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

In the matter of an Appeal from an order of the Provincial High Court of the Southern Province holden in *Balapitiya* in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19/1990 read with Article 154P of the Constitution.

S.C. Appeal No. 47/2008
SC/SPL/LA No. 248/2007
H.C. Balapitiya No. 331/2006
M.C. Elpitiya Case No. 40355

Mohamed Buhari Ikram
Applicant

Vs.

Officer-In-Charge,
Police Station,
Uragasmanhandiya.

Respondent

AND BETWEEN

Mohamed Buhari Ikram
Applicant-Appellant

Vs.

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

2. Officer-In-Charge

Police Station,
Uragasmanhandiya.

Respondents

AND NOW BETWEEN

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

1st Respondent- Appellant

Vs.

Mohamed Buhari Ikram
Applicant-Appellant-Respondent

Mohamed Buhari Mohamed Akram
Accused-Respondent

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BEFORE	:	**MURDU N.B. FERNANDO, P.C. J.** **A.H.M.D. NAWAZ, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Ms. Induni Punchihewa S.C. for the 1st - Respondent-Appellant J.P. Gamage for the Applicant-Appellant-Respondent.
ARGUED ON	:	20th January, 2022
DECIDED ON	:	15th December, 2022

ACHALA WENGAPPULI, J.

This matter arises out of an order of the Provincial High Court of Southern Province holden in *Balapitiya*, exercising its appellate jurisdiction over an order of confiscation made by the learned Magistrate of *Elpitiya.*

The Accused-Respondent *Mohamed Buhari Mohamed Akram* was charged before the Magistrate's Court of *Elpitiya* in case No. 40355 for committing an offence under section 3(c)(1) of the Animals Act (as amended), by transporting a water buffalo cow without a valid permit on 04.08.2006. He had transported the said animal in a lorry bearing No. 26-8659. Upon the said charge being read out, the Accused-Respondent had tendered an unqualified admission of guilt and was accordingly convicted on the said charge on 07.08.2006 and imposed a fine of Rs. 2500.00.

The Applicant-Appellant-Respondent *Mohamed Buhari Ikram* thereafter moved the Magistrate's Court that the lorry bearing No. 26-8659 be released to him as he was the registered owner of the said lorry. After an inquiry held by the Magistrate's Court, during which only the Applicant-Appellant-Respondent presented oral evidence, an order of confiscation was made regarding the said lorry by the learned Magistrate on 08.11.2006. Being aggrieved by the said order of confiscation, the Applicant-Appellant-Respondent preferred an appeal to the Provincial High Court at *Balapitiya* under Appeal No. 331/2006. After hearing the parties and in delivering his judgment on the appeal, the learned High Court Judge had set aside the said order of confiscation and made a

further order that the lorry be released to the said Applicant-Appellant-Respondent.

On 04.09.2007, the 1st Respondent-Appellant filed an application bearing number S.C. Spl. LA No. 348/2007 before this Court and sought special leave to appeal against the said judgment of the Provincial High Court and had tendered an amended petition on 01.11.2007 setting out the questions of law on which leave is sought. It transpires from the available proceedings that this Court had granted leave and the appeal of the 1st Respondent-Appellant had been allocated the number SC Appeal No. 47/2008. The Registrar of the High Court of *Balapitiya* confirms that the Registry of this Court had conveyed to him that said application was filed in relation to Appeal No. 331/2006 of that Court and now pending before this Court as an appeal under SC Appeal No. 47/2008. Thereupon, the original record of the said appeal had apparently been forwarded to the Registry of this Court by the Registrar of the High Court of *Balapitiya* on 19.06.2008. However, it transpires that the original docket of this Court as well as the said original Court record were subsequently misplaced and as a consequence of which, no judgment was pronounced by this Court on the said appeal, as the appeal could not be taken up for hearing owing to that reason.

At a later stage, the docket was reconstructed with the assistance of the Hon. Attorney General. Since the original docket was not available and in the absence of the relevant journal entries beyond 17.05.2017, it was not possible to ascertain the questions of law on which this Court had granted leave to appeal to the 1st Respondent-Appellant.

Thereupon, the Applicant-Appellant-Respondent as well as the Accused-Respondent were noticed to appear before this Court. After several notices, the Applicant-Appellant-Respondent filed a proxy and was present in Court on 05.05.2021. He informed Court that he was not in a position to retain services of a Counsel due to financial constraints. At this juncture, Mr. *J.P. Gamage*, Attorney-at-Law, had volunteered to assist Court by appearing for the said Applicant-Appellant-Respondent *pro-bono* and was therefore issued with a copy of the appeal brief. The matter was thereafter fixed for hearing on 20.01.2022.

When this matter was taken up for hearing on that day, in view of the submissions made by the parties, this Court had reformulated following questions of law:

1. Has the learned High Court Judge erred in law regarding standard of proof?

2. Has the learned High Court Judge erred in law on whom the burden of proof lies?

The learned State Counsel and the learned Counsel for the Applicant-Appellant-Respondent made oral submissions and were permitted to tender written submissions in relation to the said two questions of law on which this appeal would be decided.

At the hearing before this Court on 20.01.2022, it was submitted by the learned State Counsel that the learned High Court Judge had misled himself into forming an erroneous view as to the nature of proceedings that were before the appellate Court. It was submitted that the learned High Court Judge considered the appeal of the Applicant-Appellant-Respondent as if it had emanated from a prosecution of a criminal offence, in which the guilt of the latter had to be established by the

prosecution beyond reasonable doubt, when in fact the proceedings were in relation to an appeal, that had been preferred against an order of confiscation of a vehicle, by the Applicant-Appellant-Respondent.

The learned State Counsel then invited the attention of this Court to the impugned judgment of the Provincial High Court, where it is stated that the prosecution had failed to establish beyond reasonable doubt that the Applicant-Appellant-Respondent, on the day of detection, handed over the vehicle to his brother, the Accused-Respondent, for the purpose of illegally transporting a water buffalo cow.

During his submissions in reply, the learned Counsel for the Applicant-Appellant-Respondent conceded that the applicable law, in relation to the two questions of law reformulated by this Court, had already been set out in the judgments of ***Nizar v Inspector of Police, Wattegama*** (1978-79) 2 Sri L.R. 304 and ***Faris v The Officer in Charge of Galenbindunuwewa and Another*** (1992) 1 Sri L.R. 168, and therefore the learned High Court Judge had erred in imposing a wrong burden of proof and that too on the prosecution. Nonetheless, the learned Counsel for the Applicant-Appellant-Respondent had invited this Court to determine the question of whether the evidence presented before the Magistrate's Court during the inquiry by the Applicant-Appellant-Respondent indicated that he had no knowledge of the commission of an offence by the Accused-Respondent, who had acted on his own accord and therefore the part of the judgment of the Provincial High Court, in which the said Court had considered the evidence and decided to set aside the order of confiscation was correct to that extent.

Since the Accused-Respondent was convicted for an offence under the Animals Act as amended, section 3A of the said Act made any vehicle

used in the commission of such an offence be liable to be confiscated. The proviso to the said section states 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.*" Having referred to the judgment of *Vythialingam* J in ***Nizar v Inspector of Police, Wattegama*** (supra), *SN Silva* J (as he was then) stated in ***Faris v The Officer in Charge of Galenbindunuwewa and Another*** (supra) that "*in terms of the proviso to section 3A 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.*" His Lordship then added "*in terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order of confiscation should not be made*."

When an owner of a vehicle presents an application under the proviso to section 3A of the Animals Act, in relation to a vehicle that had been used in the commission of an offence under that Act be released to him, the applicable degree of proof in establishing whether he had taken all precautions to prevent the use of such vehicle or that the vehicle had been used for the commission of the offence without his knowledge, and on whom that burden lies, were considered by this Court in the judgment of ***The Finance Company PLC v Priyantha Chandana & Five Others*** (2010) 2 Sri L.R. 220. Having referred to the applicable law, as stated in the two judgments referred to above, as well as in several other judicial precedents, this Court stated (at p. 232) that "*the ratio decidendi of all the aforementioned decisions also show that the owner has to establish the said*

matter on a balance of probability." Thus, the learned Counsel for the Applicant-Appellant-Respondent had rightly conceded that the Provincial High Court had fallen into error when it applied the standard of proof beyond reasonable doubt to determine the validity of the confiscation and imposed that burden on the prosecution. The Provincial High Court had thereby disregarded the applicable burden of proof of a balance of probability that had been consistently applied by Courts, in determining the issue of confiscation, as did by the Magistrate's Court of *Elpitiya* in this instance. Hence the two questions of law should be answered in the affirmative.

In the circumstances, what remains to be considered is the question posed by the learned Counsel, of whether the Applicant-Appellant-Respondent had established that he had no knowledge that his vehicle had been used for commission of an offence to the required degree of proof and, therefore to that extent, the judgment of the Provincial High Court should not be interfered with.

A perusal of the order of the learned Magistrate indicates that he had considered the evidence of the Applicant-Appellant-Respondent extensively, in order to satisfy himself whether the latter had taken all precautions to prevent the use of such vehicle or whether the vehicle had been used for the commission of the offence without his knowledge. After evaluating the Applicant-Appellant-Respondent's evidence, the learned Magistrate had concluded that he had failed to establish to the satisfaction of Court that the vehicle was used without his knowledge. The Provincial High Court had thought it fit to interfere with the said order on the basis that it is the Applicant-Appellant-Respondent's evidence during his examination-in-chief that should be accepted and

acted upon as credible evidence, rather than rejecting same on answers given by him during cross-examination by the prosecution.

The basis on which the Provincial High Court had decided to interfere with the order of confiscation could accordingly be described as an instance of determining the validity of the conclusion reached by the lower Court on the testimonial trustworthiness of the Applicant-Appellant-Respondent coupled with an erroneous view it had entertained on the applicable degree of the burden of proof, and the party on whom that burden lies.

This Court, in the judgment of ***Pilapitiya v Chandrasiri and Others*** (1979) 1 Sri L.R. 361, stated that the determination of primary facts is always a question of fact. The judgment of ***The Attorney General v Mary Theresa*** (2011) 2 Sri L.R. 292 states that the credibility of a witness is a question of fact and not of law. It is therefore clear that the assessment of credibility of a witness, and if it finds such a witness as credible, the determination of relevant questions of fact on that evidence, are best left for the original Court to decide. This is due to the distinct advantage the original Court has over observing the demeanour and deportment of the witnesses. It had been stated by this Court in ***Bandaranaike v Jagathsena and Others*** (1984) 2 Sri L.R. 397, that due to that reason, the original Court is at a better position of determining the testimonial trustworthiness of a witness. This is because of the advantage that an original Court has over an appellate Court, as the latter would have to determine the same on an inanimate transcript of evidence, has been considered by superior Courts as a significant one.

Conclusions reached on primary facts sometime form pure questions of fact. But there could be situations where they could also be

mixed questions of fact and of law. In ***Bandaranaike v Jagathsena and Others*** (supra), following the *ratio* of the judgments ***King v Gunaratne et al*** 14 Ceylon Law Recorder 174 and ***Martin Fernando v The Inspector of Police, Minuwangoda*** (1945) 46 NLR 210, it was stated (at p. 407) that an appellate Court must attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence and consequently should not disturb a judgment of fact unless it is unsound. The Court proceeded to quote three tests as formulated by *Macdonell* CJ in ***King v Gunaratne*** *et al* (supra), in emphasising its application by an appellate Court, in determining validity of findings by the original Court on questions of fact:

1. the verdict of the judge is unreasonably against the weight of evidence,

2. there is a misdirection on the law or on the evidence,

3. the Court of trial has drawn the wrong inferences from matters in evidence, the appeal Court must not interfere with a judgment of fact.

The testimonial trustworthiness of the Applicant-Appellant-Respondent, being a question of fact, would undoubtedly have a bearing on the acceptability of his assertion that his vehicle had been used for the commission of the offence without his knowledge. But it is evident from the proceedings that diametrically opposite conclusions were reached by the two lower Courts on this particular question of fact, namely the credibility of evidence of the Applicant-Appellant-Respondent. In the circumstances, this Court must then review both these decisions of the lower Courts and the reasoning adopted in arriving at the same, in order to satisfy itself as to which of the said two determinations ought to be

accepted. It is therefore important to refer to the evidence of Applicant-Appellant-Respondent, albeit briefly, in order to assess whether he had established that claim to the required degree of proof before the Magistrate's Court by presenting credible and reliable evidence.

Only the Applicant-Appellant-Respondent had offered evidence during inquiry proceedings before the Magistrate's Court. During examination-in-chief, he said that he had handed over his lorry to his own brother on that particular day with instructions to transport a load of firewood to their bakery at *Panapitiya.* Only in the following morning he did learn that his lorry had been taken charge of by the Police, whilst transporting cattle. He said this was the first time he had ever handed over his vehicle to his brother, the Accused- Respondent, and that too was after specifically instructing latter not to engage in any form of illegal activity. The Applicant-Appellant-Respondent had further asserted that he had no knowledge that his brother would engage in such an illegal activity.

The stance of the Applicant-Appellant-Respondent is therefore clear that he was engaged in the bakery trade and therefore had no reason to get involved with cattle trade. Having specifically instructed the Accused-Respondent not to engage in any illegal activity, the Applicant-Appellant-Respondent never expected his own brother to commit an offence under the Animals Act by transporting cattle without a valid permit, when he entrusted the lorry only to transport firewood. Therefore, it is probable that the Applicant-Appellant-Respondent had no knowledge of the commission of the offence and became aware that his lorry was used to transport cattle only the following morning.

This claim obviously was advanced before the Magistrate's Court by the Applicant-Appellant-Respondent, in order to invite that Court to arrive at a conclusion that it was the Accused-Respondent who had acted on his own and decided to transport cattle, by his act of transporting a water buffalo cow, instead of transporting firewood to their bakery, contrary to specific instructions by the former to the latter. Thus, the Applicant-Appellant-Respondent had sought to convince the Magistrate's Court that it was more probable that he would have had no knowledge of his lorry would be used by the Accused-Respondent in committing an offence under the Animals Act.

The learned Magistrate was clearly not impressed with the evidence of the Applicant-Appellant-Respondent as he had totally rejected the segment of evidence in which it was asserted that this was the first-time that the Applicant-Appellant-Respondent had handed over the lorry to his brother, the Accused-Respondent. In his order of confiscation, the learned Magistrate had made references to the several inconsistencies that caught his attention which, in his view, had rendered the evidence of Applicant-Appellant-Respondent unreliable.

A perusal of the evidence indicates that, during cross-examination by the prosecution, the Applicant-Appellant-Respondent had changed some of his assertions on many important issues, which he made during examination-in-chief. This factor naturally raises credibility concerns on those assertions, made in support of his position that he had no knowledge of his vehicle was used to commit an offence.

This is evident from the Applicant-Appellant-Respondent's admission that he had supplied cattle to slaughterhouses on numerous

occasions. Shifting from his position of operating a bakery, the Applicant-Appellant-Respondent conceded during cross-examination that he was engaged in the cattle trade whilst occasionally acting as an agent of a foreign employment agency. He also admitted that there were instances where he himself had transported cattle in his lorry, thereby contradicting his own claim that this was the first instance in which his lorry was used in transporting cattle. The Applicant-Appellant-Respondent further admitted that there were previous occasions in which he had applied for permission to transport cattle and added that if permission was denied by the authorities, he would then take cattle to the abattoir on foot, taking shortcuts through the village. He was well aware of the consequences of illegally transporting cattle by motor vehicles. The Applicant-Appellant-Respondent also admitted that the Accused-Respondent had several cases for theft of cattle, and he himself settled them, after paying compensation to the respective owners.

These admissions by the Applicant-Appellant-Respondent indicate that he was not at all a stranger to cattle trade and had a close association with the owner of *Uragaha* abattoir. It was the owner of the said slaughterhouse, who alerted the Applicant-Appellant-Respondent that his lorry had been detained by the Police, whilst transporting cattle. However, it must be noted that the Applicant-Appellant-Respondent's dealings in the cattle trade, though indeed are relevant considerations, do not by themselves justify an inference that he had knowledge of the commission of offence with which the Accused-Respondent was charged. But the evidence of the Applicant-Appellant-Respondent also discloses several other considerations that amply justify an inference of knowledge on his part, as decided by the learned Magistrate.

The Applicant-Appellant-Respondent had conceded that it was with the assistance of his brother, the Accused-Respondent, he had supplied cattle previously to the abattoir at *Uragaha*. He also conceded that there were several instances where the Accused-Respondent was arrested with others for illegally transporting cattle. The Applicant-Appellant-Respondent also knew that the Accused-Respondent would not hesitate to transport cattle if a vehicle was available for that purpose. It is appropriate to reproduce the relevant part of the evidence in order to note the manner in which the Applicant-Appellant-Respondent had responded to the question put to him by the prosecutor during cross-examination. The context in which this evidence was elicited, as the line of cross-examination seems to suggest, was whether the Applicant-Appellant-Respondent was aware as to the previous instances of transporting cattle illegally.

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උ: ඔව්.

ප්‍ර: ඒ දැනුම තිබී තමයි දුන්නේ ලොරිය?

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Thus, there is no ambiguity as to the knowledge of the Applicant-Appellant-Respondent in relation to the propensity of his brother to transport cattle illegally, if a vehicle was available for that purpose. This admission greatly affects the relative probabilities of the claim advanced by the Applicant-Appellant-Respondent, in denial of any knowledge of the same. The Applicant-Appellant-Respondent had handed over his vehicle to the Accused-Respondent in the evening of the day on which the offence was committed with full knowledge of his brother's propensity to commit such offences. Even with his awareness as to the

consequences of such an act, the Applicant-Appellant-Respondent nevertheless handed over his lorry to the Accused-Respondent on that evening. Of course, the Applicant-Appellant-Respondent had denied the suggestion made by the prosecution that he had knowledge of transporting cattle. This claim of the Applicant-Appellant-Respondent had been rejected by the learned Magistrate.

In view of the above considerations, the question whether the Applicant-Appellant-Respondent had established on a balance of probability that his vehicle had been used for commission of the offence by the Accused-Respondent without his knowledge, must be answered in the negative, as rightly done so by the learned Magistrate.

The reasoning adopted by the learned High Court Judge to arrive at a contrary conclusion to the one reached by the learned Magistrate on the credibility of evidence of the Applicant-Appellant-Respondent, indicates that the learned High Court Judge was of the view that the original Court should have confined its consideration to his examination-in-chief only. This peculiar approach that had been adopted by the learned High Court Judge in evaluating testimonial trustworthiness of a witness is not known to our Courts and is contrary to the universally accepted and time-tested methods on assessment of evidence for credibility.

In an adversarial system of litigation, the importance attached to cross-examination in assessing the credibility of a witness was emphasised by *Coomaraswamy* in his treatise on the Law of Evidence (Vol. II, Book 2, p. 719) in stating that, *"Cross-examination is peculiarly a product of the English procedure and it is vital feature of all modern systems of evidence. It has been described as the greatest legal engine ever invented for the discovery of truth."* In the judgment of ***Rodrigo v Central Engineering Consultancy***

Bureau (2009) 1 Sri L.R. 248, *Marsoof* J observed (at p. 271) that cross-examination "*… after all, is the time-tested tool used in the adversarial system to get at the truth.*" This Court, in the judgment of ***Padmatilake (Sgt) v Director General, Commission to Investigate Allegations of Bribery and Corruption*** (2009) 2 Sri L.R. 151, recognised the importance of cross-examination by stating (at p. 158), "*… it is the paramount duty of the Court to consider entire evidence of a witness brought on record in the examination-in-chief, cross-examination and re-examination. In other words, Courts must take an overall view of the evidence of each witness.*"

In a recent pronouncement, *Aluwihare* J (***Kulasiriwardena v Jayasinghe and Others*** (2016) 1 Sri L.R. 93) emphasised the importance of cross-examination as a tool in assessing genuineness of a document that had been tendered under section 154(1) of the Civil Procedure Code.

The test of consistency also is an essential tool employed by Courts and has proved its value over the years in assessing credibility. The testimony of a witness is assessed for its truthfulness and reliability by considering whether there is any inconsistency *inter se* on a particular fact in issue as well whether there is any inconsistency with the testimony of other witnesses who testified on that same fact in issue.

Since the credibility of a witness is a question of fact, the decision of the learned Magistrate to not act on the evidence of the Applicant-Appellant-Respondent should be interfered with only if the appellate Court is satisfied that such a conclusion fails to qualify on one or more of the three tests as stated in the judgment of ***Bandaranaike v Jagathsena and Others*** (supra). The rationale on which the learned High Court Judge had decided to interfere with the finding of fact of the learned Magistrate, as already referred to earlier on in this judgment, does not fall into any

of the said three instances, but only as a result of a serious misdirection on the applicable law.

The decision not to accept his evidence was made by the learned Magistrate only after having seen and hearing the Applicant-Appellant-Respondent in the witness box and therefore the said decision is accordingly entitled to great weight. Thus, the Provincial High Court had fallen into grave error, when it interfered with the finding of the learned Magistrate not to accept the evidence of the Applicant-Appellant-Respondent after considering the evidence that had been elicited through him during cross-examination. It is also relevant to note that the evidence of the Applicant-Appellant-Respondent requires consideration for its truthfulness and reliability by applying the test of interestedness or disinterestedness. In the judgment of ***The Attorney General v Mary Theresa*** (supra) this Court identified the said test as one of the key tests for assessing credibility and quoted *Rajaratnam* J from an unreported judgment, ***Tudor Perera v AG*** in (S.C. 23/75 D.C. *Colombo* Bribery 190/B – Minutes of S.C. dated 01.11.1975), where His Lordship observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinised with some care and also quoted *Halsbury Laws of England* (4th Edition, paragraph 29), where it was stated that matters of motive, prejudice, partiality, accuracy, incentive and reliability have all to be weighed. Since the Applicant-Appellant-Respondent had an obvious interest as to the outcome of the inquiry, it is justified in such circumstances that the said test too is employed in assessing his evidence.

The two questions of law on which this appeal proceeded are therefore answered in the affirmative and in favour of the 1st Respondent-Appellant. Accordingly, the judgment of the Provincial High Court is set

aside and the order of the Magistrate's Court of *Elpitiya*, in confiscating the vehicle, is restored back.

Lastly, I wish to record my appreciation for the assistance voluntarily rendered by the learned Counsel for the Applicant-Appellant-Respondent, as well as to the learned State Counsel, thereby facilitating the reaching of a finality to the instant appeal, which had remained in the system far too long.

The Appeal of the 1st Respondent-Appellant is allowed.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT