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

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Mawathagama.

Complainant

C.A. Case No: **CA (PHC) 46/2015**

H.C. Kurunegala Case No: **HCR 165/2012**

M.C. Pilessa Case No: **69349/MISC**

Vs.

T.D. Sugath Priyantha Gunasekara,
Ranganagama,
Ambakote.

Accused

AND BETWEEN

Siripathul Dewayalage Nihal Premasiri,
Buluwala Kanda,
Buluwala.

Aggrieved party-Petitioner

Vs.

Officer-in-Charge,
Police Station,
Mawathagama.

Complainant-1st Respondent

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

2nd Respondent

T.D. Sugath Priyantha Gunasekara,
Ranganagama,
Ambakote.

Accused-3rd Respondent

AND NOW BETWEEN

Siripathul Dewayalage Nihal Premasiri,
Buluwala Kanda,
Buluwala.

Aggrieved party-Petitioner-Appellant

Vs.

Officer-in-Charge,
Police Station,
Mawathagama.

Complainant-1st Respondent-Respondent

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

2nd Respondent-Respondent

T.D. Sugath Priyantha Gunasekara,
Ranganagama,
Ambakote.

Accused-3rd Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Sahan Kulatunga for the aggrieved party-Petitioner-Appellant Jayalakshi De Silva, SC for the 2nd Respondent-Respondent
ARGUED ON	:	02.11.2018
WRITTEN SUBMISSIONS	:	The Aggrieved party-Petitioner-Appellant – On 22.10.2018 The 2nd Respondent-Respondent – On 01.11.2018
DECIDED ON	:	27.11.2018

K.K.WICKREMASINGHE, J.

The Aggrieved party-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of Kurunegala dated 16.01.2015 in Case No. HCR 165/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Pilessa dated 16.11.2012 in Case No. 69349.

Facts of the case:

The accused-3rd respondent–respondent (hereafter referred to as the 'accused') was charged in the Magistrate's Court of Pilessa for committing an offence punishable under section 25(2) read with sections 40A and 24(1) of the Forest Ordinance as amended. The accused had pleaded guilty to the charge and the Learned Magistrate had convicted him accordingly. Thereafter a vehicle inquiry was held with regard

to the tractor bearing number 36 – 8013 and trailer bearing number 46 shri 7863 which had been used for the commission of the offence.

The aggrieved party- petitioner-appellant (hereinafter referred to as the 'appellant') who was the registered owner of the above tractor and the trailer had given evidence in the said inquiry. After concluding the vehicle inquiry, the Learned Magistrate of Pilessa had confiscated the said tractor and trailer by order dated 16.11.2012.

Being aggrieved by the said confiscation order, the appellant had filed a revision application in the High Court of Kurunegala under case No. HCR 165/2012 and the Learned High Court Judge on 16.01.2015 had dismissed the said revision application.

Being aggrieved by the said dismissal, the appellant preferred an appeal to this Court.

Upon perusal of the evidence led in the vehicle inquiry, we observe that the tractor and the trailer were given to the accused for a monthly rent of Rs.20, 000/= and accordingly the tractor and trailer were kept at the residence of the accused. The Learned SSC for the 2nd respondent-respondent (hereinafter referred to as the '2nd respondent) contended that according to the said evidence, there had been no consistent supervision of the vehicle.

In the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008],** it was held that,

> *"On a consideration of the ratio decidendi of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest Ordinance, as amended, if the owner of the vehicle in question was a third*

party, no order of confiscation shall be made if that owner had proved to the satisfaction of the Court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The ratio decidendi of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability."

In the aforesaid case, Justice S. Bandaranayake has referred to the case of **Manawadu V. The Attorney General (1987) 2 SLR 30**, in which it was held that,

"By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused .The amended sub-section 40 does not exclude by necessary implication the rule of 'audi alteram partem' . The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry. if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him"

Accordingly the practice of the court is to release the vehicle to the owner if the owner proves on a balance of probability that he was taking precautions to prevent an offence being committed or the offence was committed without his knowledge.

In the case of **Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011],** it was held that,

> *"The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner."*

However the proviso to **Section 40(1) of the Forest Ordinance (as amended by Act No.65 of 2009)** 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."*

However the Supreme Court has not considered the Forest Ordinance (Amendment) Act No 65 of 2009 in the case of Orient Financial Services Corporation Ltd (*supra*) as the amendment came into force after the order of confiscation was made by the Learned Magistrate in the said case. Since we are required to consider the said amendment Act No.65 of 2009, it can be construed

that the Legislature intended to cast the burden on the claimant to prove that he took all precautions to prevent an offence being committed.

The Learned Counsel for the appellant has contended that a confiscation order shall not be made if the owner proves on a balance of probability that he had no knowledge about the commission of offence. Accordingly the Learned Counsel has submitted the case of **Faris V. The Officer in Charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167,** in which it was held that,

> *"In terms of the proviso to Section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters. They are:*
>
> *i. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;*
>
> *ii. That the vehicle has been used for the commission of the offence without his knowledge.*
>
> *In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order for confiscation should not be made..."*

In the case of **Nizar V. I.P, Wattegama (1978-79) 2 SLR 304**, it was held that,

> *"In 1968 two new sub-sections were added to section 3 of the Act by Act No.20 of 1968. One of them is as follows;*
>
> > *"Where a person is convicted of an offence under this part or any regulations made thee under, any vehicle used in the commission of the offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate to confiscation:*

Provided however, that in any case where the owner if the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the court that he had taken all precautions to prevent the use of vehicle or that the vehicle has been used without his knowledge for the commission of the offence...

So also in the case of ***Joslin v. S. Bandara (7)****, Thamotheram, J. said "The driver of the lorry pleaded guilty to a charge under the Forest Ordinance and the lorry was liable to forfeiture provided that where the owner proved to the satisfaction of the Court that he had used all precautions to prevent the use of the motor vehicle for the commission of the offence, no such order shall be made..... It has not been suggested that the owner or her husband were in any way privy to the commission of the offence or had any reason to anticipate the commission of the offence. In these circumstances I am of the view that the owner had led sufficient evidence to show that all precautions which could have been taken, had been taken."*

In all these Ordinances and Regulations there was no proviso similar to the proviso to section 3A of the Animals Act and the decisions in all the cases turned on an interpretation of the sections in which the words used " be liable to confiscation " is identical with the words of section 3A. It was held in all these cases that no order of confiscation should be made without giving the owner an opportunity of showing cause and that if he succeeded in showing that he had taken all precautions against the use of the vehicle for the commission of the offence and that he was not in any way a privy to the commission of the offence then the vehicle ought not to be confiscated."

However we observe that these two cases had dealt with offences committed under the Animals Act No. 29 of 1958. Accordingly we are unable to agree with the contention of the Learned Counsel for the appellant since the proviso to section 3A of the Animals Act (as amended) and the proviso to section 40(1) of the Forest Ordinance (as amended) are manifestly different.

In the case of **Samarathunga V. Range Forest Officer, Anuradhapura [CA (PHC) 89/2013], K.T. Chithrasiri, J,** held that,

> *"The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle... Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore, it is evident that no meaningful step had been taken either by the owner or his power of attorney holder, of the vehicle that was confiscated in order to prevent an offence being committed by making use of this vehicle."*

Even though Court can consider the knowledge of the vehicle owner about an offence being committed, we are of the view that Court should particularly look into the preventive measures taken by the vehicle owner in question since it is required by the Statute.

The Learned High Court Judge of Kurunegala in the order dated 16.01.2015 has held as follows;

"එහෙත් පනතේ ප්‍රතිපාදන තුළ අවශ්‍යතාවය වන්නේ අදාළ වරද සිදු කිරීම වැළැක්වීම සඳහා ගෙන තිබී ඇති පූර්වාරක්ෂක ක්‍රියා සළකා බැලීම බැවින් දැනුමක් නොතිබුණු බවට කියා සිටින හේතුව මත පමණක් වගකීමක් බැහැර විය නොහැක." (Page 41 of the brief)

We find that the above reasoning of the Learned High Court Judge was well within the law and indeed we agree with the same.

Further we observe that the appellant has testified in the vehicle inquiry that he had instructed the accused not to use the vehicle for any illegal activities and the appellant only found out about illegal transportation of timber when he was informed by the Police station of Mawathagama.

Accordingly he had answered in the cross-examination as follows;

"ප්‍ර: නැවත වරක් තමන් සොයා බලන්නේ කවදාද?

උ: මම සොයා බලලා වෙලාවක් තිබුණු අවස්ථාවල සොයා බලනවා.

ප්‍ර: තමන් අවසන් වරට සොයා බැලුවේ කවදාද?

උ: උත්තර නැත." (Page 74 of the brief)

In the case of **Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]**, it was held that.

"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 light of the above decision we are of the view that it is imperative to prove to the satisfaction of Court that the vehicle owner in question has not only given instructions but also has taken every possible step to implement them. However we observe that the appellant has failed to prove the same on a balance of probability.

Accordingly we agree with the following conclusion of the Learned Magistrate;

> "ඒ අනුව වාහනයක් නීතිවිරෝධී කාර්යයන්හි යොදවා නොගන්නා ලෙසට දන්වමින් ලියාපදිංචි අයිතිකරු විසින් හුදු උපදේශයක් පමණක් ලබා දී තිබීම මත පමණක් ඔහු විසින් ඉහතින් දැක්වූ නීතිමය ප්‍රතිපාදන ප්‍රකාරව කටයුතු කර තිබේ යැයි අධිකරණයට සෑහීමට පත්වීමට නොහැකිව ඇත..." (Page 86 of the brief)

In the case of **Bank of Ceylon V. Kaleel and others (2004) 1 Sri L R 284,** it was held that;

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."*

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,**

> *"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant*

to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal..."

Therefore we are of the view that the Learned High Court Judge was correct in dismissing the revision application due to the lack of exceptional circumstances. Accordingly we see no reason to interfere with the order of the Learned High Court Judge of Kurunegala dated 16.01.2015 and the confiscation order of the Learned Magistrate of Pilessa dated 16.11.2012. Therefore we affirm the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree.

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008],
2. Manawadu V. The Attorney General (1987) 2 SLR 30
3. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]
4. Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167
5. Nizar V. I.P, Wattegama (1978-79) 2 SLR 304
6. Samarathunga V. Range Forest Officer, Anuradhapura [CA (PHC) 89/2013],
7. Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]
8. Bank of Ceylon V. Kaleel and others (2004) 1 Sri L R 284
9. Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24