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

In the matter of an application for Appeal under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with terms of Article 154 P of the Constitution of Sri Lanka.

Court of Appeal No:

CA (PHC) 171/22

HC Negombo Case No.

HC/REV/05/22

MC Negombo Case No.

L 98197

Officer-in-Charge,

Police station,

Katana.

COMPLAINANT

Vs.

Mutukuda Arachchige Janaka Nishantha Muthukuda

No. 290, Pata Watta State,

Akaragama.

ACCUSED

Jayasooriya Arachchige Dona Mary Josephine Calista

No. 478, Kongodamulla, Katana.

REGISTERED OWNER

AND

Jayasooriya Arachchige Dona Mary

Josephine Calista

No. 478, Kongodamulla,

Katana.

REGISTERED OWNER-PETITIONER

Vs.

1. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

2. Officer-in-Charge,

Police station,

Katana.

COMPLAINANT-RESPONDENT

Mutukuda Arachchige Janaka Nishantha

Muthukuda

No. 290, Pata Watta State,

Akaragama.

ACCUSED-RESPONDENT

AND NOW

Jayasooriya Arachchige Dona Mary

Josephine Calista

No. 478, Kongodamulla,

Katana.

REGISTERED OWNER-PETITIONER-

APPELLANT

Vs.

1. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

2. Officer-in-Charge,

Police station,

Katana.

COMPLAINANT-RESPONDENT-RESPONDENT

Mutukuda Arachchige Janaka Nishantha

Muthukuda

No. 290, Pata Watta State, Akaragama.

ACCUSED-RESPONDENT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Buddhika Jayakody for the Appellant
	: Kanishka Rajakaruna, S.C. for the Respondent
Argued on	: 14-07-2023
Written Submissions	: 02-05-2023 (By the Registered Owner-Petitioner)
Decided on	: 12-10-2023

Sampath B. Abayakoon, J.

This is an appeal preferred by the registered owner-petitioner-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved by the order made by the learned High Court Judge of Negombo on 09-09-2022, wherein the revision application preferred by her invoking the revisionary jurisdiction of the High Court was dismissed.

The appellant is the registered owner of the vehicle number 48-0440, the subject matter of this appeal.

One Nishantha Muthukuda who was the driver of the said vehicle was charged before the Magistrate's Court of Negombo for having committed an offence in terms of the Forest Ordinance by transporting sawn timber for a value of Rs. 86777.55/- on or about 29-05-2019.

When the charge was read over to the accused, the accused had unconditionally pleaded guilty to the charge, although the charge had not specified what type of timber that had been transported to indicate whether it was prohibited to be transported without a valid permit.

Accordingly, the learned Magistrate of Negombo has sentenced the accused and has called upon the registered owner of the vehicle to show cause as to why the vehicle involved should not be confiscated.

The registered owner namely, Jayasooriya Arachchige Dona Mary Josephine Calista has given evidence at the inquiry held in that regard, and has stated that she purchased this lorry about 5 years ago and it was her husband who used the lorry for transportation of cement blocks and other material. It had been her evidence that since her husband fell ill and could not drive the vehicle anymore, she handed over the vehicle to Janaka Nishantha who was the accused in this case with the intention of earning a living out of the vehicle.

She has stated that the said Janaka Nishantha used to give Rs. 25000/- to 30000/- out of the earnings from the vehicle and the vehicle was under his custody for the purposes of hiring. According to her, she used to get an income weekly and the said Nishantha used to bring the vehicle once a week on Saturdays and pay her money from the earnings before taking it back on Sundays.

She has maintained the position that she, her husband and her brothers used to be vigilant about the vehicle and used to instruct the driver how he should utilize the vehicle for hiring purposes. The driver has been using the vehicle for about three years and there had been no complaints that he used the vehicle for illegal purposes, but on the day relevant to this incident, they came to know that the vehicle has been taken into custody while transporting timber.

It had been her position that the vehicle was given to the accused to transport cement blocks and other similar materials, they were unaware of his transporting of timber when this detection was made, and they would not have given the vehicle to the driver if they became aware that he is a person who does illegal things. She had stated that after the incident, the vehicle was taken over by them and was not given to the accused thereafter.

Under cross-examination, she has stated that it is her husband who use the vehicle now, but not on a regular basis. Explaining the reason for the vehicle to be given to the accused, she had stated that her husband was down with a nervous disorder and that was the reason why they gave the lorry to the accused.

The prosecution has questioned the witness on her evidence where she had stated that the vehicle was taken into custody by Kochchikade Police on the premise that the vehicle has previously been taken into custody by the said police station as well, because this was a detection by Katana Police. Her answers provided clearly establish that she has mistakenly stated the name of the police station and she was not telling a lie, purposely in that regard.

It is clear from the Magistrate's Court proceedings that only the registered owner had given evidence at the inquiry. The learned Additional Magistrate of Negombo in his order dated 23-09-2021 has considered the evidence given by the appellant and found fault with her for not calling her brothers and the husband to show that she was vigilant over the vehicle through them, and has determined that the appellant has failed to give any evidence before the Court to establish that she has taken proper steps to prevent the offence being committed. The learned Additional Magistrate has determined that the appellant failed to establish that she took preventive measures to make sure that the offence would not be committed, on the balance of probability. It has been decided to forfeit the vehicle belonging to the appellant on that basis.

When the revision application filed challenging the order of the learned Additional Magistrate was heard before the learned High Court Judge of Negombo, the learned High Court Judge, considering the relevant provisions of the Forest Act has determined that the learned Magistrate has considered the evidence made available to the Court on the balance of probabilities and has come to a correct finding. In his order, the learned High Court Judge has determined as follows;

> *"The requirement in section 40 A of the Forest Ordinance is to confiscate the vehicle which has been used in committing an offence under it. Only in later judgements, it was decided that the registered or the absolute owner of the vehicle shall be given an opportunity to prove that they had in fact taken precautionary steps and the offence concerned had been committed without*

their knowledge. As the statutory requirement is to confiscate the vehicle, the presumption is that the offence has been committed with the knowledge of the registered or absolute owner and that they have failed to take precautionary steps therefore, it is unto the registered or absolute owner to prove the contrary. In proving the contrary, the burden cast upon them is not beyond reasonable doubt but balance of probabilities."

Holding that the appellant has failed to establish on balance of probabilities, that she has taken due precautions and the learned Magistrate has come to a correct conclusion in that regard, the revision application of the appellant has been dismissed by the learned High Court Judge.

When this appeal was taken up for argument before the Court, the learned Counsel for the appellant as well as the learned State Counsel who represented the respondents agreed for a judgement based on the written submissions by the parties. As the learned Counsel for the appellant has already filed written submissions before the Court by that time, the learned State Counsel was permitted further two weeks' time for his written submissions, but no submissions were filed at the time of the writing of this judgement.

I must emphasize that the learned High Court Judge was somewhat misdirected as to the relevant provisions of the Forest Act when it was determined that the statutory requirement is to confiscate the vehicle, which may be true as section 40 of the Forest Ordinance stood before it was amended, where the forfeiture was automatic upon conviction.

It was after the judicial decision in **Manawadu Vs. The Attorney General (1987) 2 SLR 30** that the owner of a vehicle which would be subjected to a forfeiture was allowed to show cause as to why the vehicle should not be confiscated to the state.

By bringing in Forest (Amendment) Act No. 65 of 2009, the Forest Ordinance was amended and the amended and the proviso of amended section 40 (1) reads as follows.

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.

Therefore, the present statutory requirement is when the owner of the vehicle is a third party, an order of confiscation shall not be made if such owner proves to the satisfaction of the Court that he or she has taken all precautions to prevent the use of such vehicle for the commission of the offence.

As considered correctly by the learned Magistrate as well as the learned High Court Judge, the mode of proof shall be in the balance of probabilities.

However, I am not in a position to agree with the determination of the learned Additional Magistrate of Negombo that although the registered owner gave evidence and justified her actions, she failed to call her brothers and even her husband to substantiate her evidence.

I must emphasize that a person, not calling any other witnesses to substantiate his or her evidence in itself should not provide a basis to reject the said evidence, as there is no requirement of calling a particular number of witnesses to prove a fact.

The relevant section 134 of the Evidence Ordinance reads thus;

134. No particular number of witnesses shall in case may be required for the proof of any act.

It is the view of this Court that if the evidence given by a witness is believable and has not been challenged on material points, a Court can act on such evidence even though no other evidence has been called to substantiate any fact.

In the case under appeal, the evidence of the registered owner that she had no knowledge of the offence being committed and she took precautions to prevent illegal activities being carried out by the driver of the vehicle has not been challenged on material points. She has maintained a consistent position that due to her husband's ill health; the vehicle was given to the accused to transport cement blocks and other similar materials, and her husband and her brothers were vigilant over the vehicle, which means that the registered owner has been careful of the actions of the driver to prevent illegal acts being committed using her vehicle.

The evidence adduced before the Magistrate's Court clearly establishes the fact that the registered owner was unaware of the offence being committed.

I am of the view that the meaning of the words used by the legislature in its wisdom in the proviso of section 40 (1) where it has been stated that ***"had taken all precautions to prevent the use"*** needs to be interpreted in a pragmatic manner rather than giving it a strict interpretation. It is my view that the facts and the relevant circumstances in a given situation should be considered in its totality in order to find out whether there is justification in releasing a vehicle to its owner. If a Court is to look for all the possible precautions that an owner of a vehicle can take in a given scenario, there can always be some other precautions that could have been taken which in my view was not the purpose of enacting the relevant provisions as to the confiscation of a vehicle.

In the case of **Sadi Banda Vs. Officer In Charge of Nortonbridge Police Station (2014) 1 SLR 33** it was observed by **Malani Gunaratne, J.**;

> "*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.”

Having considered the facts and the relevant circumstances in relation to the matter under appeal, I am of the view that this is a fit and proper case where the learned Magistrate should have considered the totality of the uncontradicted evidence of the registered owner in order to find out whether releasing of the vehicle can be justified, and I find that the vehicle should have been released to the registered owner on that basis.

I am not in a position to agree with the determination of the learned High Court Judge as well for the same reasons.

Accordingly, I set aside the order dated 23-09-2021 of the learned Additional Magistrate of Negombo and the order dated 09-09-2022 of the learned High Court Judge of Negombo.

I order the release of the vehicle numbered 48-0440 to the appellant, who is the registered owner of the vehicle.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal