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

In the matter of an Appeal under Article 154 (p) (6) of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge

Police station

Polpithigama

COMPLAINANT

CA(PHC) Apeeal 251/17

Kurunegala HCR/35/2014

Maho Magistrate Case No. 74157

Vs.

1. Wedasitige Palitha Saman Kumara
   Aluthwewa, Bambaragaswewa, Galewela
2. Udakiriyalage Dharmadasa
   Magapitiyayaya, Pothuwila
3. Pihage Piyatissa
   Magapitiyayaya, Pothuwila

ACCUSED

AND BETWEEN

Kalana Wijesekara Dahanayake,

Kodikaragoda,

Morawaka.

AGGRIEVED PARTY-PETITIONER

Vs.

Officer-in-Charge

Police station

Polpithigama

COMPLAINANT-RESPONDENT

The Attorney General

Attorney General's Department

Colombo 12

2ND RESPONDENT

AND NOW BETWEEN

Kalana Wijesekara Dahanayake,

Kodikaragoda,

Morawaka.

AGGRIEVED PARTY-PETITIONER-APPELLANT

Vs.

Officer-in-Charge

Police station

Polpithigama

COMPLAINANT-RESPONDENT-RESPONDENT

The Attorney General

Attorney General's Department

Colombo 12

2ND RESPONDENT- RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: W. Dayarathne, P.C. with Harsha Jayamini de Silva for the aggrieved party-petitioner-appellant
	: Yuhan Abeywickrama, DSG for the Respondent
Argued on	: 07-09-2022
Written Submissions	: 12-07-2022 (By the aggrieved party-petitioner-appellant)
	: 31-05-2022 (By the 2nd Respondent-Respondent)
Decided on	: 13-10-2022

Sampath B Abayakoon, J.

This is an appeal by the aggrieved party petitioner-appellant (hereinafter referred to as the appellant) on being aggrieved by the judgement dated 13-12-2017 of the learned High Court Judge of Kurunegala.

The appellant filed an application in revision seeking to challenge the order dated 20-01-2014, made by the learned Magistrate of Maho, where the tipper truck No- SP-LH-5031 belonging to him was confiscated.

By the judgement under appeal, the learned High Court Judge has dismissed the application in revision on the basis that no exceptional circumstances have been established warranting the intervention of the High Court exercising the discretionary power of revision.

The facts that led to the application by the appellant by way of revision can be summarized as follows.

The Officer in Charge of Polpithiyagama police has filed action against three accused persons before the learned Magistrate of Maho for committing an offence punishable in terms of the Forest Ordinance for transporting teak timber without a valid permit and for committing other related offences.

When charged, all the accused have pleaded guilty as charged, and had been sentenced.

In consequent to that, the learned Magistrate has confiscated the timber transported illegally, and has correctly held an inquiry, allowing the registered owner of the vehicle who was the appellant, to show cause as to why his vehicle should not be confiscated as required by law.

The appellant, other than giving evidence by himself has called a representative from the absolute owner of the vehicle as the vehicle was subjected to a lease agreement.

The appellant giving evidence at the inquiry has established that he is the owner of a tea factory called Nilwala Tea Factory situated in Morawaka area, and also an owner of a tea estate. He was the managing director of the company that managed the tea factory. Apart from that, he was also the President of the Sri Lanka Tea Factory Owners' Association.

The appellant was the owner of 15 vehicles and the tipper truck in question was one of the vehicles owned by him. He has been using his vehicles primarily for the collection and transportation of tea leaves to the factory. It had been his evidence that the questioned vehicle and two other vehicles were handed by him to one Kapilasena on an agreement that he should use the vehicles to transport of tea leaves and should pay the monthly leasing rental payment to the relevant bank. Towards this, the appellant has entered into an informal agreement marked X-01 with the said Kapilasena with several other conditions apart from the earlier stated condition. One of the conditions had been that he should not allow the use of the vehicle for illegal purposes. It had been his evidence that since in the months of January and February, less tea leaves are available and sufficient income could not be generated for the payment of the lease rental, he allowed the said Kapilasena to use the vehicle to work for a road development project.

He has established further, that he was overseas on a business trip when this vehicle was taken into custody by the police for committing the offence. It has been his position that even before he left the country, he informed Kapilasena not to engage in any illegal activities, but he came to know that the vehicle has been taken into custody because of illegal transportation of timber. Pleading that he was unaware of the incident and had taken due precautions to ensure that the vehicle would not be used for illegal activities, he has moved for a release of the vehicle.

An agent of the Sampath Bank who was the absolute owner of the vehicle has given evidence in Court and had stated that the absolute owner had no objection for the vehicle being released to the appellant.

When the appellant was subjected to cross-examination by the prosecution, it has been suggested to the appellant that although an agreement has been signed, he has failed to exercise due care that the vehicle would not be used for illegal activities and in fact, he has encouraged the person in charge of the vehicle to engage in illegal activities in order to earn sufficient income to pay the lease rental. The appellant had denied the allegations made by the prosecution.

It is clear from the order of the learned Magistrate that the vehicle has been confiscated on the basis that the registered owner has failed to take all the necessary precautions to prevent the vehicle being used for the commission of the offence. It had been determined by the learned Magistrate that the appellant has failed or neglected in ensuring the vehicle was not being used for illegal activities and, therefore, has failed to show sufficient cause as to why the vehicle should not be confiscated.

After the matter was argued before the learned High Court Judge of Kurunegala, the learned High Court Judge agreeing with the learned Magistrate's views has held that the appellant has failed to take all the necessary precautions as concluded by the Magistrate. Therefore, it has been held that the application in revision should stand dismissed as the appellant has failed to disclose any exceptional grounds for the Court to exercise the revisionary jurisdiction.

In this matter, the fact that the appellant was the owner of a tea factory and a tea estate as well as several vehicles are facts that were not disputed by the prosecution. The prosecution has not disputed the appellant has given the vehicle in question to a 3rd party, for the said party to use it and earn an income. The fact that the appellant was overseas when this incident of illegal transportation of timber happened, establishes that he had no knowledge of the

offence being committed. There are no reasons to believe that the offence had been committed with any implied consent by him either.

It is clear that the appellant has given this vehicle and two other vehicles to a 3rd party for the transportation of tea leaves and to pay the lease rental through the income generated by that business. The appellant had been truthful that during the time relevant to this incident, he had permitted the mentioned 3rd party to use it for any other legal purposes, and in fact it was used by a road construction company.

I am unable to find any reason to believe that the appellant encouraged any person to earn money through illegal means in order to pay the lease rental to the leasing company.

Under the circumstances, I am of the view that the term mentioned in section 40 of the Forest Ordinance, which reads that ***'the owner should prove that he had taken all precautions to prevent the use of such vehicle'*** should be looked at according to the facts and the circumstances of each vehicle owner. When it comes to the facts and the circumstances of the appellant, it is undoubted that he was not in a position to keep an eye on each of his vehicles continuously, rather than relying on the persons to whom he has assigned the vehicles for the intended purpose. It is obvious that he had to rely on the trust and the confidence placed by him on such persons. I am of the view that when such a person breaks the confidence placed on him by the appellant and engages in illegal activities without his knowledge and consent, the appellant should not be penalized for such activities.

At this juncture, I would like to reproduce the judgement 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."

It is settled law that the mode of proof in an inquiry of this nature is in the balance of probability. Hence, if the registered owner of the vehicle 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."

It was held in the case of **Ceylinco Leasing Corporation Ltd. Vs. Harison CA/PHC/APN/45/2011** that the vehicle cannot be confiscated if the owner establishes on a balance of probability that he has taken all precautions to prevent the use of the vehicle for the commission of the offence, and the vehicle has been used for the commission of the offence without his knowledge.

When it comes to the facts in the matter under consideration, there is no doubt that the appellant was overseas when the incident happened and he was unaware of the commission of the offence. There is sufficient evidence if considered on the balance of probability that the appellant has taken all possible precautions within his capacity to prevent the vehicle being used for illegal activities.

For the reasons considered as above, I am of the view that the learned Magistrate of Maho was not correct when it was decided that the appellant failed to show sufficient reasons as to why the vehicle should not be confiscated.

Similarly, I am of the view that if considered in its correct perspective, there were sufficient exceptional grounds before the learned High Court Judge to exercise the discretionary remedy of revision in order to avoid a failure of justice.

Considering the manner in which the discretionary power of revision should be exercised, **Malani Gunaratne, J.** in the case of **Sadi Banda Vs. Officer-in charge, Police Station, Norton Bridge (2014) 1 SLR 33,** observed the following;

> *"The revisionary power of Court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the Court and the grant of relief is entirely dependent on the discretion of the Court., and always be dependent on the circumstances of each case. Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extraordinary power of revision should be adopted. The exceptional circumstances would vary from the case to case and the degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the same yardstick*

whether a failure of justice would occur unless revisionary powers are invoked."

Accordingly, I set aside the order dated 20-01-2014 by the learned Magistrate of Maho and the judgment dated 13-12-2017 by the learned High Court Judge of Kurunegala as they cannot be allowed to stand.

I direct that the vehicle No SP LH 5031 which was the subject matter of this action shall be released to the registered owner of the vehicle.

The Registrar of the Court is directed to forward this judgment to the relevant High Court as well as the Magistrate Court along with the original case record for necessary action forthwith.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal