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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

W.H.M. Wijithasiri Bandara,
Beat Forest Officer,
Monaragala

Complainant

Vs.

Court of Appeal Application
No: **CA -PHC- 174/2018**

Uva Provincial High Court
(Monaragala) Case
No: **Rev- 53/2017**

Magistrate's Court Monaragala
Case No: **82117**

C.M. Niruth Ishan,
Siripura Yaya,
Silbara Road, Kumbukkana.

Accused

Meddegodage Anura Priyantha,
37, Andaramandiya,
Kumbukkana

Claimant- Petitioner

AND NOW BETWEEN

Meddegodage Anura Priyantha,
37, Andaramandiya,
Kumbukkana

Claimant- Petitioner – Appellant

Vs.

1. W.H.M. Wijithasiri Bandara,
Beat Forest Officer,
Monaragala

Complainant- Respondent

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

Respondent –Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Vijaya Niranjan Perera PC with Oshadee Perera instructed by J. P. Perera for the Appellant
Argued on	:	11.10.2022
Decided on	:	29.11.2022

Iddawala – J

This is an appeal filed on 19.07.2018 against the judgment of the learned High Court Judge of Uva Provincial High Court holden in Monaragala in Case No. RA 53/2017 delivered on 10.07.2018 which affirmed in revision, an order of confiscation of vehicle under the Forest Ordinance delivered on 23.10.2017 by the learned Magistrate

of Monaragala in case No. 82117. The petitioner has invoked the appellate jurisdiction of this Court to set aside both orders and thereby to release the confiscated Tractor bearing registration No. SP (RA) 3601. In the petition the Appellant has only prayed for the release of the tractor, thus this Court would not examine the validity of the confiscation of the trailer.

On 24.05.2017, the tractor bearing registration No. SP RA 3601 (*hereinafter the vehicle*) and the trailer bearing No. UPRV 3102 were taken into custody for entering a conserved forest and removing and transporting sand in violation of the Forest Ordinance No. 16 of 1907. The accused persons who were one Nishantha who drove the vehicle at the time and others, pleaded guilty, and a fine was imposed. A vehicle inquiry was held under the Section 40 of Forest Ordinance as amended in which the Registered Owner of the Tractor (*hereinafter referred to as appellant*) gave evidence and was cross-examined by the prosecution. The registered owner of the Trailer was one Thilakaratne who had given the trailer to the appellant for a monthly payment. After the conclusion of submissions, on 23.10.2017 the learned Magistrate ordered both the tractor and the trailer to be confiscated. Aggrieved by the said decision, the petitioner filed a 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)

The Amendment of 2009 has cast a burden on a claimant of a vehicle inquiry under the Forest Ordinance, on a balance of probability, 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. 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 purchased in 2011 and used to transport construction material on hire. He had hired the driver one Samantha three months prior to the incident. Appellant further contented that Samantha was known to him from his own area, a frequent visitor to his house and the

driver's license of Samantha was checked by him. He contended that he had instructed not to engage in illegal activities using the vehicle and to return it at the end of the day, furthermore at times when time permits appellant visits the vehicle during work. He states that on the day in question, he had given the vehicle for transportation of bricks, and when he checked about it, he had been informed two loads had been completed. In the afternoon on or about 2.00 pm Samantha had informed the appellant that vehicle was taken into custody for transportation of sand and that he had given the vehicle to the accused as Samantha had got a toothache and visited a dentist.

When perusing the evidence given by the appellant in the cross-examination, it is noted that the appellant has not always been aware of the hires of the vehicle.

ප්‍ර: ඕකෙ කුළී කතා කරන්නෙ කවුද?

<u>උ: සමන්තත් කතා කරනවා.</u>

ප්‍ර: තමනුත් කතා කරන අවස්ථා තියෙනවද?

උ: ඔව්, මට ගෙදරටම එහෙම ඇවිත් කිව්වම මම සමන්තට කියනවා.

ප්‍ර: සමන්ත කතා කළාම කොහොමද මුදල් ලැබෙන්නෙ?

උ: එයාට කොමිස් එක දෙනවා.

ප්‍ර: තමුන්ට සමන්ත කොයි වෙලාවෙද මේ හයර් ගියා කියන්නෙ?

<u>උ: සවසට ගෙනත් දානකොට කියනවා. හයර් යනකොට කියනවා.</u>

ප්‍ර: හයර් භාර ගන්නකොට අහන්නැද්ද මෙහෙ යන්නද කියලා?

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ප්‍ර: එහෙම අහන් නැතිව වාහනය යොදවන අවස්ථා තියෙනවද?

උ: අරන් යනකොට මට කෝල් කරල කියනවා.

(pp. 15-16)

Therefore, it is revealed that there has been a practice of the driver not informing the appellant and the appellant not asking the driver about all the hires of the vehicle. 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".*

Thus, the law demands an active role on the part of the third party claiming the vehicle confiscated for a forest offense, surpassing mere verbal instructions. However as decided in **Dewapurage Kamal Deshapriya v Officer in Charge, Police Station of Pannala CA/PHC/139/2015** by this same bench, *"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."

This Court neither expects the owner to be in touch with the driver back and forth every minute getting updated on miniscule details nor the owner to be oblivious of important information such as who has the control of his vehicle at a given point. In consideration of the precautions taken by the appellant in the case at hand, this Court is not satisfied that he has taken all possible measures to prevent the offence. As aforementioned, there has been a practice of the appellant not been informed of all the hires, been aware of some of them at the end of the day once such hires were completed and the driver seeking prior permission of the appellant at some instances for the hires he took up. While the Court acknowledges there might have been an emergency on the part of the driver on the day of the incident, this practice seems to have contributed in driver not informing the appellant when handing over the control of the vehicle to another.

Furthermore, the learned Magistrate has relied on the fact that the appellant signed as surety for two of the accused when they were released on bail. The appellant submitted to this Court that he signed as no one else was there known to them to sign and as they were from the same village, whereas in the cross-examination the appellant has stated he did not know the other persons accused than one Nishantha. While this Court notes a contradiction in stating not knowing the accused persons and then claiming they were from same village, the lack of precautions taken by the appellant in preventing the forest offense is adequate to affirm the confiscation. Although the appellant has submitted that these

actions occurred after the commission of the offense and do not fall under precautions, such contradictions during the vehicle inquiry depicts the insincerity of the claimant which can very well be taken into consideration when confiscating the vehicle.

As this Court is not satisfied on a balance of probability that the appellant has taken all precautions to prevent the commission of the forest offense, it does not see any reason to intervene with the confiscation order of the learned Magistrate in Case No. 82117 and the judgment affirming the same delivered by the learned High Court Judge of Uva Provincial High Court holden in Monaragala in Case No. RA 53/2017.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL