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

In the matter of an Appeal in terms of Article 138 read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka and the High Court of the Provinces (special provisions) Act No. 19 of 1990.

C.A. Case No: **CA (PHC) 61/2008**

H.C. Puttalam Revision Application No: **HCR 04/2007**

M.C. Anamaduwa Case No: **45174/A**

Officer-in-charge,
Police Station,
Nawagaththegama.

Complainant

Vs.

Vijjapathiyalage Nuwan Kumara,
Kurukatiyawa.

Accused

Vijjapathiyalage Ukkuwa,
Kurukatiyawa.

(Vehicle owner-Claimant)

AND BETWEEN

Vijjapathiyalage Ukkuwa,
Kurukatiyawa.
(Vehicle owner-Claimant)

Petitioner

Vs.

1. Officer-in-charge,
Police Station,

Nawagaththegama.

Complainant-Respondent

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

2nd Respondent

AND NOW BETWEEN

Vijjapathiyalage Ukkuwa,
Kurukatiyawa.

(Vehicle owner-Claimant)

Petitioner-Appellant

Vs.

1. Officer-in-charge,
Police Station,
Nawagaththegama.

Complainant-Respondent-Respondent

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

2nd Respondent-Respondent

BEFORE : K. K. Wickremasinghe, J.

Janak De Silva, J

COUNSEL : AAL K. Asoka Fernando with AAL A.R.R. Siriwardane for the Petitioner-Appellant

		Jayalakshmi De Silva, SC for the Respondents
ARGUED ON	:	19.07.2018
WRITTEN SUBMISSIONS	:	The Petitioner-Appellant – On 18.06.2018 The Respondents – On 14.09.2017
DECIDED ON	:	18.09.2018

K.K.WICKREMASINGHE, J.

The Petitioner-Appellant has filed an appeal in this court seeking to set aside the order of the Learned High Court Judge of Provincial High Court of Wayamba province holden in Puttalam dated 01.07.2008 in Case No. HCR 04/2007 and seeking to set aside the confiscation order made by the Learned Magistrate of Anamaduwa dated 02.08.2007 in Case No. 45174/A.

Facts of the Case:

The Petitioner-Appellant (hereinafter referred to as the 'Appellant') was the owner of a tractor bearing No. 36 Shri 2507 and a trailer attached to it. His son named V. Nuwan Kumara (Accused-driver) was charged before the Learned Magistrate of Anamaduwa for illegally transporting 'Kuratiya' sticks on or about 26.02.2007 valued at Rs.1520/=, an offence punishable under section 40 read with sections 24 and 25of the Forest Ordinance (as amended). On 15.03.2007, the Accused-Driver had pleaded guilty to the said offence and the Learned Magistrate of Anamaduwa had imposed a fine of RS.5000/=. Thereafter a vehicle inquiry claim was conducted with regard to the confiscation of the Tractor bearing No. 36 Shri 2507 along with the trailer, which was allegedly used for the said offence. After concluding the inquiry, the Learned Magistrate of Anamaduwa had ordered to confiscate the vehicle by order dated 02.08.2007. Being aggrieved by the said

order, the Appellant has filed a revision application in the Provincial High Court of Wayamba province holden in Puttalam under case No. HCR 04/2007. The Learned High Court Judge of Puttalam has dismissed the said revision application by the order dated 01.07.2008.

Being aggrieved by said dismissal, the Appellant has preferred an appeal to this court.

The Learned Counsel for the Appellant has averred following grounds of appeal;

i) The order of the Learned Magistrate dated 02.08.2007 was contrary to law and the Learned High Court Judge erred in law for the failure to consider the same,

ii) The order of the Learned Magistrate was contrary to the weight of evidence adduced at the vehicle inquiry,

iii) The Learned Magistrate had failed to consider from the circumstances of the case that the vehicle being used for the committing of offence was beyond the control of the Appellant.

iv) The order of the Learned Magistrate was contrary to principles of natural justice, particularly *audi alteram partem* rule,

v) The Learned High Court Judge erred in law by taking the previous conduct of the offender into consideration and caused grave prejudice to the Appellant by considering the Appellant's failure to disclose his relationship with the offender,

The Learned Counsel for the Appellant has submitted that the evidence led at the vehicle inquiry had disclosed that the Appellant had no knowledge of the

commission of the offence. The Learned Counsel has submitted the case of **Manawadu V. The Attorney General (1987) 2 SLR 30**, in which it was held that,

> *"By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused .The amended sub-section 40 does not exclude by necessary implication the rule of 'audi alteram partem' . The owner of the lorry 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.*
>
> *The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him"*

The Appellant in his evidence had stated that the Accused-driver was his son and he had given the vehicle to the son to transport sand and gravel. However, during the cross-examination the Appellant had stated that he clearly instructed the son, not to transport any sand and gravel or not to take vehicle away from home at all (Page 55 and 56 of the brief). This position had been identified by the Learned Magistrate as a contradiction.

In the aforesaid case of **Manawadu, Shiravananda, C.J** further stated that,

> *"...**Dixon C.J., in Commissioner of Police v. Tanes(1957-58) 68 CLR 383,*** underlined this canon of interpretation:
>
> *"It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard ..."*

It is pertinent to note that the instant case was decided prior to the Amendment Act No.65 of 2009 which amended Section 40 of the Forest Ordinance. We find that the Learned Magistrate of Anamaduwa had correctly followed the aforesaid decision of **Manawadu Case** and had given ample opportunity to the Appellant to show cause against an order of confiscation. Therefore we reject the contention of the Appellant that the Learned Magistrate had acted contrary to the principles of natural justice.

The Learned Counsel for the Appellant submitted that the Learned Magistrate had failed to consider that the Appellant was not at all involved in the offence and the tractor being used for the offence was beyond his control.

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."

In the case of **Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]**, it was held that.

"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 endeavor to implement the instructions... "

It is our considered view that the Appellant is bound to show cause that he had no knowledge of the offence being committed and he had taken every possible step to prevent an offence being committed. Therefore merely stating that he had no control over the vehicle or had no control over an offence being committed would not in fact be sufficient enough to discharge the burden cast on a vehicle owner.

The Learned Counsel for the Appellant submitted that the Learned High Court Judge of Puttalam had considered the previous conduct of the offender. The Learned Counsel further submitted that the Learned High Court Judge caused a grave prejudice to the Appellant by focusing on the failure of the Appellant to disclose, in the petition submitted to the High Court, the relationship of father and son between himself and the accused.

In the case of **Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67**, it was held that,

"If there is no full and truthful disclosure of material facts, the Court would not go into the merits of the application but will dismiss it without further examination..."

In the case of **Lokugalappaththige Cyril & Others V. Attorney General [S.C (Spl.) L.A. No. 272/2013]** it was held that,

> *"In a brief manner a fair and full disclosure of all material facts would be essential and should be pleaded in applications to Superior Courts by parties aggrieved of orders and judgments of the lower courts. In the same manner a "plain and concise statements of all facts and material" would be mandatory for special leave to Appeal Applications to the Supreme Court..."*

However, we observe that the Learned High Court Judge has stated as follows;

> "...වරදකරු ලියාපදිංචි අයිතිකරු උක්කුවා සමඟ එකම ස්ථානයේ පදිංචිව සිටී. ඒ අනුව ප්‍රමාණවත් පරිදි වරදකරු නීතිවිරෝධී ප්‍රවාහන කටයුතුවල මෙම රථය යෙදවීම වැළැක්වීම සඳහා පියවර ගතයුතුව තිබුණි..." (Page 42 of the brief)

> "...පෙර වරදක් සඳහා එම රථය පාවිච්චි කිරීම මත පරීක්ෂණයක් තිබූ හෙයින් ඉල්ලුම්කාර පෙත්සම්කරු මෙම රථය නැවතත් නීති විරෝධී ලෙස ප්‍රවාහන කටයුතුවලට යෙදවීම වැළැක්වීම සඳහා කිසිදු පියවරක් ගෙන නැත..." (Page 43 of the brief)

We are unable to find any reference made with regard to the previous conduct of the offender in the confiscation order. Upon perusal of the order it is understood that the Learned Magistrate had referred to the fact that the same tractor was involved in an offence earlier as well.

The Appellant had answered during the cross-examination of vehicle inquiry as follows;

> "ප්‍ර: මීට කලිනුත් මේ ට්‍රැක්ටරය වැරදිවලට හසුවෙලා තිබුණු බව තමුන් දන්නවද?
>
> උ: දන්නවා" (Page 59 of the brief)

This Court held in a recently decided case of **R.W. Chaminda Parakrama V. Attorney General and another [CA (PHC) APN 54/2016]**, that,

> *"It is pertinent to note that the vehicle was previously involved in another offence as well. Therefore the degree of preventive measures that should have been taken by the owner of the vehicle to prevent an offence being committed again using the vehicle is comparatively higher. But the Petitioner had re employed the Accused driver after giving mere verbal instructions which in fact is insufficient to establish, on a balance of probability, that he has taken every possible precaution to prevent an offence being committed."*

Accordingly we find that the above reasoning of the Learned Magistrate as well as the Learned High Court Judge was correct in law and had not caused prejudice to the Appellant as contended by the Learned Counsel.

In the case of **Rustom V. Hapangama (1978-79) 2 SLLR 225**, it was stated that,

> *"The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist then this court will not exercise its powers in revision... "*

In the case of **Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29** it was held that,

> *"The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or*

whether an appeal had been taken or not. However this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."

Accordingly we are of the view that the Appellant had failed to demonstrate the exceptional circumstances to the satisfaction of Provincial High Court and therefore the Learned High Court Judge was correct in dismissing the said revision application.

We see no reason to interfere with the findings of the Learned High Court Judge of Puttalam and the Learned Magistrate of Anamaduwa.

The Appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Manawadu V. The Attorney General (1987) 2 SLR 30
2. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]

3. Mary Matilda Silva V. P.H. De Silva CA (PHC) 86/97]
4. Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67
5. Lokugalappaththige Cyril & Others V. Attorney General [S.C (Spl.) L.A. No. 272/2013]
6. R.W. Chaminda Parakrama V. Attorney General and another [CA (PHC) APN 54/2016]
7. Rustom V. Hapangama (1978-79) 2 SLLR 225
8. Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29