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

*In the matter of an appeal in terms of Article 154(P) 3(B) of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

CA (PHC) 0071/2019

**Provincial High Court Panadura**

Case No. HCRA/30/2018

**Magistrate's Court Horana**

Case No. 34771/18

The Officer in Charge,

Police Station,

Bandaragama.

**COMPLAINANT**

**Vs.**

Thushara Sampath

**ACCUSED**

Rathnagoda Baranathage Gamini Suraweera,

No. 15, Heenatigala Road,

Eramudugaha Junction,

Unawatuna.

**CLAIMANT**

**AND NOW**

Rathnagoda Baranathage Gamini

Suraweera,

No. 15, Heenatigala Road,

Eramudugaha Junction,

Unawatuna.

**CLAIMANT-PETITIONER**

**Vs.**

The Officer in Charge

Police Station,

Bandaragama.

**COMPLAINANT-RESPONDENT**

**AND NOW BETWEEN**

Rathnagoda Baranathage Gamini

Suraweera,

No. 15, Heenatigala Road,

Eramudugaha Junction,

Unawatuna.

**COMPLAINANT-PETITIONER-**

**APPELLANT**

**Vs.**

1. The Officer in Charge

Police Station,

Bandaragama.

**COMPLAINANT-RESPONDENT-**

**RESPONDENT**

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12,

**RESPONDENT**

**Before** : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

**Counsel** : Jagath Abeynayake with Aranya Dewanarayana and Ishani Gunathilaka for the Complainant-Petitioner-Appellant

: Jehan Gunasekara, S.C. for the State

**Argued on** : 25-10-2023

**Written Submission** : 12-01-2023 (By the Appellant)

: 02-08-2023 (By the Respondent)

**Decided on** : 26-02-2024

**Sampath B. Abayakoon, J.**

This is an appeal by the claimant-petitioner-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved by the judgment dated 03-06-2019 of the learned High Court Judge of the Western Province holden in Panadura, wherein the revision application filed by the appellant was dismissed.

The said revision application has emanated from the order dated 28-08-2018, whereby the learned Magistrate of Horana ordered the confiscation of the tipper lorry number HG-3807.

The facts that led to the above order can be summarized in the following manner.

One Thushara Sampath was charged before the Magistrate's Court of Horana for transporting 28 window frames and 8 doorframes made out of Mahogani and Jak timber valued at Rs.172013.50 without a valid permit, and thereby committing an offence punishable in terms of the Forest Act.

He has also been charged for having transported sand without a permit at the same time and at the same transaction, which was an offence punishable in terms of the Mines and Minerals Act.

The accused has pleaded guilty to the charges preferred against him, and had been sentenced by the learned Magistrate. The illegally transported timber and sand had been confiscated.

Thereafter, the learned Magistrate has allowed the appellant, who is the registered owner of the tipper vehicle used in the commission of the offence of transporting timber without a valid permit to show cause as to why the vehicle should not be confiscated in terms of section 40(1) of the Forest Ordinance.

The relevant proviso of section 40(1) of the Forest Ordinance, which provides for confiscation of vehicles involved in an offence under the Ordinance, reads as follows;

> **Provided that in any case where the owner of such, vehicle, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall 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.**

It is settled law that the mode of proof in an inquiry of this nature is on the balance of probability. Hence, if it can be determined that the registered owner of the vehicle has established that he has taken due precautions to prevent the offence, and he was unaware of the commission of the offence, it needs to be considered in favour of the owner of the vehicle.

In the case of **The Finance Company PLC Vs. Priyantha Chandra and Five Others (2010) 2 SLR 220,** after considering several judicial decisions, **Dr. Shirani Bandaranayake, J. (As she was then)** held:

> *"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 has 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 the balance of probability."*

**Held further:**

*"As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence."*

I must emphasize that what is meant by the legislature in its wisdom when it was stated in section 40(1) of the Forest Ordinance, "**had taken all precautions to prevent the use"** needs to be interpreted in a pragmatic manner, rather than giving a strict interpretation. It is my view that the facts and the circumstances relevant to a given situation should be considered in its totality, in order to find out whether there is justification in releasing a vehicle to its owner. This is especially so, since, if the Court is to look for all the possible precautions that an owner of a vehicle can take in a given scenario, there can always be some other precaution that could have been taken.

At the inquiry held in that regard, only the appellant has given evidence to substantiate his position.

After having considered the evidence placed before the Court, the learned Magistrate of Horana by his order dated 28-08-2018 has determined that the evidence of the petitioner cannot be relied upon and he has failed to establish that he took all precautions to prevent the commission of the offence. Accordingly, the vehicle No GH-3807 has been confiscated.

The appellant has filed an application in revision seeking to challenge the order of the learned Magistrate before the Provincial High Court of the Western Province holden in Colombo, where the learned High Court Judge of Colombo had pronounced the impugned judgment dismissing the application on the basis that it has no merit.

It was the submission of the learned Counsel for the appellant that the learned Magistrate has imposed a very high burden of proof on the appellant as to the matters stated by him while giving evidence at the inquiry, beyond the requirement of proving the matters urged in the balance of probability. It was his submission that based on a wrong burden of proof the learned magistrate has considered the evidence of the petitioner and had rejected the same without a sufficient basis. It was his contention that although the accused in the matter has pleaded guilty to the charge preferred against him, he has been convicted on a defective charge, which should have been considered at the inquiry, as the defects of the charge upon which the accused had been convicted are also relevant in an inquiry of this nature.

It was the position of the learned State Counsel who represented the respondents that the learned Magistrate has come to a correct finding based on the evidence placed before the Court that the petitioner has failed to prove that he took necessary precautions to prevent the offence being committed. It was the submission of the learned State Counsel that the accused in the case had all the necessary knowledge about the charge against him when he pleaded guilty to the charge and there was no material to show that he pleaded guilty being misled as to the charge.

It was contended that since the learned Magistrate has pronounced a well-considered order, and the learned High Court Judge who heard the application in revision too has addressed his mind to the relevant provisions of law in the impugned judgment and had rightly dismissed it, the appeal should stand dismissed for want of merit.

It needs to be emphasized that, although it was only the petitioner who has given evidence at the inquiry, it is not the number of witnesses that matters, but the quality of the evidence.

I find that the learned Magistrate was well aware of this legal principle and the relevant section 134 of the Evidence Ordinance, when the evidence of the petitioner was evaluated in order to find whether the petitioner has established the fact that he had no knowledge of the offence being committed, and that he had taken precautions to prevent such an offence.

Although the learned Magistrate has used wrong words when it was stated that there is a much higher burden ("ඉතා ඉහළ ඔප්පු කිරීමේ මට්ටමකින්") on the petitioner to prove the facts, I do not find it a reason to accept that the learned Magistrate has looked at the evidence other than on the balance of probability as required by law.

Therefore, I am of the view that only if it can be established that the learned Magistrate was misdirected in that regard and the learned High Court Judge too had failed to consider the revision application in its correct perspective, the petitioner becomes entitled to obtain the reliefs sought by him in his petition of appeal.

As considered correctly by the learned Magistrate, the accused of the case or the petitioner had never been misled as to the charges against him due to any alleged defects in the charges.

The relevant section 166 of the Code Criminal Procedure Act reads as follows;

> **166. Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omissions."**

It is clear that the accused has pleaded guilty knowing very well that he was being charged for transporting timber and sand without a permit as required by law. After convicting and sentencing the accused, the learned Magistrate following the due process of law, has allowed the petitioner, the person who

came forward before the Court as the registered owner of the vehicle, who was not the accused in the case, to establish the requirements of the proviso of section 40 (1) of the Forest Ordinance in order to decide whether to confiscate the vehicle involved in the offence or not.

It clearly appears that the petitioner knew very well the matters he needed to establish before the Court when he gave evidence before the Magistrate's Court under the guidance of his Counsel. It is my view that any alleged defects of the charge had no relevance to the inquiry held before the Magistrate's Court as no prejudice has been caused to the accused even if there was any defect as alleged.

Under the circumstances, I will now proceed to consider whether the learned Magistrate was correct when it was determined that the evidence of the petitioner cannot be relied upon, and he has attempted to concoct a story before the Court.

As determined correctly by the learned Magistrate, the petitioner had been the registered owner of the vehicle subjected to the inquiry. According to the petitioner, as stated in his evidence in chief, he has purchased this vehicle in the year 2017, and after using it for his business purposes, had handed over the vehicle to a close friend of him called Mahinda to be used in his cement block manufacturing business.

He has handed over the vehicle in December 2017 on the basis that his friend should pay a monthly amount of Rs. 50000/-. The vehicle had been subjected to a finance facility and the petitioner had paid the monthly finance rental which amounted to a sum of Rs. 42000/- out of the monthly payment he received for the vehicle. It had been his evidence that he gave necessary instructions to his friend that the vehicle should not be used for any illegal activities, and his instruction was to hand over the vehicle every day after work at his house.

However, when questioned by the Court at a later stage of his evidence he has stated that he purchased the vehicle in November 2014 and handed it over to his friend in the year 2017.

The appellant has stated that on the 3rd of April 2018, he came to know through his friend that the vehicle was detained by the Bandaragama police. He has claimed that when he came later to the police station only, he came to know that the vehicle has been used to transport timber and sand without a valid permit. He has claimed that the person who used the vehicle to transport timber has done so not to earn money, but to help one of his nieces, and the timber had been purchased from a timber merchant. He has claimed that the incident occurred without his knowledge and had urged for the release of the vehicle.

I find the determination of the learned Magistrate highly justified as to the reliability of the evidence of the petitioner. When he gave evidence, he has failed even to mention the correct vehicle registration number of the vehicle. Instead of the correct number GH-3807, the number stated by him as his vehicle registration number had been GH-3704, which was wrong. Not only that, he has claimed in his evidence in chief that he handed over the vehicle to one Duminda, who is a good friend of him, but under cross-examination, has stated that the friend's name is Mahinda.

Being the registered owner, and if he was claiming the vehicle on that basis, he should at least know the driver of the vehicle, even if he was a person employed by his claimed friend, if he was vigilant about his vehicle as claimed by him. He has admitted in his evidence that he did not know who the driver was, until he came to the police station after he was informed that the vehicle is under the custody of police.

In his evidence, the appellant has stated that his instructions to his friend was that the vehicle should be brought back to his house after each day's work. If it

was so, can there be any reason for him to not know who the driver of the vehicle was. There was no evidence to suggest that the driver was a person employed only for that day without the knowledge of the appellant either.

There cannot be any reason for his good friend to not inform him the reason for the detention of his vehicle when he telephoned him to inform of that fact even after when asked, which creates a serious doubt as to his claim that he knew nothing until he came to the police station.

With all the above considered discrepancies and improbabilities in the evidence of the appellant, I find that the learned Magistrate was highly justified in determining that the evidence of the appellant appears to be a concocted story in order to get over the problem he was faced with.

As I have considered before, although the number of witnesses called to prove a fact is irrelevant in an inquiry of this nature, I find that given the unreliable nature of the witness called in this particular inquiry, the failure by the appellant to call the relevant witnesses who could have substantiated his story becomes very much relevant.

If the person named Duminda or Mahinda, whom the appellant has claimed a good friend, and the person responsible for the entire episode is called to give evidence and substantiate the position of the appellant, most of the discrepancies in the evidence by the appellant would have been cleared or clarified.

I find that what had been stated as what was told to him by the said person becomes mere hearsay, which cannot be considered acceptable evidence without that person being called as a witness.

I find that the learned Magistrate has well considered all the relevant facts based on the evidence placed before him in his determination.

Even if this Court is to look at the evidence led in the case, giving a liberal interpretation to the words **"he had taken all precautions to prevent the use of such...."** as stated in the proviso to section 40(1) of the Forest Ordinance, there cannot be any justification whatsoever to disagree with the finding of the learned Magistrate that the vehicle should stand confiscated.

Similarly, I find no reason to interfere with the judgment of the learned High Court Judge as it had been reached after well considering the relevant provisions of law.

Accordingly, the appeal is dismissed for want of any merit.

The Registrar of the Court is directed to forward this judgment with the original case record to the relevant High Court. The Registrar is also directed to send a copy of the judgment to the Magistrate's Court of Horana for necessary steps.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal