

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

Officer in Charge,
Police Station,
Horowpothana.

Complainant

V.

Court of Appeal Case No.
CA PHC 140/2016

High Court of Anuradhapura
Rev. Case No.22/2016

Magistrate Court of
Kebithigollewa Case
No.78252

01. Halinna Lokuge Jayasiri Bowage Waththa
02. Wickramadasage Dissanayake
03. Herath Mudiyanseleage Dharmasiri Herath

Accused

AND

Benthota Malavi Arachchige Gunasena,
No.29/B, Liyanage Watta,
Ukwatta,
Ginthota.

Claimant-Petitioner

V.

1. Officer in Charge,
Police Station,
Horowpothana.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant- Respondents

AND NOW BETWEEN

Benthota Malavi Arachchige Gunasena,
No.29/B, Liyanage Watta,
Ukwatta,
Ginthota.

Claimant- Petitioner- Appellant

V.

1. Officer in Charge,
Police Station,
Horowpothana.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant- Respondent-Respondents

BEFORE

: ACHALA WENGAPPULI, J
K. PRIYANTHA FERNANDO, J

COUNSEL

: Chathurangi Mahawaduge SC for the Respondents.

ARGUED ON

: 16.07.2020

**WRITTEN SUBMISSIONS
FILED ON**

: 10.07.2020 by the Respondents.

JUDGMENT ON

: 25.08.2020

K. PRIYANTHA FERNANDO, J.

01. This is an appeal preferred by the Petitioner-Appellant (Appellant) against the order of the learned High Court Judge of Anuradhapura dated 07.11.2016 affirming the order of confiscation of a lorry bearing registration No. SPLC 3648 made by the learned Magistrate of Kebithigollewa on 29.03.2016.
02. The Appellant appeared in this Court on 21.01.2020 on notice and the counsel for the Appellant moved for time to pay the brief fees and to collect the appeal brief. Thereafter, the Appellant failed to appear in Court nor was he represented by counsel. Therefore, the Court decided to proceed to consider the merits of the appeal in terms of section 349(3) of the Code of Criminal Procedure Act. We carefully considered the proceedings in the Magistrate's Court including the impugned order of the learned Magistrate, proceedings in the High Court including the impugned order of the learned High Court Judge, petition of appeal, and the written submissions filed by the Respondent.
03. Grounds of appeal urged by the Appellant in his petition of appeal can be summarized as follows;
 1. The learned High Court Judge has failed to consider the exceptional reasons enunciated in paragraph 11 of the petition.
 2. The learned High Court Judge has erred when he found that the summoning of the absolute owner to give evidence by the learned Magistrate was following the rules of natural justice.
 3. The learned High Court Judge as well as the learned Magistrate has failed to consider the evidence adduced on behalf of the Appellant.

Facts in brief

04. Three Accused persons were charged in the Magistrate's Court, Kebithigollewa, for transporting *Ebony* timber without a valid permit in contravention of the provisions of the Forest Ordinance. Upon pleading guilty, the learned Magistrate sentenced the Accused persons according to the law. The Appellant was the owner of the lorry that was used to transport the said timber. Therefore, an inquiry was held by the learned Magistrate on the vehicle, where the Appellant was afforded the opportunity to show cause why the vehicle should not be confiscated. Upon such inquiry, the learned Magistrate confiscated the vehicle to state.
05. Being aggrieved by the said order of confiscation, the Appellant made an application to get the said order revised by the High Court. After inquiry, the learned High Court Judge, affirming the order of the learned Magistrate, dismissed the revision application. The instant appeal is against the said order of the learned High Court Judge.
06. According to the evidence given by the Appellant before the learned Magistrate, he had been engaged in business involved in vegetables and coconut shells. The 1st Accused had been the driver of his lorry in question. He had sent the 1st Accused to Dambulla to bring 1500 kilo grams of coconut shells and vegetables. After 9 p.m. he had failed to contact the 1st Accused driver as the driver's telephone was switched off. Next morning, he had got to know that the police have arrested the Accused whilst transporting timber. His evidence was that he had no involvement or knowledge on the transporting of timber, and that he had advised the driver not to use the lorry for any illegal activities.

The 1st Accused driver had also testified on behalf of the Appellant that he was advised by the Appellant not to use the lorry for any illegal activities.

The Law

07. Section 40 (1) of the Forest Ordinance provides;

“(1) when 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."

08. Hence, it is clear that the Appellant (owner) has to prove to the satisfaction of the Court, that he had taken all precautions to prevent the use of the vehicle for the commission of the offence, in this case transporting timber without a valid permit.
09. In the instant case, it was the evidence of the Appellant in the Magistrate's Court that he had given verbal instructions to the driver not to use the lorry to transport anything other than what was involved in his business and not to transport goat or timber.
10. In case of *Mary Matilda Silva V. P.H. de Silva, Inspector of Police, Habarana [CA (PHC) 86/97, decided on 08.07.2010]*, His Lordship Justice Sisira de Abrew discussed about the owner taking all precautions to prevent the use of the vehicle for the commission of the offence. His Lordship Justice Sisira de Abrew said;

"In my view, for the owner of the vehicle to discharge the burden (1) that he/she had taken all precautions to prevent the use of the vehicle for the commission of the offence (2) that the vehicle had been used for the commission of the offence without his/her knowledge, mere giving instructions is not sufficient.

In order to discharge the burden embodied in the proviso to section 3A of the Animals Act is it sufficient for the owner to say that instructions not to use the vehicle for illegal purpose had been given to the driver? If the courts of this country is going to say that it is sufficient, then all what the owner in a case of this nature has to say is that he gave said instructions. Even for the second offence, this is all that he has to say. Then there is no end to the commission of the offence and to the use of the vehicle for the commission of the offence. Every time when the vehicle is detected with cattle all what he has to say is that he had given instructions to the driver. Then the purpose of the legislature in enacting the proviso to section 3A of the Animals Act is frustrated...In the instant case the owner did not call her driver and establish that she had given instructions to him."

Although it was a case under the Animals Act, the same principle applies to this case.

11. The learned Magistrate has considered the evidence adduced on behalf of the Appellant and concluded that the owner (Appellant) had failed to satisfy Court that he had taken all necessary precautions and that he had no knowledge on the commission of the offence. The story of the Appellant is also improbable.
12. Credibility of a witness is mainly a matter for the Trial Judge. The Court of Appeal will not lightly disturb the findings of a Trial Judge with regard to the credibility of a witness, unless such findings of a Trial Judge are manifestly wrong (*Dharmasiri V. Republic of Sri Lanka* [2010] 2 Sri L.R. 241).
13. The learned High Court Judge has considered the evidence adduced in the Magistrate's Court and the order of the learned Magistrate carefully in his judgment.
14. The learned Magistrate on his own volition has summoned the absolute owner to give evidence. The absolute owner had already informed the Magistrate's Court that the company had no objection to the release of the vehicle to the Appellant. Therefore, there was no necessity to call

the absolute owner by Court to give evidence. However, the calling of the absolute owner to give evidence has not caused any prejudice to the Appellant at the inquiry. It was the Appellant who had to prove that he took all necessary precautions to prevent the offence being committed or that had no knowledge of the offence being committed.

15. The learned Magistrate has considered the evidence presented by the Appellant. The learned High Court Judge in his judgment, also has given careful consideration on the evidence when he affirmed the order of the learned Magistrate. I find that the grounds of appeal urged by the Appellant are devoid of merit. Hence, I see no reason to interfere with the order of confiscation by the learned Magistrate as well as the judgment of the learned High Court Judge.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL