# IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of the article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, from the judgement dated 30.07.2015 of the Court of Appeal in CA Writ Application No. 404/2009.

SC Appeal 11/2017
SC SPL LA No. 177/2015
CA Writ No.404/2009

Dinga Thanthirige Jayalath Perere,
No. 1/64, Kalalgoda Road,
Pannipitiya.
**Petitioner-Appellant**

**Vs.**

**1.** Vice Admiral W.K.J. Karannagoda
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1A. T.S.G. Samarasinghe
Vice Admiral
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1B. S.A.M.J. Perera
Vice Admiral
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1C. Vice Admiral Ravindra C. Wijegunaratne
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.
(Added)

2. M.R.U. Siriwardene,
   Rear Admiral, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

3. M. Prematillake
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

4. M.A.J. De Costa
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

5. N.W.W.G.W.M.G.M. Gunasekera
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

6. D.S. Udawaththa,
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

7. A.K.M. Jinadasa
   Captain, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

8. A.S.M.P. Alahakoon
   Captain, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

**Respondent-Respondent**

Before : Jayantha Jayasuriya, PC, CJ

L.T.B. Dehideniya, J

Yasantha Kodagoda, PC, J.

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|---|---|---|
| Counsel | : | Faisz Musthapha, PC with Faiza Markar and Keerthi Tillekaratne for the Petitioner -Appellant.<br><br>Rajive Goonetillake, Senior State Counsel for the Respondent-Respondent. |
| Argued on | : | 24.07.2020, 22.09.2020 and 21.10.2020 |
| Written submissions filed on | : | 23.02.2017 and 30.11.2020 by the Petitioner. -Appellant.<br><br>06.02.2018 and 05.01.2021 by the Respondent-Respondent. |
| Decided on | : | 11.01.2023 |

**Jayantha Jayasuriya, PC, CJ**

The Petitioner-Appellant (hereinafter referred to as the "appellant") sought special leave to appeal from this court, aggrieved by the judgement of the Court of Appeal where he invoked the writ jurisdiction of that Court and prayed for Writs of Certiorari. The Court of Appeal by its judgment dated 30th July 2015, while refusing the relief prayed, dismissed the appellant's application.

This Court granted special leave to appeal on the following questions of law:

a) Did the Court of Appeal err in holding that the Appeal, against the sentence passed by the Court Martial under section 122 of the Navy Act, to His Excellency the President is an alternative remedy which ousted the writ jurisdiction of Court in respect of the subject matter of Petitioner's application before the said Court?

b) Did the Court of Appeal err in holding that there was no need for the Court Martial to have given reasons for its verdict on the sole basis that the Code of Criminal Procedure Act does not require the jury to give reasons for its verdict nor does the Navy Act require of Court Martial to give reasons for its findings?

c) Did the Court of Appeal err in its failure to consider whether judge advocate's directions did not justify the determination of the Court Martial?

d) Is the sentence imposed on the Petitioner violative of Section 104 of the Navy Act?

e) Can this Court grant the Petitioner any relief in view of Section 122 of the Navy Act read with Section 10 of the Navy Act as the Petitioner's decommissioning has been approved by His Excellency the President?

I have had the advantage of reading the draft judgment of Justice Yasantha Kodagoda PC and I agree with the views expressed by his Lordship on the question of law (a) referred to above and hold that that the Court of Appeal erred by holding that the appeal against the sentence passed by the Court Martial under section 122 of the Navy Act, to the President is an alternative remedy which ousted the writ jurisdiction of Court. However, in my view the decision of the Court of Appeal to refuse issuing writs of certiorari and mandamus should not be interfered with, due to my conclusions on the questions of law (b), (c) and (d) on which Special Leave to Appeal was granted by this Court, as more fully described herein below.

The appellant was a Commissioned Officer of the Sri Lanka Navy – a Captain – at the time material to the incidents relating to these proceedings. On 24th July 2008 the appellant who was serving as Commanding Officer at Port of Colombo had been issued with a transfer order requiring him to take up duties as Naval Officer in Charge of Mullikulam, Silavathura and Vankalai with effect from 03rd August 2008. However, this transfer order had been cancelled and by a subsequent transfer order, dated 21st August 2008, the appellant had been transferred to newly established naval deployments in Vankalai and Nanaddan, in Mannar, effective from 04th September 2008 as Contingent Commander. At this point of time, the administration and logistics support for these two naval deployments had been channelled through one of the closest commissioned bases, namely SLNS Gajaba, as the two newly established navy deployments to which the appellant was attached were not commissioned yet. With this appointment the appellant was placed under the Commander of North Central Naval Area. The abovementioned two newly established naval deployments were placed under the aforesaid Commander, for operational purposes in accordance with the administrative structure of the said area.

On 28th October 2008, around 10.30 pm army camp namely Thalladi army camp, adjacent to the two navy deployments that were under the command of the appellant was subjected to an air attack. At the time of this attack the appellant had been at the commissioned base SLNS Gajaba. At no point did the appellant return to the two navy deployments under his command namely Vankalai and Nanaddan between the commencement of the said attack on the army camp and the time at which the threat of any further attacks ceased.

Following these events, a Navy Board of Inquiry had been appointed and the said board of inquiry had recommended suitable disciplinary action against the appellant. Thereafter, a summary of evidence had been recorded and a Court Martial had been convened as provided for, under the Navy Act. The appellant who was represented by counsel before the Court Martial was found guilty of both charges framed against him, on 13th May 2009. After the findings of the Court Martial on the two charges were pronounced, the counsel for the appellant had pleaded in mitigation and the prosecution had made available the personal file of the appellant and other confidential reports to the Court Martial. Thereafter, the Court Martial had pronounced its sentence after an adjournment of thirty-five minutes. Sentences imposed on the appellant were severe reprimand for the first charge and dismissal without disgrace for the second charge. The appellant on the following day namely 14th May 2009 had made an application for revision of the sentence to the President, in terms of section 122 of the Navy Act. While the decision of the said appeal to the President was pending, the appellant invoked the jurisdiction of the Court of Appeal on 25th June 2009. The appellant in the said application prayed for writs of certiorari to quash the report of the board of inquiry, the charge sheet, summary of evidence recommending a court martial and the findings and sentence of the Court Martial.

Two charges on which the appellant was found guilty and sentenced were; first, that the appellant, between the period 15th September 2008 and 10th November 2008 (other than on days that he was on leave or absent for health reasons) stayed away or left the place of deployment namely Vankalai and Nanaddan naval deployments at night without permission of a proper authority and thereby committed an offence under section 60(2) of the Navy Act as amended; second, that in the night of 28th October 2008, the appellant failed to return to his tactical area of command after receiving information on the air attack on Thalladi Army camp while being the Contingent Commander of the two navy deployments – Vankalai and Nanndan, and thereby

committed an offence under section 104(1) of the Navy Act, as amended. Evidence of several witnesses had been presented before the Court Martial. On behalf of the prosecution the Area Commander of the North Central Command, the secretary to the area commander, Deputy Area Commander and the Commanding Officer of Vankalai had testified. On behalf of the appellant, the appellant himself, Commanding Officer of SLNS Gajaba, Contingent Commander Mannar, Commanding Officer Naval Deployment Silavathura and Logistics Officer, SLNS Gajaba had testified before the Court Martial.

The Court of Appeal having considered the material presented before it and the submissions of counsel for all the parties had dismissed the application of the appellant where he sought writs of certiorari to quash *inter alia* findings and sentence of the Court Martial. The Court of Appeal in dismissing the application had held that there is no legal duty on the Court Martial to give reasons for its verdict and that the appellant had sought an alternative remedy, namely that the appellant had submitted an appeal to the President in terms of section 122 of the Navy Act. Furthermore, in refusing to grant relief to the appellant, the Court of Appeal had observed that the appellant holds office at the pleasure of the President in terms of section 10 of the Navy Act and the President had refused the application made by the appellant in terms of section 122 of the Navy Act.

The learned President's Counsel for the appellant submitted that the Court of Appeal erred when it reached the aforementioned decision. One of the main contentions of the learned President's Counsel was that the Court of Appeal erred when it held that there is no legal duty on the Court Martial to give reasons for its verdict. I would first proceed to consider this issue.

**'Duty to give reasons'**

Question of law (b), on which this Court granted leave, was raised by the appellant in this regard. The learned President's Counsel strenuously argued that the developments that had taken place in relation to rules of natural justice and / or in relation to fairness in administrative and or judicial decision making process as recognised by our courts should be applicable in determining this issue. In this regard much reliance was placed by the learned President's Counsel on the following judgments of this court: **Karunadasa v Unique Gem Stones Ltd; and Others** [1997] 1 SLR 256, **Jayaratne v Fernando & Others** [2000] 3 SLR 69 and **Bandara and another v**

**Premachandra** [1994] 1 SLR 301. Our attention was also drawn to the Court of Appeal Judgment in **Abeysinghage Chandana Kumara v Kolitha Gunathilaka Air Vice Marshal *et. al.***, CA Writ 333/2011, CA minutes of 01.06.2020.

In **Karunadasa** (supra) the subject matter for determination before the Supreme Court was a judgment of the Court of Appeal where a Writ of Certiorari was issued quashing a decision of the Commissioner of Labour made under the provisions of Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, as amended, on the basis that the Commissioner's failure to give reasons for his decision amounted to a violation of the rules of Natural Justice. The Supreme Court having examined the impugned judgment of the Court of Appeal observed;

> *"Senanayake, J., in the Court of Appeal did not attempt to lay down an inflexible general principle that Natural Justice always requires an administrative authority to give reasons, although he did perceive a trend in that direction. It seems to me that his observations - that giving reasons for a decision is one of the fundamentals of good administration, and is implicit in the requirement of a fair hearing - were made, and must be understood, in the context of the position of the Commissioner of Labour under the Termination Act'* (at p 262-263)

The Supreme Court having made the observation mentioned above held;

> *"To say that Natural Justice entitles a party to a hearing, does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendation thus justified the conclusion that there were no valid reasons, and that Natural Justice had not been observed".* (at p 263)

The Supreme Court having reached this conclusion, referred the case back to the Court of Appeal to re-hear the matter, after calling for the record of proceedings and the relevant recommendations based on which the Commissioner of Labour made his decision.

In **Jayaratna** (supra) the Supreme Court considered an impugned decision of the allocating authority of the railways department to cancel a decision through which one of the government quarters was to be allocated to the petitioner who was a clerk attached to the railways department. The petitioner invoked the jurisdiction of the Supreme Court alleging a violation of Article 12 of the Constitution. The Supreme Court in its judgment considered a series of illegalities and inappropriateness of conduct of relevant officials. Such illegalities and inappropriate conduct included the failure to have proper documentary evidence of ministerial orders by public officers and the absence of any power under the Establishment Code for a Minister to order the allocation or cancellation of government quarters. The Supreme Court in the above decision did not proceed to consider any issue on "failure to give reasons" even though one of the key phrases recorded in the head note of the law report reads "cancellation of an allocation of government quarters without reasons".

**Bandara** (supra) is an instance where petitioners who invoked the jurisdiction of the Supreme Court on an alleged violations of rights guaranteed under Articles 12(1), 14(1)(c) and 14(1)(d) of the Constitution, challenged the impugned decision to place them on vacation of post. In the examination of relevant Constitutional provisions and the provisions of the Establishment Code, the Court observed that,

> *"The power to make rules under Article 55(4) is subject to the provisions of the Constitution, including Article 12; and the Constitution rests on the Rule of Law. Rules made under Article 55(4) must be interpreted so as to avoid inconsistency with Article 12 and the Rule of Law, even if dismissal "without any reason being assigned" might, at other times or in other contexts, have been equated to "dismissal without any reason". I hold that the conditions on which powers have been delegated are contained in Chapter II, Section 11. Sections 11:2 and 11:5 confer an entitlement to confirmation, upon fulfillment of certain conditions; Section 11:2 makes the public officer liable to termination for misconduct and other "defects"; all this is inconsistent with any*

> *discretion to authorise dismissal "at pleasure". It is in that context that Section 11:4 must be interpreted.*
>
> *I am of the view that in the Establishments Code "without assigning any reason" only means no reason need be stated to the officer, but that a reason, which in terms of the Code justifies dismissal, must exist; and* ***when the law requires disclosure of such reason, it will have to be disclosed*** *- and, if not disclosed, legal presumptions will be drawn. I hold that the Cabinet has only delegated a power to dismiss for cause, and according to a procedure prescribed (e.g. Chapter II, Section 11:2:1)." (emphasis added)*

Examination of theses judgments reflect that primarily the administrative authorities are bound to take decisions based on reasons and no capricious or arbitrary decisions can be allowed to stand. Therefore, even if the reasons are not disclosed at the time the decision is communicated, disclosure of such reasons at a time of judicial review satisfies this requirement. It is important to note that the Court has imposed such obligation of disclosure in situations *"When the law requires disclosure of such reason, ……"* as laid down by this court in **Bandara** (supra). In my view one important factor that has to be taken into account in giving effect to this requirement is the scope of the statutory scheme within which such authorities are exercising their discretion. In **Karunadasa** (supra) Justice Fernando explicitly observed that the requirement to give reasons should be understood *"… in the context of the position of the Commissioner of Labour under the Termination Act".*

Justice Fernando with Justice Edussuriya agreeing, in **Lanka Multi Moulds (pvt) Limited v Wimalasena, Commissioner of Labour and others** [2003] 1 SLR 143 (at 152-153), a case where a decision of the Commissioner of Labour was quashed by the Court of Appeal, examined several decisions including decisions that had expressed a contrary view, and while further elaborating his decision in **Karunadasa** (supra) observed that:

> *"Although the Commissioner has a discretion in respect of both limbs of section 6, that is not an unfettered or unreviewable discretion. As the Court of Appeal observed, he must give reasons for his decision. Although in Samalanka Ltd v Weerakoon ([199] 1 SLR 405) , it was held by Kulatunga, J, (with G.P.S. de Silva, CJ. and Ramanathan, J. agreeing) that*

*the Commissioner was not under a duty to give reasons, I took the contrary view in Karunadasa v Unique Gemstones Ltd ([1997] 1 SLR 256), (with Wadugodapitiya, J. and Anandacoomaraswamy, J. agreeing). That decision was considered and followed by Gunasekera J. in Ceylon Printers v Commissioner of Labour ([1998] 2 SLR 29). Since G.P.S.de Silva, CJ. agreed with Gunasekera, J. on that occasion it is clear that he no longer agreed with Samalanka. In Mendis v Perera ([1999]2 SLR 110 at 148) I observed that the audi alteram partem rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal, and that natural justice would be devalued if the tribunal does not consider the evidence and the submissions, evaluate it properly and not in haste, and give reasons for its conclusions. However, in Yaseen Omar v Pakistan International Airlines, ([1999] 2 Sri LR 375), Samalanda was followed, apparently without the attention of the Court being drawn to the subsequent decisions to the contrary and the relevant citations.*

*It is therefore necessary to reiterate what has long been recognized: that the statutory conferment of a right of appeal against the decision of a tribunal has the effect of imposing a duty on that tribunal to give reasons for its decisions (Brook Bond Ceylon Ltd v Tea, Rubber (etc) Workers Union [77 NLR 6] Ratnayake v Fernando [SC 52/86 SCM 20.5.91] ). The conferment of a right to seek revision or review necessarily has the same effect. As the decisions cited show, if the citizen is not made aware of the reason for a decision he cannot tell whether it is reviewable, and he will thereby be deprived of one of the protections of the common law - which Article 12(1) now guarantees. Today, therefore, the conjoint effect of the machinery for appeals, revision, and judicial review, and the fundamental rights jurisdiction, is that as a general rule tribunals must give reasons for their decisions".*

In **Central Bank of Sri Lanka and others v Lankem Tea and Rubber Plantations (PVT) Ltd:** [2009] 2 SLR 75 the Supreme Court while determining an appeal from the Court of Appeal where the Court of Appeal quashed a decision of the Controller of Exchange made under the Exchange Control Act, considered the following observation of the Court of Appeal:

> *"Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In R v. Mental Health Review Tribunal, ex parte Clatworthy ([1985] 2 All ER 699) it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did, and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing."* (at p 101)

Justice Marsoof having considered submissions of all parties in this regard, observed:

> *"It is important to note that the changes taking place in other jurisdictions have also had their influence on our Courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions. The Sri Lankan authorities were examined recently by the Supreme Court in M. Deepthi Kumara Guneratne and Two Others v Dayananda Dissanayaka and Another [SC (FR) Application No. 56/2008 (S.C. Minutes dated 19th March 2009)] in which the Supreme Court has moved towards recognizing a general duty to give reasons".* (at p 105)

Having made this observation Justice Marsoof further proceeded to consider whether there was a duty to give reasons in the matter under consideration and held:

> *"In view of the fact that Section 52(7) of the Act expressly confers a right of appeal against the decision of the Central Bank to impose a penalty, and even the decision of the Minister on appeal, is reviewable in writ proceedings, I am inclined to follow the reasoning adopted by the Privy Council in Minister of National Revenue v. Wrights Canadian Ropes Ltd. [(1947) AC 109] wherein it was observed that –*
>
> *"Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action. . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal. . . The Court is . . .. always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are. . . . insufficient in law to support it, the determination cannot stand. . . ."*

*As observed by Sedley, J., in R v. Higher Education Funding Council [(1994) 1 AER 651]*

*". . . . . each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not."*

*I am of the opinion that in the circumstances of this case, the decisions contained in P10 and P14 cry out for reasons, and the failure to give any, render them devoid of any legal validity. I hold that the failure to give reasons rendered the decisions contained in P10 and P14 nugatory, and answer question (f) on which leave has been granted, in the negative and against the Appellant."* (at p 105-106)

Jurisprudence of our courts that considered developments in English common law as set out above had therefore recognised, that the "duty to give reasons" by administrative authorities when taking decisions on various matters need to be examined in the context of the given situation. The statutory scheme within which such authorities are empowered to take decisions and the specific circumstances of each case needs to be examined despite such duty is recognised as a "general duty".

It is also pertinent to note that Lord Carnwath in **R (CPRE Kent) v Dover DC** [2017] UKSC 79, [2018] 2 All ER 121 at 137-138, in examining 'what common law duty there may be on a local planning authority to give reasons for grant of planning permission' observed:

*"[51] Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see Doody v Secretary of State for the Home Dept, [1993] 3 All ER 92, [1994]1 AC 531; R v Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 All ER 651 at 671-672, [1994] 1 WLR 242 at 263; De Smith's Judicial Review (7th edn, 2013) para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a*

*decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:*

*"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …" (See [1993] 3 All ER 92 at 109-110, [1994] 1 AC 531 at 565 per Lord Mustill.)*

*It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.*

*[52]. Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (R v Aylesbury Vale District Council, Ex p Chaplin (1998) 76 P & CR 207, 211-212 per Pill LJ). Although this general principle was reaffirmed recently in R (on the application of Oakley) v South Cambridgeshire DC [2017] EWCA Civ 71, [2017] 1 WLR 3765, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said (at [61]):*

*"The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential*

*significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty."*

*His conclusion was reinforced by reference to the United Kingdom's obligations under the Aarhus Convention (para [62]; see to similar effect my own comments on the relevance of the Convention, in Walton v Scottish Ministers [2012] UKSC 44; [2013] 1 CMLR 858 at [100]). Sales LJ agreed with the result, but expressed concern that the imposition of such duties "might deter otherwise public-spirited volunteers" from council duties, and might also introduce "an unwelcome element of delay into the planning system" (para [76])."*

It is also pertinent to observe that in the United Kingdom, the duty to give reasons by non-judicial administrative tribunals had been statutorily mandated by Tribunals and Inquiries Act, of 1958. The same Act recognises limitations such as refusal to give reasons on grounds of national security. Furthermore, the Act had made provision to recognise further restrictions on future occasions after necessary consultations, on grounds such as "reasons are unnecessary" or on impracticability to give such reasons.

In the context of introducing such requirement through the provisions of the Inquiries Act of 1958, it is said:

*"In response to the widespread feeling that Act ought to say something about giving reasons for decisions, the Government introduced a new clause in the House of Commons which now stands in the Act as section 12. This requires reasons to be given for decisions both by tribunals and by Ministers after statutory inquiries. The statement of reasons may be either written or oral, and it need be made only if requested."* (Case Comment, Tribunals and Inquiries Act, 1958, H.W.R. Wade, The Cambridge Law Journal, November, 1958, p.129 at 133).

This statutory requirement had continued in the English legal system and section 10 of the Tribunals and Inquiries Act, 1992 provides:

***"Reasons to be given for decisions of tribunals and Ministers.***

*(1)Subject to the provisions of this section and of section 14, where—*

*(a)any tribunal specified in Schedule 1 gives any decision, or*

*(b)any Minister notifies any decision taken by him—*

*(i)after a statutory inquiry has been held by him or on his behalf, or*

*(ii)in a case in which a person concerned could (whether by objecting or otherwise) have required a statutory inquiry to be so held,*

***it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested**, on or before the giving or notification of the decision, to state the reasons."*

Schedule I of the said Act makes reference to more than sixty five statutory bodies / tribunals that attend to sixty five different areas such as Agriculture, Banking, Building Societies, Child support maintenance etc. Therefore, jurisprudence under the English legal system needs to be considered in the context of such statutory scheme too. Provisions in such statutory schemes would influence decisions on common law. In my view, when examining the question whether a duty to give reasons on an administrative authority at a given situation exists or not, the primary issue before court is whether the statutory scheme under which such authorities exercise their powers had imposed such a duty or not. If no such statutory duty exists, then the court needs to consider whether the manner in which authorities had exercised their statutory duties had adversely impacted on the legality and reasonableness of the decision and if so to further consider whether the common law imposes such a duty in the context of the statutory scheme within which the authorities have exercised their powers, in the given situation. In my view, examining the desirability of placing such duty to give reasons on the basis that availability of reasons would enhance the acceptability of such decisions falls outside the scope of judicial review when examining the legality and the reasonableness of a decision of an administrative body, in a given situation.

Therefore, I am of the view, in considering the legality and reasonableness of the verdict of the Court Martial in the instant appeal it is imperative to consider the relevant legal provisions applicable to the Court Martial and the manner in which proceedings had been conducted in the given situation and thereafter to consider whether the impugned verdict of the Court Martial should be quashed or not by a writ of certiorari on the basis that no reasons had been given by

the members for their verdict. The appellant's application to the Court of Appeal is to quash the verdict of the specific Court Martial and is not a challenge to the legal framework relating to Courts Martial in abstract. Therefore, it is necessary to consider whether the judgement of the Court of Appeal which refused any relief to the appellant should be interfered with or not, in its proper context. I would further elaborate on this aspect when considering the legality of the Court Martial proceedings that are impugned by the appellant.

In the outset it is pertinent to observe that appellant's right to challenge the proceedings of the Court Martial in the Court of Appeal is arising from section 132 of the Navy Act. Section 132(1) of the Navy Act reads:

> *"Such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect of any court martial or any naval officer exercising judicial powers under this Act".*

Hence, it is through this deeming provision that the proceedings of a Court Martial constituted under the Navy Act, is subjected to judicial review by the Court of Appeal. It is further pertinent to observe that through this legislative scheme a civilian court has been empowered to examine the proceedings of a tribunal established under the naval law, within the statutory framework that is specifically provided for under the above-mentioned section of the Navy Act.

The 'Manual of Military Law' published by War Office, printed under the authority of His Majesty's stationary office, London, a manual that had been compiled initially in the year 1884, to "assist officers in acquiring information in respect of those branches of law with which they have occasion to deal in the exercise of their military duties", states that *"Military law is the law which governs the soldier in peace and in war, at home and abroad. At all times and in all places the conduct of officers and soldiers as such is regulated by military law"* ['Manual of Military Law' supra, sixth edition (1914), page 1].

Objects of Military Law is described as,

> *"..to maintain discipline among the troops and other persons forming part of or following an army,. To effect this object, acts and omissions which are mere breaches of contract in civil life – e.g, desertion or disobedience to orders – must, if committed by*

> *soldiers, even in time of peace, be made offences, with penalties attached to them; while, on active service, any act or omission which impairs the efficiency of a man in his character of a soldier must be punished with severity"* ["Manual of Military Law", supra page 6].

In early periods, in England, military law had existed only in times of actual war. In such times military law had been initiated through Articles of War issued under the prerogative power of the Crown. This position had changed with the enactment of Mutiny Act, in the year 1689. At early stages military law was administered by Court of Chivalry and later through Court or Council of War. Thereafter, such Council of War had transformed to Court Martial. In 1879, Army Discipline and Regulation Act was enacted to consolidate provisions of Mutiny Act and statutory Articles and thereafter two years later in 1881, the Army Act was enacted. Thereafter, Army Act (44 & 45 Vict., c. 58) and Army Annual Act had comprised a part of Military Law of Great Britain.

It is recognised that these Acts *".[.is] part of Statute Law of England, and, with the considerable difference that it is administered by military courts and not by civil judges, is construed in the same manner and carried into effect under the same conditions as to evidence and otherwise, as the ordinary criminal law of England"* ["Manual of Military Law" supra page 1]

Trying persons who are subjected to Military Law by Courts Martial had been accepted and recognised over a long period of time, under these legislative schemes. All matters relating to such Courts Martial, including their jurisdiction, composition and procedure were governed by those statutes as well as rules made under them. According to section 52 of the Army Act (44&45 Vict. Ch 58) members of a Court Martial have to subscribe to an oath and confirm that at no stage the opinion or a vote of a fellow member will be disclosed. Furthermore, section 53 of the same act provides that in the event of an equality of votes on the finding, the accused is deemed to be acquitted. In the event of equality of vote on sentence or any other matter, the president has a second or casting vote. Under Rule 44A of Rules of Procedure (1907) findings of the Court Martial are recorded simply as a finding of "guilty" or of "not guilty" or "Not guilty and honourably acquit him of the same". Therefore, from the inception of trials before a Court Martial the practice of finding of guilt or innocence of the accused was on the basis of a "vote"

and the members were not obliged to further explain, elaborate or provide reasons for their "vote".

It is also pertinent to note that the role played by the "Judge Advocate" remains one of the main features of Courts Martial. One of the most important duties discharged by the Judge Advocate in the adjudication process in a Court Martial had been the 'summing up' he makes at the end of evidence presented by parties. Rule 103 (E) of the Rules of Procedure (1907) provides that *"At the conclusion of the case he will, unless both he and the court considers it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceed to deliberate upon their finding".* Therefore, it is a statutory requirement that the Judge Advocate has to sum up the case unless he and the court think a summing up is unnecessary. Furthermore, the Judge Advocate *inter alia* has a responsibility to address the Court Martial of any irregularities in the proceedings, and any defects in the charge. He also has a duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or incapacity. The Judge Advocate has to full fill his duties while maintaining impartiality.

In a nutshell, conveying the opinion of the members of a Court Martial on the guilt or innocence of an accused by way of a vote and the Judge Advocate who maintains impartiality providing advise on legal matters as well as providing a non-binding summing up to the Court Martial had been features that did exist from the inception of the Court Martial process established under the military law, in the British legal system.

The statutory framework relating to military law in the United Kingdom had evolved since its inception and Armed Forces Acts of 2006, 2011 and 2016 are the main statutes in this regard at present.

This Court, in **Gunaseela v Udugama *et al*** 69 NLR 193, when considering the constitutionality of the Court Martial process as provided under Army Act of 1949 as amended, made the following observations on the direct applicability of the provisions in the Army Act (1881) of the United Kingdom in Ceylon until the enactment of Army Act in 1949. The court recognised that *"The Army Act, 1881, of the United Kingdom was, like many other British enactments, part of the law of Ceylon long before the Independence of Ceylon."* (at p 194).

The Court further observed:

> *"For a long period therefore the law of Ceylon provided for the trial by Courts Martial of certain offences committed by "persons subject to military law" of the above and other categories"*. (supra at p 195)

In **Jayanetti v Martinus** 71 NLR 49, the Supreme Court examined the legality of Court Martial proceedings conducted under the Navy Act, No 34 of 1950 as amended. The court focused on the summing-up of the Judge Advocate and recognised the important role played by a Judge Advocate in a court martial convened under the Navy Act. In this regard the court observed:

> *"Section 39 of the Navy Act prescribes the powers and duties of the Judge-Advocate in court martial proceedings. They are inter alia, to give advice on questions of law or procedure during the proceedings of a court martial, to give advice on any matter before the court, to ensure that the accused does not suffer any disadvantage at his trial, and at the conclusion of the case to sum up the evidence and advise the court upon the law relating to the case.*
>
> *The reason why such powers and duties are vested and imposed on the Judge Advocate is almost obvious. A court martial, although it has the power to try and punish offences, which if committed by civilians would be tried by the ordinary courts, is not ordinarily composed of officers with legal knowledge or judicial experience. In fact the court in the present case was composed of two supply officers and one surgeon officer. It is because of this lack of legal or judicial training and experience that the function of advising courts martial is committed by law to the Judge Advocate. Indeed, his functions are comparable to those of a Judge of Assize in cases tried by Jury. Although it is the function of the Jury to decide all questions of fact, the law requires that before the Jury deliberates on the facts, the Judge must sum up to them the evidence. Section 39 (d) imposes a similar requirement in the case of a trial by court martial"* (supra at p 49-50)

Section 39 of the Navy Act sets out the Duties of Judge Advocate and subsection (d) of section 39 provides that:

> *"At the conclusion of the case he shall, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding."*

The importance of a summing-up of the judge advocate in the context of legality of the entire Court Martial proceedings was described in **Jayanetti** (supra) in following terms:

> *"Had it been necessary for me to decide that the failure of a Judge-Advocate to sum up on evidence and on the law will be a ground for quashing the finding of a court martial only if that failure resulted in a miscarriage of justice, the matters discussed in the two preceding paragraphs of this judgment would compel me to hold that there did result in this case a miscarriage of justice.*
>
> *I prefer, however, to rely on the ground that the failure of a Judge Advocate to perform the statutory duty, explicitly imposed by s. 39 (d) of the Navy Act to sum up on evidence before the court deliberates on its finding, is a fatal illegality. I hold that a finding reached without such a summing-up is one reached without jurisdiction, just as would be a verdict of a jury reached at the conclusion of a trial without there having been the charge of the trial Judge which is required by s. 243 of the Criminal Procedure Code. It is true that s. 39 (d) of the Navy Act allows the summing-up to be dispensed with, if both the Judge Advocate and the court consider it unnecessary. But the Legislature surely assumed that such a dispensation would be permitted only if the facts of a particular case are unusually simple, or perhaps if both parties consent to the dispensation. The Legislature could not have contemplated that a Judge-Advocate, the very title of whose office denotes its quasi-judicial character, might through caprice or inadvertence deny to an accused person his right to a summing-up on the evidence and on the law"* (at p. 51)

The importance of the summing up of a Judge Advocate in Court Martial proceedings as well as the similarity between the roles played by the Judge Advocate in such proceedings and a judge who presides over a jury trial, is aptly demonstrated in the above findings of the court. Whilst the summing up by the judge in a jury trial guides and assist the members of the jury in a jury trial, the summing up of a Judge Advocate in a Court Martial assists and guides members of the Court Martial. The responsibility and the duty to find the guilt or innocence of the accused is placed on

the members of the jury at a jury trial in a court of law and similarly, such duty is cast on the members of the Court Martial in proceedings before a Court Martial. There is no statutory duty imposed either on members of a Court Martial or the members of a jury to give reasons for their finding.

It is pertinent to observe that absence of reasons for the verdict of a Court Martial had not impeded civilian courts exercising powers of judicial review over such verdicts, as provided by law. The Court of Appeal in **Kumaresan v Pannanwela *et al*** [1990] 2 SLR 181, considered a summing up of a Judge Advocate of a Court Martial convened under the Air Force Act No 41 of 1949 as amended and quashed the proceedings and the order of the Court Martial by issuing a writ of certiorari. Main reasons for the court to issue the writ were the defects in the summing up of the Judge Advocate. Similarly in **Chandra Kumar and Another v Captain Samarawickrema *et al*** [2002] 2 SLR 153, also the Court of Appeal granted a writ of certiorari to quash the conviction of a Court Martial convened under the Navy Act, due to the fact that the Judge Advocate erred in law in giving a particular direction to the members of the court.

Starting with the statutory framework established in the United Kingdom from the nineteenth century and thereafter through the framework established by three statutes, Army Act (1949), Air Force Act (1949) and Navy Act (1950), regulate the Court Martial proceedings in Sri Lanka. Rules made under the Army Act and Air Force Act had further complemented the statutory framework. As a practice, proceedings of Courts Martial appointed under the Navy Act had continued to take place similar to the proceedings of Courts Martial under the other two statutes, even though no rules had been promulgated relating to proceedings of Courts Martial under the Navy Act. Two main features of the Court Martial proceedings namely the important role played by the Judge Advocate in such proceedings including delivering the summing up by him and the members of court arriving at the verdict by the process of "vote" without giving reasons for such verdict had remained intact, in Courts Martial appointed under all three statutes.

In England, Armed Forces Acts of 2006, 2011 and 2016 had brought in numerous changes to the Court Martial process. These changes had been introduced *inter alia* to address adverse concerns raised by the European Court of Human Rights. It is also pertinent to note that these statutory developments in relation to military law had been introduced while developments in common law relating to "duty to give reasons" were taking place.

However, it is further pertinent to note that no changes had taken place either statutorily or on the basis of developments in common law in relation to the manner in which the final decision of members of a Court Martial is pronounced, under the English Law. It remains that the decision of the Court Martial to be reached by the vote of the members and there is no legal obligation placed on them to give reasons for their decision or to explain the reasons for their vote. Therefore salient features of Courts Martial in the context of pronouncing their findings on the guilt or innocence of the accused continued static through out the evolution of military law and had not changed despite the developments in the common law and statutory law in relation to administrative bodies in the context of a duty to give reasons for their decisions. Furthermore, the role played by the Judge Advocate also had been preserved to ensure that the Court Martial proceedings would not breach the fair hearing guarantee.

"The Court Martial and The Summary Appeal Court Guidance" Volume 2 at p 10 version 7 (2015) (Issued by Judge Advocate General and The Director of Military Court Service) in relation to "Deliberations on Findings" (chapter 3.17) elaborates that;

"*The law permits a board in the Court Martial to reach a finding of guilt or innocence by a simple majority, but it is preferable and desirable for any finding to be unanimous if possible. If there is equality of votes, the court must acquit the defendant. There is no casting vote at this stage. Before the board retires to deliberate on its findings, the judge gives directions on this point and on other matters. Until after a finding of guilt has been announced in open court, no discussions whatsoever of sentencing options or implications, no matter how general or hypothetical, are to take place before or during any trial proceedings or in the absence of the judge."*

Contrasting Roles of the Judge Advocate and Board Members is described in "The Court Martial and The Summary Appeal Court Guidance" Volume 1 at p 5 version 7, (2015) – (Issued by Judge Advocate General and The Director of Military Court Service) in the following terms:

"*The roles and functions of the judge and the members are entirely different, but taken together they contribute directly to a just outcome of each trial. As such they are complementary and both functions are indispensable. Where there is a plea of Not Guilty in the Court Martial, the members exclusively decide the guilt or otherwise of the defendant, based on the evidence*

*presented to them. The judge takes no part in this decision (except where he decides that there is no case to answer at the close of the prosecution case and directs the board to find the defendant not guilty). The members hear, assess, deliberate on, and (if applicable) arrive at a finding on the facts of the case. During the trial proceedings they are acting in a similar way to a jury, and all members of the board have an equal vote and voice; there is no casting vote at this stage. The President of the Board chairs the discussion and reports the outcome to the court. If there is equality of votes, the court must acquit the defendant"* (3.7)

"*The judge, in addition to being aware of the evidence before the court, will have seen the trial papers and may have heard legal arguments in the absence of the board. The function of the judge is to ensure the trial is conducted fairly, decide what evidence the members hear and see, and ensure the correct interpretation and application of the law and procedures. The judge's role is exactly the same as the role of the judge presiding over a jury trial in the Crown Court until it comes to the sentencing stages"* (3.8)

It is also pertinent to observe that 'trial by jury' or 'jury trials' had been in existence in England and other common law countries for centuries. One static feature in jury trials had been that the duty to find guilt or innocence of an accused remains with the jurors. There had been no change in this unique feature in jury trials that continued despite changes in many other areas under the common law. The 'duty to give reasons' as developed by the common law in relation to decisions of administrative authorities had not been extended to the verdicts of jury trials. Therefore, neither the common law nor the statute law casts an obligation on the jurors to give reasons, for their verdict.

Jury trials in criminal proceedings had been a feature in our legal system also for centuries. Learned President's Counsel for the appellant submitted that, *"trial by jury is traceable to the Magna Carta (Vide chapter 39 of the Magna Carta whereby the people extracted the right to be tried by one's equals. Trial by jury is an institution of great historical antiquity and by usage, has acquired the force of law. It is a legacy which the law in Sri Lanka adopted and is a part of the practice of our courts. Under our law the practice of the courts constitutes LAW – cursus curiae est lex curiae as applied in Jeyaraj Fernandopulle's Case 1996 1 SLR 70 at page 83".*

At present, proceedings of jury trials are governed by the provisions in the Code of Criminal Procedure Act, No 15 of 1979 as amended. Sections 229, 230 and 231 sets out the duties of the Judge in a jury trial and section 232 sets out the duties of the jury. Sections 233, 234, 235 and 236 sets out matters relating to the verdict of the jury.

Duties of the jury as provided under the statute include "to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned, to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not to decide all questions which according to law are to be deemed questions of fact to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning".

The manner in which the verdict should be pronounced as provided under section 234 is firstly the registrar to inquire "Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged?" and the foreman to state the verdict of the jury.

Thereafter section 236 provides to record the verdict in the following manner:

"the Registrar shall make an entry of the verdict on the' indictment and shall then say to the jury the words following or words to the like effect : " Gentlemen of the jury: attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A.B. is guilty" (or "not guilty").

The statutory scheme through which a jury trial is conducted does not require the jury to give reasons for their verdict. In this regard it is also pertinent to observe that no specific statutory provision exits absolving the jury from such duty. Yet, even the trial judge has no right to inquire into the reasons for their verdict, despite a judge is empowered to ask questions from the jury to 'ascertain' what the verdict is, under section 235. It is such practice that had been continuing since the inception of trials by jury in England. Neither the common law nor the statute law had intervened in this practice. It is also pertinent to observe that even an appellate court that considers an appeal against a conviction by a jury has no right to seek for reasons from the jurors

to their verdict and absence of reasons is not a ground on which a conviction by a jury could be set aside. Law does not permit drawing an inference that reasons were not pronounced due to the absence of valid reasons for the jury to have arrived at the verdict of guilt. No duty to give reasons for the decision is imposed on a jury despite the fact that a statutory appeal lies against a conviction based on the verdict of a jury. One of the grounds on which the duty to give reasons was developed under the common law is *"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed*" (per Lord Mustill in **Doody v Secretary of State for the Home Dept,** ([1993] 3 All ER 92 at 109-110, [1994] 1 AC 531 at 565). Nevertheless, the common law principles at no stage imposed a duty on a jury to give reasons for its verdict.

Similarly, neither the common law principles as developed in England, nor the statutory schemes had extended the 'duty to give reasons' to a Court Martial in relation to its verdict. As discussed hereinbefore both jury trials and trials in Courts Martial had been in existence over centuries. Roles of the Judge Advocate and members of Courts Martial vis-à-vis roles of the presiding judge and members of a jury had been recognised, as similar. The Supreme Court in **Jayanetti** (supra) and **"The Court Martial and The Summary Appeal Court Guidance"** issued by Judge Advocate General and The Director of Military Court Service (supra) have recognised such similarity. There is no reason for me to deviate from these views even though the statutory provisions governing proceedings of Courts Martial and jury trials are not identical. Existing practices relating to Courts Martial and jury trials and the jurisprudence as discussed hereinbefore reflect, that they are similar in context. Furthermore, in my view the unique nature of the 'Court Martial' in the context of the court structure in the legal system and the responsibility on the Court Martial to act 'judicially' had not altered this position. Even a court, which falls within the traditional structure of courts in a legal system, is bound to act judicially. Yet, the developments in common law principle 'duty to give reasons', had not been extended to the verdict of a jury.

In the backdrop of these legal principles, I will now turn to the impugned Court Martial proceedings. The entire record of proceedings including the charge sheet, evidence, summing up of the Judge Advocate and the verdict is available for perusal by this court and it was available for the Court of Appeal too. A team of counsel, presumably of his choice, had represented the appellant before the Court Martial. At the commencement of the proceedings an objection had been raised in relation to one of the members of the tribunal. The Judge Advocate thereafter had addressed the remaining two members and had explained the grounds for such objection and had invited the two members to reach a decision. Accordingly, the composition of the Court Martial had been changed as they decided in favour of the objection raised on behalf of the appellant. The Judge Advocate had addressed the members on the legal position regarding the admissibility of the summary report on the prosecution case presented by the prosecuting officer. The Judge Advocate at the end of evidence had addressed the members for one hour and forty five minutes. In his address, he had drawn the attention of the members to the relevant legal principles including the burden and standard of proof, the manner in which the prosecution evidence and defence evidence should be considered as well as the different aspects of the testimonies of prosecution and defence witnesses. It is pertinent at this stage to observer, that Learned President's Counsel for the appellant in the course of his submissions before this Court did not impugn the summing up of the Judge Advocate but acknowledged the comprehensiveness and impartiality reflected therein.

Members of the Court Martial had retired for deliberations at the conclusion of the aforementioned summing up of the Judge Advocate and had pronounced its verdict after fifty-five minutes. The appellant was pronounced guilty on both counts. The Court Martial had not deviated from its practice and had not violated any statutory provision in the Navy Act.

All this material including the evidence and the summing up of the Judge Advocate was made available to the appellant as well as the Court of Appeal at the hearing of appellant's application for Writ of Certiorari. Therefore, the absence of reasons from members of Court Martial for their verdict had not adversely impacted the Court of Appeal in the exercise of its jurisdiction under Article 140 of the Constitution read with section 132(1) of the Navy Act.

Therefore, in my view the Court of Appeal did not err when it refused to quash the verdict of the Court Martial on the ground that it failed to give reasons. It is my considered view that, imposing a duty to give reasons on the members of a Court Martial on the basis that such general duty exists under the 'common law principles' brings in a complete change to the military justice system contrary to the statutory scheme and the practice prevalent over centuries.

In reaching my findings on this matter I have also considered two decisions of the Court of Appeal namely, judgment of a Divisional Bench in **Fonseka v Lt. General Jagath Jayasuriya *et al***, [2011] 2 SLR 372 and the judgment of a single judge in **Abeysinghage Chandana Kumara v Kolitha Gunathilaka *et al***, CA/Writ/333/2011, CA minutes dated 01.06.2020. In **Fonseka** (supra) on behalf of the petitioner it was contended that a Court Martial is bound to give reasons as Court Martial had been recognised as a 'court' and also has a duty 'to act judicially'. Having reiterated this submission the Court had not proceed to make a specific finding in favour of this submission but dismissed the application *in limine* on the basis that the petitioner was guilty of non-disclosure. In **Abeysinghage Chandana Kumara** (supra), the learned judge held that in the matter under consideration the Court Martial had failed to comply with regulations 98 and 175 of 'The Court Martial (General and District) Regulations which requires "The opinion of every member of the court martial as to the findings shall be given by word of mouth on each charge separately" and every member of court martial *"must give his opinion by word of mouth on every matter which the court has to decide, including sentence, notwithstanding that he may have given his opinion in favour of acquittal"* and had held that *"it is incurable and fatal to the conviction"*. Thereafter the learned judge had proceeded to hold that *"giving of reasons for decision of the court martial has not been excluded expressly or by necessary implication in the Air Force Act or Regulations made thereunder. Hence, the failure to give reasons is fatal to the conviction of murder and punishment of life imprisonment"*.

However, due to the reasons enumerated hereinbefore, I am not inclined to consider learned judge's view in **Abeysinghage Chandana Kumara** (supra) favourably. Absence of an appeal by the Honourable Attorney-General to the Supreme Court from the said decision of the Court of Appeal, in my view, is not a factor that can have any influence on my view in this regard. The learned President's Counsel for the appellant submitted that the right to judicial review of the decision of a Court Martial would be rendered an 'empty shell' if the Supreme Court departs

from the decision in **Abeysinghage Chandana Kumara's** case (supra). In this regard it is pertinent to observe that in numerous occasions, the Court of Appeal has quashed Court Martial proceedings by exercising writ jurisdiction vested by the Constitution read with the provisions in the Army, Air force and Navy Acts. Supreme Court had affirmed such decisions, unless in situations where the Court of Appeal had erred.

In **Kumaresan v Pannanwela and others** [1990] 2 SLR 181 a writ was issued to quash findings of a Court Martial under the Air Force act due to defects in Judge Advocate's summing up and the defects in the charges. In **Indrananda De Silva v Lt. Gen. Waidyaratne and others,** [1998] 1 SLR 175 a writ was issued to quash conviction entered by a Court Martial under the Army Act due to admission of illegal evidence and insufficiency of evidence. A conviction of a Navy Court Martial had been quashed in **Chandra Kumar and another v. Capt. Samarawickrama and others, [**2002] 2 SLR 153, due to defects in the summing up of the Judge Advocate and for the reason that the Court Martial erred in admitting certain items of evidence. In **Koralagamage v Commander of the Army,** [2003] 3 SLR 169, a writ was issued to quash the conviction of an Army Court Martial on the basis that the opportunity to cross examine witnesses was denied to the accused. A conviction of a Court Martial had been quashed on the basis that the offence was prescribed, in **Chandrasena v Commander of the Sri Lanka Army and others,** [2004] 1 SLR 404. In **Jayanetti** (supra), failure of the Judge Advocate to perform the statutory duty to sum up the evidence, led to the conviction being quashed.

In **Wimalasiri v Daluwatte and others,** [2002] 2 SLR 192, court in refusing to issue a writ observed that;

> *"when the evidence placed before the Court Martial is considered, it does not appear that, on the evidence available, the decision of the Court is unsupportable or perverse. There is also no serious procedural error resulting in a miscarriage of justice".* (at p 196)

In the light of the jurisprudence discussed hereinbefore, I am not inclined to consider favourably, the above-mentioned submission of the Learned President's Counsel, that the failure to follow the decision in **Abeysinghage Chandana Kumara** (supra) would make writ jurisdiction over a Court Martial an 'empty shell'.

In view of my findings enumerated hereinbefore, I answer question (b), on which this Court had granted Special Leave, in the negative.

**Did the Court of Appeal err in its failure to consider whether judge advocate's directions did not justify the determination of the Court Martial?**

It is the contention of the learned President's Counsel for the appellant that this question should be considered in the context of 'no evidence' rule. Furthermore, it was submitted that the same issue was in the forefront of the arguments before the Court of Appeal as the appellant argued that the Court Martial ought to have found the appellant not guilty for both counts.

On behalf of the respondents, learned Deputy Solicitor General submitted that the examination of the record of the Court Martial proceedings aptly demonstrate that the "no evidence" rule does not arise in the given situation. It was further contended that sufficient evidence was presented before the Court Martial and the verdict of the Court Martial on either count is neither perverse nor unreasonable despite conflicting evidence existed in relation to the first charge. The learned Deputy Solicitor General contended that the summing up of the Judge Advocate quite correctly had drawn the attention of the members of the Court Martial to the fact that such inconsistencies exist and had addressed comprehensively on the legal position relating to the standard and burden of proof. Furthermore, on behalf of the respondents it is submitted that no inconsistencies exist in the evidence pertaining to the second charge and hence, there is no legal basis to interfere with the verdict in relation to the said charge. On this basis the learned Deputy Solicitor General submitted that no legal basis exists to issue a writ of certiorari to quash the impugned verdict on either of the two charges.

On behalf of the appellant it was submitted that our courts have adopted and applied 'no evidence' rule in **Hasseen v Gunasekera and others**, CA application 128/86 CA minutes 02.10.1995, **Kiriwanthe v Nawarathne** [1990] 2 SLR 393 at 409, **Nalini Ellagala v Poddalgoda** [1999] 1 SLR 46 at 52 and **Nicholas v Macan Markar Limited;** [1985] 1 SLR 130 at 140-141.

In **Nalini Ellegala** (supra) the Supreme Court considered whether the Rent Board of Review erred in exercising its appellate jurisdiction in relation to a decision of the Rent Board.

Section 40(4) of the Rent Act provides that "Any Person who is aggrieved by any order made by any Rent Board under this Act may …….. appeal against the Order to the Board of Review: provided however, that no appeal shall lie except upon a matter of law".

In considering this issue, the Supreme Court considered the Court of Appeal decision in **Hassen v Gunasekera and Others** (supra), and recognised that the Court of Appeal had "dealt with an order of the Board of Review, affirming an order of the Rent Board which had been *"arrived at without an adequate evaluation of the evidence and by failing to take into consideration relevant items of evidence which could have influenced the finding"* and held the Rent Board as well as the Board of Review had "erred in law by failing to take into account relevant items of evidence in arriving at the finding" and therefore quashed the orders of the Rent Board as well as of the Board of Review".

Furthermore, the Supreme Court in **Nalini Ellagala** (supra) observed that

> *"Wade & Forsyth, Administrative Law, 7th edition at page 312 dealing with the 'no evidence' rule states that 'no evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence". It goes on to state at page 316 that "It seems clear that this ground of judicial review ought now to be regarded as established on a general basis", and forecasts that 'no evidence' seems destined to take its place as yet a further branch of the principle of ultra vires, so that Acts giving powers of determination will be taken to imply that the determination must be based on some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised'."*

Applying the principles enumerated hereinbefore, the Supreme Court held that

> "*the Rent Board had failed to properly evaluate the evidence and such failure was a question of law upon which the Board of Review was entitled to exercise its powers under section 40 of the Act".* (at p52).

**Nicholas** (supra) is a case where the jurisdiction of the Court of Appeal was invoked to quash a decision of the Rent Board of Review. The basis on which the application for the writ of certiorari was made includes that *"the decision of the said Board of Review bears on record an error of law, in that the Board of Review has made order without jurisdiction and / or in excess of the jurisdiction and in contravention of the statutory provisions in the law"* (at p 134).

In the said matter the court was confronted with the issue, whether the Board of Review having considered the facts including contents of documents produced before the Rent Board had taken a view different to the view taken by the Rent Board, which led to the setting aside of the order of the Rent Board when the Board of Review had the jurisdiction to consider an appeal from the Rent Board solely on matters of law, as provided under section 40 of the Rent Act? In this regard the learned counsel for the petitioner had submitted that the Board of Review could have set aside the findings on questions of fact if there was no evidence before the Rent Board to come to the conclusion it had arrived at, or on the evidence available before the Rent Board, no reasonable person could have come to that conclusion.

The court before embarking on the analysis of relevant legal principles in this regard had quite correctly identified the scope of examination the Court of Appeal has to engage, in exercising its jurisdiction of judicial review in relating to the decision of the Rent Board of Review. The court held;

> *"There is a fine distinction between, "appeal" and "judicial review". When hearing an appeal the court is concerned with the merits of the decision in appeal. The question before court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review the question before the court is whether the decision or order is lawful, that is, according to law. As such in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong, or whether the order of the Rent Board of Review is right or wrong. The function of this court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside". (at p 139)*

Clearly identifying the parameters within which a court exercising its jurisdiction in an application for "judicial review" should act, the court proceeded to observe that:

> *"A close study of the principles set down in these English and Ceylon cases referred to above show that the principles adopted by a superior court in considering a writ against an order of an inferior tribunal or court or an appeal on questions of law from an inferior court or tribunal are almost the same or have come closer. However De Smith Judicial Review of Administrative Action (4th Ed.) - page 129 states as follows:*
>
> *"The criteria adopted by the courts for distinguishing between question of law and questions of fact have not been uniform…….. Moreover, criteria applied in one branch of the law may be largely irrelevant in another: it may be unwise to, rely upon the fine distinctions drawn in income tax appeals or workmen's compensation appeals as authoritative guidance in appeals from other inferior tribunals or applications for certiorari to quash determinations of the national insurance commissioners or medical appeal tribunals for error of law on the face of the record. (In respect of this opinion) the relevant note 9 to this passage states as follows - Nevertheless, the important decision of the House of Lords in Edwards v. Bairstow (supra) a tax case in which the concept of a question of law was given a broad interpretation, has been influential in other contexts. It has been applied, e.g. in R. v. Medical Appeal Tribunal, ex p. Gilmore (supra) a case of certiorari to quash for patent error of law, and in rating........... and arbitration cases, and in a case involving the scope of the obligation to pay social security contributions (Global Plant Ltd. v. Secretary of State for Social Services (supra) and in a case concerning the registration of common land...... and in unfair dismissal cases). Subject to these qualifications, it is possible to make some meaningful generalisations about the tests applied by the courts to discriminate between law and fact in administrative law. But we must first enter another linguistic maze"."* (supra at p 142-143).

Having examined all the material available, the court observed that:

> *"The Rent Board of Review ……….. has not shown that there was no evidence for the finding of the Rent Board and that the finding was inconsistent with the evidence" and*

*contradictory of it. In my view what the Rent Board of Review has done is that it has on the same material substituted the finding of` facts' and the opinion of the Rent Board, with its own finding of facts and its opinion. What the Rent Board of Review has done is to 'come to a different conclusion on the facts of the case, from that of the Rent Board and to give that finding a legal decoration or embellishment by reference to three cases" (supra at p 144)*

In **"Administrative Law"** by H.W.R. Wade and C.F. Forsyth (10th Edition at 229-230) sets out 'no evidence" rule in following terms:

*"It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly – R v Criminal Injuries Compensation Board 1997 SLT 291. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.*

*'No evidence does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding – Allison v General Medical Council [1894] 1 QB 750 at 760, 763; Lee v Showmen's Guild of Great Britain [1952] 2 QB 329 at 345 - ; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence – R v Roberts [1908] 1 KB 407 at 423 - . This 'no evidence' principle clearly has something in common with principle that perverse or unreasonable action is unauthorised and ultra vires. It also has some affinity with the substantial evidence rule of American Law, which requires that findings be supported by substantial evidence recorded as a whole – Administrative Procedure Act (USA 1946, s 10(e); Universal Camera Corporation v National Labour Relations Board 340 US 474 (1951); Schwartz and Wade, Legal Control of Government, 228 - ."*

When *curses curie* and legal literature relating 'no evidence' rule is considered in the context of the factual position relating to the impugned Court Martial proceedings, it is pertinent to note that the prosecution had led evidence of four witnesses and a similar number of witnesses had testified on behalf of the appellant. Furthermore the appellant himself also had testified before the Court Martial.

Two charges that were framed against the appellant had been,

(a) Absence from Vankalai and Nanaddan, which was his "place of deployment" without obtaining permission from an authorised officer, in violation of section 60(2) of the Navy Act.

(b) The failure to return to his place of deployment namely Naval depot at Vankalai, upon becoming aware that the LTTE had bombed Thalladi army camp, and thereby committing an offence punishable under section 104(1) of the Navy Act.

First, I will consider the submission of the learned Deputy Solicitor General, that the 'no evidence rule' cannot be invoked in relation to the second charge, framed against the appellant. In this context it is pertinent to note that the appellant had pleaded not guilty to both charges. However, one of the admissions recorded before the Court Martial is that the appellant was away from Vankalai at the time the air raid was launched on Thalladi Army camp in the night of 28th October 2008. Accordingly, the Judge Advocate had correctly directed that the facts both parties had agreed need not be further proved. Therefore, there is no conflict on the fact that one of the core issues in relation to the second charge, namely that the appellant failed to return to his place of deployment upon becoming aware of the air raid on Thalladi camp stands proved. The appellant's position relating to the second charge is that he took the decision to remain at SLNS Gajaba without proceeding to his Area of Command on the basis that his presence at SLNS Gajaba would be more beneficial than his presence at the camp situated within his Area of Command. However, the prosecution counters this position. Prosecution contends that no member of the Navy who is acting under the command of a senior officer has the authority to deviate from the duties and responsibilities assigned to him until his superior commands to that effect. There is no dispute between the parties that at no stage during the relevant time the appellant either sought or made any attempt to seek permission of his superiors to remain at SLNS Gajaba without proceeding to his area of command, Vankalai. Hence, I am of the view

that 'no evidence rule' cannot be invoked in relation to the second charge. The issue is whether there is merit in the defence pleaded by the appellant or not.

The Judge Advocate in his summing up had drawn the attention of the Court Martial to the fact that the appellant on his own volition remained at SLNS Gajaba. Furthermore, he had placed the submissions made by both parties before the members to consider whether the appellant should be held guilty for the second charge. The members were left to decide whether the conduct of the appellant prejudices good order and naval discipline.

Section 104 of the Navy Act reads:

*"Every person subject to naval law who, by any act, conduct, disorder, or neglect which does not constitute offence for which special provision is made in any other section of this Act, prejudices good order and naval discipline, shall be guilty of a naval offence and shall be punished with dismissal with disgrace from the Navy or with any less severe punishment in the scale of punishments".*

The appellant having admitted that he did not proceed to Vankali after coming to know about the air raid on the nearby army camp, explained various steps he took by remaining at the operations room at SLNS Gajaba, in the absence of its Commander, that night. However, he admitted that he knew that his duty was to report to Vankali no sooner he came to know about the air raid and that he did not receive instructions from any senior officer to remain at SLNS Gajaba without proceeding to his area of command. It is also pertinent to note that the emergency situation that arose with the air raid approximately around 10.30 pm was fully lifted only in the early morning the following day. Judge Advocate, in his address invited the members to consider whether the appellant's failure to report to the pre- determined area of command to which he should report at a time of an emergency prejudices good order and naval discipline as submitted by the prosecution. In this context, he further invited the Court Martial to consider whether any person should be allowed to act arbitrarily. In this regard, the Judge Advocate further directed the Court Martial to consider the appellant's position that he took all possible measures to coordinate with other relevant personnel using the facilities available at SLNS Gajaba.

When all these facts are taken together, I am of the view that there was sufficient evidence before the Court Martial to consider all relevant matters and reach a decision on the second charge. Hence there is no rationale to interfere with the verdict of guilt pronounced by the Court Martial against the appellant on the second charge, on the basis of the 'no evidence rule'.

The learned President's Counsel for the appellant submitted that the second charge is '*ultra vires'*. His submission is that when an officer or a sailor commits a misconduct in battle, he is guilty of offence set out in section 54 of the Navy Act and does not become liable to be prosecuted under section 104 of the Act. It is his submission that section 104 could be invoked only relating to general conduct.

However, I observe firstly, that section 104 does not make a distinction between conduct while engaged in action and general conduct. To the contrary, section 54 deals with specific conduct in situations where there is signal of battle or on sight of a ship of an enemy. Furthermore, Section 54 (1) deals with three specific types of conduct that attracts penal consequences. They are, failure to use utmost exertions to bring his ship into action, failure to encourage his inferior officers and men to fight courageously and surrendering his ship to the enemy or withdrawing from fight. If the conduct of any flag officer, captain, commander or commanding officers falls within the ambit of any of the aforementioned circumstances, then such a person who had acted traitorously is liable to be punished with death or with any less severe punishment if such person had acted from cowardice. To the contrary, such person is liable to be punished with dismissal with or without disgrace or any less severe punishment, if had acted from negligence or through other default.

However, section 104 deals with conduct, act, disorder or neglect that does not constitute an offence under any other provision of the Act, including section 54. In the course of the submissions no attempt was made to demonstrate how the alleged conduct of the appellant in the given situation would fall within the ambit of section 54. Furthermore, that the appellant had raised no objection in relation to the second charge framed against him under section 104 of the Act but had pleaded to the charge and had taken part in the proceedings. In my view the second charge framed against the appellant is neither *ultra vires* nor illegal.

In the context of the first charge framed against the appellant, the learned President's Counsel for the Appellant drew the attention of this Court to the record of proceedings before the Court Martial with a view of demonstrating that this is a fit case to quash the verdict of the Court Martial based on 'no evidence' rule. It was his submission that evidence of several witnesses contradicted the evidence of Area Commander, on the fact that the appellant stayed outside his area of duty – place of deployment – without permission. The learned President's Counsel further submitted that the evidence of those witnesses corroborated the position taken up by the appellant in his testimony before the Court Martial.

The prosecution had led the evidence of the Area Commander, Secretary to the Area Commander, Deputy Area Commander and Commanding Officer of Vankalai. The appellant himself and four other witnesses namely Commanding Officer of SLNS Gajaba, Contingent Commander of Mannar, Commanding Officer of Naval Deployment Silavathura and Logistics Officer of SLNS Gajaba, had testified for the defence.

It is pertinent to note that the main issue to be determined in deciding the appellant's innocence or guilt in relation to the first charge is whether he stayed outside his place of deployment without permission from an authorised officer. There is no dispute that SLNS Gajaba is situated outside the place of deployment relating to the appellant and that the appellant on several occasions spent the night at SLNS Gajaba, including the day on which an air raid was launched on Thalladi army camp situated approximately 6-7 kilometers away from Vankalai. Therefore, the only issue that that had to be decided is whether the appellant had permission to stay at SLNS Gajaba, a place from where it takes about 30-45 minutes to reach Vankalai. There is also no dispute as to who should have granted such permission. It is the Area Commander under whose command the appellant was placed within the command structure and therefore it is no person other than the Area Commander could have granted such permission.

The Area Commander who testified before the Court Martial said that he did not grant permission for the appellant to stay outside his place of deployment but wanted the appellant to examine the area and inform the best location where he should stay when he reported for duty. It was his concern whether the appellant would stay at the same place where the Commanding Officer is located or whether the appellant, tactically would wish to stay at a different location.

This witness had been cross-examined extensively and it was suggested that he granted permission for the appellant to stay at SLNS Gajaba until suitable arrangements are made at Vankalai. Furthermore, it was suggested that the inadequacies in residential facilities for officers at Vankalai was discussed at official meetings and necessary instructions had been given to remedy this situation at the earliest. The witness had said that permission should have been given in writing to stay at facility situated outside the area of command. Furthermore, he said that the appellant would have attended to his initial matters within about two days of reporting to SLNS Gajaba and thereafter would inform his decision as to the best place to stay after examining the area under his command. It was his position that the appellant confirmed that the best place to stay is the place where the Commanding Officer is located – Basthipuram situated within Vankalai.

According to the appellant, he was appointed Contingent Commander of Vankalai and Nanaddan with effect from 04 September 2008. At that stage the Commanding Officer of Vankalai had been overseas and the appellant had communicated with the Commanding Officer at SLNS Gajaba to obtain necessary information to reach there. The appellant had been informed that, arrangements had been made for him to stay at SLNS Gajaba. Accordingly, the appellant had directly proceeded to SLNS Gajaba and reached there around 5.00 pm. The appellant on the following day had reported to the Area Commander who was at Thalaimannar. He had remained at VIP chalet at SLNS Gajaba till 7th of September 2008, the day on which he proceeded to Vankali situated within his area of deployment as Contingent Commander of "Vankalai and Nandaal". The appellant claims that he came to know from the Commanding Officer of Vankalai that permission had been granted for the appellant to stay at SLNS Gajaba until suitable arrangements are made to stay within the area of Vankalai and Nandaal. The Appellant further claims that he decided that the best place for him to stay is Vankali, after inspecting the area. He had accordingly informed the Area Commander and suggested that he would stay at Vankalai when the Commanding Officer is absent but would stay at SLNS Gajaba on the days that Commanding Officer is present at Vankalai. It is appellant's position that the Area Commander granted permission for him to stay at SLNS Gajaba on the days that Commanding Officer is present at Vankalai.

Deputy Area Commander who testified before the Court Martial had said that the appellant at one point told him that the Area Commander granted permission for him to stay at SLNS Gajaba on the nights Commanding Officer is availabe at Vankalai. The witness had said that he would have discussed with the Area Commander and sought permission if the appellant sought permission from him. However, as the appellant sought no permission from him the witness had not taken any steps in this regard any further or to make any inquiries from the Area Commander.

Commanding Officer of Vankalai in his testimony had said that the appellant arrived at Vankalai on the 7th of September. The appellant spent about a week at Vankalai. Therefater, on 14th September he proceeded to SLNS Gajaba after informing the witness that he received instructions from SLNS Gajaba regarding his accommodation. During the initial period the appellant had spent the night at the facility the witness was staying. However, thereafter the appellant had spent the night at SLNS Gajaba on the days the witness was present at Vankalai. This witness had further said that at a meeting held about a week prior to the arrival of the appellant, the Area Commander said that appellant would be provided with accommodation at SLNS Gajaba until suitable arrangements are made at Vankalai.

Commanding Officer of Gajaba in his testimony said that when he received the signal about appellant's arrival he obtained permission to make necessary temporary arrangements for appellant's accommodation at the initial stage as the appellant would directly arrive at SLNS Gajaba, before proceeding to his area of responsibility.

It is also pertinent to note evidence of other witnesses who testified at the Court Martial confirm that discussions took place at several meetings attended by the Area Commander on the inadequacy of residential facilities at Vankalai and the need to expedite the completion of construction work to ensure that such issues are resolved early. Furthermore, on behalf of prosecution as well as on behalf of the appellant, minutes and agenda items of said meetings had been produced as evidence before the Court Martial.

Examination of the oral evidence of the witnesses, including the evidence of the appellant, demonstrate that there had been inconsistencies on the issue whether the appellant had

permission from the Area Commander to stay the night at SLNS Gajaba - outside the area of command - on the days the Commanding Officer was present at Vankali. However, there is no inconsistency on the fact that none of the records of the meetings confirm that the Area Commander had granted permission to the appellant to stay at SLNS Gajaba. Furthermore, there is no inconsistency on the fact that at no stage the appellant obtained written permission from the Area Commander, to stay at SLNS Gajaba.

At the conclusion of the testimonies, the Judge Advocate had addressed the members and had extensively dealt with the evidence of all relevant witnesses. He had drawn the attention of the members to the inconsistencies among the evidence of witnesses, and different positions taken up by the prosecution and defence in their submissions. Furthermore, he had given instructions to the members on the standard and burden of proof placed on the prosecution. The Judge Advocate quite correctly had said that the issue whether the appellant had permission to stay at SLNS Gajaba is a question of fact that should be decided by the members. One other pertinent fact that had been placed before the members by the Judge Advocate is the absence of written permission for the appellant to stay at SLNS Gajaba and the issue whether this is a matter where such written permission is required or not.

When the totality of the oral and documentary evidence is considered in the context of the summing up of the Judge Advocate, it is clear that the members had been allowed to discharge their duty by arriving at a decision on the guilt or innocence of the appellant by forming their own view on the core issue, based on the evidence presented.

In my view, inconsistences in the oral evidence when considered together with all documentary evidence, on no reasonable hypothesis the verdict of the Court Martial could be classified as irrational, illegal, arbitrary or perverse. It is also not possible to hold that the evidence presented before the Court Martial, *is not reasonably capable of supporting the finding*. Therefore, 'no evidence rule' cannot be invoked against the verdict of the Court Martial in relation to its verdict on the first charge too. Furthermore, a court exercising writ jurisdiction has no authority to substitute the findings of facts arrived by the Court Martial with the findings of the court based on its opinion and reach a different conclusion. Therefore, I am of the view that there is no legal basis to interfere with the verdict of the Court Martial.

**Is the sentence imposed on the petitioner violative of Section 104 of the Navy Act?**

Section 104 of the Act prescribes 'dismissal with disgrace from the Navy or with any less severe punishment in the scale of punishment' as the sentence to be imposed for an offence under said section. Section 120 of the Act sets out the scale of punishments, in the descending order. While the highest punishment as per the said scale is death, dismissal with disgrace from the Navy and dismissal without disgrace remains the third and sixth in the scale of thirteen different types of punishment. For an offence under section 104, dismissal with disgrace remain the highest punishment and dismissal without disgrace remains the fourth highest punishment.

The main contention of the learned President's Counsel for the appellant regarding the sentence is that the sentence of dismissal without disgrace imposed on count 2 fails to pass the 'proportionality test'.

The alleged misconduct of the appellant and surrounding circumstances relating to the second count had already been discussed when considering the legality of the verdict of the Court Martial. Therefore, repetition of such facts is unwarranted and unnecessary at this stage. The Judge Advocate in his directions had explained the nature of the allegation and the respective positions taken up by the appellant and the prosecution. It is also pertinent to observe that the appellant was provided an opportunity to plead in mitigation and the prosecution had presented the appellant's personal file to the Court Martial for consideration. Court martial having considered all such material including the letter of displeasure issued by the Navy Commander at a prior occasion had imposed severe reprimand and dismissal without disgrace as sentence for count 1 and 2, respectively.

Learned Deputy Solicitor General defending the aforesaid sentence imposed by the Court Martial on both counts, submitted that the appellant as a senior officer of the Navy failed to provide leadership to subordinates who were under his command at a time his presence at his area of command remained his core duty. Appellant's failure to be present in his area of command without permission from his superior is a serious breach that caused prejudice to good order and naval discipline. In contrast, the learned President's Counsel for the appellant contended that the sentence of 'dismissal without disgrace' is disproportionate in view of the appellant's good record in the Navy and steps he took while remaining at SLNS Gajaba at the time of emergency.

Court Martial in imposing the sentence on count two was possessed with all this material and has imposed the fourth severe punishment that is prescribed by law. Discipline is a major factor that needs to be preserved and respected in armed forces to ensure that all members would contribute to maintain an effective and efficient defense mechanism. The sentence imposed by the Court Martial on second count is neither disproportionately drastic nor it is altogether excessive and out of proportion to the occasion. Therefore, in my view there is no basis to interfere with the sentence imposed by the Court Martial.

The Court of Appeal despite erred by holding, that the appeal against the sentence passed by the Court Martial under section 122 of the Navy Act, to the President is an alternative remedy which ousted the writ jurisdiction of Court, proceeded to examine rest of the issues and had refused to grant relief to the appellant on merits of the application.

In view of my findings on issues that are discussed hereinbefore, there is no legal basis to grant writs of certiorari and mandamus as pleaded by the appellant. Therefore, the appeal of the appellant against the judgement of the Court of Appeal fails. In view of these findings, examining the remaining issue - whether this Court could grant the petitioner any relief in view of Section 122 of the Navy Act read with Section 10 of the Navy Act as the Petitioner's decommissioning has been approved by His Excellency the President? - is of an academic exercise only.  Therefore, I will refrain from examining the said question.

The appeal of the appellant is dismissed. In the circumstances of this case, I refrain from making any order on costs.

Chief Justice

L.T.B. Dehideniya. J.

I agree.

Judge of the Supreme Court

**Yasantha Kodagoda, PC, J**

This judgment relates to an Appeal submitted to this Court against a Judgment of the Court of Appeal dated 30th July 2015.

On 16th January 2017, following a consideration of a Petition of Appeal to this Court dated 9th September 2015 against the afore-stated judgment of the Court of Appeal and submissions made by learned Counsel for the Petitioner and the Respondents, this Court granted *Special Leave to Appeal* in respect of the following questions of law:

(i) Did the Court of Appeal err in holding that the Appeal against the sentences passed by the Court Marshal under section 122 of the Navy Act to His Excellency the President, is an 'alternative remedy' which ousted the writ jurisdiction of Court in respect of the subject matter of the Petitioner's Application before the said Court?

(ii) Did the Court of Appeal err in holding that there was no need for the Court Marshal to have given reasons for its verdict on the sole basis that the Code of Criminal Procedure Act does not require a jury to give reasons for its verdict, nor does the Navy Act require a Court Marshal to give reasons for its findings?

(iii) Did the Court of Appeal err in its failure to consider whether the Judge Advocate's summing up did not justify the determination of the Court Marshal?

(iv) Are the sentences imposed on the Petitioner violative of section 104 of the Navy Act?

(v) Can this Court grant the Petitioner any relief in view of section 122 of the Navy Act read with section 10 of the Navy Act, as the Petitioner's decommissioning has been approved by His Excellency the President?

[The fifth question of law was raised by learned counsel for the Respondents. The term 'Petitioner' referred to above, is a reference to the 'Appellant' in the present Appeal.]

On 24th July 2020 at the commencement of the argument of this Appeal, learned President's Counsel for the Appellant with the leave of this Court, raised two further grounds of Appeal, which may be couched in the following terms:

(vi) Is the verdict of the Court Martial bad in law, in that, there was no evidence placed before the Court Martial which could be used to substantiate the verdict of *'guilty'*?

(vii) Are the sentences imposed by the Court Martial bad in law, in that the said sentences are not in conformity with the principle of proportionality?

Learned Senior State Counsel did not raise serious objection to this Court entertaining and considering those two additional questions of law. In any event, it is trite law that once the Supreme Court grants *'special leave to appeal',* it thereafter gains inherent jurisdiction to consider any further pertinent questions of law arising out of the judgment appealed against.

**Background**

The incident which led to the pronouncement of the impugned finding (verdict) of the Court Martial proceedings referred to in the judgment of the Court of Appeal, occurred in the backdrop of the pendency of terrorism perpetrated by a terrorist organization called the "Liberation Tigers of Tamil Eelam" (LTTE) and an armed conflict between the LTTE and the Armed Forces of Sri Lanka. The LTTE entertained the goal of establishing a separate sovereign State primarily in the Northern and Eastern Provinces of Sri Lanka to be named "Tamil Eelam". The conduct of the LTTE which was unconstitutional, was associated with the unleashing of terrorist acts, posed a serious threat to national security, caused an interruption of the territorial integrity of the country, prevented the State from exercising its writ of governance in certain parts of the country, and disrupted the exercise of sovereignty by the citizens of the Republic. In response, the Armed Forces of Sri Lanka conducted a series of military operations aimed at suppressing and terminating terrorism. At the time of the incident under reference, *"Humanitarian Operation"* - the last of a series of military operations was afoot. It ended in May 2009 with the successful termination of LTTE terrorism and its organized presence in Sri Lanka.

As part of its terrorist operations, with the aid of small rudimentary aircrafts, from time to time, the LTTE launched several aerial attacks on different parts of the country, which included Colombo. One such attack launched by the LTTE, took place on the night of 28th October 2008. That was the day on which the Appellant's conduct which became the subject matter of a trial before a Court Marshal established in terms of the Navy Act took place. It is the finding (verdict) of that Court Martial and the orders of sentence which were impugned before the Court of Appeal.

**The Appellant**

Having joined the Sri Lanka Navy on 28th February 1986 as a trainee Cadet, following continuous service to the nation and having incrementally obtained a series of promotions to higher ranks, on 1st January 2008 the Appellant had been elevated to the rank of Captain. In addition to routine training, the Appellant has obtained a Masters' Degree in Defence Studies Management. During 23 years of service, the Appellant has undergone specialized education and training in several areas. He held several important appointments which included positions which required him to command Sri Lanka Navy vessels, such as long patrol boats, fast attack crafts, a surveillance and logistics vessel, Submarine Chaser *"SLN Parakramabahu"*, and the largest standing craft of the Navy at the time, *"SLN Shakthi"*. He also served as Commanding Officer of several Navy camps and detachments. The Appellant has placed before the Court of Appeal material which reflect that he had contributed in a significant manner towards multiple naval operations against the LTTE, and towards research and development. In recognition of his services to the Sri Lanka Navy and to the motherland, the Appellant has been decorated by the award of several gallantry medals including the *"Rana Soora Padakkama"* (first awarded in 2001 and re-awarded twice in 2002), *"Purna Bhumi Padakkama"*, the *"Riviresa Campaign Service Medal"*, and had received multiple commendations. It is noteworthy that in his summing up, the Judge Advocate has observed that the Appellant had served the Navy, 'exceptionally'.

**The incident**

With the progression of the *"Humanitarian Operation"*, the Army had captured certain territorial areas from the control of the LTTE. During the period immediately preceding

September 2008, the Army had handed over two such areas, namely Vankalai and Nanaddan (situated in the District of Mannar) to the Navy. As at the time of the incident in issue, the Navy was in the process of establishing its presence in Vankalai and Nanaddan, and constructing logistics associated with the setting up of Navy camps in those areas. As Vankalai and Nanaddan were newly established camps, they had not been commissioned, and for administrative and logistics purposes, attached to *SLNS Gajaba*, which was at that time, the main Navy camp in Mannar.

On 24th July 2008, at a time when the Appellant was serving as the Commanding Officer of the Navy camp *SLNS Rangala* situated within the Colombo Port, the Appellant received a transfer order from the Commander of the Sri Lanka Navy, Vice Admiral W.K.J. Karannagoda – the 1st Respondent. He was required with effect from 4th September 2009, to assume duties as the *"Contingent Commander – Vankalai and Nanaddan"*. This appointment came within the overall administrative command of the North Central Naval Area (which is a territorial administrative area demarcated by the Navy), commanded by the Area Commander of the North Central Naval Area, who was at that time, Rear Admiral Tikiri Bandara Illangakoon.

On 4th September 2008, the Appellant proceeded to Mannar and arrived at *SLNS Gajaba* to assume duties as the Contingent Commander of Vankalai and Nanaddan. He proceeded to Vankalai on the 7th, and stayed there for two weeks. On 5th September, the day after his arrival at *SLNS Gajaba*, when the Appellant met with the Area Commander, the latter had instructed the Appellant to identify a suitable location in Vankalai where the Contingent Headquarters for Vankalai could be established. Accommodation for the Contingent Commander was to be constructed within the Vankalai Navy camp. The Appellant's position is that the temporary arrangement for him to stay during night-time at *SLNS Gajaba* was put in place with the knowledge, concurrence, verbal approval and acquiescence of the Area Commander Rear Admiral Illangakoon. This position has been refuted by Rear Admiral Illangakoon.

Following the initial 14 days at Vankalai, the Appellant started staying overnight at the 'VIP Chalet' in *SLNS Gajaba,* while during day-time, performing his duties in Vankalai and Nanaddan.

The position of the Respondents is that the Appellant had not received any authorization from the Area Commander, to, even as an interim arrangement, stay at *SLNS Gajaba* during night-time. Thus, the Respondents claim that by staying overnight at *SLNS Gajaba,* the Appellant had acted contrary to Naval law and thereby committed an offence.

On 28th October 2008, at approximately 10.20 pm, the LTTE launched an aerial attack on the Thalladi Army camp, by dropping two bombs. (Thalladi is also situated in the District of Mannar, North of the town of Mannar, adjacent the A14 road. This had been the main Army camp in Mannar.) The Vankalai Navy detachment was located approximately 7 km from the Thalladi Army camp. In preparedness to respond to possible further attacks by the LTTE, Navy personnel at the Talaimannar, Gajaba and Vankalai camps had assumed 'action station' positions.

When this attack took place, the Appellant had been at the VIP Chalet of *SLNS Gajaba*, in his temporary accommodation. The Commanding Officer of the Vankalai Navy detachment was at Vankalai. When the 'action stations' siren was sounded, the Appellant rushed out of the VIP Chalet. Outside, he met Supplies Officer Lt. Commander T.N.S. Perera, who was the Acting Commanding Officer of *SLNS Gajaba* on that day. He informed the Appellant of the attack. Thereafter, the Appellant telephoned the Commanding Officer Vankalai Lt. Commander Rohana Dissanayake and inquired about the situation at Vankalai. The Appellant ascertained what action he had taken up to that point of time, and had informed him that he was about to leave *SLNS Gajaba* to arrive at Vankalai. Lt. Commander Dissanayake had informed the Appellant that he had taken all necessary steps, sequel to his having heard of the dropping of two bombs. He had added that there was no necessity for the Appellant to come to Vankalai. In the meantime, the Appellant rushed to the Operations Room at *SLNS Gajaba.* Thereafter, the Appellant had on his own initiative, taken control of the Operations Room of *SLNS Gajaba* and taken several steps in response to the LTTE attack and to counter any further attacks. His justification for taking over command at the Operations Room of *SLNS Gajaba* is that Lt. Commander T.N.S. Perera being a 'logistics officer' of the Navy, was inexperienced in handling combat related emergency matters. Thus, it was necessary to step into his shoes and take command of *SLNS Gajaba*.

The difference of positions between the Appellant and the Area Commander Rear Admiral Illangakoon as to whether or not the latter gave permission to the Appellant to temporarily reside at *SLNS Gajaba* was the main issue which was at the very epicentre of the trial conducted against the Appellant before the Court Martial. Further, the Respondents claim that notwithstanding all the measures which the Appellant claims to have taken from the Operations Room of *SLNS Gajaba*, it remains clear that at the time of the LTTE attack, the Appellant who was the *Contingent Commander - Vankalai and Nanaddan* was not within the 'area of duty' assigned to him (referred to as the 'Tactical Area of Responsibility' - TAOR) namely, Vankalai and Nanaddan, and that during the attack and its immediate aftermath, he did not rush to his TAOR. The position of the Respondents is that, independent of the situation that prevailed at *SLNS Gajaba* at the time of the attack, the Appellant was duty bound to rush to his TAOR and perform his duties. The Respondents assert that, in the circumstances, the Appellant has acted contrary to Naval law and discipline, and thus committed an offence.

**Action against the Appellant**

On 17th November 2008, the Appellant was served with a letter calling upon him to provide explanation for *"living at SLNS Gajaba which is outside the area of responsibility"* ("P7a"). On 18th November 2008, the Appellant responded and provided explanation ("P7b"). Subsequently, a Board of Inquiry comprising of the 6th to 8th Respondents had been constituted by the 1st Respondent to conduct a preliminary investigation into the allegation that the Appellant had 'vacated the tactical area of responsibility without permission'. Consequently, the Board of Inquiry interviewed the Appellant and several other officers. Afterwards, the Board of Inquiry submitted a Report ("R3") to the 1st Respondent together with findings that the Appellant had 'stayed away from his TAOR without prior approval, denying operational leadership to men under his command'. However, the Board noted that the Appellant remaining outside the TAOR had been with the complete knowledge, concurrence, verbal approval and acquiescence of the Area Commander, a fact which such Commander himself had denied. The Board recommended that suitable disciplinary action be taken against the Appellant.

Thereafter, a 'Charge Sheet' containing the afore-stated allegation was served on the Appellant. Commencing on 12th January 2009, the 5th Respondent recorded a 'Summary of Evidence'. Following the recording of the 'Summary of Evidence', the 5th Respondent presented a report to the 1st Respondent, containing a finding that there was sufficient *prima facie* evidence to substantiate the charges against the Appellant, and recommending that the Appellant be tried before a Court Martial.

In the Court of Appeal, the Appellant sought to impugn the lawfulness of the proceedings of the aforesaid Board of Inquiry and its report, as well as the report which was prepared following the recording of the Summary of Evidence. However, he did not seek to challenge the lawfulness of those proceedings and corresponding findings contained in the said Report in the Supreme Court.

**Institution of Court Martial proceedings against the Appellant**

According to the Respondents, following a consideration of the Report of the 6th to 8th Respondents and the Report of the 5th Respondent, the 1st Respondent had decided to convene a Court Martial to try the Appellant. Accordingly, on 4th March 2009, a 'charge sheet' signed by the 1st Respondent had been served on the Appellant. The 1st Respondent also constituted a Court Martial comprising of the 2nd Respondent - Rear Admiral M.R.U. Siriwardena (Chairman), 3rd Respondent - Commodore M. Prematileka, and 4th Respondent - Commodore M.A.J. De Costa as members of the Court Martial. Rear Admiral S. Palitha Fernando, PC was appointed by the 1st Respondent to function as the Judge Advocate of the Court Martial.

**Charges against the Appellant**

During the course of the Court Martial proceedings, the original 'Charge Sheet' issued under the hand of the 1st Respondent was amended with regard to the first charge. Learned President's Counsel for the Appellant made no complaint regarding that amendment introduced to the 'Charge Sheet'. The charges (as amended) levelled against the Appellant were as follows:

*(i)* *That during the days and time period specified in the charge (which included the day on which the LTTE aerial attack took place), excluding certain days on which the Appellant was on leave and including certain days the Commanding Officer of Vankalai was on leave or was otherwise not at the Vankalai detachment,* ***<u>without</u>***

***having obtained the formal approval from a competent authority*, during night time, left or remained out of the place of duty (tactical area of responsibility), namely the Naval detachment at Vankalai and Nanaddan**, *and thereby committed an offence in terms of section 60(2) of the Navy Act.*

*(ii)* *That during the afore-stated time period, being an officer coming within the North Central Naval Area and appointed to function as the Contingent Commander for Vankalai and Nanaddan, on 28th October 2008, during night-time when the Thalladi Army Camp came under a terrorist aerial attack, and* ***having got to know that the enemy aerial attack plan had been activated for the Vankalai and Nanaddan naval areas to counter the said aerial attacks, did not proceed to the tactical area of responsibility and give leadership to men under his command****, and thereby acted in violation of naval discipline and good order, and thus committed an offence in terms of section 104(1) of the Navy Act.* [Emphasis added]

[An examination of the evidence presented before the Court Martial reveals that the main contentious issues between the prosecution and the defence, have been the portions underlined by me in the two counts.]

It is not in dispute that both the institution of Court Martial proceedings and the framing of charges against the Appellant were founded upon the exercise of authority by the 1st Respondent, and per-se not unlawful.

**Trial before the Court Martial**

Commencing on 2nd May 2009, a trial before the Court Martial constituted for the specific purpose was held. Area Commander, North Central Naval Area - Rear Admiral Tikiri Bandara Illangakoon, Secretary to the Area Commander Lt. Commander - K.W.B.M.P. Wijesundera, Deputy Area Commander Commodore - V.E.C. Jayakody, and the Commanding Officer Vankalai - Lt. Commander Rohana Dissanayake testified for the prosecution. The Appellant himself, Commanding Officer of *SLNS Gajaba* - Lt. Commander Ranaweera, Contingent Commander Mannar - Commander Baanagoda, Second in Command of the Silawatura Navy

camp - Lt. Commander Deegala, and Supplies Officer *SLNS Gajaba* - Lt. Commander T.N.S. Perera testified on behalf of the defence.

**Consideration of the testimonies given by witnesses before the Court Martial and the respective positions of counsel with regard to the evidence**

At this point, it would be necessary to refer to the evidence led by the prosecution and the defence before the Court Martial and to the submissions made in that regard by learned Counsel for the Appellant and the Respondents.

Indeed, as has been pointed out by Justice Sisira De Abrew in ***Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene and Others*** *[2007] 1 Sri L.R. 24,* the scope of judicial review in an application for a writ of certiorari in respect of a conviction or sentence pronounced by a Court Martial, is different to and narrower than the scope of judicial scrutiny in a conventional appeal from a conviction and sentence pronounced by a Court of law which has exercised criminal jurisdiction and conducted a trial into the alleged commission of an offence by an accused. Notwithstanding a Court Martial exercising **a hybrid of disciplinary and criminal jurisdiction**, judicial review in a writ application in respect of the findings of a Court Martial, is exercised for the **limited purpose of determining the legality** (lawfulness) of the impugned decisions of the Court Martial as opposed to the merits of the decisions. However, as I intend to point out at a subsequent point in this judgment, a consideration of the evidence led before the Court Martial would be necessary, particularly for the purpose of determining the legality of the findings of the Court Martial. Thus, the following consideration of the evidence.

**1st count –**

Learned President's Counsel for the Appellant submitted that, to prove the first charge, the prosecution relied purely on the testimony of the Area Commander - Rear Admiral Illangakoon, that he had not given permission to the Appellant to stay at *SLNS Gajaba* located outside the Appellant's TAOR, permission which he was entitled to give either in writing or orally. He submitted that Rear Admiral Illangakoon's oral evidence was to the effect that he did not give the Appellant permission to stay at *SLNS Gajaba*. However, this position was contradicted by other witnesses including another witness summoned by the prosecution itself to give evidence.

The position of the Appellant was that the Area Commander had given him permission to stay at *SLNS Gajaba* until a suitable accommodation facility was constructed at the Vankalai camp. Learned President's Counsel quoted the evidence of Commanding Officer Vankalai - Lt. Commander Dissanayake. His position had been that prior to the arrival of the Appellant in Mannar, at a meeting of Heads of departments held on 28th August, he had brought to the attention of Rear Admiral Illangakoon that there was no suitable accommodation facility at Vankalai for an officer of the rank of the Appellant. In response, Rear Admiral Illangakoon had instructed the Commanding Officer *SLNS Gajaba* to provide temporary accommodation for the Appellant at *SLNS Gajaba*. That was to be an interim measure, until a suitable accommodation facility was arranged in Vankalai. When the Appellant arrived in Mannar, Lt. Commander Dissanayake had informed the Appellant of this temporary arrangement. Learned President's Counsel submitted that Commanding Officer *SLNS Gajaba* - Lt. Commander Ranaweera had in his testimony corroborated this position. Lt. Commander Ranaweera testified that he had received instructions from the Area Commander to permit the Appellant to stay at *SLNS Gajaba* and had informed the Appellant of that arrangement. It was submitted that when this position was put to Rear Admiral Illangakoon, he had indicated that the Commanding Officer *SLNS Gajaba* "*may have*" sought his permission. At the next meeting of the Heads of departments held on 20th October 2008, the same issue had been brought to the attention of the Area Commander and he had issued further instructions to expedite the process of constructing new contingent headquarters and an accommodation facility at the Vankalai camp. Deputy Area Commander Jayakodi's evidence had been that he himself was aware that the Appellant was staying at *SLNS Gajaba* and that he believed that this fact was within the knowledge of the Area Commander.

The evidence of the Appellant was that, following his having reported for duty in Mannar, he received instructions from the Area Commander himself to identify a suitable location within Vankalai to establish his Contingent Headquarters and quarters. He had received permission (verbally) from the Area Commander to stay at *SLNS Gajaba*, until proper accommodation arrangements were constructed at Vankalai. Accordingly, he stayed overnight at the 'VIP chalet' at *SLNS Gajaba.* One day, the Area Commander arrived at *SLNS Gajaba* and he too stayed at the same chalet, along with him. At a Heads of departments meeting held on 24th September 2008

chaired by the Area Commander, particularly as it was dangerous for the Appellant to travel between *SLNS Gajaba* and Vankalai, he had raised this issue regarding the construction of his Contingent Headquarters and accommodation facility in Vankalai, and certain decisions had been taken by the Area Commander with the view to expediting the process.

In response, learned Senior State Counsel submitted that the Area Commander - Rear Admiral Illangakoon had given clear and specific evidence that the Appellant did not ask for permission and that he had not given permission to the Appellant to remain outside his TAOR. The Area Commander had not been aware that the Appellant had been staying at *SLNS Gajaba* during nighttime. Learned Senior State Counsel relied heavily on the admission made by the Appellant during cross-examination, that his TAOR was Vankalai and Nanaddan, and that he stayed at *SLNS Gajaba* which was outside his TAOR. He had also admitted that he was aware that according to his job functions, he was required to stay within his TAOR. Further, the Appellant had admitted that he did not get 'written permission' from the Area Commander to stay outside his TAOR, at *SLNS Gajaba*.

**2nd count –**

Learned President's Counsel for the Appellant submitted that on the night of the 28th October 2008, when the 'action station' siren was raised at *SLNS Gajaba*, the Appellant who was at the 'VIP chalet', had rushed out. He had been informed by Lt. Commander T.N.S. Perera (who was acting for the Commanding Officer of *SLNS Gajaba* as the Commanding Officer was on leave), of the LTTE aerial attack. The Appellant had initially decided to rush to Vankalai on his motor cycle. He instructed his personal security officer to get ready to proceed with him to Vankalai. Before leaving to Vankalai, he rushed to the 'operations room' of *SLNS Gajaba.* He contacted Commanding Officer Vankalai - Lt. Commander Dissanayake, who had informed the Appellant that he had taken all necessary measures to secure the Vankalai camp and that there was no necessity for the Appellant to come there. Given the size of the Vankalai Navy camp, the Appellant thought that the chances of the LTTE dropping a bomb at the Vankalai camp was quite remote. On the other hand, that night, both the Commanding Officer and the Executive Officer of *SLNS Gajaba* (the first and the second officers in-charge of the camp) had been on leave. The next senior most officer of *SLNS Gajaba* - Lt. Commander T.N.S. Perera was a 'logistics officer'

who had minimal combat experience. In the circumstances, the Appellant had decided that he should remain at *SLNS Gajaba*, take necessary decisions and provide leadership to its personnel. Learned President's Counsel submitted that the conduct of the Appellant on that occasion was a 'tacit two-way arrangement' based on exigencies of the situation.

Learned President's Counsel emphasized that the Appellant had satisfied himself that under the leadership of Lt. Commander Rohana Dissanayake, the Vankalai camp was in safe hands. Further, he had himself taken all necessary measures to ensure the safety of that camp. Lt. Commander Dissanayake had also explained to the Appellant that it was not necessary for him to rush to Vankalai. In those circumstances, the Appellant had decided that his presence in Vankalai was not essential. He was conscious of the fact that having dropped two bombs on the Thalladi Army camp, on its return journey, the LTTE aircrafts were unlikely to drop another bomb in the same general area of Mannar. Particularly as the Appellant was the third senior most officer in the entire North Central Naval Area, and as he had considerable combat experience, he thought that his primary duty was to provide leadership to *SLNS Gajaba* and defend that naval base. Counsel submitted that it would have been irresponsible on the part of the Appellant had he left *SLNS Gajaba* keeping it in the hands of Lt. Commander T.N.S. Perera who did not have necessary military leadership skills and combat experience. Having assumed de-facto command of *SLNS Gajaba*, the Appellant had taken all necessary measures that were required. In his testimony, the Appellant has explained in detail, the nature of the action he took from the operations room of *SLNS Gajaba.* He had contacted the Air Force base in Mannar and spoken with the Commanding Officer of the Thalladi Army camp. He had also alerted the officer in-charge of the Rangala naval base and informed him of the approaching LTTE aircrafts. Throughout that night, the Appellant had contacted the Commanding Officer of the Vankalai Navy camp - Lt. Commander Dissanayake, ascertained the situation at that end, and given necessary instructions to him.

Learned President's Counsel also submitted that witnesses for the prosecution had not given evidence regarding an essential ingredient of the second charge, namely, that the conduct of the Appellant on the night of the 28th of October 2008 was 'prejudicial to good order and naval

discipline'. Thus, he submitted that, on that ground alone, the 2nd count on the charge sheet should have failed.

With regard to the 2nd count, the submission of the learned Senior State Counsel was that the Appellant had admitted that it would have been possible for him to travel to the Vankalai Navy camp within 10 to 15 minutes, and that he had originally got ready to go there. He had subsequently changed his mind. The Appellant had admitted that it was his duty to have gone to the Vankalai camp. He had also admitted that, on the night of the 28th of October 2008, he had not obtained permission from a senior officer to remain at *SLNS Gajaba* and function in-charge of its operations room. He had remained at *SLNS Gajaba* based on his own discretion. Learned Senior State Counsel submitted that the Appellant did not have a valid excuse for staying back at *SLNS Gajaba* and for not having rushed to his TAOR. He submitted that returning a verdict of *'guilty'* in respect of the 2nd count was not only reasonable, it was the only finding the Court Martial could have arrived at.

**Summing up of the Judge-Advocate**

At the conclusion of the trial, the Judge Advocate summed up the evidence presented by the prosecution and the defence, and addressed the Court Martial on the applicable law. During the hearing of the Writ Application in the Court of Appeal and during the hearing of this Appeal, learned President's Counsel for the Appellant did not impugn the summing up. In fact, learned counsel asserted that the summing up contained several components which were supportive of the Appellant's contention that he was not guilty of committing the two offences contained in the charge sheet. Due to its comprehensive and balanced nature, learned President's Counsel for the Appellant appreciated the summing up. His submissions in that regard were only short of rating the summing up as a truly impartial, comprehensive and a model address.

The Judge Advocate has drawn the attention of the Court Martial to the following salient aspects of the case:

(i) Commanding Officer Vankalai - Lt. Commander Dissanayake who was called to testify for the prosecution had contradicted the testimony of the Area Commander

Rear Admiral Illangakoon, and corroborated the position of the accused. Nevertheless, he had not been treated as an 'adverse witness' by the prosecution.

(ii) Commanding Officer *SLNS Gajaba* - Lt. Commander Ranaweera who was called to testify for the defence, in his evidence had also contradicted the evidence of the Area Commander and corroborated the position of the accused. Consideration should be given by the Court Martial as to whether a junior officer would contradict the testimony of a senior officer such as that of the Area Commander, unless the latter's evidence was untrue.

(iii) Defence witnesses corroborated the evidence given by the accused.

(iv) The accused should be convicted only if the Court Martial was satisfied that the entirety of the defence evidence should be rejected in its totality.

(v) Should the Court Martial entertain any doubt regarding the testimony of the Area Commander, the benefit of such doubt should be given to the accused and he should be 'acquitted'.

The Judge Advocate has also addressed the Court Martial on the fact that the prosecution does not dispute that on the night of the LTTE attack, while the Appellant was at *SLNS Gajaba,* he had taken all necessary steps and given suitable instructions. What was in issue was whether in the circumstances that prevailed on the night of the 28th October 2008, the accused not having proceeded to his TAOR amounted to a violation of 'good order and naval discipline'.

**Finding (verdict) of the Court Martial and sentencing orders**

It is not in dispute that on 13th May 2009, following the conclusion of the proceedings of the Court Martial, it found the Appellant *"guilty"* of committing both offences in the amended charge sheet (vide "P17a"). It is evident from the proceedings of the Court Martial that prior to the determination of the sentences, the Court Martial had afforded an opportunity to the Appellant to make representations on his behalf in mitigation of the sentences. Learned Counsel who represented the Appellant before the Court Martial had made use of that opportunity and addressed the Court Martial regarding the unblemished record of the Appellant and his having been decorated for his yeoman service to the nation. Following a consideration of that plea in

mitigation of the sentences, the Appellant was sentenced by the Court Martial (vide "P17b") in the following manner:

1st Charge – Severe Reprimand

2nd Charge – Dismissal without disgrace from the Navy.

The record of the proceedings also reflects that prior to the conclusion of proceedings of the Court Martial, the learned counsel for the Appellant had notified the tribunal that the Appellant intends to present an Appeal to His Excellency the President in terms of section 122 of the Navy Act. That was for the purpose of seeking a revision of the sentences.

**Appeal to the President in terms of section 122 of the Navy Act**

On 14th May 2009, acting in terms of section 122 of the Navy Act, the Appellant presented an Appeal to His Excellency the President, seeking a revision of the sentences imposed on him. A copy of that Appeal was produced to the Court of Appeal, marked "P18". In the circumstances, the operation of the sentences was stayed. Nevertheless, the Appellant was directed not to report for work, pending a decision by the President. By his letter dated 28th May 2009, the 1st Respondent forwarded the Appeal to His Excellency the President through the Secretary to the Ministry of Defence. Following a consideration of the Appeal, His Excellency the President turned down the request of the Appellant for a revision of the sentences. By letter dated 14th July 2009, the Secretary to the Ministry of Defence conveyed the decision of the President to the 1st Respondent. In the circumstances, the punishment imposed by the Court Martial was operationalized and executed. Accordingly, with effect from 16th August 2009, the Appellant was discharged from the Navy.

**Application filed by the Appellant in the Court of Appeal seeking the issuance of a Writ of Certiorari**

By Application dated 25th June 2009, the Appellant petitioned the Court of Appeal impugning the afore-stated finding (verdict) and orders of sentence of the Court Martial. He sought the following reliefs:

(a) A mandate in the nature of a Writ of Certiorari quashing the **findings** of the Court Martial dated 13th May 2009.

(b) A mandate in the nature of a Writ of Certiorari quashing the **sentences** imposed by the Court Martial dated 13th May 2009.

**Primary positions of the Appellant and the Respondents before the Court of Appeal**

The Appellant's position was that since the prosecution had failed to prove the two charges against him beyond reasonable doubt, the Court Martial should have returned a verdict of *'not guilty'* and acquitted him. The Appellant also asserted that the findings (verdict and sentences) of the Court Martial did not contain reasons therefor. In the circumstances, it was argued before the Court of Appeal that the findings of the Court Martial were illegal, *ultra vires*, arbitrary, capricious, and unreasonable.

The Respondents' position was that the proceedings of the Court Martial were lawful and fair, and following a proper consideration of the evidence, the Court Martial had rightly arrived at a finding that the Appellant was *'guilty'* of both charges. Thus, their position was that both the conviction and the sentences imposed on the Appellant were lawful and appropriate. The Respondents asserted that a Court Martial is not obliged by law to give reasons for its findings.

**Judgment of the Court of Appeal**

Following the hearing of the Application, by judgment dated 30th July 2015, the Court of Appeal dismissed the Application of the Appellant.

The judgment of the Court of Appeal contains *inter-alia* the following findings:

(i) On the day of the LTTE aerial attack, the Petitioner (which is a reference to the Appellant before the Supreme Court) had remained at *SLNS Gajaba* without proceeding to Vankalai.

(ii) The Code of Criminal Procedure Act does not require a jury to give reasons for its verdict. Similarly, the Navy Act does not require a Court Martial to give reasons for its findings. In *G.S.C. Fonseka vs. Lt. General J. Jayasuriya and five others*, it has been held that a Court Martial need not give reasons for its finding (verdict).

(iii) By presenting an Appeal to the President in terms of section 122 of the Navy Act, the Petitioner has sought an 'alternative remedy'. Where there is an alternative remedy, a writ of certiorari will not lie.

(iv) The Petitioner's application under section 122 was refused by His Excellency the President. Under section 10 of the Navy Act, the Petitioner holds office at the pleasure of the President. The Petitioner's dismissal had been approved by the President.

In view of the afore-stated findings, the Court of Appeal dismissed the Application. The Appeal to the Supreme Court is against the afore-stated judgment of the Court of Appeal.

**Consideration of the questions of law, findings and conclusions**

**(i) Does the 'appeal' which was submitted by the Appellant to the President amount to an 'alternative remedy' which ousts the jurisdiction of the Court of Appeal?**

The issue to be determined is whether the Application (what has been referred to as an 'Appeal') presented by the Appellant in terms of section 122 of the Navy Act to His Excellency the President amounts to an 'alternative remedy' which 'ousts the jurisdiction of the Court of Appeal' in considering and awarding relief as prayed for by the Petitioner (Appellant) in respect of the Application filed by him seeking writs of certiorari quashing certain decisions including the verdict pronounced, and the sentences imposed by the Court Martial.

"P18" is a copy of the Application dated 14th May 2009, titled "An **Application for revision of sentence** in terms of section 122 of the Navy Act", presented by the Appellant to His Excellency the President through the Commander of the Sri Lanka Navy. This Application contains *inter-alia* a narration of the factual sequence which culminated in the pronouncement of the impugned finding (verdict) and the sentences imposed on the Appellant by the Court Martial. Further, it contains the following prayer:

> *"Being aggrieved by the aforesaid sentence passed on me, I humbly request Your Excellency to* ***revise the sentence*** *imposed on me by the President and the members of the*

> *Court Martial considering the mitigatory circumstances stated above and the following:"*
> [Emphasis added]

In addition to the reiteration of the grounds for mitigation of the sentences advanced before the Court Martial by counsel for the Appellant, four more mitigatory grounds have also been cited by the Appellant. The Appellant has concluded his Application to the President, with the following sentence:

> *"I humbly request Your Excellency as the Commander in Chief of the Armed Forces to consider all this (sic) aforesaid circumstances and* ***revise the sentences*** *imposed on me which will enable me to serve the Sri Lanka Navy and my motherland further."*
> [Emphasis added]

By letter dated 28th May 2009, the 1st Respondent had, through the Secretary to the Ministry of Defence, forwarded this 'Appeal' to His Excellency the President. When forwarding the 'Appeal', the 1st Respondent had attached his observations and the proceedings of the Court Martial. Following a consideration of the Application and the views of the 1st Respondent, His Excellency the President had decided to 'ratify the recommendation made by the Commander of the Navy'. Though inconsequential, it is necessary to note that the 1st Respondent had not made any 'recommendation'. He had expressed the view that the conduct of the Appellant was inexcusable. Be that as it may, in effect, the President had decided not to grant any relief to the Appellant. The decision of the President was conveyed to the 1st Respondent by Additional Secretary to the Ministry of Defence by his letter dated 14th July 2009. Accordingly, the Appellant was informed of the outcome of his Application. In view of the decision of the President, the 1st Respondent had given effect to the sentences imposed on the Appellant, and accordingly, with effect from 16th August 2009, the Appellant had been discharged from the Sri Lanka Navy. The formal announcement that the Appellant has been discharged from the Sri Lanka Navy had been produced before the Court of Appeal. ("R7")

The view expressed by the Court of Appeal (in the impugned judgment), is as follows:

> *"Petitioner has sought an alternative remedy under section 122 of the Navy Act; he has made an appeal to the President. Where there is an alternative remedy a writ of certiorari will not lie".*

**Submissions of Counsel**

**President's Counsel for the Appellant -** Learned President's Counsel critiqued the Court of Appeal's view regarding this matter. He submitted that a verdict and sentence of a naval Court Martial are specifically made amenable to the writ jurisdiction of the Court of Appeal. He cited section 132 of the Navy Act in support of this contention. Learned counsel also submitted that, the principle that when there is an alternate remedy the writ will not lie is not an inflexible rule. Citing Chief Justice Neville Samarakoon's views in *Kanagaratna v. Rajasunderam [(1981) 1 Sri L.R. 492]*, learned President's Counsel submitted that the availability of an alternative remedy does not prevent a court from issuing a writ in cases of excess or absence of jurisdiction. Further, citing the judgment of the Supreme Court in *Somasunderam Vanniasingham v. Forbes and Another [(1993) 2 Sri L.R. 362]*, it was submitted that before a Court refuses to review a decision of an inferior tribunal, it should satisfy itself that the administrative relief provided by a statute, should be a satisfactory substitute to the impugned decision being reviewed by Court.

**Senior State Counsel for the Respondents -** In response, learned Senior State Counsel, possibly having understood the soundness of the argument presented in this regard by the learned President's Counsel for the Appellant, did not seek to justify the conclusion reached in this regard by the Court of Appeal. In his post-argument written submissions, learned Senior State Counsel submitted that *"... the decision of the Court of Appeal on this aspect of an alternate remedy, even if erroneous, ..."*, indicating his inability to defend this particular pronouncement contained in the judgment of the Court of Appeal. This, truly reflects, as all counsel representing the Honourable Attorney General ought to, the learned Senior State Counsel having taken an objective view regarding this question of law, which is in consonance with the applicable law.

**Analysis and the findings**

At this stage, it is pertinent to note that by the presentation of the Application ("P18") to His Excellency the President, the Appellant had sought only the mitigation of the sentences imposed on him by the Court Martial, and had not sought the quashing of the finding of guilt (conviction) or any of the decisions which led to the institution of Court Martial proceedings against him.

**Section 122 of the Navy Act**

Section 122 of the Navy Act reads as follows:

> *"The President may* ***annul, suspend, or modify any sentence*** *(including a sentence of death) passed by a court martial or by a naval officer exercising judicial power under this Act, or substitute a punishment inferior in degree for the punishment involved in any such sentence, or remit the whole or any portion of the punishment involved in any such sentence, or remit the whole or any portion of the punishment into which the punishment involved in any such sentence has been commuted; and any sentence so modified shall, subject to the provisions of this Act, be valid, and shall be carried into execution, as if it had been originally passed, with such modifications, by such court martial or officer.*
> *Provided that neither the degree nor the duration of the punishment involved in any sentence shall be increased by any such modification."* [Emphasis added]

It is thus seen that the Appellant has acted advisedly in having sought only a revision of the sentences imposed on him, because section 122 of the Navy Act, empowers the President to **only consider and alter a sentence imposed by a Court Martial, and does not empower him to quash or vacate the findings of the Court Martial referred to as its 'finding' (verdict)**.

Section 122 of the Navy Act can be classified as a 'statutory remedy' which enables a person convicted by a Court Martial or by a naval officer who has purportedly exercised judicial power in terms of the Navy Act, to seek 'administrative relief' with regard to the sentence imposed. This statutory remedy enables an aggrieved party to seek a revision or mitigation of the sentence imposed. It does not enable an aggrieved party to seek a review and quashing of the finding of guilt, which in this case was the conviction of the Appellant in respect of the two counts in the

charge sheet. In ***Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene and Others***, Justice Sisira De Abrew has held as follows:

> *"… In fact, section 122 of the Navy Act deals with* ***revision of sentences*** *imposed by a Court Martial or by a Naval officer exercising judicial power under the Navy Act and* ***it does not deal with quashing of convictions imposed by a Court Martial*** *or by a Naval officer exercising judicial power under the Navy Act. …"*
>
> [Emphasis added]

Therefore, it is evident that the relief which the Appellant has sought in terms of section 122 of the Navy Act is **limited to a review of the sentences** imposed on him. As referred to above, the relief sought by the Appellant from the Court of Appeal is much wider, in that he has sought mandates in the nature of Writs of Certiorari to quash not only the sentences imposed on him by the Court Martial, but also the finding (verdict), the decision to institute Court Martial proceedings against him, the report of the Board of Inquiry and report of the recording of the Summary of Evidence.

**Writ of certiorari as a discretionary remedy**

Particularly since the jurisdiction conferred on the Court of Appeal to issue a mandate in the nature of a writ of certiorari is an extraordinary remedy, it is often submitted on behalf of the decision-maker of the impugned decision that the writ is not available 'as of right' or as a 'matter of course', and is issued only at the discretion of the Court. In ***Biso Menika v. Cyril de Alwis and Others [(1982) 1 Sri LR 368]*** Justice Sharvananda as he was then, held as follows:

> "*A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well-accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver…"*

It is also submitted that the Court is vested with discretion to determine whether or not the writ should be issued.

Indeed, the issuance of a mandate in the nature of a writ of certiorari is a discretionary remedy. Thus, Courts are entitled by law to exercise a considerable amount of discretion in determining whether or not a writ should be issued. Notwithstanding the Court determining that the impugned order is in fact unlawful, the Court may in certain situations refrain from issuing the writ to quash the unlawful order, if it deems withholding the issuance of the writ is justifiable and appropriate in the circumstances of the case. Thus, a writ of certiorari is not a remedy that may be claimed by a petitioner as of right. The issuance of the writ is at the instance of the Court exercising discretion.

However, it needs to be highlighted that permitting the issuance of the writ to be finally governed by the exercise of judicial discretion is troublesome, particularly from the perspective of the rule of law. Inappropriate exercise of judicial discretion resulting in the refusal to issue a writ of certiorari in the backdrop of the petitioner having successfully established that the impugned order is unlawful, would undermine the rule of law. Therefore, after the Court is satisfied that the impugned order is unlawful, if the Court is to exercise discretion in deciding as to whether or not the writ should be issued, it must be done with considerable circumspect, judiciously and with great caution.

The exercise of discretion by Court is not unfettered. For the purpose of guiding the exercise of such discretion, the common law has developed certain well-established grounds which are recognized by contemporary Administrative Law and by the *cursus curiae* of this Court and the Court of Appeal. Nevertheless, once grounds for the issuance of the writ have been satisfied by the party seeking relief, refusal to grant the writ must be founded upon compelling reasons, which would provide justification for allowing an 'unlawful order' to remain without being quashed.

However, the situation would be different when there is a statutorily recognized 'right of appeal', which would enable the aggrieved party to challenge the legality of the impugned order based on both the law and the facts. In such instances, Court will rightly question as to why the petitioner sought judicial review without exercising the statutorily available right of appeal, and unless

there is a satisfactory explanation for not having exercised the right of appeal, the Court will decline to exercise the jurisdiction of judicial review. Nevertheless, if the impugned order is a nullity due to the decision-maker having exercised power in flagrant excess of power conferred on him or due to any other reason which renders the decision void, Court would not hesitate to quash it, notwithstanding the aggrieved party not having exercised the statutorily available right of appeal.

One possible ground that would militate against the issuance of the writ, is the availability of an **adequate alternate remedy** as opposed to a mere alternate remedy. As explained above, the right to present an Application to His Excellency the President in terms of section 122 of the Navy Act cannot be recognized as an adequate alternate remedy, in that, even if the President wishes, he may only revise the sentence, and would not have any power to quash the conviction pronounced by the Court Martial. Furthermore, in my view, it would not be correct to hold that the existence of even an adequate alternate remedy would 'oust the jurisdiction' of the Court of Appeal. The existence of an adequate alternate remedy and the Application being presented to the Court of Appeal seeking a writ of certiorari without having exhausted such available remedy would only be a ground on which the Court may in the exercise of its discretion refuse to grant relief. Furthermore, after having sought an alternate administrative remedy and having been unsuccessful in securing relief, there is no bar for the aggrieved party to seek judicial relief, provided he can satisfy Court of the existence of grounds for the grant of relief.

Additionally, it is also necessary to be mindful that the Navy Act specifically empowers a person aggrieved by the finding of a Court Martial to seek from the Court of Appeal, *inter-alia*, a mandate in the nature of a Writ of Certiorari. Section 132(1) of the Navy Act provides as follows:

> *"Such provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect of any court martial or any naval officer exercising judicial powers under the Act."*

Thus, it is seen that the Navy Act, while on the one hand providing an administrative remedy to seek a revision of the sentence by applying to His Excellency the President, has afforded another remedy in the nature of judicial relief by conferring the right to invoke the jurisdiction of the Court of Appeal to issue a mandate in the nature of *inter-alia*, a Writ of Certiorari. It is however necessary to point out that, even if section 132(1) of the Navy Act did not confer such a legal right on an aggrieved party to seek judicial relief, the Constitutional provision of Article 140 by itself would entitle an aggrieved party to seek judicial review of the finding (verdict) and sentence pronounced by a Court Martial, because it is a statutory body conferred with legal authority to take decisions which have a bearing on the rights of persons.

**Conclusion reached by me in respect of the 1st question of law**

Section 122 of the Navy Act does not provide an 'adequate and efficacious alternative remedy' to a person aggrieved by a finding of guilt and the sentence imposed by a Court Martial. Furthermore, the availability of an 'adequate and efficacious alternate remedy' does not by itself 'oust the jurisdiction of the Court of Appeal' with regard to an Application seeking a writ of certiorari. It only serves as a ground on which the Court may exercise discretion and consider whether in the circumstances of the case, the writ should be refused, notwithstanding the petitioner having satisfied the Court that the impugned decision is 'unlawful'.

Therefore, I hold that it was not lawful for the Court of Appeal to have held that the Court's jurisdiction had been 'ousted' due to the Petitioner (Appellant) having sought relief from the President in terms of section 122 of the Navy Act. It was incorrect for the Court of Appeal to have held that the Application presented by the Appellant to the President amounted to an 'alternate remedy' and therefore the jurisdiction of the Court of Appeal had been 'ousted'. Thus, the first question of law in respect of which *special leave to appeal* has been granted, is answered in favour of the Appellant.

**(ii) Was it erroneous for the Court of Appeal to have held that there was no need in law for the Court Martial to give reasons for its verdict and that the absence of such reasons does not render the verdict void?**

Before the Court of Appeal as well as in the Supreme Court, the Appellant challenged the lawfulness of the finding (verdict) of *'guilty'* and the orders of sentence pronounced on him, on the footing that the Court Martial was required in terms of the law to give reasons for its finding (verdict), and that the Court Martial had failed to give such reasons. Therefore, it was argued on behalf of the Appellant that the finding of the Court Martial is bad in law and void, and hence should be quashed by a mandate in the nature of a writ of certiorari. On behalf of the Respondents, it was argued that a Court Martial was not obliged by law to reveal reasons for its finding. The Court of Appeal held in favour of the Respondents.

During their submissions before this Court, both the learned President's Counsel for the Appellant and the Senior State Counsel for the Respondents agreed with each other that as evident from the record of the proceedings of the Court Martial, the Court Martial had not given any reasons for finding the Appellant *'guilty'* in respect of the two charges contained in the charge sheet.

As regards the sentences, the learned Senior State Counsel pointed out to the proceedings of the Court Martial, where he submitted that 'reasons' for the sentences had been stated. Learned President's Counsel for the Appellant insisted that the proceedings do not reflect reasons for the sentences.

I have carefully considered the proceedings of the Court Martial. The proceedings of 13$^{th}$ May 2009 reflect that the members of the Court Martial have, after finding the Appellant *'guilty'* of both counts in the charge sheet, permitted counsel for the prosecution to tender to the Court Martial the 'personal file' of the Appellant and certain 'confidential documents'. The record does not reveal as to whether such documentary material was made available to either the accused or to his counsel for the purpose of examining them and commenting upon them. One would expect such fairness to have been adhered to in proceedings before a Court Martial. Be that as it may, counsel for the accused had addressed the Court Martial in mitigation of the sentences, and subsequently, the Court Martial has recorded the following:

> *"The Court has taken into consideration the submissions made on behalf of the accused, for the purpose of mitigating the sentence of the accused. Consideration has also been given to the letter of displeasure issued by the Commander of the Navy regarding the accused. Therefore, the following punishment is imposed: 1st count – Severe reprimand, 2nd count – Dismissal from the Navy without disgrace."*

It is thus seen that the Court Martial has only specified the material considered by it when arriving at a decision regarding the punishment to be imposed, and **has not given reasons for the imposition of the stipulated punishment**.

Thus, this judgment will proceed on the footing that the Court Martial <u>has not given any reasons</u> for both the finding of guilt (verdict) and the orders of punishment imposed on the Appellant.

Both counsel submitted that neither the provisions of the Navy Act nor any other applicable statute impose a statutory obligation on a Court Martial to give reasons for its finding (verdict). Thus, the question to be determined by this Court is, notwithstanding the absence of a statutory requirement to give reasons, whether a Court Martial has a legal duty to give reasons for its finding (verdict) and order of sentence (punishment), and whether the absence of such reasons renders the verdict and the order of sentence pronounced by a Court Martial unlawful and hence void.

Learned counsel for the Appellant and the Respondents agreed with each other that revealing reasons for the verdict and for the order of punishment has never been the practice of Courts Martial in this country. Thus, the absence of reasons for the impugned decisions is not peculiar to the instance being examined in this Appeal.

The relevant portion of the impugned judgment of the Court of Appeal regarding this particular question of law, is as follows:

> *"The next issue is the Court Martial. The petitioner argued that no reasons were given by the Court Martial for its findings. The Code of Criminal Procedure does not require the jury to give reasons for its verdict, nor does the Navy Act require a Court Martial to give reasons*

*for its findings. In the case of G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others, it was held by three judges of the Court of Appeal that a Court Martial need not give reasons."*

**Submissions of Counsel**

**President's Counsel for the Appellant** - Citing the judgment of this Court in *Karunadasa v. Unique Gem Stones Limited and Others [(1997) 1 Sri L.R. 256],* learned President's Counsel for the Appellant submitted that although there is no general duty in English law for statutory authorities to give reasons for their decisions, English judges have recognized exceptions to the rule and imposed such a duty on the basis of 'natural justice' and 'fairness'. It was submitted that this Court has observed in judgments relating to fundamental rights Applications, that Article 12(1) of the Constitution confers a right to know the reasons for a decision, which is a manifestation of the guarantee of the equal protection of the law. He submitted that in the context of the machinery for appeals, revision, judicial review and the enforcement of fundamental rights, giving reasons for decisions is increasingly becoming an important protection of the law. If a party is not told the reasons for a decision that affects his interests, his ability to seek judicial review will be impaired.

While rightfully conceding that the recent judgment of the Court of Appeal in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others [CA Writ No. 333/2011, CA Minutes of 1st June 2020]* is not binding on this Court, learned President's Counsel submitted that the Court of Appeal had in that matter, having gone into this very issue of whether there is a legal obligation cast on a Court Martial to give reasons for its finding and whether the failure to do so would render such verdict void, has held that in terms of the law of Sri Lanka, the duty to give reasons is a mandatory constitutional duty, and consequently, a decision in breach of this requirement was flawed and hence void.

Responding to the 'parallel' drawn by the Court of Appeal in the impugned judgment between a 'trial before a jury' and 'proceedings before a Court Martial', and provisions of the Code of Criminal Procedure Act which regulate such trials in the High Court heard before a Judge of the High Court together with a jury, and such provisions not requiring juries to give reasons for its verdict, learned President's Counsel for the Appellant submitted that a trial before a jury is not

comparable with proceedings before a Court Martial. He submitted that the two types of proceedings were distinguishable. Citing the views expressed by Justice Saleem Marsoof in the judgment of the Supreme Court in *Fonseka v. Attorney General [(2011) BLR 169],* learned President's Counsel submitted that though it has been held that a Court Martial is a 'court', it was not part of the 'regular judicial hierarchy'. He submitted that a Court Martial is a *sui generis* tribunal, and hence proceedings before a Court Martial cannot be equated to proceedings before a jury. Learned President's Counsel also submitted that though there is a similarity between a High Court Judge and a Judge Advocate, proceedings in the High Court in a trial before a jury is materially different to proceedings before a Court Martial. That is due to the following reasons:

(i) Section 39(a) of the Navy Act limits the role of the Judge Advocate to giving 'advice', and that too with the prior permission of the Court Martial, whereas, in a trial before a jury, the law imposes a mandatory requirement on the presiding High Court judge to sum up the evidence, which function he exercises as of right. Furthermore, jurors are bound to follow directions given by the presiding High Court judge on the law.

(ii) There exists a provision in the Navy Act which enables the delivery of the 'summing up' to be dispensed with, provided agreement in that regard is reached between the Court Martial and the Judge Advocate, whereas, in a trial before a jury, the summing up by the High Court judge cannot be dispensed with.

Learned President's Counsel for the Appellant relied heavily on the pronouncement made by Justice Sarath N. Silva (as he then was) in *Kusumawathie and Others v. Aitken Spence & Co. Ltd. and Another [(1996) 2 Sri L.R. 18]* that the norm that there is no requirement in law to give reasons for a decision should not be construed as a 'gateway to arbitrary decisions and orders'. If a decision that is challenged is not a speaking order, when Notice is issued by a Court exercising judicial review, reasons to support the decision must be disclosed at least to Court. If a statutory body fails to disclose to Court reasons for its decision, an inference may be drawn that the impugned decision is *ultra vires* and relief may be granted on that basis. If no reasons are adduced, the Court would presume that in fact, no reasons exist.

Learned President's Counsel in his usual exuberant style of rhetorical advocacy concluded his submissions by stating that if this Court were to depart from the ratio of the judgement of Court

of Appeal in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others,* it would render the right to judicial review of decisions of Courts Martial an 'empty shell'.

**Senior State Counsel for the Respondents -** In response, learned Senior State Counsel for the Respondents prefaced his submissions regarding this question of law, by submitting that the duty to give reasons is not yet 'settled' in Administrative Law. Upholding his customary frankness and the professional standard which is expected particularly from counsel representing the Honourable Attorney General, he conceded that in the contemporary era, there is an increasing trend in academic authority supporting the view that it is desirable to give reasons for administrative decisions. Citing internationally recognized authors such as De Smith, Wade and Craig, learned Counsel submitted that treatises on Administrative Law authored by these academics of high eminence refer to English Courts not yet having recognized the existence of a 'mandatory general legal duty to give reasons'. He submitted that Professor William Wade citing the case of *R. v. Home Secretary, ex parte Doody,* has advanced the view that, principles of natural justice have not yet embraced into its fold a general rule that reasons should be given for decisions of public authorities. He submitted that in the case of *S.N. Mukherjee v. Union of India [AIR (1990) SC 1984]*, the Supreme Court of India had held that while there is in India a general duty to give reasons, if a statute expressly or by implication indicates that reasons do not have to be given, then it is not mandatory to give reasons. Learned counsel for the Respondents submitted that the Indian Supreme Court had held that the scheme of the Act and the Rules are such, that reasons are not required to be recorded by a Court Martial. He submitted that the Supreme Court of India has specifically held that a Court Martial is not required to give reasons for its findings.

Turning towards Sri Lankan case law, he submitted that in *Yaseen Omar v. Pakistan International Airlines Corporation and Others [(1999) 2 Sri L.R. 375]*, the Supreme Court having examined the applicable law contained in the judgment in *Samalanka Ltd. v. Weerakoon, Commissioner of Labour and Others [(1994) 1 Sri L.R. 405]* has held that in the absence of a specific statutory requirement, there is no general principle in administrative law that requires the authority making the decision to adduce reasons, provided the decision is made after holding a

fair hearing. Learned Senior State Counsel submitted that the Supreme Court had found error in the view that, giving reason is a *sine qua non* for a fair hearing.

Learned counsel also submitted that the judgment in *Karunadasa v. Unique Gemstones Ltd.* should not be viewed as authority for the proposition that reasons must necessarily be given for all administrative and quasi-judicial decisions.

Learned Senior State Counsel conceded that the Supreme Court in the determination of Fundamental Rights Applications such as *Choolanie v. Peoples Bank and Others [(2008) 2 Sri L.R. 93]* and *Hapuarachchi and Others v. Commissioner of Elections and Another [(2009) 1 Sri L.R. 1]* has observed that the failure to give reasons for a decision may make such decision liable to be struck down for arbitrariness, on the footing that arbitrary decisions are violative of Article 12(1) of the Constitution. His position however is that Article 15(8) of the Constitution provides for the imposition of 'restrictions' on Fundamental Rights as may be prescribed by law, on members of the armed forces and the police, which may be imposed in the interest of the proper discharge of their duties and the maintenance of discipline among them. Learned counsel submitted that the provisions of the Army, Navy and Air Force Acts which require pronouncements of Courts Martial to be arrived at by 'vote' and thus do not require reasons for the decision to be given, would tantamount to a restriction which comes within the purview of Article 15(8).

Citing section 43 of the Navy Act, learned Senior State Counsel submitted that decisions pertaining to the finding (verdict) of the Court Martial and the sentence to be imposed on a person found to be *'guilty'* should be decided by 'vote'. Thus, he submitted that in any event, it would not be possible to give reasons for the verdict.

In response to the query from Court as to how a higher court exercising the function of judicially reviewing the findings of a Court Martial may perform that function if reasons are not attached to the finding, learned Senior State Counsel submitted that the higher Court may examine the record which contains the evidence recorded by the Court Martial, submissions of counsel and the summing up of the Judge Advocate, and thereby determine whether the finding is reasonable.

He submitted that it would be the same material an appellate Court exercising appellate jurisdiction in respect of a verdict returned by a jury at a ‘jury trial’ would have access to.

In view of the foregoing, learned Senior State Counsel submitted that a Court Martial is not required by law to give reasons for its finding.

**Views, findings and conclusions**

**Reasons for a decision**

‘Reasons for a decision’ are the internal cognitive thought processes which result in the decision-maker arriving at his decision. Reasons would reflect the internal step-by-step process which culminates in the final decision. It amounts to the ‘logic’ which links the ‘material considered’ with the ‘decision’ arrived at. In the context of a pronouncement by a Court of Law or a Court Martial, ‘reasons’ would amount to the (a) determination of relevant facts based on testimony or other material considered by the decision-maker, (b) appreciation and application of the law, and (c) conclusions reached which propelled the decision-maker to arrive at the final decision. Thus, ‘reasons for the decision’ is nothing additional. It is a mere external announcement of the internal decision-making process.

The issue to be determined is, in instances where the statute which empowered the decision-maker to arrive at a decision and other applicable laws are silent on whether or not reasons for the decision should be announced, and where such written law does not explicitly or impliedly exempt the decision-maker from giving reasons, whether the unwritten law or the common law would impose a legal duty on the decision-maker to disclose reasons for his decision.

**Fair Hearing**

A ***‘fair hearing’*** is a standard of fairness which is sought to be guaranteed by the rules of ***natural justice***. In terms of Article 13(3) of the Constitution, the right to a *‘fair trial’* is a fundamental right conferred on all accused. For over a century, fundamentals of justice have required that *‘no one should be condemned without being given an opportunity of explaining his conduct’,* and that unless there are compelling reasons for refraining from doing so, *‘a decision affecting the legally protected interests of a person should not be arrived at without affording that person an*

*opportunity of being heard in support of the protection of such interests'*. In addition to determining whether the purported exercise of power was within the limits of such power, a preponderance of Applications seeking judicial review of decisions arrived at by statutory and public bodies which have purportedly exercised statutorily conferred power, are decided by Courts primarily on a consideration of whether the decision-maker had complied with the rules of *natural justice* and given a *fair hearing* to the party that claims to have been affected by the decision arrived at. It can be said that **giving a *'fair hearing'* is very much a *sine qua non* for a lawful decision which has the potential of affecting rights of persons**. Rules of natural justice have been developed in order to ensure that a *fair hearing* is afforded and to regulate such hearings. Thus, a Court of law called upon to judicially review a decision arrived at by a statutory body would be anxious to ascertain whether this fundamental requirement has been complied with. While the record of the statutory body and evidence relating to the process of decision-making would generally reflect whether a *fair hearing* had been afforded, in most instances, it would be the reasons for the decision that would actually enlighten judges performing the function of judicial review, whether the hearing was in fact fair; whether an impartial and adequate hearing had been given; and whether the decision was arrived at objectively. Furthermore, a reasoned decision would give life to the principle that *"justice should not only be done, but should also manifestly be seen to be done"*.

**Objective decisions**

The decision being **objectively arrived at and being reasonable** are other necessary conditions to be satisfied for a decision to be lawful. A lawful decision is a decision taken in *good-faith* upon a diligent and unbiased consideration of all relevant facts, while rejecting irrelevant facts, and having correctly appreciated and applied the applicable law. Such a decision is recognized as an **objective decision**. A **reasonable decision** is a decision that is founded upon an objective consideration of legally relevant facts and the correct application of the law to such relevant facts. It is the **reasons for the decision** that would reflect whether the decision-maker had in fact arrived at the decision in an objective manner, and whether the decision is reasonable. Thus, a decision which has attached to it reasons therefor, attracts accountability and transparency. It enables a proper judicial assessment to be made whether the decision had been arrived at upon a proper and unbiased appreciation of the relevant facts, is founded upon a correct appreciation

and application of the law, and is therefore a **lawful decision**. Further, the availability of reasons for the decision would reveal whether the decision-maker had (a) acted in excess of the law, (b) not afforded a fair hearing, (c) decided in a biased manner, (d) founded his decision upon a consideration of irrelevant facts or an erroneous application of the law, or (e) due to other reasons, the decision is arbitrary, unreasonable, subjective, capricious or aberrant and, hence the decision is **unlawful**. Thus, a decision to which reasons have not been contemporaneously given by the decision-maker, on the one hand, impairs and hinders proper judicial review and assessment, and on the other hand runs the risk of being classified and quashed as an unlawful decision which suffers from one of the above-mentioned legal defects.

**Obligation to give reasons for the decision**

No person concerned in justice and in the correctness, fairness, quality and legality of administrative, quasi-judicial and judicial decisions, would suggest that a decision-maker need not have any reasons for his decision. The absence of reasons for decisions, as well as inability on the part of a decision-maker to publicly declare the reasons for his decision could easily be due to the adoption of an unreasonable approach or due to sheer arbitrariness. The panacea for reasonable and lawful decisions would primarily be the adoption of an unbiased, objective and reasoned approach. Thus, reasons for a decision is an absolute necessity.

In this backdrop, the issue to be determined is not whether there should be reasons for a decision, but whether a decision-maker should be required by law to disclose the reasons for his decision, which he ought to, in any event be having with him at the time he arrived at the decision.

**Factors for and against the imposition of a legal duty to give reasons**

The law and in particular the common law is primarily founded upon the rule of law, public policy and public interest, logical reasoning, fairness, justice and equity. Thus, the question of law whether public authorities who function as decision-makers should be required by law to give reasons for their decisions, should be founded upon the merits of the purposes for which such a duty should be imposed viz. possible consequences arising out of the imposition of such a duty.

The main factors in favour of administrative, quasi-judicial and judicial bodies being required to give reasons for their decisions, can be described in the following manner:

(i) The requirement to give reasons encourages the public authority concerned to give a proper *fair hearing* to the party whose rights may be affected by the decision it takes, as opposed to merely and perfunctorily going through the notions of a *fair hearing*.

(ii) The duty to articulate reasons for the decision, is a self-disciplining exercise, which encourages decision-makers to act independently, impartially and neutrally, and adopt in *good-faith*, a disciplined and focused approach. It encourages conscientious consideration of pertinent issues. It dissuades decisions being arrived at in a biased or an arbitrary manner, and decisions being taken for collateral purposes. Decision-makers are compelled to act diligently and give objective consideration to the relevant material placed before them, while applying the law correctly, and rejecting irrelevant material and considerations. When there is a legal duty to give reasons, there is a reasonable expectation of the decision-making process not going astray. The existence of a legal duty to give reasons, would encourage decision-makers to participate in the hearing and in the decision-making process with a purposive approach, so that Parliament would be able to realize its objectives in having conferred statutory power on the relevant decision-making body.

(iii) The compulsion on reasons for the decision being announced facilitates correct, lawful and higher quality administrative, quasi-judicial and judicial decision-making. Reasons for the decision would reflect the rationale for the decision.

(iv) The duty to give reasons encourages statutory bodies to adopt a reason based, logical and rational approach to decision-making. It facilitates cognitive structuring of the decision-making process founded upon valid reasons. Thus, the final decision is likely to be reasonable as opposed to being unreasonable. As the decision is to be founded upon reasons that have to be declared, it is unlikely that the decision would be arbitrary.

(v) Reasons for the decision provide a justification for the decision. Thereby, the decision becomes more transparent. When a wrong decision has been taken, the decision-maker can be held accountable.

(vi) The imposition of a duty to give reasons is the main protection against a miscarriage of justice.

(vii) A reasoned decision would demonstrate that parties have been properly heard. When reasons for the decision are known by the person affected by such decision and other concerned parties, they would be able to comprehend the decision and appreciate the justification for it. Thus, the decision is likely to become acceptable. Revealing reasons would satisfy the legitimate expectations of the person affected by the decision, to get to know reasons for the decision. Thus, reasons for the decision serve the interests of those affected by the decision and the community at large. In any event, giving reasons for the decision appeals to the normal man's sense of justice. Thus, it enhances public confidence in the particular decision-making process and in individual decisions.

(viii) Existence of reasons for the decision enables and facilitates proper and meaningful exercise of judicial review and makes such review efficacious. The existence of reasons for the decision facilitates detection of errors; particularly if justiciable flaws exist. Thus, giving reasons serves the interests of the Court performing the function of judicial review.

(ix) During judicial review, decisions containing reasons therefor, are less likely to be classified as being arbitrary or unreasonable and therefore unlikely to be quashed on such grounds. When reasons for the decision are not available, a Court performing the function of judicial review may conclude that reasons have not been given, as there were no good reasons to be given. In such situations, it is likely that the impugned decision would be denounced as being arbitrary.

(x) It is when reasons for the decision are known by the Court exercising the function of judicial review, that such Court could conclude whether the impugned decision is reasonable.

These factors serve as virtues of giving reasons, and provide incentives for decision-makers to give reasons for their decisions. These factors are in conformity with general principles of justice, and provide great logical relevance and sufficient justification for the law to confer a duty on statutory authorities to give reasons for their decisions.

The dissenting judgment of Justice Subba Rao in ***Madya Pradesh Industries Ltd. v. Union of India and Others****, Supreme Court of India, [(1966) 1 S.C.R. 466]*, contains the very essence of the strong arguments in favour of imposing a legal duty on statutory bodies and tribunals to disclose reasons for their decisions, in the following well-articulated sentences:

> *"In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunal within bounds. A reasoned order is a desirable condition of judicial disposal. … If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."*

However, it is necessary to be mindful that there are certain valid reasons as to why purely administrative bodies conferred with statutory power (as opposed to tribunals and judicial bodies), should not be mandated by law to give reasons for their decisions. These factors also cannot be overlooked or trivialized. These factors may be summed up in the following manner:

(i) Having to state reasons would almost always impede efficiency associated with the delivery of the decision, would result in inevitable delays and require enhanced resources. It may in certain circumstances, attract an intolerable burden on administrative bodies and higher costs.

(ii) There can be many situations where statutory and public bodies are required to take into consideration certain material factors that cannot be disclosed to the person who may be affected by the decision and to the public at large. Matters pertaining to (a) national security and the defence of the country, (b) sensitive matters pertaining to international relations and foreign policy, (c) certain trade and commercial interests of the country, and (d) matters pertaining to ongoing criminal investigations, are some examples.

(iii) In situations where value-based judgments have to be arrived at, articulation of reasons may be quite challenging. Decisions based purely on academic assessments is an example where reasons for the decision are virtually inexpressible, though not impossible to state.

(iv) Reasons for the decision that are stated may not necessarily be the true and complete reasons that resulted in the particular decision being arrived at. Reasons that are declared by the decision-maker may be strategy based, as opposed to candor. Thus, the compulsion to give reasons may not necessarily give rise to transparency.

(v) Stating reasons may result in the proliferation of legal challenges.

The afore-stated factors both 'for' and 'against' the imposition of a legal duty to give reasons for decisions attract considerable merit, are significant, and are of high logical relevance. However, in my view, the merits in the factors that support the imposition of a legal duty to give reasons, certainly outweigh the factors that militate against the imposition of such a legal duty. The view that reasons for a decision are not necessary or important, is not appealing to an objective and reasonable mind. However, it must be emphasized that (i) the nature and the precise content of the written law which conferred legal authority to the decision-maker, (ii) nature of the decision, (iii) the impact of the decision on the rights and interests of persons, and (iv) possible consequences that may arise by revealing reasons for the decision, would be critical factors that would determine whether or not the imposition of a legal duty to give reasons was intended by Parliament and is desirable, necessary, appropriate and justifiable. The law in this regard, both statutory and common law, can be recognized and applied in such a manner so as to prevent (a) an insurmountable burden being imposed on decision-makers by the enforcement of a legal duty to give reasons, and (b) adverse consequences flowing. These objectives can be achieved by

recognizing exceptions to the rule. Those exceptions would recognize situations where the law does not require reasons for the decision to be declared.

As seen in the views of Lord Denning MR in ***R v. Secretary of State for the Home Department, ex parte Hosenball*** *[(1977) 3 All ER 452]* the existence of the need to protect national and public security may be one such exception that provides justification for the tribunal to refrain from revealing reasons for the decision.

Whether a statutory body should be required by law and therefore would have a duty to give reasons for its decisions would depend on a host of factors, and would have to be determined on a case-by-case basis. Those factors in my view are as follows:

(i) Whether the applicable statutory framework including the law that has empowered the body to take the decision and any other applicable law, has imposed a specific or implied requirement to give reasons for the decision;
(ii) The character of the decision-making body;
(iii) The nature of the decisions it has been empowered to take and possible legal implications arising out of such decision;
(iv) Whether in the attendant circumstances, there can be a guarantee that a *fair hearing* had been given by the statutory body, unless reasons for the decision are revealed;
(v) Whether judicial review of the decision would be rendered nugatory by the statutory body not having revealed reasons for its decision;
(vi) Whether a higher Court performing judicial review of the impugned decision would not be able to perform such function in the interests of justice, unless reasons for the decision are known;
(vii) Reasons if any, that would provide a valid justification for the refusal or failure on the part of the decision-maker to give reasons for the decision.

**Views of respected academicians and reputed authors**

At this stage, it would in my opinion be desirable to consider views of several respected academicians and reputed authors contained in treatises, regarding the duty if any, to give reasons.

**Professor P.P. Craig** in *"Administrative Law"* (Sweet & Maxwell, 1999, 4th Edition, page 432 - 436) is of the view that there is no general common law duty to give reasons. He however asserts that there are nonetheless, a number of ways in which the common law has in particular instances, imposed such a duty. He has explained that in addition to the written law explicitly imposing a legal duty to give reasons, there are five indirect ways of imposing such a duty. They are as follows:

(i) By contending that the absence of reasons renders any right of appeal or review nugatory, or that it makes the exercise of that right more difficult, and therefore recognizing the existence of a duty to give reasons;

(ii) By labelling the decision reached in the absence of declared reasons as being arbitrary;

(iii) By considering the evidence or the material placed before the decision-maker and determining that in the absence of reasons, the decision arrived at is unreasonable;

(iv) By recognizing the existence of a legitimate expectation founded upon the public body concerned, had in previous instances been disclosing reasons for its decisions, and in the impugned occasion has refrained from giving reasons, thereby depriving the person affected by the decision reasons for the decision which would contravene his legitimate expectation that reasons would be given;

(v) By considering the nature of the decision-maker, the context in which he operates, the impact of the decision, and accordingly determining whether the giving of reasons is required for the attainment of justice.

These five methods could be invoked to require decision-making public authorities to give reasons for their decisions.

Professor Craig concludes in the following manner:

> ***"The general rule should be that reasons should be given, subject to exceptions where really warranted. The jurisprudence of our courts is coming close to this proposition. It would do much to simplify and clarify matters if the legal rule could be expressed in this way."***

**De Smith's Judicial Review** (2007, 6th Edition, edited by former Chief Justice of England and Wales **Lord Woolf, Professor Jeffrey Jowell** and **Professor Andrew Le Sueur**, page 410 - 422) highlights the essence of the matter, by expressing the view that the failure by a public authority to give reasons or even adequate reasons for a decision, may be unlawful in two ways. First, it may be said that such a failure is procedurally flawed and unfair. Secondly, the failure to give reasons may indicate that the decision is irrational. The author points out that as a general proposition, it is still accurate to say that 'the law does not at present recognize a general legal duty to give reasons for an administrative decision'. But, the increasing number of so-called 'exceptional' circumstances in which substantive and procedural fairness now require that reasons be afforded to an affected individual, means that the general proposition is becoming meaningless. Apart from demonstrating the mere fact that a decision-making process is held to be subject to the requirements of fairness, it does not automatically lead to the further conclusion that reasons must be given. However, it is certainly now the case, that a decision-maker subject to the requirements of fairness, should consider carefully whether in the particular circumstances of the case, reasons should be given. Indeed, so rapidly is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness will usually require a decision-maker to give reasons for his decisions. Overall, *'the trend of the law has been towards an increased recognition of the duty to give reasons'.* There has been a strong momentum since of late, in favour of greater openness in decision-making. What were once seen as exceptions to the rule which stipulated instances where reasons for the decision were required, are now becoming examples of the norm; while the cases where reasons are not required may be taking on the appearance of exceptions.

The concluding paragraph of this topic in De Smith's Judicial Review is of considerable significance:

> *"**Since the duty to give reasons may now be seen simply as yet another aspect of the requirements of procedural fairness**, it would be wrong to imagine that the duty may be artificially confined to situations in which the decision-maker is acting in a 'judicial' or 'quasi-judicial' capacity. Although in Cunningham, some reliance was placed upon the fact that the Civil Service Appeal Board is a fully 'judicialized' tribunal, and one that is*

> *almost unique among tribunals in not falling under a statutory duty to give reasons, subsequent decisions have made it clear that* ***reasons may be required of a body exercising 'quasi-judicial' functions****, such as that of the Home Secretary in relation to the tariff period to be served by life sentence prisoners,* ***and 'administrative' functions, such as a local authority making decisions regarding an individual's housing application****. Fairness may also require that a body explain why it is rejecting or preferring particular evidence or why it is failing to give effect to a legitimate expectation.* ***The distinction between judicial, quasi-judicial and administrative functions may be consigned to history in this context, as well as more generally****. As Sedley J. has put it, in rejecting such a submission in the context of the duty to give reasons, in the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v. Baldwin been alive to that fact."* [Emphasis added]

*"**Administrative Law**"* by **Professor H.W.R. Wade** edited by **Christopher Forsyth** (Oxford, 2014, 11th Edition, page 440) contains the following views:

> *"...* ***Nevertheless, there is a strong case to be made for the giving of reasons as an essential element of administrative justice****. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law.* ***A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others****."* [Emphasis added]

Referring to contemporary trends, Professor Wade has proceeded to observe the following:

> *"**The House of Lords has recognized 'a perceptible trend towards an insistence on greater openness … or transparency in the making of administrative decisions', and***

> ***consequently has held that where, in the context of the case, it is unfair not to give reasons, they must be given*.*"* [Emphasis added]

Professor Wade has cited several recent judgements where the House of Lords has held that reasons for the decision of the tribunal should have been given: *R. v. Home Secretary ex parte Duggan [(1994) 3 All ER 277]* and *R. v. Home Secretary ex parte Follen [(1996) COD 169]* where it has been held that a mandatory life prisoner was entitled to know the reasons why he continued to be classified as a 'category A' prisoner, and hence not entitled to parole, *R v. Home Secretary ex parte Murphy [(1997) COD 478]* where it had been held that a mandatory life prisoner was entitled to know the reasons why the Parole Board's recommendation that he be transferred to an open prison, was not accepted, and the judgment in *R. v. Director of Public Prosecutions ex parte Manning [(2001) QB 330]* where notwithstanding a jury before which an Inquest into a custodial death, had ruled that the death was an unlawful killing and the Director of Public Prosecutions had decided not to prosecute the alleged perpetrators of the crime, that the reasons for the decision not to prosecute should be disclosed.

The commentary on this important aspect of public law by Professor Wade concludes with the following words:

> *"**The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise**. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but **the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them**."*
> [Emphasis added]

**Dr. Sunil Coorey** in ***Principles of Administrative Law in Sri Lanka*** (2020, 4th Edition, Volume I, page 576) having surveyed a series of local judgments on this matter, including ***International Cosmetic Applicators (Pvt.) Ltd. v. Arialatha and Others**, [(1995) 2 Sri L.R. 61],* ***Unique Gemstones Ltd. v. W. Karunadasa and Others,*** *[(1995) 2 Sri L.R. 357],* ***Wickremasinghe v. Chandrananda de Silva, Secretary, Ministry of Defence and Others,*** *[(2001) 2 Sri L.R. 333],*

***Benedict and Others v. Monetary Board of the Central Bank of Sri Lanka and Others*** *[(2003) 3 Sri L.R. 68],* ***Hapuarachchi and Others v. Commissioner of Elections and Another****, [(2009) 1 Sri L.R. 1],* states as follows:

> *"…* ***But the tide seems to be turning. The view seems to be again gaining acceptance that natural justice or procedural fairness requires reasons to be given for the decision and be communicated to the parties affected****. In a recent judgment which reviewed numerous Sri Lankan and foreign decisions, views of textwriters, and other relevant material, the Supreme Court said that, "an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. …* ***Considering the present process in procedural fairness vis-à-vis rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement****" – Hapuarachchi v. Commissioner of Elections [(2009) 1 Sri L.R. 1]."*

Similarly, **Dr. Mario Gomez**, in '***Emerging Trends in Public Law'*** (1998), has, following an exhaustive examination of judicial trends in Sri Lanka and elsewhere in the common law world supplemented by recent academic thinking, expressed the following view:

> "*In Sri Lanka courts previously required reasons where there was a right of appeal. This position has altered radically over the past three years. Sri Lankan courts are now insisting that public law decision making should be reasoned. Barring one case, judicial decisions over the past three years have developed a right to reasons. The Sri Lankan courts will also ask for reasons at the stage of review and in the absence of reasons may infer a finding of ultra vires or irrationality. Recent cases show that a general duty to provide reasons is likely to emerge as part of the Sri Lankan law in the near future."*

In the concluding paragraph, Dr. Gomez emphasizes the importance of giving reasons in the following manner:

> "*Reasons enhance the participatory flavour of a decision. There is an inkling of a dialogue involved when a person is told why his or her point of view was not followed.*

*Reasons for a decision also flow inevitably as a consequence from the right to be heard. If a person has been heard and a decision is taken which adversely affects him or her, then such a person is entitled to be told why the decision was made in that way. Reasons will go some way towards ensuring that public decision making is not ad hoc and arbitrary, but closely thought out and transparent. As Craig observes the 'very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so'. Reasons will ensure higher levels of public accountability and contribute to increasing the integrity of the administrative process. Secrecy, with regard to any decision, raises suspicion and speculation."*

Dr. Shivaji Felix, in the article titled ***'An Appraisal of the duty to give reasons in Administrative Law',*** (Bar Association Law Journal, 1997, Volume VII, Part I, page 48) has expressed the following view:

*"The duty to give reasons, whether imposed by statute or as a common law requirement, is a fundamental of good administration. It results in decision-makers behaving in a more responsible manner. It is a fetter upon the exercise of arbitrary power and enhances the quality of decision-making. Openness and candour in the process of decision-making is facilitated when reasons are communicated for a decision. The duty to give reasons is an aspect of due process and is an important right that warrants protection…* ***Thus, the recognition of a duty to give reasons is an important right which requires protection. The protection of such a right, augurs well for good administration and the preservation of the rule of law.*** *It is an important fetter upon the exercise of arbitrary power and is a singular recognition of the need for openness and transparency in the process of decision-making."*

**Position in the English common law**

The historical origin in English common law of the 'duty to give reasons' on the part of public and statutory functionaries who have been vested with statutory power to arrive at decisions which have the potential of impacting on the rights of persons, dates back to the latter part of the 20th century. Over the years, the position of the common law seems to have evolved progressively towards the recognition of the existence of such a legal duty.

In the early case of ***Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others*** [(1968) AC 997], the House of Lords without recognizing that the Minister of Agriculture had a legal duty to give reasons for the impugned decision in that case, highlighted possible consequences arising out of not giving reasons for the decision. It has been held by Lord Hodson that ***where the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation***. Lord Upjohn has held that *"a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."* It is thus seen that the judgment of the House of Lords serves the purpose of providing a compelling encouragement on public functionaries to give reasons for their decisions.

In ***R. v. Civil Service Appeal Board, ex parte Cunningham****, [(1991) 4 All ER 310],* where Lord Justice Leggatt who considered the lawfulness of a decision arrived at by a tribunal empowered to take appellate level decisions on employment related disciplinary matters in the public sector, observed that the duty to act fairly in the attendant circumstances of that case extended to an obligation being cast on the tribunal to give reasons for its decision. The court observed that, in the circumstances, the failure to give reasons amounted to a breach of procedural fairness. The judgment reflects the view of the court, that the Civil Service Appeal Board is a 'judicialized' tribunal. Another important feature contained in this judgment is the view that, **once the court decides to exercise jurisdiction to cause judicial review, the public body whose decision is being reviewed owes a duty towards the Court to disclose reasons for its decision**. Justice Donaldson drew a distinction between the legal duty on a public authority to provide an individual with reasons for its decisions and the duty to provide to Court reasons for the authority's impugned decision. Breach of the former duty can lead to the quashing of the decision without more. Failure to follow the latter, he observed, may lead to the Court drawing inferences adverse to the public authority, but it will not necessarily do so.

A further strengthening of this view is seen in the judgment of the House of Lords in ***Regina v. Secretary of State for the Home Department, Ex parte Doody***, *[(1994) 1 AC 531]*, where it was held by Lord Mustill, that while *"the law does not at present recognize a general duty to give reasons for an administrative decision",* to mount an effective attack on the impugned decision, the person affected by such decision has, in the absence of reasons for the decision, virtually no means of ascertaining whether the decision-making process had gone astray. **Giving reasons though not specifically stated in the statute, may in certain circumstances be implied**. He has proceeded to opine that he observes in recent judgments, a perceptible trend towards an insistence on greater openness in the making of administrative decisions. In this case, the House of Lords expressed the view that a convicted prisoner serving a term of life imprisonment was entitled to be told by the Home Secretary reasons for his having rejected the advice of the trial judge regarding the minimum duration of the term of imprisonment which the prisoner should serve. Lord Mustill observed that **giving reasons may be inconvenient, but giving reasons would not be against public interest**.

Shortly after the delivery of that judgment, in ***Regina v. Higher Education Funding Council, ex parte Institute of Dental Surgery***, *[(1994) 1 All ER 651],* reflecting what I see as a dampening or retardation of the progressive development of the law in this regard, it has been held by Justice Sedley of a Divisional Court of the Queen's Bench, that the imposition of a duty to give reasons may place an undue burden on decision-makers. It would demand an appearance of unanimity where there is diversity of views. It would call for articulation of sometimes inexpressible value judgments and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. Nevertheless, leaving room for the common law to, in the future, impose a legal duty to give reasons in appropriate instances, Justice Sedley recognized that while there was no general and overall duty cast on administrative bodies to give reasons for their decisions either on general grounds of fairness or simply to enable grounds for judicial review of a decision to be explored, there were two classes of cases where such duty would exist in law. **Those two classes are, where, (i) the subject matter is an interest so highly regarded by law, such as for example personal liberty, that fairness requires that reasons, at least for particular decisions be given as of right, and where (ii) the decision appears to be aberrant**. In this case, the decision of the Higher Education Council regarding the quantum of the annual

research grant to be awarded to the Institute of Dental Surgery, which was founded on an academic assessment of research standards of the Institute, was deemed not to be aberrant as warranting reasons to have been given for the decision of the Council.

In view of the financial and reputational importance of the decision of the Higher Education Council to the Institute of Dental Surgery, proponents have argued, and I am inclined to agree, that if this case was decided today, the Court would not have decided the case in the same manner. It is more than likely that the Court would impose a duty to give reasons, particularly since the Court felt that it was not suitably equipped to decide on the appropriateness of the ranking given by the Council to the Institute. Thus, there is the need for reasons for the decision, enabling Court to determine whether the decision is unreasonable or arbitrary. This view is strengthened by Justice Sedley's own subsequent view expressed in ***Regina (Wooder) v. Feggetter and Another***, *[(2003) Q.B. 219],* that had the case relating to the *Institute of Dental Surgery* been decided by him when he was called upon to decide this case (*R. v. Feggetter*), it would not have necessarily been decided the same way. That is an indication that due to the progressive development of the common law with regard to the duty to give reasons, **Courts may now, even with regard to instances of decision-making involving 'academic or other value-based judgments' insist on the decision-maker giving reasons, particularly if the impugned decision attracts implications as regards legally recognized rights or interests of persons**.

***Regina v. Ministry of Defence, Ex parte Colin James Murray***, *[(1998) COD 134],* is a case quite similar to the case which this Court has been called upon to decide. The Divisional Court of the Queen's Bench had been called upon to judicially review a decision of a Court Martial which had imposed a punishment of 6-month imprisonment, reduction in rank and dismissal from service, on an Army Sergeant. Evidence revealed that the Sergeant was of good character and had served the Army for 20 years. He pleaded *'guilty'* to a charge of wounding another non-commissioned officer by biting his nose, and was accordingly convicted. During the sentencing hearing, evidence was led by the prosecution and the defence. The evidence included conflicting expert medical evidence. The position taken up on behalf of the accused Sergeant was that the impugned behaviour was attributable wholly or partially to intoxication arising out of medication

(Mefloquine) he had taken to treat malaria. That position was rejected by the Court Martial, which did not give reasons. The convicted and sentenced Sergeant appealed against the sentencing order to the Confirming Officer, who confirmed the sentence. He subsequently sought judicial review. It was observed by Chief Justice Bingham that there was no over-riding general principle that reasons must be given, and that would include decisions pertaining to disciplinary matters. Nevertheless, the Court observed that **where the liberty of a person was involved, Courts would have to supply additional procedural standards to ensure fairness**. **The absence of legislative provisions that reasons should be given, is no firm indicator that reasons need not be given**. Where there is no statutory requirement to give reasons, the person arguing that reasons should have been given, must show that the procedure of not giving reasons was unfair. **The Court observed that the carrying out of a judicial function by a tribunal, additionally favoured reasons for the decision to be disclosed, particularly as personal liberty was involved**. Court also observed that fairness required that reasons should have been given both as to why the Court Martial had reached the conclusion that there was no causal connection between the applicant's actions and Mefloquine which he had taken, and why it decided that a sentence of imprisonment was required rather than some lesser sentence which would not have had the same dire consequences for the Sergeant. However, Court observed that it should not be thought that failure to give reasons would normally result in the quashing of a post-conviction determination of fact and the determination of the sentence. **Judicial review was unlikely to succeed, for example, where the reasons were easily discernible albeit not expressed, or where no other conclusion than the one reached was realistically possible**. In the circumstances, the sentence imposed by the Court Martial was quashed by the Queen's Bench Division, for non-disclosure of reasons. Following careful consideration, I have concluded that the ratio of this judgment has high persuasive impact on the determination of the instant Appeal.

The position of the English common law on the duty to give reasons during the final years of the last millennium is seen in the observations of Lord Clyde in ***Marta Stefan v. General Medical Council**, [(1999) 1 WLR 1293]*, wherein he observed that, *"**there is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples***

***of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions****"*.

In ***Karen Louise Oakley v. South Cambridgeshire District Council****, [(2017) EWCA Civil 71] decided by the Court of Appeal (Civil Division) of the United Kingdom,* the issue that came up for consideration was whether the Planning Committee of the South Cambridgeshire District Council ought to have given reasons for granting planning permission to the Cambridge City Football Club for the construction of a 3000-seater football stadium, training and parking facilities and a recreational ground in Cambridgeshire. An Application for planning approval had been presented to the Council by the football club. The Council's senior planning officer who processed the Application, presented to the planning committee a report containing her findings, a recommendation that the Application be rejected and permission refused together with reasons therefor. The planning committee of the Council met to consider the Application, and decided not to act per the recommendation of the senior planning officer. It decided in principle to approve the proposed developmental activity. During the consultation phase, a party claiming to be aggrieved by this decision, made representations to the Council urging that planning permission be refused for the project. However, the Council granted planning approval. The party that made such representations, challenged the decision of the Council, on the footing that the planning committee had failed to give reasons for its decision, notwithstanding the existence of a duty to give reasons. According to the applicable statute, reasons were required to be given only in instances where planning approval was refused and when approval was granted subject to conditions. The statute did not specifically require reasons to be given for a decision when granting approval without imposing conditions. Deciding the matter in appeal, Lord Justice Elias observed that the common law would be failing in its duty if it were to deny to parties who have such a close and substantial interest in the decision, the right to know why the impugned decision was taken. That is partly, but by no means only, for the instrumental reason that it might enable them to be satisfied that the decision was lawfully made, and to challenge the decision if they believe that the decision is unlawful. It is also because, as citizens, they have a legitimate interest in knowing how important decisions affecting the quality of their lives have been reached. This is particularly so, where they have made representations in the course of the decision-making process. In a general sense, this may be considered as an aspect of the duty of fairness, which in

this context requires that decisions be transparent. **The Court observed that where reasons for the decision can be readily inferred, the need may not arise to give reasons**. It was not possible in the circumstances of the case to arrive at such an inference, particularly as the committee had deviated from the planning officer's recommendations. In the circumstances of this case, the Court observed that reasons for the decision were opaque. Thus, **the Court recognized the duty to give reasons, as a requirement for good administration and transparency, and reinforced the justification for the imposition of a legal duty to give reasons**.

In the judgment of the Court of Appeal (Civil Division) of England, in ***Horada (On behalf of the Shepherd's Bush Market Tenants' Association) and Others v Secretary of State for Communities and Local Government and Others [(2017) 2 All ER 86],*** Lord Justice Lewison with whom Lord Justice Longmore and then Chief Justice Lord Thomas of Cwmgiedd agreed, held as follows:

> "*One of the purposes of requiring a decision-maker to give reasons for his decision is so that those who are affected by the decision may themselves decide whether the decision is susceptible to legal challenge…In short, although it is clear that the Secretary of State disagreed with the inspector's view that the guarantees and safeguards were inadequate he does not explain why he came to that conclusion. I do not consider that requiring a fuller explanation of his reasoning either amounts to requiring reasons for reasons, or that it requires a paragraph by paragraph rebuttal of the inspector's views. But it does require the Secretary of State to explain why he disagreed with the inspector, beyond merely stating his conclusion that he did. The two critical sentences in the decision letter are, in my judgment, little more than 'bald assertions'. The Secretary of State may have had perfectly good reasons for concluding that the guarantees and safeguards were adequate. The problem is that we do not know what they were. In those circumstances I consider that the traders have been substantially prejudiced by a failure to comply with a relevant requirement."*

In ***R (On the application of CPRE Kent) v Dover District Council and another [(2018) 2 All ER 121]***, Lord Carnwath with all other Lords agreeing, held as follows:

> "*Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed. ... It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review. ... In my view, Oakley was rightly decided, and consistent with the general law as established by the House of Lords in Doody. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. Doody itself involved such an application of the common law principle of 'fairness' in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by courts.* ***Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.****"* [Emphasis added]

It appears that Lord Carnwath's views reproduced above, reflect the present position of the English law on the duty to give reasons.

**Position of the law in India**

The judgment of the Indian Supreme Court in ***Siemens Engineering & Manufacturing Company of India Limited v. Union of India and Another****, [(1976) Supplementary S.C.R. 489],* has while highlighting the importance and recognizing the existence of a legal duty on statutory administrative bodies to give reasons for their decisions, introduced a pioneering linkage between the *'duty to give reasons'* and a well-established principle in Administrative Law, namely, *'the rules of natural justice'*. Justice Bhagwati has expressed the following views:

> *"* ***It is now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons****. ... If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that*

> *administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process.* ***The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretense of compliance with it would not satisfy the requirement of law.*** *"* [Emphasis added]

Learned President's Counsel for the Appellant emphasized the importance of this Court being persuaded to follow the *ratio decidendi* in the Indian Supreme Court's decision in ***S.N. Mukherjee v. Union of India****, [(1990) AIR 1984],* which he said marks a high watermark in India's Administrative Law. This judgment contains the views of India's Supreme Court on whether (a) a *confirming authority* (exercising authority in terms of the Army Act in respect of a finding and sentence imposed by a Court Martial) is required by law to record reasons for confirming the finding and sentence imposed by a Court Martial, and (b) the *Central Government* or its *competent authority* (which is empowered to deal with a post-confirmation petition) is required to record reasons for its order in respect of a petition presented to it. In the process of considering these two issues, the Supreme Court also considered the answer to the fundamental question, as to whether a Court Martial is required to record reasons for the finding (verdict) and sentence imposed.

Having surveyed in detail the position of the law of England, United States of America, Canada, Australia and India, as regards the legal duty to give reasons by administrative bodies, Justice Agrawal has held that ***"… it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record reasons for its decisions****"*. The judgment contains the view that the requirement that reasons be recorded should govern decisions of administrative authorities exercising quasi-judicial functions, irrespective of whether the decision is subject to appeal, revision or judicial review. However, the Court observed that

the reasons for the decision which are to be declared need not be elaborate, as in the case of a Court of law. The nature and the extent of the reasons would depend on the facts and circumstances of the matter. However, it is necessary that the reasons are clear and explicit, so as to indicate that the decision-making body had given due consideration to the points in controversy.

Nevertheless, the Court noted that provisions of **India's Army Act and Rules made thereunder negatived the requirement to give reasons for the findings of the Court Martial and the order of sentence, and for that reason alone held that there was no legal duty on a Court Martial established in terms of India's Army Act, to give reasons for its decision**. Under these circumstances, India's Supreme Court dismissed the Appeal by the convicted and sentenced Army officer.

However, what is important is that, this judgment, recognizes the general principle that there exists a duty to give reasons for decisions by statutory bodies. That duty can be dispensed with, only when the empowering statute negatives that duty, either explicitly or impliedly.

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

At this stage, it would be appropriate to consider the views of our Supreme Court and the Court of Appeal, regarding this issue.

In ***Samalanka Limited v. Weerakoon, Commissioner of Labour and Others****, [(1994) 1 Sri L.R. 405],* Justice K.M.M.B. Kulatunga has commented on whether the Commissioner of Labour acting in terms of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, was required to give reasons for his decision to grant permission to an employer (Appellant) to terminate the employment of workmen of the company, subject to terms specified relating to the payment of compensation and gratuity. His Lordship has observed that the impugned judgment of the Court of Appeal could not be faulted, in that, **while it is desirable to give reasons for a decision**, for example where a right of appeal is provided against such decision, **in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to**

**adduce reasons**, provided that **the decision is made after holding a fair inquiry**. It appears that in that matter, though reasons for the decision had not been given by the Commissioner, the Supreme Court had, in view of the attendant circumstances of the case, been satisfied that a fair inquiry had been conducted by the Commissioner and that in the circumstances his decision was not arbitrary, and therefore not unlawful.

Therefore, in my view, the judgment of Justice Kulatunga which reflects a generic proposition of the law, that 'reasons for a decision need not be given by the decision-maker', is linked necessarily to the satisfaction by Court that in the circumstances of the case, a *fair hearing* had been given by the Commissioner and his decision does not appear to be arbitrary.

In ***Kusumawathie and Others v. Aitken Spence & Company Limited and Another**, [(1996) 2 Sri L.R. 18],* Justice Sarath N. Silva (as His Lordship was then), has examined this issue in a judgment of the Court of Appeal. In this matter too, whether there exists a legal duty to give reasons has been considered in the backdrop of the powers and functions of the Commissioner of Labour in terms of section 2 of the Termination of Employment of Workmen Act, No. 45 of 1971. The Petitioners had challenged a decision of the Commissioner on the sole ground that the impugned decision violated the principles of natural justice, by the Commissioner having failed to give reasons for his decision. However, it is to be noted that the Commissioner had, through an affidavit that was filed in the Court of Appeal, explained the reasons for his decision. Justice Silva has considered the question of law which was before the Court of Appeal, that being, whether in the absence of a specific statutory requirement to give reasons, the Commissioner was required by law to communicate reasons for his decision along with the decision, and whether doing so is a requirement of the rules of natural justice. His Lordship has observed that neither the common law nor the principles of natural justice require as a general rule, that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. His Lordship has also observed the following:

> *"**Thus, it is seen that the common law of this country has evolved so as to require every tribunal or administrative authority whose decision is subject to a statutory right of appeal to give its reasons for such decision**. Reasons have to contain findings on the*

> *disputed matters that are relevant to the decision. It is also seen that in the absence of a statutory requirement to give reasons for decision or a statutory appeal from a decision, as aforesaid, there is no requirement of common law or the principles of natural justice, that a tribunal or an administrative authority should give reasons for its decision, even if such decision has been made in the exercise of a statutory discretion and may adversely affect the interests or the legitimate or reasonable expectations of other persons. ... There being no statutory requirement to give reasons and no provision for an appeal from the Commissioner's decision, the only ground of challenge advanced by the Petitioner has to fail.*
>
> *However, I have to reiterate the observation made by Tambiah, J. ten years ago in the case of Samarasinghe v. De Mel that it is indeed desirable that reasons be given by the Commissioner for a decision or an order made under the Termination of Employment of Workmen (Special Provisions) Act. ...*
>
> *... The finding in the preceding section of this judgment that there is no requirement in law to give reasons should not be construed as a gate-way to arbitrary decisions and orders. If a decision that is challenged is not a "speaking order", (carrying its reasons on its face), when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed with notice to the Petitioner."* [Emphasis added]

It would thus be seen that Justice Silva has highlighted the legal duty to give reasons for the decision when there is a statutory right of appeal against the impugned decision. His Lordship's view seems to be that where there is no statutory right of appeal, there is no legal obligation to reveal the reasons for the decision simultaneously with the decision. His Lordship does not explain why reasons for a decision should be given when there is a statutory right of appeal and why reasons need not be contemporaneously declared together with the decision, in other instances, where though there is no right of appeal, judicial review may be available to challenge decisions of statutory bodies. The need for reasons for a decision in instances where there is a statutory right of appeal, is because, in the exercise of appellate jurisdiction the court should visit the merits of the decision as well as the lawfulness of the application of the law. Thus, it is

necessary to be apprised of and consider reasons for the decision. Similarly, in the exercise of judicial review, the Court has to consider whether there are errors of law embedded in the decision and also whether the decision is reasonable. In the absence of reasons for the decision, how can those matters be gone into? Thus, I must respectfully record disagreement with the limitations His Lordship has imposed regarding the instances where there exists a legal duty to disclose reasons for the decision.

However, it is pertinent to note that His Lordship has insisted on the need to disclose reasons for the decision, if and when, the decision is impugned before a Court. In the matter presently before this Court, the 2nd to 4th Respondents who were members of the Court Martial, have not placed reasons for the impugned finding of guilt before the Court of Appeal. Thus, according to the principle enunciated by Justice Sarath Silva, the impugned finding of the Court Martial is liable to be quashed on that ground alone. In this regard, it is to be noted that learned Senior State Counsel did not offer any explanation as to why reasons for the verdict pronounced by the Court Martial were not placed before the Court of Appeal.

With the view to considering the judgment of the Supreme Court in ***Karunadasa v. Unique Gem Stones Ltd. and Others***, *[(1997) 1 Sri L.R. 256],* cited by both the learned President's Counsel for the Appellant and learned Senior State Counsel for the Respondents, it is necessary to initially consider the prelude to that case, namely ***Unique Gemstones Ltd. v. W. Karunadasa and Others,*** *[(1995) 2 Sri L.R. 357].* This matter has also originated from a decision given by the Commissioner of Labour in terms of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, in the backdrop of the 1st Respondent (employee) having complained to the 2nd Respondent – Commissioner of Labour that the Petitioner (employer) had terminated his services. The employer denied that allegation and counter-claimed that the 1st Respondent vacated services following frequent instances of absenteeism. Following the conduct of an inquiry by the 3rd Respondent - Assistant Commissioner, the 2nd Respondent - Commissioner of Labour determined that the employment of the 1st Respondent had been terminated by the Petitioner and thus directed that the workman be reinstated. He further directed that a specified amount of back wages be paid to the 1st Respondent. The Petitioner asked the Commissioner to provide him reasons for his decision, to

which the latter did not respond favourably. Thereafter, the Petitioner moved the Court of Appeal for the issuance of a writ of certiorari to quash the decision of the 2nd Respondent Commissioner, on the footing that the impugned decision was not accompanied with reasons for the decision, and thus it was alleged that the inquiry contravened the principles of natural justice. Even after his decision was challenged in Court, the 2nd Respondent did not tender to the Court of Appeal reasons for his decision. Nor was the record of the inquiry conducted by the Assistant Commissioner or his recommendation to the Commissioner presented to Court. In fact, both of them had not even been represented before the Court of Appeal. In this setting, having examined a series of judgments reflecting both English and Sri Lankan law, Justice H.W. Senanayake while issuing a writ of certiorari quashing the decision of the Commissioner, observed the following:

> *"**There is a continuing momentum in administrative law towards transparency in decision making. It is my considered view that public officers who wield power on others should give reasons for their decisions**. The failure to give reasons is a breach of section 17 of the T.E. Act because it is inconsistent with the principles of natural justice. It is my view the 2nd Respondent's failure to give reasons is a negation of natural justice."* [Emphasis added]

Aggrieved by the judgment of the Court of Appeal which resulted in the quashing of the decision of the Commissioner of Labour, the employee (Karunadasa) appealed to the Supreme Court. The ensuing judgment of the Supreme Court is ***Karunadasa v. Unique Gem Stones Limited and Others***. Delivering the judgment of the Supreme Court, Justice Mark Fernando observed as follows:

> *"… Article 12(1) of the Constitution now guarantees the equal protection of the law. **In the context of the machinery for appeals, revision, judicial review, and the enforcement of the fundamental rights, giving reasons is becoming, increasingly, an important 'protection of the law'** (see for instance Bandara v. Premachandra) for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired. … To say that natural justice entitles a party to a hearing, does not mean merely that his evidence and submissions must be heard and recorded; **it necessarily means that he is entitled to a reasoned consideration of the case which he presents**. And whether or not*

> *the parties are also entitled to be told the reasons for the decision, if they are withheld,* ***once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable****'; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendations thus justified the conclusion that there were no valid reasons, and that natural justice had not been observed. ...* ***The fact that the 3rd respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons.*** *... While the mere fact that the 3rd respondent held the inquiry does not vitiate the 2nd respondent's order, the 2nd respondent's failure to give reasons is all the more serious because it was not he who held the inquiry.* ***The judgment of the Court of Appeal that natural justice required that reasons be given, must therefore be affirmed****."* [Emphasis added]

It is thus seen that the Supreme Court has in this judgment recognized that the conduct of what appears to be a *fair hearing* does not absolve the statutory body from the duty to give reasons. Further, the Court has recognized that the duty to give reasons is interwoven with the rules of natural justice. The Supreme Court has observed that the absence of reasons for the decision, renders the decision open to the criticism that it is violative of Article 12(1) of the Constitution. Furthermore, the absence of reasons for the decision would deprive the person affected by the decision of the equal protection of the law.

The next judgment which along with the judgment in the *Samalanka Limited* case that was heavily relied upon by learned Senior State Counsel was ***Yaseen Omar v. Pakistan International Airlines Corporation and Others***, *[(1999) 2 Sri L.R. 375]*. That matter also related to an inquiry conducted by the Commissioner of Labour in terms of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The Court of Appeal had set aside the impugned decision of the Commissioner of Labour on the ground that giving reasons for the decision is a *sine qua non* for a *fair hearing*, and that the Commissioner had not given reasons for the impugned decision. In appeal to the Supreme Court, Justice Dr. Shirani Bandaranayake, as she was then, citing with approval the judgment of Justice Kulatunga in *Samalanka Limited v. Weerakoon, Commissioner of Labour and Others* has observed that there is no general principle

of administrative law that natural justice requires the authority making the decision to adduce reasons, provided the decision is made after holding a *fair inquiry*. Justice Bandaranayake has also considered the judgment of the Queen's Bench Division in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery,* and cited with approval its *ratio decidendi* being, ***'while there is no general duty to give reasons for a decision, there are classes of cases where there is such a duty, namely (a) situations where the subject matter is an interest so highly regarded by the law, such as for example personal liberty that fairness requires that reasons, at least for particular decisions, be given as of right, and (b) where the decision appears to be aberrant'***.

Justice Bandaranayake has extensively dealt with the material that had been placed before Court by the Commissioner of Labour including the Report of the relevant Assistant Commissioner of Labour. The only logical conclusion that can be arrived at is that Her Ladyship was satisfied that the Commissioner of Labour had conducted a *fair inquiry* in compliance with section 17 of the Act, which requires the Commissioner to conduct an inquiry in a manner not inconsistent with the principles of natural justice. By the detailed reference to the material considered by the Commissioner, it is evident that Her Ladyship was convinced of the correctness of the decision the Commissioner had arrived at. It also appears that Her Ladyship was convinced that the decision of the Commissioner could not be invalidated merely due to the absence of reasons, particularly as there was no statutory requirement for the Commissioner to give reasons for his decision. Thus, it would not be possible for me to agree with the submission of learned Senior State Counsel, that Justice Bandaranayake's views serve to propound a 'general principle of administrative law, that in the absence of a statutory requirement, there is no general principle that requires the authority making the decision to adduce reasons, provided the decision is made after holding a *fair hearing*'. In my view, Justice Bandaranayake by recognizing the principle contained in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery,* has left it open for a Court exercising the function of judicial review to quash a decision of a statutory body to which reasons have not been attached, if the inquiry and the decision come within one of the two situations referred to in that judgment.

In the subsequent case of ***Lanka Multi Moulds (Pvt) Ltd v Wimalasena, Commissioner of Labour and others***, *[(2003) 1 Sri L.R. 143]*, Justice Mark Fernando has reiterated his views regarding the duty to give reasons, in the following manner:

> "*Although the Commissioner has a discretion in respect of both limbs of section 6, that is not an unfettered or unreviewable discretion. As the Court of Appeal observed, he must give reasons for his decision. Although in Samalanka Ltd. v Weerakoon, it was held by Kulatunga, J (with G.P.S. de Silva, CJ and Ramanathan, J agreeing), that the Commissioner was not under a duty to give reasons, I took the contrary view in Karunadasa v Unique Gemstones Ltd. (with Wadugodapitiya, J and Anandacoomaraswamy, J agreeing). That decision was considered and followed by Gunasekera, J in Ceylon Printers v Commissioner of Labour. Since G.P.S. Silva, CJ agreed with Gunasekera, J on that occasion it is clear that he no longer agreed with Samalanka. In Mendis v Perera, I observed that* ***the audi alteram partem rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal, and that natural justice would be devalued if the tribunal does not consider the evidence and the submissions, evaluate it properly and not in haste, and give reasons for its conclusions****. However, in Yaseen Omar v Pakistan International Airlines, Samalanka was followed, apparently without the attention of the Court being drawn to the subsequent decisions to the contrary and relevant citations. …*
>
> ***It is therefore necessary to reiterate what has been long recognized: that the statutory conferment of a right of appeal against the decision of a tribunal has the effect of imposing a duty on that tribunal to give reasons for its decisions. …*** *The conferment of a right to seek revision or review necessarily has the same effect. As the decisions cited show, if the citizen is not made aware of the reason for a decision he cannot tell whether it is reviewable, and he will thereby be deprived of one of the protections of the common law – which Article 12(1) now guarantees. Today, therefore, the conjoint effect of the machinery for appeals, revision, and judicial review and the fundamental rights jurisdiction, is that* ***as a general rule tribunals must give reasons for their decisions****."* [Emphasis added]

Another aspect of this issue arises out of the contemporary view that wholly unreasonable or arbitrary decisions are violative of Article 12(1) of the Constitution. When reasons for a decision are not disclosed, the Court is deprived of the opportunity of considering reasons for the decision, for the purpose of determining whether the decision is reasonable. Particularly when reasons are not revealed even after the decision is impugned before a Court, there is a justification to conclude that, (a) reasons were not revealed as the statutory body had no reasons to be given, or (b) the reasons which the statutory body had taken into account were subjective or otherwise indefensible before a Court of law, and hence would not withstand an objective scrutiny. In these situations, there is every likelihood that the Court would conclude that the decision is either unreasonable, arbitrary or unlawful due to other reasons. Thus, there is a strong argument in favour of the proposition, with which I find myself in agreement, that **decisions which are pronounced without reasons being revealed, and no legally tenable excuse being presented to Court for not having revealed reasons, are decisions which are violative of Article 12(1) of the Constitution, and thus unlawful. The situation gets compounded when reasons for the decision are not revealed even to Court, once the decision is impugned**.

In this regard, the following views of Dr. Mario Gomez contained in his article titled ***'Blending Rights with Writs: Sri Lankan Public Law's New Brew'*** published in 2006, in *Acta Juridica, University of Cape Town's Law Journal,* is of particular importance:

> "*There are two ways of challenging the discretionary power of public authorities: writs and fundamental rights. In recent years, there has been a cross-fertilization of ideas and concepts between these two areas. In applications for a writ, Sri Lankan courts are beginning to assert that the exercise of discretionary power by the public authority must conform with the requirements of Article 12 (the right to equality and equal protection) as well as with the other traditional grounds of review. At the same time the courts have asserted that* ***the constitutional right to equality and equal protection includes the right to natural justice, to reasons,*** *a recognition of legitimate expectations and the right against arbitrary and unfair treatment. This cross-fertilization of ideas and concepts has considerably enriched Sri Lankan public law."* [Emphasis added]

Justice Sripavan as His Lordship was then, in ***Benedict and others v Monetary Board of the Central Bank of Sri Lanka and others,*** *[(2003) 3 Sri L.R. 68]* has held that failure to give adequate reasons amounts to a denial of justice and therefore is itself an error of law. His Lordship held as follows:

> "*The reasons must not only be intelligible but should deal with the substantial points which have been raised. The Courts have treated inadequacy of reasons as an error on the face of record so that inadequately reasoned decision could be quashed, even if the duty to give reasons was not mandatory… In the absence of reasons, the person affected may be unable to see whether there has been a justiciable flaw in the decision making process…Giving reasons introduces clarity and minimizes arbitrariness; it gives satisfaction to the party against whom the order is made and also enables the supervisory court to keep any tribunal within bounds. If the reasons are not given, the court can only draw an inference that the first respondent had no rational reason for its decision and has failed to act with procedural fairness towards depositors and creditors."*

His Lordship has expressed a similar view *in* ***Lankem Tea and Rubber Plantations (Pvt) Ltd. v Central Bank of Sri Lanka and Others****, [(2004) 2 Sri L.R. 133]* wherein His Lordship held as follows:

> *"In the absence of reasons, it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In R v Mental Health Review Tribunal, ex parte Clatworthy, it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing."*

In ***Shell Gas Lanka Ltd. v Consumer Affairs Authority and Another****, [(2005) 3 Sri L.R. 262],* the Petitioner had sought prior approval in writing from the Respondent to revise the retail price of liquid petroleum (gas, for home consumption). That application and a subsequent appeal had been rejected by the Respondent. In this backdrop, the Petitioner contended before the Supreme Court, inter-alia that the Respondent failed to give reasons for his decision (refusal to permit a

revision of the price) and therefore, the decision was unreasonable. Justice Sisira de Abrew held that, in His Lordship's view, failure to give reasons can be construed as 'no reasons'. Citing a long line of local and foreign judicial decisions, His Lordship held that natural justice demands that administrative tribunals should give reasons for their decisions. Further, His Lordship was of the view that unreasonable decisions of administrative tribunals could be quashed by the Court of Appeal in the exercise of its writ jurisdiction. Accordingly, a writ of certiorari was issued to quash the decisions of the Respondent and a writ of mandamus was issued to compel the Respondent to determine the Petitioner's application.

That Justice Dr. Shirani Bandaranayake (as she was then) has subsequent to the delivery of the Judgment in *Yaseen Omar v. Pakistan International Airlines Corporation and Others* reconsidered her view on this matter, is evident when one considers that Her Ladyship has expressed the following views in ***Choolanie v. People's Bank and Others*** *[(2008) 2 Sri L.R. 93]*:

> *"On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Furthermore, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily in coming to their conclusion. …"*

Her Ladyship in ***Hapuarachchi and Others v. Commissioner of Elections and Another*** *[(2009) 1 Sri L.R. 1]* has reiterated her views regarding this important question of law, in the following manner:

> *"Accordingly, an analysis of the attitude of the Courts since the beginning of the 20th (sic) century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness.* ***Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try***

> ***to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement**."* [Emphasis added]

In ***Central Bank of Sri Lanka and Others v Lankem Tea and Rubber Plantations (Pvt) Ltd*** *[(2009) 2 Sri L.R. 75],* a writ of certiorari from the Court of Appeal was sought to quash a penalty imposed on the Petitioner by the Respondents for an alleged contravention of a provision of the Exchange Control Act. The Petitioner alleged that reasons were not given for the imposition of the penalty. The Petitioner also alleged that the President in her capacity as the Minister of Finance had refused to mitigate the penalty and had also refused to give reasons for the refusal. The Court of Appeal issued the writ and quashed the impugned decisions. The Respondents appealed against that judgment to the Supreme Court. Justice Marsoof with whom Chief Justice Sarath N. Silva and Justice Shiranee Tilakawardane agreed, while affirming the judgment of the Court of Appeal and dismissing the Appeal, held as follows:

> "*It is important to note that the changes taking place in other jurisdictions have also had their influence on our courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions. The Sri Lankan authorities were examined recently by the Supreme Court in M. Deepthi Kumara Guneratne and Two others v Dayananda Dissanayake and Another SC (FR) Application No. 56/2008 (SC Minutes dated 19th March 2009) in which the Supreme Court has moved towards recognizing a general duty to give reasons. ... I am of the opinion that in the circumstances of this case, the decisions contained in P10 and P14 cry out for reasons, and the failure to give any, render them devoid of any legal validity. I hold that the failure to give reasons rendered the decisions contained in P10 and P14 nugatory..."*

I wish to also consider the judgment of the Court of Appeal in ***Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Martial and Others*** *(CA Writ 333/2011, CA Minutes 1st June 2020)* decided by Justice Mahinda Samayawardhena. In this matter, the Petitioner, an aircraftman of the volunteer force of the Sri Lanka Air Force had been found '*guilty'* by a General Court Martial for committing murder and sentenced to rigorous imprisonment for life.

One out of the three grounds on which the Petitioner sought the quashing of the finding of guilt and the sentence imposed on him, was that reasons were not given for the finding of the General Court Martial. It was common ground that the General Court Martial was obliged to act in terms with the Sri Lanka Air Force Act read together with Court Martial (General and District) Regulations promulgated in terms of the Act, and that neither legislation specifically required the General Court Martial to give reasons for its findings. Justice Samayawardhena has observed the following:

> *"… **If a country is governed by the rule of law, reasons for decisions must be given, no less when a man is convicted for murder and the death sentence or life imprisonment is passed as the punishment**. … **The giving of reasons for decisions is inherent in the justice system of any civilized society**. It is embedded in it and inseparable from it. It is a basic requirement of natural justice. Such a fundamental requirement which goes to the root of the matter cannot be taken away by conjecture. … **I would go one step further to say that not only can it not be assumed that a requirement to give reasons is excluded by implication, even if that requirement is excluded in express terms, such (purported) exclusions shall be subject to strict interpretation in order to promote the essence of natural justice**. … In my judgment, giving reasons for a decision of the Court Martial has not been dispensed with expressly or by necessary implication in the Air Force Act or Regulations made thereunder. Hence, **failure to give reasons is fatal to the conviction** of murder in the instant case**… If natural justice does not require giving reasons for decisions, fairness, at least does**. **… Failure to give reasons is a denial of justice**. … **Failure to give reasons suggests arbitrariness**. … Giving reasons for decisions minimizes abuse of power. … When shall the decision-maker give reasons? **The decision-maker shall give reasons at the time of making the decision, unless there is an agreement to the contrary**. Can failure to give reasons be remedied by giving reasons later? The answer shall be in the negative. If reasons have been given but not communicated to the party concerned, the situation is different. … If the decision is an empty decision devoid of reasons, there is no decision in the eyes of the law. It is a nullity – nullity ab initio; bad – incurably bad. There is no necessity to quash such a purported decision for there is nothing to quash in the first place. Nevertheless, to avoid any*

*confusion and for clarity, the decision can be formally quashed by way of certiorari."* [Emphasis added]

I must record my agreement with the views expressed by Justice Mahinda Samayawardhena.

As regards the judgment of Justice Samayawardhena in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others*, we inquired from learned Senior State Counsel as to whether the Attorney General who represented the Respondents in that matter agrees with the views of the Court of Appeal, and learned Senior State Counsel responded in the negative. We then inquired whether the Attorney General had on behalf of the Respondents preferred an Appeal to this Court against the judgment of the Court of Appeal, to which learned Senior State Counsel also responded in the negative. However, he did not venture to explain as to why an Appeal was not presented.

**Impugned judgment of the Court of Appeal**

I must now turn towards the two reasons cited by the Court of Appeal (contained in the impugned judgment) for its conclusion that a Court Martial is not required by law to give reasons for its findings.

**First ground – Reasons need not be given since juries in jury trials in the High Court are not required to give reasons**

The first reason identified by the Court of Appeal is that the Code of Criminal Procedure Act does not require a jury to give reasons for its verdict, nor does the Navy Act require a Court Martial to give reasons for its findings. Thus, the impugned judgment of the Court of Appeal seems to suggest the following:

(a) Proceedings before a Court Martial is similar, if not identical to jury trials in the High Court. A jury is not required by the provisions of the Code of Criminal Procedure Act to give reasons for its verdict. Thus, a Court Martial is also not required by law to give reasons for its decisions.

(b) The Navy Act does not contain a legal requirement for a Court Martial to give reasons for its finding (verdict). Thus, there is no legal duty on a Court Martial to give reasons for its finding.

**Court Martial proceedings and jury trials in the High Court**

The Code of Criminal Procedure Act recognizes and provides three formats for the conduct of criminal trials by the High Court. They are, (i) trial before a judge of the High Court sitting without a jury, (ii) trial before a judge of the High Court sitting with a jury, (commonly referred to as a 'jury trial'), and (iii) trial by three judges of the High Court, (commonly referred to as a 'trial at bar'). Chapter XVIII of the Code of Criminal Procedure Act, No. 15 of 1979 regulates the conduct of such a 'jury trial'. The basis for the first part of the first reason cited by the Court of Appeal, is that, in several respects a trial before a 'Court Martial' is parallel to a 'jury trial' in the High Court, and as the law (as it stands at present) does not require a jury to give reasons for its verdict, a Court Martial is also not required by law to give reasons for its finding (verdict). As I can see, there are two fallacies in this approach, arising out of the supposed parallel between the two trial forms. First, whether the equation of a 'jury trial' in the High Court to a trial before a Court Martial is a legally tenable proposition. Secondly, whether independently of a determination on whether a jury is required to give reasons for its verdict, the question whether a Court Martial is required by law to give reasons for its finding should be determined.

The attempt at drawing a parallel between a jury trial and a trial before a Court Martial arises out of the external manifestation that a judge of the High Court who presides at a trial in the High Court before a jury performs functions which are performed by the Judge Advocate in a trial before a Court Martial, and that members of the Court Martial are like jurors who decide on facts based upon which they arrive at the finding (verdict). There is indeed a rational basis for this parallel. Thus, I respectfully agree with the proposition of Chief Justice H.N.G. Fernando in ***Jayanetti v. Martinus and Others**, (71 NLR 49),* that the functions of a Judge Advocate are **comparable** to that of a Judge of a High Court in a jury trial. However, a thorough consideration of the powers and functions of a judge of the High Court in comparison with those of a Judge Advocate of a Court Martial, reveals that the two positions and their powers and functions are **not identical**. Learned President's Counsel for the Appellant has pointed towards three critical

factors (referred to earlier) with which I find myself in agreement. These factors distinguish the two roles. The distinctions in the two roles arise out of section 39 of the Navy Act, when compared with provisions of sections 239 and 240 of the Code of Criminal Procedure Act. What appears to be a distinction of fundamental importance, is that, while a Judge of the High Court is empowered to preside over proceedings in the High Court and **give directions to the jury** on matters of law which **the jury is obliged by law to comply with**, as regards questions of law, in terms of the Navy Act, members of a Court Martial are not relegated to perform the subordinate role a jury is required to perform. Members of a Court Martial are not only the decision-makers with regard to questions of fact, they are equally placed with regard to determination of questions of law. The role and functions of the Judge-Advocate in a trial before a Court Martial as provided in section 39 of the Navy Act is **'advisory'** in nature, and he is subordinate to the legal standing of members of the Court Martial.

Sections 229 and 230 of the Code of Criminal Procedure Act, provide that, the judge of the High Court shall (i) when the trial is concluded, charge the jury summing up the evidence and laying down the law by which the jury is to be guided, (ii) decide all questions of law arising in the course of the trial, (iii) decide upon the meaning and construction of all documents given in evidence at the trial, (iv) decide upon all matters of fact which may be necessary to prove in order to enable evidence of particular matters to be given, and (v) decide whether any question which arises is for himself or the jury. Further, section 231 provides that the judge may in the course of his summing up, if he thinks proper, express to the jury, his opinion upon any question of fact or upon any question of mixed law and fact relevant to the case at hand. It would thus be seen that, the legal scheme and provisions relating to the powers and functions of a judge of the High Court in a 'jury trial' differ significantly from those relating to a Judge Advocate in a trial before a Court Martial. This in my view creates a significant difference between a jury trial and a trial before a Court Martial.

The other difference stems from the distinction between the High Court before which jury trials take place and Court Martials. As detailed out in a different part of this judgment, due to several significant reasons, a Court Martial cannot be equated to a Court of law. As pointed in that part of this judgment, a Court Martial lacks the features of a Court of law, and is a **tribunal** (and not

a 'court') which has been conferred with *inter-alia,* judicial powers to impose penal and disciplinary sanctions.

Therefore, I find myself in agreement with the submission made in this regard by learned President's Counsel for the Appellant, that a trial before a jury in the High Court <u>is not identical</u> to a trial before a Court Martial. His submission that in the eyes of the law the two types of trial proceedings are distinguishable, in my view, is well-founded.

In the circumstances, I find myself unable to agree with the reasoning contained in the impugned judgment of the Court of Appeal, that, since a jury in a jury trial in the High Court is not required by the Code of Criminal Procedure Act to give reasons for its verdict, a Court Martial too is not required to give reasons for its decisions.

Be that as it may, I would not be surprised, if in view of recent developments in Public Law aimed at ensuring adherence to the rule of law, fairness, reasonableness, transparency and accountability, in the near future the common law would demand that trial juries be also required by law to give reasons for their verdicts. Such a revolutionary change in the 'trial by jury' system would *unlock the veil of secrecy surrounding the jury room,* which has so far been guarded. That of course is not a matter to be determined in this appeal. However, that is another reason as to why the issue before this Court should not be determined founded upon the prevailing written law relating to jury trials in the High Court being the Code of Criminal Procedure Act, which does not specify that a jury should give reasons for its verdict.

**No explicit statutory duty conferred by written law on a Court Martial to give reasons for its findings**

Section 43 of the Navy Act provides for the manner of deciding questions before a Court Martial. Section 43 reads as follows:

> *"Every question before a court martial shall be decided by the majority vote of the members of the court martial. Where there is an equality of votes of the members of a court martial on the question of the finding in any case, the accused in that case shall be*

> *deemed to be acquitted. Where there is an equality of votes of the members of a court martial on the sentence in any case or on any question arising after the commencement of the hearing of any case other than the question of the finding, the president shall have a casting vote."*

It is thus seen that the Navy Act does not explicitly impose a statutory legal duty requiring a Court Martial to give reasons for its finding.

This Court inquired from learned Senior State Counsel for the Respondents whether there existed Rules made by the Minister in terms of section 161 of the Navy Act, which contained further legal requirements pertaining to the conduct of Court Martial proceedings and regarding the making of orders, the finding and sentence. Learned counsel responded in the negative.

The written law mainly provides the basic legal framework, and it is the duty of common law judges to fill in the rest with applicable legal principles existing in the domain of the unwritten law. On many occasions, the common law has filled lacuna existing in the written law and has thereby facilitated the enforcement of the law and the administration of justice in a just and fair manner. For example, it is very rarely that a legal mechanism which confers statutory power to a public or statutory functionary specifically provides that such body should adhere to the rules of 'natural justice', grant a 'fair hearing' and decide 'objectively'. Omissions by the legislature have been and continues to be filled by judges, by incorporating doctrines found in the common law into legislative provisions. Thus, merely because a particular legal requirement is not explicitly found in written law, it cannot be hurriedly and safely assumed that such a legal requirement does not exist in law. In this regard, it is important to note that the Navy Act also does not contain any provision of law or feature which negatives the existence of a legal duty on a Court Martial to give reasons for its findings. Furthermore, section 132 of the Navy Act provides that such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of *mandamus, certiorari,* and *prohibition* shall be deemed to apply in respect of any Court Martial. Thus, it is seen that the legislature in its own wisdom has provided by written law for judicial review of decisions of Courts Martial to be carried out from the perspective of Public Law, which governs the issuance of such writs. That is another reason as to why the legal

scheme contained in the Navy Act should be viewed from the perspective of Public and Administrative Law.

A careful examination of the provisions of the Navy Act reveals that there does not exist any legal provision in that Navy Act which negatives the common law duty for a Court Martial to give reasons for its finding and order of sentence. In this regard, it is to be noted that, the Indian Supreme Court refrained from granting any relief to the Petitioner in *S.N. Mukherjee v. Union of India,* since the court observed that the provisions of the Army Act of India and in particular Rules 62 and 66(1) of the Rules made in terms of the Army Act in the opinion of the Indian Supreme Court, negatived the duty to give reasons for the finding and sentence imposed by a Court Martial. It is on that footing that the Indian Supreme Court having emphatically recognized a common law requirement for statutory bodies to give reasons for their decisions, held that a Court Martial established in terms of India's Army Act is not required to give reasons for its finding and sentence.

**Second ground contained in the impugned judgment: Judicial precedent contained in *G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya***

The second reason which appears to have influenced the Court of Appeal to arrive at the finding that a Court Martial is not required by law to give reasons for its finding, is a pronouncement contained in a judgment of the Court of Appeal decided by three judges of that Court in ***G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others***, *[CA Writ 679/2010, CA Minutes of 16th December 2011]*. Learned Deputy Solicitor General who appeared in the Court of Appeal for the Respondents had invited the Court of Appeal to treat that judgment (decided by three judges of the Court of Appeal) as judicial precedent to the proposition that a Court Martial is not required by law to give reasons for its finding. That case relates to a onetime Commander of the Sri Lanka Army (the Petitioner) who was found *'guilty'* by a Court Martial and sentenced to serve a term of imprisonment. He sought to have the finding and the sentence imposed on him by the Court Martial quashed by a writ of certiorari. In that matter, one out of the several grounds based upon which the Petitioner sought to challenge the lawfulness of the impugned finding of the Court Martial and the sentence imposed on him, was that no reasons were given by the Court Martial for its finding. The Court of Appeal dismissed the application *in-limine* on the premise that the

Petitioner was *'guilty'* of non-disclosure and suppression of certain material to the Court of Appeal which in the view of the Court, the Petitioner was obliged to reveal. Therefore, the Court held that the Petitioner was not entitled to the writ of certiorari, as it is a discretionary remedy. On the afore-stated question of law, whether a Court Martial is obliged by law to give reasons for its findings, the Court of Appeal has held as follows:

> *"The learned counsel submitted that the Court Martial had been declared a court of law in G.S.C. Fonseka v. Dhammika Kithulegoda and seven others (SC No. 1/2010 CA Writ Application 676/2010 – SC Minutes of 10th January 2011) wherein the Supreme Court has 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."*

It thus appears that the Court of Appeal in the afore-stated judgment had merely referred to the submission made to it by counsel for the Petitioner, that as a Court Martial is to be recognized as a 'court', it should give reasons for its decision, and has responded to that submission by reiterating the determination of the Supreme Court, that a Court Martial should be considered to be a 'court' only for the purposes Article 89(d) of the Constitution. There is no specific finding by the Court of Appeal, that a Court Martial need not give reasons for its decisions. Nor is there such a finding in the Determination of the Supreme Court. I must observe that the Court of Appeal has given an extremely narrow construction to the Determination of the Supreme Court. It has not considered the broader and critical issue of whether a Court Martial is obliged by the common law to give reasons for its findings. This becomes a critical issue, because the Supreme Court had observed that a Court Martial should act 'judicially'. The judgment of the Court of Appeal in my view **does not** contain a finding that the common law on the matter does not impose a legal obligation on a Court Martial to give reasons for its findings.

In the Reference referred to above by the Court of Appeal to the Supreme Court in ***Gardihewa Sarath C. Fonseka v. Dhammika Kithulegoda, Secretary General of Parliament and Others***, *[SC Reference No. 1/2010, SC Minutes of 10th January 2011, reported in 2011 BLR 169]*, the question of law which the Supreme Court had to determine was whether the words 'any court' referred to in Article 89(d) of the Constitution refer to the Supreme Court, Court of Appeal and

the other Courts of First Instance, to the exclusion of tribunals and institutions or whether the words 'any court' include a Court Martial. Chief Justice J.A.N. De Silva has in response to that question of law, observed that the concept of Courts Martial is valid under the Constitution, and that considering Article 4(c) of the Constitution in relation with Articles 16, 105(2) and 142, **a Court Martial is an entity required to function judicially, and exercising judicial power and is recognized as such by the Constitution in terms of the second limb of Article 4(c), has the power to hear and try cases, and impose valid sentences including sentences of death and imprisonment**. Chief Justice De Silva with whom three other judges agreed, held that **a Court Martial is a "court" for the purposes of Article 89(d) of the Constitution**. Justice Saleem Marsoof, in his separate opinion, while agreeing with the conclusion reached by the Chief Justice, expressed the view that the institution of Court Martial, being an emanation of executive power, is not a court, tribunal or institution set up for the administration of justice which protect, vindicate, and enforce the rights of the people as described in Article 105 of the Constitution, and has no place in Chapter XV of the Constitution. However, Justice Marsoof held that **a Court Martial is a competent court within the meaning of the phrase in Article 13(4) of the Constitution**. **The term 'competent court' includes not only a regular court, but even an 'extraordinary court' such as a Court Martial**. In the circumstances, Justice Marsoof held that the words 'any court' in Article 89(d) should be construed in a manner so as to include all courts which are created and established or otherwise recognized by the Constitution as being competent to impose punishments envisaged in that Article, including a Court Martial.

For the purpose of determining this Appeal, what is pertinent to note is that both views of the Supreme Court recognize the fact that a Court Martial is a 'court' and is thus required by law to act 'judicially', in the hearing of cases and in the imposition of punishments. This is notwithstanding the unresolved issue whether a Court Martial that is required to function 'judicially' and is empowered with 'judicial power' can be appointed by the Executive, which would in this instance include the President and the Commander of the Sri Lanka Navy. Be that as it may, Article 13(4) of the Constitution provides that, any person charged with the commission of an 'offence' shall be entitled to be heard, in person or by an attorney-at-law, at a ***'fair trial'*** by a competent court. It is thus seen that in addition to the common law requirement that a ***'fair hearing'*** should be given by a statutory authority (which would include a Court

Martial) conferred with power to arrive at a decision which has the potential of affecting the rights of a person, there is an additional duty conferred on a Court Martial in view of its standing as a 'Court', to afford a ***'fair trial'*** to the accused. In terms of Article 13(4) of the Constitution, the right to a *'fair trial'* is a fundamental right conferred on any person charged with the commission of an offence. Thus, an accused before a Court Martial such as the Appellant, should be able to enjoy the fundamental right to a *'fair trial'.* In my view, a ***'fair trial'*** is a process that is a refined and specialized form of a ***'fair hearing'***. A *'fair trial'* is the standard which a court of law is required to adhere to. Thus, in my view, a Court Martial is constitutionally required to adhere to **a higher standard of fairness** than a normal statutory body which is empowered to take a decision that has a bearing on the rights of a person. It must be observed that a Court Martial is no ordinary statutory body or tribunal. It is required to adhere to the standards of *fairness* required from a Court of law. That higher standard of fairness is an additional factor which imposes a duty on a Court Martial to give reasons for its finding, as in the case of a Court of law being required to give reasons for its verdict. Such reasons for the verdict form a major portion of the 'judgment' of a Court of law that has exercised criminal jurisdiction.

Thus, I am compelled to point out that the reliance by the Court of Appeal in the impugned judgment on ***G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others***, is not defensible in the eyes of the law.

**Courts of law and Courts Martial**

Though in the afore-stated Determination of the Supreme Court, a Court Martial has been recognized to be a 'Court of law' for the purposes of Article 89(d) of the Constitution, there are significant differences between a 'Court of law' and a 'Court Martial'. As regards a trial before a Court Martial established in terms of the Navy Act is concerned, the principal differences between the two become significant when consideration is given to the following features pertaining to a Court Martial:

(i) When there is information that an offence recognized by the Navy Act has been committed by a person who is subject to naval law, the Commander of the Navy is empowered to direct the initiation of an investigative process, referred to as the

holding of a 'Board of Inquiry' and is empowered to appoint members to that Board. [Regulations 2 and 4, Navy (Board of Inquiry) Regulations, 1975]

(ii) Following the conduct of the investigative process by the Board of Inquiry, the Commander of the Navy may use the information gathered by the Board of Inquiry to determine whether the alleged offender should be subjected to a Court Martial. [Regulation 5, Navy (Board of Inquiry) Regulations] Thus, it can be said that the Commander of the Navy is empowered to decide on the institution of Court Martial proceedings against the alleged offender.

(iii) Thereafter, the Commander of the Navy is empowered to issue a 'charge sheet' against the alleged offender and thereby institute proceedings against the alleged offender. [Document marked "P13" in the Court of Appeal which is the 'charge sheet' issued to the Appellant containing offences alleged to have been committed by him, reveals that.]

(iv) Unlike a Court of law, a Court Martial lacks permanency, in that it is convened on a case-by-case basis. Thus, it may be termed as an 'ad-hoc tribunal' as opposed to a 'standing or permanent court'.

(v) A Court Martial is convened based on an order by the President of the Republic who is also the Commander-in-Chief of the Armed Forces or by an officer not below the rank of Captain authorized in that regard by the President of the Republic. [section 34(1), Navy Act] (Section 34 provides two exceptions to this, wherein due to exigencies of the situation, certain other Navy officers have been empowered to constitute a Court Martial.) Thus, a Court Martial is constituted at the discretion of the President or an officer of the Navy authorized by the President.

(vi) Members of a Court Martial are necessarily officers of the Navy, Army or the Air Force and appointed by the same authority who has ordered the convening of such Court Martial [section 35, Navy Act] or in certain situations by the President of the Court Martial. (The President of a Court Martial is also appointed by the President or other officer who convened the Court Martial.) Thus, the appointment of members of a Court Martial is case specific.

(vii) Neither the President of the Court Martial nor other members of a Court Martial are 'judicial officers'. Their primary function is not to hear cases, they do not receive any

judicial training in judicial adjudication of disputes, and are not required to adhere to judicial ethics. Thus, they cannot be categorized as professional judges. It is apt to refer to them as 'military professionals', who are called upon on a case-by-case basis to administer 'military justice'.

(viii) The Judge Advocate who plays a pivotal role in the functioning of a Court Martial, is also appointed by the President of the Republic or by such officer who convened the particular Court Martial. [section 38, Navy Act] Thus, the post of Judge Advocate is also case specific.

(ix) As pointed out above, the Judge Advocate's role in Court Martial proceedings is 'advisory' in nature. [section 39, Navy Act] Even on questions of law, he cannot 'direct' members of the Court Martial regarding the manner in which the relevant question should be determined.

(x) A Court Martial is both a 'disciplinary body' as well as a 'tribunal' vested with jurisdiction and powers akin to a Court of law vested with criminal jurisdiction.

(xi) The President of the Republic is entitled to revise a punishment imposed by a Court Martial. [section 122, Navy Act]

It would thus be seen that the investigation into an offence, institution of criminal proceedings, convening of the Court Martial and its composition, and the appointment of the Judge-Advocate is vested in the Executive branch of the State (primarily the President of the Republic, Commander of the Navy and by officers subordinate to the Commander). It is seen that the entire military justice system provided for in the Navy Act is centered on the Executive. Whereas, the functioning of a Court of law exercising criminal jurisdiction and hearing of cases by such Court happens within a wholly different legal framework, wherein there are structural and efficacious arrangements to guarantee independence and professionalism in the administration of criminal justice. Delivery of criminal justice does not occur at the discretion of the Executive. In view of the afore-stated features pertaining to proceedings of a Court Martial, it is my view that a Court Martial can in no way be recognized as an independent, impartial and neutral judicial tribunal, notwithstanding it being conferred with the exercise of functions which are akin to judicial functions and possessing the power to impose severe penal punishments.

It is necessary to appreciate that senior military officers, unlike civilian judges, would be well-placed to appreciate incidents which occur in a military setting and would be ideally suited to arrive at qualitative value judgments on military matters. However, the competency of members of a Court Martial to appreciate complex questions of law such as satisfaction of ingredients of an offence, and other important matters such as the assessment of credibility and testimonial trustworthiness of witnesses, which are issues that would invariably arise in the course of a trial before a Court Martial, can give rise to well-founded concerns.

Thus, a Court Martial can in my view be categorized as an ***'extraordinary judicialized military tribunal possessing a fusion of disciplinary and criminal adjudicatory jurisdiction'.*** A Court Martial lacks certain fundamental and key features of a Court of law. Whether the system of military justice administered by Courts Martial is in conformity with constitutionally recognized norms pertaining to administration of justice, can be called into question in many respects. Whether in view of the prevailing law relating to the composition and conduct of Court Martial proceedings, an accused before such tribunals can reasonably be expected to enjoy the fundamental right to a *fair trial* is an important question of law, which may have to be determined in the future. It is not necessary for me to express a view on that matter in this judgment. It is possible that the system of Courts Martial as contained in the Navy Act continues to survive in the contemporary era, purely due to Article 16 of the Constitution, which provides that, all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights guaranteed by Chapter III of the Constitution, and as the Navy Act had been enacted and brought into operation prior to the promulgation of the 1978 Constitution.

In concluding this part of my judgment, I need to touch on one more point. It may be argued that the law and procedure relating to the functioning of Courts Martial in Sri Lanka are similar to that of the United Kingdom, and as Courts Martial in the United Kingdom are not required by either statute or common law to give reasons for their verdicts, in Sri Lanka too, Courts Martials need not give reasons for their verdicts. I would with the greatest respect to those who may wish to advance that proposition, state that I disagree with that view. That is due to the following reasons. The Armed Forces Acts of 2006, 2011, 2016 of the UK, augmented by the Armed

Forces Act of 2021 (which are quinquennial Acts of Parliament of the UK) have greatly enhanced the integrity of the military justice system in the United Kingdom. It is now a system of justice integrated into the core system of Administration of Justice of the United Kingdom. So much so, that the Lord Chief Justice of England and Wales now devotes a chapter of his Annual Report to the Service Justice System (as the military justice system is now called). In view of procedural changes introduced to the Court Martial system by the aforementioned laws and the inbuilt safeguards to ensure that the accused has a right to a fair trial, it can now be safely said that the Court Martial proceedings in the United Kingdom are parallel to jury trials conducted by conventional courts (the Crown Court) exercising criminal jurisdiction of that country, and therefore, the necessity of insisting on a Court Martial to give reasons for its decisions is possibly not necessary. Regrettably though, that cannot be said about the military justice system of Sri Lanka. Some of the key features of the contemporary service justice system of the United Kingdom which contrasts itself from Sri Lanka's military justice system are as follows:

(i) Courts Martial in the United Kingdom are standing permanent courts.

(ii) Members of the Court Martial (Board) who invariably are military personnel are not directly appointed by the respective Commander of the relevant armed force. Nor are they appointed by the relevant Commander at his discretion to hear a particular case.

(iii) Judge Advocates (who come under the Judge Advocate General) are members of the independent judiciary, and are appointed on merit by the independent Judicial Appointments Commission. The Judge Advocate General is appointed by His Majesty the King on the recommendation of the Lord Chancellor. They are not appointed on a case by case basis by the respective Commander.

(iv) During the early stages of trial proceedings before a Court Martial, the Judge Advocate gives on record in open court, a specific direction to members of the Court Martial (the 'Board') referred to as the *'morris direction'*. This direction is aimed at ensuring that members of the Board understand their duties in respect of the trial. These directions are styled to ensure that members of the Board act in an independent manner and need not be influenced by their chain of command directives from senior military officers.

(v) The proceedings of Court Martial are open to the public unless specifically an order is made for proceedings to be held *in camera* for certain limited reasons.

(vi) The directions and rulings which the Judge Advocate may give the Board (members of the Court Martial) on questions of law, procedure and practice are binding on the court.

(vii) The summing up by the Judge Advocate cannot be dispensed with.

(viii) At the end of proceedings, if the Judge Advocate is satisfied that the findings announced by members of the Court Martial are acceptable in law, the Judge Advocate and the President of the Board shall sign a record of the findings. If the Judge Advocate is not satisfied, he shall direct the members of the Board to withdraw and reconsider their findings.

(ix) A person convicted and sentenced by a Court Martial may with the leave of Court appeal to the Court Martial Appeal Court against both the conviction and the sentence. The Court Martial Appeal Court comprises of regular judges of the Court of Appeal.

[While some of these features are found in provisions of the 2006, 2011, 2016 and 2021 Acts, others are found in the Armed Forces (Court Martial) Rules 2009 promulgated by the Secretary of State under the Armed Forces Act of 2006.]

It would be seen that these features provide systemic and procedural safeguards to ensure a fair trial to accused and the delivery of justice. These features are also aimed at ensuring the independence of members of the Court Martial, in that, they are protected from possible influences that may otherwise come their way from the military hierarchy. Further, these features guarantee procedural fairness, integrity of the system of service (military) justice. The Judge Advocate as a person and through his role in a Court Martial, is required to perform judicial functions. There exists a guarantee of professionalism and high integrity in the role and functions of the Judge Advocate. These features also confer on Court Martial a parity of status with jury trials conducted in Crown Courts of the United Kingdom. Regrettably though, none of these features are found in the military justice system of Sri Lanka. Therefore, a comparison between the service justice system of the United Kingdom and the military justice system of Sri Lanka, is

not possible. In the circumstances, I am inclined to hold that in view of the vast differences between the two systems, it is not logical to conclude that because the statutory and English common law do not require a Court Martial to give reasons for its verdict, the same principle should apply to a Court Martial of Sri Lanka governed by the respective Acts, and hence there is no legal duty to give reasons for the verdict. No comparison can be made between the military justice system of Sri Lanka and the service justice system of the United Kingdom.

From the perspectives of compatibility with norms of justice and public policy, and in conformity with human rights, findings (verdicts) of Courts Martial in Sri Lanka should necessarily be viewed with a degree of circumspect. Under such circumstances, the availability of 'reasons' for the finding of a Court Martial, is perhaps the most important source by which a Court of law exercising the function of judicial review could determine whether an accused who has been convicted of committing an offence had received a *fair trial,* and whether the finding (verdict) of the Court Martial had been arrived at independently, impartially, neutrally, necessarily in accordance with the merits of the case, founded upon a correct appreciation and application of the law, and is reasonable. In the circumstances, for the purpose of ensuring justice, fairness and transparency, and the protection of fundamental rights, it is necessary that a legal duty be cast on a Court Martial to declare reasons for its findings (verdict). Perhaps, requiring a Court Martial to give reasons for the verdict, is possibly the only effective guarantee of a *fair trial* to accused who are arraigned before a Court Martial and to ensure that justice is duly administered.

**Section 43 of the Navy Act and Article 15(8) of the Constitution**

The next issue that requires consideration is whether the legal duty imposed on members of a Court Martial by section 43 of the Navy Act to (following the conclusion of recording evidence, submissions of counsel for the prosecution and the defence and the summing up by the Judge Advocate), cast their vote and thereby indicate their individual finding, tantamount to a restriction imposed in terms of Article 15(8) of the Constitution, which restricts an accused before a Court Martial from receiving reasons for the finding arrived at by the Court Martial. This issue arises out of an indirect admission by learned Senior State Counsel that an accused before a Court Martial would in view of his Fundamental Rights to equality and equal protection

of the law recognized by Article 12(1) of the Constitution have the right to know the reasons for the finding of the Court Martial, if not for the provisions of section 43 of the Navy Act. Learned Senior State Counsel submitted that the imposition of a restriction of that nature is permissible in terms of Article 15(8) of the Constitution.

Article 15(8) of the Constitution provides the following restriction on the enjoyment of certain Fundamental Rights recognized by Chapter III of the Constitution.

> *"The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions* ***as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them****."* [Emphasis added]

**Dr. Jayampathy Wickramaratne**, **PC** in ***Fundamental Rights in Sri Lanka*** (2021, 3rd Edition, p. 159) has stated the following:

> *"A Constitution that declares fundamental rights and freedoms lays down permissible restrictions in order to maintain a balance between individual rights and freedoms on the one hand and the interests of the society on the other. While the rights and freedoms represent the claims of the individual, the permissible restrictions represent the claims of society. Yet, as Bhat J stated in Sushila Aggarwal v State (NCT of India), it would be useful to remind oneself that the rights which the citizens cherish deeply are fundamental – it is not the restrictions that are fundamental."*

The submission made by learned Senior State Counsel necessitates this Court to consider whether section 43 of the Navy Act imposes a restriction in terms of Article 15(8) of the Constitution, disentitling an accused before a Court Martial from enjoying the right to know reasons for its finding (final decision).

It is seen that section 43 of the Navy Act imposes a requirement that every matter that requires a decision by a Court Martial including its finding (verdict) be determined by a vote. Implicit in the section is the norm that where there is a difference in the number of votes cast in favour and against a particular proposition, the decision of the majority would prevail. The section also provides for the ensuing situation where there is an equality of votes. Section 43 in my view does not directly or indirectly indicate that it serves as a restriction on a Fundamental Right (in this instance the Fundamental Right enshrined in Article 12(1) of the Constitution) in so far as persons to whom the Navy Act applies. This provision of the law does not prohibit the giving of reasons for the finding or provide a legal entitlement on members of a Court Martial to refrain from giving reasons for their finding. Section 43 provides a mechanism that must necessarily be adopted, as a Court Martial comprises of multiple members who are required to arrive at decisions both during and at the end of the trial proceedings. It is seen that, while adhering to the requirement contained in section 43 of the Navy Act, it is possible for members of the Court Martial to first cast their respective votes declaring their individual decision on whether the accused is *'guilty'* or not, and thereafter give reasons for their respective finding. Consequently, there is nothing stated in section 43 that would prevent either the unanimous views of the Court Martial or the divergent views of members of the Court Martial from being declared as reasons for the finding. Furthermore, if section 43 is to serve as a permissible restriction coming within the ambit of Article 15(8) of the Constitution, there should be an intimate, real and rational connection with the object of the restriction and what is sought to be protected by Article 15(8), namely 'the interests of the proper discharge of their (members of the Armed Forces) duties and the maintenance of discipline among them'. As to how the disclosure of reasons for the finding of the Court Martial in the instant case would have a detrimental impact on the proper discharge of the functions of members of the Armed Forces and the maintenance of discipline among them, is a matter that beats even my imagination. For these multiple reasons, I conclude that section 43 of the Navy Act does not serve as a constitutionally recognized and permissible restriction on the enjoyment of the right to equality and equal protection of the law, which would entitle the accused before a Court Martial to receive reasons for the finding (verdict).

**Reasons for the finding of the Court Martial not revealed to the Court of Appeal**

Learned Senior State Counsel took pains to attempt justifying the conviction of the Appellant by the Court Martial. Based on his interpretation of the evidence placed before the Court Martial, he advanced reasons, which in his view supported the Appellant having been convicted by the Court Martial. However, the purported reasons were not revealed by the Court Martial to the Appellant at the stage the finding was announced. Nor have reasons for the finding been recorded in the official record of the proceedings of the Court Martial. Furthermore, reasons for the finding were not revealed to the Court of Appeal by the 2nd to 4th Respondents, who were members of the Court Martial.

Further, as quoted by me previously, in ***Kusumawathie and Others v. Aitken Spence and Company Limited and Another***, *[(1996) 2 Sri L.R. 18]*, Justice Sarath N. Silva has held that, if a decision that is challenged is not a 'speaking order' carrying its reasons on its face (as in the finding of the Court Martial), when Notice is issued by a Court exercising judicial review, reasons to support the decision have to be disclosed to Court with notice to the Petitioner.

Learned Senior State Counsel did not explain as to why even the Court of Appeal was not apprised of reasons for the verdict pronounced by the Court Martial. Therefore, in the circumstances of this Appeal, it is not possible to consider whether the conviction of the Appellant by the Court Martial is justifiable or not. Further, the absence of providing reasons for the verdict to the Court of Appeal, is another factor which vitiates the finding of the Court Martial.

**Need for reasons for the finding of the Court Martial due to the evidence**

Quite independent of the legal duty cast on a Court Martial by the common law to give reasons for its finding (verdict), in this case, the following analysis of the evidence presented by the prosecution and the defence, would also in my opinion warrant reasons for the finding of guilt to have been given. In the circumstances, the absence of reasons would indicate the unreasonableness and arbitrary character of the finding.

**1st Count**

As regards the 1st count in the charge sheet, which contained an allegation that the Appellant had committed an offence under section 60(2) of the Navy Act, the key ingredient the prosecution was required to prove beyond reasonable doubt was that during the period relevant to that count, the Appellant had, *'without the approval from the competent authority, remained out of his tactical area of responsibility'*, and that such conduct amounted to *'improperly leaving the place of duty'.* That is the applicable prohibition contained in the afore-stated section. It is common ground that for this purpose, the 'competent authority' was the Area Commander of the North Central Naval Area, Rear Admiral Illangakoon. His testimony was that he did not give authorization to the Appellant to stay at *SLNS Gajaba* at night-time instead of staying at the Vanlakai naval detachment. The position of the Appellant was that the Area Commander had given him authorization, as an interim measure (until suitable accommodation for him was arranged at the Vankalai naval deployment), to remain overnight at *SLNS Gajaba.* In the circumstances, to find the Appellant *'guilty'* of the first count, the Court Martial should have, as pointed out by the Judge-Advocate (a) fully believed and accepted the testimony given by Rear Admiral Illangakoon, and (b) rejected the testimony of the Appellant, Lt. Commander Dissanayake and all the defence witnesses. The question arises on what basis the Court Martial decided to do so, particularly in view of the testimony given by the prosecution's own witness Commanding Officer Vankalai - Lt. Commander Dissanayake, whose evidence in this regard cut-across the testimony of Rear Admiral Illangakoon and fully supported the evidence of the Appellant. The impact of Lt. Commander Dissanayake's evidence must be viewed in the backdrop of the prosecution not having treated him as an 'adverse witness'. Had the prosecution done so, it would have been possible for the prosecution to have discredited him and invited the Court Martial to disbelieve his testimony. Furthermore, it is seen that the testimony given by Lt. Commander Ranaweera also serves to corroborate the evidence of both the Appellant and that of Lt. Commander Dissanayake. In the circumstances, only the Court Martial would have known the reasons based upon which it decided to fully accept the testimony of one prosecution witness - Rear Admiral Illangakoon, while not accepting the testimony of another prosecution witness - Lt. Commander Dissanayake. Furthermore, even if the evidence of Rear Admiral Illangakoon is fully believed while rejecting the testimonies of all other witnesses, the question remains as to the reasons based upon which the Court Martial decided that in the circumstances of this case,

the conduct of the Appellant which was impugned by the prosecution, amounted to an offence in terms of section 60(2) of the Navy Act, in that the Appellant's conduct amounted to improperly leaving the place of duty.

**2nd Count**

As regards the 2nd count in the charge sheet, the key factual ingredient which the prosecution was required to prove beyond reasonable doubt was that on the night of the LTTE aerial attack, the Appellant *'did not proceed to his tactical area of responsibility being Vankalai and Nanaddan'*, and thereby failed to *'provide leadership to men under his command',* an offence in terms of section 104(1) of the Navy Act. That in fact, pursuant to getting to know that the LTTE had launched an aerial attack, the Appellant who was at *SLNS Gajaba* did not rush to the Vankalai naval detachment, is not denied by the Appellant. His position is that he initially attempted to rush to the Vankalai naval detachment from *SLNS Gajaba.* However, having ascertained the position that prevailed at Vankalai and Nanaddan from the Commanding Officer Vanlakai - Lt. Commander Dissanayake and having satisfied himself that the situation there was 'under control' and that all necessary measures were in place in Vankalai to counter a possible further LTTE aerial attack, in view of the situation which prevailed at *SLNS Gajaba,* he took a considered decision not to leave *SLNS Gajaba,* to take charge of its operations room and to provide leadership to the naval personnel at that camp. This was due to the fact that the acting officer-in-charge of the camp on that occasion - Lt. Commander T.N.S. Perera was not a combat-experienced naval officer and was only a 'logistics officer'. The Appellant thus felt that his presence at *SLNS Gajaba* was necessary and in the best interests of the Navy and national security. As pointed out by the Judge Advocate, even the prosecution had conceded that the accused had taken all necessary measures and given necessary instructions from *SLNS Gajaba.* Thus, whether in the circumstances, the conduct of the Appellant amounted to causing *'prejudice to the good order and naval discipline'* which is the 'resultant ingredient' of the offence contained in section 104(1) of the Navy Act, is the matter in respect of which the Court Martial had to take a decision on. As the Court Martial decided to find the Appellant *'guilty'* of the second count as well, it is evident that it had answered this question in the affirmative. Thus, the ensuing question which looms large, is the basis on which the Court Martial decided to find the Appellant *'guilty'* in respect of count 2, given the fact that he had taken a considered decision to

remain at *SLNS Gajaba,* a decision which the prosecution does not necessarily impugn, and his having taken all such measures which he claims were in the best interests of the Navy and national security.

In my view, the afore-stated analysis exemplifies the need for the Court Martial to have given reasons for its finding (verdict). The absence of such reasons gives rise to an irrefutable inference that the finding of the Court Martial is unreasonable and arbitrary or to say the least, begs of justification.

**Position of the law pertaining to the duty to give reasons for the finding and the punishment imposed by a Court Martial**

Since the dawn of the new millennium and the 21st century, it appears that Courts in the common law world have refrained from holding that 'there is no general rule that statutory bodies have a legal duty to give reasons for their decisions'. Judgments of superior Courts and views of academicians and respected authors which I have considered earlier in this judgment, reflect a general and overall, well founded progressive trend towards the imposition of a legal duty on statutory authorities who are empowered to take decisions which have a bearing on the rights of persons, to give reasons for their decisions. This change in judicial policy which is founded upon the underlying evolving policies of public law, appear to be due to the keenness on the part of Court to ensure objectivity, fairness, reasonableness, transparency and accountability in decision-making by public and statutory bodies, including administrative bodies, tribunals and Courts of law. The overwhelming merits in imposing a legal duty on such bodies to give reasons for their decisions, amply justify this shift in the policy of Public and Administrative Law and in judicial policy.

The imposition of a legal duty to give reasons for decisions, is not only desirable, but necessary. The duty to give reasons arises out of the overarching duty on statutory bodies to give a *fair hearing*, which is regulated primarily by ensuring compliance with the *principles of natural justice*. The first two pillars being *'audi alteram partem'* and *'nemo judex in causa sua'*, there is considerable merit in the proposition that the duty to give reasons is the third pillar of the doctrine of natural justice. The imposition of a legal duty to give reasons is the most efficacious

way of determining whether a *fair hearing* had in fact been given in accordance with the *principles of natural justice.* That is the fundamental basis for holding that, subject to certain justifiable exceptions, there exists a legal duty on statutory bodies to give reasons for their decisions which have a bearing on the rights of persons.

Thus, particularly in view of more recent judgments reflecting the present position of the law in this regard in the common law world, there is a compelling need to reformulate the principle pertaining to the duty to give reasons for decisions, in the following terms:

> ***Unless specifically precluded or exempted by statutory provision, or the duty to give reasons has been impliedly yet unambiguously negatived, a statutorily created body empowered by law to take a decision which may have a bearing on the rights of a person, is required by law, to, following the applicable procedure provided by law, declare and forthwith record reasons for its decision. Provided however, a statutory body may be excused from the fulfilment of such legal duty, if the duty to disclose reasons for the decision has been dispensed with by the party affected by such decision, or there existed a legally justifiable reason for having in the circumstances of the situation, refrained from giving reasons for the decision. In such event, the grounds for not revealing reasons for the decision shall be declared and recorded along with the decision.***

Exceptions to this generic legal duty, in most instances have been specifically laid down in statutes, or is to be necessarily inferred from the nature and the structure of the applicable written law, and the attendant circumstances.

In view of the foregoing detailed consideration of the law, I hold that **a Court Martial is required by the common law to give reasons for its decisions, including reasons for the finding of guilt or otherwise of the accused and the punishment imposed**.

An accused before a Court Martial, is entitled to the Fundamental Right to the equal protection of the law, as recognized by Article 12(1) of the Constitution, the concomitants of which are

equality, rule of law, equal protection of the law including non-discrimination. The right to equality imposes an additional duty on the statutory bodies to give reasons for their decisions. Furthermore, an accused before a Court Martial has in terms of Article 13(4) of the Constitution, the right to a *fair trial.* The legal duty cast on a Court Martial to afford a *fair trial* to an accused, imposes a higher threshold for the maintenance of fairness. In this regard, it is important to note that, a consideration of the reasons for the finding (verdict) and the sentence is a significant way of determining whether an accused before a Court Martial had in fact received a *fair trial.* This is an additional factor which necessitates the imposition of a legal duty on a Court Martial to declare reasons for the finding (verdict). Thus, an accused before a Court Martial has in addition to the public and administrative law entitlement of receiving the reasons for the finding, a Fundamental Right to that effect as well.

The position of the law as regards a Court Martial convened in terms of the Navy Act, may be stated in the following terms:

> ***A Court Martial convened in terms of the Navy Act is required by law to give reasons for its finding (verdict) and the order of punishment (sentence) it imposes on a convicted accused. Such reasons shall be forthwith announced to the accused and contemporaneously recorded. This legal duty cast on a Court Martial by the common law, may be negatived by explicit or implied statutory provision. However, the Navy Act does not contain any such provision which negatives the common law duty cast on a Court Martial.***

In view of the evidence led before the Court Martial in the instant case, the absence of reasons for the finding (verdict) gives rise to the irrefutable inference that the finding of the Court Martial is both unreasonable and arbitrary. That the members of the Court Martial opted not to provide reasons for their finding even to the Court of Appeal, strengthens that inference.

While it is not possible to provide a generic description of the nature, extent and degree of details to be included in the 'reasons for the decision', it would suffice to say that, reasons for a decision are the factors that gave rise to the decision. Reasons being declared should be accurate,

sufficient in detail and embedded with clarity, enabling the applicable legal framework, factual basis and rationale for the decision to be understood correctly by a discerning and objective-minded reader.

In the backdrop of the existence of a legal duty to give reasons for the finding (verdict) and for the determination of punishment (sentence), the absence of such reasons renders the finding of guilt and the sentence imposed by the Court Martial to be declared unlawful, and thus void.

**Conclusions reached by me in respect of the 2nd question of law**

In view of my findings regarding the position of the law with regard to the existence of a legal duty on a Court Martial to give reasons for its finding (verdict) and the orders of punishment (sentence), I hold that it was erroneous for the Court of Appeal to have held that there was no need in law for the Court Martial to have given reasons for its finding (verdict) and that the absence of such reasons does not render the verdict void. Thus, I hold that the finding of guilt pronounced by the Court Martial dated 13th May 2009 and the associated sentences pronounced on the same day, are, due to the absence of reasons therefor, ***ab initio void***.

**3rd, 4th, 6th and 7th questions of law**

The need to provide answers to the 3rd question of law – *"whether the Court of Appeal had erred in its failure to consider whether the Judge Advocate's directions did not justify the determination arrived at by the Court Martial?"*, 4th question of law – *"Whether the sentences imposed by the Court Martial on the Appellant is violative of section 104 of the Navy Act?"*, 6th question of law – *"Whether the verdict of the Court Martial is bad in law, in that there was no evidence placed before the Court Martial which could be used to substantiate the verdict of 'guilty'?"*, and the 7th question of law – *"Whether the sentences imposed by the Court Martial are bad in law, in that the said sentences are not in conformity with the principle of proportionality?"*, arises in my view for consideration, only if the 2nd question of law was answered in favour of the Respondents. The 3rd, 4th, and 6th questions of law are premised upon the questioning of the legality of the finding (verdict) of the Court Martial, independent of the ground that a legal duty exists on a Court Martial to give reasons for its finding, which the Court Martial had in this instance violated. As I have already held that the non-disclosure of reasons for

the findings of the Court Martial renders such findings void on that ground alone, it would not be necessary for me to provide answers to these three questions of law. Further, the 7th question of law which relates to the sentences imposed by the Court Martial, arises for consideration only if I had held that the finding of guilt pronounced by the Court Martial was lawful. As the conviction of the Appellant has been held by me to have been unlawful and therefore void, the need to consider the legality and the appropriateness of the sentences passed on the Appellant does not arise. Therefore, this judgment will not contain my views regarding the afore-stated four questions of law.

**(v) Can this Court grant the Petitioner any relief in view of section 122 of the Navy Act read with section 10 of the Navy Act, as the Petitioner's (sic) decommissioning has been approved by His Excellency the President?**

As observed previously, on 13th May 2009 the Appellant was found *'guilty'* by the Court Martial and on the same day, sentenced. ("P17a" and "P17b") By letter dated 14th May 2009, the Appellant presented an Application to His Excellency the President seeking revision of the sentences imposed on him. That was in terms of section 122 of the Navy Act. ("P18") Consequently, the implementation of the sentences imposed on him by the Court Martial had been stayed, pending a determination of the Application presented by the Appellant to His Excellency the President. ("P19") It appears from documents "R6" and "R8", that His Excellency the President had on a date between 9th June and 14th July 2009, decided not to grant any relief to the Appellant and thereby had ratified the sentences pronounced by the Court Martial, backed by the observations presented by the 1st Respondent. It is the position of the Respondents that, in view of the foregoing, the punishment awarded by the Court Martial was executed on 16th August 2009, by issuing a 'dismissal' signal (announcement). ("R 7") This has resulted in the Appellant's tenure at the Navy coming to an end.

It is to be noted that, having on 14th May 2009 submitted the afore-stated Application to His Excellency the President seeking a revision of the sentences, on 25th June 2009, the Appellant filed an Application in the Court of Appeal invoking the writ jurisdiction of that Court in terms of Article 140 of the Constitution, seeking *inter alia* mandates in the nature of writs of certiorari

quashing the finding (verdict) and the sentences imposed on him by the Court Martial. On 4th August 2009 the Court of Appeal had issued Notice on the Respondents. Following the hearing of the Application, on 30th July 2015, the Court of Appeal pronounced its judgment dismissing the Application, which was impugned in this Appeal.

It is thus seen that the punishment imposed by the Court Martial was executed by promulgating a 'dismissal' signal on 16th August 2009, while proceedings were pending in the Court of Appeal. That 'dismissal' is directly linked to His Excellency the President having decided not to revise the sentences imposed on the Appellant by the Court Martial. It can also be seen that His Excellency's decision arises directly out of the impugned finding of guilt by the Court Martial and the impugned sentences of 'severe reprimand' and 'dismissal without disgrace from the Navy' also imposed by the Court Martial, and for no other reason.

Section 10 of the Navy Act provides that *'every commissioned officer shall hold his appointment during the President's pleasure'.* The afore-stated question of law which had been proposed by learned Counsel for the Respondents has been founded upon a particular factual position, namely, that His Excellency the President has, acting in terms of section 10 of the Navy Act, withdrawn the commission of the Appellant resulting in the Appellant being decommissioned. However, no material has been placed either before the Court of Appeal or this Court in support of that factual position. Thus, it is not possible to consider this question of law on the footing that His Excellency the President has exercised discretion in terms of section 10 of the Navy Act and 'withdrawn' the commission of the Appellant. There is evidence of <u>only</u> His Excellency the President having acted in terms of section 122 of the Navy Act.

The view of the Court of Appeal in this regard, is to the following effect:

> *"Petitioner's application under section 122 was refused by His Excellency the President. Under section 10 of the Navy Act, he holds office at the pleasure of the President and his dismissal has been approved by His Excellency the President."*

It appears that the Court of Appeal had proceeded on the footing that the present status of the Appellant, of being 'dismissed' from the Sri Lanka Navy arises out of His Excellency the President having exercised power in terms of both sections 10 and 122 of the Navy Act. However, there is no material in support of that view. The 'dismissal' of the Appellant from the Sri Lanka Navy can be attributed to two developments. First, the conviction and sentence imposed by the Court Martial in respect of the second count on the charge sheet, viz. that the Appellant being dismissed from the Navy without disgrace, and secondly, His Excellency the President acting in terms of section 122 of the Navy Act and determining not to review that sentence. Thus, it would not be correct to view the present status of the Appellant from the perspective of the President having exercised power in terms of section 10 of the Navy Act.

Be that as it may, assuming for the purpose of determining the afore-stated question of law raised by learned Counsel for the Respondents, that His Excellency the President has made an order in terms of section 10 of the Navy Act, it is necessary to consider what effect the issue of a mandate in the nature of a writ of certiorari quashing the findings of the Court Martial would have on such order made by the President.

Section 10 of the Navy Act by no means empower His Excellency the President to exercise power in the nature of a *carte blanche.* I recognize that His Excellency the President being the Commander-in-Chief of the Armed Forces and the Head of State of the Democratic Socialist Republic of Sri Lanka, has in terms of section 10 of the Navy Act, been vested with a considerable degree of discretionary authority to determine the tenure of service of commissioned officers of the Sri Lanka Navy. Our Courts would not easily interfere with the exercise of that power by the Head of State. However, the *'pleasure principle'* which the learned Senior State Counsel submitted is embedded in section 10 of the Navy Act, has to be viewed from the perspective of doctrines relating to the exercise of Constitutional and statutory powers as recognized by the Constitution itself and by Public Law. *'Unfettered and unreviewable absolute discretion'* finds no place in the present era of *Constitutionalism* and the *rule of law* on which the sovereignty of the people of the Democratic Socialist Republic of Sri Lanka has been founded. The *cursus curiae* of this Court, clearly prescribes that the application of the 'pleasure principle' is circumscribed by the Constitution, which includes the Fundamental Rights

recognized by the Constitution. Subject to restrictions that may be prescribed by law in terms of Article 15(8) of the Constitution, Article 12 of the Constitution which guarantees equal protection of the law including equality and non-discrimination, would demand that the exercise of power by the President in terms of section 10 of the Navy Act be in accordance with the rule of law, be reasonable, and not be arbitrary. These same principles of law would apply to situations where His Excellency the President has exercised power of revision of sentence in terms of section 122 of the Navy Act.

As explained earlier, when His Excellency the President acting in terms of section 122 of the Navy Act decided not to review the sentences imposed on the Appellant by the Court Martial, he had acted based on material placed before him. Such material included the proceedings of the Court Martial, the finding of guilt, the orders of sentence, and the observations of the 1st Respondent. It is thus evident that the 'basis' which prompted His Excellency to decide not to grant any relief to the Appellant were the afore-stated material, which included the impugned decision of the Court Martial. I have already held that the said decisions of the Court Martial are bad in law, and hence void, *ab initio*. Nothing flows out of a void decision. Thus, the orders of the Court Martial considered by His Excellency are not cognizable in the eyes of the law. Similarly, there is no foundation recognizable in the eyes of the law for the observations of the 1st Respondent submitted to His Excellency the President, as such observations have also been founded upon primarily the impugned findings of the Court Martial. It is thus seen that in the circumstances of this matter, the material considered by His Excellency the President has no legal validity. Thus, no legal consequences would flow from the afore-stated decision of His Excellency the President not to revise the sentences imposed on the Appellant by the Court Martial.

In view of the foregoing, I hold that the ensuing **'dismissal' of the Appellant from the Sri Lanka Navy has no effect in law**.

**Would the issuance of the writ be futile?**

The common law recognizes multiple grounds on which the refusal to issue the writ would be justified under certain circumstances. **Futility** in issuing the writ is one such ground. Court will

not issue the writ in favour of a petitioner, if it is evident that the issuance of the writ would be futile, as the writ issued by Court would remain only as an order of Court, and would not yield any relief to the party who sought the writ. **Dr. Sunil Coorey** in **Principles of Administrative Law in Sri Lanka** (4th Edition, Volume 2, page 1172) has lucidly captured this principle in the following manner:

> *"Certiorari will not be issued to quash a particular exercise of power* ***if it be futile to do so*** *because* ***it is no more operational or it has had its effect****. However,* ***if there be any practical benefit*** *(in the form of a clarification of the legal position) for the future, either to the Petitioner or to the public at large, by quashing an exercise of power which is no more operational or has had its effect, certiorari will nevertheless issue to quash such exercise of power."* [Emphasis added]

As pointed out by learned Senior State Counsel for the Respondents, in ***Siddeek v. Jacolyn Seneviratne and three others****, [(1984) 1 Sri L.R. 83],* it has been held that Court will not issue a writ of certiorari where the end result will be futility, frustration, injustice and illegality.

In this matter, as to whether the issuance of a writ of certiorari would be futile, has to be considered in view of (a) the Appellant having been 'dismissed' from the Sri Lanka Navy, and (b) the Appellant having by now passed the age of retirement. (By Motion dated 19th February 2020, Attorney-at-Law for the Appellant has notified this Court that the Appellant would be reaching his retirement age on 17th August 2020.)

In this regard, it is important to note that if the consequences arising out of an impugned order is continuing to flow, it would not be futile to quash the impugned order. The issuance of the writ would thereby terminate the continuation of the flow of consequences which are detrimental to the interests of the person affected by the impugned order.

Indeed, it would now be too late to reverse the direct impact which has arisen out of the finding (verdict) and the sentences pronounced by the Court Martial, as consequent to the said orders, the sentences have been executed and the Appellant has been dismissed from the Navy. His situation has got compounded as he has by now passed the retirement age. However, the

quashing of the finding of the Court Martial and the related orders of punishment would not be completely futile and hence this Court will not be acting in vain, as the issuance of writ quashing the finding of guilt and the orders of sentence pronounced by the Court Martial would serve the interests of the Appellant, as, (i) it would erase the blemish ensuing from the said orders of the Court Martial, and would accordingly restore the image and professional reputation of the Appellant, and (ii) it would entitle him to terminal and other benefits which in terms of the applicable laws and regulations, the Appellant would have been entitled to receive, had he not been convicted and sentenced by a Court Martial and dismissed from the Sri Lanka Navy. It is also possible that during the time period commencing from the date of the finding (verdict) and sentences pronounced by the Court Martial and the date of retirement, he would have become entitled to a promotion in rank, which he was deprived of, due to his dismissal from the Navy. Thus, quashing of the impugned finding (verdict) and sentences imposed by the Court Martial may entitle him to be considered for such a promotion with retrospective effect. Thus, it is my view that the issuance of a mandate in the nature of a writ of certiorari would not in the circumstances of this case, be futile, and will not be a useless formality.

**Conclusion reached by me in respect of the 5th question of law**

As stated above, there is no evidence before this Court that His Excellency the President has exercised power in terms of section 10 of the Navy Act. In view of the foregoing analysis, I hold that, notwithstanding His Excellency the President having exercised power in terms of section 122 of the Navy Act and the Appellant having been dismissed from the Sri Lanka Navy, this Court can grant relief to the Appellant. In the circumstances of this case, the grant of a mandate in the nature of a writ of certiorari will not be futile.

**Conclusion**

In view of the answers to the 1st, 2nd and 5th questions of law, I am of the view that this Appeal should be allowed and the impugned judgment of the Court of Appeal dated 30th July 2015 should be set-aside.

In view of the foregoing, I hold that mandates in the nature of writs of certiorari quashing the findings of guilt imposed by the Court Martial dated 13th May 2009 and the associated sentencing orders imposed on the Appellant should be issued by this Court.

Thus, it is my view that the incumbent Commander of the Sri Lanka Navy should be directed by this Court to cause the erasure of the afore-stated decisions of the Court Martial which in my opinion should be quashed, and to treat the Appellant in a manner as if he had not been convicted and sentenced by the Court Martial. In the circumstances, it is my view that it should be deemed that the Appellant was never dismissed from the Sri Lanka Navy. Therefore, it is my further view that the Appellant should be entitled to terminal benefits or other employment-related emoluments, he should have been entitled to receive had he not been convicted by the Court Martial and dismissed by the Sri Lanka Navy.

I wish to record my deep appreciation to both learned President's Counsel for the Appellant and the learned Senior State Counsel for the Respondents, for their submissions and invaluable assistance to Court, which significantly contributed towards the formulation of this minority judgment.

**Judge of the Supreme Court**