

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

Officer in Charge,
Police Station,
Matale.

Complainant

V.

Court of Appeal Case No.
CA (PHC) APN 112/2018

High Court of Kandy (Rev.)
Case No. 71/14

Magistrate Court of Matale
Case No.99826

Dasanayaka Mudiyanseelage Ananda Luxman,
No. 09/11, Malwan Watta,
Ulapathpitiya,
Ukuwela.

Accused

AND THEN BETWEEN

Aluth Gedara Wasantha Bandara,
Bogasbobbella, Nalanda,
Matale.

Registered Owner Claimant- Petitioner

V.

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

Respondent

AND NOW BETWEEN

Aluth Gedara Wasantha Bandara,
Bogasbobbella, Nalanda,
Matale.

Registered Owner Claimant-Petitioner-
Petitioner

V.

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

Respondent-Respondent

2. Officer in Charge,
Police Station,
Matale.

Complainant-Respondent

BEFORE

: ACHALA WENGAPPULI, J
K. PRIYANTHA FERNANDO, J

COUNSEL

: Premani Pothupitiya for the Claimant Petitioner
Petitioner.
C. Wijesuriya SC for the Respondents.

ARGUED ON

: 20.05.2020

WRITTEN SUBMISSIONS

FILED ON

: 11.09.2019 & 05.03.2020 by the Claimant
Petitioner Petitioner.
25.09.2019 by the Respondents.

JUDGMENT ON

: 12.06.2020

K. PRIYANTHA FERNANDO, J.

01. This is a revision application preferred by the Petitioner-Petitioner (Petitioner), seeking to get the order of the learned High Court Judge of Kandy dated 15.12.2015 affirming the order of

confiscation of a lorry bearing registration No. 68-2683 made by the learned Magistrate of Matale, revised.

Background

02. The Accused was arrested by the officers of the Matale Police Station for the offence of transporting 9 logs of *Mahogany* timber in a lorry without a valid permit. The Accused pleaded guilty to the charge in the Magistrate's Court and, was sentenced. Petitioner, as the registered owner made a claim for the lorry, and after the inquiry, the learned Magistrate made an order to confiscate the lorry. Petitioner made an application in the High Court of Kandy to get the said order of the learned Magistrate revised. Upon hearing the application, the learned High Court Judge affirmed the order of confiscation by the learned Magistrate.
03. Being aggrieved by the said order of the learned High Court Judge, the instant application was preferred by the Petitioner to get the said order revised. Counsel for the parties indicated to the Court that the parties agree for the Court to pronounce the judgment on the written submissions filed by them.
04. Learned counsel for the Petitioner in his written submissions urged the following grounds to be considered by this Court.
 1. Has the learned Magistrate failed to take into his consideration the fact that the Appellant has taken precautions to prevent the use of the vehicle for the commission of the said offence?
 2. Has the learned Magistrate failed to take into his consideration the fact that the Appellant has reiterated in giving precautionary measures to the Accused driver to ensure that the vehicle is not be used for any illegal purposes?
 3. Has the learned Magistrate failed to take into consideration the fact that the said illicit transportation of timber by using the said motor lorry by the Accused driver was committed without the knowledge of the Appellant?

4. Has the learned Magistrate failed in considering the nature of the degree of proof required by the Appellant in establishing that he had taken precautionary preventive measures to prevent the said vehicle being used for such an offence under the Forest Ordinance as amended?
5. Has the learned Magistrate as well as the learned High Court Judge failed to take into their accounts in deciding this matter that the Petitioner and or the Accused driver are not habitual offenders in this nature and have no previous convictions?

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

“(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, to prevent the confiscation of the lorry, the Petitioner (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. Learned counsel for the Petitioner has submitted that the Petitioner testified in the Magistrate's Court that he took precautions to prevent the use of his vehicle for the commission of such an offence. Learned counsel referred to the portions of the evidence given by the Petitioner in the Magistrate's Court.
08. It is the submission of the learned State counsel for the Respondent that the evidence of the Petitioner had been, that he had given mere verbal instructions to the Accused, but had not disclosed any other measures that were taken by him to ensure the vehicle not been used for illegal purposes.
09. In the Magistrate's Court, the evidence of the Petitioner (owner) was that he had given the lorry to the Accused on rent, to hire the same to transport sand, bricks etc. Monthly rent to be paid to the Petitioner by the Accused had been Rs.30, 000/-. However, he had said that the lorry was brought to him weekly, where he gave instructions to the Accused not to use the lorry to transport timber and for illegal activities.
10. In 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. ...The idea of the proviso is not to protect the owner who is privy to the offence. If his behaviour indicates that he is privy to the offence then he has not discharged the said burden."

Although it was a case under the Animals Act, the same principle applies to this case as well.

11. Petitioner says that he gave verbal instructions to the driver. However, Petitioner has failed to call the Accused driver to give evidence or to cite him as a witness, when the driver was the best person other than himself to testify to the fact that the Petitioner took precautions to prevent the commission of the offence. His evidence shows that he had failed to take meaningful steps to prevent the vehicle being used to transport timber. His evidence makes it obvious that the hiring of the lorry, for whatever purpose, had been decided by the Accused, not by the Petitioner, when the lorry was with the Accused on a monthly rental basis. Petitioner had given a free hand to the Accused to decide on the hire. Therefore, the learned Magistrate rightly concluded that the Petitioner had failed to place the evidence to the satisfaction of the Court on the reasonable steps or precautions that he had taken to prevent the vehicle being used for illegal activities, in this case, to transport 9 logs of *Mahogany* timber without a valid permit, as required in the proviso to section 40(1) of the Forest Ordinance.
12. Learned counsel for the Petitioner has also submitted that the learned Magistrate failed to take into consideration that the illicit transportation of timber was committed by the driver, without the knowledge of the Petitioner.
13. It is the contention of the learned State counsel that, the fact that the offence was committed without the knowledge of the Petitioner does not become a ground to release the vehicle to the owner in terms of the proviso to section 40(1) of the Forest Ordinance, although it is an expressed ground when an offence was committed under the Animals Act.

14. In case of *Manawadu V. The Attorney General* [1987] 2 Sri L.R. 30, it was held that the owner of the lorry who is not a party to the case is entitled to be heard on the question of forfeiture of the lorry. If he satisfies the Court that the Accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.
15. Section 40 of the Forest Ordinance was amended by Act No. 65 of 2009 (certified on 16th November 2009) by adding the proviso to section 40(1). Although the added proviso did not speak about 'knowledge' on the part of the owner in committing the offence, our Superior Courts have continuously followed the principle laid down in '*Manawadu*' case.
16. In case of *Orient Financial Services Corporation Ltd. V. Range forest Officer, Ampara*, [SC Appeal 120/2011, decided on 10.12.2013], Supreme Court held;

"The Supreme Court has consistently followed the case of Manawadu V. 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 has 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."

17. In this context I wish to reproduce a paragraph by His Lordship Sharvananda C.J. in '*Manawadu*' case;

"If the construction contended by State counsel is right the consequences of that interpretation are indeed far-reaching, it would follow that if a thief steals a person's vehicle and uses the vehicle to commit a forest offence, the owner of the vehicle will have his car forfeited for no fault of his. That appears to be a strange conclusion because the owner had done no act himself. Further, such a construction will render the owner helpless against collusion or conspiracy between the prosecutor and the Accused to deprive the owner of his vehicle. ..."

18. Hence, it is clear and justifiable that no order of confiscation should be made if the owner satisfies the Court that he had no knowledge in commission of the offence, although it is not expressly provided in the proviso to section 40(1).
19. In case of *W. Jalathge Surasena V. O.I.C. Hikkaduwa and others. (CA (PHC) APN 100/2014)*, it was held that mere denial by the registered owner that he did not have the knowledge of the commission of the offence is not sufficient to prevent the confiscation of a vehicle.
20. There are some English authorities for the view that in the criminal law, 'knowledge' includes willfully shutting one's eyes to the truth.
21. In case of *Westminster City Council V. Croyalgrange Ltd., CR. App. R 155 at 164*, Lord Bridge said;
- "... it is always open to the tribunal of fact ... to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious to refrain from inquiry because he suspected a truth but did not wish to have his suspicion confirmed."*
22. The burden is on the owner (Petitioner) to satisfy Court that he had taken all precautions to prevent the commission of the offence or that he had no knowledge on the commission of the offence. Whether the Petitioner has fulfilled the said burden on 'knowledge', has to be decided on the facts and circumstances including the evidence adduced at the vehicle inquiry. As mentioned before in this judgment in paragraph 11 the Petitioner has failed to fulfill that burden on the precautions taken by him. He has merely let the Accused to decide on what hire he would take and therefore could have anticipated the commission of such offences in today's context.
23. In case of *Joslin V. Bandara, (74 N.L.R. 48)*, it was held that an order of confiscation of a lorry under section 40 of the Forest Ordinance cannot be made against the owner if he was not in anyway privy to the commission of the offence or had no reason to anticipate the commission of the offence.

24. Precautions taken or the absence of any precautions taken by the owner must be determined in relation to the actual offence committed and the circumstances under which it was committed. (*B. M. Mendis V. Range Forest Officer, Kamburupitiya (CA PHC 23/93, 16.02.98)*).
25. Learned counsel for the Petitioner has submitted that the learned Magistrate has failed to take into account that the Accused and the Petitioner were not habitual offenders. Court may consider the fact that the Accused was not a habitual offender, when arriving at the conclusion on the fact of 'knowledge' on the part of the Petitioner. However, if the Court finds that the Petitioner has failed to fulfill the burden cast upon him at the inquiry as mentioned before, the fact that the Accused or the Petitioner not being a habitual offender would have no bearing on the forfeiture of the vehicle.
26. In the above premise, I find that the learned Magistrate has rightly concluded that the Petitioner has failed to prove to the satisfaction of the Court that he has taken all precautions to prevent the commission of the offence, or that the offence was committed without his knowledge nor he was privy to the commission of the offence. Hence, I see no reason to interfere with the judgment of the learned Magistrate dated 21.07.2014, or with the judgment of the learned High Court Judge dated 15.12.2015.

Revision application is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL