

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

In the matter of an application in terms of Article 154 of the constitution read with High Court Special Provisions Act No.19 of 1990 of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal

Case No: CA(PHC) 96/18

Kuliyapitiya High Court

Case No: HCR 32/17

Kuliyapitiya Magistrate

Court Case No: 7712

Officer In Charge of Police,
Police Station,
Giriulla.

Plaintiff

Vs.

P.Dinesh Premarathne,
No.379, Bowala,
New Thalwatta.

Accused

And

Samaraweera Arachchilage
Sumanawati
Bowala, Nawathalwaththa.

Petitioner

Vs.

01. Officer In Charge of
Police,
Police Station,
Giriulla.

02. Hon. Attorney-General,
Attorney-General's
Department,
Colombo 12.

Respondent

P. Dinesh Premarathne,
No.379,
Bowala,
New Thalawatta.

**Accused-
Respondent**

And Now

Samaraweera Arachchilage
Sumanwati,
Bowala,
Nawathalwatta.

Petitioner-Appellant

Vs.

01. Officer In Charge of
Police,
Police Station,
Giriulla.

02. Hon. Attorney-
General,
Attorney-General's
Department,
Colombo 12.

**Respondent-
Respondent**

P.Dinesh
Premarathne,
No.379,
Bowala,
New Thalawatta.

**Accused-Resppondent-
Respondent**

Before : **Achala Wengappuli,J**
Devika Abeyratne,J

Counsel : Navodh Hewage with Manoj Bandara for
the Petitioner-Appellant
Shanaka Wijesinghe DSG for the
Respondents.

Written

Submission on : 29.05.2019 (by the Petitioner Appellant)
17.10.2019 (by the 2nd Respondent-
Respondent)

Decided On : 29th of May 2020

Devika Abeyratne,J

This is an appeal against the order of the High Court of Kuliapitiya, which affirmed the order of the learned magistrate forfeiting a vehicle under the amended section 40 of Act No 65 of 2009 of the Forest Ordinance.

The petitioner appellant is the registered owner of vehicle bearing No NWJP 5683 .The accused respondent-respondent P. Dinesh Premaratne , who was employed as the driver, is the son of the appellant, and was charged in the Magistrate's court of Kuliapitiya for the offence of transporting timber in the said vehicle without a license under section 38 (a) , 40 and 25 (2) of the Forest Ordinance. He was convicted on his own plea and sentenced.

The appellant claimed the vehicle and at the inquiry, testified together with, the accused respondent respondent and *Nalaka Siriwardena* the owner of the metal quarry who is said to have obtained the services of the vehicle on a regular basis. The learned magistrate after affording an opportunity to the registered owner to

show cause why the vehicle is not liable to be forfeited, confiscated the vehicle.

The appellant has evidenced before the learned Magistrate, that on 1.7.2015 around 7.30 and 8.00 in the morning, the driver has taken the vehicle to be serviced , and as the vehicle did not return at the usual time, which is around 12.30 and 1 pm, the appellant and the husband have gone to the service station to inquire about the delay and have found out that the driver son and the vehicle have been taken in to custody for transporting timber without a valid permit.

The appellant has testified that the vehicle has been given for a specific purpose of transporting metal and that she has advised the driver not to use the vehicle for any illegal activity and that when the vehicle is sent to transport metal, as a matter of practice, she and her husband always made inquiries about the movement of the vehicle at all times to ascertain whether the goods have been delivered to the destination and the time of delivery.

It appears that there are some discrepancies in the evidence with regard to the time the appellant started to make inquiries about the whereabouts of the vehicle, which has been highlighted in the cross examination.

However, the accused appellant has stated that after the service was over, at the request of a friend who is known to him from his school days, without the knowledge or obtaining permission from the mother, he has transported some timber items to the friend's house for building purposes. He has admitted that he has been advised by the registered owner his mother, not to use the vehicle for illegal purposes. He was charged as aforesaid, and he has admitted his guilt to the charge of transporting timber without a permit. The vehicle was confiscated after an inquiry.

The amendment to section 40 of the Forest Ordinance by Act No 65 of 2009 provides that, *where any person is convicted of a forest offence.*

- (A) *all timber or forest produce which is not the property of the State in respect of which the offence has been committed, and*
- (B) *all tools, vehicles, implements, cattle and machines used in committing such offence*

Shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting magistrate.

Provided that where the owner of the vehicle is a third party, 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.

The learned magistrate was of the view that giving mere verbal instructions by the owner cannot be considered as taking necessary precautions; that she has failed to make any inquiries on the day of the incident and has failed to satisfy court that she has asked the driver to inform her and obtain permission if any request is made to the driver to use the vehicle for any illegal purpose. Further, the magistrate has drawn an adverse inference on the failure to call the owner of the timber as a witness and has considered the inconsistency of the evidence with regard to the time the appellant made inquiries, for example, whether it was at 4.30 or 7.30 in the evening when she went to the police station.

In ***The Finance(Private) Ltd vs Agampodi Mahapedige Priyantha Chandana and others*** S.C .Appeal No105 A/2008 decided on 30.09.2010 it was held ...*accordingly it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge*".

It is trite law that if the owner of the vehicle satisfies the court that the offence was committed without his knowledge or participation, the vehicle is not liable for forfeiture.

The evidence adduced in court by the appellant is that the vehicle was given for a specific purpose to transport metal. The registered owner has employed her son as the driver who was paid a daily wage of Rs 1000/=, who was newly married living with his wife about 300 meters from her house. It was stated that when goods are transported in the vehicle, she checks the movement of the vehicle over the phone and sometimes personally by her husband, from the owner of the metal quarry and other customers whether the goods were delivered and the time of delivery. The vehicle was parked at her house and the driver came every morning to collect the vehicle and at the close of day returned it, which ensured that the driver took the vehicle on the supervision of the appellant.

It was also stated that as the vehicle has been given specifically to transport metal, and that the driver has been given specific instructions not to engage in any illegal activity, that the offence has been committed without her knowledge, or participation. There were no previous incidents reported and the evidence was that the driver wanted to help a friend without the knowledge of the mother on a holiday when no other work was scheduled. This evidence was not assailed.

At no point was it even suggested to either the appellant or the accused respondent that the appellant was privy to the commission of the offence.

The counsel for the appellant has referred to the decision in **K Joslin vs S Bandara**⁷⁴ NLR pg 48 where it was held that the precautions taken or the absence of any such precaution must be determined in relation to the actual offence.

It was held in **Ceylinco Leasing Corporation Ltd. Vs. Harisonet** al.CA(PHC)APN 45/2011 that the vehicle cannot be confiscated if the owner establishes on a balance of probability that he had taken all precautions to prevent the use of the vehicle for the commission of the offence, and that the vehicle has been used for the commission of the offence without his knowledge.

In **Atapatthu Mudiyanseelage SadiBanda Vs. Office-in charge police station Norton Bridge** Judgment dated 25th July 2014 in Appeal No CA PHC Appeal 03/2013 it is stated that

"I am of the view, before making the order of confiscation learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and or the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the Appellant did not have any knowledge about the transporting of timber without a permit. On these facts the Court is of the view that the confiscation of the lorry is not justifiable."

In **Abubakarge Jaleel . Vs. Anti-Vice Unit** – Case No. (CA-PHC 108/2010) Justice Salam has held

"It was evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross examination. There has been no previous instance where the driver has been charged for a similar offence. When some one is under a duty to show cause that he has taken all precautions against the commission of similar

offence, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all time in the lorry to closely supervise for what purpose the lorry is used."

The learned magistrate has held that the appellant failed to satisfy court on several points; that she had taken all the necessary precautions ; that the appellant has failed to call the owner of the timber which would have shed some light to the incident ; no inquiries made by the registered owner on the day of the incident, which findings the learned High Court judge has affirmed.

What is required in an inquiry of this nature, is for the registered owner of the vehicle to satisfy court that all precautions to prevent the use of the vehicle in the commission of the offence has been taken.

In the given circumstances, in the instant case, has the owner proved to the satisfaction of the court that she had utilized all precautions to prevent the use of the vehicle for the commission of the offence and that the offence was committed without her knowledge and participation?

The contention of the counsel for the registered owner is that she did not have any knowledge of the commission of the offence, therefore the order confiscating the vehicle was wrong.

In ***Faris vs OIC Galenbindunuwewa*** [1992] 1 SLR 167 it was held in that case that an order for confiscation could be made only if the owner was present at the time of detection or there was some evidence suggesting that the owner was privy to the offence.

In ***Umma Habeeba vs OIC Dehiaththakandiya*** 1999 3 SLR 89 Justice Yapa and Justice Gunawardena observed that the lorry in question had been used for illegally transporting nine heads of cattle and four accused were found guilty on their own pleas. The driver of the lorry was the husband of the owner of the vehicle. The court was of the view, that the fact that the driver was the husband, itself proved knowledge on the part of the appellant (owner) that the offence in question was committed with the knowledge of the appellant.

When considering the instant matter in the light of the above quoted authorities, it is established by evidence that the owner has advised the son not to engage in any illegal activity. When the lorry is not been used to transport metal it has been in the custody of the appellant.

The vehicle being sent for a service on a holiday can be accepted and considering the relationship of the owner and the driver , that day being a poya holiday, the delay in the vehicle returning would not have unduly alarmed the appellant, especially as there have not been any previous incidents to cause concern.

Thus, it is safe to infer that the appellant was not alarmed initially, that the son living next door was late coming home after the vehicle was serviced. It can be inferred that this fact explains the minor discrepancies with regard to the times the appellant has stated in the evidence.

The evidence of the appellant has not been contradicted or shown to be lacking any credit worthiness. The minor discrepancy was with regard to the time she has started inquiring, which as explained before may have been due to the fact that she was not concerned initially about the delay, it being a holiday and no work was scheduled for that day. In any event as it is the son who has taken the vehicle not any employee, she would have thought nothing of the delay at first.

After the commission of the offence the driver's work has been discontinued and there is no other evidence to the contrary. No evidence has been elicited that the appellant had knowledge that the driver was transporting the timber without a permit on that particular day.

When considering the totality of the evidence, we are satisfied, that the registered owner has taken the necessary precautions to prevent the use of the vehicle for the commission of the offence and that the offence has been committed without the knowledge of the registered owner.

I am of the view that the learned magistrate should have taken in to consideration the fact that there are no prior allegations concerning the vehicle, being used for illegal activity, the value of the timber and that the appellant had no knowledge of the commission of the offence.

In consideration of the above facts, I am of the view that the confiscation of the vehicle was unjustifiable and cannot be allowed to stand and as such, the order of the learned High Court Judge dated 7.6.2018 and the order of the learned Magistrate dated 5.12.2017 is set aside.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree

JUDGE OF THE COURT OF APPEAL