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

CA 13/2006

HC Kandy 1864/99

Dunuthilaka Mudiyanselage
Kudabanda.

Accused-appellant

Vs.

Hon. Attorney General

Respondent.

Before : A.W.A. Salam, J &

Sunil Rajapaksha, J

Counsel : Dr. Jayathissa de Costa PC for accused-appellant and Rohantha Abeysooriya DSG for the respondent.

Argued on : 03.02.2014

Decided on : 05.02.2014

A.W.A. Salam, J

The accused-appellant has preferred the present appeal against the judgment and sentence imposed against him by the learned High Court Judge who found him guilty of double murder as per charges preferred against him by indictment dated 06.01.1999. The charges preferred against the accused-appellant were that on 16.04.1989, he

caused the death of Dissanayake Mudiyanselage Kudabanda Dissanayake and Dissanayake Mudiyanselage Dushamanta Renuka Bandara Dissanayake. The learned High Court Judge after trial without a jury found that the charges had been proved and proceeded to convict the accused-appellant on both counts and sentenced him to death. When the matter of the appeal against the conviction was taken up for hearing, the learned President's Counsel adverted us to the several glaring misdirections in the judgment. He placed in the forefront of his case, the inordinate delays in making the complaint to the police against the accused-appellant as a ground that vitiates the conviction.

Admittedly, the incident had taken place on 16.04.1989 at the height of the insurgent activities said to have been initiated by the Janatha Vimukthi Peramuna. As far as case of the prosecution is concerned the complaint against the accused-appellant has been made alleging his involment as the principal offender along with certain other unknown people, almost three years after the incident. The explanation given by the main witnesses for the prosecution as to the delay is that the fear psychosis that prevailed during the relevant period prevented the main prosecution witnesses from mentioning the name of the accused appellant to the authorities concerned. They claimed that the family members were unable to make a complaint against the accused-appellant as they feared serious adverse consequences if a complaint had been promptly made against him. However favourable the situation that prevailed in the country at that time for not making a complaint may be, it is to be noted that no mention of the involvement of the accused-appellant has ever been made by the so called eye witnesses to any authority including the Magistrate who had conducted the inquest proceedings.

It is common knowledge that the fear psychosis which prevailed in the country came to an end with the death of the then so called leader of the JVP somewhere in November 1989. In the circumstance, the

witnesses could have made their complaints against the accused-appellant within a reasonable period of time from November 1989. Yet, they had waited until June 1992 to make a complaint implicating the accused with the commission of the offences. This delay on the part of the eye witnesses cannot be accepted as a satisfactory explanation.

In the case of Jayawardane and Others vs. the State 2000 SLR 192, it was held that a conviction is unsafe if a valid explanation is not given for the delay in making the complaint. The offence committed by the accused in the case of Jayawardane Vs. State was one punishable under 380 of the Penal Code and committed during the period when there was trouble prevailing in the country. In that case the incident had taken place on 28.12.1989 and the first complaint had been made in 1995. The learned Judge of the Court of Appeal in the case of Jayawardane held that as the condition in the country had improved, it was possible for any citizen to lodge a complaint at any police station after 1991. In the circumstancesn, the court held that it would be dangerous to act on the evidence implicating the accused with the belated complaint without any satisfactory explanation.

The circumstances relating to the delay in making the complaint in the case of Jayawardane vs. State apply to the present case as well. As such we hold that the delay in making the complaint against the accused in this case also has not been properly explained and therefore the learned High Court Judge could not have convicted the accused for murder. The complaint has not been made immediate after the cessation of the fear psychosis that existed in the country.

Admittedly the accused-appellant had attended the funeral of the deceased the very next day and even made his presence at the 7th day almsgiving. The conduct of the accused-appellant in attending the funeral and participating at the almsgiving is inconsistent with his guilt and the learned High Court judge has failed to give any

consideration to that evidence.

Further the dock statement made by the accused-appellant has received no attention by the learned High Court judge when he came to the conclusion that the charges against him have been proved beyond reasonable doubt. In the dock statement the accused-appellant has pleaded the defence of aliby to which he is entitled to claim with due consideration of it must be given as piece of evidence subject to the normal infirmities that are applicable to a dock statement.

The infirmities in the judgment of the learned High Court Judge are so significant that the accused could not have been found guilty of the offence, if the leaned High Court Judge gad properly addressed his mind to the legal principles regarding the quntum of proof in a criminal case.

Inthisapl a direction to send the case back for retrial also will not serve any purpose as the accused cannot be found guilty even at a retrial in the mids of the infirmities referred to in this judgment. Therefore, we are of the view that the accused is entitled to be acquitted on all the charges. Hence we allow the appeal and acquit the accused.

JUDGE OF THE CORUT OF APPEAL.

Sunil Rajapaksha, J.

JUDGE OF THE CORUT OF APPEAL.

NR/-