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

In the matter of an appeal against the order pronounced by the provincial High Court of the Western Province Holden in Colombo on 28-01-2020.

Court of Appeal No:

CA (PHC) 0104/2020

Provincial High Court Colombo

Case No. HCRA/02/2020

Magistrate's Court Mt. Lavinia

Case No. 81803/2/15

The Officer in Charge,

Police Station,

Dehiwala.

COMPLAINANT

Vs.

Mohammed Yoosuf Mohammed Iqbal,

No. 24, Waidya Road,

Dehiwala.

ACCUSED

Mohammed Iqbal Ahamed Mujahid,

No. 23/33/1/1A, 2nd lane,

Kadawatha road,

Dehiwala.

APPLICANT

AND

Mohammed Iqbal Ahamed Mujahid,

No. 23/33/1/1A, 2nd lane,

Kadawatha road, Dehiwala.

APPLICANT-PETITIONER

Vs.

The Officer in Charge

Police Station,

Dehiwala.

COMPLAINANT-RESPONDENT

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW

Mohammed Iqbal Ahamed Mujahid,

No. 23/33/1/1A, 2nd lane,

Kadawatha road, Dehiwala.

APPLICANT-PETITIONER-

APPELLANT

Vs.

The Officer in Charge

Police Station,

Dehiwala.

COMPLAINANT-RESPONDENT-

RESPONDENT

Hon. Attorney General,

Attorney General's Department,

Colombo 12,

RESPONDENT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Ruwantha Cooray instructed by Ramzi Bacha for the Appellant-Petitioner
	: Jayalakshi De Silva, S.S.C. for the State
Argued on	: 31-10-2023
Written Submission	: 23-03-2023 (By the Appellant-Petitioner)
	: 21-03-2023 (By the Respondent)
Decided on	: 01-03-2024

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 order dated 28-01-2020 of the learned Provincial High Court Judge of the Western Province Holden in Colombo, where the revision application filed by him was dismissed without notice being issued to the respondent.

The appellant is the owner of vehicle number 250-1359, which is a van. One Mohammed Yoosuf Mohammed Iqbal has been charged before the Magistrate's Court of Mt. Lavinia for having transported a cow without a valid permit on 03-08-2015, using the above vehicle for which the said person has pleaded guilty. Upon recording his plea and convicting him, the learned Magistrate has sentenced him and has also confiscated the cow that was transported without a valid permit.

Thereafter, the learned Magistrate has allowed the registered owner of the above-mentioned vehicle, namely the appellant, to show cause as to why the vehicle should not be confiscated.

At the inquiry held in that regard, the appellant has given evidence. The learned Magistrate of Mt. Lavinia of her order dated 19-11-2019, has ordered the confiscation of the vehicle on the basis that the appellant failed to satisfy the Court that he had no knowledge of the offence or that he took all necessary precautions to prevent the offence being committed.

Against the above-mentioned order, the appellant has preferred the revision application where the learned Provincial High Court Judge of Colombo has pronounced the impugned order on 28-01-2020.

It appears from the proceedings before the High Court, that the learned Counsel who represented the appellant, when supporting the application for notice, has taken up the position that the charge framed against the accused of the vehicle

in the Magistrate's Court case was not in accordance with the law, hence, there was no proper charge upon which the accused could have been convicted.

The learned Counsel appears to have maintained the position that since there was no valid charge and valid conviction, there cannot be a procedure of calling upon the registered owner to show cause, and therefore, the order of the learned Magistrate should be set aside.

The learned High Court Judge has considered the said objection, and had overruled the same. It has been determined that the appellant has failed to explain two months delay in filing the said revision application, and had refused to issue notice to the respondents in that regard.

It needs to be noted that this appeal was previously dismissed by this Court of the order dated 08-11-2021, on the basis of the appellant being absent from the Court for the hearing of the appeal.

However, after considering a re-listing application, this Court set aside the earlier dismissal order, restored the appeal back to its previous status, and decided to hear the appeal on its merits.

At the hearing of this appeal, the learned Counsel for the appellant made his submissions on the basis that the dismissal of the revision application without notice being issued was not in order, and made submissions to the effect that the learned High Court Judge should have considered the merits of the application based on facts, rather than relying on the technical objection to the charge urged by the learned Counsel when supporting the application for notice.

He contended that this is a matter where the order of the learned Magistrate should have been vacated and the reliefs asked for should have been granted.

The learned Senior State Counsel justified the dismissal of the revision application, as well as the order of the learned Magistrate, and was of the view that there was no material placed before the Court to interfere with both the orders, and moved for the dismissal of the appeal.

The accused in the relevant Magistrate's Court case has been charged in terms of the Animals Act, and had pleaded guilty to the charge preferred against him.

The learned Counsel who represented the appellant when the matter was supported for notice before the Provincial High Court has taken up a position on the basis that the charge against the accused in the Magistrate's Court was defective and the order of the learned Magistrate was therefore invalid. As correctly determined by the learned High Court Judge, I find no basis to agree with such a contention. It is abundantly clear from the charge preferred against the accused in the Magistrate's Court case that he has been well informed of the fact that the charge against him was transporting one head of cattle in the relevant vehicle without having a valid permit, and thereby committing an offence in terms of the Animals Act.

It appears that the accused had legal representation when he was charged before the Court. Although there may be a defect in the penal provision mentioned in the charge, it is clear that when the accused pleaded guilty, he knew very well what the offence against him was, as the offence was well described. Therefore, I find no basis for the argument that the vehicle inquiry had been held based on a wrong conviction. I find that the learned High Court Judge has well considered the Judgements of our Superior Courts in that regard and overruled the said position.

However, I am of the view that if the order that led to the confiscation of the vehicle was considered in its correct perspective when the application for notice in relation to the revision application filed before the Provincial High Court was supported for notice, there was good and sufficient basis to issue notice on the respondents and consider the application on its merits.

Hence, I find that it is necessary for this Court to now consider the appeal before this Court, having reference to the order of the learned Magistrate of Mt. Lavinia, as the respondents named in the revision application is represented before this Court.

It is clear from the order of the learned Magistrate that the learned Magistrate has correctly considered the relevant provision of the Animals Act under which an inquiry of this nature can be held.

The section 3A of the Animals Act as amended by the Amendment Act No. 20 of 1968 reads as follows.

> **3A. Where any person is convicted of an offence under this part or any regulation made thereunder, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation.**
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> **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.**

Interpreting the effect of the relevant section, it was held in the case of **Faris Vs. The Officer in Charge, Police Station Galenbindunuwewa and Another (1992) 1 SLR 160:**

> "In terms of the proviso of 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters. They are,
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> 1. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

2. That the vehicle has been used for the commission of the offence without his knowledge.

In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order for confiscation should not 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. **(See Nizar vs. Inspector of Police Waththegama (1978-79) 2 SLR 204)**"

The section 3A itself shows that the obligation of an owner of a vehicle subject to confiscation under this provision is significantly different when compared with the relevant provisions of the Forest Ordinance as well as other statutes which have similar provisions.

In terms of the proviso of the section 40 (1) of the Forest Ordinance as well as the decisions of our Superior Courts in relation to the said provision, the requirement in terms of the Forest Ordinance in an inquiry held in terms of the proviso of section 40 (1) is to show that the owner had no knowledge of the offence being committed and he took all precautions to prevent the offence being committed.

The requirement in terms of the Animals Act is to establish either one of those two requirements where the legislature by its wisdom has enacted the relevant statute in such a manner.

Therefore, I am of the view that the only guidance that can be taken from the Judgements pronounced by our Superior Courts in terms of the similar provision in the Forest Ordinance would be the interpretation given to the words 'all precautions to prevent the use' and apply the same in considering the evidence led in an inquiry in terms of the Animals Act. I am of the view that although the words 'all precautions' have been stated in the section, that need not mean that an owner of a vehicle needs to prove all possible precautions, but the precautions

that the owner is expected to take under the given facts and the circumstances. I am of the view that this has to be considered on a case-by-case basis in relation to the facts and the circumstances relevant to each case and not by applying a strict yardstick in that regard.

When considering the evidence led at the inquiry before the learned Magistrate of Mt. Lavinia, it was only the registered owner who has given evidence.

In his evidence he has stated that he purchased the vehicle in question having utilized the money he earned by working overseas. According to him, he has paid Rs. 500,000/- to purchase the vehicle and had obtained a finance facility of Rs. 1.5 million, where he had been paying an installment of Rs. 55,000/- per month. He had stated that he used to park his vehicle in the Pettah Cross Street and used the vehicle to transport goods from shops situated in the vicinity, and used to earn about Rs. 70,000/- per month in the process.

He has claimed that on the date of the alleged offence, the vehicle was parked at his aunt's place in Dehiwala area and he came to know that the vehicle was taken into custody for allegedly transporting a cow. He has admitted that the driver of the vehicle who was charged before the Magistrate's Court was his father, but has stated that he was not privy to the offence committed by his father and he has not engaged in any illegal activity. The appellant has claimed the vehicle on that basis.

It is clear from his evidence-in-chief that, apart from stating the fact that he never engaged in any illegal activities, he has not stated that he took all reasonable precautions to prevent the offence being committed.

However, he has been specific that he had no knowledge of the offence. Under cross-examination, he has explained that he too lives near the house where his father is living with his family, and had stated that the father used to take the vehicle with his permissions. He has claimed that on the date of the incident, he only came to know only after the detention of the vehicle by the police that the father has taken the vehicle, which was parked at his aunt's place.

He has denied the suggestion of the prosecution that it was he and his father who used the vehicle to transport the cattle in connivance with each other. Upon being questioned by the Court, he has stated that when he came to the place of the detection upon hearing the incident, he saw that the cow was tied in the garden of his parent's home and it was that cow the police took into custody. He has also stated that normally, the vehicle is used to transport goods belonging to Pettah traders in the Pettah area to various shops and he used to earn a living by engaging his vehicle for such hiring purposes.

In her order dated 19-11-2019, it appears that the learned Magistrate was well aware as to the legal requirement of either establishing that the registered owner had no knowledge of the offence being committed or he took all necessary precautions to prevent it. She had also been very much mindful that the necessary proof in that regard is on the balance of probability.

Having determined as such, the learned Magistrate has come to four main conclusions after having considered the evidence placed before the Court

For matters of clarity, I will now reproduce the said main determinations.

> 1. උක්ත සාක්ෂි අනුව මෙම නඩුවේ චිත්ති කරු සාක්ෂිකරුගේ පියා බවත්, ඔවුන් දෙදෙනා ඉතා ආසන්නයේ පිහිටි නිවෙස් වල ජීවත් වන බවත් තහවුරු වී ඇත.
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> 2. ඒ අනුව ඔහුගේ වැන් රථය යොදාගනිමින් අපරාධයක් සිදු කිරීම වැලැක්වීම සඳහා ඔහු විසින් පියවර ගනු ලැබුවේය යන්න සාක්ෂිකරු විසින් තහවුරු කර නොමැති බවට පෙනී යයි.
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> 3. උක්ත කරුණු අනුව සාක්ෂිකරු මෙම නඩුවේ දැක්වෙන වැන් රථය කුලී ගමන් සඳහා යොදවමින් ආදායමක් උපයන බවට වැඩි බර සාක්ෂි මත තහවුරු කර නොමැති බවට පෙනී යයි.
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> 4. උක්ත සාක්ෂි අනුව වැන් රථය යොදාගන චිත්තිකරු මෙම චෝදනාවේ දැක්වෙන වරද සිදු කල බව මුළුමනින්ම සාක්ෂිකරු ප්‍රතික්ෂේප කර තිබීම මත සාක්ෂිකරු අසත්‍ය ප්‍රකාශ කරන පුද්ගලයෙක් බවට තීරණය කරමි. අසත්‍ය ප්‍රකාශ කිරීම හේතුවෙන් සාක්ෂිකරුගේ විශ්වාසනීයභාවය බිඳ වැටෙන හෙයින් සාක්ෂි දෙමින් සාක්ෂිකරු ගොඩ නැගීමට යන්න දැරූ ස්ථාවරයට එමගින් බලවත් පහරක් එල්ල වන බවට තීරණය කරමි.

The above determinations clearly show that the attention of the learned Magistrate had been to determine whether the registered owner had taken all necessary precautions to prevent an offence being committed using his vehicle. I am of the view that the learned Magistrate has come to these determinations mostly on surmises and conjectures, rather than based on the evidence available before the Magistrate's Court.

The fact that the registered owner and the accused who is his father, lived close by was not a disputed fact. The evidence of the appellant had been that the vehicle was parked in his aunt's house, and although his father used to take his vehicle with his permission, on the day of the incident, it had been taken without informing him. That had been the evidence of the appellant to show that he was unaware of the offence being committed.

I find that, his evidence in that regard has not been materially challenged at the inquiry. The reasoning given by the learned Magistrate to dismiss the evidence of the appellant as to his source of income using the vehicle has been on the basis of his failure to substantiate the manner he earns his living, and him not calling evidence in that regard.

However, it needs to be noted that the appellant is a person who used his vehicle to go on hires and supply goods to various places based on the hires he receives. No one can expect a person of such caliber to maintain accurate records or to call the persons who provided hires to him, other than giving oral evidence in that regard. The evidence of the appellant had been to the effect that when he came to the place of the incident after being informed of it, he saw a cow being tied in the garden and at the time of taking over of the vehicle by the police, there was no transportation. Comparing that evidence with the fact that the driver had pleaded guilty to the charge, the learned Magistrate had concluded that the appellant is a person who is uttering falsehood. However, I am not in a position to justify such a conclusion.

According to the evidence placed before the Court, the subject vehicle is a van generally used by the appellant for hiring purposes and not by a driver employed by him. His evidence has been that his father has taken the vehicle without his permission. I am of the view that the evidence needs evaluation in that context, and not in the manner a Court would look at the evidence in a case of transporting timer without a permit or similar offences.

Even if it was the determination of the learned Magistrate that the appellant had failed to take necessary precautions to prevent the offence being committed, I find that if considered in the correct perspective, there was sufficient evidence before the Court for the learned Magistrate to conclude that the appellant had no knowledge of the offence being committed.

I am of the view that since the requirement is to establish either one of the two scenarios mentioned in the section, the appellant had sufficiently established that he had no knowledge of the offence. I am of the view that, the learned Magistrate had failed to consider that aspect in the order, and if considered in the correct perspective, there is no basis for the order of confiscation of the vehicle

I am of the view that since the learned High Court Judge has not considered whether the relevant legal principles had been adhered to by the learned Magistrate when the impugned order of refusing to issue notice was made, both these orders are orders that cannot be allowed to stand.

Accordingly, I set aside the order dated 19-01-2019 by the learned Magistrate of Mt. Lavinia and also the order dated 28-01-2020 by the learned Provincial High Court Judge of the Western Province Holden in Colombo.

I order that the vehicle number 250-1359 shall be released to the owner, namely, the appellant Mohammed Iqbal Ahamed Mujahid.

The Registrar of the Court is directed to communicate this judgment to the High Court of Colombo along with the original case record and also to the Magistrate's Court of Mt. Lavinia for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal