IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

CA (PHC) No: 152/2018

HCRA No: 02/2017

MC Kuliyapitiya Case No: 14307

In the matter of an Application for Appeal from the Judgement of the Provincial High Court holden in Kuliyapitiya in terms of article 154(G)(6) of the Constitution of Sri Lanka

Officer In Charge,
Police Station
Dummalasuriya

COMPLAINANT

Vs.

Hettinayaka Mudiyanselage Ruwan Sameera Sathkumara,
No. 803, Pothuwatawana,
Dummalasuriya

ACCUSED

AND

Warnakulasooriya Indunil Merwin Fernando,
Rupasinghe Watta,
Dummalasuriya.

APPLICAN-PETITIONER

Vs.

1. Officer In Charge,
   Police Station

Dummalasuriya

COMPLAINANT RESPONDENT

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

RESPONDENT

AND NOW BETWEEN

Warnakulasooriya Indunil Merwin
Fernando alias Warnakulasooriya
Mirissage Merwin Regil Fernando,
Rupasinghe Watta,
Dummalasuriya

APPLICANT-PETITIONER-APPELANT

Vs.

Officer In Charge,
Police Station
Dummalasuriya

COMPLAINANT-RESPONDENT-RESPONDENT

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

RESPONDENT-RESPONDENT

BEFORE : K. K. Wickremasinghe, J.

K.Priyantha Fernando, J.

WRITTEN SUBMISSIONS : By the Petitioner Appellant on 14.06.2019
By the Respondent on 27.06.2019

DECIDED ON : 07.02.2020

K.K.WICKREMASINGHE, J.

The Registered owner Petitioner- Appellant (hereinafter referred to as the Appellant) has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kuliyapitiya dated 13.09.2018 in Case No. HCR/02/2017 and seeking to set aside the confiscation order made by the Learned Magistrate of Kuliyapitiya dated 03.01.2017 in Case No. 14307. Both parties agreed to abide by the written submissions already been filed without going for argument.

The incident in question is summarized as follows

The driver (hereinafter referred to as the 'accused') of the said lorry was charged under sections 24(1)b, 38, 40, 40(A) and 25(2) of the Forest Ordinance as amended, for illegal transport of timber worth of Rs.26859.20 by a truck bearing No. NWLK 0773. The Accused, the driver pleaded guilty to the charge leveled against him on 12-01-2016 and the Learned Magistrate imposed a fine of Rs.29000/=. Thereafter the Learned Magistrate confiscated the timber and ordered to hand over the same to the State Timber Corporation. The Magistrate held a vehicle confiscation inquiry on the 14th of June 2016 and by way of its order dated 03.01.2017 confiscated the vehicle to which the Appellant claims ownership as its registered owner.

Being aggrieved by the said order of the Learned Magistrate, Magistrate's Court of Kuliyapitiya, the Appellant instituted the said Revision application bearing No: HCR/02/2017 in the Provincial High Court. The Learned High Court Judge of the Provincial High Court of Kuliyapitiya delivered his judgement on 13.09.2018

affirming the said order of the Learned Magistrate of the Magistrate Court of Kuliyapitiya dated 03.01.2017 and dismissed the Revision Application of the Appellant.

Being aggrieved by the said order dated 13.09.2018 of the Learned Provincial High Court Judge of the North Western Province holden in Kuliyapitiya, the Appellant filed this appeal to this Court.

The Learned Counsel for the appellant has submitted following grounds of appeal in written submissions;

1) The said judgement is contrary to law and to the evidence led in the Magistrate Court of Kuliyapitiya, in Case No. 14307

2) The Learned Provincial High Court Judge of North Western Province holden in Kuliyapitya, erred in law by not deciding the case of the appellant on balance of probability instead he has applied the principle of reasonable doubt when confiscating the vehicle in question.

3) The Learned Provincial High Court Judge erred in Law by affirming the order dated 03.01.2017 of The Learned Magistrate of the Magistrate Court of Kuliyapitiya, by not considering the fact that the Appellant did not have any knowledge of the commission of the said offence, as the Appellant was in Colombo at the commission of the said offence and had no control over the said vehicle bearing No. NWLK-0773

4) The Learned Provincial High Court Judge erred in law by interpreting the Section 40(1) of the Forest Ordinance as amended by the Act No.15 of 2009 and has not considered the fact that the Appellant had no connection whatsoever of the commission of the offence by the Accused.

5) A serious miscarriage of Justice has been caused to the Appellant by not granting the alternate relief that has been prayed for in the prayer to the Revision Application bearing No. HCR/02/2017 by not giving an opportunity to commence a fresh inquiry into the said confiscation of the vehicle bearing No. NWLK-0773 so as to establish further that he had no knowledge whatsoever of the offence committed by the Accused.

I wish to consider the grounds of appeal 01,03 and 04 together and analyse in the light of the relevant law to the case.

Section 40(1) of the Forest Ordinance as amended by Forest (Amendment) Act No. 65 of 2009 states as follows:

"(1) Where any person is convicted of a forest offence— (a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and

(b) all tools, vehicles, implements, cattle and machines used in committing such offence, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

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."

The Learned Magistrate has taken the cases **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008], Umma Habeeba v. OIC, Dehiattakandiya & Other 1999 (3) SLR 89, Manawadu v. OIC, Police Station, Udapussellawa 1997 (2) SLR 30** in to his consideration to decide whether precautionary measures have taken by the Appelant to prevent the commission of the offence. Hence I wish to draw my attention to the above mentioned cases to decide the relevant legal status in relation to the incident.

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." (Emphasis added)*

Umma Habeeba v. OIC, Dehiattakandiya & Other 1999 (3) SLR 89 states as follows:

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

The Learned Magistrate has analysed the testimonies and has arrived at the following observations.

"තවදුරටත් ඔහු විසින් හරස් ප්‍රශ්න වලදී සඳහන් කර ඇත්තේ ලියපදිංචි අයිතිකරුගේ හාඩ්වෙයාර් ආයතනයේ මැනේජර් වශයෙන් කටයුතු කරනවලිත නමැති ය වෙත දැනුම් දී මෙම ලොරි රථය රැගෙන ගිය බවයි. එසේම ඔහුට අනුව ඉන් පෙරද ඒ ආකාරයෙන්ම ඉන් පෙරද එය රැගෙන යන බවට පහත පිළිතුරු ලබා දී ඇත.

ප්‍ර: මෙම ලිං කැට අදින්න ලොරි රථය ලබා දුන්නේ කවුද?
උ: මැනේජර්ගෙන් යතුර ඉල්ලන් යන්නේ.
ප්‍ර: මැනේජර් කියන්නේ කවුද ?
උ: වලිත කියලා හාඩ්වෙයාර් එක බලන කෙනා.
ප්‍ර: එයාගේ කවුද?
උ: එයාගේ කළමනාකරු. එයාගේ කවුරුවත් නෙවේ වැඩ කරන කෙනෙක්.
ප්‍ර : මේ සාක්ෂිකරු කිවුවා ලොරි රථය අරන් ගියේ වලිත කියලා කෙනෙක්ගෙන් කියලා ?
උ : එයාගෙන් තමා යතුර අරන් ගියේ.
ප්‍ර :වෙනදා අරන් යන්නේ ?
උ : ඒත් එයාගෙන් තමා

The Learned Magistrate after analysing the testimonies of the registered owner and the accused driver has arrived at the following observation,

"ඔහුට අනුව මෙම රථය රැගෙන යාම සිදු කරන්නේද මින් පෙරද රැගෙන යාම සිදු කර ඇත්තේ මෙම සාක්ෂි ලබා දී ඇති ලියපදිංචි අයිතිකරු වෙත දැනුම් දීමකින් නොවේ.
ඒ අනුව එදින ලොරි රථය රැගෙන යාමේදී අයිතිකරු විසින් ලොරි රථය මෙම ක්‍රියාව සඳහා රැගෙන යන බව චූදිත විසින් දැනුම් දුන් බව ප්‍රකාශ කලද චුදිතට අනුව එවැනි දැනුම් දීමක් කර නැත. ඒ අනුව එවැනි ප්‍රධාන කරුණු සම්බන්ධයෙන් ඔවුන් දෙදෙනාගේම සාක්ෂි එකිනෙක පරස්පර වේ. ඒවායින් කුමන ස්ථාවරය පිලිගත යුතුද යන්න ගැටළු සහගත වේ."

Furthermore it should be noted that both the Accused driver and the Appellant were silent about the name of the person who requested the driver to transport a stump of Mahogany. **Hence the trustworthiness of the evidence given by the Accused and the Appellant are questionable**.

Even though the registered owner has stated that all possible precautionary measures were taken by him in order to prevent the offence, it should be noted that mere instructions would not be sufficient to prove that he took all possible precautionary measures in order to prevent the commission of the offence.

In the landmark case of **Mary Matilda Silva V. P.H. De Silva CA (PUC) 86/97J,** 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"

The Learned High Court Judge has held furthermore as follows:

"ලියාපදිංචි අයිතිකරු දැව ව්‍යාපාරයක් සිදු කරන පුද්ගලයෙකු බවට එකී විමසීමෙදී අනාවරණය වී ඇති අතර, දැව වැරදි සම්බන්ධයෙන් හා ඒවදී කටයුතු කරන ආකාරය පිළිබඳව ඔහු වෙත මනා දැනීමක් තිබුණු පුද්ගලයෙක් බවට ප්‍රබල අනුමිතියක් පහල වන බවට උගත් මහේස්ත්‍රාත්වරයා නිගමනය කර ඇත.

රාජසන්තක කරන ලද දැව වල වටිනාකම පිළිබඳව අවධානය යොමු කලද එම කරුණු හුදකලාව වෙන් කොට සලක බැලීමට නොහැකි බවත් විමසීමේදී ඉදිරිපත් වූ සාක්ෂිකරුවන්ගේ සාක්ෂි පරස්පර වීම තුල වියහැකිබාවය බරපතල ලෙස ප්‍රශ්නගත වී ඇති බවට උගත් මහෙස්ත්‍රාත්වරයා නිගමනය කර ඇත."

I find that the above observation is correct and reasoning of the Learned High Court Judge is well within the law and indeed hence agree with the same.

Now I wish to consider the 02nd ground of appeal. It has been stated that The Learned Provincial High Court Judge of North Western Province holden in Kuliyapitya, erred in law by not deciding the case of the Appellant on balance of probability, instead he has applied the principle of reasonable doubt when confiscating the vehicle in question.

The Learned Magistrate has observed the following in his judgement in relation to the burden of proof of the case.

"සාමාන්‍ය අපරාධ නඩුවකදී චූදිතට එරෙහිව චෝදනාව සාධාරණ සැකයෙන් තොරව ඔප්පු කල යුතුය. කෙසේ වුවද වාහනයක් රාජසන්තක කිරීමට අදාල විමසීමේදී එහි අයිතිකරු විසින් එකී වාහනය රාජසන්තක නොකිරීමට අදාල පනත් මඟින් දක්වා ඇති හේතු පවතින බව කුමන ආකාරයෙන් ඔප්පු කර යුතුද යන කරුණ සැලකීමේදී එරෙස් එදිරිව ගලෙන්බිඳුණුවැව, පොලිස් ස්ථානාධිපති 1992 (1) ශ්‍රී.නී. වා 167 සහ උම්මා හබීබා එදිරිව ස්ථානාධිපති දෙහිඅත්තකන්ඩිය පොලිසිය නඩු තීන්දු වලදී දක්වන ලද්දේ ශක්‍යතා වැඩි බර සාක්ෂි මත අදාල කරුණු ඔප්පු කල යුතු බවයි. එසේ නම් මෙම නඩුකරයේදී එම තත්වය අදාල වේ."

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. "

Hence it is evident that it is trite law that the owner should satisfy the court not beyond reasonable doubt, but on balance of probability, that he had taken all the precautionary methods to prevent the commission of the offence. Therefore I am of the view that the conclusion of the Learned Magistrate and the Learned High Court judge is well within law and the 02nd ground of appeal should fail.

Now I wish to consider the 05th ground of appeal which states that a serious miscarriage of Justice has been caused to the Appellant by not granting the alternate relief (f) that has been prayed for in the prayer to the Revision Application bearing No. HCR/02/2017 by not giving an opportunity to commence a fresh inquiry into the said confiscation of the vehicle bearing No. NWLK-0773 so as to establish further that he had no knowledge whatsoever of the offence committed by the Accused.

It is evident that in the above reasoning the 05th ground of appeal also fails since there is no any rationale to give any opportunity to commence a fresh inquiry with regard to the said confiscation.

In the above premise the Learned High Court Judge has rightly decided that the Learned Magistrate has acted well within law. Therefore I affirm both orders of the Learned Magistrate and the Learned High Court Judge of Kuliyapitiya dated 03/01/17 and 13/09/18 respectively.

This Appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL