

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 read with High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Officer-in-Charge,
Police Station,
Kuliyapitiya.

C.A. Case No: CA (PHC) 24/2015

P.H.C. Kuliyapitiya Case No: HCR 67/2012

M.C. Kuliyapitiya Case No: 71436

Complainant

Vs.

1. Pathirajage Don Harison Christie
Bennet,
Madampella, Katana.
2. Liyana Pamohottilage Sudath
Sisira Kumara,
Dunugaha, Batepola.
3. Jayakodi Arachchilage
Pushpakumara Hemantha Jayakodi
Govt. Quarters, Kuliyapitiya.

Accused

AND BETWEEN

Deekirikewage Don Nelum Inoka
Rose,
Carmelwatta, Kadawala,
Dunugaha.

Aggrieved Petitioner

Vs.

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

Complainant-1st Respondent

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

2nd Respondent

3. The Manager,
Hatton National Bank,
No. 62, Divulapitiya Road,
Marandagahamula.

3rd Respondent

AND NOW BETWEEN

Deekirikewage Don Nelum Inoka
Rose,
Carmelwatta, Kadawala,
Dunugaha.

Aggrieved Petitioner-Appellant

Vs.

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

Complainant-1st Respondent-1st
Respondent

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

2nd Respondent-2nd
Respondent

3. The Manager,
Hatton National Bank,
No. 62, Divulapitiya Road,
Marandagahamula.

3rd Respondent-3rd
Respondent

BEFORE : K. K. Wickremasinghe, J.
K. Priyantha Fernando, J.

COUNSEL : AAL Theekshana Pathirana for the
Aggrieved Petitioner-Appellant

Varunika Hettige, DSG with Jayalakshi de
Silva, SC for the 1st and 2nd Respondents-
Respondents

AAL Anushka Mishal for the 3rd
Respondent-Respondent

WRITTEN SUBMISSIONS : The Aggrieved Petitioner-Appellant – On
31.08.2018
The 1st and 2nd Respondent-Respondents –
On 31.08.2018
The 3rd Respondent – On 14.06.2019

DECIDED ON : 01.08.2019

K.K.WICKREMASINGHE, J.

The Aggrieved 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 Kuliypitiya dated 11.02.2015 in Case No. HCR 67/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Kuliypitiya dated 16.04.2012 in Case No. 71436. At the stage of argument, all parties agreed to dispose this case by way of written submissions and to abide by the same. I observe that in the written submissions of the 1st and 2nd Respondents-Respondents, the title is typed as 'Written Submission of the Third Respondent'. However, the contents of the written submissions refer to the '1st and 2nd respondents'. Therefore, I ignore the said title since it appears to be a typographical error.

Facts of the case:

The accused persons were charged in the Magistrate's Court of Kuliypitiya for committing offences punishable under the Prevention of Cruelty to Animals Ordinance No. 13 of 1907 and the Animals Act No. 29 of 1958, by transporting 07 cattle without a permit. The accused persons pleaded guilty to charges and were convicted and sentenced accordingly. Thereafter a vehicle claim inquiry was held with regard to the Lorry bearing No. WPLL – 1487 that was used for the commission of the offence. In the vehicle claim inquiry, the aggrieved petitioner-appellant (hereinafter referred to as the 'appellant') and the 3rd respondent-respondent (hereinafter referred to as the '3rd respondent') gave evidence. At the conclusion of the inquiry, the Learned Magistrate of Kuliypitiya confiscated the vehicle.

Being aggrieved by the said order, the appellant preferred an application for revision to the Provincial High Court of North Western Province holden in Kuliypitiya. The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the revision application.

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

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

1. The order of the Learned Magistrate is contrary to law and against the weight of the evidence.
2. The Learned High Court Judge failed to consider the fact that the evidence given at the vehicle inquiry has to be evaluated on a balance of probability.

In terms of the proviso to section 3A of the Animals Act, an order for confiscation shall not be made if the owner of the vehicle proves to the satisfaction of Court, that he has taken all precautions to prevent the use of such vehicle or that the vehicle had been used without his knowledge for the commission of the offence. This was elaborated in the case law as follows;

In the case of **Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 Sri L.R. 167**, it was held 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.

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...”

In the case of **Nizar V. I.P, Wattegama (1978-79) 2 SLR 304**, it was held that,

"In 1968 two new sub-sections were added to section 3 of the Act by Act No.20 of 1968. One of them is as follows;

"3A. Where a person is convicted of an offence under this part or any regulations made there under, any vehicle used in the commission of the offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate to confiscation:

Provided however, 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 had taken all precautions to prevent the use of vehicle or that the vehicle has been used without his knowledge for the commission of the offence..."

...In all these Ordinances and Regulations there was no proviso similar to the proviso to section 3A of the Animals Act and the decisions in all the cases turned on an interpretation of the sections in which the words used "be liable to confiscation" is identical with the words of section 3A. It was held in all these cases that no order of confiscation should be made without giving the owner an opportunity of showing cause and that if he succeeded in showing that he had taken all precautions against the use of the vehicle for the commission of the offence and that he was not in any way a privy to the commission of the offence then the vehicle ought not to be confiscated."

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... ”

Therefore, it is understood that a vehicle owner in question is required to prove one of the above two requirements, on a balance of probability.

The Learned Counsel for the appellant contended that the Learned Magistrate simply had relied on slight contradictions in the evidence of the appellant to infer the knowledge on the part of the appellant and the Learned High Court Judge overlooked the said error committed by the Learned Magistrate.

It was further argued that the Learned Magistrate had neglected the fact that the said motor lorry was hired to one Ananda for transporting of rice once a week and it is difficult for the appellant to remember the exact number of occasions the lorry has travelled to Polonnaruwa.

However, I observe that the appellant in her evidence had not mentioned any specific precaution taken by her to prevent an offence being committed using her vehicle. Therefore, the only consideration for the Learned Magistrate was to evaluate whether the appellant had no knowledge of an offence being committed. The appellant testified that she gave the lorry for a hire as requested by one Ananda on 21.10.2011, whereas the vehicle was arrested on 22.10.2011. The appellant testified that the Lorry was being travelled to Polonnaruwa every week. However, answering a question of the Court, she took up the position that the lorry was taken to Polonnaruwa only 3 times and again she changed her position stating that it was taken three times a week. Accordingly, the Learned Magistrate was of the view that the appellant was not a credible witness and therefore the Court

cannot rely on her evidence. Therefore, I am of the view that this Court should not interfere with the finding of the Learned Magistrate by way of revision, when there is no manifested error or irregularity in the said finding. Therefore, both grounds of appeal of the appellant should fail.

The 3rd respondent (hereinafter referred to as the 'respondent') was the absolute owner of the motor lorry. The Learned Counsel for the 3rd respondent submitted that the Learned High Court Judge misdirected himself in law by coming to the conclusion that the absolute owner has no right to claim the vehicle in a vehicle inquiry before a Magistrate's Court and the only claim an absolute owner can make is before a District Court based on the agreement. The Learned counsel for the 3rd respondent stated that their submissions are for the limited purpose of rectifying the above error made by the Learned High Court Judge, in order to safeguard the rights of an absolute owner in a vehicle claim inquiry.

I observe that the Learned High Court Judge in his order, referred to the case of **Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]**, and took the view that an absolute owner can file a civil action in the District Court since an absolute owner does not have possession of such vehicle.

I observe that the Supreme Court, in the case of **Orient Financial Services (supra)**, recognized the rights of an absolute owner in a vehicle inquiry, such as the right to claim the vehicle, right to be heard in the inquiry and the right to receive the vehicle if it is not confiscated by the Court. In the said case, the Supreme Court was of the view that the absolute owner will have the same burden of proof as the registered owner if the absolute owner claims the vehicle and therefore the absolute owner should prove on a balance of probability that he fulfilled the requirements as stated in the relevant statutory provisions. I observe that the Learned High Court Judge, in the instant case, has correctly observed the

aforesaid Supreme Court decision and the Learned High Court Judge did not exclude the right of an absolute owner in a vehicle inquiry, as submitted by the 3rd respondent. Therefore I do not see any error on the part of the Learned High Court Judge, which this Court needs to rectify.

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)

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 light of above, it is understood that this Court shall invoke the revisionary jurisdiction only if there has been an error, irregularity, illegality in the order challenged or there has been a miscarriage of justice which amounts to exceptional circumstances. Since the appellant has not demonstrated any exceptional

circumstances to the satisfaction of this Court, I do not wish to interfere with the order of the Learned Magistrate dated 16.04.2012 in Case No. 71436 and the order of the Learned High Court Judge of Kuliypitiya dated 11.02.2015 in Case No. HCR 67/2012. Therefore I affirm the same.

Accordingly the appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL