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

Abeysinghage Chandana Kumara,
No.148/A, Dadayankanda,
Omalpe, Ambilipitiya.
(Presently in Welikada Prison)
Petitioner

CASE NO: CA/WRIT/333/2011

Vs.

1. Kolitha Gunathilaka,
   Air Vice Marshal,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.

1A. Harsha Duminda Abeywickrama,
   Air Vice Marshal,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.

2. Naiduwa Handi Vijitha Gunarathne,
   Air Commodore,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.

3. Kasthuri Arachchige Lakshman Ranatunga,
   Group Captain,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.
4. Rajapaksha Minimuthu Pathirannahalage Ranil Suvendraraj Senaka Dharmawardana,
   Wing Commander,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.
5. Jayasekara Palitha Balasooriya,
   Wing Commander,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.
6. Anuruddha Nammuni Wijewardana,
   Wing Commander,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters,
   Colombo 2.
7. Kankanamlage Manoj Kumara Keppetipola,
   Wing Commander,
   Sri Lanka Air Force,

Sri Lanka Air Force Headquarters,
Colombo 2.

8. Sampath Viranga Premawardana,
Squadron Leader,
Sri Lanka Air Force,
Sri Lanka Air Force Headquarters,
Colombo 2.
9. Sunddrappemma Arachchige Don
Channa Manjula Jayathilaka,
Squadron Leader,
Sri Lanka Air Force,
Sri Lanka Air Force Headquarters,
Colombo 2.
10. Vijith Kumara Malalagoda,
Air Commodore,
Attorney General's Department,
Colombo 12.
11. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Darshana Kuruppu with Thanuja Dissanayaka, Aruna Gamage, Chinthaka Udadeniya and Menik Chandrasekara for the Petitioner.

N. Rohantha Abeysuriya, P.C., A.S.G., for the Respondents.

Argued on: 14.02.2020 and 04.03.2020

Decided on: 01.06.2020

Mahinda Samayawardhena, J.

1. Introduction

The Petitioner was an aircraftman of the volunteer force of the Sri Lanka Air Force when he was convicted for murder by a General Court Martial on 15.12.2010, under section 296 of the Penal Code read with section 131(2) of the Air Force Act,[1] and sentenced to life imprisonment. Since then he has been serving his sentence.

The Petitioner filed this application seeking to quash the said conviction and sentence by way of a writ of certiorari.

Learned Counsel for the Petitioner challenges the said decision on three grounds.

(a) The Court Martial had no jurisdiction to try the Petitioner for the offence of murder, as he was not on "active service" at the time material to the incident.

[1] No.41 of 1949, as amended (hereinafter "the Act" or "the Air Force Act").

(b) The finding of the Court Martial is contrary to Air Force Court Martial Regulation No.98 and therefore invalid.[2]

(c) The fact that no reasons were given vitiates the finding.

After the full argument, learned Counsel for the Petitioner abandoned the first ground. Hence there is no necessity to dwell on it.

This leads me to consider the second ground.

2. Regulation 98: Opinion as to the Finding

Regulation 98 reads as follows:

> *The opinion of every member of the Court Martial as to the finding shall be given by word of mouth on each charge separately.*

It is the argument of learned Counsel for the Petitioner that each member of the Court Martial shall individually pronounce in open Court whether he finds the accused guilty or not guilty on each charge.

It is clear from the proceedings in question that only the President of the Court Martial pronounced the finding in open Court. On this basis, learned Counsel strenuously submits that the finding shall be quashed, as it is a fatal irregularity.

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[2] Court Martial (General and District) Regulations, found in Subsidiary Legislation of Ceylon (1956), Vol.VI, Cap.359 (hereinafter "Regulation" or "Regulations").

Learned Additional Solicitor General[3] for the Respondents admits "*other than the President none of the other members of the Court Martial has pronounced the findings*", but his submission is that such procedural irregularity does not warrant quashing the impugned decision *in toto*, as no prejudice has been caused to the Petitioner thereby.[4]

It is my considered view that the submission of learned Counsel for the Petitioner on Regulation 98 and the counter submission of learned ASG on the same are on a wrong premise and therefore ought to be rejected.

Regulation 97(1) states "*The court martial shall deliberate on its finding in closed court.*" Regulation 98 states "*The opinion of every member of the court martial as to the finding shall be given by word of mouth on each charge separately.*" In my view, the giving of opinion as to the finding is part of deliberations and takes place in closed Court.

Let me explain.

Section 55(1) of the Air Force Act reads as follows:

> *Every member of a court martial and the Judge-Advocate, if any, shall take the prescribed oath or make the prescribed affirmation before the commencement of the trial of a case.*

Section 61(9) of the Act reads as follows:

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[3] Hereinafter "ASG".
[4] *Vide* page 5 of the written submissions of the Respondent dated 27.01.2020.

> *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.*

Regulation 29(1) states:

> *As soon as the court martial is constituted with the proper number of members who are not objected to, or the objections to whom have been overruled, an oath or affirmation shall be administered to and taken in the presence of the accused by each member of the court. Such oath or affirmation shall be substantially in the form A specified in the Second Schedule hereto.*

The content of Form A—the oath taken by the President and members of the Court Martial—is relevant to understand the issue.

> *I swear by Almighty God/sincerely and truly declare and affirm that I shall well and truly try the accused (or accused persons) before this Court Martial according to the evidence, and that I shall duly administer justice according to the Air Force Act and the regulations thereunder now in force, without partiality, favour or affection, and I do also*

> *swear/affirm that, except so far as may be permitted by instructions of the Commander of the Air Force for the purpose of communicating the sentence to the accused, I shall not divulge the sentence of the Court until it is duly confirmed, and I do further swear/affirm that I shall not on any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this Court Martial, unless required so to do by due course of law.* (emphasis added)

This means, before the commencement of the trial, every member of the Court Martial takes an oath or makes an affirmation that he "*shall not on any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this Court Martial, unless required so to do by due course of law."* This, in my view, refers to the *"opinion as to the finding"* in Regulation 98, which specifically mentions the opinion of *"every member"* of the Court Martial, as distinct from other Regulations which refer to the opinion of the Court Martial in general. Regulation 98 then is intended to take place in secrecy, in closed Court.

This is made clear by corresponding provisions in the Indian Army Rules of 1954, which are similar in form and substance to the Sri Lankan Regulations under consideration in the instant case.

Rule 61 of the Indian Army Rules, which encapsulates Regulations 97 and 98 of the Sri Lankan Regulations, explicitly states that the opinion of each member as to the finding shall be

given in closed Court during the deliberations of the Court Martial. It is noteworthy that this Rule is under the sub-heading "*Consideration of finding*". Rule 61 runs as follows:

> *61. Consideration of finding*
>
> *(1) The court shall deliberate on its finding in closed court in the presence of the judge-advocate.*
>
> *(2) The opinion of each member of the court as to the finding shall be given by word of mouth on each charge separately.*

The fact that the opinion of each member shall be given in closed Court has been reiterated in *Mukherjee v. Union of India*[5]—a Judgment of the Supreme Court of India, heavily relied on by learned ASG—where it says "*Rule 61 prescribes that the Court shall deliberate on its findings in closed court in the presence of the judge-advocate and the opinion of each member of the court as to the finding shall be given by word of mouth on each charge separately*."

However, learned ASG for the Respondents does not say such opinion as to the finding was given by each member by word of mouth even in closed Court. His simple argument is the word *"opinion"* found in Regulation 98 has no special meaning and it refers to the finding read in open Court by the President of the Court Martial on behalf of all members of the Court Martial. If I may use his own words, "*with regard to Rule 98 what is meant by the word Opinion there is, whether the particular member of*

[5] 1990 AIR 1984, 1990 SCR Sup (1) 44.

the Court Martial has found the Accused either guilty or not guilty and nothing more than that."[6] This argument is simply unacceptable. Every word in a statute shall be given a meaning.[7]

This means, in the instant case, the opinion of each member of the Court Martial as to the finding of guilt of the Petitioner for murder has not been given. This, in my view, is fatal to the conviction in view of Regulations 175 and 176, which are couched in peremptory terms, with the use of the word "must".

> *175. Every member of a 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.*
>
> *176. The opinion of the members of the courts martial shall be taken in succession, beginning with the member having the most junior rank.*

According to Regulations 175 and 176, the giving of opinion as to the finding by every member of the Court Martial by word of mouth is mandatory, whether in open Court or closed Court. But this mandatory requirement has not been complied with in the instant case.

However, learned ASG, citing *Seneviratne v. Urban Council, Kegalle*[8] in support, states "*even if one were to contend that the*

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[6] Page 5 of the written submission of the Respondents dated 13.03.2020.
[7] *Maxwell on The Interpretation of Statutes*, 12th Edition by P. St. J. Langan (2004), p.36.
[8] [2001] 3 Sri LR 105.

procedure followed by the Court Martial may be somewhat irregular", such procedural irregularity is "*decisive only in situations where material prejudice has been caused to the relevant party*".

In *Seneviratne*'s case, one of the grounds relied upon by the Petitioners in challenging the acquisition order was failure to state the public purpose for which the land was to be acquired in the Section 2 Notice issued under the Land Acquisition Act.[9] Counsel for the Respondents convinced the Court with documentary evidence that the Petitioners were aware of the public purpose for which the land was to be acquired long before the publication of the Section 2 Notice. It is in this context that the Court cited De Smith's *Judicial Review of Administrative Action* (5th Edition), where it states "*If the applicant has not been prejudiced by the matters on which he relies then the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a Statute may be so insignificant as not in effect to matter. In these circumstances the Court may in its discretion refuse relief*."

The issue in the instant case is not comparable. The instant case deals with the liberty of a man, not with his proprietary rights, as in *Seneviratne's* case. Regulation 98 deals with the procedure relating to infliction of punishment, in fact, the most serious known to law—capital punishment or life imprisonment. Maxwell emphasises:

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[9] No.9 of 1950, as amended.

> *Statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalised, and if there is any ambiguity or doubt it will, as usual, be resolved in his favour. This is so, even though it may enable him to escape upon a technicality.*[10]

I have no doubt the above is intensely relevant to the facts of this case, whereas De Smith's quotation in *Seneviratne*'s case is not applicable here.

For the aforesaid reasons, I hold that the Petitioner is entitled to succeed on the second ground.

I will now proceed to consider the third ground, although the application of the Petitioner can be allowed on the second ground itself.

3. Regulation 99: Reasons for the Finding

It is undisputed that no reasons were given by the General Court Martial when it convicted the Petitioner for murder[11] and passed the sentence of rigorous imprisonment for life.[12]

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[10] *Maxwell on The Interpretation of Statutes*, 12th Edition by P. St. J. Langan (2004), p. 245.
[11] *Vide* the proceedings dated 15.12.2010 at page 115 marked P1 with the petition.
[12] *Vide* R6 tendered with the Respondents' statement of objections. In addition to rigorous imprisonment for life, the Petitioner was discharged with ignominy from the Sri Lanka Air Force. The Petitioner is not challenging his discharge from the Air Force.

Learned Counsel for the Petitioner vehemently submits the failure to give reasons vitiates the said decision.

The counter submission of learned ASG for the Respondents is there is no necessity for the Court Martial to give reasons for its decision.

The argument of learned ASG, as presented in the written submission, is as follows:

> *S.99 of the Regulations reads thus;*
>
> *"99. The finding on every charge against the accused shall be recorded and, except as mentioned in these regulations, shall be recorded simply as a finding of "Guilty", or of "Not guilty" or of "Not guilty and honourably acquit him of the same."*
>
> *It is respectfully submitted that the drafters of the regulations have included the word "simply" in order to stress the fact that all what is required of Court Martial is to pronounce its verdict by using the words Guilty or Not Guilty and therefore nothing further is required.*
>
> *In this backdrop it would be pertinent to submit that there is just one section of the Regulations which seems to require Court Martial to give reasons for its recommendation. S.108 of the Regulations reads as follows;*
>
> *"108. If the Court Martial makes a recommendation of mercy, it shall give its reasons for its recommendation."*

> *Other than the aforesaid section nowhere else in the Regulations it is stated that reasons should be given.*[13]

Learned ASG develops his argument on three Indian authorities:

1. *Som Datt Datta v. Union of India* (SC) decided in 1968[14]
2. *Mukherjee v. Union of India* (SC) decided in 1990[15]
3. *Syam Sunder v. General Court Martial* (HC) decided in 1997[16]

I regret my inability to agree with this argument.

Regulation 99 quoted above deals with the finding. The finding is one thing. Reasons for the finding is another. The two are not the same. There is no issue the finding can simply be recorded as guilty or not guilty, as the Regulation stipulates. The word "simply", found in Regulation 99, does not, cannot and shall not absolve the Court Martial from giving reasons for its finding, especially when a man is convicted of murder and condemned to death/life imprisonment. Is a man who is convicted of murder and sentenced to death or life imprisonment not entitled to know the reasons for such a decision, at the bare minimum to decide whether he shall appeal against the conviction and sentence? In my judgment, he is–not as a matter of sound practice, but as of right. If a country is governed by the rule of law, reasons for decisions must be given, no less

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[13] Page 8 of the written submissions dated 27.01.2020.
[14] 1969 AIR 414, 1969 SCR (2) 177.
[15] 1990 AIR 1984, 1990 SCR Sup (1) 44.
[16] 1997 (4) ALD 637.

when a man is convicted for murder and the death sentence, or life imprisonment is passed as the punishment.

It is the submission of learned ASG that Regulation 108, which explicitly requires the Court Martial to give reasons for a recommendation of mercy, makes it clear that the necessity of giving reasons for a conviction in terms of Regulation 99 has been done away with by necessary implication.

This submission is based on the dicta in *Mukherjee*'s case (*supra*), where the Supreme Court of India in relation to Rule 66(1) of the Army Rules (which is analogous to Regulation 108 of our Regulations) stated as follows:

> *Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to have a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its finding and sentence by the court-martial and reasons are required to be recorded only in cases where the court-martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the court-martial is not required to record its reasons and at that stage reasons are only*

> *required for the recommendation to mercy if the court-martial makes such a recommendation.*

With respect, I find myself unable to agree with this reasoning.

In my view, under Regulation 108 the Court Martial is explicitly required to give reasons because there is no decision involved in the situation contemplated therein. The decision is the conviction and sentence, which has already taken place when Regulation 108 is invoked. There is no compelling need or requirement of natural justice or otherwise to give reasons for recommendations. No direct consequences flow from recommendations: they are neither enforceable nor binding, as decisions are. Hence the requirement to give reasons in express terms in Regulation 108.

In the result, I take the view that Regulation 108 does not exclude by necessary implication the requirement of giving reasons for a conviction and sentence.

In my view, it cannot be surmised that the requirement of giving reasons has been dispensed with by implication. The giving of reasons for decisions is inherent in the justice system of any civilised 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.

Maxwell says "*In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most*

in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one."[17]

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.

On parity of reasoning, statutory ouster clauses found in statutes to declare that a decision "*shall be final and conclusive for all intents and purposes*", "*shall not be subject to appeal or review in any court*", "*shall be final and shall not be called in question in any court*" etc. have been interpreted by the Courts against the plain meaning of the words, and it has been consistently held that such ouster clauses do not prevent the Courts from intervening *inter alia* in the case of lack of or excess of jurisdiction.[18] Failure to comply with the rules of natural justice is an incidence of acting in excess of jurisdiction.

In the words of Wade:

> *Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals*

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[17] *Maxwell on The Interpretation of Statutes*, 12th Edition by P. St. J. Langan (2004), p.199.
[18] *Vide Ladamuttu Pillai v. Attorney-General* (1957) 59 NLR 313; *Abeywickrema v. Pathirana* [1986] 1 Sri LR 120 at 156; *Gunasekera v. De Mel, Commissioner of Labour* (1978) 79(2) NLR 409 at 426; *Withanarachchi v. Gunawardena* [1996] 1 Sri LR 253; *Attorney-General v. Ryan* [1980] AC 718.

> *would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is better.*[19]

For instance, section 8(2) of the Administrative Appeals Tribunal Act, No.4 of 2002, reads as follows: "*A decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.*" After tracing the legal history in that regard, this Court in *Mankotte v. Chairman, Administrative Appeals Tribunal*[20] held "*section 8(2) of the Administrative Appeals Tribunal Act does not operate as a blanket prohibition on the Court of Appeal to exercise writ jurisdiction over the decisions of the Administrative Appeals Tribunal.*"

Natural justice is the essence of the law. It is eternal law which cannot be overridden by man-made law. At many points in legal history, when the law has been in crisis, it is to natural law that men have turned for inspiration.[21]

If the rules of natural justice have not been observed in enacting legislation, our Courts have stepped forward to remedy it, despite the intention of the legislature being crystal clear. The Judgment of Sharvananda C.J. in *Manawadu v. Attorney-General*[22] provides a classic example. Section 40 of the Forest Ordinance[23] was amended by Act No. 13 of 1982 in order to put

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[19] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p.609.
[20] CA/WRIT/249/2015, CA Minutes of 06.03.2019; *Vide* also *Waruna Sameera v. Chairman, Administrative Appeals Tribunal*, CA/WRIT/73/2016, CA Minutes of 20.02.2019.
[21] C.G. Weeramantry, *The Law in Crisis: Bridges of Understanding*, (1975), p.185.
[22] [1987] 2 Sri LR 30.
[23] No.16 of 1907.

in effect the forfeiture of a vehicle used to transport timber, on the strength of the conviction of any person using the vehicle for a forest offence, without giving a hearing to the owner of the vehicle. There was no scintilla of doubt that the said amendment was brought in deliberately, as a stringent measure to stop the illicit felling of trees. But Sharvananda C.J. was not inclined to give effect to the intention of the legislature on the face of blatant violation of basic principles of natural justice:

> *State Counsel relevantly pointed that section 7 of the Amending Act 13 of 1982 repealed amended section 40 of the Forest Ordinance and substituted a new section in terms of which "Upon the conviction of any person for a forest offence...the motor vehicle used in committing such offence (whether such motor vehicles are owned by such person or not), shall by reason of such conviction be forfeited to the State." He submitted that the forfeiture of the vehicle is automatic on the conviction of the offender irrespective of the fact that the owner of the vehicle is innocent and the owner is no party to the commission of the offence. He referred to the espousal of the object that the Minister had in mind when introducing the Bill for effecting the Amendment No. 13 of 1982. Vide Hansard dated 25.2.1982, Vol. 9 Part 19 at pages 1558-1559 the Minister said:- "It is necessary in the situation that we are faced, where forest resources are fast depleting to see that strong and firm action is taken although in the process some innocent people might suffer." I see the force of Counsel's argument. <u>However a construction which offends justice and is repugnant to the Rule of Law that permeates our</u>*

> *Constitution should yield to an alternate construction which is harmony with justice and human rights. It is too much to believe that Parliament intended by this amendment to jettison the in-built principles of natural justice highlighted in the judgments of our courts and of courts of other civilised countries. The Constitution assures justice to all people. Arbitrary forfeiture without reference to the owner's culpability is the negation of justice. The courts assume that the legislature does not intend injustice and seek to avoid a construction that produces or spells injustice*.[24] (emphasis added)

Accordingly, by majority decision, it was held that the amended section 40 does not exclude by necessary implication the *audi alteram partem* rule of natural justice, and therefore the word "forfeited" found in the amended section shall be taken to mean "liable to be forfeited", and the owner of the vehicle shall be heard before a decision on forfeiture is taken.

After an analysis of the natural justice perspective of giving reasons for decisions, the Supreme Court of India in *Mukherjee*'s case (*supra*)—the main case relied upon by learned ASG to say that the Court Martial need not give reasons for its decision—remarked as follows:

> *Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But*

[24] At pages 40-41.

the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in

action." As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that affect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying

> *such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.*
>
> *For the reasons aforesaid, 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 the reasons for its decision*. (emphasis added)

Then it is clear, according to the Judgments relied upon by learned ASG himself, the giving of reasons for a decision of the Court Martial is an indispensable requirement for the validity of the decision, unless the requirement has been dispensed with expressly or by necessary implication.

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.

4. Applicability of Indian Decisions

Let me further consider the applicability of the three Indian decisions learned ASG relies on to buttress his argument. For convenience if I may repeat, these are *Som Datt Datta v. Union of*

India (SC) decided in 1968,[25] *Mukherjee v. Union of India* (SC) decided in 1990,[26] and *Syam Sunder v. General Court Martial* (HC) decided in 1997.[27]

In the first place, I must state that these authorities are not binding on this Court.

In any event, the said decisions are distinguishable and therefore inapplicable in deciding the matter at hand.

In the first case, *Som Datt Datta* (*supra*), the final argument of Counsel for the Petitioner was:

> *[T]he order of the Chief of the Army Staff confirming the proceedings of the Court-Martial under s.164 of the Army Act was illegal since no reason has been given in support of the order by the Chief of the Army Staff. It was also pointed out that the Central Government has also not given any reasons while dismissing the appeal of the Petitioner under s.165 of the Army Act and that the order of the Central Government must therefore be held to be illegal and ultra vires and quashed by the grant of a writ in the nature of certiorari.*

This argument was rejected by the Supreme Court of India, stating as follows:

> *In the present case it is manifest that there is no express obligation imposed by s.164 or by s.165 of the Army Act on*

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[25] 1969 AIR 414, 1969 SCR (2) 177.
[26] 1990 AIR 1984, 1990 SCR Sup (1) 44.
[27] 1997 (4) ALD 637.

> *the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial. Mr. Dutta has been unable to point out any other section of the Act or any of the rule made therein from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, we are unable to accept the contention of Mr. Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.*

This decision can be distinguished from the instant case on three grounds:

Firstly, the question to be decided by the Supreme Court of India was not whether the Court Martial shall give reasons for its decision but whether the confirming authority and the Central Government ought to have given reasons in dismissing the appeal.

In the instant case before me, the question is whether the Court Martial, which found the Petitioner guilty of murder and passed life imprisonment as the punishment, should have given reasons.

Secondly, the basis upon which the Supreme Court of India rejected the argument of the Petitioner in the said case was "*Apart from any requirement imposed by the statute or statutory*

rule either expressly or by necessary implication, we are unable to accept the contention…that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision."

As I have already stated (and will go on to elaborate further under the sub-heading "Natural Justice and Giving Reasons") the absence of an express statutory provision compelling reasons does not absolve a deciding authority from giving reasons for its decision. Natural justice demands reasons shall be given for a decision.

Thirdly, in the said case, the Supreme Court of India stated it is unable to accept "*there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.*"

The Supreme Court of India has regarded the Court Martial as a "statutory tribunal", but in the landmark Judgment of J.A.N. De Silva C.J. in *Sarath Fonseka v. Dhammika Kithulegoda*,[28] the Supreme Court of Sri Lanka, having analysed the law including Constitutional provisions in great detail, held that the Court Martial is not only a Court but a competent Court, which can impose a sentence of death or imprisonment.

In *Mukherjee*'s case (*supra*) the Supreme Court of India followed the decision of the *Som Datt Datta* case referred to above. In *Mukherjee*'s case the two questions of law which the Court was invited to consider were:

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[28] [2011] BLR 169.

(i) *Is there any general principle of law which requires an administrative authority to record the reasons for its decision; and*

(ii) *If so, does the said principle apply to an order confirming the findings and sentence of Court Martial and post confirmation proceedings under the Act?*

These are the same questions considered in *Som Datt Datta*'s case.

In *Mukherjee*'s case, Counsel for the Petitioner invited the Supreme Court of India to reconsider the decision in *Som Datt Datta*'s case, on the basis that the Supreme Court in *Som Datt Datta*'s case had not considered decisions such as *Bhagat Raja v. The Union of India and Others*;[29] *Mahabir Prasad Santosh Kumar v. State of U.P. and Others*;[30] *Woolcombers of India Ltd. v. Woolcombers Workers Union and Another*;[31] and *Siemens Engineering & Manufacturing Co. of India Limited v. Union of India and Another*,[32] which took the view that reasons shall be given for decisions. However, in *Mukherjee*'s case, the Supreme Court did not depart from the decision in *Som Datt Datta*'s case. The Court concluded "*Since we have arrived at the same conclusion as in Som Datt Datta case (supra) the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is therefore, rejected.*"

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[29] [1967] 3 SCR 302.
[30] [1971] 1 SCR 201.
[31] [1974] 1 SCR 503.
[32] [1976] Suppl. SCR 489.

After discussing the principles of law enunciated in various Judgments, the Supreme Court of India came to the following conclusion in *Mukherjee*'s case.

> *For the reasons aforesaid, 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 the reasons for its decision.*

This is different from the conclusion of the same Court in *Som Datt Datta*'s case, where the conclusion was, if I may repeat:

> *Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, we are unable to accept the contention...that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.*

If I may explain, the position of the Supreme Court of India in *Som Datt Datta*'s case decided in 1968 was there is no general principle or rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decisions; but the position of the same Court in *Mukherjee*'s case decided in 1990 was there is a general principle or rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decisions, except in cases where the requirement has been dispensed with expressly or by necessary implication.

This means, the Supreme Court of India has shifted its stance and now strongly favours the view that giving reasons for a decision is the norm and withholding reasons is the exception.

In *Mukherjee*'s case, the Supreme Court of India recognised "*Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.*"

On the reasons set out by me with regard to *Som Datt Datta*'s case, I am not persuaded by the decision in *Mukherjee*'s case to accept the argument of learned ASG in the instant case.

In *Syam Sunder* (*supra*), the High Court of India followed the Judgment of the Supreme Court in *Mukherjee*'s case and stated as follows:

> *Their Lordships in S. N. Mukherjee's case, in para No. 48 of the judgment, observed as under:-*
>
> *"…For the reasons aforesaid it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the finding and sentence recorded by the court-martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in Som Datta case, the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is, therefore, rejected…"*

> *Therefore, in the light of the foregoing discussion, we are unable to accede to the contention of the Petitioner that the orders of the court-martial which has been confirmed by the Army Chief and the Central Government are bad in law, as no reasons are assigned for its findings.*

It is significant that the Judgment of the Supreme Court of India in *Mukherjee*'s case has not been consistently followed in later Indian decisions. One such case is *Maj. Dimple Singla v. Union of India (Uoi)*[33] decided in 2008.

In *Maj. Dimple Singla*'s case, the Petitioner took up a preliminary objection before the General Court Martial as to jurisdiction. The objection was overruled without reasons. The Petitioner challenged the said order in a writ application on the ground that it was not a reasoned order and therefore violated the principles of natural justice. The Respondents took up the position that it is not a requirement under Rule 51 of the Army Rules of India to give reasons when the Court overrules such an objection. Under Rule 51(2), "*If the court overrules the special plea, it shall proceed with the trial.*" Under Rule 51(3), "*If the court allows the special plea, it shall record its decision, and the reasons for it*". The Respondents relied on the Supreme Court Judgments in *Mukherjee*'s case and *Som Datt Datta*'s case. Having analysed the law, the High Court of India set aside the impugned order of the Court Martial. The High Court quoted the relevant portions of the Judgment in *Mukherjee*'s case and stated *inter alia* as follows:

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[33] 2008 (2) SCT 183 (P&H).

> *But that is not the end of the matter because even though there is no requirement to record reasons by the confirming authority while passing the order confirming the findings and sentence of the Court Martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before this Court under Article 32 of the Constitution or before the High Court under Article 226 of the Constitution and he can obtain appropriate relief in those proceedings.*

In the above case, the High Court of India concluded that the giving of reasons for a decision of the Court Martial will "*make the right of appeal of the Petitioner a meaningful right, which alone would satisfy the principles of natural justice, equity and fair play*." Accordingly, the impugned order was quashed.

The argument of learned ASG in the instant case, based on the Indian decisions discussed in this section that there is no statutory requirement to adduce reasons for the finding of the Court Martial and therefore no necessity to give reasons, is rejected.

The Petitioner is entitled to relief on the third ground as well.

5. Court Martial Decision not Final

There is no finality attached to the finding or decision of the Court Martial. There are a number of remedies available against

the decision of a Court Martial, as seen from the provisions of the Air Force Act and the Regulations made thereunder.

Section 63 of the Act stipulates that the conviction and sentence of a Court Martial shall not be valid until confirmed by an authority with power to approve such convictions and sentences. In certain instances, the approval of the Confirming Authority and the President is required. The Confirming Authority may, according to section 65 of the Act, refer the conviction and/or sentence to the Court Martial for revision, refer the matter to a superior authority for confirmation, or alter the conviction and/or punishment imposed.

These sections are further elaborated in Regulations 131-154. Regulation 140 also allows "*any officer or airman who considers himself aggrieved by the finding or sentence of a Court Martial may forward a petition to the confirming authority through his commanding officer*".

In addition to the above provisions, section 67 of the Air Force Act empowers the President or any prescribed officer to revise the sentence even after it has been confirmed. This has been highlighted by the Respondents themselves in their written submission:[34]

> *The President or any prescribed officer may, in accordance with such regulations as may be made in that behalf, revise any sentence passed on an accused by a Court Martial and confirmed by an authority having the power to confirm it, and in revising the sentence may—*

[34] *Vide* page 7 of the written submissions dated 03.09.2019.

a) *mitigate the punishment to a less amount of the same punishment;*

b) *remit the whole or a part of the punishment; and*

c) *commute the punishment to a different form of punishment lower in the scale of punishments authorized by this Act.*

Section 68 deals with the powers of a "superior air force authority" to revisit the sentence.

The jurisdiction of the Court of Appeal to issue writs in respect of matters before Courts Martial is expressly retained by section 79 of the Act.

> *79(1) 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 of any air-force authority exercising judicial functions.*
>
> *(2) The provisions of Article 141 of the Constitution relating to the issue of writs of habeas corpus shall be deemed to apply in respect of any person illegally detained in custody by order of a Court Martial or other air-force authority.*

In *Sarath Fonseka v. Dhammika Kithulegoda*,[35] the Supreme Court recognised the power of a Court having competent jurisdiction to set aside the decision of a Court Martial, stating "*a sentence of death or imprisonment handed down by a Court*

[35] [2011] BLR 169 at 177.

Martial is valid until and unless overturned by a Court of competent jurisdiction."

In *Mahabir Prasad Santosh Kumar v. State of U.P.*[36] the Supreme Court of India stated:

> *Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.*

The above discussion speaks volumes about the necessity to adduce reasons for a decision of the Court Martial. The Confirming Authority cannot be a mere rubber stamp. If the decision is hollow, how can the Confirming Authority or President or any competent Court revise the decision?

6. Natural Justice and Giving Reasons

Public law remedies such as writs of certiorari and mandamus are largely, if not solely, based on principles of natural justice.

[36] 1971 SCR (1) 201.

The first principle of natural justice is to hear both sides before taking a decision. This is known as the *audi alteram partem* rule, which runs across-the-board on the whole spectrum of the decision-making process as a golden thread, irrespective of whether the decision is by a regular Court, quasi-judicial body, administrative tribunal or the like. Hearing both sides does not end the matter. After the hearing, the deciding authority shall give its decision. The decision shall not be an empty decision without reasons. De Smith says "*If those entitled to be heard have no right to know how a tribunal resolved the issues in dispute at the hearing, they may well regard as an empty ritual their legally conferred opportunity to be heard*".[37] The aggrieved party has a right to know the reasons for the decision, at least to consider challenging the decision by appeal or judicial review. If the decision is challenged before another forum, such forum shall know the basis of the impugned decision to ascertain its correctness or otherwise.

> *A reasoned decision is necessary to enable the person prejudicially affected by the decision to know whether he has a ground of appeal, or alternatively, a ground of challenge by way of judicial review. Reasons will also assist the appellate or reviewing court to scrutinise effectively the decision for relevant error, without necessarily usurping the function of the decision-maker by itself re-determining the question of fact and discretion*

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[37] *De Smith's Judicial Review*, 8th Edition, p. 444.

> *which Parliament entrusted to the decision-maker. Without reasons, it can be extremely difficult to detect errors.*[38]

When the original decision is empty, what can an appellate or reviewing body do other than declaring there is no decision to appeal from or review in the eyes of the law, and therefore the purported decision is a nullity, unless, at least, the reasons for the said decision, which may have been originally withheld for some reason, are later submitted. In such an event, it is not necessary to prove that the failure to provide reasons established some other ground of review, such as irrationality or irrelevancy.

Making an order without giving reasons is a negation of the rule of law.

The Supreme Court of India in *Woolcombers of India Ltd. v. Woolcombers Workers' Union*[39] stated:

> *The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous*

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[38] *De Smith's Judicial Review*, 8th Edition, p. 443.
[39] [1974] 1 SCR 504.

> *considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decisions of judicial and quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the Court.*

Although there was a tendency to lean towards the view that "*[n]either the Common Law nor 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*",[40] the general trend in modern administrative law is an increasing acceptance of the importance of giving reasons for decisions and a rejection of the traditional view. In *Amaradasa v. Land Reform Commission*[41] it was stated "*There is no general rule that reasons should be given for decisions by an administrative body, but postulates of natural justice may warrant a departure*." It is apt to mention "*The historical origins of the rule that there is no general duty to provide reasons are obscure*."[42]

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[40] *Yaseen Omar v. Pakistan International Airlines Corporation* [1999] 2 Sri LR 375 (SC); *vide* also *Kusumawathie v. Aitken Spence Co. Ltd.* [1996] 2 Sri LR 18; *Sportsman Tea (Pvt) Ltd. v. Commissioner General of Labour* [2006] 1 Sri LR *93*; and the cases cited at 6-8 in *Hapuarachchi v. Commissioner of Elections* [2009] 1 Sri LR 1.

[41] (1977) 79(1) NLR 505 at 541.

[42] P.P. Craig, *Administrative Law,* 4th Edition, p. 131.

Wade vigorously supports the emerging trend of reasons for decisions being an essential element of administrative justice and a requirement for a general sense of justice.

> *The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions. 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, relevant consideration 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.*[43]

Whilst acknowledging it has long been a commonly recited proposition of English law that there is no general rule to give reasons for administrative decisions, De Smith admits "this situation has changed enormously."[44] He laments "*The absence of a general duty to give reasons has long been condemned as a major defect of our system of administrative law. As the Justice-*

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[43] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th Edition, pp. 440-441.

[44] *De Smith's Judicial Review*, 8th Edition, p. 439.

All Souls Committee concluded, no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions."[45] He says "*fairness or procedural fairness usually will require a decision-maker to give reasons for its decision. Overall, the trend of the law has been towards an increased recognition of the duty to give reasons and there has been a strong momentum in favour of greater openness and transparency in decision-making.*"[46] De Smith disapproves of the failure to give reasons in strong terms:

> *A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.*[47]

To my mind, the notion that there is no principle of natural justice that a tribunal or administrative authority should give reasons for its decision is inherently incoherent. The essence of natural justice demands administrative authorities give reasons for decisions.[48]

What is Natural Justice? "*In its broadest sense natural justice may mean simply the natural sense of what is right and wrong*

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[45] *Ibid.*, p. 442.
[46] *Ibid.*, pp. 441-442.
[47] *Ibid.*, p. 439.
[48] *Shell Gas Lanka Ltd. v. Consumer Affairs Authority* [2005] 3 Sri LR 262; *Kegalle Plantations Ltd. v. Silva* [1996] 2 Sri LR 180.

and even in its technical sense it is now often equated with fairness."[49]

Lord Denning in *Breen v. Amalgamated Engineering Union*[50] opined "*The giving of reasons is one of the fundamentals of good administration.*" "*The provision of reasons*", Craig states, "*increase public confidence in the administrative process and enhance its legitimacy.*"[51] De Smith adds, the giving of reasons:

> *encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making…Basic fairness and respect for the individual often requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit: in short, "justice will not be done if it is not apparent to the parties why one has won and the other has lost."[52] The giving of reasons increases public confidence in the decision-making process.*[53]

Whilst approving the recent trend of requiring reasons for decisions as an important protection of the law, Mark Fernando J. in *Karunadasa v. Unique Gems Stones Ltd*[54] observed:

> *There is an even more compelling reason for Administrative Law in Sri Lanka taking a similar stride…Article 12(1) of the Constitution now guarantees the equal protection of the law. In the context of the machinery for appeals, revision,*

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[49] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th Edition, p.374.
[50] [1971] 2 QB 175; (1971) 1 All ER 1148.
[51] P.P. Craig, *Administrative Law,* 4th Edition, p. 430.
[52] *English v. Emery Reimbold & Strick Ltd.* [2002] 1 WLR 2409 at [16].
[53] *De Smith's Judicial Review*, 8th Edition, pp.442-443.
[54] [1997] 1 Sri LR 256.

> *judicial review, and the enforcement of fundamental rights, giving reasons is becoming, increasingly, an important "protection of the law" (see, for instance, Bandara v. Premachadra (1994) 1 Sri LR 301) for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired (cf. Wade, 541-542)*

Article 12(1) of our Constitution recognises *"the equal protection of the law"* as a fundamental right. This means, empty decisions devoid of reasons not only give rise to invoking the writ jurisdiction of the Court of Appeal, but also the fundamental rights jurisdiction of the Supreme Court.

This was considered in the case of *Hapuarachchi v. Commissioner General of Elections*,[55] where the Commissioner General of Elections refused to register the Petitioners' newly formed political party as a recognised party–as the Commissioner was statutorily empowered to do–but without giving reasons. The Petitioners went before the Supreme Court complaining that their fundamental right guaranteed by Article 12(1) to equal protection of the law had been violated thereby.

Bandaranayake J. (later C.J.) at page 16 held:

> *The Petitioners had complained of the infringement of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. Article 12(1) of the Constitution deals with the right to equality and reads as follows:*

[55] [2009] 1 Sri LR 1.

> *"All persons are equal before the law and are entitled to the equal protection of the law."*
>
> *Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and, unfair decisions. As pointed out by Bhagwati, J. (as he then was) in E. P. Royappa v. State of Tamil Nadu AIR (1974) SL 555*
>
> *"From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch."*
>
> *In such circumstances to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.*

In *Siemens Engineering & Manufacturing Co. of India Limited v. Union of India & Another*,[56] the Supreme Court of India highlighted the giving of reasons for a decision as a basic principle of natural justice.

> *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 pretence of compliance with it would not satisfy the requirement of law.*

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[56] 1976 AIR 1785, 1976 SCR 489.

Quoting the above with approval, the Supreme Court of India observed in *Mukherjee v. Union of India*:[57]

> *This decision proceeds on the basis that the two well-known principles of natural justice, namely (i) that no man should be a Judge in his own cause and (ii) that no person should be judged without a hearing, are not exhaustive and that in addition to these two principles there may be rules which seek to ensure fairness in the process of decision-making and can be regarded as part of the principles of natural justice. This view is in consonance with the law laid down by this Court in A.K. Kraipak and Others v. Union of India and Others [1970] 1 SCR 457 wherein it has been held:*
>
> *"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (i) no one shall be a Judge in his own cause (nemo debet esse judex propria causa) and (ii) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice."*

If natural justice does not require giving reasons for decisions, fairness, at least, does. Explaining the relationship between

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[57] 1990 AIR 1984, 1990 SCR Sup (1) 44.

reasons and fair treatment, Galligan states giving reasons for decisions is a means of determining whether power has been exercised properly and whether parties have been treated fairly: "*the underlying principle of fair treatment is that a party be treated according to authoritative standards, and the giving of reasons is a means to that end.*"[58]

Wade says "*it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully*[59] and "*it is always possible that the failure to give reasons for a decision may justify the inference that the decision was not taken for a good reason.*"[60]

In *R v. Secretary for Trade and Industry ex parte Lonrho Plc*,[61] Lord Keith stated "*if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.*"

The observation of Lord Upjohn in *Padfield v. Minister of Agriculture*[62] is relevant:

> *if [the decision-maker] 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*

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[58] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (1996), p.432.
[59] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th Edition, p.441.
[60] *Ibid.*, p.442.
[61] [1989] 1 WLR 525 at 540.
[62] [1968] 1 All ER 694 at 719

> *good reason for reaching that conclusion and directing a prerogative order to issue accordingly.*

Failure to give reasons is a denial of justice.

In *Lankem Tea and Rubber Plantations (Pvt) Ltd v. Central Bank of Sri Lanka*,[63] Sripavan J. (later C.J.) held:

> *In the absence of reasons [by the Controller of Exchange], 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 (1985) 3 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.*[64]

Failure to give reasons suggests arbitrariness.

Bandaranayake J. (later C.J.) in the Supreme Court case of *Choolanie v. People's Bank*[65] observed:

> *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*

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[63] [2004] 2 Sri LR 133.
[64] *Vide* also the Judgment of Sripavan J. (later C.J.) in *Benedict v. Monetary Board of the Central Bank of Sri Lanka* [2003] 3 Sri LR 68.
[65] [2008] 2 Sri LR 93 at 105-106.

> *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.*

Giving reasons for decisions minimises abuse of power.

On behalf of the Supreme Court of India, in *Madhya Pradesh Industries Ltd. v. Union of India*,[66] Subba Rao J. stated:

> *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 minimises 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 tribunals 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*

[66] [1966] 1 SCR 466.

> *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.*

In the Supreme Court case of *Karunadasa v. Unique Gems Stones Ltd*,[67] the 2nd Respondent Commissioner made a formal decision upon the recommendations of the 1st Respondent Assistant Commissioner, but there were no reasons given for the decision of the Commissioner. Mark Fernando J. on behalf of the Supreme Court took the view that the failure to give reasons is a violation of natural justice:

> *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. The fact that the 3rd Respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons.*

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[67] [1997] 1 Sri LR 256.

The above case was, accordingly, remitted to the Court of Appeal to re-hear, after calling for and examining the record and the recommendations made by the Assistant Commissioner to the Commissioner.

In *Ceylon Printers Ltd v. Commissioner of Labour*,[68] G.P.S. de Silva C.J. followed the above decision.

In *Kusumawathie v. Aitken Spence Co. Ltd.*,[69] S.N. Silva J. (later C.J.) referring to the conventional view on the giving of reasons stated:

> *There is no requirement in law to give reasons should not be construed as a gateway 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. Rule 52 of the Supreme Court Rules 1978, is intended to afford an opportunity to the Respondents for this purpose. The reasons thus disclosed form part of the record and are in themselves subject to review.*

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.

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[68] [1998] 2 Sri LR 29.
[69] [1996] 2 Sri LR 18 at 28.

In such a situation, once the appeal or judicial review is put in motion, the decision-maker can tender the reasons to Court, as suggested by Mark Fernando J. in *Karunadasa v. Unique Gems Stones Ltd* (*supra*), and S.N. Silva J. (later C.J.) in *Kusumawathie v. Aitken Spence Co. Ltd* (*supra*). If reasons are suggested for the first time in Court, the tendency is to reject them as afterthoughts.

In *Wijepala v. Jayawardena*,[70] Mark Fernando J. went so far as to say:

> *Although openness in administration makes it desirable that reasons be given for decisions of this kind, in this case I do not have to decide whether the failure to do so vitiated the decision, However, when this Court is requested to review such a decision, if the Petitioner succeeds in making out a prima facie case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons—and so also, if reasons are [now] suggested, they were in fact not the reasons, which actually influenced the decision in the first place.*

In *Manickam v. The Permanent Secretary, Ministry of Defence and External Affairs*[71] it was held "*an affidavit supplementing the reasons already appearing on the order should not be entertained.*"

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[70] SC 89/95 SCM of 30.06.1995 cited in *Hapuarachchi v. Commissioner of Elections* [2009] 1 Sri LR 1 at 12.
[71] (1960) 62 NLR 204.

Wade explains the position in this way:

> *Thus the question arises whether a failure to give reasons at or about the time of the disputed decision, may be remedied by reasons given much later in the Respondent's affidavit responding to the grant of permission. If the duty to give reasons is an element of natural justice, the failure to give reasons, like any other breach of natural justice, should render the disputed decision void. And a void decision could not be validated by late reasons even if they show that the decision was justified. Consistent with this analysis the Court of Appeal has quashed a decision that an applicant was intentionally homeless notwithstanding that the bad reasons given when the decision was made were supplemented by good reasons given in the Respondent's affidavit. 'It is not ordinarily open', the Court of Appeal said in another case, 'to a decision maker, who is required to give reasons, to respond to a challenge by giving different or better reasons.' There is always the danger that the decision-maker in giving supplementary reasons may drift 'perhaps subconsciously, into ex post facto rationalisation' of the decision. Thus decision-makers should not be given 'a second bite at the cherry'. European law requires reasons to be given with the decision.*[72]

The essence of justice is adversely affected when natural justice is violated.

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[72] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th Edition, p.445.

> *As Lord Selborne once said:*[73] *"There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice." Quoting these words, the Privy Council has said that "it has long been settled law" that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. Likewise Lord Russell has said:*[74] *"it is to be implied, unless the contrary appears, that Parliament does not authorize by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles." Thus violation of natural justice makes the decision void, as in any other case of ultra vires.*[75]

"*Decisions given in breach of the rules of natural justice is a nullity and void in law.*"[76] This was emphasised in *Amaradasa v. Land Reform Commission* when it was held "*Breach of natural justice goes to jurisdiction and renders the decision or determination void, not voidable."*[77] 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

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[73] *Spackman v. Plumstead District Board of Works* (1885) 10 App. Cas. 229 at 240.
[74] *Fairmount Investments Ltd v. Secretary of State for the Environment* [1976] 1 WLR 1255 at 1263. And see *Ridge v. Baldwin* [1964] AC 40 at 80 ('a decision given without regard to the principles of natural justice is void' (Lord Reid)).
[75] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p. 374-375.
[76] *Amarasinghe v. Wijeratne* [2012] BLR 390 at 397.
[77] *Amaradasa v. Land Reform Commission* (1977) 79(1) NLR 505 at 532.

confusion and for clarity, the decision can be formally quashed by way of certiorari.[78]

The forgoing analysis goes to prove that the duty to give reasons is an inherent element of natural justice, and the failure of the Court Martial to give reasons in the instant case, like any other breach of natural justice, should render the disputed decision a nullity.

7. A Court of Law shall give Reasons for its Decision

The above discussion underscores in particular the importance of giving reasons for decisions by administrative bodies and also tribunals exercising quasi-judicial functions.

In India, a Court Martial does not appear to be recognised as a Court. In *Major Parvesh Chander Suri v. Union of India*,[79] it was stated "*the General Court Martial is a Tribunal constituted under the Army Act*". In *Union of India v. Harjeet Singh Sandhu*,[80] the Supreme Court of India stated *"The learned counsel for the Respondents submitted that a Court Martial convened under the Act is a high powered special tribunal vested with very wide jurisdiction. It cannot appropriately be called either a criminal court merely or a service tribunal simply. It is a combination of the two and much more than that.*"

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[78] *Macfoy v. United Africa Co. Ltd.* [1961] 3 All ER 1169 at 1172; *Izadeen v. Director-General of Civil Aviation* [1996] 2 Sri LR 348; *Gunadasa v. Attorney General* [1989] 2 Sri LR 130.
[79] (1987) 2 GLR 1043. *Vide* also *Subhash Chandra Sarkar v. Union of India* AIR 1973 MP 191.
[80] AIR 2001 SC 1772.

In *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial*,[81] a Full Bench of the Supreme Court of Sri Lanka considered Courts Martial to be "*extraordinary Courts*", which "*exercise not an ordinary but an extraordinary jurisdiction under circumstances of paramount necessity of State*."

More recently, as discussed previously, a five-Judge Bench of the Supreme Court in *Sarath Fonseka v. Dhammika Kithulegoda*[82] held that the Court Martial is not only a Court but a competent Court. J.A.N. De Silva, C.J. on behalf of the Supreme Court held:

> *[T]here is no contest that the concept of the Court Martial is a reality and that it has the power to hear and try cases, act judicially, and impose valid sentences including imprisonment and/or death. The only quarrel here is whether the Court Martial is "any Court" in terms of Article 89 of the Constitution. The validity of the concept of Court Martial in itself and its power to determine cases and impose sentences of imprisonment and/or death not being contested, and, the only contest being its status in the hierarchy of institutions dispensing justice, Article 13(4) of the Constitution brings it within the description of not only a "court" but a "competent court", since, in terms of Article 13(4), only a*

[81] (1915) 18 NLR 334 at 339.
[82] [2011] BLR 169 at 179.

> *"competent Court" can impose sentences of death or imprisonment.*[83]

I need hardly emphasise that although there may be a divergence of opinion on whether an Administrative Tribunal shall, in the absence of a statutory requirement, give reasons for its decisions in every case, there cannot be any dispute that a competent Court shall, nay must, give reasons for its decisions. Giving reasons is an inherent feature of the Court. Not only where no reasons are given, but also if the reasons given are grossly inadequate, a Judgment will be struck down on appeal on that ground alone.[84]

Hence the Court Martial being a Court of law shall give reasons for its decisions.

8. Judicial Review on Merits

Learned ASG says "*The pleadings of the Petitioner filed of record in the instant matter also contain copious references to the facts of the case and it is respectfully submitted that such matters cannot be revisited in a writ application of this nature*." He emphasises that the instant application being a writ application, the Petitioner must establish the impugned decision is unlawful (as opposed to incorrect); and, as the Petitioner has failed to establish this, the application shall be dismissed. He cites

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[83] Justices Bandaranayake (later C.J.), Amaratunga, Marsoof, Sripavan (later C.J.) agreed with Silva C.J.; Justice Marsoof wrote a separate Judgment.
[84] *Warnakula v. Ramani Jayawardena* [1990] 1 Sri LR 206; *Sobanahamy v. Somadasa* [2005] 3 Sri LR 201; *Latheef v. Mansoor* [2010] 2 Sri LR 333.

Browns Engineering (Pvt) Ltd. v. Commissioner of Labour[85] and *Public Interest Law Foundation v. Central Environment Authority*[86] in support of the proposition "*Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not.*"[87]

Having said so, learned ASG further submits:

> *The grounds on which the writ of certiorari may be issued are:*
>
> *(a) error of jurisdiction*
>
> *(b) lack of jurisdiction*
>
> *(c) excess of jurisdiction*
>
> *(d) abuse of jurisdiction*
>
> *(e) error of law apparent on the face of the record*
>
> *(f) violation of principles of natural justice*
>
> *If the Petitioner is to succeed in the instant matter, he must satisfy court that one of the following conditions exist.*
>
> *(a) There should be court, tribunal or an officer having legal authority to determine the question with a duty to act judicially.*
>
> *(b) Such a court, tribunal or officer must have passed an order acting without jurisdiction or in excess of the*

[85] [1998] 1 Sri LR 88.
[86] [2001] 3 Sri LR 330.
[87] [2001] 3 Sri LR 330 at 334.

judicial authority vested by law in such court, tribunal or officer.

(c) The order could also be against the principles of natural justice or the order could contain an error of judgment in appreciating the facts of the case.

It appears learned ASG has considered the said "grounds" and "conditions" as matters relevant to the legality of the decision but not the correctness thereof.

Be that as it may, according to (c) above, learned ASG submits if the Petitioner can satisfy this Court "*the order could also be against the principles of natural justice or the order could contain an error of judgment in appreciating the facts of the case*", the Petitioner can succeed in this application.

I have already stated a decision of the Court Martial devoid of reasons is in violation of the principles of natural justice. In fact, when a decision contains no reasons whatsoever, this Court cannot consider whether or not the decision contains "*an error of judgment in appreciating the facts of the case*". In such circumstances, this Court cannot be found fault with for drawing the presumption that the Court Martial did not give reasons for its decision because the facts of the case do not support the decision.

Hence, according to the argument of learned ASG himself, the application of the Petitioner is entitled to succeed.

Nonetheless, let me dispel the misconception surrounding the tussle between the 'legality' and 'correctness' of decisions in the judicial review process.

There is a misbelief that judicial review is available only against 'unlawful' decisions but not against 'wrong' decisions. According to this view, even if the decision is patently erroneous, writ does not lie if the decision-making process was flawless. Proponents of this proposition opine that by way of judicial review, a decision cannot be reviewed on merits, but only on legality sans merits. For them, errors of fact by the deciding authority are outside the purview of writ jurisdiction. This argument is generally supported by quoting the following passage of Wade in isolation and out of context:

> *The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'*[88]

This supposed dichotomy between 'right or wrong' on the one hand and 'lawful or unlawful' on the other, vis-à-vis administrative decisions, has been obliterated over the years. Wade himself explains this in the latter part of his treatise.[89] It

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[88] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p.26.
[89] *Vide inter alia* Chapter 8 on "Jurisdiction over Fact and Law" and Chapter 11 on "Abuse of Discretion".

may be observed in the above quotation that Wade restricts 'legality' to the question: "*is it within the limits of the powers granted?*" But, as I will explain below, the Court can and does look beyond this requirement.

De Smith[90] whilst pointing out "*the courts have been slow to recognise mistake of material fact as a ground of judicial review, because it appears to involve the judges in assessing the merits of a decision and turns judicial review into appeal*", hastens to add "*However, there have been instances where the courts have intervened on that basis*", i.e. on mistake of fact, giving an array of cases to establish the latter position.[91]

Wade acknowledges that mistakes of fact can make a decision bad in law.

> *Certain mistakes of fact can carry an administrative authority or tribunal outside its jurisdiction. A rent tribunal, for example, may have power to reduce the rent of a dwelling-house. If it mistakenly finds that the property is a dwelling-house when in fact it is let for business purposes, and then purports to reduce the rent, its order will be ultra vires and void. For its jurisdiction depends upon facts which must exist objectively before the tribunal has power*

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[90] *De Smith's Judicial Review*, 8th Edition, p. 609.

[91] *Hollis v. Secretary of State for the Environment* (1984) 47 P. & C.R. 351; *Simplex GE Holdings Ltd v. Secretary of State for the Environment* (1989) 57 P. & C.R. 306; *Secretary of State for Education and Science v. Tameside MBC* [1977] AC 1014; *Pulhofer v. Hillingdon LBC* [1986] AC 484; *Wandsworth LBC v. A* [2000] 1 WLR 1246; *R. v. Legal Aid Committee No.10 (E. Midlands) Ex p. Mc Kenna* (1990) 2 Admin. LR 585; *R. v. Criminal Injuries Compensation Board Ex p. A* [1999] 2 AC 330; *Edwards v. Bairstow* [1956] AC 14 at 62; *E v. Secretary of State for the Home Department* [2004] EWCA Civ 49.

> *to act. As to these 'jurisdictional facts' the tribunal's decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by Parliament. The fact that the tribunal's order appears good on its face can avail nothing. It will be quashed on certiorari if the applicant can show that the true facts do not justify it.*[92]

This explanation illustrates how a mistake of fact can make the decision of a tribunal *ultra vires*—that is a jurisdictional error. What about non-jurisdictional errors? The traditional view is the Courts have no jurisdiction under judicial review to look into non-jurisdictional errors, so long as tribunals act within jurisdiction. Accordingly, in the above example, if the property is a dwelling-house, the Court will not interfere with the decision of the tribunal on the basis of mistakes of fact. However, this is not correct in modern administrative law.

The difficulty of drawing a line between jurisdictional and non-jurisdictional errors is highlighted in the majority decision of the House of Lords in the landmark case of *Anisminic Ltd. v. Foreign Compensation.*[93] Although it is not clear on a reading of the speeches in *Anisminic* whether it established the rule that all errors by a tribunal will cause the tribunal to exceed its jurisdiction, Lord Denning MR in *Pearlman v. Keepers and Governors of Harrow School*[94] stated the distinction between an error which entails absence of jurisdiction and an error made

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[92] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p.208.
[93] [1969] 2 AC 147.
[94] [1979] QB 56 at 70. Lord Denning took the same view in several cases including *R. v. Chief Immigration Officer, ex p. Kharrazi* [1980] 3 All ER 373.

within jurisdiction was very fine and being eroded. In the House of Lords decision in *In Re Racal Communications Ltd*,[95] Lord Diplock remarked "*The breakthrough made by Anisminic was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished*." De Smith concurs with this line of thinking when he says: "*The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insists that all administrative action should be simply, lawful, whether or not jurisdictionally lawful.*"[96]

What is error of law and what is error of fact for the purpose of invoking writ jurisdiction? Like jurisdictional error and non-jurisdictional error, the distinction between error of law and error of fact is practically non-existent. An error of law encompasses more than the violation of a positive rule of law or an act in excess of power. An error of fact can also be an error of law.

According to De Smith, making a clear distinction between law and fact is notoriously difficult, and therefore, traditional restraint preventing the Courts from assessing facts in the judicial review process is being blurred.

> *Since courts in judicial review are concerned with the law and not the merits of a case, they will not normally interfere*

[95] [1981] AC 374 at 383.
[96] *De Smith's Judicial Review*, 8th Edition, p. 228.

> *with a public authority's assessment of the evidence or the facts. Sometimes there is a double limitation on review for fact, for the courts may be reviewing the decision of an appeal tribunal which itself had jurisdiction only to review the primary decision for errors of law. The complexity intensifies in the light of the notorious difficulty of making a clear distinction between law and fact. These days the prohibition on the court's assessment of facts is being blurred by the requirement that the decision-maker justify all aspects of a decision—be it law, fact, judgment or policy. In addition, when the principle of proportionality is engaged, a closer assessment of fact may be required.*[97]

In the case of *Ashbridge Investments Ltd. v. Minister of Housing and Local Government*,[98] Lord Denning MR explained how an error of fact can bring about the same result as an error of law.

> *The court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a decision to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or he has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.*

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[97] *De Smith's Judicial Review*, 8th Edition, pp. 605-606.
[98] [1965] 1 WLR 1320 at 1326. *Vide* also *Collen Properties Ltd. v. Minister of Housing and Local Government* [1971] 1 WLR 433.

What constitutes an error of law cannot be rigidly defined. In practical terms, examples can be provided to illustrate errors of law.

Section 31D of the Industrial Disputes Act, No. 43 of 1950, as amended, enacts that the order of a Labour Tribunal shall be final and shall not be called in question in any Court, except on a question of law. In the case of *Jayasuriya v. Sri Lanka State Plantations Corporations*,[99] the Supreme Court had occasion to consider the meaning given to "question of law" in the said section. The Supreme Court held:

> *While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law: if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence.*

[99] [1995] 2 Sri LR 379.

In *Collettes Ltd. v. Bank of Ceylon*,[100] in considering what constitutes a "question of law" within the meaning of the provisions of Article 128(1) of the Constitution, a Divisional Bench of the Supreme Court acknowledged "*questions of law and questions of fact are sometimes difficult to disentangle*", and held *inter alia* "*Where there is or is not evidence to support a finding, is a question of law.*" The Supreme Court defined "question of law" in the following terms:

> *(a) The proper legal effect of a proved fact is necessarily a question of law. A question of law is to be distinguished from a question of fact. Questions of law and questions of facts are sometimes difficult to disentangle.*
>
> *(b) Inferences from the primary facts found are matters of law.*
>
> *(c) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law. Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law.*
>
> *(d) Whether the evidence is in the legal sense sufficient to support a determination of fact is a question of law.*

[100] [1982] 2 Sri LR 514 at 515.

(e) If in order to arrive at a conclusion on facts it is necessary to construe a document of title or correspondence then the construction of the document or correspondence becomes a question of law.

(f) Every question of legal interpretation which arises after the primary facts have been established is a question of law.

(g) Whether there is or is not evidence to support a finding, is a question of law.

(h) Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.

(i) Whether the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law.

Error of law on the face of the record can be made use of to quash erroneous decisions, notwithstanding the decision-making process was flawless.

In *All Ceylon Commercial and Industrial Workers' Union v. Nestle Lanka Limited*,[101] Jayasuriya J. observed:

> *In R. v. Northumberland Compensation Appeal Tribunal—ex parte Shaw 1951 1 KB 711 (Affirmed in 1952 1 KB 338), the Divisional Court of the Kings Bench Division held that certiorari would issue to quash the decision of a statutory*

[101] [1999] 1 Sri LR 343 at 350.

> *administration tribunal for an error of law on the face of the record, even though that tribunal was not a court of record and although that error did not go to the jurisdiction of the tribunal. This decision pronounced by Lord Denning appeased at least to a certain extent, the public demand for better justice in the welfare state and it marked the commencement of a new era of judicial review.*

The wrongful rejection of admissible evidence and wrongful admission of inadmissible evidence in the decision-making process are incidents of errors of law on the face of the record.

If the deciding authority has manifestly failed to properly evaluate the evidence led before it, the decision can be quashed on the ground of error of law on the face of the record.

According to De Smith "*The wrongful rejection of evidence by a decision-maker may also amount either to a failure to take into account a relevant consideration and or to a failure to afford procedural propriety and thus render the decision unlawful.*"[102]

In *Chithrasiri v. National Gem and Jewellery Authority*,[103] after an inquiry, the Gem Authority issued a gem mining licence in favour of the respondent on the primary basis that the title to the land was established by a partition decree. The Petitioner, seeking to quash the said decision by certiorari, convinced this Court that the said partition decree was not relevant to the land the license was issued to but to a different land, and thereby the Authority had clearly gone wrong on facts in issuing the licence.

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[102] *De Smith's Judicial Review*, 8th Edition, pp. 612-613.
[103] CA/WRIT/38/2016, CA Minutes of 31.05.2018.

The argument of the Respondent was not that the said decree was relevant to the land, but that the writ Court could not quash the decision on that ground, as it affected the correctness of the decision and not its legality. This Court refused the said argument of the Respondent and quashed the decision by certiorari on the ground of error of law on the face of the record.

In *Brook Bond (Ceylon) Ltd. v. Tea, Rubber, Coconut and General Produce Workers' Union*,[104] it was held "*The refusal of the Tribunal to consider material facts constituted error of law*."

It was decided in *Sithamparanathan v. People's Bank*,[105] "*Failure to properly evaluate evidence or to take into account relevant considerations in such evaluation is a question of law*."

A similar conclusion was reached in *Fonseka v. Candappa*,[106] where it was decided:

> *It becomes a question of law where relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence.*

Unreasonable decisions, De Smith points out, are unlawful decisions, liable to be overturned by certiorari:

> *the question of what is relevant or material consideration is a question of law, whereas the question of what weight to*

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[104] (1973) 77 NLR 6.
[105] [1989] 1 Sri LR 124.
[106] [1988] 2 Sri LR 11.

> *be given to it is a matter for the decision-maker. However, where undue weight is given to any particular consideration, this may result in the decision being held to be unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.*[107]

In *Gunasekera v. De Mel, Commissioner of Labour*,[108] where the order of the Commissioner of Labour was sought to be quashed by way of certiorari, the Supreme Court gave a broader interpretation to lack of jurisdiction and error of law on the face of the record:

> *Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are*

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[107] *De Smith's Judicial Review*, 8th Edition, p. 602.
[108] (1978) 79(2) NLR 409 at 426.

> *given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made.*

If a decision is inconsistent with the weight of evidence led, certiorari is available to quash the decision. In *Health & Co (Ceylon) Ltd. v. Kariyawasam*,[109] the decision of the Arbitrator was quashed on this basis:

> *In the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of evidence, his award is liable to be quashed by way of certiorari.*

The conclusion was similar in *Wijerama v. Paul*,[110] where the decision in question was set aside by certiorari *inter alia* on the premise:

> *A tribunal which draws an inference wholly unsupported by the primary facts errs in point of law.*

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[109] (1968) 71 NLR 382 at 384.
[110] (1973) 76 NLR 241 at 258.

In *Virakesari Ltd v. Fernando*,[111] it was held "*The omission of an inferior tribunal to take into consideration a relevant document forming part of the record, or a misconstruction of such document, is an error of law appearing on the face of the record*."

In *Mudanayake v. Sivagnanasunderam*,[112] the decision sought to be quashed was not allowed to stand, as it was the opinion of the Court:

> *Certiorari lies not only where the inferior Court has acted without or in excess of its jurisdiction but also where the inferior Court has stated on the face of the order the grounds on which it had made it and it appears that in law those grounds are not such as to warrant the decision to which it had come.*

In *Chas Hayley and Co. Ltd., v. Commercial and Industrial Workers*,[113] Senanayake J. elaborated on what constitutes an error of law on the face of the record as a ground for certiorari:

> *It is well settled that the order of an inferior tribunal having a duty to act reasonably in determining the rights of the parties is liable to be quashed by Writ of Certiorari for an error of law appearing on the face of the record. A finding of fact may be impugned on the ground of error of law on the face of the record (a) erroneously refusing to admit admissible material evidence (b) erroneously admitting inadmissible evidence which influence the finding (c) finding*

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[111] (1963) 66 NLR 145 at 150-151.
[112] (1951) 53 NLR 25 at 31.
[113] [1995] 2 Sri LR 42 at 49-50.

> *based on no evidence (d) where the tribunal had acted with manifest or clear unreasonableness or unfairness. The misconstruction of the document becomes an error on the face of the record.*
>
> *I am of the view that the Arbitrator had misconstrued the document R16b when he failed to consider that the loss depicted in the Report and speculated on the fact that it was temporary without any evidence. There was no evidence for such a finding. This was unreasonable and unfair. The evidence revealed that the employees were getting a higher wage than prescribed by the Wages Board Ordinance. They were paid more than the other competitors in the Trade. The Arbitrator failed to consider the heavy financial loss and had acted unreasonably and unfairly in granting 30 percent increase in wages with a 10% increase in productivity was an error of law on the face of the record. In the circumstances, I quash the award of the 2nd Respondent by granting a writ of Certiorari.*

The violation of principles of natural justice, according to *Gunadasa v. Attorney-General,*[114] amounts to an error of law on the face of the record:

> *That the failure to give the Petitioner a fair opportunity to "correct or contradict" the material witnesses when they gave evidence, has occasioned a violation of the principles of natural justice; that a man's defence must always be fairly heard. The non-observance of the said principles of*

[114] [1989] 2 Sri LR 130.

> *natural justice, would consequently amount to an error on the face of the record, which would attract the remedy of Writ of Certiorari.*
>
> *The failure to make available the documents relevant to the defence of the Petitioner, at the hearing, amounted to an error on the face of the record, and the Writ of Certiorari would lie in such situations also.*

In *Nalini Ellegala v. Poddalagoda,*[115] on an application made by the appellant landlord, the Rent Board held that the premises in dispute were excepted premises in terms of the Rent Act. The tenant appealed to the Board of Review under the Act which provides for an appeal upon a matter of law. The Board of Review found that the Rent Board had failed to properly evaluate the evidence and, on that basis, set aside the order of the Rent Board and decided that the premises were governed by the Rent Act. The landlord unsuccessfully moved the Court of Appeal to quash the decision of the Board of Review by certiorari. On appeal to the Supreme Court, the decision of the Court of Appeal was upheld on the ground that failure to properly evaluate evidence is an error of law.

In the above case, the Supreme Court further recognised the 'no evidence' rule as forming another branch of the principle of *ultra vires*. Wijetunga J. held:

> *The main ground adduced before the Court of Appeal was that the Rent Board of Review was in error in entertaining the appeal which was not founded on a question of law.*

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[115] [1999] 1 Sri LR 46.

The Court of Appeal observed that "if the true and only reasonable conclusion contradicts the determination reached by the tribunal, the conclusion may be set aside on the ground that there has been an error of law, which was responsible for the determination", and proceeded to hold that the "Board of Review has not acted outside its jurisdiction in entertaining the appeal and making its decision on a matter of law".[116]

In Hasseen v. Gunasekera and others,[117] *the Court of Appeal 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.*

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

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[116] At 51.
[117] CA Application No.128/86, CA Minutes of 2.10.1995.

> *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 these principles to the matter before us, and having regard to the facts aforementioned, I am of the view 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.*[118]

The 'no evidence' rule shall not be afforded an overly restrictive interpretation. 'No evidence' does not mean no evidence at all. Rather, it means insufficient evidence to support the impugned decision. In the words of Wade:

> *It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. 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.*

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[118] [1999] 1 Sri LR 46 at 51-52.

> *'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. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.*[119]

Lord Atkinson in *Folkestone Cpn. v. Brockman*[120] stated "*an order made without any evidence to support it is in truth, in my view, made without jurisdiction*".

Wade considers the 'no evidence' rule as a firmly established, albeit more recent, ground for judicial review, and states "*older authorities to the contrary, impressive though they are, must now be consigned to the scrapheap of history. 'No evidence' thus takes place as yet a further branch of the principle of ultra vires. The time is ripe for this development as part of the judicial policy of preventing abuse of discretionary power. To find facts without evidence is itself an abuse of power and a source of injustice, and it ought to be within the scope of judicial review.*[121]

De Smith's *Judicial Review*,[122] under the sub-heading "*Decisions unsupported by substantial evidence*" says:

> *This encompasses situations where there is 'no evidence' for a finding upon which a decision depends or where the*

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[119] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p. 227.
[120] [1914] AC 338 at 367.
[121] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p.230.
[122] *De Smith's Judicial Review*, 8th Edition, p. 611.

> *evidence, taken as a whole, is not reasonably capable of supporting a finding of fact. Such decisions may be impugned as "irrational" or "perverse", providing that this was a finding as to a material matter.*[123]

Craig also acknowledges "*The courts now generally regard no evidence as a ground for review*", and further says "*The way is now open for review of the evidence supporting the decision-maker's findings.*"[124]

In Sri Lanka, the 'no evidence' rule has been recognised as a component of natural justice. In *Sirisena Cooray v. Tissa Dias Bandaranayake*,[125] on behalf of the Supreme Court, Dheeraratne J. making reference to *Mohan Mahon v. Air New*

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[123] Decisions unsupported by evidence have been held to be unreasonable in *Osgood v. Nelson* (1872) LR 5 HL 636; *R. v. Attorney General Ex p. Imperial Chemical Industries Plc* (1986) 60 Tax Cas. 1; *R. v. Birmingham City Council Ex p. Sheptonhurst Ltd* [1990] 1 All ER 1026 (no evidence in licensing decision on sex establishment "irrational"); *R. v. Housing Benefit Review Board of Sutton LBC Ex p. Keegan* (1995) 27 HLR 92 (lack of evidence of failure to pay rent rendered decision "unreasonable"; *Piggott Bros and Co Ltd v. Jackson* [1992] 1 CR 85 (Lord Donaldson MR, in the context of employment law, held that to find a decision "perverse", the appeal tribunal had to be able to identify a finding of fact unsupported by any evidence); *Peak Park Joint Planning Board v. Secretary of State for the Environment* [1991] JPL 744 (a conclusion which "flew in the face of the evidence" and was "based on a view of the facts which could not reasonably be entertained" was held to be "perverse"). Sometimes such decisions have been held to involve excess of jurisdiction, e.g. *Ashbridge Investments* [1965] 1 WLR 1320. Lord Diplock occasionally held that the principles of natural justice required a decision to be based on "evidential material of probative value", e.g. *Attorney General v. Ryan* [1980] AC 718; *R. v. Deputy Industrial Injuries Commissioner Ex p. Moore* [1965] 1 QB 456 (reached a verdict that "no reasonable coroner could have reached"). In *R. (on the application of Mott) v. Environment Agency* [2015] EWHC 314 (Admin); [2015] Env. LR 27 the imposition of conditions upon a licence to fish was held irrational where the decision-maker had failed to consider whether the evidence upon which it based its decision was credible and capable of supporting the conclusions drawn from it.

[124] P.P. Craig, *Administrative Law,* 4th Edition, p. 491.

[125] [1999] 1 Sri LR 1 at 33.

Zealand[126] and *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore*[127] stated "*Principles of natural justice require that a tribunal's decisions are based on some evidence of probative value*."

Our Courts, following English decisions, have taken a liberal approach on questions of 'no evidence', error of law and mistake of fact etc., in that no forceful attempt has been made to limit writ jurisdiction only to lack or excess of jurisdiction of the deciding authority.

There is no need to panic that the Courts, in the exercise of judicial review, will set aside administrative decisions whenever they are found to be faulty. An error of law *ipso facto* will not give the Courts *carte blanche* to review decisions on the basis of what the Courts consider to be fair and reasonable on merits. Writ being a discretionary remedy, the Court can decide whether or not the error in question is of sufficient significance to justify the writ. For instance, Lord Denning was able to side with the majority opinion in *Baldwin & Francis Ltd v. Patents Appeal Tribunal*[128] to hold that although an error of law did appear upon the face of the record, it was not an error which would warrant the remedy of certiorari.

Cooray states:[129]

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[126] [1984] 3 All ER 201 (PC).
[127] [1965] 1 All ER 81.
[128] [1959] AC 663 at 696.
[129] Sunil F.A. Cooray, *Principles of Administrative Law in Sri Lanka*, 3rd Edition, Vol 2, p.829.

> *Certiorari will not issue for any and every "error of law" contained in the order to be quashed. The error must be material to the order in the sense that the order should be wholly or partly based on it. Where an Industrial Court made an award and gave three reasons for it only one of which was an error of law, certiorari was issued to quash the award because the Court had "little doubt that the error of law was on a point deemed material by the industrial court itself."*[130]
>
> *Where only some findings made in the process of exercising power are based on errors of law, certiorari will issue to quash only those findings and other findings which are not based on error of law the Court will allow to stand.*[131]

Coming back to the instant matter under review, the above discussion reinforces the importance of giving reasons for decisions. In sum, if the reasons given for a decision by the Court Martial are *ex facie* unacceptable, this Court can quash the decision by certiorari, *inter alia*, on the 'no evidence' rule or error of law on the face of the record. If no reasons are given for the decision, the result is inevitable—the decision will be quashed by certiorari.

Let me now have a closer look at the two Judgments—*Browns Engineering (Pvt) Ltd. v. Commissioner of Labour*[132] and *Public Interest Law Foundation v. Central Environment*

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[130] *Shell Company of Ceylon Ltd. v. Perera* (1967) 70 NLR 108 at 112.
[131] In *Virakesari Ltd. v. Fernando* (1963) 66 NLR 145, the Court considered separately whether the several findings of the officer were or were not based on error of law.
[132] [1998] 1 Sri LR 88.

Authority[133]—cited by learned ASG to say that this Court cannot in the exercise of writ jurisdiction go into the merits of the case or decision.

In *Browns Engineering (Pvt) Ltd. v. Commissioner of Labour*,[134] the employer came before this Court seeking to quash the decision of the Commissioner of Labour on the ground that the computation of compensation awarded to the employees was bad in law. Whilst dismissing the application, Jayasuriya J. observed:

> *In considering and evaluating the submissions of learned counsel for the Petitioner, in his impugnment of the assessment of compensation and the ascertainment of the quantum of compensation payable by the Petitioner-company to the aforesaid workmen, this court must necessarily have in the forefront of its mind that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to award of compensation pronounced by the Commissioner of Labour will be available to quash an award of compensation only if the Commissioner of Labour wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law. The remedy by way of certiorari cannot be made use of to*

[133] [2001] 3 Sri LR 330.
[134] [1998] 1 Sri LR 88.

correct errors or to substitute a correct order for a wrong order and if the Commissioner's award of compensation was not set aside in whole or in part, it had to be allowed to stand unreversed. "The system of Judicial review is radically different from the system of appeals. When hearing an appeal, a court is concerned with the merits of the decision under appeal; when subjecting some administrative act or order to judicial review, the court is concerned with its legality. On an appeal the question is right or wrong? On review the question is lawful or unlawful?" Judicial review is a fundamentally different operation to the exercise of appellate jurisdiction. A court on review is concerned only with the question whether the award under attack should be allowed to stand or not. Vide Prof. H. W. R. Wade on Administrative Law, 7th edition, pages 38 to 39. Thus, the object of this court upon judicial review is strictly to consider whether the whole or part of the award of compensation pronounced by the Commissioner of Labour is lawful or unlawful. This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of its supervisory jurisdiction and judicial review over an award of compensation decreed by the Commissioner of Labour. In this respect, I would reiterate the prudent and wise observations made by Justice Samarawickrema in Silva v. Kuruppu (SC 182/69, SC Minutes 14.10.71).[135]

[135] At 105-106.

In the above passage, if I may repeat, Jayasuriya J. correctly states that relief by way of certiorari will be available if the Commissioner of Labour:

> *wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law.*

Having stated so, there is no necessity to give a restrictive interpretation to the word 'jurisdiction' and the phrase 'error of law', in order to exclude the merits of the matter from consideration.

The word 'jurisdiction' shall not be confined to territorial jurisdiction or the powers conferred on the decision-making body by statute or otherwise. As explained earlier, for instance, "*A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law*", which results in the decision having been made without jurisdiction.[136] This also goes to prove an 'error of law' cannot be narrowly interpreted only to mean a violation of a provision of a statute. The "*failure to properly evaluate evidence*" is an error of law, which in turn warrants quashing the decision taken thereby.[137]

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[136] *Gunasekera v. De Mel, Commissioner of Labour* (1978) 79(2) NLR 409 at 426.
[137] *Sithamparanathan v. People's Bank* [1989] 1 Sri LR 124.

However, Jayasuriya J. in the concluding paragraph of the Judgment in *Browns Engineering (Pvt) Ltd.* (*supra*) gives reasons for the dismissal of the application in the following terms:

> *I hold that the award of compensation made by the Commissioner of Labour is lawful and in the assessment of compensation he has acted on correct and legal principles which have been consistently laid down by the superior courts in Sri Lanka. I hold that there is no substantial misdirection in point of fact or law, there is no failure on the part of the Commissioner of Labour and the Assistant Commissioner of Labour to take into consideration the effect of the totality of the evidence led at the inquiry, there is no improper evaluation of evidence, neither is there any application of incorrect and illegal principles on a consideration of the totality of the evidence led at the inquiry and the findings and recommendations of the Assistant Commissioner and the order of the Commissioner of Labour. In the circumstances, I hold that there is no error of law disclosed on a perusal of the record. The Commissioner of Labour has considered the totality of the oral and documentary evidence led at the inquiry, the findings and recommendations of the Assistant Commissioner of Labour and the material in the record bearing number TE/57/94 and pronounced his order which is sought to be impugned before this court. In the circumstances, I make order dismissing the application of the Petitioner-company with costs.*

It is clear from the above that the Court did not dismiss the application on legality devoid of merits. The Court, in fact, dismissed the application on merits.

Jayasuriya J. took the same view in *Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training*,[138] a case where the Petitioners sought to quash an arbitral award by certiorari. The dismissal of the application was justified in this way:

> *There is no misdirection in point of fact or law which vitiates the award. There is no failure on the part of the arbitrator to take into consideration the effect of the totality of the oral and documentary evidence placed before him and there is no improper evaluation of the evidence placed before the arbitrator on a consideration of the award and the totality of the evidence placed before him in this matter.*[139]

Having said the above, Jayasuriya J. remarked that in judicial review the Court is concerned with legality and not correctness.[140] This general observation does not correctly explain the present position of the law.

However, in *All Ceylon Commercial and Industrial Workers' Union v. Nestle Lanka Limited*,[141] decided two years after the aforesaid two decisions, Jayasuriya J. did not opine that in judicial review the Courts cannot look into the merits of the matter. Instead, applying the 'no evidence' rule and error of law on the face of the

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[138] [1998] 1 Sri LR 235.
[139] At 248-249.
[140] At 249.
[141] [1999] 1 Sri LR 343.

record, he went into the merits of the case to quash the impugned decision by certiorari on the basis that there was no evidence to support the decision.

> *Thus, there is no evidence or material which has been adduced which could support the aforesaid inference and findings reached by the fourth respondent. Findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary. Minister of National Revenue v. Wrights Canadian Ropes Ltd.,*[142] *Argosy Company Ltd. v. IRC,*[143] *Osgood v. Nelson,*[144] *Maradana Mosque Trustees v. Mahamud,*[145] *De Smith in his judicial review of Administrative Action - 4th edition page 133 - sets out the principle that a deciding authority "which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law…The no evidence rule is well-established… and it has established itself because superior courts exercising appellate or supervisory jurisdiction in respect of errors of law need to have power to intervene wherever manifest and gross error is revealed.*
>
> *The 'no evidence rule' does not contemplate a total lack of evidence; it is equally applicable where the evidence taken as a whole, is not reasonably capable of supporting the finding or decision (vide Allinson v. General Medical Council*

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142 [1947] AC 109.
143 [1971] 1 WLR 514.
144 [1872] LR 5 HL 636.
145 [1967] 1 AC 13.

[1894] 1 QB 750 at 760 or where no deciding authority could reasonably reach that conclusion on that evidence (vide R. v. Roberts [1908] 1 KB 407 at 423).

Lord Atkinson in Folkestone Corporation v. Brockmad [1914] AC 338 at 367 remarked: "an order made without any evidence to support it is in truth, in my view, made without jurisdiction." Contra - R. v. Net Bell Liquors Ltd. [1922] AC 128 at 151 per Lord Sumner. R. v. Ludlow [1947] KB 634 per Lord Goddard CJ. However, Lord Denning in O'reilly v. Mackman [1983] 2 AC 237 at 253 has impugned the statement of the law pronounced by Lord Sumner as the darkest moment of the "blackout of any development of Administrative Law". Other decisions have described a "no evidence finding" as unreasonable, perverse and arbitrary and therefore ultra vires for other reasons.

Wade and Forsyth on Administrative Law - 7th edition at page 316 - conclude that despite the absence of an authoritative decision reviewing the justification for and against the "no evidence rule", "it seems clear that this ground of judicial review ought now to be regarded as established on a general basis…it conforms so well to other developments in administrative law that one can only assume that the older authorities to the contrary, impressive though they are, may now be consigned to the limbo of history. '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 made upon some

> *acceptable evidence. If it is not, it will be treated as arbitrary, capricious, and obviously unauthorised."*
>
> *I hold that there is an error on the face of the record which entitles this Court in the exercise of its power of certiorari to quash the aforesaid award as the finding in regard to ground five had been reached bereft of any evidence or any material which has been elicited before the arbitrator.*

The above Judgment of Jayasuriya J. was quoted with approval in the Supreme Court case of *Singer Industries (Ceylon) Ltd. v. Ceylon Mercantile Industrial and General Workers Union.*[146] The question to be decided in the said case was whether the employer had agreed to give a maximum of 3/4th of a month's salary as gratuity to employees who had served more than 20 years. After an inquiry, the Arbitrator decided that the employer had so agreed. The decision was upheld by the Court of Appeal when the employer moved to set aside the decision by certiorari. On appeal, the Supreme Court went into the merits of the case and set aside both the Award and the Judgment of the Court of Appeal on the ground that there was insufficient evidence to prove willingness on the part of the employer to give such a concession to the employees. I must emphasise there was no hesitation whatsoever on the part of the Supreme Court to scrutinise the evidence led before the Arbitrator in order to consider the correctness of the decision. Ekanayake J. (with the concurrence of J.A.N. de Silva C.J. and Thilakawardena J.) held:

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[146] [2010] 1 Sri LR 66.

The arbitrator had concluded that the respondent company had shown its willingness as far back as 1991 to give a maximum of 3/4th of month's salary as gratuity for those who had served more than 20 years. Having considered the evidence that had been available before the arbitrator I am unable to agree with the above conclusion that the respondent had shown such willingness as far back as 1991. That appears to be a finding which was not supported by evidence led in the arbitration and in fact appellant's only witness, Leelaratne's evidence had been totally contrary to the above. In the light of the above the only legitimate conclusion one could arrive upon the evidence is that there had been no final agreement between the 1st respondent, (CMU) and the appellant company in respect of enhanced gratuity payments. From the evidence available on record there is nothing to infer that the petitioner company had shown its willingness to give 3/4th of a month's salary as gratuity for those who have more than 20 years' service as concluded by the learned Court of Appeal Judge.[147]

Having considered the evidence had before the arbitrator and the conclusions of the arbitrator in his award (P2) I am of the view that the arbitrator's findings and decisions are not supported by the evidence before him. Further, for the reasons stated above the learned Court of Appeal Judge too had erred when he proceeded to state that "The findings

[147] At 83-84.

> *and the decision of the arbitrator is in accordance with the evidence led in the inquiry".*[148]

The other case referred to by learned ASG is *Public Interest Law Foundation v. Central Environmental Authority.*[149] In the said case, the Petitioners sought to quash the decision of the Central Environment Authority to construct the Southern Expressway on two grounds: (i) failure to analyse or consider reasonable and environmentally friendly alternatives to the proposed project; (ii) lack of proper intelligible and adequate reasons in the Environmental Impact Assessment report for the rejection of alternatives to the project. The Court analysed the evidence presented by both parties to conclude there was no merit in both the said grounds.[150]

In addition, the Court stated:

> *The Court is ill equipped, in any event, to form an opinion on environmental matters – they being best left to people who have specialised knowledge and skills in such spheres. Even if a matter may seem to be preeminently one of public law, the Courts may decline to exercise review because it is felt that the matter is not justiciable, i.e. not suitable to judicial determination. The reason for non-justiciability is that Judges are not expert enough deal with the matter.*[151]

Furthermore, Gunawardana J. remarked:

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[148] At 86.
[149] [2001] 3 Sri LR 330.
[150] At 334.
[151] At 333.

> *There is a distinction between appeal and review. If one appeals against a decision, one is claiming that the decision is wrong and that appellate authority or court should change the decision. The Court of Appeal, if it is persuaded by the merits of the case (appeal), may allow the appeal and thereby substitute its view for that of the Court or tribunal of first instance. Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not. In the words of Lord Brightman: "Judicial review is concerned, not with the decision but with the decision making process" (Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 at 1173). It is worth observing that the review procedure is not well suited to determination of disputed facts - factual issues arising in this case being imprecise and disputed.*[152]

There is no necessity to highlight the above quoted last part of the said Judgment in preference to previous parts which decided the matter on merits.

Four months after the above Judgment, Gunawardana J., in the case of *Geeganage v. Director General of Customs*,[153] had the opportunity of looking at the same issue from a different angle. In the said case, the goods imported did not tally with the Customs Declaration, but the importer removed the goods from the warehouse without the correct duties being paid, thereby

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[152] At 334.
[153] [2001] 3 Sri LR 179.

defrauding the State of revenue at a sum of Rs. 2,304,766. The charge against the Petitioner, an Assistant Superintendent of Customs, was that he knowingly permitted this. After an inquiry, the Director General of Customs imposed a forfeiture of Rs. 500,000 on the Petitioner, in terms of section 129 of the Customs Ordinance. The Petitioner came before the Court of Appeal seeking to quash the said decision by certiorari, inviting the Court to substitute its view on an interpretation of the factual matters elicited at the inquiry. Gunawardana J., who was constrained to go through the evidence led at the impugned inquiry, rested his decision on errors of law committed by the inquiring officer and on the 'no evidence' rule.

> *The decision of the 2nd respondent (inquiring officer) is liable to be set aside as it is vitiated by following errors of law which renders the decision of the 2nd respondent a nullity;*
>
> *(i) the 2nd respondent had in reaching the decision failed to take relevant considerations into account whilst he had allowed legally irrelevant factors to influence the decision;*
>
> *(ii) The decision of the 2nd respondent is based on "no evidence" and as such is erroneous in law;*
>
> *(iii) There is nothing to show that the 2nd respondent was satisfied that the charge or the case against the petitioner was proved to the requisite standard of proof which, in this instance, is undoubtedly proof beyond reasonable doubt.*[154]

[154] At 184.

Gunawardena J. acknowledged that 'no evidence' does not mean total lack of evidence but evidence insufficient to support the finding.

> *The other feature which is worth observing is that the 2nd respondent's decision, it could be said, is based on "no evidence". In a sense, "no evidence rule" is a ground of old wine in new bottles because review under the head of "lack of evidence" can be seen as a species of unreasonableness, in that no reasonable body would come to a decision unsupported by evidence. There is a growing body of case law reflecting the view that to act without evidence is to act ultra vires. As Wade explains "no evidence" does not mean a total lack or dearth of evidence. He sheds more light on what "no evidence" means as follows: "It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding".*[155]
>
> *No evidence rule has, of necessity, to be applied in conjunction with the requisite standard of proof in any given case. I have explained above that the question that the court of review has to consider in the circumstances of this case is this: does the totality of evidence on record reasonably justify the conclusion beyond a reasonable doubt that the petitioner had knowingly allowed the importers to remove the cargo without payment of due duties.*[156]

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[155] At 189.
[156] *Ibid.*

How can the writ Court consider whether or not, as quoted above, "*the evidence, taken as a whole, is not reasonably capable of supporting the finding*", without going into the merits of the matter?

It is reassuring to note, in the said judgement, Gunawardana J. accepts that the 'no evidence' rule has blurred the traditional distinction between appeal and judicial review.

> *In a way, the application of the "no evidence" rule may, perhaps, result in a blurring of the distinction between supervisory role of the court (under the judicial review procedure) and the appellate jurisdiction of the court because the court's exercise under this head i.e. under the concept of "no evidence" necessarily entails a consideration of the strength of the evidence. The equivalent rule in the United State allows a reviewing court to determine whether an administrative determination made after a formal hearing is supported by substantial evidence on the record taken as a whole.*[157]

The distinction between judicial review and appellate jurisdiction referred to in the above quotation has been set out at page 183 of the said Judgment in the following manner:

> *Under the judicial review procedure the court is not concerned with the merits of the case, that is, whether the decision is right or wrong. In review (as opposed to appeal) the court only considers whether the decision is lawful or unlawful. In the words of Lord Brightman, "judicial review*

[157] At 189.

> *is concerned, not with the decision, but with the decision making process." — Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155.*

The above statement of Lord Brightman has been quoted with approval in subsequent decisions of the Court of Appeal.

In *De Wass Gunawardhana v. National Police Commission*,[158] the Court of Appeal observed:

> *As Lord Brightman stated in the House of Lords in Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 at 1174, applications for judicial review are often misconceived: "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."*

The full speech of Lord Brightman in the House of Lords decision in *Chief Constable of North Wales Police v. Evans*[159] makes it clear that the Court of Appeal (in England) had originally taken the view that the Court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. Lord Brightman, considering the appeal in the House of Lords, did not agree with the position of the Court of Appeal.

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[158] CA/WRIT/399/2019, CA Minutes of 20.11.2019.
[159] [1982] 1 WLR 1155.

I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed in Ridge v. Baldwin 1964 AC 40 at page 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to "a danger of usurpation of power on the part of the courts…under the pretext of having regard to the principles of natural justice." He added: "I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case."

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories; that the respondent was entitled to a fair hearing; and that he had not had one. However Lord Denning M.R. added this: "I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. He is

> *protected against unfair dismissal. No less protection should be afforded to a probationer constable."*[160]
>
> *There is however a wider point than the injustice of the decision-making process of the Chief Constable. With profound respect to the Court of Appeal, I dissent from the view that "Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable." If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself.*[161]

Having said the above, it is interesting to note Lord Brightman does expressly acknowledge other grounds of review, such as "unreasonableness", as identified in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[162] which necessarily involves investigation of the merits of the matter.

> *In his printed case counsel for the appellant made this submission: "Where Parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's*

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[160] At 1173.
[161] At 1174.
[162] [1948] 1 KB 223.

> *supervisory function on a judicial review of that decision is limited. The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy. It follows that the court ought not to attempt to weigh the merits of the particular decision but should confine its function to a consideration of the manner in which the decision was reached."*
>
> *When the sole issue raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. Other considerations arise when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision. See the well known judgment of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223.*[163] (emphasis added)

Particularly in reference to the paragraph quoted immediately above, Wade has this to say:

> *Although it has been laid down in the House of Lords, and repeated by other judges, that judicial review means*

[163] At 1174-1175.

> *'review of the manner in which the decision was made',*[164] *the context of this statement shows that it was not intended to affect the established grounds of review which, as the whole of this chapter illustrates, extend to the substance as well as the manner of administrative decisions and acts.*[165]

The above observation of Wade militates against the argument that judicial review is concerned not with the decision, but with the decision-making process.

'Reasonableness' deals with the substance of the matter whereas 'natural justice' deals with its procedure. In the words of Wade:

> *The principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalized administrative law in recent years….Its contribution to administrative law on the substantive side is equal to that of the principles of natural justice on the procedural side.*[166]

Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[167] stressed unreasonableness as a ground for judicial review.

> *It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of*

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[164] *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155 at 1174 (Lord Brightman). Review for unreasonableness in the Wednesbury sense is expressly recognised.
[165] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 9th Edition, p.344.
[166] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Edition, p.394.
[167] [1948] 1 KB 223.

statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.[168]

The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four

[168] At 229.

> *corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.*[169]

De Smith accepts "*substantive review in English law has been dominated by the concept of unreasonableness closely identified with the famous formulation by Lord Greene MR in the Wednesbury case*".[170]

However much one takes pains to say the Courts are not supposed to consider the merits of a decision in judicial review, the reasonable or unreasonableness of a decision, for instance, cannot be effectively assessed without going into the merits of the case.

It is not practically possible to separate a right decision from a lawful decision. A right decision is almost always a lawful decision, and *vice versa.* Nor can a wrong decision be separated from an unlawful decision. Likewise, a wrong decision is always an unlawful decision, and *vice versa*.

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[169] At 233-234.
[170] *De Smith's Judicial Review,* 8th Edition, p.597.

The above discussion goes to show that the argument or proposition of law that in judicial review a Court is concerned not with the merits of the case—that is, whether the decision is right or wrong—but whether the decision is lawful or not, is no longer valid in modern administrative law. I take the view that certiorari does lie, if a tribunal has gone wrong on merits in arriving at a decision. Therefore, I reject the argument of learned ASG that the writ Court does not have jurisdiction to look into the merits of the substantive application.

Before I part with this point, let me add the following. De Smith states "*The rule of law has been a resilient and effective force behind the general development of judicial review*" and "*In practice, many of the decisions held unreasonable are so held because they offend the values of the rule of law.*"[171] By strengthening the rule of law, the rights of all people are protected, the arbitrary exercise of power is constricted and democracy ensured. Weeramantry, observing that there has been an increase in all manner of administrative authorities vested with various special jurisdictions to deal with the rights of subjects, states "*This new phenomenon has raised fears that the administration may under cover of welfare legislation arrogate to itself power over the rights and liberties of the citizen. This problem has become acute in nearly all jurisdictions and has promoted the growth of a large volume of new law by which all manner of curbs and restraints are being placed upon such authorities. The principle of judicial review of administrative decisions is expanding and administrative law is likely to grow*

[171] *De Smith's Judicial Review*, 8th Edition, p.619.

into one of the most significant branches of law, protecting the rights of the subject in the future."[172] It is undeniable that the frontiers of judicial review have expanded over the years and will continue to grow under the aegis of judicial pronouncements. The Courts have so far made great strides in this area. The modern law of judicial review shall be guided by function rather than form, and every endeavour shall be made to prevent technicalities from impeding the growth of judicial review.

9. Applicability of the Evidence Ordinance to Courts Martial

Learned ASG in his written submission states "*Even in the context of Sri Lanka S.2(1) of the Evidence Ordinance has specifically excluded its applicability to Court Martials perhaps due to the unique character of such tribunals*." His position appears to be that the said inapplicability of the Evidence Ordinance to Courts Martial is related to the maintenance of discipline among the Forces and the proper discharge of their duties.[173]

Section 2(1) of the Evidence Ordinance of 1895[174] which became law on 01.01.1896 reads as follows:

> *This Ordinance shall apply to all judicial proceedings in or before any court other than courts-martial, but not to proceedings before an arbitrator.*

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[172] C.G. Weeramantry, *An Invitation to the Law*, 1st Edition (1982), p.147.
[173] *Vide* page 9 of the written submissions dated 27.01.2020.
[174] No.14 of 1895, as amended.

Section 81 of the Air Force Act of 1949 which became law on 10.10.1950 reads as follows:

> *Subject to the other provisions of this Part, the rules of evidence to be adopted in proceedings before a court martial shall be the same as those followed in the civil courts in Sri Lanka.*

Further, Court Martial Regulations 66 and 67 made under section 155 of the Air Force Act run as follows:

> *66. The court martial shall not receive evidence for the prosecution which is not relevant to the facts stated in the statement of particulars in the charge, or any evidence which is not admissible according to the Evidence Ordinance.*
>
> *67. The rules of evidence adopted in civil courts in Ceylon shall be followed by courts martial, and objections to any question to a witness or to the admission of any evidence may be made accordingly, and a person shall not be required to answer any question or produce any document which he could not be required to answer or produce in a like proceeding before such civil court.*

Although this matter (i.e. the applicability of the Evidence Ordinance in Court Martial proceedings) was raised before the Supreme Court in *Sarath Fonseka v. Dhammika Kithulegoda,*[175] no ruling was given in this regard.

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[175] [2011] BLR 169.

But since the Supreme Court held in the said case that the Court Martial is a competent Court capable of passing even the death sentence, there cannot be any qualms in giving full effect to section 81 of the Air Force Act and Court Martial Regulations 66 and 67. Justice demands it.

The language of section 81 of the Air Force Act and Court Martial Regulations 66 and 67 is unambiguous. The intention of the legislature is clear.

It is a canon of interpretation of statutes that if the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the former is abrogated by the latter.[176]

The Court Martial cannot be given *carte blanche* to conduct proceedings as it pleases in the name of maintaining discipline among members of the forces. Discipline cannot be instilled by indiscipline.

In view of the above, I hold that the Evidence Ordinance applies to Court Martial proceedings.

10. Court Martial and Jury Trial

During the course of the argument, learned ASG stated that the Court Martial is akin to trial by jury before the High Court. This was stated when the second argument of learned Counsel for the Petitioner was under consideration. It may be recalled that the

[176] *Maxwell on The Interpretation of Statutes*, 12th Edition by P. St. J. Langan (2004), p.193.

second argument revolved around the interpretation of Regulation 98. When the Court questioned whether provisions similar to Regulation 98 are found in the Code of Criminal Procedure Act[177] with regard to Jury trials, learned ASG answered in the negative, and thereafter did not, in my view, pursue this argument.

However, learned ASG in his final written submissions makes the same point in response to the 3rd ground of the Petitioner—i.e. failure to give reasons. He articulates his argument in this way:

> *Finally, in this context the Respondent respectfully submits that the Petitioner has submitted citing Sri Lankan judicial authority that a Court Martial has been deemed to be a court of law at least for some limited purposes and therefore he had contended that a Court Martial must give reasons for its finding. It is respectfully submitted that if this contention is upheld jury trials held before High Courts would have to be considered as not valid in law on the ground that in such trials at the time the verdict of the jury is returned no reasons whatsoever are given by the jurors. In both situations i.e. Trial by Jury and Court Martials the presiding judge or judge advocate would make summing up addresses and the jurors or the members of the Court Martial thereafter retire to consider its verdict. In the Criminal Procedure Code there is no provision for members of the jury to give reasons.*

[177] No.15 of 1979, as amended.

I am not inclined to agree with this line of argument.

It is apparent this argument has been made in passing. Learned ASG does not support this argument with any provision of the law or supporting authority. None of the Indian authorities cited by him have held that there is no requirement for the Court Martial to give reasons on the ground that it is comparable to trial by jury.

It is expecting too much from the Court to study this "idea" and come to a considered finding. Nevertheless, I undertook the task to a certain extent, as this involves an important question of law.

Let me first meet the argument of learned ASG *in situ*. The only point which learned ASG stresses in making a parallel between a jury trial and Court Martial is "*In both situations i.e. Trial by Jury and Court Martials the presiding judge or judge advocate would make summing up addresses and the jurors or the members of the Court Martial thereafter retire to consider its verdict.*" In other words, it appears it is only because of the summing up address and then retirement to consider the verdict in both situations that learned ASG says a jury trial and Court Martial are comparable.

This submission is unsustainable.

In terms of section 229 of the Code of Criminal Procedure Act, "*When the case for the defence and the prosecuting counsel's reply (if any) are concluded the Judge shall charge the jury summing up the evidence and laying down the law by which the jury are to be guided.*" This is mandatory on the part of the

Judge, without which the verdict of the jury will be struck down on appeal at first sight without going into the merits. But, interestingly, summing up is not an essential prerequisite of the Court Martial.

In the first place, the appointment of a Judge Advocate is not compulsory in all forms of Courts Martial. In terms of section 53 of the Air Force Act, the presence of a Judge Advocate seems to be mandatory only in a General Court Martial, but optional in a District Court Martial. It appears there is no such requirement in a Field Court Martial.

Secondly, in terms of section 54(d) of the Air Force Act, summing up by the Judge Advocate is not a must. It can be dispensed with by mutual consent.

> *At the conclusion of the case he [the Judge Advocate] 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.*

This is reiterated in Regulation 65(1) of the Court Martial Regulations.

> *The Judge-Advocate (if any) shall, unless he and the Court Martial think a summing up unnecessary, sum up in open court the whole case.*

Retirement to consider the verdict is not a phenomenon peculiar to a jury trial or Court Martial. It so happens in any Court where a case is heard by more than one Judge.

On these grounds, although this Court can reject this argument of learned ASG and move on to the next, if any, I will further consider the matter for completeness.

As I will elaborate below, the members of the Court Martial are more like a panel of Judges than jurors.

Is the Court Martial bound by the advice of the Judge Advocate, as jurors are by the advice of the High Court Judge?

In terms of Regulation 95, the Court Martial shall be assisted by the opinion of the Judge Advocate but can disregard his opinion by giving reasons. It is the Court Martial, not the Judge Advocate, which shall be responsible for the legality of its decisions. Regulation 95 reads thus:

> *Upon any point of law or procedure which arises upon the trial, the Court Martial shall be assisted by the opinion of the Judge-Advocate which it shall not disregard except for very weighty reasons. The Court Martial shall be responsible for the legality of its decisions but it must consider the consequences which may result from the disregard of the advice of the Judge-Advocate. The Court Martial may, in following the opinion of the Judge-Advocate, record that it has decided in consequence of that opinion.*

This view has been affirmed by this Court in *Chandra Kumar v. Capt. Samarawickrama*,[178] where the conviction and sentence by a (Navy) Court Martial were quashed on the basis that the Judge Advocate had in his summing up stated the Court Martial was

[178] [2002] 2 Sri LR 153.

completely bound by his directions, whereas the relevant provision did not so specify.[179]

> *The rule…clearly indicates that the Court need not necessarily accept the directions of the Judge-Advocate on points of law. It is open to the Court to take, on points of law, a view different from that of the Judge-Advocate. In such a case the Court has only to give reasons for not accepting the advice of the Judge-Advocate.*[180]

It is significant that the word used in Regulation 95 is "opinion" and not "direction".

The provisions as to the role of the Judge and jury at a trial by jury in the High Court are set out in sections 230-232 of the Code of Criminal Procedure Act.

At a trial by jury, the Judge gives "directions" to the jury which the jury are bound to follow, as illustrated below, "*whether that direction is right or wrong and whether they do or do not agree with it.*" In terms of section 232(a) of the Code of Criminal Procedure Act, for instance, "*It is the duty of the jury 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*". Illustration (a) explains it thus:

> *A is tried for the murder of B.*

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[179] The relevant section 21 of the Navy Order No. 0513 states "*The Court shall be guided by the advice of the trial Judge-Advocate on all points of law. Where, however, the Court does not accept the advice on a point of law, it shall be the duty of the president to cause the fact to be set out in the record of the proceedings together with the Court's reasons for rejecting the advice*".
[180] [2002] 2 Sri LR 153 at 167.

> *It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide not amounting to murder and to tell them under what view of the facts A ought to be convicted of murder or of culpable homicide not amounting to murder or to be acquitted.*
>
> *It is the duty of the jury to decide which view of the facts is true and to return verdict in accordance with the direction of the Judge, whether that direction is right or wrong and whether they do or do not agree with it*. (emphasis added)

The powers and duties of the Judge Advocate are set out in section 54 of the Air Force Act.

> *54. The powers and duties of the officer appointed to be the Judge-Advocate at a Court Martial shall be as follows:*
>
> *a) It shall be his duty, whether before or during the proceedings, to give advice on questions of law or procedure relating to the charge or trial to the prosecutor and to the accused, who are hereby declared to be entitled to obtain such advice at any time after his appointment;*
>
> *Provided that during the proceedings he shall give such advice with the prior permission of the Court Martial.*
>
> *b) It shall be his duty to invite the attention of the Court Martial to any irregularity in the proceedings. Whether or not he is consulted, he shall inform the Court Martial and the authority convening the Court*

Martial of any defect in the charge or in the constitution of the Court Martial, and shall give his advice on any matter before the Court Martial.

c) *He shall take all such action as may be necessary to ensure that the accused does not suffer any disadvantage in consequence of any incapacity to examine or cross-examine witnesses or to give evidence clearly, and may for that purpose, with the permission of the Court Martial question any witness on any relevant matter.*

d) *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.*

54(a) refers to advice to be given not to the Court Martial but to the prosecutor and the accused, with the permission of the Court Martial, if it is during the proceedings.

There is no compulsion for compliance by the Court Martial on the matters referred to in 54(b).

54(c) allows the Judge Advocate to look after the interests of the accused and, when necessary, with the permission of the Court Martial, to question any witness.[181]

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[181] It appears to me that Regulation 79 is in conflict with section 54(c) of the Act, as the former suggests the Judge Advocate (like the President of the Court Martial) can question a witness without the permission of the Court Martial. Regulation 79 reads as follows: "*The president, the Judge-Advocate*

But Regulation 19(3) casts a similar burden on the President of the Court Martial to look after the interests of the accused. It reads as follows:

> *It is the duty of the president to see that, justice is administered, and that the accused has a fair trial, and that he does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance or of his incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible, or otherwise.*

Conversely, in a trial by jury, the duty of the Judge is far more onerous–he is the one who conducts the trial, unlike the Judge Advocate in the Court Martial. In the Court Martial, the proceedings are conducted not by the Judge Advocate but by the Court Martial presided over by its President.

Regulation 19(1) and (2) read as follows:

> *19(1) The members of the court martial shall take their seats according to their Air Force or Army rank.*
>
> *19(2) The president shall be responsible for the trial being conducted in proper order, in accordance with the Air Force Act, and in a manner befitting a court of justice.*

Every procedural step of the Court Martial is taken not by the Judge Advocate, but by the Court Martial collectively. The Court

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(if any) and, with the permission of the court martial, any of its members may address a question to a witness while such witness is giving his evidence and before he withdraws. Upon such question being answered, the questioner may put to the witness any question arising out of the answer which he thinks fit or which he may be requested to put by the prosecutor or by or on behalf of the accused."

Martial as a unit presided over by its President discharges the duties of a Judge in a trial by jury. To name a few of its duties, the Court Martial can remand the accused for trial,[182] the Court Martial shall be satisfied that the Charge Sheet is in order,[183] the Court Martial shall cause the accused to be brought before it,[184] the Court Martial shall allow great latitude to the accused in making his defence and may caution the accused as to the irrelevance of his defence,[185] the Court Martial shall read the charge to the accused,[186] the accused can take up jurisdictional objections before the Court Martial and the Court Martial shall make a ruling on such objections,[187] the Court Martial shall record the plea of guilty or not guilty of the accused.[188] This list is not exhaustive.

To give another example, in terms of Regulation 60, at the end of the prosecution's case, the accused can make an application to the Court Martial (not to the Judge Advocate) not to call upon his defence and to acquit him on the basis that no *prima facie* case has been made against him. In such a situation, the Court Martial can make a ruling. In terms of section 220 of the Code of Criminal Procedure Act, at a trial by jury such an application can only be made to the Judge, not to the jury.

This in itself demonstrates that the role of the Judge Advocate is not comparable to that of the Judge at a trial by jury, and that

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[182] Regulation 16.
[183] Regulation 21.
[184] Regulation 22.
[185] Regulation 25.
[186] Regulation 37.
[187] Regulation 46.
[188] Regulations 47-56.

members of the Court Martial function as a panel of Judges in a regular Court.

Furthermore, "*Where a Judge is not disposed to accept the verdict of a Jury he is entitled to redirect them on the law as well as on the facts of the case.*"[189] If the jury is not agreeable, the Judge can discharge the jury.

Sections 235 and 237 of the Code of Criminal Procedure Act read as follows:

> *235(1) Unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is.*
>
> *235(2) If the Judge does not approve of the verdict returned by the Jury he may direct them to reconsider their verdict, and the verdict given after such reconsideration shall be deemed to be the true verdict.*
>
> *237 If the jury or the required majority of them cannot agree the Judge shall after lapse of such time as he thinks reasonable discharge them.*

Such sweeping powers, as in the above, have not been given to the Judge Advocate.

At a trial by jury, the duty of the jurors ends with delivering the verdict and, if the accused is found guilty, it is thereafter the responsibility of the Judge in terms of section 238 of the Code of

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[189] *The King v. Rajakaruna* (1941) 42 NLR 337.

Criminal Procedure to "*forthwith pass judgement on him according to law*", which in practical terms refers to sentencing. However, in Court Martial proceedings, after the accused is found guilty, the Court Martial shall, according to Regulation 106, take evidence on factors to be considered in terms of sentencing and exercise its authority under section 47 of the Act in imposing punishment. According to sections 63 and 64 of the Act, and Regulations 132, 133, 138 and 162, convictions and sentences imposed by the Court Martial shall be subject to the approval of the authority having power to confirm the same, until which time the conviction and sentence shall not be valid. Hence, unlike at a trial by jury where the verdict is given by the jury and the sentence is passed by the Judge, both of which shall stand unless overturned by a superior Court, the conviction and sentence of a Court Martial are both passed collectively by all members thereof and shall take effect only upon the approval of the confirming authority–such authority also having the power to refer the matter to the Court Martial for revision or to alter the conviction and/or sentence.

In terms of Regulation 109, the sentence shall be signed by the President of the Court Martial.

> *Upon the court martial awarding the sentence, the president shall date and sign the sentence, and such signature shall authenticate the whole of the proceedings, and the proceedings, upon being signed by the Judge-Advocate (if any), shall as soon as possible be transmitted for confirmation.*

The concept of trial by jury had at its inception the idea of trying an offender by his peers, which gives credence to the system of justice. Is this concept valid in proceedings before Courts Martial? This question is posed to show that an attempt to draw a parallel between a trial by jury and Court Martial cannot be justifiable.

In terms of sections 46, 48 and 50 of the Air Force Act, it is the responsibility of the convening officer to appoint the members of the Court Martial. The convening officer also appoints the President of the Court Martial. Regulations 2-10 are also relevant in this regard. Perusal of these provisions show that a Court Martial is constituted of senior officers of the Air Force. Once appointed, the said officers participate in the proceedings as part of their duties.

In *Gunaseela v. Udugama (Major-General and Army Commander)*,[190] the Supreme Court observed:

> *A Court Martial is not a paid office; it is a body consisting of Service Officers convened ad hoc for the trial of particular cases, and the duty to serve as a member of such a Court is only one of the several kinds of duties which a Service Officer can under the relevant Statutes be called upon to perform. The office which entitled an Army officer to pay and other emoluments is his substantive office in the Army, and service as a member of a Court Martial is no more the basis of his entitlement to pay and emoluments than is his service in any other duty which the Army Act requires him*

[190] (1966) 69 NLR 193 at 194.

> *to perform. A Court Martial bears no resemblance to a Labour Tribunal established under the Industrial Disputes Act.*

The Indian case of *Nirmal Lakra v. Union of India*[191] highlights the distinction between jurors in criminal Courts and members of Courts Martial in the following manner:

> *Even though it is pointed out that the procedure of trial by Court Martial is almost analogous to the procedure of trial in the ordinary criminal courts, we must recall what Justice William O'Douglas observed: "[T]hat civil trial is held in an atmosphere conducive to the protection of individual rights while a military trial is marked by the age-old manifest destiny of retributive justice. Very expression 'Court Martial' generally strikes terror in the heart of the person to be tried by it. And somehow or the other the trial is looked upon with disfavor." In Reid v. Covert 1 L Ed 2D 1148: 354 US 1 (1957), justice Black observed at page 1174 as under: Courts martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence". In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the Court Martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice*

[191] 2003 (1) SLJ 151 Delhi.

> *which nearly all of them undoubtedly have, the members of a Court Martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.*

In terms of section 53 of the Air Force Act, the appointment of the Judge Advocate is also the responsibility of the convening authority. Section 53 of the Act reads as follows:

> *(1) The authority convening a general court martial shall, and the authority convening a district court martial may, appoint a person, who has sufficient knowledge of the practice and procedure of courts martial and of the general principles of law and of the rules of evidence, to act as Judge-Advocate at the court martial.*
>
> *(2) A person who, under subsection (2) of section 52, is disqualified from sitting on a court Martial shall not be appointed as Judge-Advocate at that court martial.*

Regulation 20(3) states "*The court martial shall further, if a Judge-Advocate has been appointed, ascertain that the Judge-Advocate is duly appointed, and is not disqualified from acting at that court martial.*" Needless to say, the jury have no such prerogative vis-à-vis the Judge.

According to section 61(3) of the Act, in the absence of the Judge Advocate, the Court Martial shall adjourn. According to Regulation 169, in the absence of either the President or Judge Advocate (if any) the Court Martial shall not proceed and, if necessary, shall adjourn. The Judge Advocate and the President

of the Court Martial are given equal status in this regard. No such parallel can be drawn between the Judge and the jury at a trial by jury.

Regulation 166 makes the Judge Advocate part of closed Court deliberations of the Court Martial. It says "*When a court martial sits in closed court for any deliberation amongst the members or otherwise, no person shall be present except the members, the Judge-Advocate, and any officers under instruction*". This is different from the Judge's detached position at a jury trial.

The aforesaid discussion points to the fact that the function of members of a Court Martial is more akin to a panel of Judges than jurors.

I am unable to accept the argument of learned ASG that Court Martial proceedings and trial by jury before the High Court are equivalent and therefore there is no requirement in law to give reasons for the decisions of the former as in the latter.

11. Equal Protection of the Law

Members of the armed forces and the police are citizens of this country. They are entitled to the equal protection of the law, subject to certain limitations. Article 12(1) guarantees "*All persons are equal before the law and are entitled to the equal protection of the law.*"

I am aware of Article 15(8) of the Constitution which reads as follows:

> *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.*

The "*restrictions*" mentioned in Article 15(8) above shall not be imaginary restrictions, but those "*prescribed by law*". The law has not prescribed that reasons need not be given for the decisions of the Court Martial.

In *Lt. Col. Prithi Pal Singh Bedi v. Union of India*,[192] the Supreme Court of India observed:

> *Reluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. More so when this Court held in Sunil Batra v. Delhi Administration[193] that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to*

[192] 1982 AIR 1413; 1983 SCR (1) 393.
[193] 1978 AIR 1675; 1979 SCR (1) 392.

> *the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution.*

The oft-quoted dicta of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy*[194] is worth repeating:

> *It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*

This shall be equally applicable to proceedings before the Court Martial, where high ranking officers of the armed forces, formed as a body, decide the fate of the accused who is lower in rank, as part of their official duties as servicemen. In this process, matters such as hierarchical subjugation and subordination are inevitable. In the case at hand, for instance, the defending officer of the accused was an officer of the Air Force below the rank of the President of the Court Martial.

One facet of the rule of law is the right to a fair trial.[195]

Article 10 of the Universal Declaration of Human Rights (UDHR) states "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*" Sri Lanka ratified the UDHR in 1955.

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[194] [1924] 1 KB 256 at 259.
[195] C.G. Weeramantry, *Law: The Threatened Peripheries*, 1st Edition (1984), p.24.

Article 13(4) of the Constitution declares "*No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law.*" "*Procedure established by law*" encapsulates within its orbit reasons for decisions as a requirement of the law, particularly when, I stress, a man is convicted of murder and punished with the death sentence or life imprisonment.

In the instant case, it is admitted that investigations into this incident were carried out simultaneously by the civilian police and military police. After his conviction by Court Martial, the Petitioner was summoned before the High Court to be tried upon an indictment. It was at this juncture that the Petitioner informed the High Court he had already been convicted by Court Martial. It is not clear who decides the forum before which the accused shall be tried. It is undeniable that had the Petitioner been tried before the High Court, instead of by Court Martial, he would have been in a more favourable position to defend himself.

12. Conclusion

Admittedly, no opinion has been given by each member of the Court Martial as to the finding of guilt of the Petitioner for murder, either in open Court or closed Court. This is a grave violation of mandatory provisions in Regulation 98 read with 175 of the Air Force Court Martial Regulations. It is incurable and fatal to the conviction.

The giving of reasons for a 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 in the instant case.

The Petitioner succeeds on the second and third grounds of argument.

Accordingly, I hold that the decision of the Court Martial to convict the Petitioner for murder and the sentence of life imprisonment passed on the Petitioner are illegal and a nullity.

I quash both the conviction and the sentence[196] by way of certiorari.

I make no order as to costs.

Judge of the Court of Appeal

[196] This is reflected on page 1 of the Court Martial proceedings dated 15.12.2010, and the document marked R6 dated 29.12.2010 tendered by the Respondents with their statement of objections.