිදී අවශ්‍ය වන්නේ එකී තෘතීය පාර්ශවකරු වන අපරාධයක් සිදු කිරීමට එකී වාහනය පාවිච්චි කිරීම වලක්වාලීම සඳහා සියලු පූර්වාරක්ෂක ක්‍රියාකලාප ගෙන තිබෙන්නේද යන්නයි. (Page 87 of the brief)

However in the petition submitted to the High Court, it was contended that the Learned Magistrate erred in applying the Act No. 65 of 2009 to the instant case because the said Act was not mentioned in the charges forwarded by the Police. This contention was correctly addressed by the Learned High Court Judge (Page 32 & 33 of the brief). I observe that the offence was committed in 2011 and the Act was certified on 16.11.2009 while it was published in Gazette on 20.11.2009. Therefore the procedure laid down in the said Act was clearly applicable to the instant case and the Learned Magistrate was correct in applying the same.

The Learned SSC for the respondent contended that the registered owner has simply told the driver not to use the vehicle for illegal purposes and merely giving instructions is not sufficient to prove that the appellant has taken all necessary precautions. The Learned President's Counsel for the appellant submitted that it is

not rational to expect the owner to go with the driver on every journey or reasonable to expect the owner to conduct a surprise check to ascertain whether the driver complies with his directives. The case of **Abubackerge Jaleel V. OIC, Anti-Vice unit, Police Station, Anuradapura [CA (PHC) 108/2010]** was submitted to support said contention, in which it was held that,

> *"When someone is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instruction. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used."*

I observe that the said case was decided under Animals Act. Under the Animals Act, a vehicle involved in an offence shall not be confiscated if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle **or** that the vehicle has been used without his knowledge for the commission of the offence. Therefore a vehicle owner under Animals Act can claim his vehicle if he fulfills one of the above two requirements. However the Forest Ordinance does not afford such options for a vehicle owner in a similar manner as in the Animals Act. Therefore I am of the view that a vehicle owner under Forest Ordinance has a heavier burden than a vehicle owner under the Animals Act. Even if I am to agree with the contention of the Learned President's Counsel to some extent, the appellant's inability in constantly monitoring the driver would not discharge the burden cast on him. It is trite law that merely giving instructions is not sufficient to discharge the said burden. For an example, if we place giving mere instructions, which is not sufficient, on one end and expecting the owner to go with the driver on every trip, which is quite irrational on the other end, there must be something rationale in-between these two points that satisfies

the Court. In the above background, denying the knowledge of an offence being committed is definitely not sufficient to discharge the burden cast on a vehicle owner. I observe that the appellant has not proved that he had taken every possible precaution to prevent an offence being committed.

The Learned President's Counsel for the appellant submitted that the Learned Magistrate had not given rationale reasons as to why he rejected the credibility of the appellant's evidence which was given in the Magistrate's Court. It is contended that it was highly unreasonable for the Learned Magistrate to refuse the evidence simply relying on one mismatch of a single fact. I observe that the Learned Magistrate has given reasons for such rejection i.e. contradictions in the appellant's evidence and lack of corroboration (Page 89 of the brief). I am of the view that the aforesaid 3rd ground of appeal should also fail since the Learned Magistrate was considering the weight of the evidence and not the number of witnesses.

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. and others (2003) 3 Sri L.R 24,** it was held that,

> *"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted.* ***If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal...*** " (Emphasis added)

Considering above, I am of the view that the Learned High Court Judge was correct in refusing to interfere with the order of the Learned Magistrate. Therefore I affirm both orders dated 20.06.2013 and 08.12.2011. This decision is applicable

to Case bearing No. CA (PHC) APN 80/2013 which is a revision application filed by the appellant on the same matter.

Accordingly the appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL