

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

Officer in Charge,
Police Station,
Hettipola.

Complainant

V.

Court of Appeal Case No.
CA(PHC) 16/2016

High Court of Kuliyaipitiya Case
No. HCR 03/2012

Magistrate Court of Hettipola
Case No.6427

D.M. Pradeep Wasantha Perera,
No.514/A, Peiris Mawatha,
Boralessa,
Lunuwila.

Accused

AND

Dihal Shashikapriya Peiris,
No.373/B/1,
J.R.Fernandopulle Mawatha,
Koswaththa,
Kochchikade.

Petitioner

V.

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

Respondents

D.M. Pradeep Wasantha Perera,
No.514/A, Peiris Mawatha,
Boralessa,
Lunuwila.

Accused- Respondent

AND NOW

Dihal Shashikapriya Peiris,
No.373/B/1,
J.R.Fernandopulle Mawatha,
Koswaththa,
Kochchikade.

Petitioner-Appellant

V.

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

Respondent-Respondents

D.M. Pradeep Wasantha Perera,
No.514/A, Peiris Mawatha,
Boralessa,
Lunuwila.

Accused- Respondent- Respondent

BEFORE

: **K.K. WICKREMASINGHE, J**
K. PRIYANTHA FERNANDO, J

COUNSEL

: Priyantha Alagiyawanna with Isuru
Weerasooriya for the Petitioner Appellant.

Shanaka Wijesinghe DSG for the Respondent.

ARGUED ON

: 02.12.2019

WRITTEN SUBMISSIONS

FILED ON

: 29.11.2019 by the Petitioner Appellant.

29.11.2019 by the Respondent.

JUDGMENT ON

: 05.02.2020

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 Kuliapitiya dated 01.03.2016 affirming the order of confiscation of a lorry bearing No. 43-9581 made by the learned Magistrate of Hettipola on 24.11.2011.
02. The Accused in the Magistrate's Court case was the driver of the lorry No. 43-9581. On the day in question, the Accused was arrested by the Hettipola police for transporting timber without a valid licence. Upon pleading guilty, the Accused was fined by the learned Magistrate and in terms of section 40 of the Forest Ordinance a vehicle inquiry was held. At the inquiry, the Appellant gave evidence claiming the said vehicle as the registered owner.

03. On behalf of the absolute owner (Asia Asset Finance Company), a representative also gave evidence. After inquiry, the learned Magistrate ordered the vehicle to be confiscated. Against the said order of the learned Magistrate, the Appellant preferred an application in the High Court of Kuliyaipitiya to get the order of the learned Magistrate revised.
04. After the hearing of the above revision application, the learned High Court Judge dismissed the said application and affirmed the confiscation order of the learned Magistrate. This appeal is preferred against the said order of the learned High Court Judge dated 01.03.2016.
05. At the argument stage of this appeal, both counsel for the Appellant and the Respondent agreed to dispose this matter on the written submissions filed by both parties.
06. Section 40 (1) of the Forest Ordinance provides;
- “(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.”*
07. 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.

08. Learned counsel for the Appellant submitted that the Appellant has proved to the satisfaction of the court that he has taken all necessary precautions to prevent the commission of the offence.

09. At the vehicle inquiry, held in terms of section 40 (1) of the Forest Ordinance, the Appellant gave evidence on his behalf. His evidence was that he was the registered owner of the vehicle in question and he had employed Accused as the driver. He had given instructions to the driver not to do any illegal acts using the vehicle (page 109 of the brief).

“... වසන්තට වාහනය ලබා දීමේ දී මා උපදෙස් දුන්නා. වැලි ප්‍රවාහනය කිරීම මා සම්පූර්ණයෙන්ම නවත්වලයි තිබුනේ. නීති විරෝධී දේවල් කරන්න එපා කියලා මා තිබුනේ. වැලි ප්‍රවාහනය කිරීම නීති විරෝධී ක්‍රියාවක් නිසා. එවැනි ක්‍රියා සිදු කරන්න එපා කියලා මා වසන්තව දැනුවත් කළා.... ”

10. Further, he said in evidence that he used to go and inspect the vehicle at the times when he is free. His evidence was that the Accused driver took the vehicle the previous day stating to transport bricks to Moratuwa. However, during cross examination it was revealed that the Appellant did not even know from where the bricks were loaded or to be loaded.

11. 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

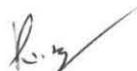
what the owner in a case of this nature has to say is that he gave said instructions. Even for the second offence, this is all that he has to say. Then there is no end to the commission of the offence and to the use of the vehicle for the commission of the offence. Every time when the vehicle is detected 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.

12. Appellant has also failed to call the Accused driver to give evidence or to cite him as a witness, when the driver was the best person other than himself to testify to the fact that the Appellant took precautions to prevent the commission of the offence.
13. As the learned High Court Judge in his Judgment has rightly observed, the behavior of the Appellant after the Accused was arrested is also suspicious. He had not even attended to the matter when his lorry was taken into custody. Appellant had come to claim the vehicle after about a month. In his evidence, he has said that he did not know that he had committed an offence and that he did not take it serious.
14. It is unlikely that an owner of a lorry is unaware of the legal position that his vehicle is liable to be confiscated when timber is transported without a valid permit.
15. Although the Appellant in this Petition of Appeal has urged a defect in the charge as a ground of appeal, at the argument stage or by way of written submissions he did not pursue the same.
16. In the above premise, the learned High Court Judge has rightly found that the order of the learned Magistrate confiscating the vehicle was in order and that the revision application should be dismissed.

Hence, the order of the learned High Court Judge dated 01.03.2016 and the order of the learned Magistrate dated 24.11.2011 are affirmed.

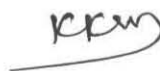
Appeal is dismissed.



JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.



JUDGE OF THE COURT OF APPEAL