

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

Nagamany Leela

Accused-Appellant

Vs

The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 121/2010
HC Batticaloa2465/2007

Before : Sisira J De Abrew J &
PWDC Jayathilake J
Counsel : Dr. Ranjith Fernando for the accused appellant
Hiranjan Peiris SSC for the Respondent

Argued on : 23.10.2013
Decided on : 14.11.2013

Sisira J De Abrew J

The accused appellant in this case was convicted for aiding and abetting four persons unknown to the prosecution to commit the murder of a man named Kandasamy Vasanthan. He was shot dead by some people unknown to the prosecution. The accused appellant after trial was sentenced to death. Being aggrieved by the said conviction and the sentence she has appealed to this court. Facts of this case may be briefly summarized as follows.

Vijaya and her husband Rasathurai were running a video shop in the police area of Eravur. The deceased person Vasanthan was working as an assistant in the

shop. He used to sleep in the house Vijaya. Rasathurai was a member of LTTE. Vijaya, in her evidence, admits that at the time of the incident in this case two armed groups known as Prabakaran's group and Karuna's group were operating. On 24.10.2004 around 8.00 p.m. while Vijaya, her children and Vasanthan were sleeping in her house, she heard the accused appellant who was living in her neighbourhood calling her. When she opened the door of the house and the gate of the garden, she saw the accused appellant standing near the gate. When the accused appellant made inquiries about Vijaya's husband, she informed her that husband was not at home as he had gone out in the evening. The accused appellant then requested her to give video deck and the cassette. At this time Vijaya says that she heard a sound of firing. Vasanthan fell on the ground as he sustained injuries from the firing. Then she saw four people whom she could not identify as they had covered their face. At this time the accused appellant used the following language. "Do not let her go. Shoot her too." The accused appellant had also told the gunmen to leave the place. Vasanthan died due to gunshot injuries.

The dock statement of the accused appellant may be briefly summarized as follows. While she was sleeping in the night, some people came and told her that Periyavaran was expecting her. She then went with them. On the way, they instructed her to knock on the door and call Vijaya which she did. Thereafter she heard the sound of gun fire. This was the summary of her dock statement.

It is necessary to consider whether the evidence of Vijaya that the accused appellant told the four persons to shoot her (Vijaya) too and asking them to leave the place is acceptable or not. If this evidence is true, it means that the accused appellant had discussed the shooting incident with the four persons prior to the incident. If that is so the accused appellant could have, prior to the shooting incident, told the four persons to eliminate Vijaya too. There was no necessity for her to tell these words to be heard by the others. When I consider all these matters,

the evidence of Vijaya regarding the words used by the accused appellant does not satisfy the test of probability. I therefore hold that it is dangerous to act on the above evidence of Vijaya. Learned trial judge has not considered these matters.

Was there a conspiracy between the accused appellant and the four persons who shot the deceased? If there was such a conspiracy would she have continued to stand near the gate of Vijaya to be seen by the inmates of the house? She could have called Vijaya and easily disappeared from the place. When I consider all these matters, it is not possible to conclude that she had conspired with the four persons who shot the deceased.

According to her dock statement she went and called Vijaya and this was done on the instructions of four unknown persons. Is there any reason to reject this version? I think not. The learned trial judge rejected the dock statement but did not give any reasons for the rejection. In Kularathne Vs Queen 71 NLR 529 Court of Criminal Appeal declared following guide lines with regard to the evaluation of a dock statement.

1. If the dock statement is believed it must be acted upon.
2. If the dock statement raises a reasonable doubt in the prosecution case, the defence must succeed.
3. Dock statement of an accused should not be used against the other accused.

The arrival of the accused appellant at Vijaya's house is also accepted by Vijaya. In my view, there is no reason to reject the dock statement of the accused appellant. It creates a reasonable doubt in the prosecution case.

Did the accused appellant intentionally aid the four persons to shoot the deceased person? This question must be considered with the stand taken up by the accused appellant. She says it was true that she went and called Vijaya but it was

done on the instructions of the four persons. This was the time, according to her, where two armed groups were operating. If she did not obey their command her life would have been in danger. Thus calling on Vijaya was done under duress. Then the said act done by her was not intentional. Thus it cannot be said that the accused appellant intentionally aided the four persons who shot the deceased person. There is no evidence that the accused appellant instigated four persons to shoot Vasanthan. The accused appellant was charged with the offence of abetment. Section 100 of the Penal Code defines the abetment in the following manner.

“A person abets the doing of a thing who-

Firstly-instigates any person to do that thing; or

Secondly-engages in any conspiracy for the doing of that thing; or

Thirdly-intentionally aids, by any act or illegal omission, the doing of that thing.”

I have earlier pointed out that the accused appellant did not instigate the four persons who shot Vasanthan to shoot Vasanthan. Thus her act does not fall within the meaning of the 1st limb of Section 100 of the Penal Code. I have earlier held that the accused appellant had not engaged in any conspiracy with four persons to shoot Vasanthan. Thus the act of the accused appellant does not fall within the meaning of the 2nd limb of Section 100 of the Penal Code. I have also held that the accused appellant did not intentionally aid the four persons to shoot Vasanthan. Thus her act does not fall within the meaning of the 3rd limb of Section 100 of the Penal Code. Therefore in my view the prosecution has not proved beyond reasonable doubt the ingredients of the offence of abetment. Further I have earlier held that the dock statement of the accused appellant creates a reasonable doubt in the prosecution case. If that is so the defence of the accused appellant should succeed. The defence of the accused appellant was that she did not commit this offence. Thus the accused appellant is entitled to be acquitted.

For the above reasons, I set aside the conviction and the death sentence and acquit the accused appellant of the charge.

Appeal allowed.

Judge of the Court of Appeal

PWDC Jayathilake J

I agree.

Judge of the Court of Appeal.