

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

Park Warden

Application No:

Wilpattu National Park

CA(PHC)APN 0144/22

Hunuwilagama, Pahalamaragahawewa.

High Court of Anuradhapura

Complainant

HCRA 13/2022

Vs.

MC Nochchiyagama

Case No.41435

Herath Bandage Gunawardena

Wanamalgama, Horuwila.

Accused

Sugathapalage Indika Mahesh Bandara

Lindawwa, Nochchiyagama.

Claimant

AND THEN BETWEEN

Sugathapalage Indika Mahesh Bandara

Lindawwa, Nochchiyagama.

Claimant-Petitioner

Vs.

The Warden

Wilpattu National Park

Hunuwilagama, Pahalamaragahawewa.

Complainant-Respondent

Herath Bandage Gunawardena
Wanamalgama, Horuwila.

Accused-Respondent

The Attorney General
Attorney General's Department
Colombo-12.

Respondent

AND NOW BETWEEN

Sugathapalage Indika Mahesh Bandara
Lindawwa, Nochchiyagama.

Claimant-Petitioner-Petitioner

Vs.

Park Worden
Wilpattu National Park
Hunuwilagama, Pahalamaragahawewa.

Complainant-Respondent-Respondent

Herath Bandage Gunawardena
Wanamalgama, Horuwila.

Accused-Respondent-Respondent

The Attorney General
Attorney General's Department
Colombo-12.

Respondent-Respondent

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

P. Kumararatnam, J.

COUNSEL : **Asanka Dissanayake with Ershan Ariaratnam for the Petitioner.**

S.M.M.Fahim, SC for the State.

ARGUED ON : **16/10/2023.**

DECIDED ON : **20/02/2024.**

JUDGMENT

P. Kumararatnam, J.

The Complainant-Respondent-Respondent (hereinafter referred to as the Complainant) filed a charge sheet against the Accused-Respondent-Respondent (Hereinafter referred to as the Accused) under and in terms of Section 9A (1) read with Section 10(d) of the Fauna and Flora Protection Ordinance as amended by Act No.22 of 2009 for illegally using a machine (Backhoe) bearing engine No.08432 and bearing chassis No. 19308, in respect of which the Petitioner is the owner.

As the Accused pleaded guilty to the charge sheet, the Learned Magistrate of Nochchiyagama had convicted the Accused as charged and imposed a fine of Rs.20000/- with a default sentence and fixed for an inquiry whether to confiscate or not the machine (Backhoe) which had been used to commit the offence.

Considering the Section 64 (1) of the Fauna and Flora Protection Ordinance, the “Backhoe” which is the subject matter could be considered as an “instrument” used in the commission of the offence.

At the conclusion of the inquiry, the Learned Magistrate had decided to confiscate the aforesaid machine by his order dated 01.09.2022. At the inquiry, the Petitioner and the Accused had given evidence in support of the Petitioner’s claim.

Being aggrieved by the order of the Magistrate, the Petitioner filed a Revision Application in the Provincial High Court of Anuradhapura to revise the order of the Learned Magistrate of Nochchiyagama. After support when moved to issue notice, the Learned High Court Judge of Anuradhapura by his order dated 06.10.2022 refused to issue notices to the Respondents.

Now the Petitioner filed this Revision Application to set aside the order of the Learned High Court Judge of Anuradhapura dated 06.10.2022 and the order of Learned Magistrate of Nochchiyagama dated 01.09.2022.

Although the absolute owner of the machine was the Lanka Oriental Leasing Company, the company had submitted a letter to the Court that they have no objection to the machine concern being released to the owner. As the Petitioner is the owner of the machine, the Court had released the it to the Petitioner after perusal of the necessary documents submitted.

The Petitioner states that although he had filed an appeal to this Court against the order of the Learned High Court Judge of Anuradhapura, he had compelled to file this Revision Application in the event if the Learned Magistrate takes steps to enforce the order by auctioning the machine concern, it will cause not only great prejudice but he has to suffer substantial loss as well.

The Petitioner had submitted following exceptional circumstances for consideration:

- a) Has the Learned High Court Judge failed to consider that on the date of supporting, the Petitioner had only to put forward a prima facie case, and thereby erred not to issue notices on the Respondents?
- b) Has the learned High Court Judge failed to appreciate that there were exceptional circumstances warranting the exercise of revisionary jurisdiction of the High Court as pleaded in the petition of the Petitioner?
- c) Have both the Learned Magistrate and the Learned High Court Judge failed to consider and/or misdirected themselves with regard to the rights of the absolute owner and the absolute owner to be heard in a claim inquiry with regard to a vehicle?
- d) Have both the Leaned Magistrate and the Learned High Court Judge failed to consider that the Petitioner has proved ownership of the said vehicle on a balance of probability?
- e) Have both the Learned Magistrate and the Learned High Court Judge failed to consider that the Petitioner has proved that the Petitioner had no knowledge of the commission of the offence?
- f) Have both the Learned Magistrate and the Learned High Court Judge failed to consider that the Petitioner had taken all precautions to prevent the use of the vehicle for the commission of the offence?

- g) Have both the Learned Magistrate and the Learned High Court Judge misdirected themselves by imposing a higher burden of proof on the Petitioner in a vehicle confiscation inquiry?
- h) Have both the Learned Magistrate and the Learned High Court Judge failed to consider and properly apply the accepted legal principles and judicial precedents in deciding whether to confiscate or not a vehicle liable for confiscation in a vehicle claim inquiry?

In this case the Learned High Court Judge only considering the order of the Magistrate Court of Nochchiyagama decided to dismiss the Revision Application stating that that the Petitioner had failed submit plausible reasons to revise the Learned Magistrate's order.

In this case the machine (Backhoe) had been confiscated for excavating gravel within the boundaries of Wilpatthu National Park without the written authority of the Director of Wildlife Department.

The Petitioner has given evidence in the Court and has claimed that he was unaware of the crime being committed as he has given the machine for only to dig 40 holes on the land owned by R.P.Sugathadasa to plant coconut plants. The operator Gunawardena of the machine was appointed one year prior to the incident. The operator is paid 20% commission of the charge levied by the Petitioner. The operator had been given proper instructions specially not to use the machine for any illegal activities. The Petitioner had given evidence and vividly explained how he had taken preventive measures that the machine not being used for illegal activities.

The operator of the machine Gunawardena also gave evidence on behalf of the Appellant in the inquiry. According to him, after he finished work contracted with one R.P.Sugathadasa, two villagers had come there and

pleaded him to excavate gravel in order to put on to a road which was used by the common people. Although he refused at the very outset but agreed to the request as the duo told him to help them considering it was a meritorious act. As such, with much reluctant he had excavated gravel from a ditch in a land. But the Petitioner was not aware that the land is belonging to the Wildlife Department. According to him he had not sought permission from the Petitioner to excavate gravel.

Despite the adducing cogent evidence that the Petitioner had no knowledge about committing the offence by the Accused, the Learned Magistrate has dismissed the application on the basis that the Petitioner had failed to show that he took all necessary precautions to prevent a crime being committed.

The Learned High Court Judge, relying on the order of the Magistrate of Nochchiyagama, refused to issue notice to the Respondents.

In **Commissioner of Police v. Tanes (1957-58) 68 CLR 383**, the Court held that:

"It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard ... "

By this order of the Learned High Court Judge of Anuradhapura, the Petitioner's right to a fair trial has been greatly violated. Considering the time period consumed after the High Court order, I consider it is not appropriate to send this case for re-hearing. Hence, firstly, I set aside the order of the Learned High Court Judge of Anuradhapura dated 06.10.2022.

Now I am going to consider whether the exceptional circumstances raised on behalf of the Petitioner have any merit. As the exceptional circumstances mentioned above are interconnected, all exceptional circumstances will be considered together hereinafter.

As the law stands today, the Claimant in a confiscation inquiry should prove that he or she had have taken all preventive measures on a balance of probability. Hence, the Learned Magistrate should consider all the evidence very carefully before coming to a conclusion.

In **The Orient Financial Services Corporation Ltd v. The Range Forest Officer, Ampara and Hon. Attorney General [2013] 1 SLR 208** the Court held that:

“1. Before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance probability 209 satisfies the Court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor, was he privy to the commission of the offence, the vehicle has to be released to the owner.

2. When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence.”

In **Mudankotuwa v Attorney General [1996] 2 SLR 77** the court held that:

“As seen from the evidence the vehicle was taken over by the driver from the Petitioner’s house in the morning and it was

returned to him in the evening with the collections. Further, clear instructions had been given by the Petitioner to the driver, not to transport timber or use the vehicle for any illegal purpose.....Therefore, the Magistrate was in error when he came to the conclusion that the Petitioner had exercise no control or supervision over the driver regarding the use of the tractor”.

In this case the Petitioner had hired the Accused only in the capacity of an operator to engage in hires only allowed by the Petitioner. As such at all times the Petitioner had the full control over his machine.

Further, the Petitioner, as the owner of the machine had given evidence and explained to the Court that he had taken all the possible and necessary precautions to prevent the machine being used for illegal purposes. Hence, when considering the evidence, experience of common life must be seriously considered. The level of precautions expected under Section 64(1) of the Fauna and Flora Protection Ordinance as amended by Act No.22 of 2009 should not be artificially looked at but should be assessed subjectively based on the facts and the circumstances of each case.

In **CA/PHC/203/17 decided on 21.06.2022**, Iddawala J, held that:

“A vehicle owner employing a driver to carry out transportation of goods cannot reasonably be expected to physically visit each and every site to ensure that illegal activities are not carries out using his vehicle”.

The Learned Magistrate also should have considered that there had been no previous or pending case against in respect of the machine that had been used for illegal activities and the Accused is not a habitual offender.

In **Mallawa Arachchige Supun Malhara v The Attorney General CA(PHC) 09/2015 dated 28.08.2020** the Court held that:

“The Accused is not a driver employed by the Appellant; he is a person doing business of his own who has access to the vehicle when requested. It is fair to assume that the Appellant would not have expected the Accused to do anything illegal. This is what is elicited in the evidence of the Appellant. It is quite apparent that there is no evidence that the Appellant was privy to the illegal act of the Accused.”

In **Ceylinco Leasing Corporation v M.H. Harrison and others SC Appeal 43/2012 dated 07.12.2017** His Lordship Aluvihare P.C J. held that:

“Section 40 of the Forest Ordinance provides for the confiscation of the conveyance used to transport the illicit timber and the provision to my mind is intended to strike at the means of transportation by providing for the confiscation of the conveyance used to transport the illicit timber, and is both a logical and legal response to the problem of illicit felling. Even in the instant case the two persons who were charged happened to be the driver of the lorry and another person who had been seated next to the driver. Although they were in physical possession of the illicit timber, may have been employees of the “owner” of the lorry. Thus, not much deterrence is achieved by imposing punishment on the persons who were in actual physical possession of illicit timber, when in most cases, the owner is behind the illegal operation.”

It is apparent that in the absence of the Petitioner having had knowledge of excavation gravel and /or having had any monetary or personal benefit from the crime committed cannot be deemed as the person behind the illegal operation.

The Learned Magistrate found fault with the Petitioner for not calling any other witnesses in support of his claim. This is a clear misdirection against the scope of Section 134 of Evidence Ordinance.

Section 134 states:

“No particular number of witnesses shall in any case be required for the proof of any fact”.

In the case of **Vadivelu Thevar Vs. State of Madras** SIR S C 614 the Indian Supreme Court observed: -

“On a consideration of the relevant authorities and the provisions of the IEA 1872, the following propositions may be safely stated as firmly established:

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness whose evidence is that of an accomplice or of an analogous character. (Emphasis is mine)

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon a plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence, has categorically laid it down that „no particular number of witnesses

shall, in any case, be required for the proof of any fact". The Legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses."

Hence, the Learned Magistrate simply dismissing the application on the basis that the Petitioner had failed to show that he took all necessary precautions to prevent a crime being committed is not correct in this case.

Hence, I decide that the order of Learned Magistrate of Nochchiyagama dated 01.09.2022 too be set aside in this revision.

Therefore, this revision application is allowed.

I direct that the machine (Backhoe) bearing engine No. 08432 and bearing chassis No. 19308 be released to the Petitioner.

The Registrar of this Court is directed to send this Judgement to the High Court of Anuradhapura and the Magistrate Court of Nochchiyagama.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL