



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

C.A.(PHC) 86/97

K.Mary Matilda Siva

HC Anuradhapura Revision 51/96

Appellant

Vs.

1. PH de Silva Inspector of Police  
Police Station,  
Habarana.

2. The Attorney General

Respondents

**BEFORE** : Sisira de Abrew J &  
Upaly Abeyrathne J

**Counsel** : Dr. Ranjith Fernando for the appellant  
Riyaz Hamza SSC for the respondents.

**ARGUED ON** : 10.06.2010

**DECIDED ON** : 08.07.2010



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**Sisira de Abrew J.**

The Appellant is the owner of lorry bearing registration NO.43 - 7056, Driver of the said lorry and three others were convicted on their on pleas for transporting 27 head of cattle in contravention of the provisions of the Animals Act and Cruelty to Animals Act. The learned Magistrate thereafter held an inquiry and made an order dated 10.10.96 confiscating the lorry. At the inquiry owner of the lorry gave evidence. The appellant's revision application was dismissed by the learned High Court Judge of Anuradhapura by his judgment dated 28.02.97. The appellant has preferred this appeal against the said judgment.

Learned Counsel for the appellant drawing our attention to page 108 of the brief contended that the learned Magistrate having observed that the owner of the lorry did not have knowledge of the commission of the offence proceeded to confiscate the lorry and that the order is therefore bad in law. But I am unable to agree with this contention when I consider the entire order. The learned Magistrate at page 109 of the brief concluded that the appellant (the owner of the lorry) had not proved that the offence was committed without her knowledge. I therefore reject the above contention. Learned counsel however conceded that word ðathaö in last paragraph of page 109 of the brief (the judgment) is a typographical error.

Section 03 of the Animals Act reads as follows:

ö Where any person is convicted of an offence under this Part of any regulations 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 conviction Magistrate, to confiscation.

Provided, however, that in any case where the owner of the vehicle is a third party, on 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 of the commission of the offence.ö

In terms of the proviso to section 3A of the Animals Act, an order of confiscation cannot be made if the owner proves to the satisfaction of court (1) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence or (2) that the vehicle has been used for the commission of the offence without his knowledge. In *Faris Vs OIC Galenbidunuwewa* [1992] I SLR 167 Justice SN Silva (as he then was) held: ö In terms of the proviso to section 3 A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters. They are

- (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.ø

Learned Magistrate has considered both these ingredients and concluded that they have not been proved on a balance of probability.

The owner in her evidence admitted that she saw the two iron rodg that had been fixed to the body of the lorry only when she was returning from court. But she was unaware of date on which they were fixed. Therefore it was her position that she was unaware of the two iron rods prior to the lorry being detected by the police. It was her position that she does not go and inspect the lorry. The driver of the lorry, at the time of the

detection, was working under her for about nine months. Learned counsel contended that she could not inspect the lorry as it was not brought to her house since the road leading to her house from the main road was a narrow road. Even if the road is narrow what was her difficulty to go the main road and inspect? I am unable to accept this contention as there is no merit in it. It is not possible to believe that the owner of the lorry was unaware of the two iron rods which could be easily seen. In my view she had given this evidence to escape from the allegation that the offence was committed with her knowledge.

It was her evidence that after the lorry was released on a bond she did not give the lorry to anybody and she only gave it for the purpose of transporting sand. This was also only for one day. But the learned Magistrate, after releasing the lorry on a bond, inspected the lorry when it was brought to court and found cow-dung and straw inside the lorry. Therefore the fact that this lorry, after being released on bail, was used only for transporting sand should be false or at least cattle have been transported after sand was transported. These facts have been observed by the learned Magistrate who has, for the above reasons, rejected her evidence as false. In my view, the learned Magistrate is correct in rejecting her evidence. When I examine the evidence of the appellant, I am of the opinion that her evidence is false and cannot be accepted. The appellant in her evidence stated that she gave instructions to the driver not to transport timber and arrack. She further told the driver not to put her into trouble. The learned Magistrate observed that giving instructions alone did not mean that the owner had taken all precautions to prevent the use of the vehicle for the commission of the offence and that the owner must take every endeavor to implement her instructions.

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 3 A 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 are going to say that it is sufficient, then all that the owner in a case of this nature has to say is that he gave the 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



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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 3 A of the Animals Act is frustrated. In the instant case, If the owner inspected the vehicle he would have noticed the modification in the lorry and taken steps to implement her instructions if in fact such instructions had been given. For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavour to implement the instructions. Failure to make an attempt to implement the instructions is indicative of the fact that genuine instructions had not been given. In the instant case the owner did not call her driver and establish that she had given instructions to him. For these reasons I hold that evidence of the owner alone to the effect that he/she gave instructions to the driver not to use the vehicle for illegal purposes is not sufficient to discharge the burden embodied in the proviso to section 3 A of the animals Act. The idea of the proviso is not to protect the owner who is privy to the offence. If his behavior indicates that he is privy to the offence then he has not discharged the said burden. In the instant case the owner says that she was unaware of the fixing of two iron rods to the body of the lorry and that she failed to inspect the lorry. If she inspected the lorry she would have notice the said two iron bars and taken steps to implement her instructions claimed to have been give. When I consider all these matters, I am unable to accept her position that she had given instructions to the driver. In my view, she had taken up the said position in order to escape from the allegation that transportation of cattle was done with her knowledge.

I have already pointed out that the two iron rods had been fixed to the body of the lorry. One can argue that modification was done in order to facilitate the transport of cattle with permits. But the owner in her evidence did not say that this lorry was being used to transport cattle with permits. It is not possible to believe that the owner was unaware of the two iron rods fixed inside the lorry. When I consider the facts of this case, I am of the opinion that cattle had been transported with the knowledge of the owner of the lorry. I have earlier held that the evidence of the owner is false and cannot be accepted. When I consider all these matters I hold that the owner has not established, on a balance of probability, any of the following matters.



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- (1) that she 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.

For the aforementioned reasons, I hold that the order of confiscation had rightly been made.

I therefore refuse to interfere with the order of the learned Magistrate and the learned High Court Judge and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal.

Upaly Abeyrathne J.

I agree.

Judge of the Court of Appeal.