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.15/1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka and High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

C.A. No. 111/2012

H.C. Gampaha No.120/2010

Wanasinghe Arachchilage
Samantha Thilakasiri alias Suda

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

****

BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Amila Palliyage with Nihara Randeniya for the Accused-Appellant. Parinda Ranasighe (Jr.) P.C., A.S.G. for the respondent
ARGUED ON	:	15th March, 2019, 18th March, 2019, 02nd May, 2019, 09th May, 2019 & 10th May, 2019
DECIDED ON	:	20th September, 2019

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ACHALA WENGAPPULI, J.

The accused-appellant (hereinafter referred to as the "appellant") was indicted before the High Court of Gampaha for committing rape on *Stephen Koralalage Don Nishani Buddhika* on or about 3rd November 2006 and, in the same course of transaction, committing robbery and of committing her murder. The appellant elected a trial without a jury. At the conclusion of his trial, the appellant was convicted on all three counts. He was then sentenced to serve a fifteen-year term of imprisonment each on account of his conviction to the charges of rape and robbery, in addition to a fine of Rs.7,500.00 with a default term of six month imprisonment.

Sentence of death was pronounced upon his conviction for the offence of murder.

Being aggrieved by the said conviction and sentence, the appellant sought to challenge them upon the following grounds of appeal;

a. the trial Court had failed to evaluate the items of circumstantial evidence in its correct perspective in finding the appellant guilty,
b. the trial Court erroneously convicted the appellant on mere speculation and pure conjectural surmises, which are not supported by the evidence led before it,
c. the failure of the trial Court to reject the "unsafe" evidence that had been led under Section 27 of the Evidence Ordinance through the Police which is in conflict with the evidence of the medical expert,
d. the failure of the trial Court to consider that the verdict of guilty is not the irresistible inference when considered the evidence in its totality specially when it failed to exclude the involvement of a 3rd party in the murder,
e. the trial Court had failed to consider that there was no evidence in support of the charge of rape,
f. the trial Court had erroneously rejected the appellant's evidence which was corroborated by the evidence of the medical expert.

These grounds of appeal that had been raised by the appellant could be considered conveniently by this Court under the following four broad areas. The appellant relied on grounds of appeal concerning the principles governing prosecutions based on circumstantial evidence, consideration of admissibility of evidence relating to discovery of fact, the evaluation of the defence case by the trial Court and sufficiency of evidence in relation to the charge of rape.

It is evident from some of the grounds of appeal that they concern the correctness of the evaluation of the items of circumstantial evidence undertaken by the trial Court in arriving at the conclusion that the appellant is guilty to the three counts he was charged with. Therefore, it is helpful if this Court refers to these several items of circumstantial evidence that had been presented before the trial Court by the prosecution in a sequential order *albeit* briefly, before this Court makes an attempt to consider the question of validity of the conviction in the light of the abovementioned grounds of appeal.

It was revealed before the trial Court that the deceased was a resident of *Meerigama* and used to commute daily in train to her workplace in Colombo. She used to walk along a foot path which ran along a canal, abutting a threshing floor, to reach *Wilwatte* Railway Station where she boarded the 6.20 a.m. Colombo bound commuter train. In the evening she would return home after alighting from the train from the same station and walking along the same footpath in order to reach her home by about 6.30 p.m. with her mother who would wait for her at the Station. The deceased was 26 years of age at the time of her death and was about to get marry to her fiancé, *Kasun Udawatta.*

On 03.11.2006 too, she left home in the morning as usual and when her mother *Sumitra* went to the Station to accompany the deceased in the evening, she learnt that the deceased had left her workplace earlier than the usual on that particular day. *Sumitra* was anxious since the foot path was already under water due to the heavy downpour to the area during the day and decided to wait for her, in spite of the fact that the deceased had left her office early that afternoon. She thought the deceased would arrive in the train which followed to the one, the deceased used to take regularly and therefore took shelter in a nearby boutique. She waited there till 8.30 p.m. Whilst waiting in anticipation, she was told by witness *Sujatha* that she saw the deceased, who had arrived at *Wilwatta* Station in the evening. Hearing this, the witness became highly agitated and the thought crossed her mind whether her daughter had accidently fallen into the canal, which was overflowing with rain water.

The witness then alerted her son *Buddhika* about the deceased's disappearance. He in turn contacted her fiancé *Kasun*. They have gone to Police to inform about the disappearance of the deceased. Thereafter they have looked for the deceased in the surrounding areas along her usual route. *Buddhika* had then seen the body of the deceased lying naked in the temporary shed on the threshing floor at about 9.30 or 10.00 p.m. in the same evening. He also noted a plastic cone that had been inserted into her vagina. He had covered her body with his T shirt. *Sunitha,* who lived close to the place where the body was found had provided a bed sheet to the Police who arrived there subsequently to cover the body of the deceased.

Ariyaratne, who plucks coconuts in the area, stated in his evidence that the appellant had took him to that particular threshing floor near the

Wilwatta Station in one evening and made an attempt to stab him over a past dispute. He noted a bullock cart on the said threshing floor. He escaped the attempt of the appellant on his life by running away from him. He was arrested by Police in connection with this murder and was subsequently discharged by Court when the appellant was arrested by the Police.

In his evidence, *Wijeratne Silva* stated that he learnt about the death of the deceased from others and had met the appellant quite by chance at the *Minuwangoda* bus stand where the latter had told him that he was released on bail on that day. When the witness met the appellant again after few days after their earlier meeting, he asked the appellant as to the reason why the appellant was not seen around. In replying to this query the appellant had told witness that he was accused of murder of a girl who was returning home after work. He had run away from the Police who came to arrest him by giving them the slip. He further described an incident to the witness in following terms:

"ප්‍ර : ඒ කිව්ව විස්තරය කියන්න?

උ : ගෑණු ළමයා සවස වැඩ ඇරිලා එද්දි ලහට ගියා කිව්වා. ගිහින් අතින් අදිද්දි එයා කුඩෙන් ගැහුවා කිව්වා. කුඩේ කැඩෙනකම් ගැහුවා කිව්වා. ඊට පසුව ආයේ පාරක් ගහලා තිබෙනවා කිව්වා. ඊට පසුව එයා වැටිලා කමතට අරන් ගිහින් තිබෙනවා කිව්වා. එතන කරත්තයක් තිබුණා කිව්වා. කරත්තයේ එල්ලලා නුල් කෝන් එහෙම තිබුණා කිව්වා.

ප්‍ර : ඒ විස්තරය කවුද කිව්වෙ?

උ : සමන්ත කිව්වෙ."

The appellant also told the witness that " නුල් කෝන් දෙක එයාගෙ ස්ත්‍රීලිංගය ඇතුලට යවල" and there was a drizzle at the time of her murder. After listening to the description of the circumstances that surrounded the murder, as provided by the appellant, the witness became suspicious as to how the appellant, who is from a different locality, knew that it had rained in *Wilwatta* that very evening the girl was murdered. The witness later conveyed his suspicion to one of his friends, who then had apparently alerted the local Police about the appellant.

PS 25842 *Serasinghe* of *Meerigama* Police received information about the discovery of a dead body and had left the station to investigate at 12.20 a.m. on 04.11.2006. The initial observations made by the witness revealed that a naked body of a woman was lying on the threshing floor in between two bullock carts. Her body was covered with two T shirts. The officer had noted one cloth bag and another black bag in the canal during investigations he conducted in the following morning. He also noted a broken umbrella with a bended main shaft. A handbag containing identification papers of the deceased, a rose coloured T shirt, some shirt buttons, a brown skirt, a tight short, a brassier, a leather bag were among the items that were found in a pile in the immediate vicinity of the dead body.

IP *Kosala* arrived there with a team of officers and had taken charge of the items that were found at the scene. He also made observations of the body. It was lying in supine position and the witness noted significant bleeding from her vagina. He took steps to photograph the scene and had recovered three white buttons and one purplish button embedded in the muddy threshing floor. He also noted that the canal that ran along the foot

path and the surrounding paddy fields were still under water after the heavy rains in the previous evening.

The Judicial Medical Officer Dr. *Ananda Wijewickrama* of *Gampaha* Hospital had arrived at the scene and made his observations. He had performed a post mortem examination on the body of the deceased after its removal to the hospital. He noted down the following observations at the scene;

> *"Body was seen naked, in a threshing floor of a paddy field near a cadjan hut. It was lying upwards with both legs bent upward and stretched out at knees. Both hands were stretched away from the body and the left hand was bent upwards at elbow joint. Blood stains were seen on the floor near the buttock. A brassier, pant, blouse and a skirt were seen near the left side of the body. It was a well built, fair skinned female. There were mud stains and sand all over the body, but mainly on back aspect. Bloodstained, uniform, fine froth was seen flown out from both nostrils. A cone shaped, plastic case of thread roll was seen forced into the vagina. There were blood stains on inner and back aspects of both upper thighs and on buttocks. A variety of plant leaves were seen entangled in hair."*

During examination in chief of the witness *Sumitra,* the prosecution had clarified that the deceased wore several items of jewellery regularly to office. The jewellery items and the clothing worn by the deceased and her personal items were shown to the witness and were identified. She also stated that she was shown these items by the Police at some point of time

after its recovery during investigations and again during the inquiry before the Magistrate's Court. This fact was not challenged by the appellant.

Witness *Dharmasena* had assisted the police officers in their further investigations. He accompanied some police officers to the place where the body of the deceased was seen lying. They saw several broken branches of a *Kottan* tree on the bank of the canal about 50 feet away from the threshing floor and have decided to conduct a search in the canal. At that time the flood water level had receded and was at knee high. The witness felt something in the muddy bed of the canal and located a pair of rubber slippers worn by the deceased. He then recovered another rubber slipper which was bigger in size to the pair he already recovered. A statement was recorded off the witness by the Police about these recoveries.

IP *Premasundera* of *Meerigama* Police confirmed the said recovery was made under his supervision.

In his evidence, IP *Jayakody* stated that he was attached to the unresolved crimes unit under the direct supervision of Senior SP of the area. The appellant was arrested upon an information received by an Assistant SP. He was arrested near *Meerigama* bus stand at about 10.00 p.m on 27.11.2006. His statement was recorded at 11.20 p.m. Then the Police team had left for his house at about 2.00 a.m. to conduct further investigations. The witness had recovered several items of jewellery wrapped in a polythene bag, which had been placed under a pot of aloe bushes. The place where these items were recovered was pointed out by

the appellant. A shirt with a missing button and a trouser too was recovered by the Police. They returned to the station at 8.15 a.m.

The appellant had also pointed out a place in a shrub jungle along the railway in *Kosetadeniya* where a rubber slipper was found on 28.11.2006. The appellant was examined by a Judicial Medical Officer prior to his production before Court.

The main thrust of the appellant's challenge on the recovery of jewellery items was pivoted on the three fresh injuries that were noted by the JMO who estimated that they could have been caused to him within three to four days prior to his medical examination which could be due to an assault. This factor, the appellant contended, would render the evidence relating to the discovery of a fact, which had been utilised by the trial Court to infer the appellant's guilt, unsafe.

Learned Counsel for the appellant took great pains to impress upon this Court that the appellant had sustained these injuries during his extended period of illegal detention at the hands of his investigators and the only significant item of evidence against the appellant i.e. the recovery of the items of jewellery is therefore a result of information extracted from him under those circumstances. His contention is that the recovery was made under duress and it rendered that evidence inadmissible and unreliable as per the judgments of ***Poulier v Abeygunawardene***41 N.L.R. 347 and ***The Queen v Appuhamy*** 60 N.L.R. 313.

Learned Additional Solicitor General sought to counter this submission on the basis that the appellant never suggested that the jewellery items, said to have been recovered upon his pointing out the

place where they were concealed, were in fact introduced into the case by the investigators during a subsequent stage of the investigations after obtaining them from the deceased's family to any of the relevant lay witnesses, although he stated so only in the defence case. Therefore, learned ASG submitted that the appellant had mounted this factual challenge inconsistently and that too only at a later stage of the trial. That is a clear indication that it was raised only as an afterthought, and accordingly the trial Court's decision to reject the appellant's evidence on this basis is amply justified when considered in the light of the totality of the attendant circumstances.

The prosecution evidence is that the appellant was arrested on 29.11.2006 at 2.20 a.m. in *Kosetadeniyawa* of *Kitulwala* after 26 days since the death of the deceased. At the time of his arrest, the appellant had fresh injuries on his heels. He was examined by Dr. *Wijewickrama* also on 29.11.2006 at 11.30 a.m. upon being produced by SI *Jayakodi.*

The appellant, during his cross examination of SI *Jayakodi* did suggest that he was arrested on 22.11.2006 at *Gampaha* but was denied by the witness. The appellant however did not suggest to any Police officer that he was assaulted by them during his period of detention at the police station.

In his evidence, the appellant claimed that he was arrested on 22.11.2006 by SI *Jayakodi* and was kept in detention for "28 days". The appellant also claimed that he was "inhumanely" tortured by six policemen. He was made to sign on five blank loose sheets of paper. When he refused to place his signature on blank papers, the policemen

made him sign on them by crushing his fingers (තැලුවා) by placing them upon a table and striking on them with a club.

It was submitted by the learned Counsel for the appellant that the appellant's claim of torture is amply supported by the medical witness's observation of injuries.

Understandably the appellant seeks to challenge the most damning item of circumstantial evidence presented against him by the prosecution. It is therefore incumbent upon this Court to consider this claim of the appellant very seriously since it will certainly have a bearing on his conviction on these counts.

The appellant relied on the three fresh injuries that were noted by the medical witness on his person to substantiate his position that he was kept in detention for well over legally permissible 24-hour period and the admissibility of the evidence relating to the discovery of a fact by the trial Court was therefore tainted due to the fact that his statement was obtained during this continued detention and under compulsion upon torturous acts performed on him by the Police.

Perusal of the oral evidence as well as the medico legal report of Dr. *Wijewickrama* revealed that the three fresh injuries that utilised to support the appellant's claim of torture, are described as follows:

Injury No. 8: A fresh, grazed abrasion measuring 1.5 cm long, placed obliquely on front aspect of left shoulder,

Injury No. 9: A fresh, grazed abrasion of U - shaped, measuring 0.5 cm + 1 cm + 0.5 cm placed on the front aspect of left shoulder,

Injury No. 10: A fresh grazed abrasion measuring 2.5 cm long, placed transversely on outer aspect of left forearm, 4 cm above the wrist.

The appellant in his evidence did not make any reference to any of these three injuries. He instead alleged in more general terms that he was "inhumanely tortured" (අමානුෂික වධ හිංසා වලට ලක් කළා.). He also asserted that he was "burnt" and his fingers were "crushed" after placing them on a table top. He repeated his assertion of "crushing" his fingers when he referred to the circumstances under which his statement was recorded.

Learned Additional Solicitor General, in his submissions invited attention of Court that the appellant, although he alleged torture, did not make even a passing reference about it to the medical officer when he was produced before him. He also did not complain about it to the Magistrate's Court. He also did not make an application to the Prison Authorities to have him medically examined for the physical injuries that he claims to have sustained due to the acts of torture, during his period of detention.

In explaining the failure of the appellant to make a complaint to the examining medical officer, learned Counsel for the appellant highlighted that in view of the facts that the appellant was produced before the medical officer by SI *Jayakody,* his immediate presence during examination

and the fact of returning of the appellant back to Police custody after the examination, his silence could be understood and justified.

The trial Court, in its judgment had considered the appellant's evidence in quite detail. It is clear that the evidence of the appellant was not accepted by the trial Court upon its determination on credibility issues. The trial Court, having noted that the appellant's claim of obtaining his signature on five blank loose sheets is clearly a false claim when it considered the evidence that the relevant Information Book contained his statement in bound pages or not on paper which had later been affixed on it. The trial Court also considered the appellant's claim that the items of jewellery were introduced on him after the deceased's parents have supplied them to the police after his arrest, also as not creditworthy.

Having considered the evidence of the appellant, this Court concurs with the conclusion reached by the trial Court that his evidence is not at all creditworthy. In addition to the reasons adduced by the trial Court, as stated in its judgment, this Court also has considered the following aspects of his evidence especially in relation to his allegation of torture.

The prosecution admits that the appellant was kept in detention for more than 24 hours, but with the sanction of Court. An application was made to the relevant Magistrate's Court that the appellant be kept in police custody for 48 hours and it was allowed. Other than his bare assertion that he was kept in detention for 8 days (mistakenly stated as "28" days) there was no material even to suspect the validity of this claim.

In relation to the allegation of torture, the appellant relies on his assertion that he was "burnt" and had his fingers "crushed". The medical

examination in fact revealed that the appellant has had a single burn scar on his body as the medical officer noted a shiny irregular shaped scar measuring 2 cm x 3 cm placed on front aspect of right forearm (Injury No. 7). But this burn scar does not support his assertion that it was due to torture by Police since he himself admitted that it is an old scar.

It could also be observed that the appellant had 6 healed abrasions on his limbs (Injury Nos. 1 to 6) which are older in age and hence could not be connected to the alleged acts of torture.

Thus, if at all, the alleged acts of torture are confined to the three fresh injuries which could have been a result of an "assault" during the period of detention. It could also be the outside of the 48 hour long detention since the age of the injuries were estimated as 3 - 4 days. The appellant, although clarified from the medical witness that these injuries could be due to an assault, however did not elicit any evidence as to the weapon which may have used by the officers to inflict such injuries on him. Learned prosecutor had merely clarified that there was no complaint by the appellant of any assault to the medical witness and had thereby left the issue frozen in the position that had been elicited by the appellant during his cross examination of the medical witness. The appellant therefore claims that these injuries are sufficient proof of the fact that he was subject to torture.

It is correct that the prosecution, for the reasons best known to them, opted not to clarify from the medical witness as to the basis of his opinion that those three injuries are due to an act of "assault". At the same time, these injuries should then match with the description given by the

appellant when he described as to the manner by which he was tortured. He made no reference to any of these injuries or to the manner in which they had been inflicted. In short, he did not assert these three injuries were a result of an act of assault. His allegation of burning and crushing his fingers are clearly made out versions of events. The appellant himself speaks about a failed attempt by the Police to apprehend where he had escaped from their custody until he was re-arrested at a subsequent point of time.

In addition, the position advanced by the appellant creates another difficulty in the conceptual level. When the appellant claimed that his statement, which resulted in the recovery of certain articles, was recorded upon torture, he tacitly admits that in fact there was a recovery made by the Police upon information provided by him. As such, the appellant seeks to extend the prohibition imposed by Section 25 of the Evidence Ordinance extended to the exception created by Section 27.

However, when the appellant, in the same breath, claimed that these items were introduced to him by the police after obtaining them from the deceased's parents, he contradicts the very basis of his previous challenge to the recovery of articles on the ground of torture, since this claim totally excludes his knowledge to the articles recovered upon his pointing out the place. Clearly, if the Police were to introduce these articles on to the appellant, after obtaining them from the deceased's parents at a subsequent stage of the investigations, they need not labour themselves in torturing the appellant, risking their professional careers, to find a place of concealment where the appellant's knowledge to it is imputable. The appellant admitted that the Police had visited his house after his arrest and

that had provided an opportunity for the Police to find a suitable place of concealment and make notes about it, if they so wished, that such items were recovered from a place within the compound where the appellant resided. For that kind of introduction, the Police need not have undertaken any coercive action with the appellant by subjecting him to torture.

The ***The Queen v Appuhamy*** (supra), is a case where a confession made by an appellant was ruled out as inadmissible due to its involuntary nature in view of clear evidence of acts of torture inflicted by the Police. The appellants have called five witnesses in support of their claim of torture including a medical officer. The appellate Court had concurred with the conclusion reached by the lower Court that the allegations of assault of stripping the appellant naked, pressing the appellant's penis into a drawer, suspending him by his legs in a cross beam, forcing to inhale burning chili powder on red hot charcoal, dug in his ribs by coconut stalk, applying chili powder on his genitalia are credible allegations. The appellants have complained to the Magistrate about the atrocities they had endured during Police custody through their Counsel on the first available opportunity. The Magistrate also observed that the appellant was "tired and exhausted and felt he was going to faint". The Court also noted that the appellants are "persons of good character and men of means and good standing in the society to which they belonged".

The Court expressed its serious concern over the credible allegation of acts of torture as their Lordships observed that "... *the police administration has degraded itself by crude methods*". Having ruled the confession is thus inadmissible, in these circumstances, the Court of Criminal Appeal had indicated its view on the question "... *whether*

information forced out of an accused person by the use of violence is the 'kind of information contemplated in section 27 ? " clearly in the negative.

Both these authorities relied upon by the appellant and many other judgments pronounced by the superior Courts have clearly have reiterated its condemnation in employing such methods by the investigators to discover incriminating evidence against a suspect who is in their custody. There is no question that such deplorable practices, that are sometimes employed by the Police, had been strongly condemned by our judiciary consistently and more vociferously whenever such instances are brought to its attention.

The judgment of the Supreme Court in ***Rupasinghe v Attorney General*** (1986) 2 Sri L.R. 329, where a bench consisting of five Justices have considered the all-important right to silence of an accused and had dealt with this particular aspect in the following manner:

> *"The origins of the doctrine against self-incrimination in the English Common Law are discernible in the pronouncement of the later Stuart Judges which echoed the revulsion of the community against the practice of the Court of Star Chambers of compelling persons brought before it to testify against themselves on oath. The use of the rack and other forms of torture to extort confessions or other incriminating statements from persons accused of crime contributed to this reaction."*

But the nature of injuries and the appellant's conspicuous absence of making any reference to them even though he made an attempt to make up a case of torture and the trivial nature of the three injuries as seen from the medical evidence, coupled with the fact that it was only during the trial before the High Court the appellant first complained about his rough treatment by the Police, would certainly leads to the justifiable conclusion that it is only made out at a subsequent stage in order to challenge the admissibility of the evidence relating to recovery of items.

The trial Court, which has had the distinct advantage of observing the demeanour of the appellant at the witness box, correctly concluded that his evidence lacks credibility and therefore no reasonable doubt arose in its mind in respect of the strong inference of guilt that had been drawn upon the prosecution case against him.

In view of above considerations this Court is of the considered view that the grounds of appeal, based on the contention that the trial Court had erroneously relied on the evidence of recovery of jewellery items and also had erroneously rejected the appellant's evidence as not creditworthy, have no merit.

That leaves the consideration of the other substantial ground urged by the appellant that the trial Court acted contrary to the principles of law governing cases presented on items of circumstantial evidence.

It was the contention of the appellant that the trial Court had failed to consider the fact that the prosecution had failed to establish a nexus between the body of the deceased and the appellant. He also submitted that the trial Court had failed to note that the appellant was seen at *Wilwatta* threshing floor at some point of time has no relevance to this incident as there was no specific time period mentioned in that evidence. Another complaint highlighted by the appellant is that the trial Court had failed to note that the prosecution did not exclude involvement of a third party in the murder and strong suspicion that might exist against the appellant does not suffice to impute criminal liability on him.

The appellant relied on the reasoning contained in the unreported judgment of ***Deehagawatura v Attorney General*** (CA No. 61/2001 - decided on 02.08.2005) where the applicable principles in relation to circumstantial evidence had been extensively considered.

Learned Additional Solicitor General, in his reply, has invited attention of Court that the main items of circumstantial evidence that had been presented against the appellant are as follows:

a. the appellant had knowledge of the crime scene, as per the evidence of *Ariyaratne*
b. the appellant had detailed knowledge of the incident including the weather conditions that existed in the area as per the evidence of *Wijeratne Silva,*

c. the appellant had exclusive knowledge of the place where jewellery items of the deceased were kept concealed and, in the absence of any acceptable explanation, it could therefore be presumed that it was the appellant who had placed them at the place from where it was eventually recovered.

The trial Court, having considered the several items of circumstantial evidence presented before it, concluded that the prosecution had proved beyond reasonable doubt that the appellant is not "an innocent person". The appellant's contention that the trial Court had failed to apply the legal principles in imputing criminal liability on the basis of a circumstantial evidence case stems from the wording of this conclusion.

In ***Deehagawatura v Attorney General*** (supra) *Sisira de Abrew* J, having considered the principles laid down in several judicial precedents which dealt with the cases based on circumstantial evidence, crystallised the applicable principles as follows:

> *"Having regard to the principles laid down in the above judicial decisions I hold that in a case of circumstantial evidence in order to base a conviction on circumstantial evidence the jury or the trial judge as the case may be must be satisfied on following grounds. (a) Proved facts must be consistent only with the guilt of the accused (b) Proved facts must point the finger of guilt only to the accused (c) Proved facts*

must be incompatible and inconsistent with the innocence of the accused. (d) Proved facts must be incapable of any other reasonable explanation than that of his guilt. In a case of circumstantial evidence, if two decisions are possible from the proved facts, then the decision which is favourable to the accused must be taken. In a case of circumstantial evidence, if an inference of guilt is to drawn from the proved facts such inference must be the necessary, irresistible and inescapable inference and it should be the one and only inference. In a case of circumstantial evidence, if the circumstances found to be as consistent with the innocence as with the guilt of the accused; or if an innocent explanation is found from the evidence of the prosecution, no inference of guilt should be drawn. Therefore if the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the innocence of accused."

Having considered the conclusions reached by the trial Court after evaluating each primary fact that had been proved before it through circumstantial evidence, this Court is not inclined to accept the submissions of the appellant that the trial Court reached an erroneous conclusion. It may be that the trial Court had not referred to these principles by referring to them in more explicit terms, when it reached the conclusion on the evidence. However, it is clear from the wording used in

the judgment that it was mindful of those principles when it had evaluated the evidence that had been presented before it as a whole and applied them in reaching a valid conclusion against the appellant.

In ***Premaratne v Republic of Sri Lanka*** (2008) 1 Sri L.R. 44, this Court considered a similar argument that had been advanced by the appellant. Having considered the submissions on the point, *Sisira de Abrew* J stated thus:

> *"Learned Counsel contended that the conviction of the 2nd accused appellant could not be sustained as the learned trial judge had failed to consider the principles governing cases of circumstantial evidence. It is true that the learned trial judge failed to observe the principles governing cases of circumstantial evidence. Should the trial judge always state the said principles in his judgment? In considering this question, I must not forget the fact this was a trial by a judge and not by a jury. In a trial by a jury, at the commencement of the trial, the judge has to inform the members of the jury of their duties. At that stage the judge also directs them briefly on the presumption of innocence, the burden of proof and other principles of law as may be relevant to the case. Vide section 217 of the Criminal Procedure Code (CPC). This is because jurors are ordinary laymen. It is noteworthy to mention here that Attorney-at-law cannot serve as jurors. Vide Section 245 of the CPC. Thus the law presumes that jurors do not possess knowledge in law. This appears to be the reason that the judge is expected to direct the jurors on*

the relevant principles of law in both his opening address and in summing up. The judge who has a trained legal mind cannot be equated to a juror. In this connection I would like to quote a passage from the judgment of Justice Kulathilake in the case of ***Dayananda Lokugalappathy v The State*** *(2003) 3 Sri L.R. 362 at 392:*

> *"In a trial by a Judge of the High Court without a jury it is significant that there are no such provisions similar to section 217 of the Act, for example to set forth the basic principles of criminal law, i.e. the presumption of innocence, the burden of proof etc. We do not see any requirement similar to section 229 that he should lay down the law which he is to be guided. The reason being that the law takes for granted that a Judge with a trained legal mind is well possessed of the principles of law, he would apply."*

Considering all these matters I hold the view that in a trial by a judge without a jury, judge cannot be expected to lay down all the principles of law in his judgment. But this does not mean that the trial judge can ignore the legal principles relevant to the case in deciding the issue before him. If the appellate court is of the opinion that the case had been proved beyond reasonable doubt, the appellate court will not set aside the conviction on the ground that the judge had failed to lay down the principles of law in his judgment. If a conviction is set aside

on the said ground such a course would lead to deterioration of administration of justice."

The appellant also complained that the trial Court had narrated a sequence of events that had not been proved by the circumstances. This compliant in fact was made in reference to certain inferences that had been reached by the trial Court, upon the evidence presented before it. The trial Court is entitled to draw inferences upon proved facts as per Section 114 of the Evidence Ordinance and this Court had already considered the scope of the Section.

In ***Ariyasinghe and Others v Attorney General*** (2004) 2 Sri L.R. 357, *Amaratunga* J had held thus:

> *"When section 114 of the Evidence Ordinance is closely examined, a very significant feature, which is highly relevant to the exercise of the discretion available to Court, becomes apparent. In deciding to presume the existence of any facts, the Court can take into account the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Those highlighted words indicate the guiding factor. Those words clearly indicate that the reasonableness and the correctness of the Court's decision to presume the existence of any fact would depend on the particular facts of that case. The question of drawing a presumption of fact is a matter to be considered on a case by case basis. Thus the use of the*

words 'in their relation to the facts of the case' prevents the Courts from laying down any general guidelines regarding the situations in which a Court may be justified on drawing a presumption under section 114 of the Evidence Ordinance. When a trial judge has presumed a fact under section 114 of the Evidence Ordinance, it is the unenviable task of an appellate Court to examine the validity of the trial Judge's conclusion in the light of particular facts of the case." (emphasis original)

As already indicated, this Court had examined the validity of the inferences drawn against the appellant by the trial Court in the light of the available evidence before it. The references made by the trial Court to the effect that the deceased who was returning home was forcibly put to under water and thereby made her unconscious by the appellant are inferences that could be drawn from the established facts. The deceased had died clearly due to drowning. But her body was laid out on the threshing floor in supine position. Her clothing had been removed and was found kept in a pile besides her body. The jewellery items worn by the deceased also had been removed and was later recovered upon the information provided by the appellant. The appellant pointed out to one rubber slipper while another similar slipper for the other foot with same colour and size had been recovered embedded in the mud along with the foot-wear worn by the deceased. Her broken umbrella was also found along with her clothing. The appellant, although a resident of a different area, was strangely familiar with the place on which the deceased body

was recovered and knew the details as to how and under what circumstances the death of the deceased had occurred.

The recovery of jewellery items of the deceased upon information provided by the appellant gave rise to the reasonable inference that he had exclusive knowledge of the place where it was kept as per the three positions articulated by the judgment of ***Ariyasinghe and Others v Attorney General*** (supra). In the course of the said judgment *Amaratunga* J imputed the knowledge, attributed to an appellant on whose information certain recoveries were made, to the following three ways:

i. The accused himself concealed the items.
ii. The accused saw another person concealing the items.
iii. A person who had seen another concealing the items in that place told the accused about it.

The evidence of the appellant does not reveal that he relied on the second and third propositions mentioned above, leaving the only inference that it was he who concealed those items of jewellery. This exclusive knowledge possessed by the appellant required him to offer an acceptable explanation as to how he came to possess those items.

It is clear from the evidence the deceased was alive when she got off the train at *Wilwatta* Station that evening. Her lifeless body was recovered few hours later lying naked on the threshing floor. By then only her jewellery had been removed. Her clothing was found kept aside near her

body in a pile. Whoever who removed her jewellery only had a window of opportunity of that few hours between her arrival and discovery of body to complete his task without being seen. If the person who removed those items is the appellant himself then he brings himself to the crime scene since he had the exclusive possession of the items without an acceptable explanation. The explanation offered by the appellant, that these items of jewellery are an introduction on him had been rightly rejected by the trial Court. The resultant position is that the appellant had no valid explanation to offer. The involvement of a 3rd person does not arise in these circumstances.

It is in consideration of these circumstances, the trial Court had reached the inference that was challenged by the appellant. This Court concurs with the conclusions reached by the trial Court, as the circumstances have led to the irresistible and inescapable inference of his guilt and is of the view that this ground of appeal too is without any merit.

The complaint by the appellant that he had been convicted for the commission of the offence of rape on the deceased without any evidence needed to be considered at this concluding stage of the judgment.

It was submitted by the appellant that there was no proof that the appellant ever had penile penetration, a vital element that had to be established beyond reasonable doubt by the prosecution in proving an

allegation of rape. Having considered the medical evidence, this Court finds that there is merit in this submissions made by the appellant.

It was clear from the medical evidence, that the death of the deceased was due to "drowning". Her naked body was found in supine position with a plastic cone inserted into her vagina. The medical officer, who visited the scene and performed the post mortem examination on the body of the deceased, expressed his opinion that the lacerations he had observed in the hymen and the vaginal wall of the deceased could be due to insertion of a "very hard object" into her vagina. He excluded the possibility of sustaining such injuries due to sexual intercourse. He also admitted that there was no medical evidence to establish that she was "raped". The medical witness also expressed opinion that the insertion of plastic cone could have happened simultaneously with the death of the deceased or just after her death had occurred. The vaginal swabs taken for further analysis revealed that there were no sperms found in the vaginal fluids.

Thus, it appears that although there was clear evidence as to vaginal penetration by some "very hard object", the prosecution had no clear evidence which could have supported a reasonable inference that there was penile penetration by the appellant in order to sustain the charge of rape. This Court is of the view that there exists reasonable doubt as to whether there was penile penetration and even if there was such penetration, whether the deceased was alive at the time of such penetration. Therefore, the appellant is entitled to be acquitted of the said charge of rape and to have the sentence, which was imposed on him on that account, set aside.

In conclusion,

(a) The conviction and sentence imposed on the accused-appellant on the 1st Count are set aside.

(b) The conviction and sentence imposed on the accused-appellant on the 2nd Count are affirmed.

(c) The conviction and sentence imposed on the accused-appellant on the 3rd Count are affirmed.

Therefore, the appeal of the appellant is partly allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL