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

The Officer-In-Charge,
Koswatte Police Station.

Plaintiff

CA Case No:
CA (PHC) 09/2015

-Vs-

HC of Chilaw Case No:

HCR/19/2013

Warnakulasooriya Anthony Basil Fernando,
No.224/F,
Madha Naynamadama,
Naynamadama.

Accused

-Vs-

1. Mallawa Arachchige Supun Malhara,
   Supun Wasa,
   Uruwella Road,
   Katuneriya.

Claimant (Registered Owner)

2. Mallwa Arachchige Supipi Madumalika,
   Supun Wasa,
   Uruwella Road, Katuneriya.

Power of Attorney-Holder of the Registered Owner

Now

Mallawa Arachchige Supun
Malhara,
Supun Wasa,
Uruwella Road,
Katuneriya.

Claimant (Registered Owner)-Petitioner

-Vs-

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

2. The Officer-In-Charge,
Koswatte Police Station.

3. Warnakulasooriya Anthony,
Basil Fernando,
NO. 224/F,
Madha Naynamadama,
Naynamadama.

4. Central Finance Company PLC,
No.270, Vauxhall Street,
Colombo 02.

Respondents

AND NOW

Mallawa Arachchige Supun Malhara,
Supun Wasa, Uruwella Road,
Katuneriya.

Claimant (Registered Owner)
Petitioner-Appellant

-Vs-

1. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

2. The Officer-In-Charge
   Koswatte Police Station

3. Warnakulasooriya Anthony
   Basil Fernando,
   NO. 224/F, Madha Naynamadama,
   Naynamadama.

4. Central Finance Company PLC,
   No.270, Vauxhall Street,
   Colombo 02.

Respondents-Respondents

Before : K.K.Wickremasinghe, J
Devika Abeyratne, J

Counsel : Senaka De Seram for the 4th Respondent-Respondent
Panchali Vitharana SC for the 1st and 2nd Respondents

Written Submissions : 04.01.2019(by the Claimant Petitioner-Appellant)
03.09.2018(by the 4th Respondent-Respondent)
On 31.08.2018(by the 1st and 2nd Respondents)

Decided on : 28.08.2020

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Devika Abeyratne,J

The appellant *Mallawa Arachchige Supun Malhara* has preferred this appeal seeking to set aside the order of the learned High Court Judge of *Chilaw* dated 26.01.2015 affirming the order of the learned Magistrate of *Marawila* dated 07.08.2013 wherein the vehicle in issue was confiscated.

The accused *W.A. Basil Fernando* in the *Marawila* Magistrate's Court Case No 75984/C was charged for committing an offence under section 25 (1) of the Forest Ordinance to be read with Section 40 (1) of the said Act for transporting timber without a valid permit.

He was convicted on his own plea and a fine of Rupees 30,000 was imposed.

At the inquiry under section 40 of the Forest Ordinance in respect of the vehicle bearing registered number 252-7008 the appellant, as the registered owner claimant (hereinafter referred to as the appellant) has claimed the vehicle. As the vehicle is subject to a lease, as the

absolute owner, a representative from Central Finance Company has also given evidence.

After the conclusion of the inquiry, the learned Magistrate made order to confiscate the vehicle. At the Revision Application in the High Court of *Chilaw*, the decision of the learned Magistrate was upheld and the application was dismissed.

Aggrieved by the dismissal, the appellant has preferred this appeal.

Section 40 (1)(b) of the Forest Ordinance as amended) provides as follows;

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 the 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 where the owner of the vehicle 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, there is provision for the owner of a vehicle used in the commission of an offence relating to the Forest Ordinance to satisfy Court that he/she has taken all necessary precautions to prevent the commission of such offence.

Complying with the said provisions, the learned Magistrate has given an opportunity to the appellant to show cause why the alleged vehicle should not be confiscated and thus, it is incumbent on the appellant to satisfy Court that he had taken all precautions to prevent the offence from taking place and that he has no connection to the illegal act of transporting the timber without a valid permit.

The learned High Court Judge's conclusion is that the appellant has failed to satisfy the Magistrates' Court that he had no knowledge that the vehicle was used for the commission of an illegal act by the accused *Basil Fernando.*

According to the appellant, the vehicle which was on a leasing facility was used for the personal and private use of the appellant and his family, especially for the use of the sick father.

The evidence before the Magistrate has been that the accused is known to the appellant, to whom he has given the vehicle on a couple of occasions, once to take the wife of the accused for medical treatment and in this particular instance on 26.01.2013 to go out somewhere "....එදා ගමනක් යන්න තියෙනවා කියලා ඉල්ලා ගෙන ගියා...." However, no specific place has been mentioned.

He was later informed by the *Koswatta* Police that the vehicle was taken into custody for transporting timber without a permit and the seat at the back of the vehicle has been removed to accommodate the illegal act.

When the accused was questioned by him why timber was transported without his knowledge, the appellant had been told that it was to build a fence near a waterway close to the residence of the accused. In the cross examination of the appellant, it transpired that the accused has no permanent job, but to the appellant's knowledge he is involved in a business of buying and selling scrap iron together with his son-in-law.

He has denied knowledge of *Basil Fernando* being involved in a timber business, however, after the incident, has come to know that the accused was dealing in some timber business also. The explanation according to the appellant why the vehicle was given for the use of the accused is that, the accused accompanying the appellant to take his terminally sick father for medical treatment , that on one occasion when the appellant was not home, the accused had taken the sick father for urgent medical treatment in this vehicle and helping them out.

The vehicle has been taken by the accused around 03.00 pm on 26.01.2013 and the appellant was informed by the police about the vehicle being taken in to custody around 09.00 pm the same day and when he immediately went to the police station he has seen the vehicle with the timber logs, and had questioned the accused why the vehicle was used to transport timber when the vehicle was requested by the

accused to visit someplace. He has evidenced that he was unaware of the transportation of the timber and that he was not a participant to that act.

The suggestion that the seat of the vehicle was removed to accommodate the transportation of timber and that the windows were also protected from possible damage, was not accepted by the appellant and has stated that only 4 nails have to be removed to take out the seat of the vehicle and that he had no knowledge of its removal . However, there is no independent evidence that the vehicle was modified to transport timber as suggested by the prosecution. (page 115 of the Brief)).

The learned Magistrate has concluded that the appellant has given the vehicle to a person not well known to him. However, the evidence is that the appellant has known the accused from his young days and knows him as a person from *Katuneriya* who does business with his son in law collecting scrap iron. That he is a person who has helped him out when he was not home by getting medical help for the sick father taking him in the vehicle in issue. He has also spoken of an instance where the accused after using the vehicle has returned the keys to his mother.

These facts establish that lending the vehicle to the accused has not been a remote incident and has acted on the familiarity and trust he had of the accused. The pattern of evidence how the vehicle has been used by the accused shows that it has been given on the trust he had of the accused. It is not uncommon for people in villages to lend their vehicles to known people. It is also safe to infer, on the evidence adduced

that the appellant would have been grateful and obliged to the accused who has been of help to the family.

In this background and considering the relationship of the appellant and the accused, is there sufficient evidence elicited that the accused was aware and had knowledge of the commission of a crime by the accused and that he was party to it? It has not been established so.

In *Faris Vs Officer-In-Charge Galenbidunuwewa* [1992] 1 SLR 167;

> *"In terms of the proviso, if the owner establishes anyone of these matters on a balance of probability, an order for confiscation could be made. An order for confiscation could be made only if the owner was present at the time of the detection or there was some evidence suggesting that the owner was privy to the offence."*

In the instant matter, the appellant was not present when the vehicle was seized. There is no evidence that the appellant was privy to the offence.

It is correct that there is no clear evidence that the appellant has taken any precautionary measures such as advising not to use the vehicle for illegal purposes. But considering the previous instances where the vehicle has been used by this person known to the family for some time and who has come to the aid of the family in time of need ,

could the appellant have foreseen the vehicle being used for an illegal offence.

Further, considering the relationship is it probable to expect that any advising would be done when the vehicle was requested to go on some journey by a person who had used the vehicle on previous occasions also . It was not a total stranger who has taken the vehicle. The appellant would not have had any hint as to the possibility of his vehicle being confiscated when he conceded to the request of the accused.

The counsel for the appellant has referred this Court to the authorities in *K.Joslin Vs Bandara* (74 NLR at page 48) and *Mary Matilda Silva Vs I.P Habarana* [CA (PHC) 86/87].

In *K.Joslin vs Bandara* (Supra) it was held;

> *".... The precautions taken or the absence of any such precautions must be determined in relation to the actual offence committed and the circumstances under which it was committed."..... In such a case I cannot see what effective precautions could have been taken by the owner. It has not been suggested that the owner or her husband were in any way privy to the commission of the offence or had any reason to anticipate the commission of the offence."*

Mary Matilda Silva Vs I.P Habarana (Supra) it was held;

> *That the claimant of the vehicle has to prove on a balance of probability that he has taken all precautions to prevent the offence being committed and he had no knowledge of the offence.*

Considering the relationship of the accused and the appellant one cannot expect the appellant to explain in so many words not to use the vehicle for an illegal act. The accused is not a driver employed by the appellant, he is a person doing business of his own who has access to the vehicle when requested. It is fair to assume that the appellant would not have expected the accused to do anything illegal. This is what is elicited in the evidence of the appellant. It is quite apparent that there is no evidence that the appellant was privy to the illegal act of the accused. Therefore, the above referred authorities would be of assistance in favour of the appellant in the instant matter.

In page 120 of the brief the learned judge has questioned in the following manner and the answers elicited gives an insight to the thinking of the appellant.

ප්‍ර : කොහේ යන්නද වාහනය ඉල්ලා ගත්තේ?

උ : ගමනක් යන්න තියෙනවා මට පොඩ්ඩක් දෙන්න කියලා කිවුවා. තැනක් කිවුවේ නැහැ. එක දවසකුත් දුන්නා.

ප්‍ර : තමා කිසිම සොයා බැලීමක් නැතුව ගමනක් යන්න වාහනය දුන්නා කියලද කියන්නේ?

උ : එයා මට මුලදී විශ්වාසයෙන් සිටි නිසාත්, තාත්තාට බෙහෙත් ගේන්න එන නිසාත් මම දුන්නා. පැය ගණන් ගන්නේ නැහැ. ඉක්මනට ගෙනත් දෙනවා.

The line of cross examination of the prosecution at one point has been that the appellant was doing business with the accused which he has totally denied.

In page 115 of the brief

ප්‍ර : යෝජනා කරනවා ඔබේ මේ රථය බැසිල් ප්‍රනාන්දු යන අය දැව ව්‍යාපාරිකයෙක් බව දැන ගෙනම මුදල් ඉපයීම සඳහා ඔහුට ලබා දී තියෙනවා කියලා දැව අදින්න?

උ : පිළිගන්නේ නැහැ.

ප්‍ර : ඒ වගේම ඔබේ රථය දැව ඇදීම සඳහා විශේශයෙන් සකස් කරන ලද රථයක් කියලා යෝජනා කරනවා.

උ : ඒක වෑන් රථයක්. ඒකේ එක ශීට් එකක් තිබුණා.

ප්‍ර : පිළිගන්නවාද දැව අදින අවස්ථාවේ කිසිම ශීට් එකක් තිබුනේ නැහැ කියලා?

උ : ගෙදර ඉන්නකොට තිබුණා. පසුව ඇණ වලින් ගලවලා.

There is no evidence that the appellant has benefited monetarily or personally by lending the vehicle, which could have led to the conclusion that he had knowledge of the commission of the illegal act. But in the instant case, it is apparent that the appellant has not enriched himself by his act of lending the vehicle to the accused.

The State Counsel has referred to the case *CA (PHC) 37/2007 decided on 04.05.2016 where Malini Gunarathne, J has held*;

> *"...the appellant cannot escape liability by stating that he was not aware or that he had any knowledge that the lorry was used in the commission of the offence. He must show that he had taken all precautions available to prevent the use of the vehicle for the commission of the offence."*

However, circumstances in each and every case is different. One needs to consider the relationship of the accused and the appellant to see whether the above mentioned authority could be applied to the instant case.

There is no evidence that the appellant participated in the act of transporting timber or that there were any previous convictions that the said vehicle has been used for offences of this nature. The appellant has denied knowledge of the act of the accused and has evidenced that as he had lent the vehicle on previous occasions without any issue, to a person who has been of help to him and his family, the request for the vehicle was granted. The appellant has reiterated that if he knew that the purpose of asking for the vehicle was to commit an offence, he would not have given the vehicle. Would any person knowingly without any personal benefit lend a vehicle for the commission of an illegal act that might be detrimental to him? especially when a very close relationship is not established. As no contrary evidence to the contention of the appellant has been established, the position of the appellant can be believed on a balance of probability. The evidence of the appellant has not been contradicted or shown to be lacking in any credit worthiness.

When the totality of the evidence is considered it is safe to surmise on a balance of probability, that the appellant was not privy to the commission of the offence and thus, it is my considered opinion that the confiscation of the vehicle is unjustifiable and cannot be allowed to stand.

Considering the circumstances of the instant case, I am of the view that the confiscation of the vehicle was not on a legally accepted premise and that the order cannot be allowed to stand. As such, the order of the learned High Court judge dated 26.01.2015 and the order of the learned Magistrate dated 07.08.2013 is hereby set aside.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J

I Agree,

JUDGE OF THE COURT OF APPEAL