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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act no.15 of 1979 and in terms of Section 11 of the High Court of the Provinces (Special Provisions) Act no.19 of 1990.

Officer-in-charge,
Police Station,
Kiribathgoda

Complainant

Vs.

Court of Appeal Application
No: **CA -PHC- 120/2018**

High Court of Negombo
No: **HCRA/442/2011**

Magistrate's Court of
Wattala
No :**62077/2011**

1. Edirisinghe Arachchige Sriyanthi Jayani
   291, Enderamulla, Wattala.

2. Kaluthota Financial Services Limited,
   49, Hudson Road, Colombo 03.

Applicants

AND BETWEEN

Kaluthota Financial Services Limited,
49, Hudson Road, Colombo 03.

2nd Applicant-Petitioner

Vs.

Officer-in-Charge,
Police Station,
Kiribathgoda.

Complainant-Respondent

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

Respondent

Edirisinghe Arachchige Sriyanthi Jayani,
291, Enderamulla, Wattala.

1st Applicant- Respondent

AND NOW BETWEEN

Edirisinghe Arachchige Sriyanthi Jayani
291, Enderamulla, Wattala.

1st Applicant-Respondent-Appellant

Vs.

Kaluthota Financial Services Limited,
49, Hudson Road, Colombo 03.

2nd Applicant-Petitioner-Respondent

Vs.

Officer-in-charge,
Police Station,
Kiribathgoda.

Complainant -Respondent-Respondent

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

Respondent-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Wenuka Cooray for the 1st Applicant-Respondent- Appellant Panchali Witharana, State Counsel for the State.
Argued on	:	08.09.2022
Written Submissions on	:	05.09.2022 by Respondents
Decided on	:	31.10.2022

Iddawala – J

This is an appeal filed by the 1st applicant-respondent-appellant (hereinafter the appellant). The appellant impugns the order dated 29.06.2018, delivered by the Provincial High Court of the Western Province holden in Negombo, which acted in revision and affirmed the vehicle confiscation order dated 25.11.2011, delivered by the learned Magistrate of Wattala under the ambit of Section 40 of the Forest Ordinance. The appellant has preferred this instant appeal to this Court in order to set aside both the orders dated 29.06.2018, delivered by the High Court and the order dated 25.11.2011, delivered by the Magistrate Court and thereby to disallow the confiscation of the vehicle bearing the registration number WPLE 5652.

The facts of the case are briefly as follows. The Magistrate Court of Wattala framed charges against the accused for committing an offence under Section 40, read with Sections 24 and 25 of the Forest Ordinance, as amended by, inter alia, Act no.65 of 2009 (hereinafter Act), where the accused has illegally transported sawn timber worth of Rs. 43, 905.55, by employing the said vehicle in question. The accused pleaded guilty for the said charge on 25.03.2011, upon which the accused was convicted for the said offence by the learned Magistrate. The conviction of the accused ensued an inquiry by the learned Magistrate, to show cause as to why the vehicle in question should not be confiscated, pursuant to which the appellant or the registered owner of the vehicle and the 2nd Applicant-Petitioner-Respondent (hereinafter Respondent) or the absolute owner of the vehicle, submitted evidence before the Magistrate Court.

In concluding the evidence submitted, the learned Magistrate ordered the vehicle to be confiscated for want of precautionary measures on the part of the owner of the vehicle as per the law set out in the Act.

Aggrieved by the said decision, the appellant filed a revision application in the High Court of Negombo, which reaffirmed the order of the learned Magistrate. Hence the appellant has preferred the instant appeal to the Court of Appeal to set aside the order dated 25.11.2011, delivered by the Magistrate Court and the order dated 29.06.2018 delivered by the High Court.

Prior to the perusal of the merits of this application, the law relevant to this application can be set out in the following manner.

Section 40 of the Act stipulates that where any person is convicted of a forest offence, the tools or the vehicle used in committing such an offence shall be confiscated by an order of the convicting Magistrate. However, the proviso to the section provides that, if the owner of such vehicle is a third party, no order of confiscation of the vehicle shall be made "if such owner proves to the satisfaction of the court that" he has taken precautionary measures to prevent the commission of such an offence.

Therefore, as per the law set out in the Act, it is apparent that the onus falls on the owner of a vehicle to prove on a balance of probability, that s/he has taken sufficient precautionary measures to prevent the use of his vehicle to commit such an offence. It is an indispensable burden cast on the owner of a vehicle to prove that s/he has acted responsibly with regards to the use of his vehicle, where he has taken necessary precautions to prevent the commission of such an offence.

Hence, this Court primarily looks in to the contention of whether the learned Magistrate has correctly applied the legal provisions and evaluated the evidence presented before the court in arriving at the final determination that the appellant has failed to dispense the said burden to the satisfaction of the court.

The evidence presented before the court, revealed that the owner of the vehicle has not wielded proper authority over the use of the vehicle for the key of the vehicle has been in the possession of the mother of the appellant

at the time the accused took the vehicle out on the said excursion (212 of the Appeal Brief). This shows that the appellant has not been in proper control of her vehicle and that her lackadaisical attitude towards the use of her vehicle allowed the vehicle to be used by any person, even without the express consent of the vehicle owner. Therefore, it is the view of this Court that the appellant has not properly discharged the burden cast on her to prove to the satisfaction of the court that she has taken necessary precautionary measures to prevent the commission of such an offence.

As held in **S. D. N. Premasiri v Officer In Charge, Mawathagama** C A (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"*.

However, in the instant application, the appellant has not taken any such precautionary measures to ensure the proper employment of the vehicle without being subjected to the commission of such offences.

Furthermore, as revealed by the journal entry dated 18.11.2011 of the order dated 25.11.2011 delivered by the Magistrate Court, the absolute owner of the vehicle at the time of the inquiry was not the Kaluthota Financial Services Limited, the respondent of the instant application, it was the Mercantile Investment Company who was the absolute owner, and they did not claim ownership over the vehicle. Therefore, the evidence submitted by the respondent in this application is immaterial as they are not the absolute owner of the vehicle at the time of the inquiry.

As per the law set out in Section 40 of the Act, the owner of a vehicle must prove on a balance of probability that he has taken necessary precautionary measures to prevent an offence and thus, merely giving instructions or the lack of knowledge of the diversion of the vehicle does not suffice to prove to the satisfaction of the court that he has taken precautionary measures to prevent such an offence.

Therefore, due to the failure of the appellant to prove on a balance of probability, the prevalence of precautionary measures, to the satisfaction of the Court, thereby failing to dispense the burden cast on the owner of a vehicle, this Court is of the view that there is no irregularity or illegality in the order delivered by the learned Magistrate and the learned High Court judge has correctly dismissed the revision application. Accordingly, we see no reason to interfere with the order of the learned High Court Judge dated 29.06.2018 and the confiscation order of the learned Magistrate dated 25.11.2011.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL