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

In the matter of an Application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Revision Application No:
CA (PHC) APN 25/2015

Vs.

H.C. Monaragala Case No: **HC 60/2014**

M.C. Wellawaya Case No: **BR 616/2012**

1. Wickramage Ranjith Kumara alias Podi

Accused

2. Widanagamage Ajith Kumara,
No. 1888, Shakti Mawatha,
Modarawana,
Embilipitiya.

Claimant (Vehicle owner)

AND NOW BETWEEN

Widanagamage Ajith Kumara,
No. 1888, Shakti Mawatha,
Modarawana,
Embilipitiya.

Claimant – Petitioner

Vs.

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

Respondent

BEFORE	:	K K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	Shanaka Ranasinghe, PC with AAL N. Abeysooriya for the Claimant – Petitioner Nayomi Wickremasekara, SSC for the Respondent
INQUIRY ON	:	09.08.2018
WRITTEN SUBMISSIONS	:	The Claimant-Petitioner – On 04.09.2018 The Respondent – On 15.07.2016
DECIDED ON	:	23.10.2018

K.K. WICKREMASINGHE, J.

The Applicant-Petitioner has filed this revision application seeking to set aside the confiscation order made by the Learned High Court Judge of Monaragala in Case No. 60/2014.

Facts of the Case:

The Accused-driver (hereinafter referred to as the 'accused') was charged for trafficking and having possession of Cannabis Satvia L., offences punishable under Poisons, Opium and Dangerous drug Ordinance. The accused had pleaded guilty when the charges were read out on 04.08.2014 and the Learned High Court Judge

had convicted and sentenced accordingly. The vehicle bearing registration number WP-HA 2421 (SG-HA 2421) was listed as the vehicle allegedly used for committing the said offences.

Thereafter a vehicle inquiry was held with regard to the confiscation of the vehicle and the claimant-petitioner (hereinafter referred to as the "petitioner") and his wife had given evidence in the inquiry. At the conclusion of the inquiry, the Learned High Court Judge had confiscated the vehicle by the order dated 02.12.2014.

Being aggrieved by the said order, the petitioner had preferred an appeal. However, the Learned High Court judge had pointed out that there were no provisions to appeal against a confiscation order of a vehicle in terms of section 79(1) of the Poisons, Opium and Dangerous Drugs Ordinance. Therefore the petitioner had withdrawn the appeal.

Thereafter, the petitioner had preferred a revision application to this Court seeking to revise the confiscation order dated 02.12.2014. This Court had delivered the order on 14.10.2016. The Supreme Court had set aside the said order and had directed this Court to re-consider the application on merits.

The Learned President's Counsel for the petitioner contended that the Learned High Court Judge had failed to consider principles set out in case law and therefore the order made was bad in law.

The Learned President's Counsel has submitted the case of **Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167,** in which it was held that,

> *"...an order for confiscation cannot be made if the owner establishes one of two matters. They are:*

i. *That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;*

ii. *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..."

However, section 79 of the Poisons, Opium and Dangerous Drugs Ordinance does not afford a third party owner an opportunity to claim the vehicle. Accordingly any vehicle or equipment which had been used for the commission of offence, by reason of such conviction, is forfeited to the State.

In the case of **Manawadu V. The Attorney General (1987) 2 SLR 30**, 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"

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,

"According to the plain reading of this section it appears that upon conviction the confiscation is automatic. The strict interpretation of this Section will no doubt cause prejudice to the third parties who are the owners of such vehicles...

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."

Accordingly the Learned High Court Judge of Monaragala had held a vehicle inquiry following the principles of Natural justice. Therefore the appellant was 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.

The Learned President's Counsel for the petitioner has submitted that as per the evidence led on behalf of the petitioner, he did not have any knowledge of the commission of the offence. On the date of arrest, the petitioner and his family had attended an almsgiving at the residence of a relative of his wife. After the almsgiving, his family was ready to return home and they had packed personal belongings in the car including clothes, keys of house and wallet of the petitioner. Thereafter the accused had taken the vehicle without the knowledge of petitioner while petitioner was having a wash at a well nearby. Accordingly the Learned President's Counsel for the petitioner submitted that above evidence clearly established that the petitioner did not have any knowledge of the accused using the vehicle to commit the particular offence. The Learned President's Counsel further contended that if the respondent was to challenge the position of the petitioner that the personal belongings of the petitioner were inside the vehicle, it was the duty of the respondent to place evidence to the contrary before Court.

However, it is imperative to note that the burden of proving shifts to the petitioner upon the conviction. Therefore it is the duty of the petitioner to prove on a balance of probability that he was not privy to the offence.

In the case of **Umma Habeeba V. OIC, Dehiattakandiya and other (1999) 3 Sri.L.R. 89**, it was held that,

> *"What s. 3A means is that the vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. If, as contended the Magistrate was given a discretion to consider whether to confiscate or not - the Magistrate could confiscate even when the offence was committed without the knowledge of the owner taking*

into consideration other damnable circumstances apart from knowledge or lack of it on the part of the owner..."

We observe that the petitioner and his wife had taken different positions in the inquiry. The petitioner had testified that he never allowed the accused to drive the vehicle and the accused did not have driving license. However the wife of the petitioner had testified that she gave the key of the vehicle to the accused since the accused used to drive the said vehicle with the consent of the petitioner. Further we observe that no clothes were recovered according to the notes made by the Police on 01.07.2012 with regard to the arrest of the accused.

Therefore we are of the view that the petitioner had failed to discharge the burden cast on him on a balance of probability. We are mindful that the Learned High Court Judge had considered fatal contradictions in the evidence led on behalf of the petitioner due to deliberate false statements.

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284,** it was held that;

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go 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 court."

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..."

Therefore considering the facts of the case and the order of the Learned High Court Judge, we are of the view that there is no failure of justice, defect, illegality or irregularity to shock the conscience of Court in order to invoke the revisionary jurisdiction of this Court. Accordingly we do not see any reason to revise the order of the Learned High Court Judge of Monaragala dated 02.12.2014. The order of the Learned High Court Judge is affirmed.

Therefore the revision application 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. Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167
2. Manawadu V. The Attorney General (1987) 2 SLR 30
3. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]
4. Umma Habeeba V. OIC, Dehiattakandiya and other (1999) 3 Sri.L.R. 89
5. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284
6. Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29