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

In the matter of an Appeal under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Koswaththa.

Complainant

Vs.

C.A. Case No: **CA (PHC) 10/2015**

P.H.C. Chilaw Case No: **HCR 20/2013**

M.C. Marawila Case No: **70591/C**

Yaana Prakashakalage Roshan Indika
No. 64, South Kadirana,
Jayabima, Negombo.

Accused

Yakupitige Kanthi Silva
No. 31, Jayabima,
South Kadirana, Negombo.

Claimant

AND BETWEEN

Yakupitige Kanthi Silva
No. 31, Jayabima,
South Kadirana, Negombo.

Claimant-Petitioner

Vs.

1. Officer-in-Charge,
   Police Station,

Koswaththa.

2. The Attorney General,
Attorney General's
Department,
Colombo 12.

Respondents

AND NOW BETWEEN

Yakupitige Kanthi Silva
No. 31, Jayabima,
South Kadirana, Negombo.

Claimant-Petitioner-Appellant

Vs.

1. Officer-in-Charge,
Police Station,
Koswaththa.

2. The Attorney General,
Attorney General's
Department,
Colombo 12.

Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : AAL Chandana Wijesooriya for the Claimant-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the Respondent-Respondents

ARGUMENT ON	:	13.03.2019
WRITTEN SUBMISSIONS	:	The Claimant-Petitioner-Appellant – On 11.12.2018 The Respondent-Respondents – On 03.12.2018
DECIDED ON	:	26.06.2019

K.K.WICKREMASINGHE, J.

The Applicant-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Wayamba Province holden in Chilaw dated 26.01.2015 in Case No. HCR 20/2013 and seeking to set aside the confiscation order made by the Learned Magistrate of Marawila dated 28.08.2013 in Case No. 70591/C.

Facts of the case:

The Police, Koswatta arrested the accused-driver on or about 07.08.2012 for illegally transporting Teak wood valued at Rs. 129,354/- without a valid permit. The vehicle bearing No. PA - 8222 which was utilized for the transportation was taken into custody by the Police.

The accused-driver was charged before the Learned Magistrate of Marawila, for illegally transporting Teak wood, an offence punishable under section 25(2) read with sections 38A, 40, 40A and 25(2)(a) of the Forest Ordinance as amended. The accused-driver pleaded guilty to the said charge and the Learned Magistrate imposed a fine of Rs. 30,000 with a default sentence of 6 months imprisonment.

Thereafter a vehicle inquiry was held with regard to the vehicle used for committing of the offence. The Claimant-Petitioner-Appellant who is the registered owner of the vehicle (hereinafter referred to as 'the appellant') gave evidence in the said inquiry. The Learned Magistrate confiscated the vehicle by the order dated 28.08.2013.

Being aggrieved by the said order, the appellant preferred an application for revision to the Provincial High Court of Wayamba Province holden in Chilaw. The Learned High Court Judge dismissed the said application by the order dated 26.01.2015.

Being aggrieved by the said dismissal, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal in written submissions;

1. The Learned Magistrate failed to take into consideration the fact that the appellant has taken precautions to prevent the use of vehicle for an offence.
2. The Learned Magistrate failed to take into consideration that the appellant has taken every measure to ensure that the vehicle was not used for illegal purposes.
3. The Learned Magistrate failed to take into consideration that the said illicit transportation of timber took place without the knowledge of the appellant.
4. The Learned Magistrate failed to take into consideration the nature of degree of proof required by the appellant.
5. The Learned Magistrate and the Learned High Court Judge failed to take into consideration that the appellant and the accused are not habitual offenders and have no previous convictions.
6. The Learned Magistrate wrongly insisted upon corroboration of the testimony of the appellant in deciding the matter.

It was the contention of the Learned Counsel for the appellant that in the inquiry, the appellant proved that she took every measure to ensure the vehicle was not used for illegal purposes, even during the date of the alleged offence. On the date of offence, the appellant's husband had to go to a medical clinic and therefore the accused-driver was asked to transport two loads of Gneiss. The driver came with one load of Gneiss and went back to pick the second load. The appellant tried to contact the driver in the evening and the appellant's husband went on searching for the driver when the driver was late to return home.

In the case of **Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011],** it was held that,

> *"The Supreme Court has consistently followed the case of Manawadu vs the 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 had 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."*

After the enactment of Act No. 65 of 2009 which amended section 40 of the Forest Ordinance, a vehicle owner in question should prove precautions taken by him/her to prevent an offence being committed, on a balance of probability.

In the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008 – decided on 02.07.2009],** it was held that,

> *"On a consideration of the ratio decidendi of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest*

Ordinance, as amended, if the owner of the vehicle in question was a third party, no order of confiscation shall be made if that owner had 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. The ratio decidendi of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability."

In the case of **K.W.P.G. Samarathunga V. Range Forest Officer, Anuradhapura and another [CA (PHC) 89/2013],** it was held that,

"The law referred to in the said proviso to Section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance, making use of that vehicle..."

In light of above, it is understood that even though the previous law allowed a vehicle owner to prove either he took precautions or he had no knowledge of an offence being committed, the amended section 40 only focuses on the precautions taken by a vehicle owner in question.

Now I will consider whether the Learned Magistrate failed to consider that the appellant has taken every measure to ensure the vehicle was not used for illegal purposes. I observe that the appellant had testified as follows;

"...වෙන දේවල් කරලා නැහැ කලින්. මේ වාහනය කොහේද යන්නේ කියලා හොයලා බලනවා. සමහර දවසට කෝල් එකක් දෙනවා. සමහර වෙලාවට

මහත්තයා බයික් එකේ යනවා. ඒ කිසිම අවස්ථාවකවත් දැනගන්න ලැබුණෙ නැහැ ඔහු නීතිවිරෝධී ක්‍රියාවල යෙදෙන බව. (Page 109 of the brief)

<u>හරස් ප්‍රශ්න</u>

ප්‍ර: ඔය තැනැත්තාට ලොරිය දුන්නම, එතනින් අරන් ගියාට පස්සෙ හොයලා බලන්න එහෙම හැකියාවක් තියෙනවද?

උ: මහත්තයා දෙවෙනි කලුගල් එක ආවෙ නැති නිසා බලන්න ගියා.

ප්‍ර: දුරකථනෙන් සම්බන්ධ කරගන්න බැරිනම්, වෙනත් ආකාරයට හොයලා බලනවද?

උ: අසනීප තත්වයක් නැත්නම් මහත්තයා ගිහින් බලනවා (Page 113 & 118 of the brief)"

The appellant has taken this position throughout her evidence. It was elicited from the appellant's evidence that the vehicle was under her control and it was given to the accused-driver only if her husband was unable to drive it.

At this juncture I wish to consider whether the reasons given by the Learned Magistrate to confiscate the vehicle was justifiable. The Learned Magistrate made following observations;

"මෙම නඩුවේ ලියාපදිංචි අයිතිකරුගේ සාක්ෂියෙහි ඇය කියා සිටින්නේ මෙම ක්‍රියාව පිලිබඳව ඇය නොදන්නා බව පමණි...

ව්‍යවස්ථාදායකය විසින් අදාල 2009 අංක 65 දරන සංශෝධනය මගින් අපේක්ෂා කර ඇති තත්ත්වය මෙය නොවේ. එමගින් දක්වා ඇත්තේ වාහනයේ ලියාපදිංචි අයිතිකරු අදාල අපරාධය සඳහා තම වාහනය යොදා ගැනීම වැලැක්වීමට අවශ්‍ය

පූර්වාරක්ෂක ක්‍රියාමාර්ග ගෙන තිබූ බවට අධිකරණය ඉදිරියේ කරුණු තහවුරු කළ යුතු බවයි.

මෙම නඩුවේ වාහනයේ ලියාපදිංචි අයිතිකරු තම සාක්ෂිය පුරාම එවන් කරුණක් පිලිබඳව කිසිදු අවස්ථාවක සඳහන් කර නොමැත..." (Page 128 of the brief)

I observe that the appellant clearly testified that she was monitoring the vehicle whenever it was given to the accused-driver. The appellant has contacted the driver twice on that day as well. Therefore I am of the view that the Learned Magistrate misdirected in evaluating the evidence since the appellant clearly testified that she took precautions within her capability.

In the case of **W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F) – decided on 02.08.2013],** it was held that,

"It is trite law that the purpose of revisionary jurisdiction is supervisory in nature, and that the object is the proper administration of justice. In ***Attorney General v Gunawardena (1996) 2 SLR 149*** *it was held that: "Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not, primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right, and its object is the grant of relief to a party aggrieved by an order of court which is tainted by error. .. "*

In the case of **Bank of Ceylon V. Kaleel and Others (2004) 1 Sri LR 284**, it was held that:

" ...to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which is beyond

an error or defect or irregularity that an ordinary person would instantly react to it ... the order complained of is of such a nature which would have shocked the conscience of the court."

Considering above, I am of the view that the Learned Magistrate erred in coming to the conclusion that the appellant had not proved precautions taken by her, to the satisfaction of Court and it clearly caused a miscarriage of justice. I am of the view that it was an exceptional circumstance for the High Court to invoke the revisionary powers, but the Learned High Court Judge failed to observe the error on the part of the Learned Magistrate.

Therefore I decide to set aside the order of the Learned High Court Judge dated 26.01.2015 and confiscation order of the Learned Magistrate dated 28.08.2013. I order the vehicle to be released to the appellant.

Accordingly the appeal is hereby allowed.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL