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

*In the matter of an application for Appeal under section 11 of the Act No. 19 of 1990 read with section 331 of the Code of Criminal Procedure Act.*

**Court of Appeal No:**

CA (PHC) 34/2020

**PHC Kegalle Case No.**

REV/5654/2020

**MC Warakapola Case No.**

99646

Officer-in-Charge,

Police station,

Warakapola.

**COMPLAINANT**

**Vs.**

Narasinghe Arachchilage Anupriya Chaga Narasinghe of Mahawita, Ambepussa.

**ACCUSED**

Gamlath Arachchilage Amila Sudarshana Amaradasa of Ambepussa, Warakapola.

**VEHICLE CLAIMANT**

**AND BETWEEN**

Gamlath Arachchilage Amila Sudarshana Amaradasa of Ambepussa, Warakapola.

**VEHICLE CLAIMANT-PETITIONER**

**Vs.**

1. Officer-in-Charge,

Police station,

Warakapola.

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENTS**

**AND NOW BETWEEN**

Gamlath Arachchilage Amila Sudarshana

Amaradasa of Ambepussa, Warakapola.

**VEHICLE CLAIMANT-PETITIONER-APPELLANT**

**Vs.**

1. Officer-in-Charge,

Police station,

Warakapola.

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENTS-RESPONDENTS**

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

: P. Kumararatnam, J.

**Counsel** : Kamal Perera for the Appellant

: Ridma Kuruwita, S.C. for the Respondent

**Argued on** : 04-08-2023

**Written Submissions** : 14-11-2022 (By the Appellant)

**Decided on** : 03-11-2023

**Sampath B. Abayakoon, J.**

This is an appeal by the petitioner-appellant (hereinafter referred to as the appellant) on being aggrieved by the order dated 13-05-2020 pronounced by the learned High Court Judge of the Provincial High Court of Sabaragamuwa Holden in Kegalle.

From the said order, the learned High Court Judge refused to issue notice of the revision application filed by the appellant in the High Court of Kegalle Revision Case Number පුනි/5654/2020.

The appellant has filed the above-mentioned revision application invoking the revisionary jurisdiction of the High Court in order to challenge the order dated 28-02-2020 pronounced by the learned Magistrate of Warakapola, wherein, the vehicle bearing number SG GA-5320 was confiscated to the state by the learned Magistrate after holding an inquiry in that regard.

When this matter was taken up for argument, it was brought to the notice of the Court that the appellant has filed the Revision Application Number CPA/0023/2022 before this Court invoking the revisionary jurisdiction of this Court in order to challenge the same order pronounced by the learned High Court Judge of Kegalle. The parties agreed to abide by the judgement pronounced in this case in the revision application as well, as both the matters relate to the

same two orders pronounced by the learned High Court Judge of Kegalle and the learned Magistrate of Warakapola.

The Officer in Charge (OIC) of Warakapola police has charged one Chaga Narasinghe for transporting six logs of jack timber without a valid permit in the tipper vehicle numbered SG GA-5320 on 21-07-2019, which is an offence punishable in terms of the Forest Ordinance as amended.

When the accused was charged before the Magistrate's Court of Warakapola, he has pleaded guilty to the charge and has been fined Rs. 25000/-. The timber has been confiscated to the state.

The learned Magistrate of Warakapola has released the vehicle on a bond to its registered owner who is the appellant in this matter, has decided to hold an inquiry allowing the registered owner to show cause as to why the vehicle involved in the commission of the offence should not be forfeited to the state.

It is clear that the learned Magistrate has ordered the inquiry as provided for in the proviso of section 40(1) of the Forest Ordinance, as amended by Forest (Amendment) Act No. 65 of 2009, which reads as follows,

> **"Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be 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."**

At the inquiry held in that regard, the registered owner has given evidence and has stated that the vehicle was primarily used by him to carry goods for his business purposes, where he was having a cement block and concrete post manufacturing facility. He has stated that on the day in question, he had to deliver 250 cement blocks out of 1000 blocks purchased from him by the

accused in the Magistrate's Court case. It had been his position that he did not drive the vehicle, but employed a person called Chandana Hemantha who worked in another vehicle whenever it becomes necessary for him to use his own vehicle to bring in materials for him or to deliver orders.

He has stated that he could not obtain the services of the said Hemantha over three days and therefore could not deliver the 250 cement blocks he promised to deliver to the accused. The accused has come in the morning of the day of the incidents to his workplace and had insisted that he need the balance cement blocks in order to complete his work before his marriage, which was due to be held on 12th September.

To substantiate that fact, the appellant has produced the invitation card he received in that regard as X-01. The accused was a person who lived in the same area and a person well known to the appellant from his childhood days, and the appellant knew that the accused could drive vehicles. Since he was not in a position to deliver the cement blocks as required, the accused has offered that he could transport the cement blocks in the vehicle, and asked the appellant to allow him to take it and deliver the goods to his house for which the appellant had agreed, considering the need of the accused.

In his evidence, the appellant states that the accused wanted to transport some additional concrete material from another location as well, and he agreed to that request requiring the accused to pay for the hire for him and allowed the accused to take the vehicle believing that he will use the vehicle for the purposes he undertook to use and return it back to him. The appellant has been specific that he instructed the accused to use the vehicle only for the intended purposes and bring it back to him. The appellant has expected the vehicle to return around 10.30 in the morning. Since it has not returned, he has attempted to contact the accused over the phone, but he has not responded. Around 11.30 in the morning, the accused had answered the phone and had informed that he is in the police station. When the appellant went to the police station, he has been

informed that the accused has transported logs of timber on his way from his establishment.

The appellant has claimed that he never used the vehicle for any other hiring purposes, but only for the needs of his manufacturing facility, and never gave the vehicle to anyone else but to the driver Hemantha whom he knew from his childhood, It has been his position that on the day in question, he allowed the accused to take his vehicle considering his need to finish his building work before his marriage, as there was no way for him to deliver the cement blocks since his regular driver was not available.

The appellant has insisted that he was careful throughout not to use his vehicle for any illegal activities and it was the same on the day of the incident and had pleaded that the vehicle be released to him.

When the appellant was cross-examined by the prosecution, apart from suggesting that the appellant willfully allowed the accused to transport timber in this manner, the evidence of the appellant had not been challenged in any other material points. Explaining why the said driver has not come to give evidence on behalf of the appellant, the appellant had stated that because of this incident, there was an argument with the accused driver and now he is not in talking terms with him and, therefore, unable to convince him to come and give evidence at the inquiry on behalf of him.

However, the appellant has called the driver Chandana Hemantha who used to drive the said vehicle for the appellant to substantiate his evidence. He has corroborated the evidence of the appellant stating that he used to be the regular driver of the vehicle whenever his services were needed, and on the day in question, he could not drive the vehicle as he was ill. He has testified that after the detention of the vehicle by the police, he came to know that the appellant has allowed the accused to drive the vehicle in order to deliver the cement blocks the accused purchased from the appellant. The said Chandana Hemantha has testified further that he too was an invitee to the wedding of the accused,

therefore, he was aware that the accused needed to get the cement blocks delivered to his house.

Pronouncing his order on 28-02-2020, the learned Magistrate has determined that the vehicle owner should establish in the balance of probability that the vehicle has been used for the commission of the offence without his knowledge and that he has taken all precautions to prevent the use of the vehicle for the commission of the offence.

Having considered the evidence of the appellant, the learned Magistrate has satisfied himself that the appellant who is the registered owner of the vehicle had no knowledge of the commissioning of the offence. The relevant finding at page 5 of the order (page 69 of the appeal brief) reads as follows.

> "ඉහත සාක්ෂිය මගින් ලියාපදිංචි අයිතිකරු චුදිතට එරෙහිව ඉදිරිපත් කර ඇති චෝදනාවට පාර්ශවකරුවෙකුවී නොමැත. ඔහුට චුදිත සිදු කරන ලද වරද සම්බන්දයෙන් දැනීමක් හෝ අවබෝධයක් ද නොතිබූ බව පෙනීයයි."

Having determined as above, the learned Magistrate has proceeded to consider whether the registered owner has taken the necessary precautions to prevent the crime being committed, and has determined that the registered owner has failed to take all necessary precautions in that regard and has decided to confiscate the vehicle on that basis.

In coming to his determination, it appears that the learned Magistrate has been guided by the following factors.

1. The learned Magistrate has determined that the registered owner has given the vehicle to the accused without first finding out whether he has the necessary qualifications to drive the vehicle, whereas, it has been admitted that the accused had no valid driving license when the offence was committed.
2. The learned Magistrate has considered the time taken by the registered owner to initiate inquiries about his vehicle after allowing the vehicle to

leave his workplace around 8.30 in the morning, in order to determine that the registered owner has not acted with due diligence to inquire about the whereabouts of his vehicle.

3. The learned Magistrate has found the regular driver of the vehicle namely, Chandana's evidence unacceptable on the basis that for a person who is driving another vehicle on regular basis, there is very low probability of engaging in driving the vehicle of the appellant, and has determined that even the registered owner had the ability to drive the vehicle if wanted.

Based on the above conclusions, the learned Magistrate has decided that the registered owner has failed to satisfy the Court that he took all the necessary precautions as envisaged by the proviso of section 40(1) of the Forest Ordinance. Accordingly, the learned Magistrate has confiscated the vehicle.

When this order was challenged by way of the impugned revision application before the Provincial High Court of Sabaragamuwa Holden in Kegalle, the learned High Court Judge by his order dated 13th May 2020 has refused to issue notice in that regard to the respondents mentioned in the application.

It has been determined that to allow such an application, there should be evidence to show that a miscarriage of justice has occurred due to a fundamental rule of procedure being violated and had concluded that no such violation has occurred. It has been observed that the learned Magistrate has properly considered whether all precautions have been taken as provided for in section 40 of the Forest Ordinance and has come to correct conclusions in that regard. Accordingly, the application invoking the revisionary jurisdiction of the High Court has been dismissed without notices being issued to the respondents.

It was the contention of the learned Counsel for the appellant that the evidence given by the registered owner and the witness called on behalf of him has not been challenged at material points and the learned Magistrate should have accepted the evidence, rather than rejecting the evidence on certain

presumptions. He was of the view that the determination where the failure by the registered owner to call the driver of the vehicle when the offence was committed to give evidence as a reason to dismiss the evidence of the registered owner was untenable.

The learned State Counsel who represented the respondents justified the decision of the learned Magistrate to confiscate the vehicle, as well as that of the learned High Court Judge not to issue notices, on the basis that both those decisions are within the required parameters of the law, which need not be disturbed on appeal.

With the above-mentioned facts and the relevant law in mind, I will now proceed to consider whether the order pronounced by the learned Magistrate can be justified.

After having determined that the registered owner of the vehicle had no participation in the offence committed by the accused, and had no knowledge of it, the learned Magistrate has proceeded to consider whether the registered owner has taken necessary precautions to prevent the offence being committed. It appears from the order that the learned Magistrate has believed the evidence of the registered owner, but based on the same evidence the determination that the registered owner has failed to take the necessary steps to prevent the offence been committed has been reached.

The evidence that the registered owner permitted the driver who was not the regular driver of the vehicle to take the vehicle to transport cement blocks on that day had been considered along with the permission given to the driver to transport some concrete blocks from another location using his lorry, and pay him a fee, with the fact which has come to light after the detection was made, where the police has found that the driver had no valid driving license with him.

The learned Magistrate has found fault with the registered owner for allowing a person who had no valid driving license to use his vehicle to determine that the registered owner has not been careful enough in that regard. However, I find that

the registered owner of the vehicle has given clear evidence in that regard and has explained as to the reasons why he allowed the accused to drive his vehicle.

I am of the view that the facts of a matter need to be considered in its totality and not in the isolation of one fact alone.

The accused has come to the establishment of the registered owner in order to get the cement blocks he purchased from him transported to his house. The registered owner has explained the necessity the accused had, and since the regular driver could not be contacted, he has decided to allow the offer made by the accused to transport the goods by himself.

The evidence clearly provides that the vehicle was not a vehicle used for hiring purposes but solely for the purposes of manufacturing and transporting cement products manufactured by the registered owner. The evidence also clearly shows that the accused was a fellow villager and well known to the registered owner and registered owner has known very well that the accused was competent in driving heavy vehicles as he had often seen him driving buses and lorries previously.

Under the circumstances, it is hard to justify the learned Magistrate's conclusion that the registered owner was not vigilant enough to inquire whether the accused possessed a valid driving license. Under a village setting, I am not inclined to believe that every time when a person who is known to be competent to drive a vehicle is allowed to drive, the owner of the vehicle should be expected to check his license. The evidence led in this case clearly shows that the registered owner believed that the accused had the competency to drive through his past experiences.

Another reason considered by the learned Magistrate had been that although the distance that the cement blocks were due to be transported was about 3 kilometers, the owner of the vehicle has waited over three hours to inquire into the whereabouts of his vehicle. In his evidence, the registered owner had stated the distance from his house to the accused's house was about 3 kilometers and

it takes about 15 minutes to get there. He has stated that the vehicle left his place around 8.30 in the morning and he came to know about the arrest of the vehicle around 11.30 am. If one considers that piece of evidence in its isolation, the determination of the learned Magistrate can be justified. However, the evidence was that the registered owner allowed the accused to transport additional material, obviously from another location to his house. There is no evidence to establish at what time the detection was made. One also has to consider the time that may take for a person to unload the cement blocks, and if the person has taken some other materials in the vehicle to unload them as well. The evidence of the registered owner had been that he waited until 10.30 in the morning, which was about 2 hours after the vehicle left his establishment and attempted to call the accused because of his failure to return. I do not find waiting for about 2 hours and begin to worry about the vehicle as an unusual delay on the part of the registered owner. The evidence of the registered owner had been that although he attempted to contact the accused from 10.30 in the morning, he answered the phone around 11.30 and informed that the vehicle is in police custody. I find no reason to find fault with the registered owner as observed by the learned Magistrate.

The learned Magistrate has doubted the evidence that the registered owner had no permanent driver but utilized the services of a driver who worked in another vehicle if and when he needed to use the vehicle. I do not find anything unusual in such a practice under the given circumstances. The registered owner has given clear evidence that his vehicle was not used for regular hiring purposes and used the vehicle only when necessary. Under the circumstances, paying for a permanent driver would not be feasible.

The learned Magistrate has found the evidence of the regular driver of the vehicle where he says that he has seen the registered owner of the vehicle driving it as a vital contradiction in relation to the evidence led at the inquiry.

I am of the view that in itself does not provide a reason to conclude that the registered owner has failed to take necessary precautions to prevent an offence being committed in terms of the Forest Ordinance.

I am of the view that after finding that the registered owner had no knowledge or connection to the offence committed by the accused in the case, the learned Magistrate should have taken a more pragmatic view in analyzing the evidence led in this case in order to find whether the registered owner has taken all necessary precautions as stated in the proviso of section 40(1) of the Forest Act.

When considering the evidence led in an inquiry of this nature, such evidence has to be considered in its totality given the relevant facts and the circumstances unique to each situation. I am of the view that if the evidence was considered in its totality, there were ample reasons for the learned Magistrate to release the vehicle.

In the case of **Sadi Banda Vs. Officer In Charge of Nortonbridge Police Station (2014) 1 SLR 33**, it was held by **Malani Gunaratne, J.**;

> *"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 or the accused are habitual offenders in this nature and had no previous convictions and the acceptance of the fact that the appellant did not have any knowledge about the transporting of the timber without a permit."*

In the matter under consideration as well, if the totality of evidence was considered in the correct perspective, there cannot be any justification for the order where the vehicle belonging to the appellant was confiscated.

I find when the notice was refused by the learned High Court Judge of Kegalle in this regard, the learned High Court Judge too had thought it fit to justify the order pronounced by the learned Magistrate of Warakapola by considering the

same reasons. I am of the view that the refusal to issue notice cannot be justified for the reasons considered as above.

Accordingly, I set aside the order dated 28-02-2020 by the learned Magistrate of Warakapola and the order dated 13-05-2020 by the learned High Court Judge of the Provincial High Court of Sabaragamuwa Holden in Kegalle, as both the orders cannot be allowed to stand.

I order that the vehicle numbered SP GA-5320 shall be released to the appellant.

The appeal is allowed.

The Registrar of the Court is directed to communicate this judgement to the High Court of Kegalle for information, and to the Magistrate's Court of Warakapola for necessary compliance.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal