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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0250/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/3861/2007

Selvakumar Sathyaleela *alias* Sathya

ACCUSED

AND NOW BETWEEN

The Attorney General,

Attorney General's Department,

Colombo

COMPLAINANT-APPELLANT

Vs.

Selvakumar Sathyaleela *alias* Sathya

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Azard Nawavi, DSG for the Complainant-Appellant

: Rienzie Arsecularatne, P.C. with S. Rathnawel, Chamindri Arsecularatne, Ramitha Gnanaraj and Thilina Punchihewa for the Accused- Respondent

Argued on : 22-11-2022

Written Submissions : 07-04-2021 (By the Accused- Respondent)

: 16-12-2019 (By the Complainant-Appellant)

Decided on : 23-01-2023

Sampath B Abayakoon, J.

This is an appeal by the complainant appellant (hereinafter referred to as the appellant) on being aggrieved of the judgment dated 16-01-2018 and the sentence of even date by the learned High Court Judge of Colombo.

The appellant, acting under the powers vested in him as the Attorney General of the Republic, filed the indictment relevant to the appeal under consideration as a direct indictment in terms of section 3(1) of the Code of Criminal Procedure (Special Provisions) Act No. 15 of 2005.

The charges preferred against the accused respondent (hereinafter referred to as the respondent) are as follows;

(1) During the period between 01-03-2004 to 07-07-2004 the accused respondent committed conspiracy or abatted along with the now deceased Thayagaraja Jayarani and people unknown to the prosecution to commit the murder of Douglas Devananda, which is in an offence punishable with death. However, since the murder of the

said Douglas Devananda did not occur, the accused respondent committed an offence read with section 113(A), section 108 and section 296 of the Penal Code and punishable accordingly.

(2) At the same time and at the same transaction the accused respondent abatted the now deceased Thayagaraja Jayarani and people unknown to the prosecution to commit the murder of Douglas Devananda, which in an offence punishable with death, and since the said murder did not occur, she committed an offence punishable with section 296, read with section 108 of the Penal Code.

(3) In the same transaction as mentioned in the above charges, and on or about 07-07-2004, the accused aided and abetted the earlier mentioned Jayarani to commit the murder of Police Inspector Ekanayaka at Kollupitiya and thereby committed an offence punishable in terms of section 296 read with section 104 of the Penal Code.

(4) In the same transaction as mentioned in the above charges, and on or about 07-07-2004, the accused aided and abetted the earlier mentioned Jayarani to commit the murder of Police Sergeant 411 Artigala at Kollupitiya and thereby committed an offence punishable in terms of section 296 read with section 104 of the Penal Code.

(5) In the same transaction as mentioned in the above charges, and on or about 07-07-2004, the accused aided and abetted the earlier mentioned Jayarani to commit the murder of one Bonifes Liyanage at Kollupitiya and thereby committed an offence punishable in terms of section 296 read with section 104 of the Penal Code.

(6) In the same transaction as mentioned in the above charges, and on or about 07-07-2004, the accused aided and abetted the earlier mentioned Jayarani to commit the murder of one Kasthuri Badal at Kollupitiya and thereby committed an offence punishable in terms of section 296 read with section 104 of the Penal Code.

Initially, the date of offence mentioned in the indictment in relation to the 3rd to 6th counts had been 4th July 2004, which has been duly amended on 9th November 2009 by the prosecution with the permission of the Court to read as 7th July 2004.

After trial, the learned High Court Judge of Colombo found the respondent guilty for the 2nd count preferred against her and she was acquitted of the other charges.

Accordingly, she was sentenced for a period of 24 months rigorous imprisonment suspended for 15 years. In addition, she was ordered to pay a fine of Rs. 25,000/-, in default 12 months simple imprisonment.

It appears that the respondent was so sentenced having considered the fact that the respondent was in remand custody for thirteen years, which was six years over the maximum period of the sentence that can be imposed on a person found guilty for an offence in terms of section 108 of the Penal Code, which was the penal provision under which the respondent was found guilty.

The appellant has filed this appeal on the basis that the learned High Court Judge was misdirected when the respondent was acquitted of the 1st, 3rd, 4th, 5th and the 6th counts preferred against her, and the sentence imposed on the respondent for the count where she was found guilty was wholly inadequate given the seriousness of the crime for which she was found guilty.

The facts that led to the indictment against the respondent, briefly, are as follows;

On the day of this incident, namely, on 7th July 2004, the respondent has accompanied Thaygaraja Jayarani mentioned in the indictment to the Colombo office of the Eelam People's Democratic Party (EPDP), whose leader was Mr. Douglas Devananda, a government minister at that time. Both the respondent and the earlier mentioned Jayarani has gained access to the office in the pretext of meeting the minister. The respondent was known to the minister as

well as the persons who worked at the party office as she too has been working at the EPDP Jaffna office previously and was also a party supporter.

As for the security procedures of the office, when the security personnel attempted to body check Jayarani, she has refused to be searched sighting shyness for such a check.

Because of the suspicions arose due to this, the said Jayarani has been handed over to police for further investigations and taken to the Kollupitiya police station. At the police station, she has detonated a suicide bomb she was wearing which killed herself, and the four persons relevant to the 3rd to 6th charges mentioned in the indictment, while several others also received injuries.

After this incident, the respondent has been promptly arrested. She has been produced before the Colombo Fort Magistrate, on the following day, where she has given a statement to the Magistrate in terms of section 127 of the Code of Criminal Procedure Act No. 15 of 1979.

At the hearing of this appeal, it was the contention of the learned Deputy Solicitor General (DSG) for the appellant that the learned High Court Judge has well considered the facts and the relevant law and had reached right conclusions in that regard until the learned High Court Judge was misdirected in his final conclusions in the operative part of the judgment.

Citing the evidence led at the trial and the reasoning in the judgment he brought to the notice of the Court that it has been determined that the respondent, along with the deceased Jayarani and other members of the terrorist movement Liberation Tigers of Tamil Eelam (LTTE) has conspired with the common purpose of assassinating minister Devananda, although the said task failed. It has also been determined that the respondent aided and abetted in the commission of the offence knowingly.

The learned DSG Pointed to the fact that the respondent who has given evidence in this action under oath, has admitted or has not challenged most of the evidence led at the trial, other than claiming that she had no knowledge that Jayarani was a suicide bomber and she accompanied her to meet the minister due to a chance meeting of her near the EPDP office.

Disagreeing with the conclusions of the learned High Court Judge as to the reasons for finding the respondent not guilty for the 1st count preferred against her, it was the submission of the learned DSG that the learned trial judge was misdirected when it was determined that section 108 of the Penal Code has no application for the facts of the matter. He was also of the view that there was ample basis for the learned trial judge to act under section 177 of the Code of Criminal Procedure Code if it was the case, as such an action would not have caused any prejudice to the respondent. It was his view that the 1st count preferred against that appellant was correct and there was evidence beyond reasonable doubt against the respondent in that regard, as correctly determined by the learned High Court Judge.

Commenting on the basis upon which the respondent has been acquitted of the 3rd,4th,5th, and the 6th counts, it was his submission that the determination that detonating a suicide bomb at the Kollupitiya police station was not a result of the respondent aiding and abating Jayarani to assassinate minster Devananda, but an unexpected event for the respondent, was also a total misdirection. He pointed out that the said incident occurred as a direct result of the conspiracy and the aiding and abating of the respondent to commit the crime of assassinating the Minister. He was of the view that there was sufficient evidence before the Court to convict the respondent for the said counts as well.

Under the circumstances, the learned DSG urged the Court to set aside the acquittal of the respondent and convict her for all the charges preferred against her and to sentence her accordingly.

He pointed out further that giving the respondent a suspended sentence on the basis of her long incarceration was not warranted given the seriousness of the crime committed by her.

The learned President's Counsel making submissions on behalf of the respondent, defended the judgment and the sentence of the learned High Court Judge on the basis that determinations reached by the learned trial judge were correct and need no disturbance from this Court.

Commenting on the acquittal of the respondent from the 1st count it was his view that if the prosecution chose to charge the respondent for the conspiracy where there is a separate penal provision or to base the charge on the basis of section 102 instead of section 108 of the Penal Code, a conviction could have been sustained. He submitted that the learned High Court Judge's determination that the said charge has been wrongly formulated and amending the charge at the stage of the judgment in terms of section 167 of the Code of Criminal Procedure Code will cause prejudice to the respondent was a correct decision.

He made further submissions in line with the learned High Court Judge's view that the incident at the Kollupitiya police station cannot be attributed to the respondent on the basis of conspiracy and aiding abating to the crime.

He moved for the dismissal of the appeal by the appellant arguing that it has no merit, and for an order affirming the judgment and the sentence imposed by the learned High Court Judge.

As I have considered earlier, this is a case where the learned High Court Judge has determined that all the relevant facts as elicited by way of evidence by the prosecution have been proved beyond reasonable doubt, and a case where the defence put forward by the respondent has been rejected.

I find no reason to disagree with the said determinations be the learned High Court Judge as they have been reached after well considering and analyzing the evidence in its totality with sound reasoning.

The reason for the acquittal of the respondent of the 1st count preferred against her had been on the basis that the said charge against her was defective. The learned High Court Judge has reason out the said determination in the following manner.

දණ්ඩ නීති සංග්‍රහයේ 108 වන වගන්තියේ සඳහන් වන්නේ වෙනම වරදකි. එනම් මරණයෙන් දඬුවම් කළ හැකි යම් වරදක් සිදු කිරීමට අනුබල දෙන තැනැත්තෙකුගේ එකී අනුබල දීමේ ප්‍රතිඵලයක් වශයෙන් එම වරද සිදු කරනු නොලැබී නම් එබඳු අනුබල දීමකට දඬුවම් දීම සඳහා මේ සංග්‍රහයෙහි පැහැදිලිව විධි විධාන සලසා නොමැති නම් අනුබල දෙන තැනැත්තා අවුරුදු 7 ක් දක්වා කාල සීමාවක දෙයාකාරයෙන් එක් ආකාරයකට බන්ධනාගාර ගත කිරීමට හා දඩයකට යටත් විය යුතු බව එම වගන්තියේ සඳහන් වේ.

මේ අනුව දණ්ඩ නීති සංග්‍රහයේ 108 වන වගන්තියේ සඳහන් වන්නේ මරණයෙන් දඬුවම් කළ හැකි වරදක් සිදු කිරීමට අනුබල දී එහි ප්‍රතිඵලයක් ලෙස එම වරද සිදු නොවීමයි. මෙහිදී ඩග්ලස් දේවානන්ද ඝාතනය කිරීමට චිත්තිකාරිය විසින් අනුබල දී එම වරද සිදු කිරීමට නොහැකි වී තිබේ.

01 වන චෝදනාවෙහි ඉදිරිපත් කර ඇති වගන්තීන් වන්නේ 113(අ) වගන්තිය සමග කියවිය යුතු 108 වන වගන්තිය සමග කියවිය යුතු 296 වන වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් බවය. 113 (ආ) වගන්තිය වන්නේ යම් වරදක් සිදු කිරීමට හෝ ඊට අනුබල දීමට කුමන්ත්‍රණය කිරීමයි. මෙම චෝදනාවෙහි පවතින දෝශය වන්නේ දණ්ඩනීති සංග්‍රහයේ 108 වන වගන්තියෙහි දැක්වෙන මරණයෙන් දඬුවම් කල හැකි යම් වරදක් සිදු කරනු නොලැබීම සඳහා කුමන්ත්‍රණය කිරීමක් සිදු විය නොහැකි බැවිනි. කුමන්ත්‍රණය කල හැක්කේ වරදක් සිදු කිරීම සඳහාය. දණ්ඩනීති සංග්‍රහයේ 108 වන වගන්තියේ දැක්වෙන්නේ වරදක් සිදු කරනු නොලැබෙන අවස්ථාවක් ගැනය. ඒ සඳහා කුමන්ත්‍රණය කල නොහැකිය. ඒ අනුව 01 වන චෝදනාව නෛතික වශයෙන් දෝශ සහගත වේ.

The above reasoning shows that it has been determined that there cannot be a conspiracy to not to commit an offence as in terms of section 108 of the Penal Code.

As the learned High Court Judge has correctly held that there was a conspiracy to assassinate minister Devananda and the respondent was part of the conspiracy and she aided and abated in order to achieve that purpose and that attempt failed, I find it unnecessary to consider the legal principles governing the offences of conspiracy and the abatement any further.

However, I find it necessary to consider and interpret the section 108 of the Penal Code, as it was the basis for the acquittal of the respondent of the 1st count preferred against her.

Section 108 of the Penal code reads as follows;

> **108. Whoever abates the commission of an offence punishable with death shall, if that offence be not committed in consequence of the abatement, and no express provision is made by this Code for the punishment of such abatement, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;**
>
> **And if any act for which the abator is liable in consequent of the abatement, and which causes hurt to any person, is done, the abator shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.**

Illustration

> **A instigates B to murder Z. The offence is not committed. If B murdered Z he would have been subject to the punishment of death. Therefore, A is liable to imprisonment for a term which may extend to seven years, and also fine; and if any hurt is done to Z in consequent of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and a fine.**

I am of the view that the primary basis upon which a charge can be formulated under this section is the abatement for a commission of an offence and nothing else. Section 113A of the Penal Code, which provides the definition of the offence conspiracy has been mentioned in order to better explain the charge that the abatement was a result of the conspiracy to assassinate Minister Devananda. Therefore, I find no basis for the contention that there should have been a separate charge of conspiracy.

When it comes to the contention that the defect in the charge was the failure to mention section 102 as the punishable section rather than 108, I find it necessary to draw the attention to section 164 of the Code of Criminal Procedure Act No. 15 of 1979 which refers the basic requisites of a charge.

The said section reads as follows;

164.

(1) Every charge under this code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged.

(4) The law and the section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to

constitute the offence charged was fulfilled in the particular case.

(6) The charge shall when it preferred, whether at the inquiry preliminary to committal for trial or at the trial. Be read to the accused in a language which he understands.

I am of the view that a careful reading of the section and the illustration provided, would amply demonstrate that the 1st count preferred against the respondent was in conformity with the relevant provisions of the Code of Criminal Procedure Act.

The offence of conspiracy and abatement has been clearly mentioned and described so that the respondent could understand the basis upon which she has been charged, since the intended purpose of the actions of the respondent, which was the murder of Minister Devananda was not achieved. I find that the prosecution has correctly charged the respondent in terms of section 108, mentioning it as the punishable section.

I find that the learned High Court Judge has well described the purpose of section 108 of the Penal Code in paragraph 71.1 of his judgment. However, I am in no position to agree with the learned High Court Judge's determination that a conspiracy cannot take place to not to do something punishable with death, and therefore, the 1st count preferred against the respondent was defective.

The learned High Court Judge has well considered the evidence and has correctly determined that there was a conspiracy to murder minister Devananda and the respondent was part of the that and she aided and abated in order to achieve that purpose. After determining so, there cannot be justification in stating that section 108 does not cover a situation where a conspiracy to not to do something. Section 108 is a section based on abatement and not on conspiracy.

It needs to be noted that section 108 of the Penal Code envisages a situation where a person abates the omission of an offence punishable with death, but not committed in consequence of the abatement for some reason.

In the instant action, the abatement has been to murder, which has not occasioned due to the failure of the attempt, hence, the respondent cannot be convicted for murder based on her abatement. I am of the view that under the circumstances, charging her in terms of section 108 was the only option.

Accordingly, I hold that the learned High Court Judge was misdirected as to the 1st count preferred against the respondent when it was determined that the said count was defective, in acquitting the respondent of count one.

The 3rd, 4th, 5th, and the 6th counts preferred against the respondent, for which she was acquitted, were counts based on the deaths occurred at the Kollupitiya police station when the suicide bomber Jayarani detonated the bomb she was wearing. The said counts are counts that had been formulated in terms of sections 104 and 296 of the Penal Code.

As considered by the learned High Court Judge the relevant section 104 of the Penal Code reads as follows;

> **104. When an act is abated and a different act is done, the abettor is liable to the act done, in the same manner and to the same extent as if he had directly abetted it:**
>
> **Provided the act done was the probable consequence of the abatement, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abatement.**

After considering the provisions of section 104, the learned High Court Judge has given his reasons to acquit the respondent in the following manner.

මෙම අරථ විග්‍රහය අනුව යම් ක්‍රියාවකට අනුබල දීමෙන් පසුව වෙනස් ක්‍රියාවක් කල විට අනුබල දීමෙන් විය හැකි ප්‍රතිඵලය තිබිය යුතු බව සඳහන් වේ. සාක්ෂිවලින් තහවුරු වන්නේ විත්තිකාරිය අනුබල දී ඇත්තේ ඩග්ලස් දේවානන්ද ඝාතනය කිරීමට බවයි. එම ක්‍රියාව සිදු කිරීමට යාමේදී එකී ක්‍රියාව සිදු කිරීමට ගිය ජෙයරාණි නමැත්තිය විසින් ගත් තීරණ සහ ඇයගේ ක්‍රියාකලාපය හේතු කොටගෙන ඇයව කොල්ලුපිටිය පොලිස් ස්ථානයට ගෙන ගොස් ඇත. එහිදී ජෙයරාණි විසින් බෝම්බය පුපුරවා ගෙන ඉහත කී 3,4,5,6 චෝදනාවලට අදාළ පුද්ගලයන් මියගොස් තිබේ. ඉතා පැහැදිලිව පෙනී යන්නේ මෙම තත්වය විත්තිකාරිය විසින් කිසි ලෙසකින් හෝ අපේක්ෂා කල දෙයක් නොවන බවයි.

මේ අනුව කොල්ලුපිටිය පොලිස් ස්ථානය තුළදී මිය ගිය පුද්ගලයන් බෝම්බ පිපිරීම හේතු කොටගෙන මිය ගියේ ඩග්ලස් දේවානන්ද ඝාතනය කිරීමට විත්තිකාරිය අනුබල දීමේ ප්‍රතිඵලයක් වශයෙන් නොව අනපේක්ෂිත තත්වයන් යටතේ උද්ගතවූ අවස්ථාවකදී බව පෙනී යයි. ඒ අනුව 3,4,5,6 චෝදනා වල සඳහන් වැරදි සඳහා විත්තිකාරියට අපරාධමය වගකීමක් නොපැවරෙන බවට තීරණය කරමි. ඒ අනුව 3,4,5,6 චෝදනාවලින් විත්තිකාරිය නිදොස් කොට නිදහස් කල යුතුය.

It appears from the above reasoning that the learned High Court Judge has concluded that because the respondent has only aided and abated to assassinate Minister Devananda, the detonating of the bomb by the suicide bomber Jayarani at the police station was a thing that the respondent could not have anticipated under any circumstances, hence, the respondent bears no criminal responsibility for the deaths of the four persons mentioned in the respective charges.

I am unable to find a basis to agree with this view either. It is clear that the act abated was to assassinate Minister Devananda, but a different act has been done in consequent to it, which led to the death of four persons. Anyone who chose to wear a suicide bomb in order to commit the murder of a person, or an abettor for that matter, knows for sure that when it is detonated, not only the intended target but serval others including the carrier of the bomb may die as a result. In this instant, the intended purpose has not been fulfilled because of the arrest of the mentioned Jayarani. When she was taken to the police station,

she and the respondent shall know that the bomb has to be detonated at some point as there would be no escape. It is therefore, clear that the act done was a probable consequence of the abatement and was committed under the influence of the instigation, which is an act falls within the ambit of the section 104 of the Penal Code.

Both the respondent and the mentioned Jayarani had the required knowledge that their actions were so dangerous that it must in all probabilities cause death, which falls within the definition of murder in terms of section 294 of the Penal Code.

For matters of clarity, I think it is appropriate to reproduce the fourth limb of section 294 which reads thus;

> **294. Except in the cases hereinafter excepted, culpable homicide is murder-**
>
> ***Fourthly*- IF the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.**

For the reasons as stated above, I am of the view that the learned High Court Judge was misdirected in law when it was determined that the respondent should stand acquitted of the 1st, 3rd, 4th ,5th, and the 6th counts preferred against her.

Accordingly, I set aside the acquittal of the respondent of the said counts and convict her for the said counts as well, in terms of the powers vested in this Court by section 337 of the Code of Criminal Procedure Act.

Although this was a matter not argued during the appeal, I am of the view that the 2nd counts should be a count that needs to be considered as an alternative count to the 1st count preferred against the respondent for the purposes of sentencing, as both the counts refer to the one and the same incident. I am of the view that the 1st count was a count based on the conspiracy and the abatement, while the 2nd was a count based only on the abatement.

Hence, I set aside the sentence imposed upon the respondent on the 2nd count and sentence her as below.

On count one, I sentence her to five years rigorous imprisonment and to a fine of Rs. 25000/-. In default of paying the fine, she shall serve a period of six-month simple imprisonment.

On count two, I make no sentencing order on the basis that this needs to be considered as an alternative count to the 1st count preferred against her, for which she was sentenced.

On count three, the respondent is sentenced to death.

On count four, the respondent is sentenced to death.

On count five, the respondent is sentenced to death.

On count six, the respondent is sentenced to death.

The learned High Court Judge of Colombo is directed to follow the necessary procedural steps as required by law, before the pronouncement of the sentence of death on the respondent.

The learned High Court Judge is also directed to issue a warrant of arrest of the respondent at the first instant, if it becomes necessary for the proper implementation of this judgment and the sentence.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal