

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

In the matter of an Appeal under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka and under the High Court of Provinces (Special Provisions) Act No.19 of 1990 against the order in case No.5572 Revision of the Provincial High Court of Kegalle.

Court of Appeal

Application No:

CA (PHC) 0175/2019

PHC Kegalle High Court

No.5572/ Revision

MC Kegalle

Case No.11151/WL/17

The Officer-in-Charge

Police Station

Pindeniya.

Complainant

VS.

Menik Pedige Dilshan Sangeeth

Jayasinhe

No. C 49/02, Kussaldeniya, Atugoda,

Dambunukola.

Accused

Rajapakshe Pedige Sugath Wimalasuriya

Arandara,

Atala.

Claimant

AND BETWEEN

Rajapakshe Pedige Sugath Wimalasuriya

Arandara,

Atala.

Claimant-Petitioner

Vs.

1. The Officer -in-Charge
Police Station
Pindeniya.
2. The Attorney General
Attorney General's Department
Colombo-12.

Respondents

AND NOW BETWEEN

Rajapakshe Pedige Sugath Wimalasuriya

Arandara,

Atala.

Claimant-Petitioner-Appellant

Vs

1. The Officer -in-Charge
Police Station
Tissamaharama.

2. The Attorney General
Attorney General's Department
Colombo-12.

Respondent-Respondents

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL : **Dr.Thashira Gunatilake with Buddika
Alagiyawanna for the Appellant.
Kanishka Rajakaruna, SC for the
Respondents.**

ARGUED ON : **18/07/2023.**

DECIDED ON : **17/10/2023.**

JUDGMENT

P. Kumararatnam, J.

The 1st Respondent-Respondent (hereinafter referred to as the Respondent) filed a charge sheet Under Section 25(2) read with Section 40(b) of the Forest Ordinance against the Accused in the Magistrate Court of Kegalle for illegally transporting timber without a valid permit

on 25.09.2017. As the Accused pleaded guilty to the charge sheet, the Learned Magistrate of Kegalle had convicted the Accused as charged and imposed a fine of Rs.25000/- with a default sentence and fixed for an inquiry whether to confiscate or not the vehicle bearing No. SG LB-0640 which had been used for the transportation of the timber mentioned above.

At the conclusion of the inquiry, the Learned Magistrate had decided to confiscate the aforesaid vehicle by his order dated 24.09.2019. At the inquiry, only the Appellant had given evidence on his behalf and marked two documents.

Being aggrieved by the order of the Magistrate, the Claimant-Petitioner-Appellant (hereinafter referred to as the Appellant) filed a Revision Application in the Provincial High Court of Kegalle to revise the order of the Learned Magistrate of Kegalle. After support when moved to issue notice, the Learned High Court Judge of Kegalle by his order dated 18.10.2019 refused to issue notice to the Respondents.

Now the Appellant filed this appeal to set aside the order of the Learned High Court Judge of Kegalle dated 18.10.2019 and the order of Learned Magistrate of Kegalle dated 24.09.2019.

The Appellant submitted following grounds of appeal:

1. The Learned High Court Judge erred in arriving at the conclusion that the Appellant did not have control over the driver.
2. The Learned High Court Judge erred in arriving at the conclusion that the Appellant failed to take precautions to stop the vehicle being used for the commission of any offence.
3. The Learned High Court Judge erred in arriving at the conclusion that the Appellant failed to corroborate his evidence.

In this case the Learned High Court Judge only considering the order of the Magistrate Court of Kegalle decided to dismiss the revision application stating that that the Appellant had failed shock the conscious of the court.

In this case a lorry had been confiscated for transporting timber worth about Rs.183, 401/-illegally.

The Appellant of the vehicle has given evidence in the Court and has claimed that he was unaware of the crime being committed as he has given the vehicle for hire after appointing the accused as the driver. The Appellant had gave evidence and vividly explained how he had taken preventive measures that the vehicle not being used for illegal activities.

Despite the adducing cogent evidence that the Appellant had no knowledge about committing the offence by the Accused, the Learned Magistrate has dismissed the application on the basis that the Appellant had failed to show that he took all necessary precautions to prevent a crime being committed.

The Learned High Court Judge, not affording an opportunity to all necessary parties to present their submissions, relying on the order of the Magistrate of Kegalle, refused to issue notice to the Respondents.

In **Commissioner of Police v. Tanes (1957-58) 68 CLR 383**, the court held that:

"It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard ... "

By this order of the Learned High Court Judge of Kegalle, the Appellant's right to a fair trial has been greatly violated. Considering the time period consumed after the High Court order, I consider it is not appropriate to send this case for re-hearing. Hence, firstly, I set aside the order of the Learned High Court Judge of Kegalle dated 18.10.2019.

Now I am going to consider whether the grounds of appeal raised on behalf of the Appellant have any merit. As the appeal grounds mentioned above are interconnected, all appeal grounds will be considered together hereinafter.

As the law stands today, the Claimant in a vehicle confiscation inquiry should prove that he or she had have taken all preventive measures on a balance of probability. Hence, the Learned Magistrate should consider all the evidence very carefully before coming to a conclusion.

In **The Orient Financial Services Corporation Ltd v The Range Forest Officer, Ampara and Hon. Attorney General [2013] 1 SLR 208** the Court held that:

“1. Before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance probability 209 satisfies the Court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor, was he privy to the commission of the offence, the vehicle has to be released to the owner.

2. When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence.”

In **Mudankotuwa v Attorney General [1996] 2 SLR 77** the court held that:

“As seen from the evidence the vehicle was taken over by the driver from the Petitioner’s house in the morning and it was returned to him in the evening with the collections. Further, clear instructions had been given by the Petitioner to the driver, not to transport timber or use the vehicle for any illegal

purpose.....Therefore, the Magistrate was in error when he came to the conclusion that the Petitioner had exercise no control or supervision over the driver regarding the use of the tractor”.

In this case the Appellant had hired the Accused only in the capacity of a driver to engage in hires only allowed by the Appellant. As such at all times the Appellant had the full control over his vehicle.

Further, the Appellant, as the owner of the vehicle had given evidence and explained to the Court that he had taken all the possible and necessary precautions to prevent the vehicle being used for illegal purposes. Hence, when considering the evidence, experience of common life must be seriously considered. The level of precautions expected under Section 40(1) of the Forest Ordinance should not be artificially looked at but should be assessed subjectively based on the facts and the circumstances of each case.

In **CA/PHC/203/17 decided on 21.06.2022**, Iddawala J, held that:

“A vehicle owner employing a driver to carry out transportation of goods cannot reasonably be expected to physically visit each and every site to ensure that illegal activities are not carries out using his vehicle”.

The Learned Magistrate also should have considered that there had been no previous or pending case against in respect of the vehicle that had been used for illegal activities and the accused is not a habitual offender.

In **Mallawa Arachchige Supun Malhara v The Attorney General CA(PHC) 09/2015 dated 28.08.2020** the Court held that:

“The Accused is not a driver employed by the Appellant; he is a person doing business of his own who has access to the vehicle

when requested. It is fair to assume that the Appellant would not have expected the Accused to do anything illegal. This is what is elicited in the evidence of the Appellant. It is quite apparent that there is no evidence that the Appellant was privy to the illegal act of the Accused.”

In **Ceylinco Leasing Corporation v M.H. Harrison and others SC Appeal 43/2012 dated 07.12.2017** His Lordship Aluvihare P.C J. held that:

“Section 40 of the Forest Ordinance provides for the confiscation of the conveyance used to transport the illicit timber and the provision to my mind is intended to strike at the means of transportation by providing for the confiscation of the conveyance used to transport the illicit timber, and is both a logical and legal response to the problem of illicit felling. Even in the instant case the two persons who were charged happened to be the driver of the lorry and another person who had been seated next to the driver. Although they were in physical possession of the illicit timber, may have been employees of the “owner” of the lorry. Thus, not much deterrence is achieved by imposing punishment on the persons who were in actual physical possession of illicit timber, when in most cases, the owner is behind the illegal operation.”

It is apparent that in the absence of the Appellant having had knowledge of the transportation of timber and /or having had any monetary or personal benefit from the crime committed cannot be deemed as the person behind the illegal operation.

Hence, the Learned Magistrate simply dismissing the application on the basis that the Appellant had failed to show that he took all necessary precautions to prevent a crime being committed is not correct in this case.

Hence, I decide that the order of Learned Magistrate of Kegalle dated 24.09.2019 too be set aside in this appeal.

Therefore, this appeal is allowed.

I direct that the vehicle No. SG LB 0640 be released to the Appellant.

The Registrar of this Court is directed to send this Judgement to the High Court of Kegalle and the Magistrate Court of Kegalle.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL