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

In the matter of an application for revision under Article 138 and 154 of The Constitution read with provisions in Chapter XXIX of the Code of Criminal Procedure Act and section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

CA (PHC) APN 36/22

High Court Galle

No. REV/625/2022

Magistrate's Court Udugama

No. 10122

The Officer in Charge,

Police Station,

Udugama.

COMPLAINANT

Vs.

Wanniarachchige Dularathne,

Amuhenakanda, Paranathanayamgoda,

Maapalagama, Galle.

ACCUSED

Wanniarachchige Chandrarathne,

Godallawatta, Paranathanayamgoda,

Maapalagama, Galle.

VEHICLE CLAIMANT

AND BETWEEN

Wanniarachchige Chandrarathne,

Godallawatta, Paranathanayamgoda,

Maapalagama, Galle.

VEHICLE CLAIMANT-PETITIONER

Vs.

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

2. The Officer in Charge,
   Police Station,
   Udugama.

COMPLAINANT-RESPONDENTS

AND NOW BETWEEN

Wanniarachchige Chandrarathne,

Godallawatta, Paranathanayamgoda,

Maapalagama, Galle.

VEHICLE CLAIMANT-PETITIONER-PETITIONER

Vs.

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

2. The Officer in Charge,
   Police Station,
   Udugama.

COMPLAINANT-RESPONDENTS-RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kamal Suneth Perera for the vehicle claimant-petitioner-petitioner

: Kanishka Rajakaruna, S.C. for the Respondents

Argued on : 08-06-2023

Decided on : 07-08-2023

Sampath B. Abayakoon, J.

This is an application by the vehicle-claimant-petitioner-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction of this Court vested in term of Article 138 of the Constitution.

Having considered the matter, this Court decided to issue notice on the parties and the respondents were allowed to file their objections if any. At the arguments on this matter, this Court heard the submissions of the learned Counsel for the petitioner and the views expressed by the learned State Counsel on behalf of the respondents.

The facts that led to the confiscation of the three-wheeler vehicle owned by the petitioner can be briefly summarized in the following manner.

The Officer-in-Charge of Udugama police filed a charge against the accused in Udugama Magistrate Court Case No-10122 for transporting Venivelgeta, without a permit as required in terms of the Forest Ordinance, in the three-wheeler vehicle No SP AAV-0722, and thereby committing an offence punishable in terms of section 25(2) read with section 40(1) of the Forest Ordinance.

The accused has pleaded guilty to the charge preferred against him and has been convicted and sentenced accordingly.

Thereafter, the learned Magistrate of Udugama, as he should have, has called upon the owner of the vehicle to show cause as to why the vehicle that was used in the commission of the offence should not be confiscated as a result of the conviction.

At the inquiry held in that regard, the petitioner has given evidence claiming the three-wheeler vehicle and has called a representative of a leasing company as the vehicle was subject to a leasing agreement.

The learned Magistrate of Udugama by his order dated 27-01-2022 has ordered the confiscation of the vehicle on the basis that the petitioner failed to establish that he has taken the necessary precautions sufficiently to prevent the offence being committed.

I would like to highlight the following observations made by the learned Magistrate in his order, which I find material for the matter under consideration.

At page 05 of the order (page 92 of the appeal brief);

> "මෙම සිද්ධිය සිදු වූ දිනද උදේ වරුවේ සිය සහෝදරයා කුලී ගමනක් මාපලගම ප්‍රදේශයට ගිය බවත් හවස් වරුවේ මෙම සිද්ධියට අදාලව ගමන් කරන අවස්ථාවේදීත් නීති විරෝධී වැඩ නොකර හයර් යන්න කියා තිබෙන බවට සාක්ෂි ලබාදී ඇත. ඒ අනුව ලියාපදිංචි අයිතිකරු ප්‍රකාශ කරන ආකාරයට ඔහු විසින් ලබාදුන් උපදෙස් නිසි පරිදි රියදුරු විසින් අනුගමනය කලේ නම් මෙවැනි අපරාධයක් සිදු වීමේ හැකියාවක් නැත. නමුත් ලියාපදිංචි අයිතිකරු විසින් ලබාදුන් උපදෙස් නොසලකා රියදුරු ක්‍රියා කර ඇති බැවින් එයින් පෙනී යන්නේ ලියාපදිංචි අයිතිකරු පූර්වාරක්ෂණ ක්‍රියා මාර්ග ඵලදායී ලෙස ලබා ගැනීමට අපොහොසත්ව ඇති බවයි."

At page 09 of the order (page 96 of the appeal brief);

> "ලියාපදිංචි අයිතිකරුට අනුව මෙම සිද්ධිය සිදුවන දිනයේදීද උදෑසන ලියාපදිංචි අයිතිකරු විසින් සිය සහෝදරයාට මෙම කුලී ගමන් යාම සම්බන්ධයෙන් උපදෙස් ලබාදී ඇත. නමුත් ලියාපදිංචි අයිතිකරුගේ උපදෙස් හා මග පෙන්වීම් නොතකා ක්‍රියා කරමින් මෙම වරද සිදු කර ඇත. මෙයින් පෙනී යන්නේ ලියාපදිංචි අයිතිකරු විසින් තමාගේ වාහනය සිය වැඩිමහල් සහෝදරයා රියදුරු ලෙස යොදා ගැනීමේදී දුරකථන මාර්ගයෙන් කරන ලද සොයා බැලීම් පැහැදිලිවම ඵලදායී ක්‍රියා මාර්ගයක් නොවන බවයි."

After having determined as above, the learned Magistrate has proceeded to confiscate the three-wheeler on the basis that the owner has failed to call his brother who was the driver of the vehicle to corroborate his evidence, and therefore, he has failed to satisfy the Court that he has taken sufficient precautions to prevent an offence being committed.

When the revision application challenging the determination of the learned Magistrate was supported before the learned High Court Judge of Galle for notice and an interim order on 22-02-2022, the application has been refused without notice being issued to the respondents mentioned, on the basis that there are no exceptional circumstances, and a miscarriage of justice had not been occasioned to interfere with the order of the learned Magistrate.

For the completeness of this judgment, I would like to reproduce some of the observations made by the learned High Court Judge in order to justify the refusal to issue notice to the respondents of the application.

> "සාක්ෂි ඛණ්ඩ පරීක්ෂා කර බැලීමේදී ද ඔහු මෙම වාහනය කුලී සින්නක්කර ක්‍රමය මත ගත් දිනයක් හෝ මාසික වාරිකය නිශ්චිතව කියා සිටීමට අපොහොසත් වී ඇති අතර අවුරුදු දෙකක කාලයකට ඔහු භාරයේ තිබුණ ද එය ඔහුගේ නිවසේ නොමැති බවත්, වාහනය නිවසට රැගෙන යාමට පවා නොහැකි අතර වෙනත් ස්ථානයක ගාල් කර තබා තිබෙන බවටත් පිළි ගෙන ඇත. ඒ අනුව බැලූ බැල්මටම ඔහුගේ සාක්ෂියෙන් මෙම ත්‍රීරෝද රථය ඔහුගේ සන්තකයේ, ඔහුගේ ආරක්ෂණය යටතේ, ඔහුගේ පාලනය යටතේ විධිමත්ව තිබූ බවක් ඔහුගේ සාක්ෂියෙන් අනාවරණය නොවන බවට උගත් විනිසුරුතුමා ගෙන ඇති නිගමනය පැහැදිලිය."
>
> .....
>
> "ඒ අනුව පරම අයිතිකරු විසින් විධිමත් විමර්ශනයක් සිදු කලේ නම් එම වාහනය අදාල වරද සඳහා යොදා ගෙන තිබූ බවට පැහැදිලිව සනාථ වන අතර පරම අයිතිකාර සමාගමේ නියෝජිතයා විසින් වර්ෂ 2020 ජූලි මස පරීක්ෂා කිරීමේදී එය ඇතුළත් නොකිරීම අනුව එම වාර්තා පිළි ගැනීමට නොහැකි වීම පැහැදිලිය."

(Page 08 of the appeal brief)

It was the submission of the learned Counsel for the petitioner that the learned Magistrate has observed that the driver of the vehicle has not followed the instructions given by the owner. It was his view that there cannot be any justification to come to a finding that the owner of the vehicle has failed to take necessary precautions to prevent an offence being committed if the evidence led at the inquiry was evaluated in its correct perspective by the learned Magistrate.

Citing the judgment pronounced by **Malini Gunaratne, J.** in **Sadi Banda Vs. Officer-in-Charge of Norton Bridge Police Station (2014) 1 SLR 33**, it was the submission of the learned Counsel that the charge preferred against the accused in this case has no value or the quantity of the Venivelgeta the accused is supposed to have transported, and there was no way to measure the gravity of the offence, which is necessary to consider exceptional circumstances in a matter of this nature.

It was also his submission that the learned High Court Judge should have noticed the respondents and should have given a hearing to the petitioner as his property rights were at stake.

The submission of the learned State Counsel was that the learned Magistrate was correct in his conclusions, and the petitioner has clearly failed to satisfy the Court that he has taken all necessary precautions to prevent the offence. It was his position that the quantity of the transported Venivelgeta was 50 kilograms. The learned State Counsel moved for the dismissal of the application on the basis that it is without merit.

The relevant section 40(1) of the Forest Ordinance under which the confiscation of the vehicle was ordered reads as follows;

> **40(1). Where any person is convicted of a forest offence-**
>
> **(a) All timber or forest produce which is not the property of the state in respect of which such offence has been committed; and**
>
> **(b) All tools, vehicles, implements, cattle, and machine used in committing such offence,**
>
> **shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate.**
>
> **Provided that in any case where the owner of such tools, vehicle, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.**

It is settled law that the mode of proof in an inquiry of this nature is on the balance of probability. Hence, if it can be determined that the registered owner of the vehicle has established that the he has taken due precautions to prevent the offence and he was unaware of the commission of the offence, it needs to be considered in favour of the owner of the vehicle.

In the case of **The Finance Company PLC Vs. Priyantha Chandra and Five Others (2010) 2 SLR 220,** after considering several judicial decisions **Dr. Shirani Bandaranayake, J. (As she was then)** held:

> *"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, on order of confiscation shall be made it that owner had proved to the satisfaction of the Court that he has 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 the balance of probability."

Held further;

"As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence."

I must emphasize that what is meant by the legislature when it was stated by its wisdom, in section 40(1) of the Forest Ordinance, "**had taken all precautions to prevent the use"** needs to be interpreted in a pragmatic manner, rather than giving a strict interpretation. It is my view that facts and circumstances relevant to a given situation should be considered in its totality, in order to find out whether there is justification in releasing a vehicle to its owner. This is especially so, since, if the Court is to look for all the possible precautions that an owner of a vehicle can take in a given scenario, there can always be some other precaution that could have been taken.

The facts considered in the case of **Sadi Banda Vs. Officer-in-Charge of Norton Bridge Police Station** (Supra) was very much similar the facts under consideration in this appeal. The son of the owner of the vehicle was found to be transporting Tuna timber valued at Rs. 876/42 on 04-02-2004, and pleaded

guilty to the charge against him. The vehicle was confiscated after inquiry, and the revision application to the High Court was dismissed.

It was observed and held:

> *"I have to admit that nowhere in the said inquiry proceedings there is evidence that the appellant had taken all precautions to prevent the commission of the offence. However, at the inquiry the appellant has given evidence and stated, he purchased the lorry on 26-02-2000 and gave it to his son to transport tea leaves. Further stated, that he had no knowledge about transporting of timber. The learned Magistrate in his order has accepted the fact that the appellant did not have any knowledge about the transporting of timber without a permit.*
>
> *Nevertheless, the learned Magistrate has confiscated the lorry. I am of the view before making the order of confiscation the learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and or the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the appellant did not have any knowledge about the transporting of timber without a permit. On these facts the Court is of the view that the confiscation of the lorry is not justifiable."*

In the instant matter, it clearly appears that by determining that the driver had failed to follow the instructions given to him by the owner, and if he followed the instructions, an offence of this nature would not have occurred, the learned Magistrate had in fact, had impliedly come to a finding that the owner had taken necessary precautions, and he had no knowledge. Despite that, the vehicle had been confiscated on the basis that the owner had failed to take the precautions in a meaningful manner as highlighted above.

It is the considered view of this Court that if the learned Magistrate addressed his mind to the other relevant facts and the circumstances, there was ample reasons before the learned Magistrate to release the vehicle to the owner, after being satisfied as to the requirements of the proviso of section 40(1) of the Forest Ordinance.

I am of the view that the prosecution's failure to mention the quantity of the transported Venivelgeta, and its value, also becomes a relevant factor, given the above context.

I am in no positions to agree with the reasons given to justify the refusal of the revision application by the learned High Court Judge either, which are reasons that had not been considered by the learned Magistrate in his order of confiscation.

The learned High Court Judge had considered the part that should have been played by the absolute owner of the vehicle who has not claimed it before the Magistrate Court, which was matter the learned Magistrate had decided not to consider very correctly, as the absolute owner was not the party who had the physical control over it at the time of the commission of the offence.

The learned High Court Judge has considered the petitioner’s evidence before the Magistrate Court, where he has stated under cross-examination, that the amount he has to pay as lease rentals is about eleven thousand odd rupees, and at a later stage that it may be Rs.11085/- per month as far as he can remember, as relevant. He has also considered his evidence that since he cannot take the vehicle to his house, the vehicle was used to be parked in his brother’s house, as relevant, to justify the conclusions of the Learned Magistrate that the owner has failed to take necessary precautions.

It is my view that, if the learned High Court Judge intended to look the additional material to justify the order of the learned Magistrate, the proper procedure would have been to issue notice in relation the revision application and give a hearing before coming to his own conclusions. As this was a matter where property rights of a third party are involved as a result of a conviction of an accused in a case, it is the view of the Court that refusing to issue notice in this matter was without justification.

At this juncture, I would like to quote again from the case of **Sadi Banda Vs. Officer-in-Charge of Norton Bridge Police Station** (Supra), which I find relevant in the above context.

> *"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 of the Court. The grant of such relief is of course a matter entirely in 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 extraordinary power of revision should be adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked."*

For the reasons considered as aforementioned, it is my view that this is a case where the learned High Court Judge should have considered the merits of the revision application rather than dismissing it without issuing notice, and if considered in its correct perspective, the application in revision should have been allowed by the learned High Court Judge.

I find that the petitioner has adduced sufficient exceptional circumstances for this Court to allow the application invoking the revisionary jurisdiction of this Court.

Accordingly, I set aside the order dated 27-01-2022 of the learned Magistrate of Udugama and the order dated 22-02-2022 of the learned High Court Judge of Galle, as both the orders cannot be allowed to stand.

I direct the learned Magistrate of Udugama to make appropriate orders to release the three-wheeler vehicle No- SP AAV-0722 to the petitioner.

The Registrar of the Court is directed to communicate this judgment to the relevant Magistrate Court and the relevant High Court for necessary action.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal