

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

*In the matter of an Application for
Revision under and in terms of Article
138 of the Constitution.*

Court of Appeal Case No.
CPA/0018/23

High Court Anuradhapura

Case No. HC 88/2020

Democratic Socialist Republic of Sri
Lanka

COMPLAINANT

Vs.

1. Thaha Saideen Mohamed Raseen

2. Walimunige Mahesh

Chathuranga

3. Herath Mudiyanseelage Anura

Bandara

ACCUSED

Mohamed Uvais Mohamed Fazal,
No. 61, Keththarama Mawatha,
Grandpas, Colombo 14.

CLAIMANT

AND NOW BETWEEN

Mohamed Uvais Mohamed Fazal,
No. 61, Keththarama Mawatha,
Grandpas, Colombo 14.

CLAIMANT-PETITIONER

Vs.

1. Thaha Saideen Mohamed Raseen

2. Walimunige Mahesh

Chathuranga

3. Herath Mudiyanseelage Anura

Bandara

ACCUSED-RESPONDENTS

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Asanka Dissanayake with Ershan Ariaratnam for the
Claimant-Petitioner

: Jayaluxshi De Silva, SSC for the Respondent

Inquiry on : 26-07-2023

Order on : 19-10-2023

Sampath B. Abayakoon, J.

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

When this matter was supported for notice and for a stay order as prayed in the prayer of the petition, this Court decided to issue notice as well as a stay order restraining the operation of the order dated 07-10-2022 pronounced by the learned High Court Judge of Anuradhapura in relation to the vehicle which is the subject matter of this application.

At the hearing of this application, this Court heard the submissions of the learned Counsel for the petitioner in this regard and that of the Senior State Counsel on behalf of the complainant-respondent.

Three accused stood indicted before the High Court of Anuradhapura in HC Anuradhapura Case No. 88/2020 on two counts of possessing and trafficking of 17 kilograms and 570 grams of *Cannabis sativa L* commonly known as ‘කේරල ගංජා’ (Kerala Ganja) on 18th July 2014 in Medawachchiya area, which are offences punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984.

They have been charged on the basis that they possessed and transported this quantity of Cannabis in the passenger transport bus bearing number WP NB-6586 which was a bus plying from Mannar to Colombo. The 3rd accused charged was the driver of the bus, while the 1st accused had been the conductor engaged by the registered owner of the bus who is the petitioner of this application. The 2nd accused had been a person who used to be a temporary conductor and had travelled in the bus along with the 1st and the 3rd accused.

The facts relating to the detection that led to the indictment can be summarized as follows.

A group of officers from Medawachchiya police has stopped the relevant bus, which was traveling from Mannar to Colombo while on night patrol duty in Medawachchiya town, and had inspected the bus where they have found two bags inside the back luggage compartment of the bus, for which none of the passengers claimed ownership. When searched, it has been found that the two bags contain Cannabis.

Accordingly, the police have arrested the driver, conductor and the 2nd accused Mahesh Chathuranga, who was with the said two persons for having possessed the said quantity of Cannabis and for also trafficking the same.

They were indicted before the High Court of Anuradhapura and when the charges were read over to the accused on 15th February 2022, all three of them have pleaded guilty to both the counts preferred against them.

Pleading in mitigation through their Counsel, they have stated that two females kept the two bags in the luggage compartment but when the detection was made, the said females could not be found in the bus, which is suggestive of that they have pleaded guilty to the charges because the said passenger bus was under their care at the time of the detection.

Accordingly, the learned High Court Judge has fined the three accused Rs. 40000/- each on each of the two counts and in default, they have been sentenced to three months imprisonment on each of the counts.

Since, the passenger transport bus had been temporarily released to its registered owner who is the petitioner, the learned High Court Judge has decided to allow the petitioner to show cause as to why the vehicle should not be confiscated.

The relevant section in relation to the order to show cause made by the learned High Court Judge, namely section 79 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984 reads as follows.

79. (1) Where any person is convicted of an offence against this Ordinance or any regulation made thereunder the Court shall order that all or any articles in respect of which the offence was committed and any boat, vessel, vehicle, aircraft or airborne craft or equipment which has been used for the conveyance of such article shall, by reason of such conviction, be forfeited to the State.

(2) Any property forfeited to the State under subsection (1) shall

(a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;

(b) if an appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

In this subsection "relevant conviction" means the conviction in consequence of which any property is forfeited to the State under subsection (1).

It needs to be noted that the above provisions are very much similar to section 40 of the Forest Ordinance, which stood until the said section was amended by the Forest (Amendment) Act No. 65 of 2009, where the forfeiture should become

effective by the reason of a conviction in terms of the section 40 of the Forest Ordinance.

At the inquiry held in that regard, the petitioner has given evidence. According to him, he is a person who owns seven passenger transport buses and the bus bearing number WP NB-6586 was one of them. He has engaged this bus to transport passengers between Colombo and Mannar. Usually, the bus leaves Colombo 10.30 in the morning and after reaching Mannar, it leaves Mannar at 7.30 in the night reaching Colombo, the following morning.

The bus as well as his other buses used to be parked at the Sugathadasa stadium vehicle park. It had been his evidence that his bus left for Mannar as usual on 18th July 2014. His driver has been the 3rd accused Bandara, and the conductor was the 1st accused. They have been working with him for about 6 years at the time of this incident. Later in the day, he has come to know through a friend that his bus was at the Medawachchiya police station. His attempts to contact the driver and conductor have failed, and when he reached the Medawachchiya police station on the following day, he has come to know that his driver, conductor and a third person namely the 2nd accused Mahesh Chathuranga has been arrested by the police for transporting cannabis in his bus.

It had been his position that although the 2nd accused was a person who worked for him previously, he has been taken without his consent or knowledge by the regular conductor. He has pleaded that he was unaware of the transportation of cannabis in his bus and only came to know about this when he was informed about the detention of the bus. It had been his contention that he trusted his employees and they have never been found guilty of such offences previously.

He has also admitted that he did not specifically instruct the driver and the conductor not to do such things, and the bus should not be used for such illegal activities.

By his order dated 07-10-2022, the learned High Court Judge has decided to consider the evidence of the petitioner on the basis whether it can be concluded that the petitioner being the registered owner of the bus had no knowledge of the commission of the offence and also, whether he has taken necessary steps to prevent the offence being committed. Accordingly, the vehicle has been confiscated to the state on the basis that the registered owner failed to satisfy the Court in that regard.

At the hearing of this application, the learned Counsel for the petitioner urged the grounds mentioned in paragraph 10 of the petition as exceptional grounds that should be considered by the Court.

He submitted that the registered owner had been vigilant of his vehicles to the best of his ability and had trusted his employees who had worked for him over several years. It was his position that this was an offence committed without the knowledge of the petitioner and urged the Court to release the vehicle to him and to set aside the order of confiscation by the learned High Court Judge.

The learned Senior State Counsel submitted that it is the settled law that giving mere instructions would not suffice but a registered owner should take meaningful steps to prevent an offence being committed. It was her position that the registered owner had failed to establish that he took any steps to prevent the offence being committed and the learned High Court Judge has correctly analyzed the evidence placed before him in deciding to confiscate the vehicle as the petitioner has failed to satisfy the Court why his vehicle should not be forfeited.

In the case of **Manawadu Vs. The Attorney General (1987) 2 SLR 30** where the automatic forfeiture provisions of section 40 of the Forest Ordinance, as stood then was considered, it was stated by **Sharvananda, C.J.**, that,

“It was not intended to deprive an owner of his vehicle used by the offender in committing a forest offence without the owner’s knowledge and without his participation. The word forfeited must be given the meaning liable to be forfeited so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. The amended section 40 does not exclude by necessary implication the rule of audi alteram partem. The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the Court that the accused committed the offence without his knowledge or participation his lorry will not be liable to forfeiture.”

It appears from the order of the learned High Court Judge that he was very much mindful of the proviso of section 40 (1) of the Forest Ordinance as amended by Forest (Amendment) Act No. 65 of 2009 which reads thus;

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 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.

As a result of the case of **Manawadu Vs. The Attorney General (supra)** and the long list of judgements pronounced by our Superior Courts, and the amendments effected to the relevant statutes that attract forfeiture provisions, I find that it has now become the norm for our Courts to consider in such instances whether the owner of a vehicle had the knowledge of the offence being

committed and at the same time whether he has taken the due precautions in preventing such an offence being committed.

I find that in deciding whether to confiscate a vehicle or not, our Judges often giving strict interpretation as to the words 'taken all precautions to prevent the use,' mentioned in the relevant statutes.

It needs to be noted that almost all these decided cases are cases decided in terms of the above cited provision of the Forest Act and that of the Animals Act which has a similar provision where the owner of a vehicle which is subjected to a confiscation is a third party, before confiscating the vehicle, he should be given an opportunity to show that he has taken all precautions to prevent such an offence being committed.

However, I must emphasize that section 79 of the Poisons, Opium and Dangerous Drugs Ordinance only speaks about an automatic forfeiture, which needs to be considered in the light of the **Manawadu Vs. The Attorney General (supra)** where the owner of such vehicle should be given an opportunity to show cause as to why the vehicle should not be confiscated.

In the case under consideration, although the learned High Court Judge has determined that he cannot accept the vehicle owner's evidence where he had stated that he had no knowledge of the offence being committed, I find no basis for such a determination. It is obvious that the vehicle is not a thing that would usually be used to transport goods as in a normal lorry. It is a passenger transport bus used to take passengers on the Colombo-Mannar route, which requires long distance travel.

There cannot be any argument that the owner being a businessman, having seven such vehicles would not be in a position to keep an eye on all such vehicles at the same time, but to rely on his employees in that regard. The facts revealed in this matter have clearly established before the Court that there would have been no possibility for the vehicle owner to know that his bus has been used for

the transport of Cannabis known as Kerala Ganja (කේරල ගජා) which clearly appears to be an act of a third party other than the owner of the vehicle.

Therefore, I am of the view that the learned High Court Judge was misdirected as to the facts when it was decided not to accept the evidence of the registered owner that he had no knowledge of the commission of the offence.

It is true that the registered owner has given evidence and stated that other than giving usual instructions, he has not given specific instructions to his driver and the conductor not to transport prohibited goods in his bus, which appears to be the very reason why the learned High Court Judge has decided that the registered owner has not taken any step to prevent the offence being committed, and failed to prove on the balance of probability that he had no knowledge of the offence being committed.

It appears from the reasoning of the order that although the learned High Court Judge has not used the words that the registered owner has failed to take all precautions to prevent the use of the vehicle, the provisions of the Forest Ordinance were very much in his mind when the evidence was considered in this order.

It is my considered view that what constitutes all precautions to prevent the use should be interpreted in a pragmatic manner rather than giving a strict interpretation. It is my view that the relevant facts and the circumstances unique 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. 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 precautions that could have been taken.

At this juncture, I would like to draw my attention to the observations made by **Malani Gunaratne, J.** in the case of **Sadi Banda Vs. Officer In Charge of Norton Bridge Police Station (2014) 1 SLR 33**, which reads;

“I am of the view before making the order of the confiscation, the learned Magistrate should have taken into consideration, value of the timber transport, no allegation prior to this incident that the lorry had been used for an 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 an appellant did not have any knowledge about the transporting of timber without a permit.”

As I have already determined, there cannot be any doubt that the owner of the vehicle had no knowledge of the offence being committed by his employees and he was in no way privy to it. Under the circumstances, what should have been looked at would be whether the vehicle, which is a passenger transport bus worth millions of rupees, should be confiscated for no fault of his.

It is very much clear from the evidence that the registered owner has trusted his driver and the conductor who had been working for him for over 6 years. They have had no previous record of any offence being committed. Although they have pleaded guilty to the charge because the cannabis was found in the bus under their charge, the circumstances under which the prohibited drug was found should have been considered in favour of the registered owner. It is my view that the owner not giving specific instructions should not have been the only criteria to dismiss his evidence under the circumstances.

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 the 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 above, I am of the view that this is a matter where the extraordinary power of revision of this Court should be exercised in order to prevent a miscarriage of justice. I am satisfied that the vehicle owner has submitted sufficient exceptional grounds which warrant the intervention of this Court.

Accordingly, I set aside the order dated 07-10-2022 of the learned High Court Judge of Anuradhapura and order the release of the vehicle numbered WP NB-6586 to its registered owner who is the claimant-petitioner of this application.

The Registrar of the Court is directed to communicate this judgment to the High Court of Anuradhapura for necessary implementation.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal