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

Egodapitiyagedara Lalithangani
Hemalatha Jankure,
Delwita

The Petitioner

MC: Rambodagalla 9939
HCR: 93/2011
CA (PHC): 216/15

-Vs

1.The Officer in Charge
Police Station
Rambodagalla

2.Hon. Attorney General
Department of Attorney General
Colombo

The Respondent

AND NOW BETWEEN

Egodapitiyagedara Lalithangani
Hemalatha Jankure,
Delwita

The Petitioner – Appellant

-Vs.

1.The Officer in Charge
Police Station

Rambodagalla
2.Hon. Attorney General
Department of Attorney General
Colombo

The Respondent -Respondent

BEFORE	:	K. K. Wickremasinghe, J. Priyantha Fernando, J.
COUNSEL	:	Jacob Joseph for the Petitioner Appellant Panchali Witharana , SC for the Respondent-Respondent
ARGUED ON	:	On 01.11.2019 both counsels agreed to abide by the written submissions without argument.
WRITTEN SUBMISSIONS	:	Petitioner Appellant - On 12.09.2019 Respondent Respondent - On 31.10.2019
DECIDED	:	17.12.2019

K.K.WICKREMASINGHE, J.

The Petitioner-Appellant (hereinafter referred to as the '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 12.11.2015 in Case No. HCR 93/2011 and the confiscation order made by the Learned Magistrate of Rambodagalla dated 25.11.2011 in Case No 9939. 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:

The son of the registered owner (hereinafter referred to as the 'accused') of the vehicle in question bearing No: LF7187 (hereinafter referred to as the 'vehicle') was charged in the Magistrate's Court of Rambodagalla for transporting sawn timber worth of Rs. 1,92161.55/= on or about 04.08.2011, utilizing the abovementioned vehicle and thereby committed an offence punishable under section 25 read with section 40 of the Forest Ordinance (as amended). The accused has pleaded guilty to the charge and the Learned Magistrate has convicted him and imposed a fine of Rs. 50,000/=on the accused.

Thereafter, a vehicle inquiry was held with regard to the Lorry bearing number No. LF7187 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 25.11.2011.

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 on12.11.2015.

Thereafter, the appellant preferred this appeal.

The Learned Counsel for the appellant contended in the written submission dated 11.09.2019, that in the revision application, bearing No: HCR 93/2011 to the High Court of the North western Province, Kurunegala, the petitioner has tendered that he had taken all precautions in order to prevent the crime. It is stated that the

accused was her son who was a trusted person who had no previous convictions ; the lorry was parked at night at the residence of the petitioner ; the absolute owner and the petitioner advised the son not to use the vehicle for any purpose other than the transport of rubble and the petitioner visited the quarry to verify whether the lorry had come.

For the purpose of deciding whether the Learned Magistrate and the Learned judge of the high Court have erred in law, the law in relation to the confiscation order should be diligently analysed.

As per section 40(1)(b) of the Forest Ordinance as amended, all tools, vehicles, implements, cattle and machines used in committing an offence under the Forest Ordinance, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate. Therefore it is trite law that any vehicle involved in an offence under the Forest Ordinance is subject to confiscation upon a valid conviction. It is observed that the amendment made to section 40 of the Forest Ordinance in 2009, requires Court to look into the preventive measures taken by the vehicle owner whose vehicle is involved in an offence under Forest Ordinance.

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)

It should be analysed whether the vehicle owner, the appellant had taken all precautions to prevent the commission of the act by her son.

The Learned Magistrate has observed in the judgement :

" ව්‍යවස්ථාදායකය විසින් හඳුන්වාදී ඇති එම ප්‍රතිපාදන මගින් පැහැදිලි වන්නේ යම් අපරාධයකට යොදා ගනු ලබන වාහන ආදියෙහි හිමිකරුවන් සම්බන්ධයෙන්ද දැඩි වගකීමක් පැවරෙන ආකල්පයකට අදාළ පනත මගින් ව්‍යවස්ථාදායකය තල්ලු වී ඇති බවයි."

The Learned Magistrate and the Learned High court judge, in the light of decided judgements, have analysed as to what actions constitute to be the precautionary actions.

I wish to draw the attention to the landmark case decided on a similar matter **The Finance Private Ltd. v Agampodi Mahapedige Priyantha Chandana and others** in **Supreme Court Appeal No.105A/2008** decided on 30.09.2010 Her Ladyship the Chief Justice Shirani Bandaranayake has stated

"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 has 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 therefore mentioned decisions also show that the owner has to establish the said matter on balance of probability"

Furthermore it was stated in the abovementioned judgment that,

"As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence."

The Learned Magistrate has correctly stated in his judgment that even in the case of an absolute owner, mere ignorance of the commission by the absolute owner is not sufficient to depict that the owner had taken all possible and feasible measures to prevent the crime.

Since the section 40 of the Forest ordinance states that no Order of Confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence. It should be analysed whether the Learned Magistrate Court judge has properly analysed if the owners of the vehicle have taken proper and all possible precautions to prevent the commission of the offence.

The Learned Magistrate has correctly pointed out in the brief that the witness who testified on behalf of the absolute owner had not been able to prove that they had taken all preventive precautionary measures to prevent the commission of the offence to the satisfaction of the court. Furthermore the Learned judge has mentioned that the abovementioned witness has contradicted his evidence and hence his evidence is not trustworthy for the court to believe, thereby the conclusion of the court is that the absolute owner had not taken any steps to prevent the commission of the offence. (page 226 of the brief)

Furthermore the Learned Judge in his judgement has mentioned the Registered owner also has contradicted herself during the cross examination. (page 227 of the brief)

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. "

In the case of **Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167,** it was held that,

"...an order for confiscation cannot be made if the owner establishes one of two matters. They are:

i. *That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;*

ii. *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..."

Moreover as law stands today, it is mandatory to prove preventive measures taken by a vehicle owner in question, on a balance of probability. Undoubtedly, such burden would not be discharged merely because the owner in question did not have knowledge about an offence being committed or because the vehicle was not involved in an offence previously. The Learned Magistrate had correctly analyzed this question and came to the conclusion that the appellant was not monitoring the vehicle cautiously because loading of the timber stock has been taken place nearby to the house of the registered owner. The Learned Magistrate has correctly pointed out that

"ඉහත කරුණු වලට අමතරව අදාළ වරද සිදුවී ඇත්තේ එනම්, ලොරි රථයට ලී පැටවීම කර ඇත්තේ ලියාපදිංචි හිමිකාරියගේ නිවසේ සිට කිලෝමීටරයක්, කිලෝමීටර භාගයක්

වැනි ඉතාමත් ආසන්න ස්ථානයක වන බව ලියාපදිංචි හිමිකාරියගේ මෙන්ම විත්තිකරුගේ සාක්ෂිය මගින්ද තහවුරු වන අතර එදින විත්තිකරු බෙහෙත් ගැනීම යැයි පවසා ගිය බවත්, ගල් ඇදීමට නොගිය බවටත්, තම නිවසේ නොසිටි බවටත් ගමේ පිහිටි වෙනත් නිවසකට ගොස් සිටි බවටත්, ලියා පදිංචි හිමිකාරිය සාක්ෂි දී ඇතත් විත්තිකරු සාක්ෂි දී ඇත්තේ ලියාපදිංචි හිමිකාරිය එදින නිවසේ සිටි බවටත්, තමා එදින ගල් ඇදීමට යන බව පවසා යතුර රැගෙන ගිය බවත්ය. එමෙන්ම එදින ලී පටවා ගෙන පොල්කුඹුර ප්‍රදේශයේ වඩුමඩුවක් වෙත රැගෙන යාමට ගියේ තම මව වන ලියාපදිංචි හිමිකාරිය පදිංචි නිවාස ඉදිරිපිටින් බවද විත්තිකරු මෙම අධිකරණය හමුවේ හරස් ප්‍රශ්න වලට පිළිතුරු දෙමින් පිළිගෙන ඇත . එම කරුණු අනුව ලියාපදිංචි හිමිකාරිය විසින් තම ලොරි රථය නීති විරෝධී ක්‍රියා සඳහා යොදා ගන්නවද යන්න සම්බන්ධයෙන් අවධානයෙන් සිටිය නම් සහ ඒවා වැළැක්වීමට ගත හැකි සියලු පූර්වාරක්ෂණ ක්‍රියාමාර්ග ගනු ලැබුවා නම්, මෙම නඩුවට වරදට අදාල ලොරි රථය යොදා ගැනීම වලක්වා ගැනීමට හෝ අඩුම තරමින් ඒ සම්බන්ධයෙන් අනාවරණය කර ගැනීමට හැකියාව තිබුණි" (brief 229,230)

The learned High Court Judge has elaborated on the fact that the registered owner has not taken sufficient precautionary measures to prevent the crime happening and if she was vigilant enough about the fact she could have prevented the commission of the said crime. Even though the registered owner has stated that she gave instructions to her son to refrain from committing any offence using the vehicle, she has not been able to prove that she took all possible precautionary measures to prevent the commission of the said offence.

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,**

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..."

Therefore the revisionary powers of this Court shall not be exercised when there was no illegality, irregularity or failure of justice in aforesaid orders. I observe that in the present case also there had been no miscarriage of justice, irregularity or injustice in the order of the Learned Magistrate and therefore the Learned High Court Judge was correct in refusing to interfere with the order of the Learned Magistrate due to absence of exceptional circumstances. 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 and I affirm both orders of the Learned Magistrate dated 25.11.2011 and the Learned High Court Judge Galle dated 12.11.2015.

Accordingly the appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Priyantha Fernando, J
I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to :

The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]

Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]

Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167

Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,