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

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

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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 insufficient to produce an accurate ore resource estimation and therefore predicting the life time of the project will be highly difficult task. However, TEC generally satisfied 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 issuing the Industrial Mining License.

The final paragraph of the TEC Final Report is as follows;

"After considering all the information and also the existing 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

conditions given in Annexure 1. A very closer monitoring 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 affidavits.

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 proponent 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 document 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.

(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 recommended 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 regulation 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 Department (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 regulation 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

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 Officers as the PAA.

In terms of the law the PAA, which is the Forest Department in compliance with the "Authority" meaning the Central Environmental Authority should approve the proposed project. As mentioned earlier the PAA (FD) and the CEA are members 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 implementation 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 revised EIAR had been submitted in September 2006, which had been kept for public review. Finally, the TEC had recommended the approval of the proposed project. According to the submissions of the petitioner, he had repeatedly informed

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 regulations had specified 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 specific 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 statutory 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 petitioner 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 application for a mechanized Mine Project to the 1st respondent in

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 compliance 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-

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.

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 – Section 57, Section 109 [e], Section 133 – Charges bad in law? Guidelines – No force or authority – Charges prescribed/ Bias of the judge advocate – Constitution Art 89. 91 [1] a – Disqualification from being elected to Parliament – Reasons not given – Judicial body – Suppression of material facts – fatal? Uberrima fides – What are material facts? – To be decided by Court only?

The petitioner sought to quash the decision of the respondents to convict 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 convicted of the charges and was imposed the sentence of cashiering from the Army. Court Marshal 2 was convened on 17.3.2010 with the appointment 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

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 application 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 sufficient materiality to justify or require immediate discharge of the order without consideration 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

(4) *Republic of Peru vs. Driefius 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 Aluvihare, 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 filed 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-

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 filed for the respondents. Objections and counter objections have now been filed. 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 filed. 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 filed on 13.10.2010, the petitioner 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 incumbent 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.

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 serving 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 coherent, 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 Presidential 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 first 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

sentence of cashiering from the Army. The petitioner stated the while in military custody the petitioner contested Parliamentary 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 accordance 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 submitted that these charges are bad in law. The learned President's

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 obligation 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 before not particularly specified 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 submits 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 concerning 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 influenced the Tender Board. There was no allegation of the tender having being

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 interest 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 custody 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 petitioner was charged in April 2010. The offences were committed 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 questionable. The 5th respondent who was away at that time was specially flown from the United Kingdom to be the Judge

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 questionable 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 submitted 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 confirmed. In terms of section 134 an officer shall be sentenced to be cashiered before he is sentenced to imprisonment. Therefore the second cashiering appeared to be only a formality which was rectified.

Disproportionate Sentence

The petitioner had been sentenced to 30 months imprisonment. 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

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 imprisonment simple or rigorous for a term not exceeding three years. However this section makes provision for the Tribunal to consider 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 following shall be the scale of punishments, in descending order of severity, which may be inflicted on officers 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 officer 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

be quashed by way of a certiorari. The learned counsel submitted 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 disqualified 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 qualified to be elected as a Member of Parliament or to sit and vote in Parliament – (a) if he is or becomes subject to any of the disqualifications specified in Article 89; (b) to (g) not reproduced.

Article 89 is as follows:-

89. No person shall be qualified 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 disqualifications namely – (a), (b), (c) & (e) to (j) not reproduced.

(d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (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 immediately preceding completed the serving of a sentence of imprisonment 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 submitted that is why the petitioner was given an imprisonment

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. However 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 petitioner 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 quashing the entirety of the proceedings held in the aforesaid Court Martial II.

i. Grant an order in the nature of writ of certiorari quashing all orders and/or decisions made by the 2nd to 5th

respondents in Court Martial II including the aforesaid order dated 26th August 2010 to proceed with Court Martial II. Overruling the submissions made on behalf of the Defence 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 petition to have the above reliefs is that the 2nd, 3rd and 4th respondents who sat in the Court Martial II as its president and Members have been biased.

The petitioner stated that the petitioner was responsible 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 Secretary Defence and the Secretary Defence had influence 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:

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 Commander 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 Inquiry convened by the petitioner.*

b. *The 3rd respondent: The 3rd respondent is closely associated with the Secretary Defence and both of them are from the Gajaba Regiment. The 3rd respondent had been working 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 Election. The 3rd respondent was also the head of the Gajaba Regiment that was brought in to sideline the Sinha Regiment 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 evidence by the prosecution and the defence and the written submissions filed by the parties) as made available to the petitioner is filed 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-

spondents were in the Common stream of the Army. Which (as outlined above) was a virtual demotion and/or humiliation 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 bearing No. 350/2010 was filed 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 filed 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 aforesaid circumstances, the aforesaid decision of the 2nd to 4th respondents dated 17th September 2010 finding the petitioner guilty of the aforesaid charges in Court Martial II

and the purported imposition of sentence of 30 months by the 2nd to 4th respondents and all the orders, decisions and/or findings and /or proceedings of Court Martial II including 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 Lordships 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 motivated 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 respondents.

"f". The bias, disqualification 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 consideration 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

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 interim relief staying the decision to convict and staying the decision to impose a sentence of 30 months on the petitioner until the final 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 respondents were represented by counsel. However the learned President's Counsel for the petitioner submitted 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 filed. In the objections, the respondents raised the issue with regard to the **suppression of material facts**.

To the allegation of untrustworthiness and lack of integrity of the 2nd respondent, the respondents averred that the 2nd respondent was appointed as Commander/Vice Chancellor 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 Officiating General Officer, 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 respondents 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 reproduced 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 reproduced.

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 respondents 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 Petitioner 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 2nd respondent was a perfectly honest, trustworthy and competent officer 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 confirmed by the President of the Republic on or about the 26th of May 2009. These respondents file herewith, marked 2RI2 and 2RI3 respectively and plead as part and parcel hereof, true copies of the said recommendation by the petitioner and the said confirmation/ appointment by the President of the Republic dated 26th May 2009.*

(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 officers/cader officers 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 Commandant/Vice Chancellor of the Kotelawala Defence University is a highly prestigious and much sought after office in the Army and/or is and can only be given to a perfectly trustworthy and competent officer.*

(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 respondent are from the Gajaba Regiment, an infantry Regiment 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 3rd respondent 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 officiating General Officer, Commanding the 21st Division while still a Brigadier on the 26 of October,*

2007. These respondents file 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 appointing the 3rd respondents the officiating General Officer, Commanding the 21st Division. The post of General Officer Commanding any division is one ordinarily held by an officer 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 Officer 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 respondents 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 contents 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.