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

In terms of Article 154 (P) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka and under the Provincial High Court (special provisions) Act number 19 of 1990.

CA (PHC) 196/2000

PHC – Colombo 407/94

OIC Police Station
Peliyagoda

Complainant

Mallawaratchige
Dasapalitha Kithsiri
No. 31, Janatha Kohumola,
Thalkatuwa,
Dummalasuriya.

Claimant

AND

Mallawaratchige
Dasapalitha Kithsiri
No. 31, Janatha Kohumola,
Thalkatuwa,
Dummalasuriya.

Petitioner

Vs

Attorney General
Attorney General's
Department
Colombo.

Respondent

AND

Mallawaratchige
Dasapalitha Kithsiri
No. 31, Janatha Kohumola,
Thalkatuwa,
Dummalasuriya.

Appellant

Vs

Attorney General
Attorney General's
Department
Colombo.

Respondent

Before: P.Padman Surasena J. (P/CA)

K.K.Wickremasinghe J.

Counsel for the Appellant: - AAL Amila Palliyage with AAL Nihara Randeniya

Counsel for the Respondent: - DSG Varunika Hettige for the Respondent

Written submission of the Appellant submitted on: 25/01/2018

Written submission of the Respondent submitted on: 11/12/2017

ARGUED ON: 06/11/2017

DECIDED ON: 21/02/207/18

JUDGEMENT

K.K.Wickremasinghe J.

The Petitioner-Appellant in this case is the registered owner of the vehicle bearing No.17 Sri 2960(hereinafter referred to as 'the vehicle). The vehicle had been used for illegal transportation of liquor. The driver of the vehicle pleaded guilty and accordingly sentenced was imposed on them by the learned Magistrate. The appellant signed a Bond with a condition to produce the said vehicle when required by court. Therefore, the vehicle was released on that bond to the appellant. The appellant was unable to produce the vehicle to court. An inquiry with regard to the confiscation of the vehicle was held, but the appellant was not present in court for many dates. Therefore, the bond was confiscated subsequent to the inquiry. On 21/04/1994 the learned Magistrate ordered the appellant to pay Rs.250, 000/- (the bond signed by the Appellant was for Rs. 500,000/-) with a default sentence of 06 months imprisonment.

Being aggrieved by the said order of the learned Magistrate the appellant sought to revise the said order in the High court of Colombo. The revision application was dismissed for the reason that the appellant was not exercising the alternative remedy. The appellant made an appeal to the Court of Appeal against the said order (118/1995).

The order of the Court of Appeal dated 21/06/1999 was to send back the case to the High court to decide on the above issue on merits. After rehearing the case on its merits, the learned High court Judge dismissed the revision application. Being aggrieved by the dismissal, the appellant has filed the instant appeal to this court.

The appellant claimed that he handed over the vehicle to one W. George Nishantha Fernandopulle on or about 19/04/1992. The appellant did not sign MT 06 papers and because the aforesaid Nishantha Fernandopulle had to pay a sum of Rs 5,000/- to the appellant and he undertook to hand over the papers upon receiving money from Nishantha Fernandopulle. However aforesaid Nishantha Fernandopulle did not pay him the arrears amount he did not sign the MT 06 papers.

Nishantha Fernandopulle was arrested on or about 31/07/1992 in connection with transportation of illicit liquor using the aforesaid vehicle and produced before the Magistrate court of Colombo. Upon pleading guilty to the charges

leveled against Nishantha Fernandopulle he was fined a sum of Rs 17,500/-. However, the vehicle was not transferred to Nishantha Fernandopulle and it was registered under the appellant's name. He was noticed to attend to court in order to release the vehicle. The appellant had appeared in Magistrate's court on 10/08/1992 and signed a Bond. Thereafter the aforesaid vehicle was released and the aforesaid Nishantha Fernandopulle continued to use the vehicle as it was handed over to him by the appellant.

The appellant had gone to Dummalasooriya police station as he was informed so by the police and further that a warrant had been issued for his failure to produce the aforesaid vehicle to the court on 18/10/1992. The appellant had appeared in court and found that the aforesaid vehicle was confiscated and by the order of the court on 23/05/1993 a warrant had been issued against him.

The appellant informed court that the vehicle was handed to Nishantha Fernandopulle on 19/04/1992 and it was unknown to him that the document signed by him was a Bond. The appellant was informed to produce the vehicle to the court on 18/11/1993. The appellant went in search for the vehicle and found that the aforesaid vehicle had been sold by Nishantha Fernandopulle to another by forging his signature. And the vehicle has been sold to one Dr. Rathnayake.

As the appellant informed these facts to court, the court issued summons to Dr. Rathnayake. On 16th December by the order of the learned Magistrate the vehicle was released to Dr. Rathnayake and the appellant was informed to show cause as to why his bond should not be confiscated.

The learned AAL for the Appellant states that the appellant acted with due diligence after he had found that an illegal activity had been taken place regarding the aforesaid vehicle. The appellant informed the court all relevant facts regarding the vehicle and rendered his assistance to recover the vehicle and finally managed to produce the vehicle to court through Dr. Rathnayake. He complained that his signature has been forged by the aforesaid Nishantha Fernandopulle and sold the vehicle to another. The learned AAL argues that the appellant never breached the bond he signed even though it was unknown to him that it is a bond. Further, at the time of the offence the aforesaid vehicle was not in his possession. The appellant categorically states that he hasn't used the aforesaid vehicle after it was handed over to N. Fernandopulle on 10/08/1992.

The learned counsel for the appellant has concluded her argument stating that the order of the learned Magistrate and the order of the learned High court judge are illegal and cannot be sustained in law.

As submitted by the learned counsel for the respondent, the appellant has failed to appear at the inquiry on 5 occasions. It is pertinent to note that although the appellant contended that his signature was forged on the MTA 6 form he had not reported of such serious offence to any authority.

In the case of **Rodrigo v Karunaratna [21 NLR 3]** it was held that "........*it does not matter whether the person knows the truth about the facts which by his statement or conduct misrepresents. Whether he knows the truth or not if he speaks or acts, in such a way as to create the impression he must take the consequences of the impression he so creates.*"

The appellant has admitted that he signed the bond and did so voluntarily. The appellant also gave the impression that he will produce the vehicle as and when required. At a later time, he has estopped from taking up the position that he was unaware of his responsibilities – which he voluntarily took upon himself.

The bond signed by the appellant for 500,000/-, yet learned Magistrate ordered only 250,000/- to be confiscated. The learned High court judge granted further concession by implementing sale of immovable or moveable property before implementing the sentence of imprisonment.

The decision in the case of **Mary Matilda v OIC Habarana CA (PHC) 86/97** is amply clear that simply telling the driver is insufficient. It was held that "the *order of confiscation cannot be made if the owner proves to the satisfaction of court:*

(1) that he has all precautions to prevent the use of the vehicle for the commission of the offence and

(2)that the vehicle has been used for the commission of the offence without his knowledge".

It was decided in the above case that the owner should take positive steps to prevent the commission of the offence. In the instant case the appellant failed to prove on a balance of probability that he took all precautions to prevent commission of the offence taking place.

In the case of **Orient Finance Services Corporation Ltd case (SC Appeal no 120 / 2011)** *"no order of confiscation shall be made if that owner has 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."*

Considering the above circumstances we are of the view that there is no merit in this appeal.

Therefore, the Appeal is hereby dismissed.

Judge of the Court of Appeal

P.Padman Surasena J. (P/CA)

I agree,

President of the Court of Appeal