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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Rathnayake Mudiyanselage Jayantha Rathnayake
No. 19 B, Daya Gunasekera Mw,
Badulla.

ACCUSED

CA/252/2009
H.C Badulla Case No 90/2007

And,

Rathnayake Mudiyanselage Jayantha Rathnayake
No. 19 B, Daya Gunasekera Mw,
Badulla.

ACCUSED-APPELLANT

Vs,

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

COMPLAINANT- RESPONDENT

Before : Vijith K. Malalgoda PC J (P/CA) &
H. C. J. Madawala J

Counsel: Anil Silva PC with S. Jayadewarchchi for the Accused- Appellant

Thusith Mudalige SSC and H. Jayaneththi SC for the AG

Argued On: 24.02.2015, 10.03.2015, 16.03.2015, 29.04.2015, 03.06.2015, 03.06.2015, 04.06.2015, 18.06.2015, 24.06.2015, 20.07.2015, 30.07.2015, 06.10.2015, 16.10.2015

Written Submission On: 28.10.2015

Order On: 18.03.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The accused-appellant was indicted before the High Court of Badulla for the murder of Manjula Priyadarshani Warnakulasuriya, his legally married wife on or about 19th May 2005.

The said Indictment was preferred by the Attorney General directly to the High Court under section 3 (1) of the Criminal Procedure (Special Provisions) Act No. 42 of 2007.

The accused–appellant elected to be tried before the High Court Judge without a jury and after trial he was convicted for the said offence and sentenced to death. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal.

During the arguments before this court it was transpired that the initial investigations in to the death of the said deceased was proceeded under the provisions of Motor Traffic Act and under section 298 of the Penal Code on the belief that the said death was caused due to a motor traffic accident.

At the arguments before this court the Learned President's Counsel for the accused-appellant has raised the following grounds of appeal,

a) The Learned High Court Judge has misdirected himself as to how a defence of accident under section 73 of the Penal Code should be considered

b) The Learned High Court Judge erred in law when he failed to evaluate the items of evidence which are in favour of the accused-appellant

c) The Learned High Court Judge erred in law when he failed to appreciate properly the legal concept relating to circumstantial evidence

The position taken up by the accused–appellant right throughout the trial was that, the death of the said Manjula Priyadarshani Warnakulasuriya was caused due to a motor traffic accident.

As admitted by both parties the deceased and the accused had gone to Mahiyangana on that day (i.e. 19.05.2005) to attend a house warming function of the Magistrate Mahiyangana one Nandani Abeygunawardena. They traveled to Mahiyangana from Badulla in their Toyota Cami Jeep bearing registration No UPHM0588 driven by the Accused. It was further admitted by both parties that the deceased and the accused left Mahiyangana around 6.15 pm. Little prior to 7.00 pm a telephone call was received by the manager of their shop (Jayantha Trade Centre) from the deceased and she asked the Manager Francis to close the shop and take the children home. She spoke to the children and asked them to prepare dinner for them.

The next recorded event or the admitted fact is the making of the 1st Complaint at Mahiyangana Police Station by the accused-appellant of an accident at 7.50 pm. The events took place in between were contested by both parties before the High Court as well as before us.

The accused-appellant took up the position that the incident was an accident and in support of this contention the defence mainly relied on the subsequent conduct of the accused and the evidence of few lay witnesses who testified to the events took place immediately after the alleged accident.

In the absence of any eye witness to the incident the prosecution mainly relied upon Circumstantial Evidence which includes medical, scientific and RMV's evidence which was supported by the evidence of lay witnesses.

As referred by me earlier in this judgment, the position taken up by the accused-appellant right throughout this case was that the death of Manjula Priyadarshani Warnakulasuriya was due to a road traffic accident. The first and the second grounds of appeal raised by the Learned President's Counsel were based on the said position taken by the accused-appellant.

In support of his contention he placed several material before this court and I intend analyzing the said version first.

The fact that the accused and the deceased went to Mahiyangana in their Toyota Cami Jeep bearing Registration No UPHM0558 to attend a house warming function of the Magistrate Mahiyangana is admitted by both parties. According to the evidence of the guards attached to the said bungalow, Herath Mudiyanselage Senarathne and Adikari Mudiyanselage Gunawardena deceased and the Accused had left the bungalow after being there for about 1 hour around 6.15 pm. The witnesses had opened the gate for them to leave the bungalow.

The next item of evidence available to establish the movements of the accused and the deceased was the evidence of Suppiah Anton Francis Manager of Jayantha Trade Centre in Badulla. According to the evidence of Francis he received a telephone call from the deceased around 7.00 pm. He received this call little prior to closing the shop and on that day the shop was closed around 7.00 pm.

In addition to the fact that the deceased was alive little prior to 7.00 pm, the accused –appellant relied on the above evidence to show, that the deceased was in a good state of mind and did not complain of any harassment to her at that time.

The Accused-Appellant further relied on the evidence of one Bowatta Wijitha Siriwardena who was summoned by the prosecution and a resident close to the place where the incident took place. She is the person, whom the accused-appellant said to have contacted soon after the incident. According to her evidence on the day in question between 7.00-7.30 pm when she was at her house, a person who had come near her house had worshiped herself and her husband and pleaded with them to rescue his wife.

He was in a depressed mood and was crying at that time. Without even inquiring from him, he went on saying that his car went to the canal with his wife and requested them to save his wife and the car and if not he will jump into the water. However the witness could not identify the said person as the accused-appellant at the High Court.

At that stage the witness and her husband went up to the canal but they feared that the said person might jump in to the water.

This position was confirmed by witness Sitisekara Mudiyanselage Chandradasa, a trishaw driver who happens to pass the said place in his three-wheeler.

After hearing the cries of a man he went up to them and at that time he saw one Jinadasa (husband of Wijitha) holding another person. When questioned, Jinadasa informed him that a vehicle had fallen to the canal with the wife of the said person and that he was trying to jump in to the water and therefore he is holding on to him. The said person was shouting and asking them to rescue his wife.

When referring to the above evidence the Learned Counsel for the accused-appellant requested the court to consider this conduct of the accused and submitted that the above conduct clearly shows his genuine feelings at the time the accident took place and the effort he made to rescue his wife or otherwise to commit suicide because he could not control himself.

The Learned Counsel for the accused-appellant further relied on the evidence of the officer in Charge of the Mahiyangana Police Station Nihal Priyantha Liyanage (at page 642), the officer who recorded the statement of the accused-appellant PC Chandana Premasiri Nawarathne (at page 632) and brother–in–law of the accused-appellant who visited him at the police station Mahiyangana K.A. Ajith Sumith (at page 459) in support of the above contention.

Based on the above evidence the Learned Counsel for the accused-appellant complained that the subsequent conduct of the accused-appellant as well as the position taken up by the accused-appellant

that this was an accident, was not considered infavour of him by the Learned High Court Judge in his Judgment.

I will discuss the issue of failure by the Learned High Court Judge to consider matters infavour of the accused as alleged by the Learned Counsel for the accused-appellant at a later stage of the Judgment.

It was further submitted on behalf of the accused-appellant that, even though there was some displeasure between the accused-appellant and the deceased some time back, since March 2005 they decided to live under one roof and there were no fights between the accused-appellant and the deceased during this period. Magistrate Mahiyangana – Nandani Abeygunasekara had acted as a mediator when these two had problems, and on the day in question the accused-appellant and the deceased visited the said Nandani Abeygunasekara to attend her house warming ceremony clearly indicates that they have patched up their differences by that time.

I now turn to consider the prosecution story of this case and the arguments raised by the Learned Senior State Counsel before this court, since that will help this court to consider the arguments raised on behalf of the accused-appellant. As understood from the prosecution story placed before this court, it appears that the prosecution has relied heavily on establishing the motive by the accused to commit this offence, even though there is no requirement to establish the motive in a criminal trial.

In the case of ***Chandra Prakash Shahi V. State of U.P (2000) 5 SCC 152*** the importance of the motive was observed as follows, "Motive is the moving power which impels action for a definite result or which incites or stimulates a person do an act."

In the case of ***Nathuni Yadav V. State of Bihar (1998) 9 SCC 288*** the extent to which the motive can be established in a criminal trial was discussed as follows, "Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see in to the mind of another. **Motive is the emotion which impels a man to do a particular act.** Such impelling cause needs not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or

prominent motive. It is quite possible that the aforesaid impelling factors would remain undiscoverable. Though, it is a sound proposition that every criminal act is done with a motive**, it is unsound to suggest that no such criminal act can be presumed unless motive is proved**..... In some cases, it may not be difficult to establish motive through direct evidence, while in some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act.' (emphasis added)

However when referring to the danger of acting on the evidence which indicates the motive of the accused-appellant the Learned President's Counsel relied on the following observation made by Amaratunga J in the case of ***Lionel V. Attorney General 2004 (1) Sri LR 123 at 130***;

"Motive is a double edged weapon. The deceased also could have had a reason to implicate the accused due to this reason. The Learned Trial Judge has failed to consider this aspect when he considered whether there was any motive to the deceased to falsely implicate the accused."

I see no relevance of the said judgment to the present case since the evidence relied by the prosecution was not based on anything uttered by the deceased but based on the testimony of other witnesses who gave evidence before the trial court and faced cross examination by the defence. I will now turn to consider the said material referred to by the Learned Senior State Counsel.

According to the evidence of Somapala Warnakulasuriya father of the deceased Manjula Warnakulasuriya, a landed proprietor, living in Bandarawela with his wife who was an English Teacher, deceased Manjula had eloped with accused when she was less than 16 years. On the following day the girl was brought back home, but the girl eloped again with the accused soon after attaining 16 years and the parents then gave up the attempt in guarding her. Thereafter the deceased gave birth to two children (a daughter and a son) and gradually commenced visiting her patents. The children were brought home thereafter and the accused too joined after some time.

Accused, who started his life as a salesman in Bandarawela in a Furniture Shop, had moved to Badulla after he eloped with the deceased for the second time and started a furniture business in Badulla. Both the accused and the deceased were engaged in the said business which prospered and they moved in to a five storied building in the heart of the town and carried out the business under the name of "Jayantha Trade Centre." At the beginning the family lived in a part of their business establishment but later moved to a two storied house which they purchased in Daya Gunasekara Mawatha, Badulla.

Until mid 2000 both the accused and deceased worked together and there were no complains with regard to their family life. However the prosecution relied on the evidence of 3 lay witnesses' namely,

1. Somapala Warnakulasuriya (98) farther of the deceased
2. Lakmini (363) cousin of the deceased
3. Sujatha (467) domestic servant at the deceased' house

to establish that the said peaceful environment at the deceased's house was changed subsequently due to an illicit affair commenced between the accused and one Jayamini during this period. The said Jayamini was also called as a witness for the prosecution.

According to the evidence of Somapala Warnakulasuriya father of the deceased, after some time, there was displeasure between the couple over an illicit affair of the accused–appellant and during this period his daughter returned home with two children about 4 times. Whilst referring to one Nandani Abeygunasekara a Magistrate, he said that the said Nandani Abeygunasekara was a student of his wife and had a very close relationship with their family. Whenever his daughter returned home, the said Magistrate had intervened and tried to settle the differences between the two and managed to send the deceased back to Badulla to live with the accused-appellant. In December 2004 the Deceased had come home for the last time and stayed with the parents until March 2005 and again due to the mediation decides to go back to Badulla. However during her stay in Bandarawela, the deceased had decided to file divorce action against the accused–appellant and instructed an Attorney–at–Law to institute proceedings in the District Court of Bandarawela.

Witness Somapala Warnakulasuriya had further said in his evidence that during this period his daughter was using the Toyota Cami Jeep and he too had travelled with her in the said jeep several times and his daughter wears seat belt and always insisted to switch on the A/C when travelling in her vehicle. In one occasion when he requested his daughter to switch off the A/C since it was uncomfortable to him, she insisted to travel with A/C on because she is used to travel when the A/C is on.

Prosecution had also relied on the evidence of Lakmini to establish the motive. According to her evidence she is the first cousin of deceased Manjula and on the request of Manjula she had stayed at her house on 4 occasions. According to her the deceased and the accused-appellant along with their children had stayed in two places in Badulla. Firstly they lived in the upstair of their shop in Badulla Town and thereafter had moved to an upstair house in Daya Gunasekara Mawatha, Badulla. Lakmini had stayed with them in both those places time to time.

Her first visit which was limited for few days was just after she left school. On the second occasion she stayed for six months with the deceased family. On the 3rd occasion she was with the deceased family shortly before her wedding and 4th and the last occasion she had come to the deceased house with her husband and stayed for 3 weeks and left to Bandarawela with the deceased and her two children after an incident between the deceased and the accused-appellant. During her stay with the deceased, on several occasion the accused-appellant told the witness to leave the house saying that they (deceased and the accused–appellant) will solve their problems, but deceased did not allow her to leave. Her last visit to the deceased house with her husband was in the latter part of year 2004.

According to the witness, the accused–appellant did not stay with the family throughout this period but visited the house after 2-3 days. On the last day they stayed at the house of the deceased, the accused-appellant stayed the night with the family and in the morning around 9.00 - 9.30 am witness heard an exchange of words between the deceased and the accused-appellant. When the accused-appellant tried to, attack the deceased with his slipper the witness and her husband had intervened. At that stage the deceased was scolding the accused-appellant saying that the accused-appellant should not go to the

house of his mistress again and if he wanted, then he should not visit the family. At that stage the accused-appellant tried to assault the deceased again and when he was prevented by the witness's husband, he went to the kitchen and came with a knife and threatened to kill the deceased but when witness's husband prevented the accused-appellant again, he went out of the house with anger and punched the tyres of the deceased's vehicle (Toyota Camy Jeep) with the knife and went away.

Thereafter the witness had accompanied the deceased to the police station to lodge a complaint and the police visited the house to inquire into the complaint. Thereafter they returned to Bandarawela with the deceased and her two children.

The above evidence given by witness Lakmini was corroborated by witness Samantha Gajanayake a Sub-Inspector attached to the Police Station Badulla. According to him he has gone to No. 19B Daya Gunassekara Mawatha on 21.12.2004 to investigate into a complaint made by the deceased in this case with regard to damaging of two tyres in a Jeep bearing No. UPHM0558 belonging to the deceased. The said complaint was against the accused-appellant in the present case and he confirms making positive observations on that day and thereafter producing the suspect before Magistrate after the accused-appellant surrendered at the Police Station through an Attorney-at-Law.

The Learned Senior State Counsel referred to several incidents which took place between the deceased and the accused -appellant during the period the witness Lakmini stayed with the deceased's family to show that there was no peace prevailed in the deceased's family due to the conduct of the accused-appellant.

It is further submitted by the Learned Senior State Counsel whilst referring to the evidence of Lakmini that the, accused-appellant insisted the deceased to agree with him to allow his mistress and her child to live with deceased's family under one roof. In order to insist the deceased to agree for this, he forcibly took his mistress along with his family on several occasion and the Learned Senior State Counsel

referred to two such occasions narrated by witness Lakmini in her evidence, firstly an outing to a restaurant in Badulla called "Dunhinda Sisila" and secondly to attend a wedding in Maharagama area.

On both these occasions the deceased objected for the presence of the mistress along with her but the accused-appellant ignored her protest and insisted to treat both families alike.

When the deceased was returning after attending the wedding in Maharagama, she could not control herself and jumped out of the van from which they travelled pretending that she wanted to take a phone call at Ingiriya and when the accused-appellant tried to take her back to the van forcibly, the people of the area had surrounded the van and tried to apprehend the accused-appellant thinking that he was abducting a woman.

According to the evidence of Sujatha, who was employed after her sister as the domestic servant at deceased' house, she had stayed with the deceased's family for one year and 4 months during 2003-2004 periods.

This witness too had referred to several incidents took place between the deceased and the accused-appellant during her stay. On one such occasion, the accused-appellant wanted the deceased to accompany him to attend the birthday party of his mistress's child. (His child too) but it was ended up with a fight between the two since the deceased refused to attend the birth day party.

On another day, after a fight between the two, the accused-appellant locked the deceased inside an Almirah. The witness and her mother who was also present on that day had rescued the deceased. According to the witness, the accused-appellant insisted that he be allowed to bring his mistress and the child to the up stair of their house, but the deceased protested to it saying "ළමයි දෙන්නා සිටින නිසා පාරෙ බැහැලා යන්න ඕන"

Whilst referring to the above evidence the Learned Senior State Counsel submitted that, the above evidence reveals a strong motive for the accused-appellant to commit this offence.

The Learned Senior State Counsel, further submitted that, from the evidence of Lakmini and Sujatha it is further revealed that the deceased wanted out siders to live in their house as much as possible and in addition to Lakmini and Sujatha, even Sujatha's mother too was staying in this house from time to time even though the accused-appellant did not like it.

Learned Senior State Counsel referred to the evidence of Diana Kathrene Gnanamuththu an Attorney-at Law from Bandarawela, with regard to the Divorce Action filed by the deceased against the accused-appellant. In the said divorce action, Muthukuda Arachchige Jayamini Priyadarshika Namali was made the Co-respondent since one of the main grounds averred for grant of the divorce was adultery. The plaint was filed in the District Court of Bandarawela on 17.02. 2015 and the summons were issued on the two Respondents. According to the witness, in the said application the plaintiff had asked Rs. 20 million as permanent alimony. The above position was confirmed by the Registrar District Court Bandarawela H.L. Tuder, who was also called as a witness for the prosecution. At the time the alleged incident took place, the accused-appellant was served with the summons with regard to the divorce action and the prosecution position before the trial court was that, at no stage the deceased decided to drop the divorce action, even though she lived with the accused-appellant between March to May 2005. This position is confirmed by the evidence of instructing attorney Diana Kathrene Gnanamuththu.

When referring to the above evidence, I observe that the prosecution had placed evidence before the trial court to establish a strong motive for the accused-appellant to commit this offence. In addition to the above evidence, prosecution has decided to call Muthukuda Arachchige Jayamini Priyadarshika Namali as a witness for the prosecution to establish the relationship between her and the accused-appellant. The prosecution has placed the same reliance on the evidence of Jayamini when the prosecution decided to call her as a witness for the prosecution. The prosecution has not treated her as an adverse witness and placed the same reliance on her evidence. According to the evidence of Jayamini she was married to one Anura Rajapakshe in the year 1985 and lived with him as husband and

wife for nearly 15 years. The said Anura Rajapakshe is a cousin of the accused-appellant and somewhere in 1995 the accused-appellant visited her house in Pinarawa with her husband and requested her to do some sawing for his shop. During this period both the accused-appellant and his wife visited her with the material for her to engage in sawing for their shop. However there was a rumor with regard to a relationship between the witness and the accused-appellant and, her husband had left her over that rumor.

She speaks of a very strong relationship between the accused-appellant and herself since year 2000 and accused-appellant renting a house for her. The accused-appellant is the father of the child she delivered in the year 2003 but according to her the deceased knew all these things but did not object for the affair no she made any protest when the witness got pregnant from the accused-appellant. During this period the accused-appellant visited her house and stayed the night with her once or twice a week.

Even though she referred to a cordial relationship with the deceased, during her evidence witness had admitted some unpleasant incidents took place during this period as well, and the trip to Maharagama in order to attend a wedding was one such incident. According to her it is the deceased and the accused-appellant who attended the wedding but she too was taken along with them and on their return at Ingiriya some incident had taken place.

However according to witness Jayamini she stopped her relationship with the accused-appellant in February 2005 but admits speaking to him even after the death of the deceased.

The effect of the above evidence on the prosecution case to the effect that the accuse-appellant had a strong reason to commit this offence which establishes the motive, I will discuss at a later stage of this judgment.

I will now deal with the rest of the argument raised by the Learned Senior State Counsel, to wit; that there is a strong case based on circumstantial evidence to establish that this is not an accident as claimed by the accused-appellant but it is a premeditated murder.

In this regard the prosecution has relied on several items of circumstantial evidence. According to the Learned Senior State Counsel, the items of circumstantial evidence the prosecution has relied upon has to first rule out the possibility that the death of the deceased Manjula Warnakulasuriya was not a result of an accident and thereafter establishes that it is due to a voluntary act committed by the accused with the intention of committing murder of the deceased.

As placed before us by the Learned Senior State Counsel, the post mortem examination of the deceased Manjula Warnakulasuriya was conducted by the Consultant Judicial Medical Officer-Kandy Dr. A.B. Senevirathne who has conducted nearly 15,000 Post Mortem inquiries during his carrier. The said post mortem examination was conducted on 21.05.2005. It was further revealed that the consultant Judicial Medical Officer had visited the crime scene, and also examined the Jeep in which the deceased and the accused-appellant had travelled on that day. According to the Post Mortem Report which was produced marked P-27 the cause of death was due to drowning. The body of the deceased had only one external injury which was a minor abrasion on the nose.

As said by the accused in his evidence before court, the deceased and the accused were not wearing seat belts at that time and the accused–appellant was driving the vehicle at 80-90 kmph and the doctor was expecting much more injuries on the body of the deceased due to above factors.

He had expressed a similar opinion regarding the possibility of receiving injuries to the accused even though the accused too did not have any injuries according to the evidence of Dr. Dissanayake of Mahiyangana Hospital who examined the accused-appellant during the same night at 12.50 A.M.

It was also observed by the Medical Expert that the nature of the injuries that the occupants should sustain while trying to come out from the front shutter were not found on the body of the deceased since the body was not found inside the Jeep.

Considering the dimensions of the body the Consultant Judicial Medical Officer has further opined that if the deceased was inside the jeep when it went into the water the body too should have been inside the Jeep.

Based on the observation he has made, the Consultant Judicial Medical Officer had given an opinion that, when the jeep went into water the deceased wouldn't have been inside the Jeep. He had further observed an unsecure bridge (across the canal) near the place where the jeep went into water and given an opinion that if the deceased was pushed from this bridge she could fall into water without injuries as in the present case.

The Learned President's Counsel for the accused-appellant has brought to our notice the fact that a pair of ladies slippers found inside the Jeep, which is also another item of circumstantial evidence, cuts across the above position.

However when this position was put to the Government Analyst, he took up the position that he would expect a 60 kg human body which was not flexible after the death to remain inside the Jeep if the two small shoes were found inside the Jeep.

However it is important to note that this observations and opinion given by the consultant Judicial Medical Officer is his opinion only, which he is entitled to say but this court is not bound to accept it unless it is the only inference this court can come to, based on the evidence placed before court.

The evidence of the Consultant Judicial Medical Officer was challenged by the defence in the High Court Trial by calling Dr. Sarathchandra Kodikara (Lecturer in Forensic Medicine at the University of Peradeniya) as a defence witness.

In his evidence Dr. Kodikara admitted that he conducted only 2000 post mortem inquires within a period of 8 years and given evidence in 25-30 cases. He further admitted that this is the 2nd occasion he is giving evidence on a report prepared by a different doctor. In his evidence he stated that it is wrong to expect injuries on the bodies of persons who met with accidents, when the vehicle in which the said

person had travelled fallen into water. He was relied his opinion based on the results of a research conducted in Sweden. He took up the position that only 8% received injuries when their vehicle fallen into the water. The evidence given by the said witness was challenged by the state and under cross examination he admitted that according to the findings of the research he referred to, 92% received non grievous injuries and only 8% received grievous injuries. When he was confronted with above figures he admitted that according to the findings of the said research the rate of receiving injuries is not 8% but it is 100%. He further admitted in cross examination that the speed of the vehicle which met with an accident by falling into water is material to give an opinion with regard to the injuries received by the inmates of the vehicle.

With regard to the above position he had finally admitted his lapses as follows;

ප්‍ර: ප්‍රධාන කරුණු නැතිව කොහොමද ඔබගේ මතය විශේෂඥ මතයක් කියා සලකන්නේ?

උ: එය අඩුපාඩුවක් බව මම පිළිගන්නවා උතුමානෙණි. නමුත් මට ලබාගත හැකි කරුණු හා දත්ත මත පිහිටා ස්ථාන පරීක්ෂණය, වාහන පරීක්ෂණය ආදී කරණු මත පමණක් ඒ පිළිබඳව මගේ අත්දැකීම් මත මතයක් ප්‍රකාශ කලේ උතුමානෙණි.

ප්‍ර: ඔබ දැන් පිළිගත්තා වේගය නොසලකා මතයක් ප්‍රකාශ කිරීම අඩුපාඩුවක් ලෙසට?

උ: එසේය උතුමානෙණි.

ප්‍ර: දැන් පිළිගන්නවාද ඒ අඩුපාඩු පිළිගත්තානම් ඔබ මේ අනතුර සම්බන්ධයෙන් ඉදිරිපත් කරන මතය සලකාබලන්න සුදුසු නැහැකියා අධිකරණයට

උ: එම මතය අධිකරණයට ඉදිරිපත් කලේ අඩුපාඩු ඇතිව බව මා පිළිගන්නවා ඒ පිළිබඳව ගරු අධිකරණය විසින් තීරණය ගන්නවා ඇතැයි මා විශ්වාස කරනවා උතුමානෙණි.

The next important aspect the Learned Senior State Counsel relied upon was the evidence and the report produced marked P-24 by the Government Analyst. Senior Assistant Government Analyst D.M.L.W. Jayamanne who has visited the scene made his observations with regard to the scene and the Jeep, had made the following observation with regard to the inspection he has made,

With regard to the Jeep

a) The Jeep has several damages and scratch marks including some identical dents on the front buffer.
b) The front windscreen was broken
c) The roof had identical scratch marks
d) Except in one place on the silencer there were no damages on the underneath of the vehicle

Place where the incident occurred

a) The canal (Viana Ela) was running parallel to the road and it was a constructed canal.
b) There is a three meter gravel area between the road and the edge of the canal.
c) Between the edge of the canal and the real canal which carried water, there is a distance of 7 meters with 25^0-30^0 slants.
d) Tyre marks were found on the gravel stretch as well as on the concrete slope of the canal.
e) An unprotected bridge was found 100 meters down constructed on some pillars across the canal.

Based on the above observations he made at the scene and on the Jeep, Senior Assistant Government Analyst had expressed the following opinion,

a) The entire damage to the Jeep has caused when it was inside the water

b) If the jeep was driving at a speed of 80-90 kmph the Jeep should topple when going down on the precipice (slope)

c) The Jeep has gone down on the precipice

   i. Without any damage to the underneath

   ii. Without topple

   and it confirms the fact that the Jeep has gone down on the precipice (slope) at a slow speed such as two meters per second or 8-10 kmph

d) The damage to the Jeep was caused when the Jeep turned upside down inside the water and moved down touching the concrete bottom of the canal up to the bridge where it was stuck and also due to the collusion between the concrete pillar of the bridge, but none of the damage found on the Jeep was compatible with damages caused during a fall in to the water if the Jeep was driving at a high speed.

The next witness prosecution has relied upon is the Examiner of Motor Vehicles, Prabath Kusumsiri. This witness too had given his opinion that the jeep could not have driven at 90 kmph when it went out of the road since there were tyre marks from the edge of the road to the water level of the canal. If the vehicle was driven at 90 kmph he expected the vehicle to be flipped in the air for few seconds and landed half way making more damages to the canal as well as to the vehicle and there can't be tyre marks for the entire distance.

During the arguments before us the Learned Senior State Counsel referred to the photographs marked during the trial and the evidence given by the witnesses with regard to the place where the incident occurred, including the Inspector of Police Priyantha Liyanage, to the effect that there were guard stones on the road to prevent a vehicle going out of the road at the bend but the place where the vehicle said to have gone out of the road was beyond the guard stones i.e. to say that the Jeep had veered off after passing the bend avoiding the guard stones fixed at the bend.

The Learned Senior State Counsel further relied on the evidence of two witnesses to establish the condition of the vehicle at the time incident occurred. The contention of the Learned Senior State Counsel by leading the said evidence was to contradict one of the positions taken up by the accused-appellant in his statement to the police, to the effect that there was a defect in the Jeep.

Before analyzing this position, it is important to note at this stage, that the statement made by the accused-appellant to police which was produced marked P-9, does not offend section 110 (3) of the Code of Criminal Procedure Act No 15 of 1979 since it was made prior to the commencement of the investigation.

In the said statement the accused-appellant had "explain as to how the incident had occurred as follows;

"හවස 6.30ට පමණ මහේස්ත්‍රාත් තුමියගේ නිළ නිවසින් පිටත් වී මහියංගණ බදුල්ල මාර්ගයේ ධාවනය කර අලිකඳුර ප්‍රදේශයේදී මා පදවාගෙන ආ ජීප් රථය ධාවනය කරමින් සිටන විට එකවරම ගැහිගැහී වමට කැපුනා එම කැපුන ගමන් ඇල මාර්ගයට ඇදගෙන වැටුනා."

In this regard prosecution has first relied on the evidence of witness R.M. Sarath Chandrapala the mechanic who attended to the vehicle during this period. According to this witness on a day in the month of May 2005 the accused-appellant came to his garage and wanted him to check the brakes of the vehicle and also complained of a jerk in the front tyres when driving fast. He first attended to the brakes and replaced the brake pads. With regard to the second complaint he drove the vehicle to check this and also removed the tyres and checked the ball joints but could not observe any defect. He informed this to the accused-appellant.

Secondly the prosecution relied on the evidence of Nelson Wijesiri a technician from Toyota Lanka and Gamini Priyalal De Silva who was the Service Manager at Toyota Lanka during this period.

According to the evidence of Nelson Wijesiri he had examined the vehicle in question on the request of the Criminal Investigation Department at the Mahiyangana Police Station, in the presence and guidance

of his Service Manager and he could not observe any defect in the tyres, tyre rods shock absorbers, rack-ends, bearings, ball joints and the coil spring of the said vehicle and the vehicle was in perfect good running condition and he could not find any reason for a Jerk in the said vehicle at that time. This position was confirmed by the then Service Manager of Toyota Lanka Gamini Priyalal de Silva.

Out of the above two witnesses the 1st witness who had undergone training at Toyota Lanka work shop had over 15 years of experience in vehicle repairing. The 2nd witness under whose guidance and supervision the 1st witness carried the said inspection, is a diploma holder in Motor Mechanism, had received a Special Mechanical Training from Toyota Japan during his 18 ½ years service at Toyota Lanka and the prosecution had relied him as an expert in his field.

The question of, who is considered as an Expert Witness? Was discussed in the case of ***The State of Haryana Pradesh V. Jai Lal (1999) 7 SCC 280*** as follows;

> "An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation; and he must have a special knowledge of the subject.
>
> In order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special experience therein or in other words that he is skilled and has adequate knowledge of the subject."

This court has no reason to reject the evidence and the report submitted by witness Priyalal de Silva when considering his experience and the qualification in the relevant filed, as transpired during his evidence. The evidence of the other two witnesses namely Sarath Chandrapala and Nelson too can also be considered as evidence in this case but, if they have given any opinion that cannot be considered by this court as expert opinion, however that can be considered as evidence if it has been corroborated by the evidence of an expert witness. With regard to the evidence given by witness Nelson, we observe that, he has carried out an inspection on the instruction of witness Priyalal de Silva and both witnesses

had corroborated each other with regard to the observations they made and therefore this court has no reason to reject the evidence of witness Nelson as well.

The Learned Senior State Counsel further relied on the evidence of Dr. Dissanayake of Mahiyangana Hospital who examined the accused-appellant during the same night around 12.30 am. The accused-appellant was produced before him as a suspect in a Fatal Accident case by the Mahiyangana Police. According to the evidence of Dr. Dissanayake, in order to examine the accused-appellant, he got the shirt removed first and examined him. During his examination he could not observed any injuries on his body. Before examination he questioned the accused-appellant and he was not confused and could give a clear description of the events take place during that night. Dr. Dissanayake in his evidence has referred to the condition of the accused-appellant as observed by him as follows;

ප්‍ර: විත්තිකරුගේ මානසික තත්වය පිළිබඳව බලාපොරොත්තු වූ ආකාරයට අදහස් ලබාගැනීමට පුලුවන් වුනාද?

උ: ඔව් ස්වාමීනි

ප්‍ර: මොකක්ද විත්තිකරුගේ මානසික තත්වය පිළිබඳව අදහස

උ: මානසික තත්වය හොඳ තත්වයක තිබුනා විත්තිකරුගේ, ඔහුගේ සම්පූර්ණ විස්තරයම ලබා දුන්නා

ප්‍ර: සම්පූර්ණ විස්තරය කියන එකෙන් අදහස් කලේ මොකක්ද?

උ: ජීප් රථයේ ගිය විදිහ ජීප් රථය පාරෙන් ලිස්සලා ඇළට වැටුන විදිහ ඔහු ඉවත්වී බේරුන බවත්, බිරිඳ සහ ජීප් රථය සොයාගැනීමට නොහැකි බවත් කිව්වා. මතකයේ කිසිම අවහිරතාවයකින් තොරව අනුපිලිවෙලින් සඳහන් කලා ඒ අවස්ථාවේ ඔහුට හොඳ මතකයක් තිබුනා

ප්‍ර: එවැනි රෝගියකු පරීක්ෂා කරනවිට යම්සිද්ධියකට පසුව එම සිද්ධියට මුහුණදුන් පුද්ගලයා පරීක්ෂා කරනවිට මතකය සම්බන්ධයෙන් ගැටළු සහගත තත්වයක් තිබෙනවාද?

උ: සමහරවිට හදිසි අනතුරකින් පසුව මතකය පිළිබඳ ප්‍රශ්න පවතින අවස්ථාත් තියෙනවා සමහර අවස්ථාවල සම්පූර්ණයෙන් අමතකවීමක් සිදුවෙනවා කම්පනය නිසා සමහර අයට සිද්ධියේ මුල සහ සමහර අයට සිද්ධියෙන් පසු අවස්ථාව මතක නැතිවීම වෙනවා මෙහිදී මෙම පුද්ගලයාට සම්පූර්ණ සිද්ධිය අනුපිලිවෙලින් කියන්න පුලුවන් කමක් තිබුනා ඒනිසා තමයි මතකය හොඳබවට තීරණය කලේ

During the examination he observed only the bottom part of the trouser was wet only up to the knee level. The balance part of the trouser and the shirt was not wet. When it was suggested to the witness that due to the laps of time and other outside conditions the cloths he was wearing could have dried up, the witness's answer was that he is unable to say anything but he could only say that he saw only the bottom part of the denim trouser worn by the accused-appellant was wet. It is important to be mindful of this aspect of the evidence since the accused-appellant was wearing a Denim Trouser and not a cotton or a synthetic trouser at that time.

Prosecution has then called a witness by the name Dassanayake Mudiyanselage Ranbanda Dassanayake Engineering Assistant at Mahaweli Authority. This witness was summoned to obtain the water level of the "Viyana Ela" on that day.

According to this witness, the Mahaweli Authority is collecting data with regard to the water levels of this canal and the said water levels are stored in their system. According to the date given, i.e. on 19th May 2005 the water level of Viyana Ela was 3.05 meters which is approximately 10 feet. When the water level is 10 feet a person fallen to the canal will have to swim in order to come out from the canal and therefore it is not wrong to expect all his cloths are soaked with water when he come out from the canal.

Prosecution has further relied on the different positions taken up by the accused-appellant at different times with regard to the incident which are contradictory to each other and therefore submitted before this court, that

a) The accused-appellant was trying to cover up the real incident and therefore he was giving contradictory versions to different people at different times,

b) The evidence given by the accused on oath should be rejected due to the contradictory position taken up by him

In this regard the Learned Senior State Counsel relied upon the evidence given by the following witnesses.

a) According to the evidence of witness Chandradasa who was passing the place where the incident had occurred, when the accused-appellant made a request to take him to the Magistrate's bungalow at Mahiyangana, the witness obliged but took the accused-appellant to Mahiyangana Police. On their way the accused-appellant told him "That he fall asleep and also said that the shutters were closed since it was drizzling (page 271) this evidence went unchallenged and there is no reference to excessive speed or mechanical defect to this witness.

b) According to the evidence of witness Palitha Ariyawansa Lankadeepa Correspondent for Badulla he had interviewed the accused-appellant prior to his arrest on 20th May 2005. The said news item was produced marked P-3 and in the said news item the accused-appellant says he drove the jeep at an excessive speed and failed to negotiate the bend. There is no reference to him falling asleep or mechanical defect to this witness.

c) According to witness Jayamini, having heard about the incident she telephoned the accused-appellant. At that stage he told her that the vehicle skidded off the road. There is no reference to him falling asleep or mechanical defect to this witness too.

d) According to the evidence of witness Ajith Sumith who is the brother in law of the accused-appellant, when he met the accused-appellant at Mahiyangana Police Station, he told him that he came at a speed of about 90 kmph and the vehicle went off the road when he was

negotiating the bend. However there is no reference to him falling asleep or mechanical defect to this witness.

In the Police Statement made to Mahiyangana Plice Station prior to his arrest, which was produced marked P-9 the accused –appellant had taken up the following position; ".....මහවැලි ඇළ මාර්ගයේ අලිකඳුර ප්‍රදේශයේදී මා පදවාගෙනආ ජීප් රථය ධාවනය කරමින් සිටින විට එකවරම වංගුවක් සහිත ගැට්ටක් තිබුන අතර එම ස්ථානයේ ජීප් රථය ධාවනය වෙමින් තිබියදී එකවරම ගැහිගැහී වමට කැපුනා එම කැපුන ගමන් ඇළ මාර්ගයට ඇදගෙන වැටුනා..... මා අංක UPHM 0588 දරණ ජීප් රථයෙන් කිලෝමීටර 90ක වේගයෙන් ධාවනය කලා."

As observed by this court, even though the accused-appellant had taken up the position that he drove the vehicle at 90 kmph at that time, he has not referred to the fact that the vehicle skidded off the road but stated that when he was negotiating the bend, with a jerk the vehicle moved to the left beyond his control which is indicative of a mechanical defect in the vehicle.

When the case for the prosecution was concluded and the accused-appellant was explained by court, his rights, the accused-appellant had preferred to give evidence on oath. In his evidence he has referred to the incident as follows; (page 1373-1374)

ප්‍ර: ඔබ වංගුව ගත්තාද?

උ: එහෙම ගන්නවාත් එක්කම සද්දයක් ආවා ස්වාමීනි

ප්‍ර: වංගුව සම්පූර්ණයෙන්ම ගත්තාද?

උ: නැහැ ස්වාමීනි ගන්න ලැබුනේ නැහැ ගන්නකොට පිටිපස්සෙන් ශබ්ධයක් ආවා එතකොට සුක්කානම ලිහිල් වුනා ඒ එක්කම ස්ටියරින් එක වමට කැපුනා

ප්‍ර: වමට කැපෙන්න ඉස්රවෙලා මොකද වුනේ?

උ: යම් දෙදරීමක් වුනා මට කියන්න තේරෙන්නේ නැහැ ස්වාමීනි ගැස්මක් ආවා

ප්‍ර: එතකොට වමට කැපුනාද?

උ: ඔව් ස්වාමීනි රිට පස්සේ වමට කැපෙනවාත් එක්කම ගිහිල්ලා ඇළේ තමයි වාහනය නැවතුනේ

The above position taken up by the accused-appellant whilst under examination in chief is almost similar to his position in the 1st complaint but when the accused-appellant was under cross examination he had changed his version as follows;

ප්‍ර: ඔබ මහියංගන පොලිසියට ඉස්සෙල්ලම ප්‍රකාශයක් දුන්න?

උ: ඔව්

ප්‍ර: එම ප්‍රකාශයේ ඔබ විස්තරකලා අනතුරට හේතුව පොලිසියට?

උ: ඔව් ස්වාමීනි

ප්‍ර: දැන් ඔබගේ සාක්ෂිය අනුව ඔබ කියන විධියට මෙම අනතුරේ හේතු දෙකක් ඔබ කිව්වා

උ: ඔව් ස්වාමීනි

ප්‍ර: එකක් තමයි වාහනයේ ඔබ කියපු ආකාරයේ දෝශ සුක්කානම වෙව්ලීම, ශබ්ධයක් ඒම සහ ගැස්සීම?

උ: වාහනයේ දෝශම කියන්න බැහැ ස්වාමීනි

බ්‍රේක්කර ඉස්සරහට ගන්නාවිට ආපු ටයර් ශබ්ධය දෝශයක්ම කියලා කියන්න බැහැ

ප්‍ර: ඒ කියන්නේ වාහනයේ මොකුත් දෝශයක් තිබුනේ නැහැ

උ: ඒ අවස්ථාවේදී දෝශයක් තිබුනේ නැහැ

ප්‍ර: වාහනය පාරෙන් ඉවතට පැන්නේ නැත්නම් අනතුර සිදුවීමට දෝශයක් බලපැවේ නැහැ

උ: වාහනයේ කාර්මික දෝශයක් බලපැවේ නැහැ

ප්‍ර: ඔබගේ සාක්ෂි තමයි වාහනය පාරෙන් ඉවතට ගොස් අනතුරට පත්වීමට බලපැවේ ඔබගේ වංගුව නිරීක්ෂණය කිරීමේ දුර්වලතාවය

උ: ඔව් ස්වාමීනි

ප්‍ර: ඒ නිසා තමයි වාහනයට මෙම අනතුර සිදුවුනේ

උ: ඔව් ස්වාමීනි

ප්‍ර: ඔබ පළවෙනි කට උත්රය මහියංගන පොලිසියට දුන්නා

උ: ඔව් ස්වාමීනි

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ප්‍ර: එම ප්‍රකාශයේ වචනයක්වත් කිවුවාද මගේ නිරීක්ෂණය කිරීමේ ගැටළුව නිසා තමයි අනතුර වුනේ කියලා

උ: නැහැ ස්වාමීනි

Under cross examination the accused-appellant changes his earlier positions of defect in the vehicle to failure in judging the bend due to his speed, but admitted that he did not inform the police of this position in his first complaint or thereafter.

When considering the positions taken up by the accused-appellant, as to how the incident had taken place, at different points, to different authorities and different personal, it is correct to conclude that the accused-appellant was not sure as to how this incident took place for reasons best known to him.

It is further observed by this court that, according to the evidence of the accused-appellant jeep veered off when he was negotiating the bend and not after negotiating the bend but, according to the observations, the incident had taken place after passing the bend, beyond the guard stones.

Another argument raised by the Learned Senior State Counsel before this court was the time taken by the accused-appellant to come from Mahiayangana to the place where the incident had taken place. In his statement made to the Mahiyangana Police at 7.50 pm which is produced marked P-9 the accused-appellant had taken up the position that he left Mahiyangana at 6.30 pm, and the incident had taken place around 7.15 pm. If the accused-appellant had left Mahiyangana at 6.30 pm and did drive fast as he explains at around 90 kmph he could have reached the place where the incident occurred (i.e. nearly 20 km) easily within 20-25 minutes.

With regard to this issue the Learned Senior State Counsel brought to the notice of court, that the accused-appellant, even though not referred in his first complaint but later explained that he had to stop the vehicle for pump petrol, made an offering to a temple and answer a call of nature before he reached the place where the incident took place to establish the fact that he was driving at a speed of 90 kmph at the time the incident took place.

Whilst referring to the said statement it was further submitted by the Learned Senior State Counsel that the accused-appellant had taken the trouble to explain minor details such as, the air conditioner was switched off, the shutters were opened and they were not wearing seat belts at that time, clearly indicates that the accused-appellant was trying to build up a case for him in his police statement. In this regard this court is mindful of the evidence given by Dr. Dissanayake of Mahiyangana Hospital who has observed that, the accused-appellant was not confused and could give a clear description of the events took place during that night.

With regard to the incident, the accused-appellant had further taken up the position that the vehicle was flipped in to the air prior to it being landed on the water. The said evidence can referred to as follows;

ප්‍ර: පාරෙන් ඉවතට ගියාට පසුව වතුරට වැටෙන තෙක් කොහේවත් පතිත වුනේ නැද්ද?

උ: ඒක මතක නැහැ

ප්‍ර: වාහනය ඉවතට උඩින් ගිහිල්ලා වතුරට වැටුනා කියන්නේ?

උ: ගුවන්ගත වීමක් තිබුනා

ප්‍ර: ගුවනින් ගිහිල්ලා තමයි වැටුනේ

උ: ඔව්

This evidence is clearly contradictory to the observations made by the official witnesses including the police officer, Examiner of Motor Vehicles and the Government Analyst to the effect that there was a tyre mark visible from the edge of the road up to the water level of the canal.

The Learned Trial Judge after analyzing the said evidence placed both by the prosecution and the defence, had correctly rejected the evidence given by the accused-appellant and also rejected the evidence given by defence witness Sarathchandra Kodikara. This court too had considered the said evidence as submitted by the Learned Senior State Counsel and see no reason to interfear with the above findings of the Trial Judge.

Other than the evidence given by the accused-appellant the Learned President's Counsel further relied on the evidence of the prosecution witnesses which indicates the subsequent conduct of the accused-appellant.

As observed by me earlier in this judgment, the accused-appellant had made contradictory statement to people whom he met after the incident. In one of the initial statement made to Chandradasa while he was taken to Mahiyangana by him, the accused-appellant had told him that there was drizzling and the shutters were closed in the jeep and he felt a sleep prior to the incident. The evidence of witness Chandradasa admitted unchallenged but this version is contradictory to the subsequent positions taken up by the accused-appellant.

According to Dr. Dissanayake who examined the accused-appellant few hours after the incident, had said that the accused-appellant was not confused and could give a clear description of the events that took place during that night as referred to in this judgment by me earlier.

Dr. Dissanayake has not observed any injuries on the body of the accused-appellant. Witness Wijitha Senevirathne the person to whom the accused-appellant had first informed the incident, too in her evidence had said that, the person, without even asking went on saying things happened at that time.

As submitted by the Learned Senior State Counsel, the accused-appellant in his first complaint, made at 7.50 pm referred to miner details such as, he and his wife did not wearing seat belts at that time and also could remember the date of purchase of the said vehicle as 13.10.2003 which clearly indicates the state of mind of the accused-appellant few minutes after the incident took place.

When considering the events that had taken place immediately after the incident, we observe that the Learned Trial Judge had correctly considered the material available before court and rejected to consider the said conduct of the accused-appellant under section 8 (2) of the Evidence Ordinance.

As his first ground of appeal the Learned President's Counsel submitted that the Learned Trial Judge has misdirected himself when he failed to consider the defence of accident under section 73 of the Penal Code.

Section 73 of the Penal Code reads thus;

> "Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner, by lawful means and with proper care and caution."

When considering the material already discussed in this judgment I see no relevance in the above provisions to the present case.

As correctly concluded by the Trial Judge to reject the evidence given by the accused-appellant, the evidence of the defence witness and refuse to consider certain items of evidence under section 8 (2) of the Evidence Ordinance, this court is not inclined to agree with the contention of the Learned

President's Counsel that the items of evidence which are in favour of the accused-appellant were not considered by the Learned Trial Judge.

For the reasons setout above I see no merit in the 1st and 2nd grounds of appeal raised by the accused-appellant.

Third and the final ground of appeal raised by the Learned President's Counsel was based on the alleged failure by the Trial Judge to appreciate properly the Legal concept relating to Circumstantial Evidence.

As observed by me at the very commencement of this judgment, the entire case for the prosecution was based on circumstantial evidence. As further pointed out by me, in establishing the prosecution case prosecution relied heavily on motive of the accused-appellant to commit this offence. The Leaned Senior State Counsel relied on the decision in ***Plomp V. Queen 37 ALJR 191*** to explain the nature of circumstantial proof needed in a case of this nature.

In the said case of ***Plomp V. Queen*** where the facts are very similar to the present case, the deceased met her death when she was in sea along with the applicant at Southport at dusk on 24th February 1961. There were no eye witnesses and the only account of what happened was given by the applicant to various people called as witness.

Other than the said material the rest of the evidence available in the said case was strong evidence to establish the motive of the applicant including his affair with another lady and his subsequent conduct to marry her.

The importance of motive in a circumstantial evidence case was discussed by Menzies J in the said case as follows,

> "It would be just as unrealistic to treat the presence of a motive for doing an act which, if it occurred at all was done by the accused as irrelevant to determining whether he did it as to treat

the absence of a motive as irrelevant to the determination; yet the absence of a motive is commonly relied upon as a circumstance tending in favour of accidental death as against suicide or in favour of a person accused of a crime.

This court is mindful of the requirements needed in establishing a case based on circumstantial evidence discussed in series of cases, by the Supreme Court as well as Court of Appeal, but at the same time observe the importance of motive in a Circumstantial Evidence case as observed above.

The importance of motive was again discussed in the case of ***R.V. Ball [1911] AC 47*** by Lord Atkinson as follows, "Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his malice afterthought inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not."

In the case of ***Don Sunny V. Attorney General 1998 (2) Sri LR 1*** the principles that should be applied by court in analyzing circumstantial evidence was identified as follows,

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

   On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drown is that the accused committed the offence then they can be found guilty.

4. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

As observed in the said case of ***Plomp V. Queen*** a strong motive was considered as crucial evidence in a circumstantial evidence case but as I have pointed out earlier, our courts have constantly applied the requirement of following the principles in establishing a circumstantial evidence when the case is essentially a circumstantial evidence case.

Even though I will not consider the motive as the crucial evidence in the present case, I must say that a strong motive for the accused-appellant to commit this offence is established by the prosecution in this case. Even though the accused-appellant had denied such motive and said that since March he lived a peaceful life with the deceased, that evidence was totally rejected and that could not have even created a doubt or suspicion in the mind of the Trial Judge. However prosecution has left one single issue for me to consider with regard to the evidence of Jayamini Priyadarshika Namalie the mistress of the accused-appellant. She was called by the prosecution as a prosecution witness in order to establish the illicit affair she had with the accused-appellant. She confirmed this position but went on to say that the deceased did not object them to continue with their affair and in fact she too had visited her on few occasions. However in contrary the same witness admitted several instances where the deceased had objected her being present with the accused-appellant which was corroborated by the evidence of Lakmini and Sujatha. Witnesses Lakmini and Sujatha in their evidence referred to several such incidents and last being the incident reported to Badulla Police on 21st December 2004 which was corroborated through Police Evidence. Under these circumstances, the extent to which the evidence of witness Namalie could be relied upon becomes essential to be considered by this court.

In this regard I am mindful of the maxim *falsus in uno, falsus in omnibus* and the decision in ***Samaraweera V. The Attorney General 1990 (1) Sri LR 256*** where the Court of Appeal held "The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances Further all falsehood

is not deliberate. Errors of memory, faulty observation or lack of skill on observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another."

When considering the evidence of witness Nimalie it is obvious that she is trying to help the accused-appellant since she will become a mother of a child without the father, if the accused-appellant is convicted in the present case and therefore she has a reason to protect him. Therefore this court is of the view that the evidence of witness Namalie can be safety separated as material corroborated by the evidence of the other witnesses and not corroborated by the evidence of the other witnesses and can safely act upon the evidence corroborated by other witnesses.

Under those circumstances, this court will conclude that the prosecution has established a strong motive on the part of accused-appellant to commit the murder of the deceased Manjula Priyadharshani Warnakulasuriya.

In addition to the motive to kill the deceased, the prosecution has relied on several items of circumstantial evidence to establish the guilt of the accused.

As observed by the doctor, if the deceased was travelling in the vehicle without wearing a seat belt at the time it went in to the water, at the speed the accused-appellant explained, she should receive much more injuries on her body. As admitted by the defence witness Dr. Sarathchandra Kodikara the percentage of receiving injuries in such a situation is 100%.

The consultant Judicial Medical Officer had gone a step further saying that even the driver should receive injuries if he was inside the vehicle at that time. Dr. Dissanayake has not observed any injuries on the body of the accused-appellant and also observed the Denim trouser the accused-appellant was wearing at the time he examined him was wet only up to knee level. According to the evidence of Dissanayake Mudiyanselage Ranbanda Dissanayake of Mahaweli Authority the water level on Viyana Ela was approx. 10 feet on that day. The doctor has given an opinion that if the deceased was pushed to the canal from the unprotected bridge which is in close proximity, it is possible the deceased to receive one single minor injury as observed at the post mortem. This fact is further confirmed by two more points placed during the argument, one being the fact that the body was found 1 ½ km away down the canal and not inside the jeep and secondly the fact that the accused-appellant was very well aware that the body was not inside the jeep from what he informed the police to the effect; "මෙම අනතුරින් මගේ බිරිඳ මහවැලි ඇළේ ජලයට ගසාගෙන ගිය අතර ජීප් රථයද ගසාගෙන ගියා"

The evidence of the Government Analyst and the Examiner of Motor Vehicle had ruled out the possibility of the jeep falling in to the water at a high speed and the position taken up by them was that the vehicle carefully gone to the water at a considerably lower speed. When the said witnesses, expected either the vehicle to topple or flipped in the air and fallen half way, no damage compatible to such an incident was observed by them.

The accused-appellant at a later stage of his evidence had tried to change his version by saying that the vehicle was first flipped to the air and landed on the water, this position has to be rejected in view of the observations made at the scene by the police and other official witnesses.

As observed by this court, the accused-appellant had made every attempt to establish that the vehicle was driven at a speed closer to 90 kmph in order to justify his defence but the prosecution had scientifically destroyed the said possibility.

The Learned President's Counsel tried to gain advantage from the fact that a ladies pair of slippers were found inside the jeep but could made use of the said point when the expert witnesses took up the position as to how a stiff body with the weight of 60 KG went out from the jeep.

When considering the above evidence it is our considered view that the only irresistible inference that can be arrived by this court is that the murder of Manjula Priyadarshani Warnakulasuriya was committed by the accused-appellant Ratnayake Mudiyanselage Jayantha Ratnayake and not by any other persons. Prosecution has also ruled out the possibility of an accident in this case. The said items of circumstantial evidence are consisting only with the guilty of the accused and nothing else.

In this regard we observe that the Learned Trial Judge had carefully evaluated each and every item of circumstantial evidence in the present case before coming to the conclusion, even though he has not specifically referred to the principle behind it, this court is mindful of the fact that the trial judge with a trained legal mind was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion.

In the case of ***Dayananda Loku Galappaththi and Eight Others V. The State 2003 (3) Sri LR 362*** this position was discussed as follows;

> "In a Jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties specified in section 232 of the Code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to section 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the Trial Judge was alive and mindful of the relevant principle of law and has applied them in arriving at his conclusion. The law takes for granted that a Judge with a trained Legal mind is well possessed of the principles of law, he would apply."

For the reasons setout above we see no merit in the 3rd ground of appeal raised by the Learned President's Counsel for the accused-appellant.

We therefore affirm the conviction and sentence imposed by the Learned High Court Judge Badulla and dismiss this appeal.

Appeal Dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL