

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

*An Appeal against the Order of a Revision  
Application filed in the High Court under  
Article 154P (3) (b) of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.*

**CA Case No:**

CA/PHC/216/2017

Officer-in-Charge,

Police Station,

Alawwa.

**HC Kurunegala**

**COMPLAINANT**

**Case No:** HCR/126/2014

**Vs.**

**MC Polgahawela**

**Case No:** 13766/MISC

1. Arachchilage Pubudu Dhammika Thennakoon

Pothupitiya, Dambadeniya

2. Maliga Rangage Samantha Gamini Jayalath

Midellagolla, Wennoruwa

3. Basnayaka Ralalage Sunil Basnayaka

Galoliyawa, Maharachchimulla

4. Athapattu Mudiyanseelage Kalum Sampath

Athapattu

Dundeniya, Maharachchimulla

**ACCUSED**

**AND BETWEEN**

Jayakodi Mudiyansele Ranjith Kumarasiri

Jayakodi

Bulugahawatta, Kurunegala/Bopitiya

**AGGIEVED PARTY-PETITIONER**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

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

**02<sup>nd</sup> RESPONDENT**

3. Mercantile Investment Finance PLC  
236, Galle Road  
Colombo 03

**03<sup>rd</sup> RESPONDENT**

**AND NOW BETWEEN**

Jayakodi Mudiyansele Ranjith Kumarasiri

Jayakodi

Bulugahawatta, Kurunegala/Bopitiya

**AGGRIEVED PARTY-PETITIONER-APPELLANT**

**Vs.**

1. Officer-in-Charge,

Police Station,

Alawwa.

**COMPLAINANT-RESPONDENT-RESPONDENT**

2. The Hon. Attorney General,

Attorney General's Department,

Colombo 12

**02<sup>nd</sup> RESPONDENT-RESPONDENT**

3. Mercantile Investment Finance PLC

236, Galle Road

Colombo 03

**03<sup>rd</sup> RESPONDENT- RESPONDENT**

**Before**

: Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

**Counsel** : Duminda de Alwis with Charuni de Alwis for the  
Aggrieved Party-Petitioner-Appellant.

: Indika Nelummini, SC for the State.

**Argued on** : 29-07-2022

**Written Submissions** : 29-08-2022, 20-05-2022 (By the Aggrieved Party-  
Petitioner-Appellant)

: 29-07-2022 (By the Respondents)

**Decided on** : 30-09-2022

**Sampath B Abayakoon, J.**

The aggrieved party petitioner appellant (hereinafter referred to as the appellant) preferred this appeal on being aggrieved by the judgment of the learned High Court Judge of Kurunegala, where his application in revision was dismissed.

At the hearing of this appeal parties agreed to accept a judgment based on the written submissions filed by the parties, and the parties were allowed an opportunity to file reply written submissions as well, if they so wish.

The facts that led to the application by the appellant by way of revision are as follows.

The Officer-in-Charge of Alawwa Police filed a plaint and a chargesheet before the Magistrate of Polgahawela against four persons for illegally transporting Jak timber logs in the vehicle bearing No- NW JI 4871 on 27-04-2014, an offence punishable in terms of the Forests Ordinance.

The first accused, namely, Pubudu Dhammika Thennakoon was the driver of the vehicle.

When charged, all the accused pleaded guilty to the charge and accordingly they were sentenced and the illegally transported logs were confiscated to the state.

Thereafter, the learned Magistrate of Polgahawela, as he should have, held an inquiry allowing the owner of the vehicle that was used in the commission of the offence to show cause as to why his vehicle should not be confiscated as required by law.

At the inquiry, as the vehicle was subjected to a finance leasing agreement, a representative of the respective Finance Company has given evidence, to confirm the fact that in the finance leasing agreement itself, the lessee has agreed to prevent the vehicle being used in any illegal activity. The appellant, who is the registered owner of the vehicle and the claimant before the Court has given evidence, and another person as well.

The appellant in his evidence has stated that he is a businessman who has a business of selling glass and mirrors in the Giriulla town, and the vehicle, which is a Canter Lorry, was primarily used for his business activities. He has admitted that in addition, the vehicle was used for hiring purposes and the driver was the first accused in the action. He has been under his employment for about two years by the time this incident has happened.

He has explained the precautionary measures he took to ensure the vehicle was not being used for any illegal activity and the advice he had given to the driver in that regard.

It was his position that the vehicle was used to be parked in the town during the day time and in the night, it was parked at his house in Bopitiya area. However, on the day in question, namely, on 27-04-2014, his vehicle was not taken to the town and was parked at his house.

While in his shop, around 1.30 in the afternoon, he has received a request from one of his friends to transport a Backhoe machine from Maholawa to Pangolla.

As he has transported the machine previously as well, he has agreed to the request and had instructed his driver to engage in the job.

He has called the driver around 4.00 p.m. to inquire as to the transportation, and had been told that a hire fee of Rs. 5000/- was paid, the Backhoe was loaded, and they were about to leave the place to the intended destination.

The appellant has come home around 9.00 p.m., after closing his business for the day to find the lorry was not in his house as expected. When inquired from the person who hired the vehicle, he had been told that the lorry left his house after delivering the Backhoe around 6.00 p.m. The appellants attempt to contact the driver has not been successful. Thereafter the appellant has gone in search of the vehicle and has come to know that the vehicle had been taken into police custody. At the police station he has found the lorry, the driver and several other persons who are unknown to him in police custody.

It had been his position that he was unaware of the illegal activity of the driver and although he has taken measures to prevent such activity, the driver has committed the offence of transporting timer without a valid permit unknown to him.

Other than claiming that the appellant was lying and was in the habit of engaging in illegal activity in order to earn money for the payment of his leasing facility, the prosecution has not materially challenged his evidence.

The appellant has called Nalaka Dharmasiri Bandara in support of his version of events. He is said to be the person who hired the vehicle belonging to the appellant for the purpose of transporting of his backhoe machine. It was his evidence that he was using a backhoe machine and used to take it for the purpose of working on his sister's private property. It was his position that during the time relevant to this incident, he transported his machine from his village to the land of his sister in a tractor, and in order to transport it back to his village, he engaged the services of the appellant who had a lorry that can

transport his backhoe machine. Accordingly, the transportation was done and it was brought to his area around 6 p.m. on that day and he settled the vehicle hire as well and released the lorry was his evidence. Around 8 p.m. in the night, he has received a call from the owner of the lorry, who was the appellant, asking whether the lorry left his place, for which he has answered affirmatively. After about 2 days, he has come to know that the lorry has been taken into custody by police for illegal transportation of timber. Under cross-examination, it appears that the prosecution has asked very few questions from the witness.

I would now reproduce the questions relevant for the purposes of this appeal asked by the prosecution in the cross-examination.

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ප්‍ර. බැකෝ යන්ත්‍රය ගෙන ඉල්ලීම කලේ අප්‍රේල් වලට පෙරද පසුවද ?

උ. පසුව.

ප්‍ර. බැකෝ එක තිබුණේ කොහෙද ?

උ. අපේ ගෙදර දුන්දෙනියේ මම වැඩ කරන යන්තරය මාහෝලවට ගෙන ගියා.

At the conclusion of the inquiry and by his Order dated 10-11-2014, the learned Magistrate of Polgahawela has decided to confiscate the vehicle on the basis that the appellant has failed to prove that he took all necessary measures in order to prevent such an offence being committed.

It appears from the reasoning of the learned Magistrate that it has been determined that the registered owner of the vehicle and the witness called by him has given evidence contradictory to each other in relation to the alleged hire to transport the backhoe machine and that they have concocted evidence in order to suppress the real facts and had been uttering falsehood before the Court.

On that basis the learned Magistrate has refused to accept the evidence of the registered owner as well as the witness called in support of his version of

events, and had thereby decided that the registered owner had failed to show cause as to why the vehicle should not be confiscated.

It is clear from the Order, that the learned Magistrate has come to this conclusion solely on the basis of what the two witnesses said as to from where to where the transportation of the backhoe machine was done. It was the view of the learned Magistrate that the registered owner's evidence was that the transportation was done from Maholawa to Pangolla area and he permitted the driver only to do the transportation as such. However, it was the view of the learned Magistrate that the evidence of the witness called by the appellant to support his evidence, namely, Nalaka Dharmasiri Bandara has stated the backhoe was transported from his village in Dundeniya to Maholawa. The learned Magistrate has determined that even under cross-examination, the witness Dharmasiri Bandara has confirmed this position as I have earlier reproduced.

I find that if this was the correct analysis of the evidence, the learned Magistrate was totally justified in determining that the evidence of the appellant and the witness called on his behalf are contradictory to each other and they have attempted to create a story which is false.

However, I find that the learned Magistrate was totally misdirected as to his analysis of the evidence which he used in order to come to his findings and to confiscate the vehicle.

As I have stated before, the position of the registered owner had been that he allowed the vehicle to be used to transport a backhoe machine from Maholawa to Pangolla area. The prosecution has not challenged his stand in a material way to suggest that his version of events could not be believed.

The witness Nalaka Dharmasiri Bandara in his evidence-in-chief has narrated the background under which he requested the vehicle belonging to the



appellant for the transportation of his backhoe machine in the following manner:

“මම බැකෝ යන්ත්‍රයක් වැඩ කරනවා. මට කාලය සම්බන්ධයෙන් හරියට මතක නැහැ. මම මැගින් එක ගෙනාවේ අප්‍රේල් මාසයේ. අපේ අක්කා ඉන්නේ පුද්ගලික වත්තක. එම වත්ත වැඩ කරනවා මෙම බැකෝ එක ගෙනල්ලා. එය ගෙනාවේ අපේ ගමේ ඉඳල ගෙන ගියේ ට්‍රැක්ටරයෙන්. ආපසු ගෙනාවේ අක්කගේ හිතවත් කෙනෙක් ලොරියේ අයියා. ඔහුගේ ලොරියෙන් ගෙනාවා. ඔහුගෙන් තුන්පාරක් මම අරගෙන ගොස් තිබෙනවා. මම ගෙනිහිල්ලා දින එකහමාරක් වැඩ කරා. අයිතිකරුට කතා කලහම ඔහු කීවා වැඩ තියෙනවා එන්න විදිහක් නෑ කියල. ලොරියේ අයිතිකාරයට කතා කරා. මල්ලි වැඩක්ද කියල බලන්නම් කීවා. පැය එකහමාරක් යනකොට ලොරිය ආවා. ඇවිල්ල ලොරියට පැටෙව්වා. අපේ ප්‍රදේශයට නැවත අරන් ආවා 6 ට විතර.”

Even under cross-examination, he has not deviated from this position. When asked, where the backhoe was, his answer had been that it was in his house at Dundeniya and was taken to Maholawa for work.

It is therefore clear that if one takes care to read the evidence as a whole, there was no contradiction between the evidence of the appellant and Nalaka Dharmasiri Bandara who has hired the vehicle. It is abundantly clear that the hire was from the Maholawa area to the area where the witness Nalaka Dharmasiri Bandara lived.

I find that the learned Magistrate was misdirected as to the facts when he determined that there was a material contradiction in that regard which was the basis upon which the evidence of the appellant as well as Nalaka Dharmasiri Bandara was rejected.

When the appellant filed his application in revision before the High Court of Kurunegala, it appears that the learned High Court Judge, has agreed with the learned Magistrate as to the mentioned contradiction in the evidence. By the judgement dated 08-08-2017, it has been determined that there were no exceptional circumstances to intervene into the Order of the learned

Magistrate, and accordingly, the application in revision has been dismissed on that basis.

I find that the learned High Court Judge too has misdirected herself as to the evidence led at the inquiry in agreeing with the findings of the learned Magistrate. I find that if viewed correctly, there was sufficient basis to disagree with the findings of the learned Magistrate, as I have stated before.

It is correct to state that the power of revision is an extraordinary discretionary power that can be exercised only upon exceptional circumstances as considered by the learned High Court Judge.

However, the question here is whether the learned High Court Judge was correct in dismissing the application of the appellant on the basis that there were no exceptional circumstances to act upon. I am of the view that earlier considered misdirections as to the evidence led by the appellant provides a sufficient basis to consider that as an exceptional ground upon which the discretionary remedy of revision should have been granted. If considered in the correct perspective, the evidence given by the appellant as well as the witness called to corroborate his version of events are not contradictory to each other and are evidence that can be considered cogent and truthful as to what really happened on that day. I do not find any valid basis for the rejection of that evidence if considered in the correct perspective.

It is to be noted that the burden of proof in an inquiry of this nature is in the balance of probability, and if the owner is able to satisfy the Court that he has taken due precautions and that the incident happened without his knowledge, that needs to be considered in favour of the owner of the vehicle in a case of this nature.

Interpreting the term, the 'balance of probability' **Lord Denning**, in the case of **Miller Vs. Minister of Pensions (1947) 2 AER 372**, observed that:

*“If the evidence is such the tribunal can say we think it more probable than not the burden is discharged.”*

At this juncture, I would like to reproduce the judgement cited by the learned Counsel for the appellant, pronounced in the Court of Appeal by **A.W.A. Salam, J.** in **Case No. CA/PHC/108/2010 dated 26-08-2014**, which refers to the mode of proof that is required in an inquiry under the Forest Ordinance:

*“Even assuming that the owner of the vehicle was under a duty to show cause against a possible order of confiscation, I find it difficult to accept the basis on which the learned Magistrate has entered an order for confiscation on the merits of the inquiry. It was the evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross-examination. There has been no previous instance where the driver has been charged for similar offences.*

*When someone is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used. In an order of confiscation of the vehicle, then however much the owner comes forward and says that he gave instructions not to make use of the vehicle for illegal purposes, by reason of the fact that he is on the monthly payment, the vehicle has to be confiscated. This approach does not appear to be reasonable and acceptable in law. In an inquiry of this nature, what the owner has to*

*prove is that he took every measure to ensure that the vehicle is not used for illegal purposes.”*

For the reasons adduced as above, I am of the view that the Order of the learned Magistrate of Polgahawela cannot be allowed to stand and also the dismissal of the application for the revision of that Order by the learned High Court Judge of Kurunegala.

Therefore, I set aside the judgement dated 08-08-2017 by the learned High Court Judge of Kurunegala and allow the application in revision by the appellant. In consequent to that, the Order dated 10-11-2014 by the learned Magistrate of Polgahawela is also hereby set aside.

I direct the learned Magistrate of Polgahawela to make necessary orders to release the subject matter of this action which is the motor lorry numbered WP-JI-4871 to its registered owner forthwith.

The Registrar of this Court is directed to forward copies of this judgement to the High Court of Kurunegala and Magistrate of Polgahawela along with the original case records, if available, without any further delay.

Appeal allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal