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

In the matter of an Appeal in terms of Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Office in Charge,
Police Station,
Nikawaratiya.

Complainant

C.A. Case No: **CA (PHC) 73/2014**

P.H.C. Kurunegala Case No:
HCR 173/2012

M.C. NIkaweratiya Case No: **8350**

Vs.

1. Dissanayake Mudiyanselage Nimal Ranasinghe
2. Thotahewage Sunil Wickramarathna
3. Pathirannehelage Senawirathna Dissanayaka

Accused

AND BETWEEN

Dissanayaka Mudiyanselage Tikiri Banda,
Ihakolagama,
Nikawaratiya.

Petitioner

Vs.

1. Office In Charge,
   Police Station,
   Nikawaratiya.

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

Respondents

AND NOW BETWEEN

Dissanayaka Mudiyanselage Tikiri Banda,
Ihakolagama,
Nikawaratiya.

Petitioner-Appellant (deceased)

Imihami Mudiyanselage Podi Menika,
Ihakolagama,
Nikaweratiya.

Substituted Petitioner-Appellant

Vs.

1. Office In Charge,
   Police Station,
   Nikawaratiya.
2. The Attorney General
   Attorney-General's
   Department,
   Colombo 12.

Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
K. Priyantha Fernando, J.

COUNSEL : AAL Sunil Abeyratne for the Petitioner-Appellant

		N. Wickremasekara, SSC for the Respondents-Respondents
WRITTEN SUBMISSIONS	:	The Petitioner-Appellant – 07.11.2018 The Respondents-Respondents – On 03.12.2018
DECIDED ON	:	14.11.2019

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 North Western Province holden in Kurunegala dated 24.06.2014 in Case No. HCR 173/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Nikaweratiya dated 04.12.2012 in Case No. 8350. At the stage of argument, both parties agreed to dispose this case by way of written submissions and to abide by the same. The appellant, in his petition of appeal, has erroneously prayed to have set aside the order in case No. HCR 174/2012 even though the correct case number is HCR 173/2012. Since, the body of the petition refers to the correct case number, I disregard the said error in the prayer.

Facts of the Case:

The three accused-persons (hereinafter referred to as the 'accused') were charged in the Magistrate's Court of Nikaweratiya for transporting Teak wood worth of Rs. 55,377.40 on or about 21.09.2011, utilizing a Lorry bearing No. NWGS - 7439 and thereby committed an offence punishable under section 25 read with section 40 of the Forest Ordinance (as amended). The three accused pleaded guilty to the charge and the Learned Magistrate convicted them and imposed a fine of Rs. 15,000/= on each accused.

Thereafter, a vehicle inquiry was held with regard to the Lorry bearing number No. NWGS – 7439 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 04.12.2012.

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of North Western Province holden in Kurunegala and the same was dismissed by the Learned High Court Judge on 24.06.2014.

Thereafter, the appellant preferred this appeal. (Since the appellant passed away after filing of this appeal, his wife was substituted as the petitioner-appellant).

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

1. The said order is contrary to law and is against the weight of the evidence adduced in the case.
2. The Learned High Court Judge as well as the Learned Magistrate misdirected in law by interpreting too strictly the phrase 'all precautions' as stipulated by section 40 as amended by Act No. 65 of 2009.
3. The fact that the appellant did not have the knowledge of the offence committed by the driver had not received adequate considerations. Hence the Court has misdirected itself on the law.
4. The said order is wrongful and therefore, not tenable and it has resulted in a failure of justice.

Firstly, I wish to consider 2nd and 3rd grounds of appeal together.

The Learned Counsel for the appellant contended that the illegal activity carried out by the accused was beyond his control and accordingly, the appellant was innocent even under natural justice. It was further submitted that the Learned High

Court Judge has rejected the revision application on the basis that the appellant failed to act on due diligence regarding the involvement of the said vehicle quoting **Umma Habeeba V. OIC, Dehiaththakandiya (1999) 03 SLR 89** and **Mary Metilda Silva V. P.H. De Silva, I.P, Habarana and others [CA (PHC) 86/97]**. The Learned Counsel for the appellant argued that facts involved in the said cases are different to the present case.

As per the evidence of the registered owner (deceased appellant), the vehicle was purchased in 2008 and the vehicle was driven by his son for the purpose of transporting goods from the market. The vehicle was parked in the appellant's house and the son used to take it in the morning and return in the evening. After the vehicle was involved in the said offence, the appellant had stopped giving the vehicle to his son and employed a new driver. On the date of the incident, the vehicle was taken to transport goods to Nikaweratiya Market. However, the Police officer who arrested the vehicle testified that he arrested the vehicle on a Tuesday night and usually the Market in Nikaweratiya was held on Thursdays. The Grama Niladari of the area testified that he knew that the vehicle was arrested and at that time, the son of the appellant was there.

The Learned SSC for the respondents-respondents (hereinafter referred to as the 'respondents') contended that the evidence shows that the appellant did not know what his son was doing with the vehicle and the appellant had no control over the vehicle.

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..."

It is trite law that, a vehicle owner whose vehicle was involved in an offence under the Forest Ordinance is required to prove preventive measures taken by him, in order to avoid his vehicle being confiscated, as per section 40 of the Forest Ordinance (amendment Act No. 65 of 2009). However, the Learned Magistrate in the instant case proceeded to see whether the vehicle owner has proved that he took precautions and he had no knowledge of an offence being committed.

I observe that the appellant in his evidence took up the position that he did not know what his son was doing with the vehicle;

"ප්‍ර: තමා සොයා බලනවාද පුතා මොකද කරන්නේ කියා?

උ: අපේ ගෙදර තියෙන්නේ. උදේ අරගෙන ගිහින් හවස ගෙනවා. මම දන්නේ නැහැ මොනවාද කරන්නේ කියා." (Page 71 of the brief)

Upon being questioned about the new driver, the appellant answered that he did not even know the name of the driver.

"ප්‍ර: දැනට කවුද වැඩ කරන්නේ?

උ: පුතාට දෙන්නේ නැහැ. ළමයෙක් වැඩ කරනවා. දැන් ඉන්න අයගේ නම දන්නේ නැහැ." (Page 71 of the brief)

After evaluating the evidence, the Learned Magistrate was of the view that the son had freedom to use the vehicle anytime and the appellant had failed to inquire about details of the work. Accordingly, the Learned Magistrate was of the view that even after the offence, the vehicle was not under the control of the appellant and the custody of him, which demonstrates his lack of interest over the vehicle.

Further, I observe that the appellant had merely denied his knowledge about an offence being committed, but did not testify to the effect that he gave instructions to the accused to refrain from using the vehicle for illegal activities. Therefore, the appellant had failed to discharge the burden cast on him to the satisfaction of Court.

Considering above, I am of the view that the Learned Magistrate was correct in coming to the conclusion that the appellant was not vigilant of his vehicle and there was a possibility that the vehicle would be used for illegal activities in the future as well. Therefore, I see no merits in the above said 2nd and 3rd grounds of appeal.

Now I wish to consider 1st and 4th grounds of appeal together in which it was argued that the order is wrongful and contrary to law and is against the weight of the evidence adduced in the case.

It is settled law that a burden is cast on a vehicle owner to prove that he took all precautions to prevent an offence being committed, on a balance of probability. As I have already mentioned above, the Learned Magistrate had carefully evaluated evidence before coming to the conclusion that the appellant was not vigilant of his vehicle. Therefore, I do not wish to evaluate said evidence again and the 1st and 4th grounds of appeal too should fail.

Considering above, I see no reason to interfere with the order of the Learned Magistrate of Nikaweratiya and the order of the Learned High Court Judge of Kurunegala. I affirm the same.

Accordingly, the appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, 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]