

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

*In the matter of an Appeal under Part VII
of the Criminal Procedure Code (No. 15 of
1979) read with Section 331 of Chapter
XXVII of the Criminal Procedure Code.*

Officer-in-Charge,
Police Station,
Kamburupitiya.

Complainant

Vs.

Court of Appeal Application
No: **CA-PHC- 09/2021**

Wisenthige Nilantha

Accused

High Court of Matara
Case No: **HCRA-164/2018**

Vidanage Nalaka Sandun Kumara

Registered Owner

And between

Magistrate's Court of
Matara
Case No: **31142**

Vidanage Nalaka Sandun Kumara

Registered Owner- Petitioner

Vs.

Officer-in-Charge,
Police Station,
Kamburupitiya.

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

Complainant-Respondents

Vidanage Nalaka Sandun Kumara
**Registered Owner- Petitioner-
Appellant**

Vs.

Officer-in-Charge,
Police Station,
Kamburupitiya.

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

**Complainant-Respondents-
Respondents**

Before : Menaka Wijesundera J.
Neil Iddawala J.

Counsel : Dinesh de Silva for the Petitioner-
Appellant.
Ridma Kuruwita, SC for the
Respondents.

Written Submissions : 28.07.2022 by the Appellant
01.09.2022 by the Respondents

Decided on : 04.10.2022

Iddawala – J

This is an appeal filed against the order of the Provincial High Court of Southern Province holden in Matara dated 04.03.2021 which affirmed the Matara Magistrate's Courts order to confiscate the appellant's vehicle under the Forest Ordinance, No. 16 of 1907 (as amended) dated 18.09.2018. 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. 227-6258 (hereinafter the vehicle).

On 20.04.2015, the vehicle was taken into custody for violation of the Forest Ordinance by transporting timber without a licence. The accused pleaded guilty, and a fine was imposed. An inquiry was commenced on 07.06.2016 to show cause as to why the vehicle should not be confiscated. At the inquiry the petitioner who is the registered owner of the vehicle, appeared as the claimant. After the conclusion of submissions, the learned Magistrate held that the appellant had failed to take all precautions to prevent the commission of the offence, and ordered the vehicle to be confiscated under Section 40 of the Forest Ordinance.

Aggrieved by the said decision, the petitioner filed a revision application in the High Court, which affirmed the order of the learned Magistrate and dismissed the application. The appellant now seeks the setting aside of these impugned Orders. Both parties have agreed to proceed in the instant case by way of tendering only written submissions.

For ease of reference, Section 40(1) of the Forest Ordinance (as amended) which provides for confiscation of vehicles connected with a forest offence, is quoted below:

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/she, having ownership of the vehicle concerned, had taken all precautions to prevent the use of such vehicle for the commission of the offence. 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 petitioner has failed to dispense the said burden.

The learned Magistrate, in delivering the impugned order, has firstly examined whether the petitioner has sufficiently established ownership to the vehicle, which is followed by an evaluation of the submissions made by the petitioner in relation to the precautionary steps taken by him. Even if the Amendment No. 65 of 2009 has not been mentioned by name, the requirement in the proviso to Section 40(1) of the owner of the vehicle having to take all necessary precautions to prevent the commission of an offence, has been adequately discussed by the learned Magistrate and thereafter by the learned High Court Judge.

The learned Magistrate has also referred to certain omissions and contradictions in the evidence tendered by the petitioner to hold that the petitioner has failed to satisfactorily dispense the burden cast on him under the proviso to Section 40(1).

Both the learned Magistrate and the learned High Court Judge have identified that comprehensive instructions have been given and steps have been taken by the petitioner, by his own admission, only to prevent the usual driver of the vehicle, one Gangodage Lal from using the vehicle to undertake any unauthorized and illegal activities. No such instructions were given, nor steps taken when the petitioner left a property which he so meticulously attended to, with his friend Nilantha. The petitioner has only asked the accused Nilantha, to inform him if the driver requests the vehicle in his absence, and has never instructed the accused not to use it for any adverse purpose. And no credible reason has been alluded to by the petitioner as to the necessity of leaving the vehicle along with the key with the accused, as opposed to with the usual driver or at the owner's home. The petitioner only pleads his ignorance of such use of his vehicle by the accused. However, this does not suffice to satisfy the Court of the high standard of care expected from an owner that all precautions have been taken to avert the very incident that has transpired.

Further contradictions are evident when perusing the evidence tendered by the petitioner at the Magistrate's Court. At the examination-in-chief, the petitioner has denied that he usually hands over the vehicle to the accused when the petitioner is away, and has denied that the accused has ever driven the vehicle before (page 104 of the Appeal Brief). However, at the re-examination, the petitioner has contradicted himself by stating that he usually leaves the vehicle in the care of the accused (page 114 of the Appeal Brief). The petitioner has not presented additional evidence to corroborate his stance. This raises a question as to the bona fides of the petitioner and tilts the scale of balance of probability in detriment to the petitioner.

As per the precedent set by the vast body of case law, the crux of the matter in such cases revolves upon whether or not the owner of a vehicle successfully satisfies the Court that he/she has taken all necessary precautions to prevent the misuse of their vehicle on a balance of probability favourable to them.

As held by the Supreme Court in ***The Finance Company PLC v. Agampodi Mahapedige Priyantha Chandana and others*** (2010) 2 Sri L.R. 220, "...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.” (Emphasis added)

The then Chief Justice Priyasath Dep, PC. in ***Orient Financial Services Corporation Ltd. v. Range Forest Officer, Ampara and Another***, SC Appeal No. 120/2011 (SC Minutes 10.12.2013), opined that, “*the registered owner ... who has the control over the vehicle is required to satisfy court that he had taken precautions to prevent the commission of the offences and that the offence was committed without his knowledge.*”

Therefore, it is apparent that in the present case, even if the petitioner was unaware/had no knowledge of the use of his vehicle to commit and offence, he should also be successful in establishing on a balance of probability, that he has taken all possible precautions to prevent the commission of an offence. For instance, like entering into a verbal or a written agreement with the accused as to not utilizing the vehicle for committing any offence. But as such evidence of instructions given or steps taken by the petitioner to prevent the accused from using the vehicle for transporting timber has not been established on a balance of probability, this Court finds no reason to interfere with the judgment of the learned High Court Judge in affirming the Order of the Magistrate’s Court.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL