

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

H. G. Sujith Priyantha
Nugagala Mawatha, Hiniduma
Galle

Petitioner-Appellant
Vs.

C.A.(PHC) NO.157/12

H.C.GALLE-HCRA 834/11

MC.GALLE CASE NO.41311

Officer-In-Charge
Police Station
Poddala

Complainant-Respondent-Respondent

1. N. Saman Kumara
Weewarugoda, Ihala Kimbiya
Wanduramba
2. L. Ranathunga
Pokunalaga. Ihala Kimbiya
Wanduramba

Accused-Respondent-Respondents

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

Respondent-Respondent

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| BEFORE | : | K.T.CHITRASIRI J. MALANIE GUNERATNE J. |
| COUNSEL | : | Alan David for the Petitioner-Appellant Anoopa de Silva S.S.C. for the Respondent-Respondent |
| ARGUED ON | : | 30.10.2014 |
| WRITTEN SUBMISSIONS FILED ON | : | 15.12.2014 by the Respondent-Respondent 16.12.2015 by the Petitioner-Appellant |
| DECIDED ON | : | 19.02.2015 |

CHITRASIRI, J.

Applicant-Petitioner-Appellant filed this appeal seeking to set aside the two orders dated 02.12.2011 and 11.10.2012 of the learned Magistrate and of the learned High Court Judge of Galle respectively. By those two orders, both the learned Judges have disallowed the application of the appellant that was made to have the vehicle bearing No.SPLB 0713 released to him. The said application by the appellant in the Magistrate's Court had been made pursuant to the two accused Respondent-Respondents been convicted under Section 38(a) and 40(a) read with Section 25 (2)(b) of the Forest Ordinance as amended. Admittedly, the said vehicle had been used to transport timber without a valid permit having violated the provisions contained in the Forest Ordinance. Both the accused have pleaded guilty to the aforesaid charge and were convicted accordingly, by the learned Magistrate of Galle. Consequently, the appellant made the aforesaid application in the Magistrate's Court relying upon the proviso to Section 40 of the aforesaid Forest Ordinance in order to have his vehicle SPLB 0713 released to him in the capacity of its registered owner.

The proviso referred to above 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 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."

In terms of the provision of law referred to above, it is the burden of the owner of the vehicle which was used to commit an offence under the Forest Ordinance to establish that he had taken precautionary measures to prevent the use of the said vehicle for the commission of the offence. In order to prove the said precautionary measures taken by the appellant, he has given evidence before the learned Magistrate. In that evidence, he has stated that he gave special instructions to the driver Saman Kumara (1st Accused-Respondent-Respondent) not to transport timber without a permit. He has also stated that he terminated the services of the said Saman Kumara after he pleaded guilty to the charge. Under cross-examination, he has admitted that those instructions by him were given by way of verbal instructions but did not give written instructions to the driver Saman Kumara to that effect. He has also stated that the driver has taken the lorry for the purpose of transporting timber without a permit having completed a hire that he had undertaken on that date.

He is the only witness who gave evidence to support the position of the appellant. Learned Magistrate having considered the evidence of the appellant, has concluded that the appellant has failed to establish that he has taken the necessary precautions to prevent the offence being committed. Learned High Court Judge too has accepted the reasoning of the learned Magistrate and has affirmed the decision of the learned Magistrate.

This Court in many occasions have decided that mere verbal instructions given to the driver as to the manner in which the vehicle is to be used is not sufficient to establish that the owner has taken the necessary precautions to prevent the offence being committed as required in the proviso to Section 40 of the Forest Ordinance. It is evident by the decisions in the cases of ***Mary Matilda Silva v. Inspector of Police, Habarana. [C.A.Minutes dated 08.07.2010 in C.A.(P.H.C.) 86/97, P.Aruna Pradeepa Prasanna v. Officer-In-Charge, Special Crimes Investigation Unit, Western Province (North) Peliyagoda, [C.A. Minutes dated 28.11.2014 in C.A.(P.H.C.) 61/2012 and Peoples Leasing Company Limited v. Forest Officer, Monaragala. [C.A. Minutes dated 22.01.2015 in Revision C.A.(P.H.C.) APN No.106/2013]***

In the circumstances, I do not find any error in the reasons assigned and the conclusions arrived at by the learned Judges in the Courts below since they have correctly applied the law to the facts of this case. Therefore, I am not inclined to interfere with the decision by which they have decided to disallow the application of the appellant, namely to have the vehicle SPLB 0713 released. However, the learned Counsel for the appellant contended that the order to confiscate the vehicle cannot be sustained when the charge to which the accused had pleaded guilty is defective.

In support of this argument, he has referred to several authorities. The issue that had been considered in those decisions referred to by the learned Counsel for the appellant had been on the question of legality of the charge that had been

questioned or raised **before the act of finding guilty being completed**. Moreover, application to have the release of a vehicle upon being convicted had not been adverted to in those decisions referred to by the learned Counsel for the appellant. Hence, those decisions cannot be made applicable to the case at hand under the rule *stare decisis*.

In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time. Indeed, an application under the aforesaid proviso to Section 40 in the Forest Ordinance could only be made when confiscation has taken place under the main Section 40 of the Forest Ordinance. Aforesaid main Section 40 of the Forest Ordinance imposes a duty upon the Magistrate who convicted the accused under the Forest Ordinance to confiscate the vehicle used in committing such an offence. Furthermore, the word "shall" is used in that main section and therefore the confiscation of the vehicle is automatic when the accused is found guilty. Accordingly, it is clear that the law referred to in the proviso to Section 40 is applicable only thereafter. Therefore, I conclude that the appellant who made the application relying upon the proviso to Section 40 is not entitled to raise an issue as to the defects in the charge after the accused have pleaded guilty to the charge under Section 40 of the Forest Ordinance.

Furthermore, the person who makes a claim under the proviso to the said Section 40 could not have made such an application unless and until the accused

are found guilty to a charge framed under the Forest Ordinance. Hence, it is clear that he is making such a claim, knowing that the accused were already been convicted for a particular charge under the Forest Ordinance. Therefore, the appellant is estopped from claiming the cover relying on the defects in the charge sheet, in his application made under the proviso to Section 40 of the Forest Ordinance.

Moreover, in the event this court makes a determination on the issue as to the defects in the charge sheet at this late stage, it may lead to raise questions as to the conviction of the accused as well. Such a position is illogical and certainly it will lead to absurdity. Such an absurdity should not be allowed to prevail before the eyes of the law. In the circumstances, I am not inclined to accept the contention of the learned Counsel for the appellant on the legality in the charge framed against the accused.

For the aforesaid reasons, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J.

I agree

JUDGE OF THE COURT OF APPEAL