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

In the matter of an Appeal under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Range Forest Officer,
Department of Wildlife Conservation,
Range Forest Office,
Galgamuwa.

Complainant

C.A. Case No: **CA (PHC) 112/2013**

P.H.C. Case No: **HCR/74/2011**

M.C. Case No: **88646**

Vs.

1. H.M. Mohamed Naleem
2. R.M. Chandana Upul Kumara

Accused

Mohamad Casimge Mohamad Thasleem,
Pannawa, Kobeigane.

Registered owner
(Vehicle claimant)

AND BETWEEN

Mohamad Casimge Mohamad Thasleem,
Pannawa, Kobeigane.

Registered owner-Petitioner

Vs.

Range Forest Officer,
Department of Wildlife Conservation,
Range Forest Office,
Galgamuwa.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Mohamad Casimge Mohamad Thasleem,
Pannawa, Kobeigane.

Registered owner-Petitioner-Appellant

Vs.

Range Forest Officer,
Department of Wildlife Conservation,
Range Forest Office,
Galgamuwa.

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	AAL Shantha Jayawardena with AAL Hirannya Damunupola, AAL Chamara Nanayakkarawasam and AAL Dinesh De Silva for the Registered Owner-Petitioner-Appellant Nayomi Wickremasekara, SSC for the Complainant-Respondent-Respondent
WRITTEN SUBMISSIONS	:	The Registered owner-Petitioner-Appellant – On 16.01.2019 The Complainant-Respondent-Respondent – On 28.11.2018
DECIDED ON	:	21.02.2019

K.K.WICKREMASINGHE, J.

The Registered owner-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kurunegala dated 04.06.2013 in Case No. HCR/74/2011 and seeking to set aside the confiscation order made by the Learned Magistrate of Galgamuwa dated 24.08.2011 in Case No. 88646. Both parties agreed to conclude this case by way of written submissions.

Facts of the Case:

The two accused (hereinafter referred to as the 'accused') named H.M. Mohamed Naleem and R.M. Chandana Upul Kumara were arrested on or about 19.11.2010 for illegally transporting timber valued at Rs.20, 798.76 using a vehicle bearing

No. NWLG - 4303. The accused were charged before the Learned Magistrate of Galgamuwa under the Forest Ordinance (as amended). Both accused had pleaded guilty to the charge and the Learned Magistrate convicted them accordingly. Thereafter a vehicle inquiry was held with regard to the lorry bearing number No. NWLG – 4303 and the registered owner-petitioner-appellant (hereinafter referred to as the 'appellant') and a relative of the appellant had given evidence in the said inquiry. After concluding the inquiry, the Learned Magistrate had confiscated the vehicle by order dated 24.08.2011.

Being aggrieved by the said order the appellant filed a revision application in the Provincial High Court of North Western Province holden in Kurunegala. The Learned High Court Judge has dismissed the same on 04.06.2013 due to lack of exceptional circumstances.

Being aggrieved by the said dismissal the appellant preferred an appeal to this Court.

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

1. Both the Learned Magistrate and the Learned High Court Judge failed to appreciate that the appellant had taken all the precautions within his means.
2. The Learned High Court Judge failed to consider the exceptional circumstances averred by the appellant.

The Learned Counsel for the appellant submitted that the phrase "had taken all precautions to prevent the use of for the commission of the offence" employed in the proviso to section 40 of the Forest Ordinance is extremely wide and ambiguous. Accordingly the Learned Counsel contended that unless the phrase "all precautions" is given a reasonable interpretation, the registered owner will not be successful in any claim as the phrase is open ended.

However we observe that the appellant has not put forth this argument before the Learned High Court Judge. Since this is an appeal preferred against the order of the Learned High Court Judge, we cannot allow an appellant to present a case that is materially different to the High Court application.

We observe that the appellant has taken up the position that it was not mandatory to demonstrate the existence of exceptional circumstances in a revision application of this nature. Therefore we are of the view that the appellant cannot argue that the Learned High Court Judge has failed to consider exceptional circumstances especially when the appellant failed to specify the same in the petition submitted to the High Court.

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. and others (2003) 3 Sri L.R 24,** it was held that,

> *"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted.* ***If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal...*** " (Emphasis added)

This position was correctly considered by the Learned High Court Judge as follows;

> "...පෙත්සම්කරුගේ පැහැදිලි ස්ථාවරය වන්නේ මෙබඳු ප්‍රතිශෝධන ඉල්ලීමකදී එබඳු අවශ්‍යතාවයක් පැන නොනගින බවය. (බලන්න පෙත්සම්කරුගේ ප්‍රතිවිරෝධතා පෙත්සම)

මෙහිදී පැහැදිලි විය යුතු කරුණ නම් නීති විරෝධී දැව ප්‍රවාහනය කළ අවස්ථාවක වාහනය රාජසන්තක කිරීමට අදාළ පරීක්ෂණයකින් පසු දෙනු ලබන නියෝගයනට එරෙහිව අභියාචනය කිරීමේ හිමිකමක් නොමැති බවය. එබඳු අවස්ථාවක පෙත්සම්කරුට කළ හැක්කේ නියෝගය ප්‍රතිශෝධනය කරවා ගැනීම සඳහා යම් ඉල්ලීමක් කිරීම පමණකි. අභියාචනයක් නොවන එවැනි ඉල්ලීමක් අධිකරණයට සළකා බැලිය හැක්කේ ඒ සඳහා සුවිශේෂී වූ හේතු පවතින්නේ නම් පමණි..." (Page 38 and 39 of the brief)

Further we observe that the vehicle which is the subject matter of the instant application had been involved in another offence previously and the appellant, in the vehicle inquiry, suppressed such involvement. After the amendment Act No. 65 of 2009 made to the Forest Ordinance, it is mandatory to prove preventive measures taken by a vehicle owner in question 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],** 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."* (Emphasis added)

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... Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore, it is evident that no meaningful step had been taken either by the owner or his power of attorney holder, of the vehicle that was confiscated in order to prevent an offence being committed by making use of this vehicle."

This Court has previously held in the case of **R.W. Chaminda Parakrama V. Attorney General and another [CA (PHC) APN 54/2016 – decided on 05.06.2018]**, 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."

Considering above, we are of the view that the Learned Magistrate was correct in ordering to confiscate the vehicle by the order dated 24.08.2011.

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 on 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 the Learned High Court Judge was not inclined to interfere with the order of the Learned Magistrate in the absence of exceptional circumstances. We see no reason to interfere with the orders made by both the Learned High Court Judge and the Learned Magistrate. Therefore we affirm the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL