

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

In the matter of an Appeal from the High Court of the Provinces (North Western Province) holden in Kuliypitiya established in terms of Article 154 P 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.

Officer in Charge,
Police Station,
Pannala.

Complainant

Vs.

Court of Appeal Application
No: **CA (PHC) 139/2015**

High Court Kuliypitiya
Case No: **46/2012**

K. Nishantha De Silva,
Bulugahawatta,
Bowatta,
Yakwila

Kuliypitiya MC
No: **73323**

Accused

AND BETWEEN

Dewapurage Kamal Deshapriya,
Bogahawatta,
Yakwila.

Aggrieved Petitioner

Vs.

1. Officer in Charge,
Police Station,
Pannala

Complainant- 1stRespondent

2. Hon. Attorney General
Attorney General's Department,
Colombo 12

2ndRespondent

K. Nishantha De Silva,
Bulugahawatta,
Bowatta,
Yakwila.

1st Accused – 3rd Respondent

AND NOW BETWEEN

Dewapurage Kamal Deshapriya,
Bogahawatta,
Yakwila.

Aggrieved Petitioner – Appellant

Vs.

1. Officer in Charge,
Police Station,
Pannala

Complainant- 1st Respondent- 1st Respondent

2.Hon. Attorney General
Attorney General's Department,
Colombo 12

2nd Respondent – 2nd Respondent

K. Nishantha De Silva,
Bulugahawatta,
Bowatta,
Yakwila.

1st Accused – 3rd Respondent- 3rd Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Appellant absent and unrepresented.
Yuhan Abewickrama DSG for the State.

Argued on : 01.08.2022

Decided on : 20.09.2022

Iddawala – J

This is an appeal filed on 07.09.2015 against the judgment of the learned High Court Judge of Kuliyaipitiya in Case No. 46/2012 delivered on 31.08.2015 which affirmed in revision, an order of confiscation of vehicle under the Forest Ordinance delivered on 29.03.2012 by the learned Magistrate of Kuliyaipitiya. The petitioner has invoked the appellate jurisdiction of this Court to set aside both orders and thereby set aside the confiscation of vehicle bearing registration No. NW JC 9439.

On 13.01.2012, the vehicle bearing registration No. NW JC 9439 (*hereinafter the vehicle*) was taken into custody for violation of the Forest Ordinance. The accused pleaded guilty, and a fine was imposed with a sentence of 6 months rigorous imprisonment. A vehicle inquiry was held on 01.03.2012 under section 40 of Forest Ordinance as amended in which the Registered Owner (*hereinafter referred to as Appellant*) gave evidence and was cross-examined by the prosecution. After the conclusion of submissions, the learned Magistrate ordered the vehicle to be confiscated. Aggrieved by the said decision, the petitioner filed revision application in the High Court, which dismissed the revision application and reaffirmed the order of the learned Magistrate.

Section 40 of the Forest Ordinance No. 16 of 1907 as amended by Forest (Amendment) Act No 65 of 2009 stipulates confiscation of vehicles connected with a forest offence as follows:

(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 such, the legislature has unequivocally cast a burden on a claimant of a vehicle inquiry under the Forest Ordinance to dispense the burden of proving to the satisfaction of the Court that he, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. It must be noted that the requirement of proving that all precautionary measures have been taken by such third party making a claim against a confiscation, is unique to the Forest Ordinance in comparison with other legislations with similar provisions. The position prior to 2009 was that a vehicle involved in a forest offence is liable for confiscation and that a third party may make a claim against such confiscation. After 2009, the legislature has delineated a specific burden on such a party making a claim. He must prove that he took all precautions to prevent the use of such vehicle for the commission of the forest offence. The legislative intent of imposing such a stringent threshold in section 40 of the Forest Ordinance as amended in 2009, is to conserve the forest cover and preserve the green nature of Sri Lanka.

Hence, the primary contention to be decided by this Court is whether the learned Magistrate has correctly evaluated the evidence placed before him when arriving at the final determination that the appellant has failed to dispense the said burden. It was contended by the appellant that the vehicle had been used to transport rocks from a quarry and the driver (accused) picked up the vehicle when required and handed over at around 8.00/9.00 p.m. usually. He further contented that he employed the accused as the driver of the vehicle as he was known to him from his own village, and the driver himself had previously owned and driven a lorry. The driver has requested the appellant to employ him as he had sold his own vehicle. He further contended that the driver had not engaged in any illegal activities with his own vehicle. He states that on the day in question, driver had taken the vehicle to the quarry and had not returned. The appellant had gone searching for the vehicle and the quarry had informed him that the driver had gone to transport a load of rocks. Then the appellant had called the driver on his mobile phone which had not worked. He contends that upon being informed about the incident he inquired the driver as to why he committed such an act when he is informed otherwise, following which he has dismissed the driver from his employment. During examination in chief, the appellant has given evidence as to the manner in which he dispensed the burden cast upon him under the Forest Ordinance, i.e., that he had given all instructions and taken all necessary precautions to prevent the commission of a forest offence.

When perusing the evidence given by the appellant, it is noted that the prosecution has not properly cross-examined and/or contradicted or challenged the precautionary measures he has claimed to have taken. Therefore, all such measures he has contended remain admissible as evidence. At this point it is pertinent to quote 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.....’*”.

Hence, in evaluating the evidence before the Court, the stringent stipulations on confiscation as envisioned by the legislature must be balanced and reconciled with individual property rights. In such a context, evidence that were not challenged or otherwise disputed, in the absence of any alternative propositions by the prosecution, must be given due consideration.

At this juncture, the following observation in **Samarasinghe Dharmasena v W. P. Wanigasinghe** CA(PHC) 197/2013 CA Minute dated 22.01.2019 is applicable:

“.....it is well settled law that in a vehicle inquiry the claimant has to discharge his burden on a balance of probability. According to section 40 of the Forest Ordinance (as amended) it is mandatory to prove on a balance of probability that the owner took every possible precaution to prevent the vehicle being used for an illegal activity....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”

(Emphasis added)

As held in **S. D. N. Premasiri v Officer in Charge, Mawathagama** CA (PHC) 46/2015 Court of Appeal Minute dated 27.11.2018 “...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”. Furthermore in **Cadar Bawa Jennathul Farida v Range Forest Officer and Others** C.A PHC 94/2017 minute dated 05.07.2019, it was held that “ it is trite law that mere giving instruction is not sufficient to discharge the burden cast on a vehicle owner under the Forest Ordinance.”

Nevertheless, the Act does not mean that the owner of vehicle should sit beside the vehicle round the clock and should control all the activities of the driver. The burden cast upon the owner is to prove to the satisfaction of the Court that he had taken all precautions to prevent the use of such vehicle for the commission of the offence. As stated by this division in **Kuttiali Mohommadu Marshooq Mohommadu Niyaz Vs Officer-in-Charge, Police Station, Pannala** CA/PHC/203/17 minute dated 21.06.2022 “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”.

When considering the impugned order of the learned Magistrate, it is evident that a discrepancy in the evidence given by the appellant as to the date of the offence has been heavily relied upon by him. However, neither the remainder of the undisputed evidence elicited during the examination in chief has been considered nor has the learned Magistrate given any reasoning for disregarding such evidence. It appears that the learned Magistrate has based his determination on the singular fact that the appellant has misquoted a date, holding the said discrepancy to be of such graveness that it tipped the balance of probability in favour of the

prosecution. This Court is unable to agree with such a construction. As discussed earlier, a case concerning the confiscation of property under the Forest Ordinance, one must strike a balance between the legislative intention of conserving the environment and the proprietary rights of the individual. In such a context, this Court is hesitant to completely shut out the evidence of the appellant merely because he mistook the date of the offence.

It is the view of this Court that the Magistrate ought to have considered the undisputed nature of the evidence given by the appellant when making his final determination. When weighing the evidence given by the appellant against the prosecution, where no attempt has been made to challenge such evidence or otherwise make proposal in support of the prosecution, and the fact that the Magistrate has disregarded the bulk of the evidence given by the appellant, this Court deems the instant application a fit case to exercise appellate jurisdiction of this Court. This Court notes that the High Court judgment dated 31.08.2015 has affirmed the impugned Magistrate's order by relying on the same discrepancy without considering the remainder of the facts and points of law. Hence, this Court finds both orders are warranting an intervention of this Court. Accordingly, this Court sets aside the judgment of the High Court of Kuliyaipitiya in Case No. 46/2012 delivered on 31.08.2015 which affirmed in revision and the order of confiscation under the Forest Ordinance delivered on 29.03.12 by the learned Magistrate of Kuliyaipitiya.

The appellant has further submitted that the Magistrate has failed to frame a charge in accordance with Section 182(1) of the Code of Criminal Procedure as the charge sheet is not signed by the Magistrate, and the accused was erroneously charged under Section 13(1) of the Code of Criminal Procedure as there is no nexus between the offence committed

by the accused. While noting the said irregularities, this Court will not examine the said asymmetries at this juncture, as it has already decided the case on its merits.

This Court sets aside the order of confiscation delivered by the Magistrate Court of Kuliyaipitiya in Case No. 46/2012 dated 29.03.2012 and the judgment affirming the same delivered by the learned High Court Judge of Kuliyaipitiya in Case No. 46/2012 dated 31.08.2015. The Magistrate Court is ordered to release the vehicle bearing No. NW JC 9439 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