

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

CA NO.293/2006

HC.Colombo Case No.1280/03

Galbokka Hewage Noyel Wijaya de Silva
No. 18, 5th Lane,
Nelum Pura South,
Rathmalana.

Accused-Appellant

-Vs-

Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondent

BEFORE : Anil Gooneratne, J. &
W.M.M. Malinie Gunaratne, J.

COUNSEL : G.P.J. Silva for the Accused-appellant.
Jayantha Jayasuriya ASG, PC with Haripriya
Jayasundera DSG for the AG.

ARGUED &

DECIDED ON : 01.07.2014

ANIL GOONERATNE, J.

Learned counsel for the accused-appellant submits to Court that the accused-appellant was indicted on three counts. The Count No. 01 is based on robbery. The 2nd Count is a charge of murder and the 3rd Count is a charge of rape. The Accused-appellant was convicted on all three Counts and sentenced as follows.

On the charge of Robbery the accused-appellant was sentenced to 07 years Rigorous Imprisonment. As regard the charge of murder he was convicted and sentenced to death. As regard the charge of rape the accused-appellant was sentenced to 07 years rigorous imprisonment and a fine of Rs. 10,000/-. Learned Counsel also submits to this Court that this was a trial by Jury and in particular refers to the proceedings at page 85 and 87 of the brief. It was the position of the Defence-Counsel that the prosecution witness No. 2, the mother of the deceased,

being questioned had given the answer that she came to know that it was the accused-appellant who committed the act of murder. However, the question and answer has not been recorded. When this matter was raised by learned defence-Counsel, it was the position of the learned High Court Judge that he could recollect that the prosecution witness No. 2 had given such an answer. i.e. that the witness uttered the words that she came to know it was the accused who committed the act of murder. All these matters have been recorded at page 88 of the brief and the learned High Court Judge's order on above is at page 89. As at the time these objections and submissions were made, the Jury was asked to retire and subsequent to making the order by the learned High Court Judge the Jury again assembled in Court and High Court Judge directed that the trial should proceed from that point on wards.

It is the position of both learned Counsel for the Accused-appellant as well as the learned Additional Solicitor General that Jury should have been cautioned of the above matters prior to commencing the trial as well as in the trial Judges summing up such matters should have been told to the Jury and there is a duty cast on the trial Judge to caution the Jury as stated above. Both learned Counsel indicate to Court that such a direction has not been given by the learned Trial Judge to the Jury. As such, a grave prejudice is caused to the accused-appellant by the above non-direction to the Jury. In the above circumstances, it is the position of the learned Additional Solicitor General that the accused-appellant did not have a proper fair trial. Therefore, this Court proceeds to set aside the conviction and sentence imposed by the learned trial Judge and send the case back for re-trial. In view of the fact that the offence has been committed in the year 1998 we direct the

learned High Court Judge to expedite the trial and dispose of this case as soon as possible.

Registrar is directed to forward all the productions to the relevant High Court namely, High Court of Colombo forthwith.

Case is send back for re-trial.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KRL/-