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 of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal

Case No:

CPA/0161/2022

The Officer-in-Charge,

Anti-Corruption Unit,

Badulla.

COMPLAINANT

Vs.

High Court of Badulla

Case No: REV 118/2017

1. Dissanayake Mudiyanselage Pradeep Pushpakumara

No.57, Oliya Mandiya, Badulla.

Magistrate's Court of Badulla

Case No: 75829

2. Weerasekara Mudiyanselage Weerasekara

No. 08/57, Katupelallagama, Badulla.

ACCUSED

Samsudeen Nissardeen,

No. 33, Karaliyadda Road, Badulla.

REGISTERED OWNER-CLAIMANT

AND NOW

Samsudeen Nissardeen

No. 33, Karaliyadda Road, Badulla.

REGISTERED OWNER-CLAIMANT-PETITIONER

Vs.

The Officer-in-Charge,

Anti-Corruption Unit,

Badulla.

COMPLAINANT-RESPONDENT

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Samsudeen Nissardeen,

No. 33, Karaliyadda Road, Badulla.

REGISTERED OWNER-CLAIMANT-PETITIONER- PETITIONER

Vs.

The Officer-in-Charge,

Anti-Corruption Unit,

Badulla.

COMPLAINANT-RESPONDENT-

RESPONDENT

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: R. Gurusinghe, J.

: P. Kumararatnam, J.

Counsel : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Tharinda Ratwatte, Lakitha Wakishta Arachchi and Subaj De Silva for the Claimant-Petitioner-Petitioner.

: Maheshika Silva, D.S.G. with Jayalakshi De Silva, S.S.C., for the Respondent-Respondent

Argued on : 05-03-2024

Written Submissions : 20-02-2024 (By the Respondents)

: 16-11-2023 (By the Registered Owner-Claimant-Petitioner)

Decided on : 12-06-2024

Sampath B. Abayakoon, J.

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

When this matter was supported for notice after having considered the facts, circumstances and the relevant law, this Court decided to issue notice to the respondent-respondents (hereinafter referred to as the respondents). Subsequently, the respondents were allowed to file objections to the application and the petitioner was allowed to file counter-objections in that regard.

At the hearing of this application, this Court heard the submissions of the learned Counsel for the petitioner which were on the basis that the revision application should be allowed, and the relief granted to the petitioner as sought in his petition.

This Court also heard the submissions of the learned Deputy Solicitor General (DSG) on behalf of the respondents, where it was contended that the revision application should stand dismissed for want of merit.

This is a matter where two accused persons were charged before the Magistrate's Court of Badulla, in MC Badulla Case Number 75829 for transporting timber valued at Rs. 381,401.07 during night, using the lorry bearing No. 42-5722, without having obtained a valid permit as required under the provisions of the Forest Ordinance, and thereby committing an offence punishable in terms of section 25(2) read with sections 40(1) and 40(a) of the Ordinance.

Both the accused have pleaded guilty to the charge against them, and they have been sentenced by the learned Magistrate of Badulla.

After having confiscated the timber transported without a permit, the learned Magistrate acting in terms of the proviso of section 40(1) of the Forest Ordinance has allowed the registered owner of the vehicle used in the commission of the offence to show cause as to why the said vehicle should not be confiscated.

At the resultant inquiry, a representative from the finance company which has provided leasing facilities to the registered owner to purchase this vehicle has been called as a witness. He has confirmed that the vehicle was under a finance leasing facility obtained by the registered owner on 30-03-2012 for a sum Rs. 600,000/-. It has been established that by 15-02-2016, the registered owner has paid 44 installments of Rs. 21,225/- per month and only four more installments were being due by then. The registered owner, who is the petitioner of this application has also given evidence in this matter to substantiate his claim for the vehicle.

The learned Magistrate of Badulla pronouncing his order dated 31-10-2017 has decided that the registered owner has failed to establish to the satisfaction of the Court that he took all precautions to prevent the offence being committed using the vehicle. Accordingly, vehicle bearing No. 42-5722 has been confiscated by the state.

Against this order, the petitioner has invoked the revisionary jurisdiction of the Provincial High Court of the Uva Province Holden in Badulla, granted to the said Court in terms of Article 154P of The Constitution.

Having heard the application of the petitioner, the learned High Court Judge of Badulla, of his judgment dated 03-08-2022 has determined that the learned Magistrate has made the confiscation order in accordance with the law. Therefore, he has no basis to conclude that there are exceptional circumstances which warrant the revision of the said order. Accordingly, the revision application has been dismissed.

It is against this judgment the petitioner has filed this revision application seeking to set aside the judgment of the learned Provincial High Court Judge of Uva Province Holden in Badulla, as well as the order of the learned Magistrate of Badulla, which led to the judgment pronounced by the learned High Court Judge.

At the hearing of this application, submitting several questions of law that needs to be looked at, it was the submission of the learned Counsel for the petitioner that the learned Magistrate of Badulla erred in law when the requirements of the proviso of section 40(1) of the Forest Ordinance as amended by Forest (Amendment) Act No.65 of 2009 was interpreted.

He also submitted that the learned Magistrate has failed to consider the required burden of proof in an inquiry of this nature. It was also his position that the learned High Court Judge of the Provisional High Court of Uva Province Holden in Badulla erred when it was determined that no exceptional circumstances exist for the Court to invoke the revisionary jurisdiction in favour of the petitioner.

Referring to the evidence led at the inquiry held before the Magistrate's Court, the learned Counsel took up the position that none of the evidence led had been challenged by the prosecution at any material points, and therefore, the mode of proof of an inquiry of this nature being the balance of probability, the evidence of the registered owner should have been considered in favour of the petitioner by the learned Magistrate of Badulla.

Submitting that what a registered owner of a vehicle should prove in an inquiry of this nature would be that he had no knowledge of the offence being committed and he took necessary precautions for the prevention of the offence being committed, it was the position of the learned Counsel that one cannot expect a registered owner to take all possible precautions in a given scenario. It was his position that the evidence has to be considered in a fact sensitive manner, and the learned Magistrate of Badulla has failed to address the evidence in the correct perspective.

It was his position that there was sufficient material before the learned High Court Judge of Badulla to hold in favour of the petitioner, and there was no basis for the learned High Court Judge to determine that no exceptional circumstances exist for him to invoke the revisionary jurisdiction of the Court if the relevant facts, circumstances and the law were correctly applied.

It was the submission of the learned DSG that this is a matter where the petitioner should have exercised his right of appeal if he was dissatisfied with the judgment of the learned High Court Judge. It was her position that without exercising the right of appeal, the petitioner cannot come before this Court seeking the discretionary remedy of revision.

It was also her submission that to obtain relief by way of revision, the availability of exceptional circumstances needs to be established by the petitioner, and no such exceptional circumstances have been established.

Arguing that the intention of the legislature when formulating the provisions of the Forest Act had been to strictly control the destruction caused to the forest cover of the country, it was her position that the provisions of the Act should be strictly interpreted.

Citing several judgments of our Superior Courts, it was her position that the determination of the learned Magistrate is justified, when considering the facts and the circumstances that had led to the relevant offence being committed. It was her position that the registered owner has failed to establish that he maintained due diligence in preventing an offence being committed, and had failed to convince the Court by way of evidence that the vehicle should be released to him.

The learned DSG was of the view that since the learned High Court Judge has correctly determined that the petitioner has failed to establish sufficient exceptional circumstances that shock the conscience of the Court, the judgment of the learned High Court Judge was well within the law. The learned DSG moved for the dismissal of the application by the petitioner.

I am in no position to agree with the submission of the learned DSG that since the petitioner failed to avail himself of his right of appeal, he cannot rely on the discretionary remedy of revision to seek relief.

In the cases of **SC Appeal No-111/2015, 113/2015 and 114/2015 decided on 27-05-2020**, the issue considered by Their Lordships of the Supreme Court was whether having failed to exercise the right to file an appeal in terms of section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, could a person invoke the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of The Constitution of the Republic of Sri Lanka in order to canvass a decision made by a Provincial High Court exercising its appellate powers.

Although the application before this Court emanates from a revision application filed before the relevant Provincial High Court, it is my view that the underlined principles would be the same.

It was held:

Per Aluvihare, P.C., J.

> *"Thus, it is clear that the existence of the right of appeal does not uniformly and blanketly result in undermining the revisionary jurisdiction. The right of appeal, is no doubt, a determining factor which the Court takes into account when considering a revisionary application. However, having recourse to an appeal does not ipso facto act as an ouster of the revisionary jurisdiction. On the contrary, it is the Court's prerogative to decide, at its discretion, to refuse a revisionary application where it appears that the existence of a parallel right of appeal does not give rise to an exceptional circumstance. Thus, where these jurisdictions are separate but complementary to each other, a negation or the expressed provision of right of appeal does not result in ousting the revisionary jurisdiction"*

There cannot be any argument that the revisionary jurisdiction of this Court is a discretionary remedy, which could be exercised only upon the existence of exceptional circumstances which requires the intervention of the Court to remedy a miscarriage of justice.

In the case of **Caderamanpulle Vs. Ceylon Paper Sacks Ltd (2001) 3 SLR 112** it was held that,

> *"The existence of exceptional circumstances is a pre-condition for the exercise of the power of revision".*
>
> **Per Nanayakkara, J.**
>
> *"..when the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited, that powers of revision had been exercised only in limited category of situations. The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision and absence of exceptional circumstances in any given situation results in refusal of remedies."*

It was held in the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd (1987) 1 SLR 5** that,

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamararatnam (Sriskantha Law Report Vol. IV page 47)** it was held that,

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365** it was observed,

> *"Revisionary powers should be exercised where a miscarriage of justice has occasioned due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.*

Having considered the above judicial pronouncements, I find it necessary to consider whether the learned High Court Judge has determined the principles that govern exceptional circumstances in its correct perspective in relation to the facts and circumstances of the inquiry that led to the confiscation of the vehicle by the learned Magistrate.

In that context, I find it relevant to reproduce the relevant part of the order by the learned Magistrate for better understanding of this judgment.

At page 3 of the order dated 31-10-2017, after having considered the evidence led at the inquiry, the learned Magistrate has stated as follows.

> "ඉදිරිපත් කරන ලද එකී සියළු සාක්ෂි විශ්ලේෂණය කරමි. 'ඉ.1' දරණ ලේඛනය අනුව අංක 42-5722 දරණ ලොරි රථයේ ලියාපදිංචි අයිතිකරු සම්සුඩීන් නිසාර්දීන් නමැති අය බව තහවුරුවේ.
>
> එකී ලොරි රථය ප්‍රදීප් නමැති රියදුරු හට ලබා දී ඇති බවත් රියදුරු විසින් දැව ප්‍රවාහනය කිරීම හේතුවෙන් එකී ලොරි රථය පොලීසියේ අත් අඩංගුවට පත් වී ඇති බවටත් පැසා. 01 ප්‍රකාශ කර ඇත. එකී ලොරි රථයෙන් දැව ප්‍රවාහනය කිරීම සම්බන්ධයෙන් කිසිදු දැනීමක් තමාට නොතිබූ බවට ලියාපදිංචි අයිතිකරු ප්‍රකාශ කර ඇත. සංශෝධිත වන සංරක්ෂණ ආඥාපනතේ 40(1) ආ අනුරු විධානය අනුව මෙම ලොරි රථය භාවිතා කරමින් වරදක් කිරීම වලක්වාලීම සඳහා සියළු පූර්වාරක්ෂක ක්‍රියා මාර්ග තමා විසින් ගත් බවට අධිකරණය සෑහීමකට පත් කිරීම ලියාපදිංචි අයිතිකරු විසින් සිදු කල යුතුව ඇත. නීති විරෝධී වැඩ නොකිරීමට රියදුරු හට උපදෙස් ලබා දුන් බවට ලියාපදිංචි අයිතිකරු ප්‍රකාශ කර ඇත. නමුත් හුදෙක් වාචික උපදෙස් දීම පමණක් මෙවන් නඩුකර වලදී ප්‍රමාණවත් නොවන බව මේරි මටිල්ඩා එදිරිව පී. එච්. ද සිල්වා, ස්ථානාධිපති, පොලිස් ස්ථානය, හබරණ CA(PHC) 86/97 නඩුවේදී දක්වා ඇත. එසේම මෙම සිද්ධිය සිදු වූ දින අදාළ රියදුරු හට උපදෙස් ලබා දීමක් සිදු කළ බවට කිසිදු සාක්ෂියක් ලියාපදිංචි අයිතිකරු ලබා දී නැත. තවද රියදුරු කෙරෙහි තිබූ විශ්වාසය මත රියදුරු අදාළ ලොරි රථය ඔහුගේ නිවසට රැගෙන යන අවස්තාවන්හීදී එකී ලොරි රථය සම්බන්ධයෙන් සොයා නොබලන බවට ලියාපදිංචි අයිතිකරු සාක්ෂි ලබා දී ඇත. ඒ අනුව සලකා බැලීමේදී එකී ලොරි රථය භාවිතා කරමින් වරදක් සිදුකිරීම

වැලැක්වීම සඳහා පූර්වාරක්ෂක ක්‍රියා මාර්ග රැගෙන ඇති බවට, අධිකරණය සැහීමකට පත් කිරීමට ලියාපදිංචි අයිතිකරු අසමත් වී ඇති බව පෙනී යයි."

It appears that the learned High Court Judge too has gone on the same premise that giving mere instructions would not be sufficient in determining that the petitioner has failed to show exceptional circumstances that warrant the intervention of the High Court.

It needs to be emphasized that the learned Magistrate when referring to section 40(1)(b) as the relevant section under which he is determining this matter, I find that it has been referred out of context. Although section 40(1)(b) is the provision under which a confiscation can be made, the relevant provision that needs to be considered when determining whether the vehicle should be confiscated or not shall be the proviso to section 40(1).

The Forest Ordinance was amended by the Forest (Amendment) Act No.65 of 2009. Accordingly, section 40(1) of the principal enactment, which had similar provisions was repealed and substituted.

The relevant new section 40(1) which refers to confiscation of tools, vehicles, implements and machines used in the commission of forest offences reads as follows.

40(1). Where any person 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 machines 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 3rd 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 maybe, for the commission of the offence.

In terms of the proviso, if the owner of a vehicle or other material used in the commission of such forest offence is a 3rd party, as in this case, a confiscation cannot 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 maybe, for the commission of the offence.

It is settled law that when determining an outcome of an inquiry of such a nature, the mode of proof is on the balance of probability. Hence, I am of the view that the "satisfaction of the Court" as mentioned in the proviso should be on the balance of probability.

In the case of **The Finance Company PLC Vs. Priyantha Chandra and Five Others (2010) 2 SLR 220,** after considering several judicial pronouncements, **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, an order of confiscation shall not be made if 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 shows 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."*

In the case of **Orient Financial Services Corporation Limited Vs. Attorney General (2013) 1 SLR 208**, **Piyasath Dep, P.C., J.** (as he was then) observed as follows.

> *"The Supreme Court has consistently followed the case of* ***Manawadu Vs. The Attorney General****. Therefore, it is settled law that before an order for forfeiture is made, the owner should be given an opportunity to show cause if the owner of the balance of probability satisfies the Court that he has taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence, then the vehicle has to be released to the owner."*

When it comes to the evidence led at the inquiry, I find that the evidence of the registered owner has not been challenged by the prosecution at any material points. The position taken up by the prosecution had been that the registered owner had engaged the lorry for illegal purposes, because the money earned through his business was insufficient for him to pay the lease rental to the finance company, which the registered owner has repudiated.

The position taken up the registered owner had been that, he is a businessman who runs a fruit stall near the Badulla bus station for over 25 years, and he is the owner of the largest fruit stall in Badulla.

He has purchased this lorry for the purposes of transporting fruits he purchased from other areas to his fruit stall in Badulla, and the vehicle was not used for hiring purposes or any other activity.

It had been his position that the driver of the lorry who was charged before the Magistrate's Court had been serving with him for about 5 years and was a trusted servant. He was in the habit of allowing the driver to take the vehicle home when the vehicle returned late in the night, or when it was required to leave early in the morning to purchase fruits from outside areas. He has stated that when handing over the vehicle to the driver he used to instruct him to engage the vehicle only for the purpose of his requirements and not to engage the vehicle in hiring activities. The registered owner has explained further that the vehicle used to be taken out two or three days per week to purchase and bring fruits to his stall, and on other days the driver used to help him at his fruit stall.

Explaining what happened on the date of the incident, he has stated that he allowed the driver to take the vehicle to his home as the vehicle returned late on that day and also he wanted to leave early on the following day to purchase fruits. As the lorry did not come in the morning as instructed, upon inquiry, he has come to know that the lorry has been taken into custody by the police for committing the offence mentioned in the charge.

He has maintained the position that even when the driver takes the vehicle to purchase fruits from outstation areas, he was in the habit of calling him and inquiring as to his whereabouts, and it was the driver who usually purchased goods for him, because of the trust he has placed upon him. He has stated further that the driver is no longer employed by him and this was the 1st time his vehicle was involved in an offence and there are no pending cases either, relating to his vehicle. It was on that basis the registered owner has urged the Court to release the vehicle to him.

I find that despite the evidence being not materially challenged, the learned Magistrate has determined that he cannot be satisfied that the registered owner has taken all necessary precautions to prevent the offence being committed, which had been the basis for the confiscation of the vehicle.

It appears that the learned Magistrate had decided to give a strict interpretation to the words, "*had taken all precautions to prevent the use*", stated in the proviso of section 40(1) of the Forest Ordinance in his determination.

Our Superior Courts have preferred the strict interpretation of the relevant words in several judgments pronounced in this regard, while the same words had been given a liberal interpretation at other instances in relation to the mode of proof to the satisfaction of a Magistrate as required in the proviso.

In the case of **The Range Forest Officer, Ampara Vs. The Attorney General, CA (PHC) 37/2007** which was the judgment that was considered by the learned High Court Judge in his determination, it was held;

> *"The view of this Court is, giving mere instructions or stating that the vehicle had been used for the commission of the offence without his knowledge is not sufficient in order to discharge the burden embodied in proviso of section 40(1) of the Forest amendment Act."*

Similar strict interpretation was preferred in the case of **Mary Matilda Silva Vs. Inspector of Police Habarana CA (PHC) 86/97** decided on 08-07-2010.

It needs to be noted that, what was meant by the legislature in its wisdom when it was stated in the proviso of section 40(1) *"all precautions to prevent"* has not been given an interpretation in the statute itself.

That is the very reason why our Superior Courts have interpreted the relevant operative part in the proviso in cases relating to forest offences when the confiscation of vehicles or other material was challenged before the Court.

Although a strict interpretation has been preferred in earlier judgments in this regard, I find that our Superior Courts have lately moved away from the strict interpretation rule and had thought it fit to interpret the relevant words in a fact sensitive manner, considering the uniqueness of each case under consideration before the Court.

A.W.A Salam, J. in the case of **CA-PHC-108-2010** decided on **26-08-2014,** considering the mode of proof of the words "*all precautions to prevent*" as stated in the proviso of section 40(1) of the Forest Ordinance observed as follows;

> *"Even assuming that the owner of the vehicle was under a duty to show cause against a possible order of confiscation, I find it difficult to accept the basis on which the learned Magistrate has entered an order for confiscation on the merits of the inquiry. It was the evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross-examination. There have been no previous instances where the driver has been charged for similar offences. When someone is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instructions. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used. In an order of confiscation of the vehicle, then however much the owner comes forward and says that he gave instructions not to make use of the vehicle for illegal purposes, by reason of the fact that he is on the monthly payment, the vehicle has been confiscated. This approach does not appear to be reasonable and acceptable in law. In an inquiry of this nature what the owner has to prove is that he took every measure to ensure that the vehicle was not used for illegal purposes."*

In the case of **Sadi Banda Vs. Officer in Charge of the Norten Bridge Police Station (2014) 1 SLR 33, Malani Gunaratne, J.** clearly deviated from the strict interpretation of the earlier considered words and observed as follows.

> *"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 had given evidence and stated he purchased a 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 had confiscated the lorry. I am of the view before making the order of confiscation the learned Magistrate should have taken in to 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 all the accused are not habitual offenders of 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."*

It is my considered view that the mode of proof being on the balance of probability, when considering the evidence in a case where an inquiry was held allowing the owner of a vehicle subjected to confiscation under the provisions of the Forest Ordinance or under any statutory provisions of similar nature for that matter, such evidence should be considered in a more pragmatic manner as considered in the above judgments, from which I would like to take guidance from.

Needless to say, that when an inquiry is held to decide whether to confiscate a vehicle or not, the Court is considering the evidence against a 3rd party who was not the accused in the case. Therefore, the Court will have to be mindful about the property rights of such a third party before depriving his rights for an offence committed by someone else, although the relevant vehicle belongs to him.

When it comes to the fact relevant to this case, the registered owner of the vehicle has given uncontradicted evidence as to the circumstances under which he used to give the vehicle to his driver, trusted by him as a long-standing employee. According to his evidence, this was a vehicle not used for hiring purposes or any other purposes than transporting fruits purchased from outstation areas to Badulla to be sold at the fruit stall of the petitioner.

Under the circumstances, whether the petitioner has taken all necessary precautions to prevent the offence being committed needs to be considered in that context. The petitioner has given evidence stating that he used to give instructions to his driver not to use the vehicle for any other purpose. It was also his evidence that he was in the habit of contacting the driver when he goes away to purchase fruits from outstation areas. The petitioner has well explained the circumstances under which he used to allow the driver to take the vehicle to his home stating that when the vehicle returns late or when the vehicle has to be sent early in the day for purposes of purchasing fruits, he used to allow the driver to take the vehicle home, which cannot be seen as an unusual practice when considering the business, the petitioner is engaged in.

As considered earlier, the evidence of the petitioner in that regard has not been challenged at any material point. The only suggestion made to the petitioner had been that he has used the vehicle for illegal purposes in order to pay the monthly finance rental to the finance company. The petitioner has replied that he has no such need.

The evidence given by the representative of the finance company shows that the petitioner has taken a finance facility for Rs. 600,000/- and had paid the finance

rentals regularly over several years. The petitioner being a businessman, it is clear that he had no difficulty in paying the monthly rentals as required. I am of the view that the suggestion made by the prosecution when the petitioner was giving evidence at the Magistrate's Court does not attract any reason to doubt the evidence of the petitioner.

There was no material before the Magistrate's Court to show that the vehicle or the driver had been involved in any offences previously, which should have been considered in favour of the petitioner.

In a setting where drivers of vehicles often get changed or leave their employment, it is impossible to expect the owner of a vehicle to enter into written agreements or to give written instructions to a driver. What an owner can do at his best is to give proper oral instructions and rely on the driver employed by him to follow the instructions. The same thing cannot be said if the owner of the vehicle is a well-established company where the drivers are being employed on written contracts, but still offences can be committed without the knowledge of connivance of the organization which employed the driver even under a written contract and instructions. I am of the view that, no Court should expect a registered owner to take all possible precautions to prevent his or her vehicle being used in committing an offence, as there can always be some other precautions that can be taken under a given scenario.

Therefore, I am of the view that when assessing the evidence placed before a Court in an inquiry of this nature, a Judge should consider the relevant factors unique to each circumstance under which the offence has been committed and consider them in the balance of probability to find whether the owner of a vehicle has discharged his duty of safeguarding his property rights. I am of the view that expecting an owner to take all the precautions possible should not be the norm in an inquiry of this nature but to consider whether such an owner has taken precautions that can be expected of him under the given circumstances.

I am of the view that since it was the uncontradicted evidence that the vehicle which was the subject matter of the inquiry before the learned Magistrate had been used only for the purposes of transporting fruit, the instructions given by the owner of the vehicle to his driver should come within the meaning of all precautions he could have taken under the given circumstances.

At this juncture, I would like to quote again from the case **of Sadi Banda Vs. Officer in Charge of Norton Police station (supra)**, which I believe 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 gaged by the Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked."*

I am of the view that this a matter fit to exercise the discretionary power of revision of this Court, as the learned Magistrate has failed to consider the evidence placed before the Court in his correct perspective as considered above. I find that a miscarriage of justice has occasioned to the petitioner as a result of the learned Magistrate's decision to reject the evidence of the petitioner on the basis that he has only given verbal instructions to his driver and giving such instructions are not sufficient under the provisions of the Act.

I am also of the view that the judgment of the learned High Court Judge of Badulla cannot be justified as the judgment has also been reached justifying the narrow path taken by the learned Magistrate to confiscate the vehicle.

Accordingly, I set aside the judgment dated 03-08-2022 pronounced by the learned High Court Judge of the Provincial High Court of Uva Province Holden in Badulla, and also the order of the learned Magistrate of Badulla dated 31-10-2017, as both cannot be allowed to stand for the matters as considered above.

I order that the vehicle numbered 42-5722 shall be released to the petitioner of this application.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of Uva Province Holden in Badulla for necessary compliance.

Judge of the Court of Appeal

R. Gurusinghe, J.

I agree.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal