

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

CA (PHC) 162/2012

PHC Kurunegala HCR 17/2011

M.C.Kurunegala Case No.24557

M.H. Gamini Chandrasiri

Petitioners

Hon. Attorney General
Attorney General's Department
Colombo 12.

OIC
Police Station,
Gokarella.

Respondents

CA (PHC) 162/2012

PHC Kurunegala HCR 17/2011
M.C.Kurunegala Case No.24557

Before : K.T. Chitrasiri, J. &
W.M.M. Malinie Gunaratne, J.

Counsel : Kumar Dunusinghe for the petitioner-appellant.
Thusith Mudalige SSC for the AG.

Argued &

Decided on : 29.08.2014

K.T. CHITRASIRI, J.

Heard both Counsel in support of their respective cases.

This is an appeal seeking to set aside the judgment dated 08.11.2012 of the learned High Court Judge of Kurunegala. In the petition of appeal the appellant also has sought to have the lorry bearing No. 42-1238 involved in committing an offence under the Forest Ordinance, released to him. The aforesaid vehicle was confiscated by the learned Magistrate in Kurunegala by his Order dated 21.02.2011 having given the opportunity to the appellant to show cause why it should not be confiscated in terms of Section 40 of Forest (Amendment) Act No. 65 of 2009.

The proviso to the aforesaid Section 40 in the Forest Ordinance reads thus:

“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 Confiscated 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”.

Accordingly, it is the duty of the person who claims a vehicle involved in an offence committed in terms of the provisions contained in the Forest Ordinance, as amended, to establish, on a balance of probability that he had taken all precautions to prevent the use of such vehicle for the commission of the offence.

In discharging the duty referred to above in Law, the appellant, he being the registered owner has given evidence before the learned Magistrate. It is only his evidence that shows the steps taken by the owner of the vehicle as to the precautionary measures that he had taken in order to prevent the vehicle being used for the transportation of Sating timber, illegally. The appellant in his evidence has stated that he has given instructions to the driver who is his own son, not to use the vehicle for any illegal purposes. The driver has taken the vehicle stating that he is proceeding to Elpitiya to transport bricks. In this regard, the appellant also has stated that it takes only 3 or 4 hours for such a trip to go to Elpitiya and for the driver to return. Therefore, the driver should have returned home at least by 11 in the morning. The owner has not taken any meaningful steps to ascertain as to why the lorry did not return till that evening except for the attempt that he has made to telephone his driver who

was his son even though he could have even gone to Elpitiya in a short period of time.

All those circumstances, it being matters of facts of the case, had been carefully considered by the learned Magistrate. The best person to determine those matters involving the facts of the case is the original Court Judge. Hence, this Court is not inclined to interfere with the decisions of those findings arrived at, considering the facts of the case since we do not see that his decision is perverse or irrational.

Moreover, those matters have been carefully considered in the revision application once again by a senior judicial officer, he being a High Court Judge. Having done so, he has clearly stated that he is not inclined to interfere with the decision of the learned Magistrate.

The manner in which the precautions that are to be taken by the owner of a vehicle in order to prevent an offence being committed using his vehicle, has been dealt with in the case of Mary Matilda Silva, Vs. P.H. De Silva (CA(PHC) 86/97). In that decision Sisira De Abrew, J has stated thus:

“For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions.”

In this instance too, it is only the verbal instructions had been given to the driver by the owner of the vehicle. As stated by Abrew J, I am also of the opinion that such verbal instructions are not sufficient to establish the

precautionary measures that should have been taken by the owner of the vehicle to prevent an offence being committed using the vehicle.

In the circumstances, we are of the opinion that the appellant in this particular instance has failed to establish, on a balance of probability that he has taken every endeavour to prevent the vehicle being used to commit this offence.

For the aforesaid reasons this appeal is dismissed.

Registrar of this Court is directed to inform the learned Magistrate of Kurunegala to take the possession of the confiscated vehicle to the custody of the Court immediately and to take steps to auction the same after the laps of the appealable period, if no appeal is filed against this order.

Appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KRL/-