

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

Court of Appeal Case No.
CA PHC 188/15

PHC Badulla Case No. 44/2011
(Rev)

MC (Mahiyanganaya) Case No.
68676

Abdul Kapoor Mohamed Aliyar,
Pagaragammana,
Mapakadawewa,
Mahiyanganaya.

Petitioner-Appellant

V.

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

Respondents

BEFORE

: **K.K. WICKREMASINGHE, J**
K.PRIYANTHA FERNANDO, J

COUNSEL:

Shantha Jayawardena with Chamara
Nanayakkarawasam for the Petitioner
Appellant.

Panchali Witharana SC for the Respondents.

ARGUED ON : 04.09.2019

WRITTEN SUBMISSIONS

FILED ON: 21.05.2019 by the Petitioner Appellant.
07.08.2019 by the Respondent.

JUDGMENT ON : 08.11.2019

K. PRIYANTHA FERNANDO, J.

01. This is an appeal against the Judgment dated 17.11.2015 by the learned High Court Judge of the Provincial High Court Badulla which affirmed the order of confiscation of the vehicle by learned Magistrate of Mahiyanganaya on 31.10.2009.
02. The Accused driver named 'Akbar' was charged in the Magistrate Court Mahiyanganaya on 31.10.2009 in case No. 68676 for illegally transporting 7 cattle using Motor lorry No. UPHE 6083, in violation of the section 03 of Animals Act No. 13 of 1958 (as amended) and section 02 of Cruelty to Animals Ordinance No. 13 of 1907 (as amended). Thereafter, on 01.09.2010 the Accused pleaded guilty and accordingly at the conclusion of the proceedings the learned Magistrate had called for a vehicle confiscation inquiry. Having evaluated the evidence presented at the inquiry, the learned Magistrate ordered the said vehicle in question to be confiscated.

03. Being aggrieved by the said order, the registered owner of the said vehicle, Petitioner Appellant (hereinafter referred to as the Appellant) had preferred a Revision application No.44/2011 in the Provincial High Court of Badulla. On 30.08.2012, the learned High Court Judge had dismissed the said Revision application on the basis that Appellant had invoked the Revisionary jurisdiction without preferring an appeal against the said impugned order of the learned Magistrate.
04. However, the Appellant made an appeal against the said order of the learned Provincial High Court judge dated 30.08.2012 in this Court in case No. CA (PHC) 121/2012 and this court set aside the said order dated 30.08.2012 and directed the learned High Court Judge to consider the merits of the said Revision application.
05. After re-hearing, the learned High Court Judge on 17.11.2015 dismissed the said Revision application and affirmed the confiscation order of the learned Magistrate. Being aggrieved by the said judgment the Appellant preferred this appeal.
06. I carefully considered the evidence adduced at the inquiry, order of the Magistrate, judgment of the learned High Court Judge, written submissions filed on behalf of the Appellant and the Respondent, and the submissions made by counsel for both Appellant and the Respondent.
07. Contention of the counsel for the Appellant is that the said Motor lorry was used for the transporting purposes of the rice mill owned by the Appellant. He had assigned the said lorry to the Accused and the rice mill to his brother in law as he was living in Batticaloa with his wife. The alleged offence was committed while he was in Batticaloa. Therefore, the Appellant did not have

any knowledge of commission of the offence nor he was privy to the said offence.

08. It was further submitted by the counsel for the Appellant that on a previous occasion, the previous driver named 'Faizar' had committed a similar offence using the same vehicle and the Appellant had removed him after that. Then he had warned the Accused whom he had hired as the second driver not to engage in any illegal transportation activity. Therefore, according to the counsel for the Appellant, he had taken necessary precautions to prevent the use of the vehicle for the commission of an offence.

09. In terms of the section 3A of the Animals Act,

“where any person is convicted of an offence under this part or any regulations made thereunder, any vehicle used in the commission of such 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 of 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 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.”

10. His Lordship Justice Sisira de Abrew in the case of ***Mary Matilda Silva V. P.H. De Silva, IP Police Station Habarana [CA (PHC) 86/97, decided on 08.07.2010]***, held that;

"In my view, for the owner of the vehicle to discharge the burden (1) that he or she had taken all precautions to prevent the use of the vehicle for the 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. In order to discharge the burden embodied in the proviso to Section 3A of the Animals Act, is it sufficient for the owner to say that the instructions not to use the vehicle for illegal purpose had been given to the driver? If the Courts of this country is going to say that it is sufficient, then all what the owner in a case of this nature has to say is that he gave said instructions. Even for the second offence, this is all that he has to say. Then there is no end to the commission of the offence and to the use of the vehicle for the commission of the offence. Every time when the vehicle is detected with cattle all what he has to say is that he had given instructions to the driver. Then the purpose of the legislature in enacting the proviso to section 3A of the Animals Act is frustrated."

11. The Appellant is bound to take every possible precaution to prevent an offence being committed or he has to prove that he had no any knowledge about the commission of the offence. The learned Magistrate had observed that the said vehicle had been arrested on a previous occasion in relation to a similar offence. The learned Magistrate of Kandy had released the said vehicle subjected to a bond in 26.09.2009. Having released the vehicle previously on such a bond, again on 31.10.2009 the Accused was charged for committing a similar offence where the same vehicle had been used to do so. Within such a short period of time, the Appellant should have been more vigilant of his Vehicle and he should have had more control over his vehicle.

Merely stating that he warned the Accused not to commit any illegal act using the vehicle would not be sufficient enough to discharge the burden cast on him because he could have known that the vehicle could be used to do another offence since he was aware about the similar offence committed using the said vehicle before. In this instance, he cannot discharge his burden relying on the defence of no knowledge.

12. In *Umma Habeeba V OIC Dehiattakandiya [1999] 3 SLR 89*, it was decided that;

“What section 3A means is that the vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. If as contended, the Magistrate was given a discretion to consider whether to confiscate or not – the Magistrate could confiscate even when the offence was committed without the knowledge of the owner taking into consideration other damnable circumstances apart from knowledge or lack of it on the part of the owner.”

13. In *Faris V OIC Galenbindunuwewa [1992] 1 SLR 167*, Justice S.N. Silva held that,

“In terms of the proviso to the section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters.”

They are;

1. *That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;*
2. *That the vehicle has been used for the commission of the offence without his knowledge.*

In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order for confiscation should not be made. An order for confiscation could be made only if the owner was present at the time of the detection or there was some evidence suggesting that the owner was privy to the offence.”

14. A similar situation was discussed in ***R.W. Chaminda Parakrama V. Attorney General and another [CA (PHC) APN 54/2016]***, it was held that;

“It is pertinent to note that the vehicle was previously involved in another offence as well. Therefore, the degree of preventive measures that should have been taken by the owner of the vehicle to prevent an offence being committed again using the vehicle is comparatively higher. But the petitioner had re employed the Accused driver after giving mere verbal instructions which in fact is insufficient to establish, on a balance of probability, that he has taken every possible precaution to prevent an offence being committed.”

15. Even though in his submissions, the Counsel for the Appellant argued that the Appellant has not committed such an offence as a habitual offender, a similar offence had already been committed in a previous occasion using the same vehicle. Even though the driver was removed, the Appellant should

have expected that such an offence could be committed again. If this argument is accepted anybody could get away from discharging his burden by affirming that he gave instructions to the driver. Accordingly, I am of the view that giving mere verbal instructions to the Accused driver by the Appellant does not sufficiently establish that the Appellant took precautionary measures on the said vehicle which was used to commit a similar offence before. Brother in law of the Appellant who was under control of the rice mill and the lorry, never gave evidence even to say that he took precautionary measures.

16. The Counsel for the Appellant submitted that the learned Magistrate in her order dated 20.10.2010, proceeded to adjudicate the matter on the premise that there is a presumption that the owner has not taken all precautions to prevent the use of the vehicle for the commission of the offence and had come to a conclusion that the Appellant has failed to adduce evidence to rebut the said presumptions. Even though the learned Magistrate has erred in stating that there is such a presumption, her order for confiscation was correct in law and the Appellant has not been prejudiced.

17. In the above premise, I am of the view that the judgement of the learned High Court Judge of Badulla affirming the confiscation order of the learned Magistrate of Mahiyanganaya is in accordance with the law. Thus, I see no reason to interfere with the decisions of both the learned High Court Judge and the learned Magistrate.

Appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL