

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

In the matter of an Application for
revision under Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka

C.A. Case: **CA (PHC) APN 51/2018**

P.H.C. Galle Case No: **REV 259/2018**

M.C. Galle Case No: **56792**

OIC,
Police Station,
Yakkalamulla.

Complainant

Vs.

Udumalgala Gamage Gamini,
Sri Sumanapala Mawatha,
Thammitiya, Nakiyadeniya.

Accused

AND BETWEEN

Udumalgala Gamage Lalitha,
Sri Sumanapala Mawatha,
Thammitiya, Nakiyadeniya.

Claimant Applicant-Petitioner

Vs.

OIC,
Police Station,
Yakkalamulla

Complainant-Respondent

Hon. Attorney General,
Attorney- General's Department,
Colombo 12.

Respondent

Udumalgala Gamage Gamini,
Sri Sumanapala Mawatha,
Thammitiya, Nakiyadeniya

Accused - Respondent

AND NOW BETWEEN

Udumalgala Gamage Lalitha,
Sri Sumanapala Mawatha,
Thammitiya, Nakiyadeniya.

**Claimant Applicant-
Petitioner-Petitioner**

Vs.

OIC,
Police Station,
Yakkalamulla

**Complainant-Respondent-
Respondent**

Hon. Attorney General,
Attorney- General's Department,
Colombo 12

Respondent- Respondent

Udumalgala Gamage Gamini,
Sri Sumanapala Mawatha,
Thammitiya, Nakiyadeniya
Accused – Respondent Respondent

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J

COUNSEL : H. Withanachchi for the Claimant
Applicant-Petitioner-Petitioner
Nayomi Wickramasekera SSC for the
Respondent-Respondent

ARGUED ON : 14.02.2019

WRITTEN SUBMISSIONS : Claimant Applicant- Petitioner-Petitioner –
On 30.08 .2019
Respondent-Respondent - On 03.12.2018

DECIDED : 29.11.2019

K.K.WICKREMASINGHE, J.

The Registered owner Petitioner- Petitioner has filed this revisionary application seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Southern Province holden in Galle dated 05.02.2018 in Case No. Rev 259/18 and seeking to set aside the confiscation order made by the Learned Magistrate of Galle dated 13.12.2017 in Case No. 56792.

The incident in question is summarized as follows;

On the date of the incident, the Accused-Respondent-Respondent, was transporting jack timber by the lorry bearing registration No. 227-5989. The Accused-Respondent-Respondent and the petitioner are husband and wife. On the date of incident, the Accused-Respondent-Respondent was transporting this jack timber without a valid permit and the lorry owned by the petitioner was seized by the Police on or about 04-07-2016 for illegal transportation of the said timber. It was revealed that the timber owner had obtained a permit to cut down the said Jack tree but not the accused driver. The accused had pleaded guilty to the charge framed against him, namely illegal transportation of Jack timber. The petitioner testified

that she was unaware of the incident in question and she had advised her husband not to do any illegal activity. The timber owner testified that he did not have a permit to transport the timber even though he obtained a permit to cut the Jack tree.

The driver (hereinafter referred to as the 'accused') of the said lorry was charged under section 25(2) read with section 40A of the Forest Ordinance as amended. On 01.02.2011, the Accused Respondent, the driver pleaded guilty to the charge leveled against him on 12-07-2016 and the Learned Magistrate convicted the accused and imposed a fine of Rs.7500. Thereafter a vehicle inquiry was held with regard to the lorry that was allegedly used for the commission of the offence. After concluding the inquiry, the Learned Magistrate confiscated the vehicle by order dated 13-12-2017.

Being aggrieved by the said order dated 13-12-2017, the appellant filed a revision application in the Provincial High Court of Southern Province holden in Galle bearing No. Rev 259/2018. The Learned High Court Judge has dismissed the said application without issuing notices on the respondents, holding that the Petitioner has not disclosed any exceptional circumstances in the application.

Being aggrieved by the said dismissal the appellant preferred a revisionary application to this Court.

The Learned Counsel in the written submission for the petitioner submitted that;

1. The timber was transported free of charge in the lorry owned by the Petitioner for a destitute lady,
2. There was no allegations prior to this incident that the lorry had been used for any illegal purpose,
3. The Petitioner and or the accused are not habitual offenders in this nature,

4. No record of previous convictions for similar offences against the Petitioner and the Accused,
5. The Petitioner and or the accused have never been involved in any criminal case before,
6. The petitioner did not have any knowledge about the transporting of timber without a permit.
7. The timber transported in the in the lorry was released.

The Learned Counsel has furthermore submitted that the learned Magistrate had failed to take into consideration the above undisputable facts before making the order of confiscation against the Petitioner.

I wish to consider grounds of appeal of 02, 03, 04 & 05 together. They should be analysed in the light of relevant law applicable to the case.

As per section 40(1)(b) of the Forest Ordinance as amended, all tools, vehicles, implements, cattle and machines used in committing an offence under the Forest Ordinance, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate. Therefore it is trite law that any vehicle involved in an offence under the Forest Ordinance is subject to confiscation upon a valid conviction. It is observed that the amendment made to section 40 of the Forest Ordinance in 2009, requires Court to look into the preventive measures taken by the vehicle owner whose vehicle is involved in an offence under Forest Ordinance.

In the case of **The Finance Company PLC. V. Agampodi Mahapedige Priyantha Chandana and 5 others [SC Appeal 105A/2008]**, it was held that,

*“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, **no order of confiscation shall be made if that owner had proved to***

the satisfaction of the Court that he had 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 a balance of probability.” (Emphasis added)

It should be analysed whether the vehicle owner, the petitioner had taken all precautions to prevent the commission of the act by his husband.

The Learned Magistrate has observed in her judgement that

“ලියාපදිංචි අයිතිකාරියගේ සාක්ෂිය පලකා බැලීමේදී ඇය ප්‍රකාශ කරන්නේ වරදට ආදාළ ලොරි රථය හාඩ්වෙයාර් එකක භාණ්ඩ ප්‍රවාහනය කල බවත්, එකී හාඩ්වෙයාර් එකේ තැනැත්තාගේ නම තමන් නොදන්නා බවත්, තමන්ට තම ස්වාමිපුරුෂයා පවසා ඇත්තේ එම ලොරි රථයෙන් ප්‍රවාහනය කරන්නේ හාඩ්වෙයාර් එකේ භාණ්ඩ බවත්, මෙම වාහනය පොලීසියේ අත්අඩංගුවට පත්වූ බව තමන්ට දැනගන්නට ලැබුනේ ලීවල අයිතිකාරිය යම් කියනු කාන්තාවකගේ පුතෙකු මාර්ගයෙන් බවත්ය. එසේම මෙම ලී ප්‍රවාහනය සම්බන්ධයෙන් තමන්ට දැනුවත් භාවයක් නොතිබුණු බවත් එසේ දැනුවත්ව සිටියේ නම් එම ලී ප්‍රවාහනයට තමන් ලොරි රථය ලබා නොදෙන බවත් ප්‍රකාශ කර ඇත.”

The Learned Magistrate had correctly analyzed this question and came to the conclusion that the appellant was not monitoring the vehicle and she was aware only about what her husband narrated to her (the accused-driver). Therefore, the Learned Magistrate was of the view that the petitioner failed to satisfy the Court, that she had taken all precautions to prevent the use of the vehicle for the commission of the offence (Page 56 & 57 of the brief).

It is furthermore emphasized in the written submission of the Petitioner that the Petitioner had no knowledge about the transporting of timber.

However in the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that,

“...A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle

which had been used for a commission of an offence for an unauthorized purpose...”

Moreover, the Petitioner has reiterated the fact that the commission of the offence was done for the benefit of the destitute lady on sympathetic grounds. The law states that it is compulsorily required from the owner of the vehicle to take all necessary precautions to prevent the offence being committed even though the commission of the offence has been done for a charitable purpose. The person's benevolent intentions do not discharge the vehicle owner from taking all possible preventive measures to prevent commission of any offence.

The evidence in chief (page 30) was that the owner of the lorry did not have any knowledge as to the fact that it was used for the transportation of the said timber and according to her husband the lorry was used to transport sand and bricks.

In the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that,

“...A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose...”

Hence, I am of the view that, above conclusion of the Learned Magistrate is well within law and therefore, the grounds of appeal of 02, 03, 04 and 05 should fail.

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,**

“Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal...”

Therefore, the revisionary powers of this Court shall not be exercised when there was no illegality, irregularity or failure of justice in aforesaid orders. I observe that in the present case also there had been no miscarriage of justice, irregularity or injustice in the order of the Learned Magistrate and therefore the Learned High Court Judge was correct in refusing to interfere with the order of the Learned Magistrate due to absence of exceptional circumstances. We affirm both orders of the Learned Magistrate and the Learned High Court Judge Galle dated on 13.12.2017 and 05.02.2018.

Accordingly the revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J

I agree,

JUDGE OF THE COURT OF APPEAL