

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 14**

**PAGES 365 - 392**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Company Printers (Private) Ltd.**

**Price: Rs. 25.00**

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*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

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In conclusion the TEC had stated in paragraph 4.6 the

following;

“The TEC is in view that the available geological date is

insuffcient to produce an accurate ore resource estimation

and therefore predicting the life time of the project will be

highly diffcult task. However, TEC generally satisfed with

the methodology adopted by the team proposed the EIA

report including the resource estimation.

At the same time TEC considered and analyzed the

following concerns crop up due to this project proposal”

The TEC concerns are in paragraph 4.6 (a) (b) (c) (d) and (e)

The law provides that if approval is granted, then the PAA

is required to forward to the CEA a report which contains a

plan to monitor the implementation of every approved project

within 30 days of granting the approval. (NEA regulation 14)

The concerns mentioned in paragraph 4.6 (a) and (b)

could be monitored by the monitoring plan.

The concerns (c) (d) and (e) are matters that should be

considered by the 1st respondent bureau at the time of issu-

ing the Industrial Mining License.

The fnal paragraph of the TEC Final Report is as

follows;

“After considering all the information and also the exist-

ing legal background for projects of this nature, the TEC has

decided;

1. To recommend the approval of the project on a phase

out basis initially for 2 years period subject to the

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conditions given in Annexure 1. A very closer moni-

toring mechanism has to be adopted to monitor and

evaluate the proceedings.

2. In order to address the public concerns on handing

over the resource to a single private sector institution

without any competition including export of the iron

ore during initial period, the matter will be referred to

the Secretary, Ministry of Environmental and Natural

Resources to make a policy decision”

I shall now address the objections raised by the CEA

and the PAA in their affdavits.

The NEA and its’ regulations specify the procedure for

the approval of projects.

Accordingly, in terms of the law the project proponent

is required to address the TOR and submit the EIAR to the

PAA. On receipt of the EIAR the PAA is required to comply

with NEA regulation 7. That means the PAA must submit

the said EIAR for public comments. And if the TOR was not

adequately addressed by the project proponent, the law has

laid down the procedure that should be followed.

In terms of the law, upon completion of the period of

public inspection the PAA must forward to the project pro-

ponent the public comments received from the public for

review and response. (NEA regulation 8) Consequently, the

EIAR had been kept for public review. According to the docu-

ment R2 the EIAR had been subjected to public review twice.

The project proponent was informed of the public comments.

The TOR was revised and submitted to the project proponent.

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(Vide P 26) The project proponent had resubmitted the EIAR

in September 2006 (P27). According to the document R 2, the

revised EIAR marked as P 27 had been kept for public review

in 2006 (NEA regulations 10 to 12)

Then the TEC by their “FINAL REPORT” had recommend-

ed the approval of the proposed project.

In that event the PAA was required to publish the project

under section 23BB 4 of the NEA read along with NEA regula-

tion 13(i)

Therefore, the law had provided the manner in which the

CEA and the PAA could object to the EIAR. I am of the view

that if the project proponent had not addressed the matters

in the TOR adequately, the procedure laid down in the NEA

regulations should have been followed by the PAA. Instead

of mentioning any inadequacies the TEC recommends the

approval of the project.

In the TEC the CEA (Authority) and the Forest Depart-

ment (PAA) had been represented. The TEC had approved the

project. The 7th respondent was in breach of a statutory duty

involving unfairness amounting to abuse of power when he

did not comply with section 23BB 4 of the NEA read with NEA

regulation 13(i). The 7th Respondent had only to comply with

the provisions contained in the Act and the NEA regulations

and gazette the project under section 23BB4 and NEA regu-

lation 13(i) as the TEC had recommended and approve the

proposed project.

The duty to approve the implementation of the project is

not imposed on any individual. It is imposed on the Forest

Department, which is referred to as the PAA. The 7th

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respondent as the Conservator of Forests is the Head of the

Department of Forests. A writ of Mandamus cannot be issued

against a Department. It can only be issued against a person.

In this case the writ can only be issued against the Head of

the Forest Department. It would be impractical to issue the

writ against all Forest Offcers as the PAA.

In terms of the law the PAA, which is the Forest Depart-

ment in compliance with the “Authority” meaning the Central

Environmental Authority should approve the proposed proj-

ect. As mentioned earlier the PAA (FD) and the CEA are mem-

bers of the TEC. The decisions in the TEC have been taken in

compliance with each other, Finally, in the “Final Report: the

TEC had recommended and approved the implementation of

the project.

The NEA regulations are directly applicable to the NEA

with regard to the procedure that should be followed by the

PAA and the CEA when considering the approval of the imple-

mentation of the project. Thus, the regulations become part

of the National Law. In this case the regulations became part

of the National Environmental Act. Consequently, the NEA

regulations have direct effect and applicability for approval of

projects. The Authority (CEA) and the PAA (FD) had followed

the terms of the NEA regulations up to the point of keeping

the EIAR for public comments referred to in NEA regulations

8 to 12. and thereafter, had informed the comments and the

revised TOR to the project proponent. The Petitioner’s re-

vised EIAR had been submitted in September 2006, which

had been kept for public review. Finally, the TEC had recom-

mended the approval of the proposed project. According to

the submissions of the petitioner, he had repeatedly informed

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the FD to gazette the project as required by the law as the

project had been approved by the TEC. The petitioner had

even sent letters through lawyers to the 7th respondent as the

Head of the Forest Department (PAA). But the PAA (FD) had

failed to comply with the terms of the law. The NEA regula-

tions had specifed a time within which the PAA (FD) should

make a decision. (NEA regulation 13).

If a Statute imposes a duty on a statutory body to do an

act on a specifc date, it is clear that a failure to do that duty

on that date would constitute a breach of a statutory duty.

The question is when is his failure to act a breach of statu-

tory duty amounting to an abuse of power? The answer will

depend on the circumstances of each case. Relevant facts to

some extent should include;

1. Subject matter of the duty and the context in which it

falls to be performed.

2. Length of time taken to perform the duty.

3. The reasons for delay.

4. Any prejudice that is, or may be caused by the delay

Even in cases which only affect property interests (as

opposed to rights concerning the life and limb of persons)

and even where little or no prejudice can be shown there is

likely to come a time when a failure to perform a duty is a

breach of a duty and is unlawful. In this case the petition-

er had made the application for the exploration license in

the year 2002. And upon completion of the exploration the

petitioner had made an application for the Industrial Mining

licensing in 2004. The Petitioner had submitted the applica-

tion for a mechanized Mine Project to the 1st respondent in

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2004. The environmental scoping meeting had been held in

2004. The environmental scoping was carried by the FD (PAA)

in 2005. The report had been kept for public review teice.

(Vide R 2) The revised TOR had been submitted to the project

proponent on 28-6-2005. Thereafter, the revised EIAR had

been submitted by the project proponent in September 2006

marked as P 27. Finally, the TEC by their “FINAL REPORT”

had recommended the approval of the project subject to

certain conditions which are annexed to the said document

R2. As mentioned earlier the TEC comprised of the CEA and

PAA. Consequently, the project had been approved in compli-

ance with NEA regulation 13.

If the duty had not been performed simply through lack

of interest the court is more likely to decide that there had

been a breach of duty. Such a conclusion is different where

a decision had been made but the reasons are irrational. In

this case the NEA had not acted in compliance with the NEA

regulations after the petitioner had submitted the EIAR in

September 2006, and after it had been recommended and

approved by the TEC, which comprised of the CEA and PAA.

I am of the view that the 7th respondent was in breach

of a statutory duty amounting to unfairness and an abuse

of power when he did not comply with gazetting the project

approved by the TEC subject to the conditions 2.1 to 2.25 in

R 2.

I issue a writ of mandamus as prayed for in prayer (b) of

the petition in favour of the petitioner. Consequently, I direct

the 7th respondent to act in compliance with section 23BB 4

of the NEA read along with NEA regulation 13 (i) and regula-

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tion 15 and publish the approval of the project within 30 days

from today. And as I have mentioned earlier the PAA should

comply with the NEA regulation 14 and forward the Authority

a plan to monitor the project.

The application of the petitioner is allowed and the prayer

(b) of the petition is granted in favour of the petitioner.

*Application allowed.*

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**FONSEkA vS. LT. GENERAL JAGATH JAYASURIYA**

**AND FIvE OTHERS**

COuRT OF APPEAL

ERIC BASNAyAkE, J.

SALAM J.

ABEyRATNE J.

CA 679/2010 (DB)

MAy 24, 25, 26, 31, 2011

JuNE 1, 8, 14, 22, 23, 2011

JuLy 6, 28, 2011

AuguST 1, 3, 2011

SEPTEMBER 12. 15, 2011

**Writ of Certiorari – Decision of a Court Marshal – Army Act – Sec-**

**tion 57, Section 109 [e], Section 133 – Charges bad in law? Guide-**

**lines – No force or authority – Charges prescribed/ Bias of the judge**

**advocate – Constitution Art 89. 91 [1] a – Disqualifcation from**

**being elected to Parliament – Reasons not given – Judicial body**

**– Suppression of material facts – fatal? Uberrima fdes – What are**

**material facts? – To be decided by Court only?**

The petitioner sought to quash the decision of the respondents to con-

vict the petitioner in Court Marshal 2, and to quash the sentence of 30

months imprisonment.

The petitioner – Ex Army Commander – was taken into military custody

on 8.2.2010 and kept in custody until the Court Marshal. In the Court

Marshal 1 – the petitioner was charged – that he engaged in political

activities whilst being subject to Military Law. The petitioner was con-

victed of the charges and was imposed the sentence of cashiering from

the Army. Court Marshal 2 was convened on 17.3.2010 with the appoint-

ment of 2-4 respondents as its President and Members. The 4 charges –

relate to the petitioner having served as Chairman of the Tender Board

pertaining to the procurement of certain equipment – the charges

alleged that tenders were awarded to B Company through H Company

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and that the petitioner’s son –in-law had an interest or concern with H

company. It was alleged that the petitioner by concealing or failing to

disclose that his son-in-law had such intent or concern – did commit a

fraudulent act- punishable under section 109 [3] of the Army Act.

The respondents contended that, the petitioner has misrepresented and

suppressed material facts with a view to misleading/deceiving Court.

The petitioner contended that, the alleged suppression goes only to the

ground of bias, and as bias was not one of the main grounds urged at

the hearing the application does not depend upon bias.

**Held:**

(1) A petitioner who seeks relief by writ which is an extra-ordinary

remedy must in fairness to Court, bare every material fact so that

the discretion of Court is not wrongly invoked or exercised.

(2) It is perfectly settled that a person who makes an ex parte applica-

tion to Court is under an obligation to make that fullest possible

disclosure of all material facts within his knowledge.

(3) If there is anything like deception the Court ought not to go in to

the merits, but simply say" we will not listen to your application

because of what you have done.

Per Abdus Salam J.

“Material facts are those which are material for the Judge to

know in dealing with the application as made, materiality is to be

decided by Court and not by the assessment of the applicant or

his legal advisers.

Whether the facts not disclosed are of suffcient materiality to jus-

tify or require immediate discharge of the order without consider-

ation of the merits, depend on the importance of the facts to the

issues, which are to be decided by Court”

**APPliCATioN** for a Writ of Certiorari.

**Cases referred to:-**

(1) *In Re The Eighteenth Amendment*

(2) *G.S.C. Fonseka vs.Dhammika Kitulegoda and seven others* – SC

No. 1/210 CA. (wrl) 676/2010 S.C.M. 10.1.2011

(3) *R vs. Kensington Income Tax Commissioner –* (1917) 1kB - 486

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(4) *Republic of Peru vs. Driefus Brother and com –* 55 LT. 802 al 803

(5) *Daglish vs. Jarvie* – (1950) - 2 MAC & g 231

(6) *Alphonso Appuhamy vs. Hettiarachchi* – 71 NLR 131

(7) *Athula Ratnayake vs. Lt. Col. Jayasinghe( –* 78 NLR 35

(8) *Laub vs. Attorney General and Another* – (1995) 25 Sri LR 88

(9) *Walker Sons & Co. Ltd., vs. Wijayasena* – (1997) 25 NLR 88

(10) *Sarath Hulangamuwa vs. Siriwardene, Principal, Vishaka*

*Vidyalaya,–* (1986) 1 SLIR 282

(11) *Hotel Galary vs. Mercantile Ltd –* (1987) 1 SALR 6

(12) *Dahanayake vs. Sri Lanka Insurance Corporation Ltd –* 1 Sri LR 67

and 77

(13) *Blanca Diamonds (Pvt) Ltd v. Wilfred Van Else & Others* – 1997 - 1

SR LR 360

(14) *Thermax Ltd. V. Schott Industrial Glass Ltd* – (1981) FSL 289 - 295

(15) *Bank Mellat v. Nikpour –* (1985) FSR 87 (CA)

(16) *Brinks MAT –* (1988) 3 All ER 188

*Romesh de Silva PC* with *Sugath Caldera, Wasantha Batagoda, Riad*

*Ameen, Shanaka Coorey* and *Eraj de Silva* for petitioner.

*Bimba Tillekeratne PC Addl. Solicitor General* with *Buwaneka Aluvi-*

*hare, DSG. Nerin Pulle, SSC. Shaminda Wickremasinghe SC* and *Deepthi*

*Tilakawardane SC* for 1st, 5th and 6th respondents.

*S. L. Goonesekera* with *Sanjeewa Jayawardane* for 2nd and 3rd

respondents.

*Sanjeewa Jayawardane* with *Manoj Bandara* and Chintha Rupasinghe

for 4th respondent.

December 16, 2011

**ERiC BASNAyAkE J.**

The petitioner fled this application seeking a writ of

*certiorari inter alia* to quash the decision of the 2nd to 4th

respondents to convict (conviction on 17.9.2010) the petitioner

in Court Martial II and to quash the sentence of 30 months

imprisonment. When this case was supported, several pre-

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liminary objections were raised on behalf of the 1st, 5th and

6th respondents. After an inquiry this court (consisting of two

Judges at the time) pronounced an order on 15.12.2010 by

which the court postponed the answering of the preliminary

objections to the end of the case.

At that time objections were not fled for the respondents.

Objections and counter objections have now been fled.

Thereafter oral submissions were made for petitioner and

the respondents and the learned President’s Counsel for the

petitioner made submissions in reply. Written submissions

too were fled. Having carefully considered all the submissions

I am of the view that this application for certiorari should be

dismissed *in limine*. Hence there is no necessity to answer to

the preliminary objections.

According to the petition fled on 13.10.2010, the peti-

tioner is the Ex-Army Commander. The 1st respondent is the

present Army Commander, The 2nd to 4th respondents are the

President and the Members of the Court Martial II. The 5th

respondent was the Judge Advocate.

The petitioner states that he rendered an exemplary

service to the country as Commander of Sri Lanka Army and

led it to victory in May, 2009 over the Liberation Tigers of

Tamil Ealam (LTTE) and put an end to a 30 year old war that

had plagued the nation. The petitioner states that the incum-

bent Defense Secretary described the petitioner as the “best

Army Commander” in the June 2009 Edition of “Business

Today” magazine. During his career in the Army, which spans a

period of forty years, the petitioner was awarded prestigious

awards and also won several honours.

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The petitioner states that the petitioner took charge of

the important military offensive and strategy to enable the

army to effectively combat and defeat the LTTE militarily. To

achieve this, the petitioner had established two streams as

command stream and common stream. When persons serv-

ing in the command stream were put to serve in the common

stream, it was considered a demotion and humiliation and

this made them bear a grudge with the petitioner.

After winning the war the petitioner was promoted to

the rank of general. The petitioner relinquished duties as

Commander on 14.7.2009. On 15.7.2009 the petitioner was

appointed as Chief of Defense Staff. The petitioner states

that by letter dated 12.11.2009 the petitioner sought to retire

from the Army with effect from 1.12.2009. However by letter

dated 14.11.2009 the petitioner was sent on retirement with

immediate effect.

The petitioner states that he was invited by the major

political parties in the opposition to contest the 2010

Presidential Election as the “common candidate”. Ever since

his nomination as common candidate there has been “a coher-

ent, systematic and discernible course of events, amounting

in law to targeted malice. Reducing and thereafter removing

the petitioner’s security totally, the armed forces surrounding

the hotel the petitioner occupied on the day of the Presiden-

tial Election, arresting and searching his supporters can be

described as some of those events.

The petitioner was taken in to military custody on

8.2.2010 and kept in custody until the Court Martial. In the

frst Court Martial the petitioner was charged that he engaged

in political activities whilst being subject to military law. The

petitioner was convicted of the charges and was imposed the

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sentence of cashiering from the Army. The petitioner stated

the while in military custody the petitioner contested Parlia-

mentary Elections held in April 2010 and was elected to the

Parliament.

Court Martial II

Court Martial II was convened on 17.3.2010 and was

reconvened on 6.4.2010 with the appointment of the 2nd to

4th respondents as its President and Members. There were

four charges. The charges relate to the petitioner having

served as Chairman of the Tender Board pertaining to the

procurement of:-

234 – Day Vision Binoculars (6.11. 2007).

50 – 12v Maintenance Free batteries (23.8.2007)

50 – 5kVA generators (28.2.2008)

3 – VHF Direction Finders (23.7.2008)

In all four charges the tenders were awarded to M/s.

British Borneo Defense –Australia through Hicrop (Pvt.) Ltd.

The charges alleged that the petitioner’s son-in-law Danuna

Tilekeratne had an interest or concern with M/s. Hicrop (Pvt.)

Ltd. If this relationship was disclosed the petitioner should

have disassociated himself from the tender process in accor-

dance with paragraphs 1:4:2 and 1:4:3 of the Procurement

guidelines of 2006. The petitioner by concealing or failing

to disclose that Danuna Tilekeratne is the son-in-law did

commit a fraudulent act punishable under section 109 (e) of

the Army Act.

Charges based on guidelines have no force or authority

The learned President’s Counsel for the petitioner submit-

ted that these charges are bad in law. The learned President’s

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Counsel submitted that concealing such relationship did not

constitute an offence. The procurement agency was created

on 8.7.2004 on a Presidential direction. The agency set up

the guidelines. These guidelines have no force or authority as

the guidelines have not been approved by the Parliament. In

the case of IN RE THE EIgHTEENTH AMENDMENT (1) seven

Judge Beach of the Supreme Court held that rules setting out

the procedure and guidelines either approved by Parliament

or by the power of the council, is restricted to the formation of

guidelines only. In that sense it is not law and where there is

no law there is no disobeying of law. Thus there is no obliga-

tion for the petitioner to disassociate himself from the tender

process or even to disclose the relationship

The petitioner was charged and convicted under section

109 (c) of the Army Act which is as follows:-

*Every person subject to military law who (a). (b), (c), (d) (not*

*reproduced) (e) commits any other fraudulent act herein be-*

*fore not particularly specifed or any act of a cruel, indecent or*

*unnatural kind, shall be guilty of a military offence and shall,*

*on conviction by a court martial, be liable to suffer simple or*

*rigorous imprisonment for a term not exceeding three years*

*or any less severe punishment in the scale set out in Section*

*133.*

The learned President’s Counsel for the petitioner sub-

mits that the offences referred to under section 109 (e) should

be interpreted according to the rule of *ejusdem generis*. The

offences referred to in section 109 (a) to (d) are concern-

ing personal gain. For there to be personal gain, the tender

should have been wrongfully given. The tender was awarded

on the recommendation of the Evaluation Board. There was

no evidence to suggest that the petitioner infuenced the Ten-

der Board. There was no allegation of the tender having being

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made wrongly. No allegation that anybody unlawfully gained.

Thus it becomes purely a technical matter. Can it be said that

the act committed, that is by chairing the Tender Board with

the knowledge that the son-in-law of the petitioner had inter-

est in Hycrop Ltd., is fraudulent? It is the fraudulent act that

becomes an offence.

Offences are prescribed in terms of section 57 of the Army

Act.

Section 57 of the Army Act is as follows:-

Where a person subject to military law commits any

offence and thereafter ceases to be a person subject to

military law, he may be taken in to and kept in military cus-

tody and be tried and punished for that offence by a court

martial:

Provided that he shall not be so tried after the lapse of

six months from the date of the commission of such offence,

unless such offence is the offence of mutiny, desertion or

fraudulent enlistment (emphasis added).

Sub Section (2) not reproduced.

The learned President’s Counsel submitted that the peti-

tioner was charged in April 2010. The offences were commit-

ted in the year 2007 & 2008. The charges were brought more

than six months after the commission of the act and thus the

offences even considered valid are prescribed.

Bias of the Judge Advocate

The learned counsel for the petitioner submitted that

the conduct of the 5th respondent was suspicious and ques-

tionable. The 5th respondent who was away at that time was

specially fown from the united kingdom to be the Judge

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Advocate for both Court Martial (I & II). The army has a

regular Judge Advocate who is a Major-general. The 5th

respondent is the Judge Advocate in the Navy. The learned

President’s Counsel submitted that the Judge Advocate

should be unbiased. The learned counsel complained that

the 5th respondent did not deny when suggested that he (5th

respondent) had appeared against the petitioner as a junior

counsel in the Supreme Court in a fundamental rights case.

The Prosecuting Counsel as well as the Judge Advocate have

been Deputy Solicitors general from the Attorney-general’s

Department. The counsel vehemently submitted that it was

the 5th respondent who conducted the Court Martial. It was

submitted that the conduct of the Judge Advocate was ques-

tionable and for the reasons given leads to suspicion which

warrant the issue of a writ. The learned President’s Counsel

however refrained from addressing court with regard to any

mis-directions or non-directions in the summing up before

the Court Martial.

Sentence of cashiering and imprisonment

The learned President’s Counsel for the petitioner sub-

mitted that the petitioner had been cashiered along with the

imprisonment. The petitioner was already cashiered in the

1st Court Martial previously. Therefore it was submitted that

this order has to be quashed. However it transpired that it

was only the sentence that was confrmed. In terms of section

134 an offcer shall be sentenced to be cashiered before he is

sentenced to imprisonment. Therefore the second cashiering

appeared to be only a formality which was rectifed.

Disproportionate Sentence

The petitioner had been sentenced to 30 months impris-

onment. The learned President’s Counsel for the petitioner

submitted that if the petitioner chaired the Tender Board

knowing that his son-in-law had interests in Hycrop through

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whom the tender was awarded to British Borneo, if at all the

petitioner’s conduct would have been un-ethical. If that is so

does the petitioner deserve such severe sentence?

The learned counsel further submitted that the sentence

a Court Martial could impose under section 109 is imprison-

ment simple or rigorous for a term not exceeding three years.

However this section makes provision for the Tribunal to con-

sider a less severe punishment “in the scale set out in section

133 of the Army Act. Section 133 is as follows:-

133 (1) Subject to the provisions of section 134, the fol-

lowing shall be the scale of punishments, in descending order

of severity, which may be inficted on offcers convicted of

offences by Court Martial:-

(a) death;

(b) rigorous imprisonment;

(c) simple imprisonment;

(d) cashiering;

(e) dismissal from the army;

(f) forfeiture, in the prescribed manner, of seniority of

rank, either in the army or in the corps to which the

offender belongs, or in both; or, in the case of an

offcer whose promotion depends upon length of

service, forfeiture of all or any part of his service for

the purpose of promotion;

(g) severe reprimand or reprimand;

(h) such penal deductions from pay as are authorized by

this Act.

Sub section (2) not reproduced.

The learned counsel submitted that the petitioner was

given a sentence with an ulterior motive and if proved could

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be quashed by way of a certiorari. The learned counsel sub-

mitted that the petitioner became a challenge to none other

than the President of this country and therefore there was a

move to keep the petitioner away so that he will not become

a challenge.

When a person is imposed a sentence of six months or

more, he is disqualifed from being elected as President or as

a Member of Parliament. Article 91 (1) (a) of the Constitution

is as follows:-

*91(1) No person shall be qualifed to be elected as a Mem-*

*ber of Parliament or to sit and vote in Parliament – (a) if he is*

*or becomes subject to any of the disqualifcations specifed in*

*Article 89; (b) to (g) not reproduced.*

Article 89 is as follows:-

*89. No person shall be qualifed to be an elector at an election*

*of the President, or of the Members of Parliament. . . . if he*

*is subject to any of the following disqualifcations namely*

*– (a), (b), (c) & (e) to (j) not reproduced.*

*(d) if he is serving or has during the period of seven years im-*

*mediately preceding completed serving of a sentence of im-*

*prisonment (by whatever name called) for a term not less*

*that six months imposed after conviction by any court for*

*an offence punishable with imprisonment for a term not*

*less than two years or is under sentence of death or is*

*serving or has during the period of seven years immedi-*

*ately preceding completed the serving of a sentence of im-*

*prisonment for a term not less than six months awarded in*

*lieu of execution of such sentence (emphasis added):*

Proviso not reproduced.

The learned President’s Counsel for the petitioner sub-

mitted that is why the petitioner was given an imprisonment

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exceeding 6 months. He further submitted that the conviction

and the sentence are both colourable and should be subject

to review.

Failure to give reasons

The learned counsel submitted that the Court Martial had

been declared a court of law in *G.S.C. Foneka vs. Dhammika*

*Kitulegoda and seven others*(2) wherein the Supreme Court

held that the Court Martial should act judicially. Therefore

the Court Martial should give reasons for its decision. How-

ever the Supreme Court’s interpretation of the Court Martial

is for the purpose of Article 89 (d) of the Constitution.

No evidence that Danuna Tilekeratne had interest in Hycrop

The learned President’s Counsel submitted that there is

no evidence that the petitioner was aware that his son in law

had interest in the Hycrop.

**Now i shall examine some of the prayers of the petition-**

**er to his application dated 13.10.2010. The prayers are**

**numbered from “a” to “i”. Prayer “A” is as follows:**

*(a). Call for and examine the records maintained by the 1st to*

*5th respondents including video and audio recording of the*

*proceeding of Court Martial II.*

*Proyers b, c, d, e and g are not reproduced.*

*h. Grant an order in the nature of writ of certiorari quash-*

*ing the entirety of the proceedings held in the aforesaid*

*Court Martial II.*

*i. Grant an order in the nature of writ of certiorari quash-*

*ing all orders and/or decisions made by the 2nd to 5th*

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*respondents in Court Martial II including the aforesaid or-*

*der dated 26th August 2010 to proceed with Court Martial*

*II. Overruling the submissions made on behalf of the De-*

*fence that there was no prima facie case.*

*Prayers j, k and l are not reproduced.*

**one of the grounds urged for the petitioner in the peti-**

**tion to have the above reliefs is that the 2nd, 3rd and 4th**

**respondents who sat in the Court Martial ii as its presi-**

**dent and Members have been biased.**

The petitioner stated that the petitioner was responsi-

ble in bringing the 2nd to 4th respondents from the command

stream to the common stream which was considered as a

demotion due to which the 2nd to 4th respondents were

biased in their decisions at the Court Martial. The reason to

bring the 2nd respondent to the common stream was that the

2nd respondent made a false statement at a court of inquiry

and was found to be untrustworthy and lacking in integrity.

The 3rd respondent was closely associated with the Secre-

tary Defence and the Secretary Defence had infuence over

the 3rd respondent. The 4th respondent had close intimation

with the LTTE in that the 4th respondent was bribed by the

LTTE. What is stated above is contained in paragraphs 40 a,

b, c, 42, 43, 44 and 49 of the petition and are reproduced as

follows:

*40. The petitioner states that despite the inadequacy of time,*

*when court martial II reconvened on 6th April 2010, the*

*petitioner raised the following objections to the 2nd, 3rd*

*and 4th respondents functioning as President/Member of*

*court Martial II:*

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*a. The 2nd respondent: The 2nd respondent was removed from*

*the main command stream/line of the Sri Lanka Army*

*by the petitioner while the petitioner was the Command-*

*er of the Army because the 2nd respondent was found to*

*be untrustworthy and lacking in integrity because the 2nd*

*respondent had made a false statement at a Court of In-*

*quiry convened by the petitioner.*

*b. The 3rd respondent: The 3rd respondent is closely associ-*

*ated with the Secretary Defence and both of them are from*

*the Gajaba Regiment. The 3rd respondent had been work-*

*ing in the Ministry of Defence for two years directly under*

*the Secretary Defence who has time and again made clear*

*his hostility and hatred towards the Petitioner since the*

*Petitioner contested his brother at the Presidential Elec-*

*tion. The 3rd respondent was also the head of the Gajaba*

*Regiment that was brought in to sideline the Sinha Regi-*

*ment to which the petitioner belonged.*

*c. The 4th respondent: The 4th respondent was alleged to*

*have had intimate connections with the LTTE in that, he*

*had been bribed and/or been on the pay roll of the LTTE*

*for which the petitioner had taken action and was to take*

*further action while he was the Commander of the Army.*

*A true copy of the entire case record in Court Martial II*

*(including the proceedings, the documents marked in evi-*

*dence by the prosecution and the defence and the written*

*submissions fled by the parties) as made available to the*

*petitioner is fled herewith marked P12 in volume I and*

*pleaded same as part and parcel hereof.*

*42. The petitioner states that the 2nd, 3rd and 4th respondents*

*were not in the Command Stream of the Army. The said* re-

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spondents w*ere in the Common stream of the Army. Which*

*(as outlined above) was a virtual demotion and/or humili-*

*ation within the army.*

*43. The petitioner states that, since, as outlined above, the*

*petitioner was responsible for the establishment of such*

*streams there is a real likelihood of bias/animosity on*

*the part of the 2nd, 3rd and 4th respondents against the*

*petitioner.*

*44. In the circumstances, the petitioner states that the 2nd to*

*4th respondents are biased and that any decision taken*

*by these respondents against the petitioner is invalid and*

*/or void in law.*

*49. The petitioner states that previously a Writ Application bear-*

*ing No. 350/2010 was fled in the Court of Appeal against*

*inter alia the said decision of the 2nd to 4th respondents*

*to function as the President and Members in Court Martial*

*II and the said application was dismissed by the Court of*

*Appeal by an order dated 29.6.2010. The petitioner has*

*fled an Application for Special leave to Appeal bearing No.*

*141/2010 against the said decision of the Court of Appeal*

*and the said Application is presently pending before the*

*Supreme Court.*

*The petitioner alleged bias on the part of the 5th respondent*

*and I will reproduce paragraphs 65 “d”, “e”. “f”, “u” and “v” to*

*the petition which are as follows:-*

*65. The petitioner therefore states, in the totality of the afore-*

*said circumstances, the aforesaid decision of the 2nd to 4th*

*respondents dated 17th September 2010 fnding the peti-*

*tioner guilty of the aforesaid charges in Court Martial II*

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*and the purported imposition of sentence of 30 months by*

*the 2ndto 4threspondents and all the orders, decisions and/*

*or fndings and /or proceedings of Court Martial II includ-*

*ing the order dated 26th August 2010 to proceed with Court*

*Martial II and/or the decision contained in the letter dated*

*30th September 2010 should be quashed by Your Lord-*

*ships Court on the following amongst other grounds set out*

*hereinbefore in this Application and the other grounds that*

*would be urged by counsel for the petitioner at the hearing*

*of this application:*

*“a”, “b” “c” not reproduced.*

*“d”. The said decisions of both the Court Martial II are moti-*

*vated by ulterior motive of targeted malice and/or targeted*

*persecution in law that is so apparent on the face of the*

*course of events that has unfolded, as set out above.*

*“e”. The said decision of Court Martial II is motivated by actual*

*and/or apparent bias on the part of the 2nd to 5th respon-*

*dents.*

*“f”. The bias, disqualifcation and/or the aforesaid conduct of*

*the 5th respondent Advocate - General as set out above,*

*renders the decisions of Court Martial II illegal, ultra vires*

*and without jurisdiction.*

*“g” to “t” not reproduced.*

*“u”. The summing up of the 5th respondent Judge Advocate*

*General is on a wrong footing, takes irrelevant matters into*

*consideration and fails to take relevant matters into con-*

*sideration and constitutes a misdirection in law.*

*“v”. The 5th respondent Judge Advacate General has failed to*

*properly analyze the law, and the charges, and to properly*

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*and fairly summarize the evidence for consideration of the*

*Court Martial.*

“w” to “z” and “aa” to “cc” not reproduced.

The petitioner in his petition sought notice and an in-

terim relief staying the decision to convict and staying the

decision to impose a sentence of 30 months on the petitioner

until the fnal hearing of this application. The petitioner was

convicted on 17.9.2010 and the sentence was pronounced on

30.9.2010. The respondents were noticed by the petitioner as

required by the Court of Appeal (Appellate Procedure) Rules

as the petitioner had moved for interim orders.

When this case was taken up for support all the re-

spondents were represented by counsel. However the

learned President’s Counsel for the petitioner submit-

ted that he would not be supporting for an interim order

at that stage and thus deprived the counsel for the 2nd, 3rd

and 4th respondents from making submissions. The learned

President’s Counsel did not object to the learned Deputy

Solicitor general making submissions on behalf of the 1st,

5th and 6th respondents. The learned DSg raised preliminary

objections and submissions were heard only with regard to the

preliminary objections for the 1st, 5th and 6th respondents.

After hearing submissions of counsel for the petitioner

and 1st, 5th and 6th respondents the court decided to issue

notiice on the parties formally. The order with regard to the

preliminary objections was postponed. **Thus at the time of**

**formally issuing notice this case was heard against the**

**2nd to 4th respondent, ex-parte.** Thereafter objections were

fled. In the objections, the respondents raised the issue with

regard to the **suppression of material facts**.

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To the allegation of untrustworthiness and lack of integ-

rity of the 2nd respondent, the respondents averred that the

2nd respondent was appointed as Commander/Vice Chancel-

lor of the kotalawela Defence university on 24.12.2008 on

the recommendation of the petitioner. The 2nd respondent

also denied to having given evidence before a court of inquiry.

With regard to the 3rd respondent, the submission was

that the 3rd respondent was transferred to the Ministry of

Defence by the petitioner. The 3rd respondent was appointed

on 26.10.2007 as Offciating general Offcer, commanding

the 21st Division.

On the allegation with regard to the 4th respondent

being bribed by the LTTE, it was averred that there was a

move to assassinate the 4th respondent while he was the

overall operations Commander, Colombo. Major Anuradha

Perera was court martialled for providing intelligence to the

LTTE to assassinate the 4th respondent. The said Major

Perera was found guilty and sentenced to death. The death

sentence was commuted to life imprisonment. The respon-

dents averred that the petitioner has uttered falsehood and

suppressed material facts.

The above information is contained in paragraphs 34f(o)

a, b, c, d, e, (ii) a, b, c, (iii) a, b, c, d, 36 a, b, c, d, e, & f. of

the objections of the 2nd and 3rd respondents and are repro-

duced as follows:-

34. Responding to paragraphs 40, 41, 42, 44, 45, 46,

47, 48 and 49 of the petition, these respondents state as

follows:-

Sub paragraphs “a”, “b”. “c”. “d” and “e” are not repro-

duced.

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*34. “f”. Subject and without prejudice to the averments in sub-*

*paragraph ‘d’ above, these Respondents respond to the*

*said paragraphs 40 to 48 of the petition as follows:-*

*(i) Responding to paragraph 40 (a) of the petition, these re-*

*spondents admit only that the said paragraph contains the*

*essence of the purported objections raised by the petitioner*

*to the 2nd respondent and while denying the truth and*

*accuracy of the content thereof states further as follows:-*

*(a) The 2nd Respondent did not give evidence before the*

*Court of Inquiry referred to therein.*

*(b) The said Court of Inquiry was not convened by the Pe-*

*titioner but by Major General U.B.L. Fernando*

*(c) The 2nd Respondent was not and could not have been*

*found to have made a false statement at the said Court*

*of Inquiry.*

*(d) The petitioner himself, by his conduct manifested the fact*

*that the 2ndrespondent was a perfectly honest, trustwor-*

*thy and competent offcer in that he recommended the*

*2nd Respondent to be the Commander/Vice Chancellor of*

*the Kotelawala Defence University on or about the 24th of*

*December 2008 and the said appointment was con-*

*frmed by the President of the Republic on or about*

*the 26th of May 2009. These respondents fle herewith,*

*marked 2RI2 and 2RI3 respectively and plead as part*

*and parcel hereof, true copies of the said recommen-*

*dation by the petitioner and the said confrmation/ap-*

*pointment by the President of the Republic dated 26th*

*May 2009.*

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*(e) By way of further response to paragraph 40(a) of the*

*petition these respondents state that the Kotelawala*

*Defence University is one which imparts training to of-*

*fcers/cader offcers not only of the Army but also of*

*the Navy and the Air Force of Sri Lanka and hence the*

*future leaders of the said Forces and as well as certain*

*foreign students, and hence, the position of Comman-*

*dant/Vice Chancellor of the Kotelawala Defence Uni-*

*versity is a highly prestigious and much sought after*

*offce in the Army and/or is and can only be given to a*

*perfectly trustworthy and competent offcer.*

*(ii) Responding to paragraph 40(b) of the petition, these*

*respondents admit only that the said paragraph contains*

*the essence of the purported objections raised by the*

*petitioner to the 3rd respondent and deny the veracity of*

*the content thereof. These respondents further state as*

*follows:-*

*(a) While both the Secretary Defence and the 3rd respon-*

*dent are from the Gajaba Regiment, an infantry Regi-*

*ment of high repute, (the 1st Commander was the late*

*Major General Wijaya Wimalaratna), the said fact is*

*incapable of leading to the inference that the 3rdrespon-*

*dent was in any way biased against the petitioner.*

*(b) The 3rd respondent was not closely associated with*

*the Secretary Defence. The 3rd respondent was in the*

*Ministry of Defence after he was attached thereto by*

*order made by the petitioner on or about the 5th of April*

*2006, and served in that position until he was appointed*

*as offciating General Offcer, Commanding the 21st*

*Division while still a Brigadier on the 26 of October,*

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*2007. These respondents fle herewith, marked R14*

*and R15 respectively and plead as part and parcel*

*hereof, true copies of the said order attaching the 3rd*

*respondent to the Ministry of Defence dated 5th April*

*2006 and the order made by the petitioner appoint-*

*ing the 3rd respondents the offciating General Offcer,*

*Commanding the 21st Division. The post of General Of-*

*fcer Commanding any division is one ordinarily held*

*by an offcer holding the rank of Major General.*

*(c) While the 3rd respondent worked in the Ministry of*

*Defence, he did not do so directly under the Secretary,*

*Defence but only in the capacity of the Assistant to the*

*Military Liaison Offcer Major General WPP Fernando*

*at the Ministry of Defence and hence, was at the time,*

*under the said Major General WPP Fernando.*

*(iii) Responding to paragraph 40 (c) of the petition, these re-*

*spondents admit only that the said paragraph contains the*

*essence of the objections raised by the petitioner to the 4th*

*respondent and deny the truth and accuracy of the con-*

*tents thereof. These respondents further state as follows:-*

*(a) The very grave and highly defamatory allegations made*

*by the petitioner against the 4th respondent, under the*

*cover of privilege, in objecting to the 4th respondent*

*being a member of the said Court Martial, were based*

*on nothing more than hearsay in that they were,*

*ex facie based purely and wholly on what the petitioner*

*claims to have been told to him by the Director of the*

*Criminal Investigation Department as having been*

*said to him by a person suspected of LTTE activities*

*who was in custody.*