

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

*In the matter of an Appeal in terms of Article
138 (1) (2) of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

Kuttiali Mohommadu Marshooq
Mohommadu Niyaz
Bammanna, Narangoda, Pannala.

Applicant – Petitioner

Vs.

Court of Appeal Application No:
CA/PHC/203/17

High Court of Kuliyaipitiya No:
HRC 07/2016

Magistrate’s Court of
Kuliyaipitiya
No :**81240**

1. Officer-in-Charge
Police Station
Pannala.

Complainant-Respondent

2. The Attorney General
The Attorney General’s Department
Colombo 12

Respondent

3. Rathnayaka Mudiyansele Saman
Ruwan Tharanga
Hathhiniya, Narangoda

Accused-Respondent

And between

Kuttiali Mohommadu Marshooq
Mohommadu Niyaz
Bammanna, Narangoda, Pannala.

Applicant-Petitioner-Appellant

Vs.

1. Officer-in-Charge
Police Station
Pannala.

Complainant-Respondent-Respondent

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

Respondent-Respondent

3. Rathnayaka Mudiyansele Saman
Ruwan Tharanga
Haththiniya, Narangoda

Accused-Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Nihara Randeniya for the Appellant
Kanishka Rajakaruna SC for the Respondents.

Argued on : 19.05.2022

Decided on : 21.06.2022

Iddawala – J

This is an appeal filed on 13.11.2017 against the order of the High Court of Kuliyaipitiya dated 02.11.2017 which affirmed an order of confiscation of vehicle under the Forest Ordinance delivered by the Magistrate's Court of Kuliyaipitiya on 15.09.2016.

The facts of the case are as follows. The accused-respondent (*hereinafter the accused*) was charged in the Magistrate Court of Kuliyaipitiya for transporting timber in a vehicle bearing No. 40 9812 (*hereinafter the vehicle*) without a valid license and thereby acting in contravention of the Forest Ordinance as amended by Act, No. 65 of 2009 (*hereinafter the Act*). The vehicle was taken into custody and released to its registered owner, who is the applicant-petitioner-appellant (*hereinafter the appellant*), on a Bond of Rs. 1,500,000/-. The accused pleaded guilty to the charges levelled against him and the Magistrate convicted the accused on 15.11.2012 and imposed a fine of Rs. 50,000/-. A vehicle inquiry commenced on 12.12.2013 and the appellant, accused and another named Fawzi who was a hardware store owner, gave evidence. The Magistrate delivered his order dated 15.09.2016 and confiscated the vehicle on the basis that the appellant failed to take necessary precautions to prevent the commission of a forest offence with the use of his vehicle. Aggrieved by the said order, the appellant filed a revision application in the High Court of Kuliyaipitiya. The said application was supported both orally and via written submissions and the High Court delivered its order on 02.11.2017, dismissing the application. Hence, the appellant has preferred the instant appeal to the Court of Appeal, seeking to set aside both the High Court order dated 15.09.2016 and Magistrate Court order dated 02.11.2017.

Prior to embarking on an analysis of the merits, it is pertinent to quote the law applicable to the instant application. In this regard Section 40 of the Act is reproduced below:

“(1) 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 such 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 in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, 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. (Emphasis added)

As decided by a series of judgments in interpreting the proviso to Section 40 (1) of the Act as amended by Act, No. 65 of 2009, the matter of confiscation of a vehicle under the Act pivots on the issue of whether the claimant, professing to be an innocent third party, has dispensed the burden of proving on a balance of probability that he took all precautions to prevent the use of his vehicle for the commission of a forest offence under the Act. (See **Rajapakshe Pedige Sugath Wimalasuriya v Officer in Charge, Police Station Pindeniya** CA/ PHC / APN / 139/19 CA Minute dated 09.11.2021)

The appellant's version is that he is the registered owner of the vehicle who had employed the accused as a driver to use the vehicle for hires. He stated that the ordinary course of business is that he receives requests for hires and that he directs the accused to carry out such request. He stated that he advised the accused not to engage in illegal activities whilst driving the vehicle and stated that he is in the habit of regularly checking whether the accused does otherwise. The appellant stated that on the day in question, he received a request for a hire from a nearby hardware (owned by Fawzi) to transport some building material to a location not far. The appellant gave evidence stating that he expected the vehicle to return within 45 minutes and since there was a delay of over 1 hour and 30 minutes, he took the initiative to call the accused and inquire about his whereabouts. It is at that point he has been informed that the accused along with the

vehicle has been taken into custody for illegally transporting timber. The appellant has immediately dismissed the accused who was his employee for over a year. Appellant insisted that he never gave instructions to transport timber and that neither the accused nor the hardware owner Fawzi informed him about the said timber when the latter placed the request for a hire. (Vide pages 109 – 110

of the Brief). In their evidence, both the accused and Fawzi states that they did not inform the appellant regarding the timber. (Vide pages 117 and 124 of the Brief respectively). Having set out the material facts pertinent to the case, this Court will now examine the applicable law.

Rajapakshe Pedige (supra) concerned an instance where the claimant failed to adduce any evidence to corroborate the evidence that he dispensed his burden under the proviso to Section 40 (1) of the Act and as such the Court of Appeal affirmed the confiscation of the claimant's vehicle. In **Imiya Mudiyansele Aruna Chandana v Officer in Charge, Police Station Giriulla** CA/PHC/24/17 CA Minute dated 03.03.2022, this Bench affirmed a confiscation of a vehicle under the Act where the petitioner merely narrated the events precedent to the commission of the forest offence without attempting to convince the Court of the measures he had taken as a responsible person in ownership of a vehicle. In both these cases, the claimants have not carried themselves as reasonable men in dispensing the burden stipulated by the legislature. In **Samarasinghe Dharmanasa v W. P. Wanigasinghe** CA(PHC) 197/2013 CA Minute dated 22.01.2019, the Court of Appeal observed that “... *it is amply clear that simply giving instructions to the driver is insufficient to discharge the burden cast on a vehicle owner. Therefore, merely giving instructions alone will not fall under the possible preventive measures ought to be taken by a vehicle owner*”. Similarly, in **S. D. N. Premasiri v Officer in Charge, Mawathagama** C A (PHC) 46/2015 Court of Appeal Minute dated 27.11.2018, the Court held “...*it is imperative to prove to the satisfaction of Court that the vehicle owner in question has not only given instructions but also has taken every possible step to implement them*”. An extrapolation of

all these cases reveal that Courts are unlikely to be satisfied under the proviso to Section 40(1) of the Act if the claimant has conducted themselves unreasonably, both prior to the commission of the forest offence under the Act and before the Court, dispensing their legislative burden.

In the instant appeal, witnesses have corroborated the appellant's submission that he was unaware that his vehicle was being used to transport timber, a fact that is uncontested. The accused, who gave evidence during the inquiry, has no previous convictions of similar offences apart from the instant incident, and has been employed by the appellant for a considerable time period. Under such conditions, the appellant has been vigilant of the time the accused took to complete his assigned task. He has made immediate inquiries when the accused failed to return with the vehicle within the expected time period, and upon being notified about the forest offence, has immediately expelled the accused from employment. The Magistrate order dated 15.09.2016 has pronounced that the appellant ought to have physically visited the accused without merely making an inquiry over the phone. It is the considered view of this Court that such a construction is unreasonable. A vehicle owner employing a driver to carry out transportation of goods cannot reasonably be expected to physically visit each and every site to ensure that illegal activities are not carried out using his vehicle. The appellant has given instructions to the accused and has followed up with due diligence on the completion of the task. A discrepancy on the number of wood planks inside the vehicle has prompted the trial judge and the judge sitting in revision to reject the position of the appellant, which in the opinion of this Court is not the primary burden envisaged by the legislature under Section 40 of the Act. It is pertinent to echo the annotations made by His Lordship Justice Salam P/CA in the case of **Jaleel Vs OIC Anti Vice Unit Police Station Anuradhapura**, CA PHC-108/2010 CA Minute 26.08 2014, *'It has to be borne in mind that an order of confiscation of property whether movable or immovable leads to deprivation of property rights of a citizen.*

Inasmuch as the court has to approach the issue relating to the liberty of the subject by giving a strict interpretation of the law and the same approach has to be aimed at resolving the issues relating to the legality of the confiscation orders as well.....”.

On the other hand, the role of the judge in applying the law related to the confiscation of property under the Act is to ensure that legislative intention is not undermined, which in its essence sought stringent legal measures to safeguard forests and the environment at large, whilst safeguarding individual rights.

Based on the above reasoning, it is the considered view of this Court that the appellant has conducted himself as a reasonable man in satisfying this Court that he had taken all precautionary measures to prevent the use of his vehicle for the commission of an offence under the Act. Order dated 02.11.2017 of High Court of Kuliyaipitiya dated 02.11.2017 and order dated 15.09.2016 of Magistrate’s Court of Kuliyaipitiya on 15.09.2016 are hereby set aside and this Court orders the vehicle be released to the appellant and the bond be discharged.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL