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

In the matter of an Appeal under the Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge
Police Station
Panadura North

Complainant

Vs.

Court of Appeal Application
No: **CA/PHC/211/2019**

Provincial High Court of
Panadura
No: **REV/4/2019**

Magistrate court of
Panadura
No;**54046**

Muthuthanthrige Priyantha Srimal Corey
No. 90/3, Sri Chandrasekara Road,
Horethuduwa

Accused

AND IN BETWEEN

Adambarage Kelum Thushantha Alwis,
No. 90/2, Sri Chandrasekara Road,
Horethuduwa, Keselwatta.

Petitioner

Vs.

1. Officer in Charge
   Police Station
   Panadura North

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

Colombo 12.

Respondents

Muthuthanthrige Priyantha Srimal Corey
No. 90/3, Sri Chandrasekara Road,
Horethuduwa

Accused- Respondent

AND NOW IN BETWEEN

Adambarage Kelum Thushantha Alwis,
No. 90/2, Sri Chandrasekara Road,
Horethuduwa, Keselwatta.

Petitioner-Appellant

Vs.

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

2. Officer in Charge
   Police Station
   Panadura North

Complainant-Respondent-Respondents

Muthuthanthrige Priyantha Srimal Corey
No. 90/3, Sri Chandrasekara Road,
Horethuduwa

Accused-Respondent- Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Pradeep Perera with Dilmi Pieris for the Appellant. Diana Rodrigo for the Accused Respondent Respondent Nishantha Nagaratnam, SC for the Hon. Attorney General.
Argued on	:	06.12.2022
Decided on	:	07.02.2023

Iddawala – J

This is an appeal against the Order dated 05.11.2019, delivered by the Provincial High Court of the Western Province holden in Panadura which acted in revision and affirmed the vehicle confiscation order dated 05.02.2019, delivered by the Panadura Magistrate Court under the provisions of the Forest Ordinance. The Petitioner has preferred this appeal to this Court in order to have both the orders set aside, and thereby disallow the confiscation of the vehicle bearing registration no. 48 - 4853 (hereinafter the vehicle).

The following are the facts of the case. The accused was charged in the Magistrate Court of Panadura for the offence of transporting an amount of 58 jack fruit logs in the said vehicle without a valid permit, thereby contravening Sections 40 (4) read with Section 25(1) and Section 25 (2) of the Forest Ordinance as amended by laws, inter alia, Act no.65 of 2009 (hereinafter the Act). The accused pleaded guilty to the charge and the Magistrate convicted the accused on 05.09.2018, upon which the accused was imposed a fine with a default imprisonment sentence. The conviction of the accused ensued the confiscation of the vehicle in relation to the offence which was released temporarily to its registered owner, the claimant- petitioner- appellant (hereinafter the appellant), on a bond of 2,000,000/. After an inquiry into the matters of the appellant's knowledge of the said diversion of the vehicle in relation to the case and whether the appellant has taken sufficient precautionary measures to prevent such an offence, the Magistrate set out the order dated 05.02.2019 to confiscate the vehicle.

Aggrieved by the said Order dated 05.02.2019, the appellant filed for revision in the High Court of Panadura, and the revision application was refused by the learned High Court Judge for want of necessary precautions on the part of the appellant to prevent the commission of the offence under the Forest Ordinance. Hence, the appellant has preferred the instant appeal to the Court of Appeal, seeking to set aside the order dated 05.02.2019 of the Magistrate Court and the order dated 05.11.2019 of the High Court.

Before diving into an analysis of the merits, it is apt to quote the relevant law in this instant application. Thus, Section 40 of the Act is quoted 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 on Forest Law has unequivocally casted a burden on the third party of an offence within the ambit of Section 40 to dispense the burden of proving to the satisfaction of the court that he, as the registered owner of the vehicle in dispute, has taken necessary precautionary measures to prevent the vehicle from being employed in acts of crime. Therefore, the court primarily looks into the contention of whether the learned Magistrate has correctly evaluated the evidence presented before the Court in arriving at the final determination that the appellant has failed to dispense the said burden.

The Magistrate Court, followed by the High Court decided against the appellant for want of satisfactory show of cause as to why the vehicle should be released to the appellant. The learned Magistrate, in delivering the impugned order, has firstly examined whether the appellant has

sufficiently established the ownership to the vehicle and after affirming such evaluation, the learned Magistrate has evaluated the submissions presented by the appellant, during which, certain discrepancies in the presented evidence were noted to hold that the appellant has failed to constitute, on a balance of probability, the burden of proving to the satisfaction of the court, that the appellant has unequivocally dispensed the burden casted on him by the Forest Ordinance.

It was the contention of the appellant that, he has taken necessary precautions to preclude the vehicle from being employed in illegal activities. In furtherance, he has stated before the learned Magistrate that he has given specific instructions to not to engage the vehicle beyond Moratuwa town and that he was constantly updated about the whereabouts of the vehicle. However, it was the determination of the learned Magistrate that as there were no evidence to corroborate the said evidence, a mere statement with regards to giving instructions to the accused does not satisfy the burden casted on the appellant to prove, on a balance of probability that he has taken the necessary precautions to prevent the commission of an offence. At this juncture, it is apt to quote the observations made in **Samarasinghege Dharmasena v W. P. Wanigasinghe** CA(PHC) 197/2013 CA Minute dated 22.01.2019**,** where it's stipulated 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"*.

In the matter at hand, the appellant contends that he has given instructions to the accused to abstain from using the vehicle for illegal activities. Albeit there is no evidence to corroborate the evidence provided by the appellant. The mere statement without any corroboration of the

evidence by the appellant that he has given instructions and inquired about the whereabouts of the vehicle does not satisfy the court of the appellant's position. Therefore, in the absence of any such reasonable steps taken to ensure the prevention of the involvement of the vehicle in illegal activities, the learned High Court Judge has observed that there were no exceptional circumstances to shock the conscious of the court and there was no illegality in the order of the learned Magistrate to invoke the revisionary jurisdiction of the High Court.

However, it is more appropriate to note that corroboration of evidence is not imperative where there is irrefutable evidence at face value provided by the appellant to satisfy the court on a balance of probability that necessary precautionary measures have been taken as a reasonable owner of the vehicle to prevent the commission of offences by using the vehicle.

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"*. It is observed by this Court that, in this instant application, the appellant has proved neither.

Moreover, this Court is of the observation that there are discrepancies in the evidence provided by the appellant during the inquiry with regards to having knowledge of the whereabouts of the vehicle. It was revealed before the Magistrate Court that the taking to custody of the vehicle took place on 10.05.2018, however the appellant was informed on the 25.05.2018 that the was vehicle was taken into custody and thus duly produced before the court after 15 days of such custody of the vehicle. Therefore, it is evident that the appellant's averment that he knew of the whereabouts of the vehicle on a daily basis is refutable as he was not aware of the taking

the vehicle to the custody of for fifteen days. This is a testament to his lackadaisical attitude towards his vehicle as the registered owner of the vehicle, and thus this Court is of the observation, that there are no precautionary measures taken to prevent the vehicle from being used in illegal activities and the appellant has failed to duly dispense the burden cast on him by Section 40 of the Act.

Therefore, in the absence of evidence stating otherwise, it is considered the view of this Court, since the appellant has failed to dispense the burden cast on him, that the learned Magistrate has duly concluded the matter at hand and the High Court has correctly dismissed the revision application. Accordingly, we see no reason to interfere with the order of the learned High Court Judge dated 05.11.2019 and the confiscation order of the learned Magistrate dated 05.02.2019. Therefore, this Court affirms the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL