

**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 154P of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.*

**Court of Appeal No:**

CA/PHC/0038/2017

Warnakulasuriya Patabendige Nelson,

No. 221, Matara Road, Pallikudawa,

Tangalle.

**High Court Tangalle**

Case No. HC RA 01/2016

**REGISTERED OWNER PETITIONER-**

**PETITIONER-APPELLANT**

**Vs.**

**Magistrate's Court Tangalle**

Case No. 6248

1. Officer in Charge,

Police Station,

Tangalle.

**PLAINTIFF-RESPONDENT-**

**RESPONDENT**

2. The Attorney General,

Attorney General's Department,

Colombo 12.

**RESPONDENT-RESPONDENT**

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

**Counsel** : P. L. Gunawardena for the Appellant  
: Chathurangi Mahawaduge, S.C. for the Respondent

**Argued on** : 21-09-2023

**Written Submissions** : 07-12-2021 (By the Appellant)  
: 17-05-2022 (By the Respondent)

**Decided on** : 17-01-2024

**Sampath B. Abayakoon, J.**

This is an appeal preferred by the registered owner-petitioner-appellant (hereinafter referred to as the appellant) seeking to challenge the judgment dated 06-04-2017, pronounced by the learned Provincial High Court Judge of the Southern Province Holden in Tangalle.

The appellant has invoked the revisionary jurisdiction granted in terms of Article 154P of The Constitution by way of a revision application filed before the High Court seeking to challenge and set aside the order dated 06-01-2016 pronounced by the learned Magistrate of Tangalle, wherein the tipper truck numbered 43-8739 belonging to him was ordered to be confiscated.

The above-mentioned tipper truck was a subject matter in the Magistrate's Court of Tangalle case number 6248.

The Officer-in-Charge of the Tangalle police has charged one Pattiyakumburage Sunil Shantha for having transported 14 logs of Paaramaara timber valued at Rs. 31,802/- in the tipper truck numbered 43-8739, without a valid permit on 01-08-2011, at a place called Maarakolliya, Godigamuwa, and thereby committing an offence punishable in terms of section 40 read with section 25(2) of the Forest Act.

The said accused has pleaded guilty to the charge, and he has been fined accordingly.

After having confiscated the timber, the learned Magistrate of Tangalle has allowed the registered owner of the vehicle, who was not the accused, to show cause as to why the tipper truck should not be confiscated.

At the inquiry held in that regard, the appellant who is the registered owner of the vehicle, the accused who was the driver of the said vehicle, and a Buddhist monk has given evidence.

The appellant in his evidence has stated that he purchased this vehicle about two and a half years ago subjected to a finance facility. He has employed the accused as its driver and has engaged this vehicle for the purposes of hiring. It had been his evidence that he gave necessary instructions to the driver not to engage in illegal activities, and he was vigilant whether the driver is using the vehicle as instructed. The vehicle used to be parked in front of the driver's house for hiring purposes. The registered owner has stated that he was in the habit of calling the driver frequently and inquire about his activities. It had been his evidence that there were no issues with the driver or any complaints that he was doing illegal activities until he came to know about this detection.

It is clear from the Magistrate's Court proceedings that the registered owner was a person who was suffering from a nervous disorder, and hence, a person who could not do things as a normal person in his day-to-day affairs. It appears from his evidence that due to his illness, he was unable to remember some of the details of the incident. He has stated that he cannot remember the name of his driver or the date of the offence, but has maintained the position that what he told the Court was the truth, and he was not lying in that regard.

The accused of the Magistrate's Court case too has given evidence at the inquiry. It had been his evidence that while working as the driver of the vehicle belonging to the appellant, he received necessary instructions from him not to engage in any illegal activities and his instructions were only to transport materials like

bricks, sand, etc. He has stated that the registered owner used to inquire from time to time as to his whereabouts and he never used the vehicle for any illegal purpose.

Explaining what occurred on the day of the incident, he has stated that he was engaged by a person called Susil to transport some bricks from Maarakolliya to Pattiyapola area. It has been his position that after he transported the bricks to the house of the said person, he met a female on his way, and she requested him to transport the Paaramaara timber, which she claimed as timber donated to a temple called Subodhaaramaya at Pattiyapola.

The driver has claimed that the timber comprised of 14 decaying outer parts of a Paaramaara Tree (පිට පළව), and he agreed to transport the timber without thinking further, because it was said to him that it was a donation to the temple. He has stated that he received Rs. 250/- for the transportation, and had admitted that he failed to follow the instructions given by the owner of the vehicle on that instance.

The Buddhist priest who gave evidence has stated that he is from a temple called Sambodhi Viharaya in Godigamuwa. He has stated that the temple was in need of some timber and one of the benefactors (දායකයා) donated a Maara Tree in that regard, and he informed a person called Sunil of his need to transport the timber to the temple and he later came to know that the vehicle which transported the timber had been taken into custody by the police.

It appears from the evidence of the priest that his evidence has been confusing at its best. He has stated that the person he mentioned as Sunil was a driver, but under cross-examination, it appears that the person who he mentioned as Sunil was the benefactor who donated the tree to the temple, and had stated that the vehicle also belongs to Sunil.

The position taken up by the prosecution had been that the driver's evidence had not been that the tree was transported to Sambodhi Viharaya as stated by the

priest in his evidence, but to a temple called Subodhaaramaya which was also situated nearby.

In his order dated 06-01-2016, the learned Magistrate has considered the fact that the owner of the vehicle being a person with a health condition and his evidence that he used to be vigilant about his vehicle.

The learned Magistrate has determined that in the following manner.

“ලියාපදිංචි හිමිකරු වාහනය රියදුරුට ලබා දෙන අවස්ථාවේදී නීතිවිරෝධී ක්‍රියාවන් වලට යොදා නොගන්නා ලෙසට ඔහු රියදුරුට දැනුන්දීමක් සිදු කළේය යන්න රියදුරුගේ සාක්ෂිය වන බව පෙනී යයි. නමුත් සියලු සාධාරණ ක්‍රියාමාර්ගයන් ගත්තේය යන්න එම කරුණ ඔප්පු කිරීම මත පමණක් සංකෘත වන්නේ නැත.”

The learned Magistrate has doubted the registered owner's evidence where he has stated that he used to inquire about the activities of the driver periodically, and has considered the contradictions in the evidence of the driver and the Buddhist priest to observe that the registered owner has failed to establish that he has taken reasonable steps to prevent the offence being committed. The vehicle has been confiscated on the said basis.

When the matter went up before the learned High Court Judge of Tangalle, it appears that several objections has been raised as to the maintainability of the charge before the learned Magistrate of Tangalle and also based on section 48 of the Judicature Act, urging them as exceptional grounds that should require invoking the revisionary jurisdiction of the Court. The learned High Court Judge has found that the said grounds raised have no bearing and the said grounds cannot be considered as exceptional circumstances for the Court to invoke the revisionary jurisdiction of the Court. Accordingly, the revision application filed by the appellant seeking to challenge the order of the learned Magistrate of Tangalle has been dismissed.

When this matter was taken up for argument, the learned Counsel for the appellant thought it fit to argue that the charge against the accused in the

Magistrate's Court was defective and hence, a conviction based on a defective charge cannot attract the provisions of the Forest Ordinance where a vehicle can be confiscated, among other matters brought to the notice of this Court by the learned Counsel.

The contention was that in the charge preferred against the accused in the Magistrate's Court case, the prosecution has failed to refer to Forest (Amendment) Act No. 65 of 2009.

However, it is clear from the charge preferred against the accused, the prosecution has clearly informed the accused that he is being charged in terms of section 40 read with section 25(2) of the Forest Ordinance. It is clear that the accused has pleaded guilty knowing very well the charge for which he is pleading guilty. The registered owner of the vehicle had not been misled in any manner as he has taken steps to call evidence to establish that he had no knowledge of the offence and he took due precautions to prevent such an offence being committed.

I find no reasons to accept that there was a defect in the charge sheet or a defect that has a vitiating effect on the inquiry held after the conviction.

At the hearing of this application, the learned State Counsel took up a preliminary objection as to the maintainability of this application on the basis that the appellant has sought to set aside only the judgement of the learned Provincial High Court Judge of Tangalle, and not the order of the learned Magistrate of Tangalle in the prayer of the petition of appeal.

Citing the judgement pronounced in the Court of Appeal case number **CA/PHC/APN/141/16** decided on 25-01-2017, it was the contention of the learned State Counsel that the appeal should stand dismissed on that ground alone.

However, I am of the view that the matters considered in the above-mentioned case were much different to the appeal before this Court. In the said case, the application has been dismissed on the basis that the petitioner has sought to set aside a non-existing order, alleged to have been given on a certain date.

In the case under consideration, the appellant has sought to set aside the judgement pronounced by the learned High Court Judge of Tangalle in an application to challenge the order made by the learned Magistrate of Tangalle, who ordered the confiscation of the vehicle belonging to the appellant. I am of the view that although it would have been better for the appellant to pray for the setting aside of the learned Magistrate's order, since the appellant has sought to set aside the judgement of the learned High Court Judge, where he has sought the setting aside of the order of the learned Magistrate, if set aside, in my view, it would amount to setting aside of the order of the learned Magistrate as well. Therefore, I do not find a basis for the preliminary objection taken up by the learned State Counsel.

Having considered the facts, circumstances, and the order of the learned Magistrate, it is clear as I highlighted above, that the learned Magistrate has not doubted that the registered owner has given necessary instructions to the driver not to engage in illegal activities. The learned Magistrate has considered the evidence of the appellant, as well as, that of the accused of the Magistrate's Court case as credible evidence up to that extent. However, based on the apparent contradictions of the evidence of the driver with regard to the transporting of timber to a certain place and that of the priest who gave evidence to substantiate the evidence of the driver, it has been determined that the registered owner has not taken reasonable steps to prevent the offence being committed.

It is settled law that in an inquiry of this nature, the burden of proof is in the balance of probability. It is my considered view that any evidence given in an inquiry needs to be considered in the context of the given facts and the

circumstances unique to each case. There is no doubt that the owner of the vehicle is a person who is suffering from a nervous disorder. It has to be understood that such a person cannot physically inspect the vehicle all the time. I find that he has given clear evidence as to the instructions he gave to his driver, and the steps he used to take in order to be vigilant about his vehicle. I am not in a position to accept that the contradictions between the evidence of the driver and the priest, should be considered against the stand taken by the registered owner in his evidence, as it has been established that he had no hand in the illegal transportation of the timer.

In the case of **Sadi Banda Vs. Officer In Charge Of Nortonbridge Police Station (2014) 1 SLR 33**, it was observed that,

*“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 has given evidence and stated, he purchased the 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 has confiscated the lorry. 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 and or the accused are habitual offenders in 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.”*



I am of the view that after determining as to the knowledge of the appellant and the fact that he has given necessary instructions to the driver, the learned Magistrate should have taken a more pragmatic view of the evidence, rather than determining it in a manner to conclude that the appellant has failed to establish he has taken due precautions. I am of the view that if considered in the correct perspective, there was sufficient evidence before the learned Magistrate on the balance of probability to justify the release of the vehicle to the appellant.

I am also of the view that these factual matters should have been considered by the learned High Court Judge of Tangalle before the revision application filed by the appellant was dismissed.

At this juncture, I would like to quote again from the case of **Sadi Banda Vs. Officer In Charge Of Nortonbridge 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 gauged by 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 as stated above, I set aside the judgement dated 04-06-2017 pronounced by the learned High Court Judge of the Provincial High Court Judge of the Southern Province Holden in Tangalle and the order dated 06-01-2016 by the learned Magistrate of Tangalle, as I find no reason to allow them to stand.

Accordingly, I order the release of the vehicle numbered 43-8739 to its registered owner.

The Registrar of the Court is directed to communicate this judgement along with the original case record for the relevant High Court for information, and to the relevant Magistrate's Court for necessary compliance.

Appeal allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal