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

In the matter of an Appeal under and in terms of Article 154P (6) of the Constitution read with Article 138 of the Constitution and Section 2 of the Coronavirus Disease 2019 (Temporary Provisions) Act No. 17 of 2021.

Court of Appeal Case No.
CA (PHC) 27/2021

High Court Ampara
HC/AMP/REV/513/2020

Magistrate Court Dehiaththakandiya
21175

Forest Range Officer,
Forest Range Office,
Mahaoya.

COMPLAINANT

Vs.

1. Attanayake Mudiyanselage Anil Gamini,
51st Post, Kehel-ulla,
Padiyathalawa.

2. Tikiriwanni Unnehelage Mahesh Lakshitha Dhanapala,
No. 327, Upper Street,
Padiyathalawa.

3. A. M. Chaminda Attanayake,

51st Post, Kehel-ulla,

Padiyathalawa.

ACCUSED

AND BETWEEN

Tikiriwanni Unnehelage Dhanapala,

No. 327, Upper Street,

Padiyathalawa.

APPLICANT-PETITIONER

Vs.

1. Forest Range Officer,

Forest Range Office,

Mahaoya.

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS

AND NOW BETWEEN

Tikiriwanni Unnehelage Dhanapala,

No. 327, Upper Street,

Padiyathalawa.

APPLICANT-PETITIONER-APPELLANT

Vs.

1. Forest Range Officer,

Forest Range Office,

Mahaoya.

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS-RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Chamara Nanayakkarawasam for the appellant

: Chathurangi Mahawaduge, S.C. for the respondents

Argued on : 07-07-2023

Written Submissions : 22-02-2023 (By the Respondent)

: 12-09-2022 (By the Appellant)

Decided on : 27-09-2023

Sampath B. Abayakoon, J.

This is an appeal preferred by the applicant-petitioner-appellant (hereinafter referred to as the appellant) seeking to challenge the order dated 13-07-2021 pronounced by the learned High Court Judge of the Provincial High Court of the Eastern Province Holden in Ampara in Case No. HC/AMP/REV/513/2020.

By the impugned order, the learned High Court Judge affirmed the order dated 23-01-2020 made by the learned Magistrate of Dehiaththakandiya in Magistrate's Court of Dehiaththakandiya Case No. 21175, where the vehicle owned by the appellant was confiscated.

The facts relevant to the order made by the learned Magistrate can be summarized in the following manner.

Three accused persons were charged before the learned Magistrate of Dehiaththakandiya by the Range Forest Officer of Mahaoya for transporting 5 logs of Kumbuk timber valued at Rs. 59372/= in the vehicle number bearing EP DAB-1081, which is a TATA Super Ace Model lorry, and thereby committing an offence in terms of the Forest Ordinance as amended.

When the accused were charged before the Magistrate's Court, they have pleaded guilty to the charge and had been sentenced. Thereafter, the learned Magistrate of Dehiaththakandiya has called upon the registered owner of the vehicle who is the appellant in this matter to show cause as to why the said vehicle should not be forfeited to the State in terms of section 40(1) of the Forest Ordinance as amended by Forest (Amendment) Act No 65 of 2009.

At the inquiry held in that regard, the appellant has given evidence and has admitted that the driver of the vehicle was his own son. He has stated that he is a retired teacher and he purchased this lorry in the year 2015 and was well aware that the vehicle cannot be used for illegal purposes.

It had been his evidence that he engaged his own son who is living with him in his house as the driver of the vehicle and he gave clear instructions to him not to use the vehicle for any illegal purposes and trusted him in that regard.

According to him, the vehicle was used for hiring purposes and the son used to take the vehicle to the town and engage in hiring the vehicle. He has stated that on some days, the son would take his vehicle to Colombo and bring fruits and King Coconut to be sold in the market and on such days, he used to come home on the following day. He has claimed that he was in the habit of communicating with his son over the phone while the vehicle was away and inquire about the work the son is doing.

On 15-02-2018, his son has not returned home for the day, and his attempts to contact him over the phone has failed. On the following day, he has gone to the place where his son parks his vehicle for hiring purposes, and upon inquiry, he has been informed by another driver that he saw his vehicle at the Padiyathalawa police station. When he went there, he has been informed by the police that his son and two other persons were taken to the Magistrate's Court of Dehiaththakandiya. It had been his position that since he was not in good health, he could not go to the Court on that day. His son has returned from the Court in the night, and when inquired from his son why he did such a thing despite his instructions, he has not answered.

Subsequently, the vehicle had been returned to the appellant on a bond and he has maintained the position at the inquiry that he has given due instructions to his son not to engage in illegal activities and he was unaware of the actions by his son on that day. On that basis, he has pleaded with the Court to release the vehicle.

Under cross-examination, he has stated that his son had no previous convictions and had maintained the position that he used to give regular instructions to his son not to engage in illegal activities.

It needs to be noted that other than that, the evidence of the appellant had not been challenged by the prosecution on material points.

After the conclusion of the inquiry, the learned Magistrate by her order dated 23-01-2020 had determined that the appellant in his evidence has failed to adequately explain how this offence was committed by his son and two others and had determined that although he was the registered owner of the vehicle, he had no knowledge of the offence.

For matters of clarity, I will now reproduce the relevant portion of the order which is at page 4 (page 125 of the appeal brief) of the said order.

> "ලියාපදිංචි අයිතිකරු වන පියාගේ සාක්ෂි අනුව ඔහු විසින් නිසි ආකාරයෙන් උපදෙස් ලබා දෙන බවත් සඳහන් කර ඇත. චෝදනා පත්‍රයට අනුව මෙම වරද සිදුව ඇත්තේ රාත්‍රී කාලයේ වන අතර ඊට අදාලව චුදිතයන් තුන්දෙනෙක් අධිකරණයට ඉදිරිපත් කිරීමක් සිදු කර ඇත. පුතා විසින් රැගෙන ගිය වාහනය මේ ආකාරයෙන් තවත් දෙදෙනෙක් චුදිතයන් කරමින් මෙම වරද සිදුවී ඇත්තේ කෙසේද යන්න ලියාපදිංචි අයිතිකරු විසින් සාධාරණ පැහැදිලි කිරීමක් සිදු නොකරයි. එයින් පෙනී යන්නේ ඔහු ලියාපදිංචි අයිතිකරු වුවද මෙම වරද සිදුවූ ආකාරය සම්බන්දයෙන් හෝ ඔහුට සාධාරණ දැනුමක් නොමැති බවයි."

The learned Magistrate has considered that a registered owner cannot always travel in a vehicle in practical terms, but the appellant has failed to establish before the Court the steps he took to prevent the vehicle being used for an offence of this nature. It has also been concluded that the appellant has only given instructions to his son to use the vehicle carefully and nothing else. Accordingly, it has been determined that the registered owner has failed to satisfy the Court that he has taken all precautions to prevent the offence being committed and therefore the vehicle should stand confiscated to the State.

When this matter was considered before the learned High Court Judge of the Provincial High Court of the Eastern Province Holden in Ampara, it is clear from the order pronounced on 13-07-2021, that the learned High Court Judge has considered the appellant's stand in relation to the incident and the objections raised by the respondents to consider whether there are reasons to interfere into

the order pronounced by the learned Magistrate of Dehiaththakandiya under exceptional circumstances.

The learned High Court Judge has considered the relevant provisions in the Forest Ordinance, which attracts a confiscation of a vehicle that transports prohibited timber without a permit.

The learned High Court Judge has also considered the judgement pronounced on 12-06-2020 by this Court in the Case No. CA/PHC/API/112/2018 and had determined that before confiscating a vehicle for an office of this nature, the knowledge in that regard should be with the registered owner and if a registered owner kept quite knowing very well about an offence being committed, such an act can be interpreted as the registered owner having the knowledge in that regard.

It has been correctly determined that in an inquiry of this nature, the facts and the circumstances unique to each matter should be considered. It has been determined that the driver of the vehicle had been the appellant's own son and he and the driver lived in the same house where the vehicle was kept parked for the night.

The paragraph 12 of the order of the learned High Court Judge reads as follows;

> "12. මෙම නඩුවේ වාහනයේ ඉල්ලුම්කරු රියැදුරු බලපත්‍රයක් නොමැති ලොරි රථයක ගමන් කල නොහැකි අන්දමින් අසනීප තත්වයෙන් පෙලෙන විශ්‍රාමික ගුරුවරයෙකි. මෙවැනි තත්වයක් යටතේ ඔහුට කිසිදු අවස්ථාවකදී වාහනය සැබවින්ම නීත්‍යානුකූල කාර්යයන් සඳහා යොදාගන්න බවට පුද්ගලිකව තහවුරු කරගැනීමක් කල නොහැකි බව පැහැදිලිය. එනමුත් එනයින්ම ඔහු මෙවැනි වාහනයක් තම නමින් ලියාපදිංචි කර යම් පුද්ගලයෙකුට කුලී පදනම මත රියැදුරෙකු ලෙස ලබා දී මුදලක් උපයාගැනීමට නොහැකි අයෙක් බවට නිගමනය කල නොහැක. එසේ නිගමනය කළහොත් ඔහුට යම් පුද්ගලයෙකුට නීත්‍යානුකූල රැකියාවක නිරත වීමට ආණ්ඩුක්‍රම ව්‍යවස්ථාවෙන් ලබා දී ඇති අයිතියද උල්ලංගනය කිරීමක් වනු ඇත."

Although I am unable to see the relevancy of the above comment in relation to the inquiry held in this matter, it appears that the learned High Court Judge has

recognized that the appellant is a retired teacher who is suffering from ailments and he has a right to engage his vehicle for the purposes of earning a living.

In paragraph 14 and 15 the learned High Court Judge has commented in the following manner.

> "14. වාහනය සිමෙන්ති ප්‍රවාහනය කලේ නම් සිමෙන්ති කුඩු ගෑවී තිබේද යන්නද වාහනයේ පිරිසිදු කමද ඔහු නිරන්තරයෙන් පරීක්ෂා කරන බවද ඔහු පවසා ඇත. නමුත් මෙවැනි දැව ආදී ප්‍රවාහනය කරන විටදී එවැන්නක් තම නිවසේම නවත්වා තිබෙන වාහනයේ තිබෙන සලකුණු වලින් ඔහුට නොපෙනීයාම ඉතා දුෂ්කර බව සම්භාවිතා පරීක්ෂාව යොදාගැනීමේදී පෙනී යයි.
>
> 15. සියලු කරුණු අනුව මා හට පෙනීයන්නේ එක්කෝ මෙම වාහනය වැලි සඳහා යොදාගැනීම ලියාපදිංචි අයිතිකරු දැනුවත්වම සිටි බව හෝ නැතහොත් සිය පුත්‍රයා මෙම වාහනය නීතිවිරෝධී ක්‍රියාවන්ට යොදාගනු ඇතැයි පවතින අනුමිත දැනුමක් තිබියදී ඒ සම්බන්ධයෙන් වැඩිදුරටත් විමසා නොබලා උදාසීන ප්‍රතිපත්තියක් අනුගමනය කිරීමට තීරණය කර ඇති බවය. එවැනි අවස්ථාවකදී වුවද ඔහුට දැනුමක් තිබූ බවට නිගමනය කල හැකි බවට ඉහත මා සඳහන් කල අලුත්ගෙදර වසන්ත බණ්ඩාර එදිරිව නීතිපති නඩුවේ හරය අනුව පැහැදිලිය."

The learned High Court Judge has determined that there is no basis to conclude that the learned Magistrate of Dehiaththakandiya was wrong in her determination to confiscate the vehicle and had determined that the appellant has failed to establish exceptional circumstances for the Court to set aside the order of the learned Magistrate. The revision application has been dismissed on the said basis.

At the hearing of this appeal, it was the contention of the learned Counsel for the appellant that the learned Magistrate has correctly held that the appellant had no knowledge of the offence committed by his son. It was his position that it was a misdirection to have held that the appellant failed to establish that he took all the precautions to prevent the offence. He submitted that what precautions a registered owner could have taken should be fact sensitive, where there cannot be a strict yardstick in that regard.

Commenting on the order made by the learned High Court Judge, it was the position of the learned Counsel that the learned High Court Judge too had

determined that the appellant had no knowledge of the offence and had determined that confiscation of a vehicle should be decided on facts applicable to each case. However, he pointed out that at paragraph 15 of the order, the learned High Court Judge, may be due to a mistake of facts, has commented that the offence committed was the transporting of sand. It was further stressed that the learned High Court Judge was misdirected when it was determined that he has no basis to interfere with the order made by the learned Magistrate in confiscating the vehicle.

It was the view of the learned State Counsel who represented the respondent-respondent that the evidence by the registered owner was clear that he has only given general instructions to his son informing him that he should not commit illegal acts.

The learned State Counsel justified the reasoning given by the learned Magistrate as well as the learned High Court Judge on the basis that the registered owner has failed to establish before the Court that he has taken all precautions to prevent the offence being committed in terms of the Forest Ordinance and moved for the dismissal of the appeal.

It is clear from the facts adduced before this Court that the son of the appellant was the driver of the vehicle when the detection was made. At the time of the detection, two other persons had accompanied him and the Range Forest Officer who conducted the raid has detected 5 logs of Kumbuk timber inside the lorry for which the accused have pleaded guilty before the Magistrate's Court of Dehiaththakandiya.

As considered before, the learned Magistrate of Dehiaththakandiya has decided to hold an inquiry as provided for in the proviso of section 40 (1) of the Forest Ordinance as amended by Forest (Amendment) Act No. 65 of 2009 which reads thus;

> **Provided that in any case where the owner of such tools, vehicle, 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, vehicle, implements, cattle and machines as the case may be, for the commission of the offence.

It is settled law that the mode of proof in an inquiry of this nature is on the balance of probability. It is also settled law that there is no strict requirement of how many witnesses should be called to establish a fact before a Court of law. Even if only a single witness has given evidence, as in the case under appeal, if it can be determined that such evidence is cogent and trustworthy, a Court can act upon even on a single witnesses' testimony.

When it comes to the matters relevant to this appeal, if it can be determined that the registered owner was unaware of the offence being committed and he has taken due precautions to prevent an offence being committed, that fact needs to be considered in favour of the registered owner of the vehicle who is the appellant in this instance.

There can be no argument that the words used in the proviso of section 40 (1) of the Forest Ordinance as amended is *"if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of ….."*

It is clear from the earlier decisions of our Superior Courts, like in the case of **Mary Matilda Silva Vs. Inspector of Police Habarana (CA PHC 86/97 decided on 08-07-2010)** the view expressed was that the relevant section should be given a strict interpretation and any claimant of a vehicle should prove that all precautions to prevent the use of the vehicle being used in the crime was taken by him.

However, it needs to be noted that what is meant by all precautions stated in the section had not been given an interpretation in the statute itself.

I find that our Superior Courts had lately moved away from the strict interpretation rule in this regard and had thought it fit to interpret the relevant words in relation to the facts applicable to each case considering the said facts independently in relation to each case under consideration before the Court.

In the case of **Sadi Banda Vs. Officer-in-Charge of Norten Bridge Police Station (2014) 1 SLR 33, Malani Gunaratne, J.** clearly deviated from the strict interpretation of the above words with clear reasoning and observed as follows.

> *"I have to admit that nowhere in the said inquiry proceedings there is evidence that the appellant had taken all precautions to prevent the commission of the offence. However, at the inquiry the appellant had given evidence and stated he purchased the lorry on 26-02-2000 and gave it to his son to transport tea leaves. Further stated that he had no knowledge about the transporting of timber. The learned Magistrate in his order has accepted the fact that the appellant did not have any knowledge about the transporting of timber without a permit.*
>
> *Nevertheless, the learned Magistrate had confiscated the lorry. I am of the view before making the order of confiscation the learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and all the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the appellant did not have any knowledge about the transporting of timber without a permit. On these facts, the Court is of the view that the confiscation of the lorry is not justifiable."*

In the instant matter, the learned Magistrate as well as the learned High Court Judge has correctly determined that given the facts and the circumstances of the appellant, who is the registered owner of the vehicle had no knowledge of the offence being committed on that particular day.

It is my considered view that fact needs to be considered together with the other evidence by the appellant at the inquiry to come to a finding whether the appellant has taken due precautions in relation to this vehicle to prevent an offence being committed.

I am of the view that such possible precautions had to be considered in relation to the other facts relevant to each individual case and not on a common basis of taking all possible precautions.

In the matter under consideration, the vehicle involved in this crime is a TATA Super Ace Model lorry commonly known as a Demo Batta lorry, which is not a vehicle that has the capacity to transport timber on a regular basis, as it is a vehicle not made for carrying heavy loads. According to the evidence of the appellant, the vehicle had been used primarily for hiring purposes and to transport fruits and other material like King Coconut and on the days where the vehicle goes out of the town, it used to return on the following day.

The appellant is a retired teacher and a sickly person who has trusted his son who was living with him at his house to follow his instructions. In his evidence, he had admitted that he knew that the vehicle should not be used for any illegal activities and it was his position that he instructed his son in that regard. It is also clear that the appellant has purchased this lorry with the intention of earning some additional money other than his pension.

It is hard to believe under the circumstances that the appellant being the registered owner would encourage his son to engage in illegal activities or had impliedly encouraged his son to do illegal activities or was lethargic in that regard as observed by the learned High Court Judge when his application filed in revision challenging the order of the learned Magistrate of Dehiaththakandiya was dismissed.

I am of the view that there were ample reasons for the learned High Court Judge to allow the application in revision preffered by the appellant under exceptional circumstances as the confiscation of the lorry for the offence committed by the

accused charged before the Magistrate's Court of Dehiaththakandiya cannot be justified.

Accordingly, I set aside the order dated 23-01-2020 by the learned Magistrate of Dehiaththakandiya and the order dated 13-07-2021 by the learned High Court Judge of the Provincial High Court of the Eastern Province Holden in Ampara as both the orders cannot be allowed to stand.

I order the release of the vehicle number EP DAB-1081 to the appellant who is the registered owner of the vehicle.

The Registrar of the Court is directed to communicate this judgement to the Magistrate's Court of Dehiaththakandiya for necessary implementation of this judgement and to the High Court of Ampara for information.

The appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal