

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

An Appeal under and in terms of Article 154 of the
Constitution of the Democratic Socialist Republic
of Sri Lanka and Act No.19 of 1990

Inspector of Police,
Police Station,
Dickwella.

Complainant

V.

Kandambige Kamal Ranjith and Another

Accused

AND

Piyadasa Prathapasinghe
No.51, Beliaththa Road,
Dickwella.

Petitioner

V.

1. Inspector of Police,
Police Station,
Dickwella.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Court of Appeal Case No.
CA/PHC/154/2013

High Court of Matara
Revision Case No. HC 51/2012

Magistrate's Court of Matara
Case No. 18131

AND NOW BETWEEN

Piyadasa Prathapasinghe
No.51, Beliaththa Road,
Dickwella.

Petitioner - Appellant

V.

1. Inspector of Police,
Police Station,
Dickwella
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent - Respondents

BEFORE

: **ACHALA WENGAPPULI, J**
K. PRIYANTHA FERNANDO, J

COUNSEL:

Razik Zarook. PC with Rohana Deshapriya,
Chanakya Liyanage and T.K. Wijesinghe for
the Petitioner-Appellant

Panchali Witharana SC for the Respondent -
Respondents

ARGUED ON

: 10.09.2020

WRITTEN SUBMISSIONS

FILED ON

: 09.08.2018 by the Petitioner- Appellant.

28.09.2018 by the Respondents.

JUDGMENT ON

: 22.10.2020

K. PRIYANTHA FERNANDO, J.

01. This is an appeal against the order made by the learned High Court Judge of *Matara* on 09.10.2013, which affirmed the order of confiscation of a vehicle by the learned Magistrate of *Matara* on 31.05.2012.
02. The accused *H.K. Kamal Ranjith* and *Sudath Nandana Weerathunga* were charged in the Magistrate's Court of *Matara* for transporting timber using the lorry bearing registration No. WPLD 5911 without a valid permit, contravening provisions of the Forest Ordinance. Upon pleading guilty to the charge both accused were sentenced on 24.05.2012. After inquiry that was held under Section 40 of the Forest Ordinance, the learned Magistrate made an order confiscating the vehicle, rejecting the claim by the appellant who is the registered owner. The appellant made an application to revise the said order of confiscation by the learned Magistrate, to the High Court of *Matara*. By his order dated 09.10.2013, the learned High Court Judge refused the application affirming the order of confiscation by the learned Magistrate.
03. Learned President's Counsel for the appellant submitted that the learned Magistrate has imposed a higher burden on the appellant at the inquiry. It was further submitted that the learned Magistrate has not taken into consideration the value of the timber that was transported and the evidence given by the appellant. The learned High Court Judge had misdirected himself when he said that the appellant had failed to produce the receipt from the service station, when in fact the vehicle could not go to the service station as it was detected before that.
04. Learned State Counsel for the respondent submitted the appellant has refrained from calling the person named *Lakshman* who is said to be his trustworthy person to give evidence to show that he took all precautions to prevent the vehicle being used for

any illegal activity. The appellant had failed to take precautions on the day in question as he had not sent *Lakshman* with the driver as he did on other days. Hence, it is submitted that the appellant had failed to discharge his burden.

05. Section 40 (1) of the Forest Ordinance provides that;

“(1) when 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.”

06. 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.

07. In her order dated 31.05.2012, the learned Magistrate has said that the registered owner testified that the vehicle was used to bring furniture from *Moratuwa* once in two to three months (page 44 of the brief/ page 8 of the order), when in fact the evidence of the registered owner was that the vehicle was sent to *Moratuwa* four times a month (page 35 of the brief). With that mistake, the learned Magistrate has further come to a conclusion that the registered owner could not have paid the monthly leasing rental of the vehicle with that income. I am of the view that it was

an unreasonable and unjust assumption made by the learned Magistrate, when in fact the evidence of the registered owner was unchallenged although he was cross examined.

08. The evidence of the appellant was that he sent his relative confidant by the name of *Lakshman*, whenever he sent the driver to *Moratuwa* to bring furniture. He had checked with the *Moratuwa* furniture shop as well as his *Dikwella* shop to see whether the vehicle had come. Although the petitioner had said in evidence that he checked about the driver and the vehicle whenever the vehicle was sent to *Moratuwa*, he never said in his evidence that he checked on the day in question about the driver or the vehicle, when in fact he sent the driver alone without *Lakshman*.

09. In the 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.

10. One cannot expect the owner of the vehicle to be seated next to the driver every time the vehicle is used by the driver. However, in this case, according to him, the appellant has always sent *Lakshman* with the driver whenever the vehicle was sent to *Moratuwa* to bring furniture. He has not taken that kind of precaution on the day in question. The appellant had taken *Lakshman* with him when he went to see the doctor. There is no evidence as to whether he had even called the driver or the shop to check on the driver. It would take a considerable time to go to the place where the timber was and to load seven logs of teak timber to the lorry. The evidence of the Appellant was that the distance to the service station where the driver was supposed to take the vehicle for service was about 500 meters. If the petitioner was vigilant or he took precautions, it would have been impossible for the driver to transport such timber as the service station was just 500 meters away.
11. The appellant has failed to call *Laksman* as a witness. Apart from the appellant, *Lakshman* would have been the best person to testify about the precautions the appellant had taken. The burden is on the appellant to satisfy Court that he took all necessary precautions to prevent the commission of the offence. I am of the considered view that the learned High Court Judge was correct when he found that the appellant had failed to prove to the satisfaction of the Court that he took necessary precautions to prevent the commission of the offence on the day in question and that the order of the learned Magistrate should be affirmed.

12. Hence, the order of the learned High Court Judge dated 09.10.2013 dismissing the revision application preferred against the order of the learned Magistrate dated 31.05.2012 is affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL