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

In the matter of an Appeal made in terms of rule 02 of the Court of Appeal (Procedure for appeals from High Courts) Rules, 1988.

Additional Forest Officer,
Forest Office,
Walasmulla.

Complainant

Vs.

C.A. Case No: **CA (PHC) 64/2013**

P.H.C. Tangalle Case No:
HCRA 03/2012

M.C. Walasmulla Case No: **17601**

1. Wijesinghe Karunaratne
   Hin Aara, Gurugodella,
   Hakuruwela.
2. Herath Mudiyanselage Saman Kumara,
   No. 89, Dimbulgoda,
   Wekadawala.

Accused

AND BETWEEN

Middeniya Gamage Piyasena
Tharindu Stores, Katuwana Road,
Middeniya.

Petitioner

Vs.

Additional Forest Officer,
Forest Office,
Walasmulla.

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

Respondents

AND NOW BETWEEN

Middeniya Gamage Piyasena
Tharindu Stores, Katuwana Road,
Middeniya.

Petitioner-Appellant

Vs.

Additional Forest Officer,
Forest Office,
Walasmulla.

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

Respondents- Respondents

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	The Petitioner-Appellant appeared in person Nayomi Wickremasekara, SSC for the Respondents-Respondents
WRITTEN SUBMISSIONS	:	The Petitioner-Appellant – did not file The Respondents-Respondents – On 30.08.2018
DECIDED ON	:	16.10.2019

K.K.WICKREMASINGHE, J.

The Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Southern Province holden in Tangalle dated 29.04.2013 in Case No. HCRA 03/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Walasmulla dated 02.03.2012 in Case No. 17601. Both parties agreed to dispose this case by way of written submissions and to abide by the same.

Facts of the Case:

The accused-persons (hereinafter referred to as the 'accused') were charged in the Magistrate's Court of Walasmulla for transporting bamboo worth of Rs. 3525/= on or about 09.05.2011, utilizing a vehicle bearing No. SPGN - 0443 and thereby committed an offence punishable under the Forest Ordinance. The accused pleaded guilty to the charge and the Learned Magistrate convicted them and imposed a fine of Rs. 2500/= on each accused with a default term of 03 months imprisonment.

Thereafter, a vehicle inquiry was held with regard to the vehicle bearing number No. SPGN - 0443 and the petitioner-appellant (hereinafter referred to as the 'appellant') claimed the vehicle in the said inquiry. At conclusion of the inquiry, the Learned Magistrate confiscated the vehicle by order dated 02.03.2012.

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of Southern Province holden in Tangalle, which was dismissed by the Learned High Court Judge on 29.04.2013.

Thereafter, the appellant preferred this appeal.

The appellant has submitted following grounds of appeal, in the petition of appeal;

1. The Learned High Court Judge has not considered grounds averred in the appeal
2. The Learned Magistrate has not accepted the evidence of the appellant even if it was not challenged in the cross-examination
3. The appellant was not given sufficient opportunity to call witnesses in the vehicle inquiry
4. There had been no fair trial
5. The Learned High Court Judge erred in affirming the order of the Learned Magistrate even if the appellant had taken precautions to prevent an offence being committed.

The appellant did not file written submissions even though the opportunity was given.

Upon reading of the petition, I find that the grounds averred by the appellant in the petition submitted to the High Court and the petition submitted to this Court are different. Accordingly, it is observed that the 3rd and 4th grounds of appeal are fresh

grounds which were not brought before the Learned High Court Judge. Since an appellant is not allowed to raise fresh grounds at the appeal stage from a revision application filed in the High Court, I will not consider the said 3rd and 4th grounds.

The 1st and 2nd accused were arrested while transporting pieces of bamboo without a valid permit. At the vehicle inquiry, the appellant and a representative of the absolute owner gave evidence. The appellant was the registered owner of the vehicle. The appellant testified that the vehicle in question was used for the purpose of transporting goods for his shop. Apart from that, the appellant allowed the 1st accused to take vehicle for other hires undertaken by him. The appellant further testified that the vehicle was kept in his residence and the accused-driver sought his permission prior to taking the vehicle for hire.

The appellant further testified that he did not have knowledge about an offence being committed and he had advised the accused driver to refrain from using the vehicle for any illegal purpose.

The Learned SSC for the respondents-respondents (hereinafter referred to as the 'respondents') argued that the evidence of the appellant clearly demonstrated that he was not vigilant of his property rights.

I observe that the Learned Magistrate had evaluated all the evidence placed before him. The Learned Magistrate was of the view that even though the appellant and the absolute owner company testified that they took precautions to prevent an offence being committed, no evidence was produced in the vehicle inquiry, to prove the same.

In the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008],** it was held that,

"On a consideration of the ratio decidendi of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest Ordinance, as amended, if the owner of the vehicle in question was a third party, ***no order of confiscation shall be made if that owner had proved to the satisfaction of the Court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence.*** *The ratio decidendi of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability."* (Emphasis added)

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 settled law that a vehicle owner in question is required to prove to the satisfaction of Court that he has taken all precautions to prevent an offence being committed utilizing his vehicle. Our Courts have held that mere denying of the

knowledge about an offence being committed is not sufficient to discharge the burden, set out in section 40 of the Forest Ordinance. This view was taken in the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, in which 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..."*

I observe that both, the Learned Magistrate and the Learned High Court Judge, were of the same opinion that the appellant had failed to discharge the said burden cast on him, to the satisfaction of Court.

The Learned High Court Judge had made the following observation,

> "...උගත් මහේස්ත්‍රාත්වරයා විසින් ඉහත කී නිගමනයට එළඹීමේදී ඉදිරිපත් වූ සාක්ෂි නිවැරදිව විශ්ලේෂණය කොට නෛතික සිද්ධාන්ත නිවැරදි ලෙස සැලකිල්ලට ගෙන ඒ මත එළඹ ඇති නිගමනයක් බවත්, එතුමාගේ නියෝගයට එළඹීමේදී ඊට අදාළ වන සියලුම පූර්ව නඩු තීන්දු සහ නෛතික සිද්ධාන්තයන් නිවැරදි ලෙස අර්ථ නිරූපනය කර සහ අනුකූල කරගෙන ඇති බවත්, උගත් මහේස්ත්‍රාත්තුමා විසින් ඉහත කී නඩු තීන්දුවල අනුකූලතාවය සහ ආවේශතාවය නිවැරදිව අර්ථ දක්වමින් මෙම නියෝගය ප්‍රකාශ කර ඇති බවත්, මා හට පෙනී යයි." (Page 45 & 46 of the brief)

Upon perusal of the both orders, I am satisfied that both the Learned Magistrate and the Learned High Court Judge had made well-reasoned orders, following due procedure. Therefore, I see no reason, which amounts to exceptional circumstances, to interfere with the said orders.

Further, as per journal entries, the appellant was absent and unrepresented in many occasions when the case was taken up. The notices were issued on the appellant and his Registered Attorney on three occasions. The appellant failed to tender written submissions as well. Therefore, it is apparent that the appellant was not interested in maintaining this appeal anyway.

Considering above, I affirm both orders of the Learned Magistrate and the Learned High Court Judge.

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

Cases referred to:

1. The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]
2. K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013]
3. W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]