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

In the matter of an appeal under and in terms of Article 154P(6) of the Constitution read together with the High Court of the Provinces (Special Provision) Act No. 19 of 1990 (as amended)

CA Case No:
CA (PHC) 3/16

PHC Polonnaruwa Case No:
(Rev) 22/2014

MC Bakamuna Case No:23801

Officer-In-Charge
Police Station
Bakamuna

Complainant

Vs.

1. Moihomed Haniffa Mohommed Illiyas,
   No.20, Pahala Gammedda
   Raja Vediya
   Digana.

2. Ambi Mohommed Marshu,
   No. 81, Dehemiyagama
   Kolongoda
   Hasalaka

Accused

AND BETWEEN

Navur Pichchei Moosin
No.19,
Kumbukkandura,
Theldeniy.

Petitioner

Vs.

1. Officer-In-Charge
   Police Station
   Bakamuna

2. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12

Respondents

AND NOW BETWEEN

Navur Pichchei Moosin
No.19,
Kumbukkandura,
Theldeniy.

Petitioner-Appellant

Vs.

3. Officer-In-Charge
   Police Station
   Bakamuna

4. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12

Respondents- Respondents

Before : **K.K.Wickremasinghe,J**

Devika Abeyratne,J

Counsel : Shantha Jayawardhena with Ashiq Hassim and Dinush de Silva for the Petitioner
Maheshika de Silva SCC for the Respondents

Written Submissions On : 02.09.2019 (By the Petitioner-Appellant)
27.09.2019(By the Respondents-Respondents)

Argued On : 12.03.2020 ,31.08.2020 and 28.09.2020.

Decided On : 20.11.2020

Devika Abeyratne,J

The petitioner appellant has preferred this appeal against the Judgment of the learned High Court Judge of *Polonnaruwa* dated 25.01.2016 which affirmed the order of forfeiture of a vehicle by the learned magistrate of *Bakamune* on 18.8.2014.

Briefly the facts relevant to this appeal are as follows;

The two accused in Case No 23801 in the Magistrate' s Court of *Hingurakgoda* were charged with the following offences to which they

were found guilty on their unconditional plea of guilt and fined accordingly.

1. Transporting 20 heads of cattle (6 buffaloes and 14 dairy cattle) on or about 23.08.2011 in contravention of the provisions of the Animals Act No. 29 of 1958 (as amended)
2. Contravening the provisions of Cruelty to Animals Ordinance No. 13 of 1907 (as amended); and
3. Contravening the provisions of the Motor Traffic Act No. 14 of 1951 (as amended)

The inquiry pertaining to the vehicle involved in the above offences was held and on 3.4.2013 the appellant being the registered owner has given evidence stating that; he had not authorized the driver to use the vehicle for any illegal activities; the said vehicle had never been involved in the commission of any offence; he had never been prosecuted before a Court of law ; he was not privy to the commission of the said offences by the Accused ; the 'closed' body of the Motor Lorry was there at the time he purchased the vehicle from its previous owner and the lorry was necessary for his business which included transportation of vegetables and building materials; that the Motor Lorry had been used in the past to legally transport cattle on a permit issued by the Municipal Council of Kandy which is borne out by document marked "Y" marked.

After inquiry by order dated 08.08.2014 the learned Magistrate has confiscated the vehicle. For easy reference a part of the order is quoted below;

".....The Finance Com.PLC Vs Agampodi Maha Pedige Priyantha Chandana and others HC 105/A 2008 නඩුවේදී ශිරාණි බණ්ඩාරනායක විනිසුරුතුමිය විසින් පැහැදිලි කර ඇත. එහිදී ෆාරිස් එදිරිව ඕ.අයි.සී. ගලෙන්බිදුණුවැව සහ තවත් අයෙක් 1992 (1) එස්.එල්.ආර්. 167 නඩුවේදී අදාල කරගෙන ඇති නෛතික තත්ත්වය මත,

අයිනිකරු විසින් රථය අපරාධ වැලැක්වීමට ගතයුතු සියලු පූර්වඥානයන් යොදා තිබූ බවට,

*නිමිකම් පාන්නාගේ දැනීමකින් තොරව අදාල වරද සිදු කර ඇති බවට, යන කරුණු 2 න් 1 ක් ශක්‍යතා වැඩිබර මත ඔප්පු කලයුතු යන නෛතික සිද්ධාන්තයෙන් ඔබ්බට වර්තමානයේදී ඉහත සඳහන් කල **කරුණු 2 ම** ශක්‍යතා වැඩිබර මත ඔප්පු කලයුතු බව එහිදී විනිසුරු තුමිය විසින් පහැදිලි කර ඇත. ඒ අනුව වර්තමාන පිළිගත් තත්ත්වය වන්නේ ඉහත සඳහන් **කරුණු 2 ම** ශක්‍යතා වැඩිබර මත ඔප්පු කලයුතු බවයි.*

*මෙම නඩුවේදී නිමිකම් පාන්නා විසින් ඉහත සඳහන් **කරුණු 2 ම** ශක්‍යතා වැඩිබර මත ඔප්පු **කර නොමැති හෙයින්** අංක 68-9297 දරණ ලොරි රථය රාජසන්ථක කරමි.* (emphasis added)

An appeal as well as a revision application was preferred against the said order and subsequently, the petitioner has opted to proceed with the revision application agreeing that the order from the revision application will apply to the Appeal as well, which revision application was dismissed on 25.1.2016, which is the impugned order.

It is contended by the appellant that the learned High Court Judge erred in law when he failed to appreciate that the learned Magistrate has misdirected herself when she erroneously held that in *K.Mary Matilda Silva vs PH de Silva Inspector of Police Station, Habarana C.A. (PHC) 86/97, The Finance Company Pvt Ltd. Vs. Agampodi Maha Pedige Priyantha Chandana and Others SC Appeal 105A 2008 decided on 30.09.2010 and Faris Vs. O.I.C. Galenbindunuwewa and another*

1992 1 SLR 167 has now determined the law to be that the petitioner appellant has to prove both the following defences ; that he has taken all precautions to prevent the use of such vehicle; and that the vehicle has been used without his knowledge for the commission of the offence.

In the instant matter the relevant section is Section 3A of the Animals Act. (as amended) which provides as follows;

> *"Where any person is convicted of an offence under this part or any regulations made thereunder, any vehicle used in the Commission of such offence shall be, 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 of 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 has taken all precautions to prevent the use of such vehicle* ***OR*** *that the vehicle has been used without his knowledge for the commission of the offence". (emphasis added)*

This section stipulates that one of the two alternatives should be proved by the owner of the vehicle in order to satisfy Court why the vehicle should not be confiscated. This position is clearly laid down by His Lordship Sarath N Silva in *Faris V The Officer-in-Charge, Police Station. Galenbindunuwewa and another* 1992 (1) SLR 167 at page 169 that **only one** of the above two requirements need be proved on a

balance of probability under the proviso to section 3A of the Act and held that;

" .....*In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order of confiscation should not be made*".[emphasis added]

In the instant case the learned Magistrate has concluded that both defences have to be proved as per the decisions in *Mary Matildas* case (supra) and *The Finance Company Pvt Ltd. Vs. Agampodi Maha Pedige Priyantha Chandana and Others (supra).*

These two cases relate to section 40 of the Forest Ordinance and in the instant case the relevant law is section 3 A of the Animals Act which has specifically stipulated that if one of the requirements is proved there should be no order of confiscation. Thus, it is clearly seen that the learned Magistrate has misdirected herself on that position.

The learned High Court Judge quite correctly has held that the appellant it required only to prove either one of the above mentioned defences on a balance of probability to prevent the confiscation of the vehicle. Thus, the High Court has accepted the fact that the learned magistrate has erred in her determination, with regard to this most vital issue. Thus it is established that the order of the magistrate is based on an incorrect legal basis.

The appellant has testified that he bought the vehicle on 30.01.2010 for his business and that he had employed the first accused *Illiyas* as his driver who has been driving the said vehicle on hires to places like *Mahiyanganaya.* It was also stated that the vehicle was used to transport vegetables to *Dambulla* and Bricks to *Mahiyanganaya* and at one time a permit had been obtained from the Kandy municipality for the transportation of cattle.

Thus, it is apparent that the vehicle in question has been used for various business purposes which is corroborated by the evidence of the *grama sewaka* of the area who gave evidence on behalf of the appellant.

It is submitted that on 22.08.2011 the driver has taken the vehicle on hire to *Mahiyanganaya* around 12.00 pm and on the following day, 23.8.2011 the appellant has been informed that the *Bakamuna* Police has taken the vehicle in to custody for illicitly transporting cattle. It is submitted that the driver whom he employed from the time he purchased the vehicle has not been authorised to use the vehicle for any illegal purpose. He has also testified that there are no previous incidents pertaining to such illegal acts and that he has no knowledge that the driver has been committing any illegal acts. He has discontinued the services of the driver immediately. Thus, it was his evidence that he had no knowledge of the commission of this offence and that he was not a participant who was privy to the illegal act. This position is uncontradicted.

It is on record that at one time the appellant had obtained a valid permit to transport cattle which document was marked as Y and

submitted by the appellant. However, the learned magistrate has concluded that as previously the appellant had been transporting cattle in this vehicle, it cannot be believed that he had no knowledge of the illegal transportation of the cattle. It appears that the learned High Court Judge and the Magistrate have drawn an inference that transporting cattle on a permit on earlier occasions established that the present offence was committed with the knowledge of the appellant. This reasoning is without any legal basis and on conjecture which is not a fair, sound or reasonable conclusion.

The learned Magistrate has also concluded that the appellant had changed the body of the Motor Lorry to accommodate the transportation of cattle which according to the learned judge has been further established by the accused pleading guilty to charge No 3 which is, Contravening the provisions of the Motor Traffic Act No. 14 of 1951 (as amended).

The appellant was not an accused in the case, therefore, the unconditional plea of guilt by the accused in the action cannot be imputed against the appellant who was not charged with that particular offence.

Further, the Certificate of Registration of the vehicle does not specify the type of body which had been fixed to the lorry at the time it was first registered. Therefore, it cannot be proved or disproved what type of body the vehicle had. When there was no material before court it was improbable to come to a finding that the vehicle was modified to

transport cattle. The learned High Court judge has failed to appreciate this fact.

Thus, the learned Magistrate concluding that the vehicle was modified to accommodate the transportation of cattle is without any rational basis and is not tenable.

In *Faris V The Officer-in-Charge, Police station Galenbindunuwewa and another* (supra), the Court of Appeal whilst allowing the appeal and setting aside the order of confiscation of the lorry has stated; *"The presence of some special facility in the lorry for the transporting of animals does not per se establish that the owner had knowledge of the commission of the particular offence. This however, could be a highly relevant fact, which may be used together with some other evidence, to negative the claim of the owner that he had no knowledge of the commission of the particular offence. In this case I am of the view that there is no material to negative the claim of the owner that he had no knowledge of the commission of the particular offence".*

In the instant case, there is no evidence elicited that the appellant was aware that an illegal transportation was taking effect on that particular day. There have been no previous offences relating to the vehicle or the appellant. After the commission of the offence, the driver's services have been discontinued and there is no evidence to the contrary.

The learned High Court Judge in affirming the order of the learned Magistrate has not considered that there was no evidence before

the Magistrate's court to conclude that the appellant had knowledge of the commission or was privy to the commission or was a participant of the alleged offences .

In consideration of all of the above facts, the appeal is allowed and the order made by the High Court of *Polonnaruwa* dated 25.01.2016 upholding the learned Magistrate's order dated 18.08.2014 as well as the said order of the learned Magistrate is hereby set aside.

The registrar is directed to communicate this Judgment to the High Court of *Polonnaruwa* and the Magistrate's Court of *Hingurakgoda.*

At the conclusion of the hearing of the appeal the learned State Counsel informed this Court that the vehicle in issue has been sold by public auction in the Magistrate's Court of *Hingurakgoda.* An explanation was called from the relevant Magistrate's Court how the vehicle was auctioned when the matter was in appeal. As per the report dated 25.08.2020 the learned Magistrate has stated that officers concerned have acted in an irresponsible manner in discharging their duties and that the proceeds of the sale is in custody of Courts.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J

I Agree

JUDGE OF THE COURT OF APPEAL