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

In the matter of an Appeal in terms of Section 11 of the High Court of Provinces (Special Provisions) Act No.19 of 1990 read with Rule 2 of the Court of Appeal (Procedure for Appeals from High Court established by Article 154A of the Constitution) Rules 1988.

Court of Appeal
Application No:
CA PHC 0031/2018
High Court of Hambantota
No.HCRA/05/16
MC Tissamaharama
Case No.34477

The Officer-in-Charge
Police Station
Tissamaharama.

Complainant

VS.

Dissanayake Mudhiyanselage Indika
No.09, Industrial Land, New Town,
Weeravila.

Accused

AND BETWEEN

Hettiarachchige Chathurika Maduwanthi
No.09, New Town
Weeravilla.

Applicant-Petitioner

1. The Officer -in-Charge
   Police Station
   Tissamaharama.

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

Respondents

AND NOW BETWEEN

Hettiarachchige Chathurika Maduwanthi
No.09, New Town
Weeravilla.

Applicant-Petitioner-Appellant

1. The Officer -in-Charge
Police Station
Tissamaharama.

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

Respondent-Respondents

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL : **Asthika Devendra with Aruna Madhushanka for the Appellant.**
Ridma Kuruwita, SC for the Respondents.

ARGUED ON : **04/07/2023.**

DECIDED ON : **18/09/2023.**

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JUDGMENT

P. Kumararatnam, J.

The 1st Respondent-Respondent (hereinafter referred to as the Respondent) filed a charge sheet Under Section 24(1) of the Forest Ordinance against the Accused in the Magistrate Court of Tissamaharama. As the Accused pleaded guilty to the charge sheet, the Learned Magistrate of Tissamaharama had convicted the Accused and imposed a fine of Rs.15000/- with a default sentence and fixed for an inquiry whether to confiscate or not the Vehicle bearing No. SP LE-8799 which had been used for the transportation of the timber mentioned above.

At the conclusion of the inquiry, the Learned Magistrate had decided to confiscate the aforesaid vehicle by his order dated 29.03.2016. At the inquiry, only the Appellant had given evidence on her behalf and marked documents X-X1.

Being aggrieved by the order of the Magistrate, the Applicant-Petitioner-Appellant (hereinafter referred to as the Appellant) filed a Revision Application in the High Court of Hambantota to revise the order of the Learned Magistrate of Tissamaharama. After the inquiry, the Learned High Court Judge had dismissed the said application on the premise that the Petitioner has failed to establish that she took all necessary precautions to prevent the allege offence being committed.

Now the Appellant filed this appeal to set aside the order of the Learned High Court Judge of Hambantota dated 07.03.2018 and the order of Learned Magistrate of Hambantota dated 26.03.2016.

The Appellant submitted following grounds of appeal:

1. The order to confiscate the said vehicle has been made in disregard of the fact that the Appellant has not provided a reasonable and acceptable explanation that she was unaware of the commission of/had no knowledge of the commission of the illegal act.
2. The Learned Judge of the Provisional High Court of Hambantota has failed to consider existing judicial *dictum* in decided cases pertaining to the value of the item.
3. The confiscation of the said vehicle is not in line with the Human Right of the Appellant and is not just and equitable.

It is settled law that revision is a discretionary remedy, and such power shall be invoked only upon demonstration of exceptional circumstances.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

> *"the decision must in each case depend on its own peculiar facts and circumstances".*

In **Marian Beebee v. Seyed Mohamed 69 CLW 34** the court held that:

> *"Power of revision is an extraordinary power of the court which is independent and distinct from the appellate jurisdiction. The object of revisionary jurisdiction is to ensure the due administration of justice and the correction of all errors in order to avoid a miscarriage of justice".*

In the case of **Rasheed Ali v.Mohammed Ali and Others [1981] 1 SLR 262,** the court held that:

> " …the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternative remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm".

In **Commissioner of Police v. Tanes (1957-58) 68 CLR 383,** the court held that:

> *"It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard ... "*

As the appeal grounds mentioned above are interconnected, all appeal grounds will be considered together hereinafter.

The Appellant contended that the order to confiscate the said vehicle has been made in disregard of the fact that the Appellant has not provided a reasonable and acceptable explanation that she was unaware of the commission of/had no knowledge of the commission of the illegal act.

As the law stands today, the Claimant in a vehicle confiscation inquiry should prove that he or she had have taken all preventive measures on a balance of probability. Hence, the Learned Magistrate should consider all the evidence very carefully before coming to a conclusion.

In **The Orient Financial Services Corporation Ltd v The Range Forest Officer, Ampara and Hon. Attorney General [2013] 1 SLR 208** the Court held that:

> *"1. Before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance probability 209 satisfies the Court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor, was he privy to the commission of the offence, the vehicle has to be released to the owner.*
>
> *2. When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence."*

In this case the Petitioner, as the owner of the vehicle had given evidence and explained to the Court that she had taken all the possible and necessary precautions to prevent the vehicle being used for illegal purposes. The evidence demonstrate that the usual driver assigned was a neighbour of the Petitioner. The vehicle was not used for any illegal activities by the permanent driver at any stage. When this vehicle was taken into custody, the driver was the closely related brother of the Petitioner. According to the evidence of the Petitioner she had given instructions not to use for illegal activities. She has placed full trust on her brother when she gave the vehicle to him. As it was not used for any illegal purpose up to then, she had given the vehicle to her brother subject to her supervision to transport paddy. Hence, it is not correct to

say that the Petitioner had not taken any action to prevent the vehicle being used for illegal purposes.

Although the timber value is Rs.4836.89 mentioned in the charge sheet filed against the accused, this was not considered at all in the order of the Learned Magistrate of Hambantota.

In **Sadi Banda v OIC of Police Station Norton Bridge** [2014] 1 SLR 33 the Court held that:

> *"Before making the order of confiscation the learned magistrate should have taken into consideration, value of the timber transported, allegations prior to this incident that the lorry was being 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 petitioner appellant did not have any knowledge about the transporting of timber without a permit. In the instant case confiscation of the lorry is not justifiable."*

The Learned Magistrate also should have considered that there had been no previous or pending case against in respect of the vehicle that had been used for illegal activities and the permanent driver or the accused are not habitual offenders.

In this case the Learned High Court Judge only considering the order of the Magistrate Court of Tissamaharama and decided to dismiss the revision application stating that that the Appellant had failed establish exceptional circumstances. The Claimant of the vehicle has given evidence in the court and has claimed that she was unaware of the crime being committed as she has given the vehicle to the accused who is a brother of the Petitioner.

The Learned High Court Judge has failed to consider that the said vehicle was not involved in any illegal activities previously nor wanted for any offence committed. Further, the person driven the vehicle is

Petitioner's relative who had taken the vehicle previous occasions too. But not involved in any illegal activities previously.

In **Mallawa Arachchige Supun Malhara v The Attorney General CA(PHC) 09/2015 dated 28.08.2020** the Court held that:

> *"The Accused is not a driver employed by the Appellant; he is a person doing business of his own who has access to the vehicle when requested. It is fair to assume that the Appellant would not have expected the Accused to do anything illegal. This is what is elicited in the evidence of the Appellant. It is quite apparent that there is no evidence that the Appellant was privy to the illegal act of the Accused."*

In **Ceylinco Leasing Corporation v M.H. Harrison and others SC Appeal 43/2012 dated 07.12.2017** His Lordship Aluvihare P.C J. held that:

> *"Section 40 of the Forest Ordinance provides for the confiscation of the conveyance used to transport the illicit timber and the provision to my mind is intended to strike at the means of transportation by providing for the confiscation of the conveyance used to transport the illicit timber, and is both a logical and legal response to the problem of illicit felling. Even in the instant case the two persons who were charged happened to be the driver of the lorry and another person who had been seated next to the driver. Although they were in physical possession of the illicit timber, may have been employees of the "owner" of the lorry. Thus, not much deterrence is achieved by imposing punishment on the persons who were in actual physical possession of illicit timber, when in most cases, the owner is behind the illegal operation."*

It is apparent that in the absence of the Petitioner having had knowledge of the transportation of timber and /or having had any

monetary or personal benefit from the crime committed cannot be deemed as the person behind the illegal operation.

Hence, the Learned Magistrate simply dismissing the application on the basis that the Claimant had failed to show that she took all necessary precautions to prevent a crime being committed is not correct in this case.

Further, finding of the Learned High Court Judge that there are no exceptional circumstances to grant relief is also erroneous.

Hence, I set aside the order of the Learned High Court Judge of Hambantota dated 07.03.2018 and the order of Learned Magistrate Court of Tissamaharama dated 26.03. 2016.

Therefore, this appeal is allowed.

I direct that the vehicle No. SP LE 8799 be released to the Appellant.

The Registrar of this Court is directed to send a copy of this Judgement to the High Court of Hambantota and the Magistrate Court of Tissamaharama.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL