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

In the matter of an Application for a mandate in the nature of Writ of *Certiorari* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Lt. Col. E.M.H. Ekanayake,  
358/3, Sridigama Road,  
Wilamuna,  
Theldeniya.

**PETITIONER**

Case No: CA/WRIT/142/2017

*Vs.*

1. Lieutenant General A.W.J.C. De Silva,  
Commander of the Army,  
Army Headquarters,  
Colombo 03.
2. Major General P.W.B. Jayasundara,  
Military Secretary,  
Army Headquarters,  
Colombo 03.
3. Brig. M.A.A.D. Sirinaga,  
President of the Court Martial,  
Army Headquarters,  
Colombo 03.

4. Col. M.A. Wanniarachchi,  
Member of the Court Martial,  
Army Headquarters,  
Colombo 03.
5. Col. K.P.S. Premalal,  
Member of the Court Martial,  
Army Headquarters,  
Colombo 03.
6. Brig. R.P. Rajapathirana,  
Judge Advocate General,  
Army Headquarters,  
Colombo 03.
7. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**Before** : P. Padman Surasena, J. (P/CA)

&

A.L. Shiran Gooneratne J.

**Counsel** : Shavindra Fernando, PC with Asith Siriwardena & Mrs. Eliza  
Candappa, for the Petitioner.

Mrs. Zuhri Zain, SSC for the Respondents.

**Supported on** : 28/02/2018

**Decided on** : 28/06/2018

**A.L. Shiran Gooneratne J.**

The Petitioner has invoked the jurisdiction of this Court seeking, a mandate in the nature of writ of Certiorari to quash the findings and sentence of the Order of the Court Marshal, as contained in document marked P5.

When this application was taken up for support, Senior State Counsel appearing for the Respondents brought to the notice of Court that by Gazette Notification No. 2015 – 2017, dated 12/04/2017, filed of record, the said sentence passed by the Court Marshal has been approved by the President of the Republic. The Counsel for the Petitioner concedes to the said fact and also concedes that the said Gazette Notification has been published.

I observe the following paragraphs of the affidavit tendered to Court by the Petitioner;

Paragraph 56,

I state that, I verily believe that the conviction and sentence has not been approved by His Excellency the President and that in any event the appeal on sentence made by me has not been submitted to either the Commander of the Army or His Excellency the President.

Paragraph 57,

I state that irreparable damage would be caused to me if the sentence is now sent for approval of His Excellency the President or Gazetted, -----

It is further observed that, the interim relief prayed for in paragraph (b) to the Petition is also pleaded in order to prevent “the Respondents from taking steps to get the approval of His Excellency the President or publish by Gazette Notification the sentence of the Court Marshall and/ or submitting for approval the dismissal of the Petitioner from service -----.”

I further observe that, the Affidavit tendered by the Petitioner, dated 7<sup>th</sup> April 2017, has been signed prior to the date of publication of the Gazette Notification. Therefore, it is clear that the facts and circumstances pleaded by the Petitioner challenging the Court Marshall findings relates to events prior to the approval of the sentence by the President of the Republic by Gazette Notification dated 12/04/2017. The said Gazette Notification does not form part of the Petitioners pleadings nor has the Petitioner sought permission of Court to submit the said Gazette Notification to Court.

It is noted that the Petitioners application for relief should be within the scope of the Petition. The sentence imposed by the Court Marshall has been approved by the subsequent Gazette Notification which was clearly not within the knowledge of the Petitioner at the time of filling this application. The Petitioners application for relief is based on the premise that, if the sentence is submitted for approval by His Excellency the President and/ or Gazetted, the Petitioner would

suffer irreparable damage. Therefore as of now, there is a clear change in facts and circumstances, which the pleadings do not support. Accordingly, it is the view of this Court that the Petitioner should not be permitted to enlarge the scope of his application to encompass the change in facts and circumstances, as noted earlier, which were not contemplated at the time of submitting the affidavit, in support of the Petition. Therefore, this Court should, in the exercise of its discretion, refuse the Petitioner's application.

I note with regret, that in spite of the undertaking given to Court to file written submissions by 04/05/2018, the Respondents have failed to do so on the agreed date or thereafter.

In all the above circumstance, notice is refused and the Petition is dismissed without costs.

**JUDGE OF THE COURT OF APPEAL**

**P. Padman Surasena, J. (P/CA)**

**I agree.**

**PRESIDENT OF THE COURT OF APPEAL**