IN THE COURT OF APPEAL OF THE DEMOÇRATIC SOCIALIST REPUBPLIC OF SRI LANKA

In the matter of an Appeal from the High Court of the Provinces (North Western Province) holden in Kuliyapitiya in terms of Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Court of Appeal No: CA (PHC)15/2016

High Court Kuliyapitiya: 31/2011(Revision)

Magistrate Court Hettipola: 4636

Officer –in- Charge,
Police station
Hettipola.

Complainant

Vs

A.H.S Darshana Senanayake
Munihiriyagama
Hettipola

Accused

AND BETWEEN

A.H. Mithrasena
Munihiriyagama
Hettipola

Aggrieved - Petitioner

Vs

1. Officer –in- Charge,
   Police station
   Hettipola.

Complainant – Respondent

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

2nd Respondent

3. A.H.S Darshana Senanayake
Munihiriyagama
Hettipola

1st Accused – 3rd Respondent

AND NOW BETWEEN

A.H. Mithrasena
Munihiriyagama
Hettipola

Aggrieved – Petitioner – Appellant

Vs

1. Officer –in- Charge,
   Police station
   Hettipola.

Complainant – Respondent – 1st Respondent

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

2nd Respondent – 2nd Respondent

3. A.H.S Darshana Senanayake
Munihiriyagama
Hettipola

1st Accused – 3rd Respondent - 3rd Respondent

BEFORE	:	Hon. K. K. Wickremasinghe, J. Hon. Devika Abeyratne , J.
COUNSEL	:	Chula Bandara, AAL and Lakmini Edirisinghe, AAL for the Aggrieved Petitioner-Appellant Chathuri Wijesuriya, SC for the 2nd Respondent- 2nd Respondent
WRITTEN SUBMISSIONS	:	The Aggrieved Petitioner-Appellant – 4/10/2019 The 2nd Respondent- 2nd Respondent – On 18.11. 2019
DECIDED ON	:	20.10.2020

K.K.WICKREMASINGHE, J.

The Aggrieved – Petitioner - Appellant has filed this appeal seeking to set aside the Judgment of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kuliyapitiya dated 13.01.2016 in Case No. Rev 20/2013 and seeking to set aside the confiscation order made by the Learned Magistrate of Hettipola dated 05.05.2011 in Case No. 4636 MISE.

Facts of the case:

The accused - driver A.H.S Darshana Senanayake was charged on 01.02.2010 before the Learned Magistrate of Hettipola, for illegally transporting wood, an offence punishable under section 25(2) read with sections 38A, 40, 40A and 25(2)(b) of the Forest Ordinance as amended. The accused-driver pleaded guilty to the said charge and the Learned Magistrate imposed a fine of Rs. 20,000.

Thereafter a vehicle inquiry was held with regard to the vehicle used for commission of the offence. The Aggrieved-Petitioner-Appellant who is the registered owner of the vehicle (hereinafter referred to as 'the appellant') gave evidence in the said inquiry. The Learned Magistrate confiscated the vehicle by the order dated 05.05.2011.

Being aggrieved by the said order, the appellant preferred an application for revision to the Provincial High Court of North Western Province holden in Kurunegala. Subsequently, the said matter was transferred to the Provincial High Court of North Western Province holden in Kuliyapitiya. The Learned High Court Judge of Kuliyapitiya dismissed the said revision application by the order dated 13.01.2016.

Being aggrieved by the said dismissal, the appellant preferred this appeal. The Learned Counsel for the appellant submitted following grounds of appeal in written submissions;

1. The Judgement is contrary to the Law and against the weight of the evidence.
2. The Learned High Court Judge had erred in holding that the Learned Magistrate had acted according to law when the Learned Magistrate failed to properly evaluate the evidence laid down before him regarding the manner the vehicle was used and precautionary measures taken by the registered owner.

3. The Learned High Court Judge erred by disregarding the evidence of the Appellant and holding that the registered owner had failed to take precautionary measures in respect of the vehicle.

I wish to consider ground 2 and 3 together and ground 1 separately. The incident in question is summarized as follows;

Ground 2 and 3

As per the evidence of the appellant, the vehicle was used for the following purposes;

> "මෙය මිලදී අරන් අවුරුද්දක් පමණ වෙනවා. මෙම වහනය මාගේ නිවසේ නතර කර තිබෙනවා. අපි මෙම වහනය යොදාගෙන ලවැල්ල කපනවා , වතු එලි කරනවා, වෙල් හානව, බලපත්ර තිබෙන වැලි අදිනවා, කලුගල් අදිනවා." (Page 116 of the brief)

The accused - driver and the appellant are son and father. On the date of the incident, the accused – driver had taken the vehicle for the purpose of loading and transporting bricks. Consequently, the owner has got to know that the vehicle has been taken in to the police custody while transporting illegal wood. The accused-driver pleaded guilty to the charges and a fine was imposed by the Learned Magistrate. Subsequent to holding of the vehicle inquiry, the Learned Magistrate confiscated the vehicle by the order dated 05.05.2011.

At this stage I wish to set out the provisions of section 40 of the Forest Ordinance and succeeding amendments thereto to show the gravity of the offence and punishment in the eyes of the law.

Section 40 of the Forest Ordinance reads as follows:

> *"When any person is convicted of a forest offence, all timber or forest produce which is not the property of the Crown in respect of which such offence has been committed, and all tools, boats, carts, cattle, and motor vehicles used in committing such offence, shall be liable, by order of the convicting Magistrate"*

Section 40 of the Forest Ordinance as amended by Act 56 of 1979 was repealed by Act No. 13 of 1982 and section 7 was substituted as follows:

Section 40 (1);

> *Upon the conviction of any person for a forest offence –*
>
> *(a) all timber of forest produce which is not the property of the State in respect of which such offence has been committed ; and*
>
> *(b) all tools, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not), shall by reason of such conviction be forfeited to the State.*

The proviso to **Section 40(1) of the Forest Ordinance (as amended by Act No.65 of 2009)** reads as follows;

> *"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."*

Therefore it is trite law that in a vehicle inquiry conducted in terms of section 40(1) of the Forest Ordinance, the burden of proving the precautionary measures taken to prevent an offence being committed is cast on the vehicle owner. The statutory provision is further supported by a line of legal authorities.

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."*

In the case of ***The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others*** **[SC Appeal 105A/2008 – decided on 02.07.2009],** 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."*

In the case of ***K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another*** **[CA (PHC) 89/2013],** it was held that,

> *"The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle..."*

Accordingly a vehicle owner should discharge the said burden of proof on a balance of probability.

The counsel for the Appellant submitted that the Appellant had taken all the preventive steps to stop commission of such offence. In page 116 and 117 of the brief, the testimony of the Appellant elicited an insight to his stance.

> "මම ට්‍රැක්ටර් රියදුරුට උපදෙස් දීල තිබුණ නීති විරෝධී ක්‍රියා කරන්න එපා කියල. මට මෙම වහනයෙන් නීති විරෝධී ක්‍රියා කරනවද කියල සොයා බලනවා. මම දැනගෙන හිටියේ නැහැ මෙවැනි නීති විරෝධී ක්‍රියාවක් කරයි කියල මෙවැනි වරදක් සිදු කරනවා කියල මගේ දැනුමට භාජනය වුනේ නැහැ. එදින ඔහු මෝඩ ගල් අදින්න යනවා කියලා තම ට්‍රැක්ටරය අරන් ගියේ. මම දැනගෙන හිටියනම් මෙවැනි වැරදි සිදු කරන්න ඉඩ දෙන්නේ නැහැ. මගේ වහනය මීට පෙර මෙවැනි නීති විරෝධී ක්‍රියා සිදු කරලා නැහැ. මම රියදුරුට උපදෙස් දීල තිබුන නීති විරෝධී ක්‍රියා කරන්න එපා කියල. ඔහු මගේ උපදෙස් පිළිපැදලා නැහැ." (Page 117 of the brief)

When considering the evidence of the owner, "ඔහු මගේ උපදෙස් පිළිපැදලා නැහැ" it is evident that in fact he had no control over his son, the accused. Further he was trying to prove that he had no knowledge.

However in the case of ***W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others*** **[CA (PHC) APN 100/2014]**, it was held that,

> *"...**A mere denial** by the of Registered Owner **of the fact that he did not have knowledge**, of the alleged commission is **not sufficient** as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose..."*

In ***Mary Matilda Silva V. P.H. De Silva*** **CA (PHC) 86/97**, it was held that giving "mere instructions" is not sufficient to discharge the said burden. The same stance is taken up in the case of ***Saman Kumara and another v Attorney General*** **CA (PHC) 157/12**, where it is decided that mere verbal instructions are not sufficient to discharge the burden. Similarly, in the case of ***Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others*** **CA (PHC) 95/2012 decided on 04.09.2018** it was held as follows:

> *"Accordingly, it is amply clear that simply telling the driver is insufficient to discharge the burden cast on the vehicle owner by law."*

In the case of ***K.W.P.G. Samarathunga v. Range Forest Officer and one other*** **C.A (PHC) No.89/2013**, the term used in the judgment with regard to precautions, is "necessary precautions". In the later part of this judgment, His Lordship Chitrasiri J pronounced the term a "meaningful step". Therefore what amounts to a meaningful step is a question of fact to be decided by the Court.

Therefore in light of the cited authorities, the law stands today makes it mandatory to prove preventive measures taken by a vehicle owner in question, on a balance of probability. Undoubtedly, such burden would not be discharged merely because the owner in question did not have knowledge about an offence being committed or because the vehicle was not involved in an offence previously.

I observe that both, the Learned Magistrate and the Learned High Court Judge, were of the same opinion that the appellant had failed to discharge the said burden cast on him, to the satisfaction of Court.

The Learned High Court Judge had made the following observation;

> "තවද 3වන චිත්තිකාර වග උත්තරකරු ඔහුට කමති ආකාරයටක මෙම ට්‍රැක්ටර් භාවිතා කර ඇති බවක් සාක්ෂි තුලින් ගම්‍ය වන අතර එදින මෝඩ ගල් ඇදීමට මෙම ට්‍රැක්ටර් පිටත් කර හැරිය බව සඳහන් කලත් එය කගේ ගල්ද කොහේ සිට කොහාට ගෙන යන්නේද සම්බන්දයෙන් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නැති නමුත් ප්‍රවාහනය කරමින් තිබු දැව කඳන් කාගේද කොහාට ගෙනයන්නේද සම්බන්දයෙන් සියලු තොරතුරු පෙත්සම්කරුගේ සාක්ෂියේ ඉදිරිපත් කර ඇත." (Page 77 of the brief)

Therefore, I do not think that a vehicle owner, under the present law, can submit the absence of knowledge as a ground to avoid a vehicle confiscation, anymore. Therefore, the above two grounds of appeal too should fail and I am satisfied that both the Learned Magistrate and the Learned High Court Judge had made well-reasoned orders, following due procedure.

Ground 1

Now I will consider whether the Learned Magistrate failed to consider the typographical error in the evidence and whether the Learned High Court Judge considered such in his order.

The Learned Magistrate had made the following observation;

> "හරස් ප්‍රශ්න වලට පිළිතුරු දෙමින් තමාගේ එකම පුතා බවත් දර පටවාගෙන කැම හදන මුදලාලි කෙනෙකුගේ ගෙදර යන විට පොලිසියෙන් අත් අඩංගුවට ගෙන ඇති බවත් ප්‍රකාශ කොට ඇත . සාක්ෂිකරු විසින් වුදිත වන තමාගේ පුතා තමාගේ අනුදැනුමකින් තොරව මෙම රථය ගෙන ගිය බව මුලික සාක්ෂි වල ප්‍රකාශ කලද හරස් ප්‍රකාශ වලදී එකී දර රැගෙන යාම අනුදැනුමෙන් සිදුවී ඇති බව පිළිගෙන ඇත." (Page 131 of the brief)

Afterwards, the Learned High Court Judge had made the following observation;

"තවද පෙත්සම්කරු වෙනුවෙන් මතු කල තර්කයක් වන්නේ වැරදි ලෙස යතුරු ලියනය වීමක් එනම් "අපි දර පටවාගෙන ගියා " යනුවෙන් "පුතා" වෙනුවට "අපි" යතුරු ලියන දෝෂය මත පිහිටා උගත් මහේස්ත්‍රාත් තුමිය ක්‍රියා කිරීම හේතුවෙන් අගතියක් සිදුවී ඇති බවයි .

ඉහත හේතු මත මෙවැනි යතුරු ලියන දෝෂය තිබුන බවට උපකල්පනය කලේ වුවද අනෙකුත් සාක්ෂි සලකා බැලීමේදී උගත් මහේස්ත්‍රාත් තුමිය නිවැරදි නිගමනයකට පැමිණ ඇති බව ගම්‍ය වේ." (Page 78 of the brief)

Therefore, one cannot give much weight to the above mentioned typographical error. I observe that the Learned High Court Judge and the Learned Magistrate had acted according to law, properly evaluated the evidence laid down before him.

Considering above, I find no reasons to interfere with the order of the Learned High Court Judge of Kuliyapitiya dated 13/01/2016 and the order of the Learned Magistrate of Hettipola dated 05.05 2011. Therefore, I affirm the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Devika Abeyratne, J.
I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. ***Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]***
2. ***The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008 – decided on 02.07.2009***

3. ***K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013]***
4. ***W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]***
5. ***Mary Matilda Silva V. P.H. De Silva CA (PHC) 86/97***
6. ***Saman Kumara and another v Attorney General CA (PHC) 157/12***
7. ***Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others CA (PHC) 95/2012 decided on 04.09.2018***
8. ***K.W.P.G. Samarathunga v. Range Forest Officer and one other C.A (PHC) No.89/2013***