

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,
Athimale.

Complainant

C.A. Case No: CA (PHC) 178/2013

Vs.

P.H.C. Monaragala Case No:
19/2010(REV)

1. R.M. Somasiri,
No. 173, Athimale.
2. K.M. Jayarathna,
No. 197, 50 kotasa,
Athimale.

M.C. Monaragala Case No: 38516

Accused

And
Sethapenage Appuhamiralalage
Chandrapala,
No. 181, Athimale.

Vehicle Claimant

AND BETWEEN

Sethapenage Appuhamiralalage
Chandrapala,
No. 181, Athimale.

Vehicle Claimant-Petitioner

Vs.

1. Officer in Charge,
Police Station,

Athimale.

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

Respondents

AND NOW BETWEEN

Sethapenage Appuhamiralalage
Chandrapala,
No. 181, Athimale.

**Vehicle Claimant-Petitioner-
Appellant**

Vs.

1. Officer in Charge,
Police Station,
Athimale.
2. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : AAL Neranjan Jayasinghe for the Vehicle
claimant-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the
Respondents-Respondents

ARGUED ON : 08.02.2019

WRITTEN SUBMISSIONS : The Vehicle Claimant-Petitioner-Appellant
– On 09.10.2018
The Complainant-Respondents-Respondents
– On 09.10.2018 & 01.04.2019

DECIDED ON : 17.07.2019

K.K.WICKREMASINGHE, J.

The Vehicle claimant-Petitioner-Appellant 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 13.11.2013 in Case No. REV 19/2010 and seeking to set aside the confiscation order made by the Learned Magistrate of Monaragala dated 30.07.2010 in Case No. 38516.

Facts of the case:

A vehicle bearing No. UPRA - 2698 (Tractor) along with a trailer was arrested with its driver and the assistant on or about 16.09.2009 for transporting timber valued at Rs. 121312.88 without a valid permit. The driver and the assistant were charged before the Learned Magistrate of Monaragala under section 25(2) read with section 40 of the Forest Ordinance. Both of them pleaded guilty to the charge and the Learned Magistrate convicted both accused and imposed a fine of Rs.15,000/=. Thereafter the vehicle claimant-petitioner-appellant (hereinafter referred to as the 'appellant') claimed the tractor in a vehicle inquiry and one Premathilake claimed the trailer. At the conclusion of the inquiry, the Learned Magistrate confiscated the tractor and the trailer by order dated 30.07.2010.

Being aggrieved by the said order, the appellant preferred an application for revision to the Provincial High Court of Monaragala and the Learned High Court Judge affirmed the order of the Learned Magistrate.

Being aggrieved by the said order, the appellant filed this appeal.

The following grounds of appeal were averred on behalf of the appellant;

1. The Learned Magistrate considered the amended section in Act No. 65 of 2009 whereas the offence was committed on 16.09.2009 and the Act came into operation from 16.11.2009
2. The Learned Magistrate failed to consider the element of knowledge of the vehicle owner
3. The Learned High Court Judge failed to consider that the Learned Magistrate erred in considering evidence that was proved on a balance of probability
4. The orders of the Learned Magistrate and the Learned High Court Judge are contrary to law.

I observe that the first ground of appeal was very correctly addressed by the Learned High Court Judge in his order dated 13.11.2013. The Learned High Court Judge has compared law relevant to confiscating a vehicle under the Forest Ordinance prior to and subsequent to the amendment Act No. 65 of 2009. This question of law was addressed in light of case law as well. The Learned High Court Judge was of the view that the burden cast on a vehicle owner under section 40 of the Forest Ordinance as amended by Act No. 65 of 2009 is not very different from the previous law where it required a vehicle owner to prove on a balance of probability either he took all precautions or he had no knowledge of an offence being committed. It is observed that proving of all precautions taken by a vehicle owner remained a requirement under both previous law and the present law. Therefore the Learned High Court Judge arrived at the correct conclusion that no prejudice had been caused to the petitioner (Page 52 – 57 of the brief).

The Learned Counsel for the appellant contended that the Learned Magistrate had failed to consider the element of knowledge namely whether the vehicle had been used for committing of the offence without the knowledge of the owner.

In the vehicle inquiry before the Magistrate's court, following witness had given evidence.

- i. Owner of the vehicle
- ii. Driver of the vehicle
- iii. An assistant of the driver of the vehicle
- iv. Owner of the Timber (Sunil Bandara)

The owner of the trailer testified to claim his trailer.

As per the evidence, the appellant used the vehicle for farming and he had assigned both accused persons as a driver and an assistant. The appellant had testified that the driver takes his vehicle in the morning and would return it in the evening, but some occasions the driver keeps the vehicle with him and he returns it in the next morning.

On the date of incident, the driver had called the appellant at 9pm to inform that there was a puncture which needed to be repaired. As per the appellant, the vehicle was given for transporting of bricks and the appellant had informed the driver to finish the hire and bring the vehicle. Thereafter the appellant had not inquired about the vehicle from the driver. The next day morning he got to know that the driver and the assistant were arrested for transporting timber without license.

At the claim inquiry, the driver named Somasiri testified that he took the vehicle to transport bricks and afterwards he transported timber and therefore the owner was not aware of the timber transportation. The driver further testified that on some

days he would keep the vehicle with him and will return it on the next day morning and the appellant would not check about the vehicle. The driver stated that he had not informed the appellant about the tyre puncture in the night and the petitioner got to know all the details after they were arrested by the police. Sunil Bandara who was the owner of timber in question stated that the timber was transported on his request and he persuaded the driver and the cleaner to do so.

Accordingly it was argued that the owner did not have any knowledge about the incident. The Learned Counsel for the appellant argued that before the amendment it was a well settled law that confiscation cannot be made if the owner establishes one of two matters i.e. the owner had taken all the necessary precautions that he could take to prevent the crime or he had no knowledge of an offence being committed. At this juncture, it is noteworthy that the Learned High Court Judge has evaluated the evidence again and held that the contradictions in the evidence of the witnesses infer knowledge on the part of the appellant about illegal activities carried out utilizing his vehicle. The Learned High Court Judge observed that the appellant failed to disclose the details as to why he needed a trailer to do farming and it shows that he was using it for transportation. I wish to express my agreement on this observation of the Learned High Court Judge.

The registered owner of the trailer stated that he gave the trailer to his cousin over 5 years ago and cousin gave that trailer to a friend. The trailer owner admitted that he did not have any control over his vehicle.

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.”

In light of above, it is understood that mere denial of knowledge is not sufficient to discharge the burden cast on a vehicle owner in question and he is required to prove, on a balance of probability, that he took all precautions to prevent an offence being committed utilizing his vehicle.

The Learned Counsel for the appellant submitted that the owner had given special instructions not to use the vehicle for illegal activities and vehicle had not been used for any illegal activities prior to this incident.

However in the case of **Mary Matilda Silva V. P.H. De Silva** [CA (PHC) 86/97], it was held that,

"For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions... "

Therefore a vehicle owner is required to prove what actions he took in order to make sure that the instructions were in fact implemented. This position was very correctly considered by both the Learned Magistrate and the Learned High Court Judge and both of them had made well explained orders. Therefore I do not see any reason to interfere with the order of the Learned High Court Judge dated 13.11.2013 and the order of the Learned Magistrate dated 30.07.2010. I affirm the same.

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