B. SIRISENA COORAY
v.
TISSA DIAS BANDARANAYAKE AND TWO OTHERS

SUPREME COURT
DHEERARATNE, J.,
GUNAWARDANA, J. AND
WEERASEKERA, J.
S.C. SPECIAL (WRIT) NO. 1/98
NOVEMBER 18, AND 19, 1998.
DECEMBER 18, 1998
JANUARY 8, 21, 1999

Writ of Certiorari – Report of a Commission of Inquiry under the Special Presidential Commission of Inquiry Law – Liability for contempt of the Commission – Scope of the writ jurisdiction of the Supreme Court – Amenability of the Commission's report to judicial review – Special Presidential Commissions of Inquiry Law, No. 7 of 1978, sections 2, 7, 9, 11, 12, 16 and 18A of the Law – Articles 13 (3), 81, 89, 91 and 140 of the Constitution – Section 22 of the Interpretation Ordinance.

The President issued a warrant under the Special Presidential Commissions of Inquiry Law, No. 7 of 1978 as amended appointing the 1st respondent and two others as Commissioners to inquire into and report on matters specified in the warrant relating to the assassination of late Lalith William Athulathmudali. The other two Commissioners resigned and the 2nd respondent was appointed as a Commissioner. On 12. 07. 1996 acting in terms of section 16 of the Law, the Commission informed the petitioner that it was of the opinion that he was a person whose conduct should be subject to inquiry and that he was entitled to legal representation. He was not informed of the date of the inquiry. At the time of that notice the petitioner had left for the USA. On 02. 08. 1996 when the petitioner was still out of the Island, the Secretary to the Commission by its order, wrote letter P3 to the petitioner requesting him to attend the office of the Commission on 9th August to record his statement. The petitioner's son replied P3 stating that it was received on 7th August and that it would be given to the petitioner on his return. On 19. 12. 1996 the Commission caused a notice P5 to be affixed on the front door of the petitioner's residence. P5 referred to the two previous notices issued by the Commission, alleged that despite such notices the petitioner was travelling in different foreign countries and was since "moving from place to place in India", stated that the evidence before the Commission disclosed his complicity in the murder of late Lalith Athulathmudali and commanded him to

appear in person on 09. 01. 1997 before the Commission. On 03. 01. 1997 the petitioner's attorney-at-law addressed a letter to the Secretary of the Commission seeking another date as the petitioner's counsel was not free on 09th January. On 09. 01. 1997 junior counsel for the petitioner appeared before the Commission and moved for a date on behalf of the senior counsel. But this was refused on the ground that lawyers had no status as the petitioner had failed to appear on summons. On the same day the Commission issued a warrant for the arrest of the petitioner. On 18. 01. 1997 the Commission purported to make a determination that the petitioner was guilty of the offence of contempt under section 12 (1) of the SPCI Law and disqualified from being elected to Parliament for 7 years in terms of Articles 89 and 91 of the Constitution.

Alternatively, the Commission determined that on the basis of the "evidence" before it, the petitioner was "responsible" for the assassination of Mr. Athulathmudali and directly concerned as a member of the conspiracy to assassinate him which amounted to political victimization, and that he also procured police officers to assist which amounted to corruption. The Commission recommended that the petitioner be subjected to civic disability.

At the hearing of the application the counsel for the 1st and 2nd respondents *interalia* raised certain legal objections, namely –

(*a*) that the petitioner's application should be rejected on the ground of delay;

(*b*) that the writ jurdisction of the Supreme Court has been ousted by preclusive clauses contained in the SPCI Law and the Interpretation Ordinance;

(*c*) that the report of the Commission was not amenable to judicial review.

Held:

1. There was no delay in making the application in that the petitioner made it so soon as he became aware of the finding against him from the report of the Commission after its publication as a sessional paper.

2. The writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution. It cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in sections 9 (2) and 18A of the SPCI Law or section 22 of the Interpretation Ordinance. In fact the first proviso to section 18A (2) specifically confers writ jurisdiction on the Supreme Court. That jurisdiction is unfettered.

3. The recommendation or the decision of the Special Presidential Commission has the effect of potentially jeopardising the rights of persons. As such the Commissioner's report is amenable to judicial review. Section

18A (2) of the SPCI Law itself contemplates the exercise of judical review by the Superior Courts over Commissions appointed under the Law.

Per Dheeraratne, J.

"In a democracy the Commissions cannot be permitted to be a law unto themselves and operate outside the ambit of the Rule of Law. As observed by G. P. S. de Silva, CJ, in *Premachandra v. Major Montague Jayawickrema*[35] at 102 " . . . our Constitution and the system of Government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent judiciary".

4. The summons issued by the Commission (P5) was flawed as it was not in conformity with sections 7 (1) (c) and 11 (3) of the SPCI Law; Nor was it a notice under section 16. Hence the warrant too was flawed; and the Commission has no power to "convict" any person of any offence. That power is vested in the Supreme Court – section 10 (1) of the Law.

5. The determinations and recommendations of the Commission are flawed firstly as being unreasonable in that the Commissioners did not call their own attention to the relevant matters; secondly as they are not based on evidence of any probative value; and thirdly because those determinations and recommendations have been reached without giving the petitioner a right of hearing in breach of the principles of natural justice.

Per Dheeraratne, J.

"The legislature has (in providing for appointment of Judges to the Commission) in all probability given its mind to the fact that a Judge will bring to bear in functioning as a Commissioner, his legal training and judicial experience and the combination of those attributes will make him not only to act, in the words of Burke, with 'cold neutrality of an impractical judge' but also act fairly".

Cases referred to:

1. *Bandaranaike v. Weeraratne and two others* (1978-1979) 2 Sri LR 412.
2. *Weeraratne v. Hon. Percy Colin-Thome' and Three Others* (1988) 2 Sri LR 151.
3. *Wickramabandu v. Herath and Others* (1990) 2 Sri LR 348.
4. *Visuvalingam and Others v. Liyanage and Others* (1984) 2 Sri LR 123.
5. *Hopman and Others v. Minister of Lands and Land Development and Others* (1994) 2 Sri LR 240 at 247.
6. *Atapattu and Others v. People's Bank* (1997) 1 Sri LR 208.
7. *Goonesinha v. De Kretser* (1944) 46 NLR 107.

8. *K. Nakkuda Ali v. Jayaratne* (1950) 51 NLR 457.
9. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1947) 2 ALL ER 680.
10. *CCSU v. Minister for the Civil Service* (1984) 3 ALL ER 935 at 951.
11. *The King v. Electricity Commissioners, Ex parte London Electricity Joint Committee Company (1920) Ltd. and Others* (1924) 1 KB 171 at 205.
12. *De Mel v. De Silva* (1949) 51 NLR 105.
13. *Dias v. Abeywardene* (1966) 68 NLR 409.
14. *Fernando v. Jayaratne* (1974) 78 NLR 123.
15.(*a*) *Ratnagopal v. The Attorney-General* (1969) 72 NLR 145.
15.(*b*) *Ratnagopal v. The Attorney-General* (1968) 70 NLR 409.
16. *Silva and Others v. Sadique and Others* (1978-79-80) 1 Sri LR 166 (5JJ).
17. *Mendis, Fowzie and Others v. Goonewardena and Silva* (1978-1979) 2 Sri LR 322.
18. *Selvarajan v. Race Relations Board* (1976) 1 ALL ER 12.
19. *Secretary of State for Home Department ex parte Hosenball* (1977) 3 ALL ER 452 (1977) 1 WLR 766.
20. *Breen v. Amalgamated Engineering Union and Others* (1971 2 QB 175).
21. *CHVT Ltd. v. Price Commission* 1976 ICR 170 at 179.
22. *Chief Constable of North Wales Police v. Evans* – 1982 1 WLR 1155.
23. *Daganayasi v. Minisler of Immigration* 1980 2 NZLR 130.
24. *R. v. Secretary of Trade, ex parte Perestrello* 1981 QB 19.
25. *McInnes v. Onslow-Fane* 1978 1 WLR 1520.
26. *R. v. Liverpool Corporation ex parte Taxi Fleet Operators' Association* (1972) 2 B 299.
27. *R. v. Criminal Injuries Compensation Board ex parte Lain* (1967) 2 ALL ER 770 at 777-778.
28. *In re Pergamon Press Ltd.* (1970) 3 ALL ER 535 at 539.
29. *Re Grosvenor and West End Railways Terminus Hotel Ltd.* (1897) 76 LT 337.
30. *Hearts of Oak Assuarance Company Ltd. v.* AG 1932 AC 392, 1932 ALL ER 732.
31. *Wiseman v. Borneman* 1969 3 ALL ER 275, 1969 3 WLR 706.
32. *Re SBA Proprties Ltd.* – 1967 2 ALL ER 615 1967 1 WLR 799.
33. *R. v. Gaming Board for Great Britain ex parte Benaim* 1970 2 ALL ER 528 1970 2 WLR 1009.
34. *Russel v. Duke of Norfolk* (1949) 1 ALL ER 109.
35. *Premachandra v. Major Montague Jayawickrema and Another* (1994) 2 Sri LR 90 at 102.
36. *Karunathilleke v. Ameen* (1943) 44 NLR 213.
37. *Re U. N. Wijetunga* (1976) 70 NLR 515.
38. *Bandaranaike v. de Alwis* (1982) 2 Sri LR 664 at 673.
39. *Mohan v. Air New Zealand* (1984) ALL ER 201.
40. *R. v. Deputy Industrial Injuries CMR, Ex P. Moore* (1965) 1 ALL ER 81.

APPLICATION for a writ of certiorari against the Special Presidential Commission of Inquiry.

K. N. Choksy, P.C., with *Desmond Fernando*, P.C., *Sunil Rodrigo*, *Crossette Thambiah*, *M. D. K. Kulatunga*, *Hemantha Warnakulasuriya*, *Methsiri Cooray*, *V. K. Choksy* and *K. Wijetunga* for petitioner.

Wijedasa Rajapaksa with *Tilaka-Bandara Waduressa*, *Nihal Bamunuarachchi*, *Dhammika Abeygunawardena*, *Kapila Liyanagamage* and *S. A. Sripathi* for the 1st and 2nd respondents.

Kolitha Dharmawardena, DSG with *Harsha Fernando* SC, for the 3rd respondent.

Cur. adv. vult.

February 05, 1999.

DHEERARATNE, J.

The petitioner moved the Court of Appeal by this application for a writ of certiorari to quash the findings, determinations and recommendations, made in respect of him, by a commission which was appointed in terms of the Special Presidential Commissions of Inquiry Law No. 7 of 1978 as amended by Acts No. 4 of 1978 and No. 38 of 1986 (the SPCI Law), consisting of the 1st and 2nd respondents. The application for writ stood transferred to this court in terms of section 18A of the SPCI Law, as the 1st respondent commissioner was a Judge of the Supreme Court when he was appointed to the commission.

The warrant issued by Her Excellency The President dated 7th December, 1994, stated :

"Whereas Lalith William Athulathmudali, late leader of the Democratic United National Front was assassinated on April 23, 1993;

And, whereas, numerous allegations have been made that the investigation into the above-mentioned assassination was not conducted in a proper and impartial manner;

And, whereas, it appears to me to be necessary to establish a Special Presidential Commission of Inquiry into the matters hereinafter mentioned, being matters in respect of which an inquiry will, in my opinion, be in the public interest" the 1st respondent and two others were being appointed as commissioners. The other two commissioners resigned some time thereafter and the 2nd respondent was appointed commissioner.

The commissioners were required to hold all inquiries, make investigations, and to make recommendations in respect of the following matters :

"(*a*) the circumstances relating to the assassination of the late Lalith William Athulathmudali at a meeting held at Kirulapone, on April 23, 1993, and the person or persons directly or indirectly responsible for such assassination and whether any persons conspired to assassinate, or aided and abetted in assassinating the said Lalith William Athulathmudali at Kirulapone on April 23, 1993;

(*b*) the circumstances relating to physical attacks on the late Lalith William Athulathmudali –

(i) at Pannala on November 2, 1991;
(ii) at Madapatha, Piliyandala on April 23, 1992;
(iii) at the Fort Railway Station on August 7, 1992, and
(iv) at Dehiwala on August 29, 1992,

and whether the persons involved in, or connected with, any or all of the 3 attacks were directly or indirectly connected with or involved in the aforesaid assassination;

(*c*) whether there was a failure or omission on the part of any public officer to perform any duty required of him by law, in relation to investigations into the incidents referred to in paragraphs (*a*) and (*b*);

(*d*) whether there was a failure to provide or intentional withdrawal of security by the authorities at the meeting held at Kirulapone on April 23, 1993, at which the late Lalith William Athulathmudali was assassinated and if so, person or persons responsible for such failure or intentional withdrawal;

(*e*) whether there was a failure by the authorities concerned to provide adequate personal security to the late Lalith William Athulathmudali despite repeated requests by him, for such security".

The findings of the commission in respect of the petitioner were summed up in the report at page 215 as follows :

"These crimes have been planned not by a volcanic type of personality who just explodes and subsides. This planner has awaited his time patiently after careful preparations, and gets others, perhaps under obligation, to commit crimes to sustain their corrupt regime. We observe Mr. Sirisena Cooray's conduct in avoiding the commission with a 'letter' and an 'affidavit' the contents of which are revealing. His excuses contained in the 'affidavit' are not acceptable. His presence was required. These documents are valueless.

In the background of all the evidence taken together we draw the irresistable inference, supported by Mr. Cooray's own conduct in avoiding the commission by going abroad that he was one of those responsible for these assassinations and was directly concerned in and a member of the conspiracy to assassinate Mr. Athulathmudali in consequence of which conspiracy Athulathmudali was assassinated. All of the facts and circumstances taken together are not consistent with any reasonable theory of his innocence.

The commission would ordinarily have recommended that this act of murder amounts to political victimisation, the procurement of police officers such as the police to assist amounts to corruption, and making up a false scenario in respect of Ragunathan's death,

a fraudulent act to subvert the course of justice and he (*sic*) should be subject to civic disability. But this result has already taken place by operation of law (ie) by reason of his conviction for contempt of the commission. We recommend that he be made subject to civic disability if our view of the consequences of the finding of contempt of the commission are unacceptable. There are also Penal Code offences that may be considered by the Attorney-General. Those offences are conspiracy with others to commit murder, and abetment of the offence of murder".

It was contended on behalf of the petitioner, firstly, that the commission's findings on contempt and the decision that the petitioner stands deprived of his civic rights by operation of Article 89 (i) (ii) of the Constitution, have been made, in excess of jurisdiction of the commission. Secondly, it was contended, that the commission's findings of complicity with the assassination of Mr. Lalith Athulathmudali, political victimisation, corruption, and subverting the course of justice, in respect of the petitioner, and the recommendation for the imposition of civic disability on him, were made, in the absence of any credible evidence, and without permitting him the right of legal representation, contrary to the principles of natural justice and contrary to the mandatory provisions of section 16 of the SPCI Law.

The 1st and 2nd respondents took up the position that the petition should be rejected on the ground of delay. The report of the commission was published as a Sessional Paper on 30th January, 1998 and was made available to the public only in March, 1998. As far as the determination on the matter of contempt was concerned, although it was made on 18th January, 1997 and the petitioner came to know of that soon thereafter, it was not until the petitioner had access to the report that he became aware that the commission had "convicted" him and determined that he was disqualified from being an elector by operation of law. The petition was filed on 19th of May, 1998 and we are of the view that there was no delay in making the application. The next matter raised on behalf of those respondents was that inasmuch as the petitioner has acted in breach of Rule No. 3 (1) (*a*) of the Court of Appeal (Appellate Procedure) Rules 1990, in that, the proceedings before the commission and notes of the

commissioners were not filed along with the petition, the petition must be rejected. We pointed out to the learned counsel for those respondents, that we have not been invited by this application to exercise any appellate jurisdiction and therefore the commission's report was adequate for exercising judicial review.

The other two objections taken on behalf of the 1st and 2nd respondents were broadly (1) that the writ jurisdiction of this court was ousted or affected by the preclusive clauses contained in the SPCI Law and the Interpretation Ordinance and (2) that the report of the commission was not amenable to judicial review. I shall deal with those vital issues, in that order before proceeding to consider (*a*) the determination on contempt and (*b*) the findings on conspiracy to murder the late Mr. Athulathmudali and other matters, concerning the petitioner reached by the commission.

Writ jurisdiction of the Supreme Court, the preclusive clauses contained in the SPCI Law, and the provisions of the Interpretation Ordinance.

The general writ jurisdiction was originally conferred on the pre-1978 Supreme Court by the provisions of the Courts Ordinance No. 1 of 1889 and thereafter by provisions of the Administration of Justice Law, No. 44 of 1973. It is significant to observe that the writ jurisdiction of the present Supreme Court is anchored on two provisions of the Constitution which came into force on 7th September, 1978. In terms of the Constitution the writ jurisdiction is ordinarily exercisable by the Court of Appeal. Firstly, Article 126 (3) mandates the Court of Appeal, where in the course of hearing into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, *procedendo, mandamus and quo warranto*, if it appears to that court that there is *prima facie* evidence of an infringement or imminent infringement of the provisions of chapter III (fundamental rights) or chapter IV (language rights) by a party to such application, to refer such matter for determination by the Supreme Court. That provision does not concern us in this case. Secondly, Article 140, provides:

Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any court of First Instance of tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, *procedendo*, *mandamus*, and *quo warranto*, against the judge of any court of First Instance or tribunal or other institution or any other person.

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.

The SPCI Law, No. 7 of 1978 came into force on 10th February, 1978. The SPCI Amendment Act No. 4 of 1978 which brought in several important amendments to the principal enactment, though certified on 22nd November, 1978, was given retrospective effect by its section 12, as having deemed to come into operation on the date on which the principal enactment came into operation. I may add that the amendments naturally led to a great deal of controversy as some of them were directed to nullify the effect of the judgment of the Court of Appeal in *Bandaranaike v. Weeraratne and two others*[1].

Subsection 18A (1) brought in by the SPCI Amendment Act provided that :

Every application to the Court of Appeal in relation to any commission established or purported to have been established under this Law or any member thereof and every application to such court to which such commission or a member thereof is a party shall, where such commission at the time it was so established or such application is made consists of at least one Judge who was a Judge of the Supreme Court or Court of Appeal or where such member at the time of his appointment as a member of a commission or at the time of the application is or was a Judge of the Supreme Court or of the Court of Appeal, stand transferred to the Supreme Court which shall in respect of such application

have and exercise all the powers of the Court of Appeal and the Court of Appeal shall not have or exercise any power or jurisdiction to deal with such application.

It is seen that the provisions of the above subsection are referable to the proviso to the Article 140 of the Constitution. (For similar power granted to the Supreme Court to issue writs see section 4 of the Urban Development Projects Special Provisions Act, No. 2 of 1980).

The SPCI Law contains several preclusive clauses either ousting or partially ousting the writ jurisdiction. They are subsections 2 (5), 9 (2), and 18A (2). Only subsections 9 (2) and 18A require our attention in this case. Subsection 9 (2) states that :

"Any report, finding, order, determination, ruling or recommendation, made by a commission under this Law, shall be final and conclusive, and shall not be called in question in any court or tribunal by way of writ or otherwise".

Subsection 18A (2) (which is deemed to have come into operation on the date the principal law came into operation) states :

"No court shall, notwithstanding anything to the contrary, have power or jurisdiction to make any order at any stage whatsoever and in any manner –

(*a*) staying, suspending or prohibiting the holding of any proceeding before or by any commission established by warrant issued by the President in the exercise of the powers vested in the President under section 2 (1) or the making of an order, finding, report, determination, ruling or recommendation by any such commission;

(*b*) setting aside or varying any order, finding, report, determination, ruling or recommendation of any such commission;

Provided that where by reason of the provisions of subsection (1) any application stands transferred to the Supreme Court, such court may, only upon final determination of such application, make any order which, in the lawful exercise of its jurisdiction, such court may make;"

(The second proviso omitted)

These preclusive clauses in the SPCI Law must be read subject to the provisions of section 22 of the Interpretation Ordinance 21 of 1901 brought in by the Amendment Act No. 18 of 1972. The impact of section 22 is, where any enactment has used in relation to any order, etc., made by any person, authority, etc., the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise", no court shall, in any proceeding and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, etc. The proviso to that section specifies that this provision does not exclude the exercise of the jurisdiction of the Supreme Court or the Court of Appeal under Article 140 in respect of following matters-namely:

"(*a*) where the order, etc., is *ex facie* not within the power conferred on such person, authority, etc.

(*b*) where such person or authority, etc., is bound to conform to the rules of natural justice or is obliged to comply with any mandatory provision of law as a condition precedent to making of such order, etc., and the Supreme Court or the Court of Appeal is satisfied that there has been no such conformity or compliance".

The object of subsection 18A (2) of the SPCI Law, seems to me is to restrict to some extent the relaxation brought about by the proviso to section 22 of the Interpretation Ordinance to preclusive clause 9 (2) of the SPCI Law. If I may paraphrase subsection 18 A (2), that subsection precludes any court (which includes the Supreme Court) at any stage (*a*) from staying, suspending or

prohibiting the holding of any proceeding before any commission or making any order, finding, report, determination, ruling or recommendation by any commission; and (*b*) setting aside or varying any order, finding, etc., of any such commission.

The first proviso to that subsection, however confers power on the Supreme Court, when an application stands transferred to that court, to make any such order in the lawful exercise of its jurisdiction, only upon final determination of that application.

The important question of law we are now called upon to decide in this case is whether the untrammelled writ jurisdiction conferred upon the Superior Courts by the Constitution could be lawfully restricted in any manner by the provisions of ordinary legislation contained in the Interpretation Ordinance and the SPCI Law. It appears that arguments on this aspect of the matter were not presented to court on behalf of the petitioners either in *Bandaranaike v. Weeraratne and two others* (*supra*) or in *Weeraratne v. Hon. Percy Colin-Thome and three others*[2].

In this connection our attention was drawn to Articles 168 (1) and 80 (3) of the Constitution. By virtue of the deeming provision contained in the SPCI Law Amendment Act No. 4 of 1978 that became existing Law at the time the 1978 Constitution came into operation. Article 168 (1) provides that unless Parliament otherwise provides, all laws, in force immediately before the commencement of the Constitution, shall, *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force. Article 80 (3) provides that where a Bill becomes law upon the certificate of the Speaker being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.

An analogous question arose in *Wickramabandu v. Herath and others*[3] decided by a bench of five judges. H. A. G. de Silva, J. at page 361 observed : "We are of the view that section 8 of the Public Security Ordinance and regulation 17 (10), which provides that such an order shall not be questioned in any court on any ground, do not

affect our jurisdiction. Firstly existing written laws continue in force except as otherwise expressly provided in the Constitution' (Article 168 (1); Articles 17 and 126 confer jurisdiction on this court in respect of infringement of fundamental rights, and this is express provision which prevails over any written law to the contrary, including section 8 – whatever the position may have been prior to the Constitution. Article 16 (1) saves the Public Security Ordinance (since it is existing law) but only from invalidation on the ground of inconsistency with fundamental rights; it does not validate any inconsistency with Articles 17 and 126. Secondly, the power to make Emergency Regulations does not include the power to make regulations overriding the provisions of the Constitution (Article 155 (2); Regulation 17 (10) therefore cannot override or in any way affect the jurisdiction of this court under Articles 17 or 126". See also *Visuvalingam and others v. Liyanage and others*[4] Kulatunga, J. in *Hopman and others v. Minister of Lands and Land Development and others*[5] at 247 expressed the view that power derived from Article 140 is not affected by section 24 of the Interpretation Ordinance. In *Atapattu and others v. People's Bank*[6] it was held that the constitutional provisions being the higher norm, must prevail over the ordinary staturory provisions. The words 'subject to the provisions of the Constitution in Article 140 was necessary to avoid conflicts with other provisions of the Constitution as Articles 18 (3), 120, 124, 125, and 126 (3). Those words do not refer to contrary provisions of written laws kept alive by Article 168 (1). Where the Constitution contemplated that its provisions may be restricted by other written laws as well, the phrase "subject to the provisions of the Constitution and of any law" was used, as in Article 138 (1).

We are here certainly not inquiring into, pronouncing upon, or in any manner calling in question, the validity of the SPCI Amendment Act No. 4 of 1978 as contemplated by Articles 80 (3). The Constitutional provision must prevail over normal law. For the reasons stated above I hold that the jurisdiction conferred on this court by Article 140 is unfettered.

The phrase "according to law" in Article 140 was also used in section 42 of the Courts Ordinance and was judicially interpreted to

mean that writs should be issued in the circumstances known to English Law. See *Goonasinghe v. de Kretser*[7] and *K. Nakkuda Ali v. Jayaratne*[8]. We must assume that the phrase was used in Article 140 in the same sense and that proposition admits of no controversy.

Before I part with this section of the judgment let me make a brief reference to the scope of judicial review. The grounds of judicial review were originally broadly classified as three-fold. The first ground is "illegality"; the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is "irrationality" namely Wednesbury unreasonableness (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[9]. The third is "procedural impropriety". (Halsbury 4th bd., vol. 11 para 60). To these grounds a fourth may be added "proportionality". See Lord Diplock in *CCSU v. Minister for the Civil Service*[10] at 951.

Amenability of the Commission's report to judicial review.

What attracts judicial review Lord Justice Atkin in *The King v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company (1920) Ltd. and others*[11] said : "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs".

This dicta was faithfully followed in some cases in Sri Lanka where judicial review was sought on reports of commissions appointed under the Commissions of Inquiry Act, No. 17 of 1948. In *de Mel v. de Silva*[12] it was stated that the commissioner was not expected to make any order in his report affecting the legal rights of the petitioner; that was unnecessary in view of subsection 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949, which stated that the Governor-General shall cause the finding, if adverse to the petitioner, to be published in the *Gazette;* and that on such publication, the petitioner was to be subjected to the disqualifications set out in that subsection; an adverse finding by the

commissioner necessarily affected the legal rights of the petitioner. For this reason, the court was of the view that the respondent commissioner was a person having legal authority to determine a question affecting the rights of the petitioner and having a duty to act judicially. In *Dias v. Abeywardene*[13], it was stated that there was literally nothing in the Commissions of Inquiry Act, by reason of which such a determination can create, affect, or prejudice, the rights and obligations of persons. It was held that the commissioner was not exercising judicial functions. In *Fernando v. Jayaratne*[14] it was stated that the only power the commissioner had was to inquire and make a report and embody therein his recommendations. He had no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*, nor did he make judicial decision. The report of the commissioner had no binding force; it was not a step in consequence of which legally enforceable rights might be created or extinguished. In the Supreme Court judgment in Re Ratnagopal [15a] – set aside by the Privy Council in *R. Ratnagopal v. The Attorney-General*[15b] on the ground of invalidity of the appointment of the commissioner – at page 422 it was stated that the purpose of the commission, which was merely to inquire and report on certain matters, did not involve in the excercise of judicial or quasi-judicial functions, or even of executive power; that being so, any failure of the commission to duly carry out its purposes was a subject for complaint to the Governor-General and not to courts. Again in *Silva and others v. Sadique and others*[16] setting aside the judgment of the Court of Appeal in *Mendis, Fowzie and others v. Goonawardena and Silva*[17], it was held that a commission of inquiry established under the Commissions of Inquiry Act did not have the legal authority to make binding decisions; any penalty or consequence that followed a report of such a commission was by the action of some other authority, although, it may be based on the findings contained in the report; the report did not take effect *proprio vigore.*

Over the years frontiers of Lord Atkin's formula in Electricity Commissioners case have been advanced by judicial decisions. It is no longer the duty to act judicially or quasi-judicially which attracts review but the "duty to act fairly". See *Selvarajan v. Race Relations Board*[18] *R. v. Secretary of State for Home Department, ex parte*

Hosenball[19]; and *Breen v. Amalgamated Engineering Union and others*[20].

Wade and Forsyth (7th) edition at page 516 states: "Acting fairly is a phrase of such wide implication that it may ultimately extend beyond the sphere of procedure. It was suggested in one case that it included a duty of acting with substantial fairness and consistency. [*CHVT Ltd. v. Price Commission*[21] at 179 – Scarman, LJ]. But when Lord Denning MR said much the same thing (that not only must there be a fair hearing but 'the decision itself must be fair and reasonable') the House of Lords repudiated his opinion. [*Chief Constable of North Wales Police v. Evans*[22] perhaps giving Lord Denning's words the wider meaning than he intended. In *Daganayasi v. Minister of Immigration*[23] Cooke, J. said that (fairness need not be treated as confined to procedural matters . . .] On the other hand, fairness may not necessarily comprise the whole domain of natural justice. Inspectors investigating the affairs of companies, who are subject to the duty to act fairly, are not required to be free from bias. [*R v. Secretary for Trade, ex parte Perestrello*[24]. Yet, the same phrase has been used to describe a duty to act honestly and without bias or caprice but without any need to disclose the charge or give a hearing. [*McInnes v. Onslow-Fane*[25]. Judges seem to be using it in a variety of different situations, so that it has no precise meaning except when used as a synonym for natural justice".

The phrase "affecting the rights" in Lord Atkin's dicta has been liberalized to mean not rights in the jurisprudential sense. They need not be legally enforceable rights; they may not be immediately enforceable rights but a decision in merely a step as a result of which legally enforceable rights may be affected. See *R. v. Liverpool Corporation, ex parte Taxi Fleet Operators, Association*[26] and *R v. Criminal Injuries Compensation Board, ex parte Lain*;[27]. Lord Denning, MR in *Re Pergamon Press Ltd.*[28] at 539 observed:

> "It is true of course, that the inspectors are not a court of law. their proceedings are not judicial proceedings; see Grosvenor and West End Railway Terminus Hotel Ltd;[29]. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only

investigate and report. They sit in private and are not entitled to admit the public to their meetings; see *Hearts of Oak Assurance Company Ltd. v. AG*[30]. They do not even decide whether there is a *prima facie* case, as was done in *Wiseman v. Borneman*[31].

But this should not lead us to minimise the signifcance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. it may bring about the winding-up of the company, and be used itself as material for the winding-up; see *Re SBA Proprties Ltd.*[32] Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed – see S. 41 of the Companies Act 1967. When they do make their report, the board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large. Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly. This is a duty which rests on them, as many other bodies, although are not judicial, nor quasi-judicial, but only administrative, see *R. v. Gaming Board for Great Britain, ex parte Benaim*[33].

It is sufficient if the recommendation or decision of the authority has the effect of potentially jeopardising the rights of persons. The fact that the recommendations are not self-executory or the fact that a discretion of some other authority interposes between the recommendation and any actual consequences to the persons affected, does not necessarily preclude judicial review. It is the nature, functions and powers of the commission that would determine whether the commissioners have a duty to act fairly. See *Russel v. Duke of Norfolk*[34]. For this purpose let me refer to some features of the warrant and the provisions of the SPCI Law. The warrant granted to the commission requires it to inquire into certain aspects of the assassination and four physical attacks on the late Lalith Athulathmudali, which are all criminal acts, and to make recommendations. The SPCI

Law grants the commission power to determine and report whether any person is guilty of any act of political victimization, misuse or abuse of power, corruption or fraudulant act, in relation to any court or tribunal or any public body, or in relation to the administration of any law or administration of justice; and in those circumstances to recommend whether such person should be made subject to civic disability (section 9 (1)). That recommendation can result in the Parliament taking steps to impose civic disability or expel that person from Parliament if he is a MP (Article 81). It has the power to summon witnesses and to receive evidence on oath or affirmation (section 7 (*a*) to (*c*)). It has power to admit evidence which might be inadmissible in any civil or criminal proceedings (section 7 (*d*)). In relation to any person (1) who is specified in the warrant as a person whose conduct is the subject of inquiry or (2) who is in any way implicated or concerned in the matter under inquiry or (3) who in the opinion of the commission, is in any way implicated or concerned in the matter under inquiry, the commission has the power to so inform that person (section 16). Power is granted to the commission to determine whether a person has committed an offence of contempt (section 12). This determination can lead to a person being convicted of that offence by the Supreme Court. That conviction can result in that person being disqualified for seven years from being an elector or a Member of Parliament (Articles 89 and 90 of the Constitution). The commissioners are immune from civil and criminal proceedings (section 18). The commission can thus come to several determinations and decisions which can have serious repercussions as pointed out by Lord Denning, MR in Pergamon case (*supra*). That is the very reason why the law casts on the commissioners a duty to act fairly.

In terms of subsection 2 (1) of the SPCI Law the legislature has granted the power to the President to appoint to the commission judges of a court not below the District Court. There must be some good reason for the legislature to pick judges from a long catalogue of several qualified professionals. The legislature has in all probability given its mind to the fact that a judge will bring to bear in functioning as a commissioner, his legal training and judicial experience, and that the combination of those attributes will make him not only to act, in the words of Burke, with "cold neutrality of an impartial judge", but

also fairly. There is no parallel provision in the Commission of Inquiries Act, No. 17 of 1948 to appoint judges as commissioners, yet it is interesting to reflect upon how great judges of this court, injected into commission proceedings a degree of fairness, particularly before labelling a person as a criminal. They were quite conscious, being public functionaries on whom enormous powers were vested by law, of the fact that "it is excellent to have a giant's strength, but it is tyrannous to use like a giant" (Measure for Measure). For instance in the Bandaranaike Assassination Commission headed by Justice T. S. Fernando, the commissioners stated at page 36 of the report (Sessional Paper III – 1965) :

> "Section 7 of the Commissions of Inquiry Act, No. 17 of 1948, empowers our commission to admit this confession in evidence notwithstanding the provisions of the Evidence Ordinance. Although there is, therefore, no legal bar to our admitting the confession, it is entirely a matter for us to decide what weight we should attach thereto. The very important question of the weight to be attached to the evidence of this confession would not have risen before us had Somarama been available to be called as a witness before us. Somarama was dead before our commission was appointed. The sentence of death pronounced on him at the trial had been carried out in 1962 some time after his application for special leave to appeal from the dismissal by the Court of Criminal Appeal of his appeal against the conviction and sentence passed in the Supreme Court had been refused by the Privy Council. We were therefore left without an opportunity of testing the truthfulness of that part of the confession of Somarama which tended to implicate Mr. Dickie de Zoysa in the conspiracy to kill Mr. Bandaranaike, and accordingly decided that we should not at our inquiry admit the confession as an item of evidence against Mr. de Zoysa."

In similar vein, Justice K. D. de Silva the one-man commissioner appointed to the Navy Commission in his report (sessional paper VI 1963) at page 31 stated: "This is not a court proceeding. This inquiry was held under the provisions of the Commissions of Inquiry Act (cap. 393). The Evidence Ordinance (cap. 14) is not wholly applicable to it. Section 7 (*d*) of the Commissions of Inquiry Act, *inter alia,* states

that a commission appointed under the Act shall have the power 'notwithstanding any of the provisions of the Evidence Ordinance, to admit any evidence, whether written or oral, which might be inadmissible in civil or criminal proceedings'. As I have stated earlier, this is mainly a fact-finding commission. The object is to ascertain the truth pertaining to relavent matters. Hearsay evidence is admissible at such an inquiry. Of course in assessing the value of a statement made by a person who is not available for cross-examination, great caution has to be exercised. The effective means of testing the statement of a witness is cross-examination. In the case of hearsay evidence that test is not available. Nevertheless, the statement need not be ruled out at an inquiry such as this; but before placing any reliance on such a statement, the commissioner should be satisfied, beyond reasonable doubt, that the facts appearing in such a statement which are accepted, are true. Whether or not such a statement is corroborated by independent evidence is a matter of great importance".

Although one counsel appeared for both the 1st and the 2nd respondents at the hearing of this application, two different counsel have filed written submissions on their behalf. I mentioned this fact only to refer to a submission made by counsel for the 1st respondent in his written submissions regarding our jurisdiction. That submission, in counsel's own words is this: "If a report or a recommendation is made, enabling the legislature to pass a statute or a resolution (that?) cannot be interpreted by the Supreme Court, as it amounts to an interference into the sovereignty of the people which is exercised through the Parliament. On the other hand such an interference is directly against the basic rule of inalienability of the sovereignty". I may say that we have not the least intention or desire to interfere with any statute or any resolution the Parliament may in its wisdom pass; nor to trespass on people's sovereignty. We are only concerned with the validity of matters affecting persons the commissioners determine as public functionaries. In a democracy, the commissions cannot be permitted to be a law unto themselves and operate outside the ambit of the Rule of Law. As observed by G. P. S. de Silva CJ in *Premachandra v. Major Montague Jayawickrema and another*[35]". . . at 102 Our Constitution and the system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent judiciary".

Section 18A of the SPCI Law itself contemplates the exercise of judicial review by the Superior Courts over commissions appointed under that law.

Findings by the Commission on the offence of contempt.

The SPCI Law draws a distinction between, on the one hand a witness (sec. 7) and on the other a person (*a*) who is specified in the warrant (of the President) as a person whose conduct is the subject of inquiry or (*b*) who is in anyway implicated or concerned in the matter under inquiry or (*c*) who is in the opinion of the commission, is in anyway implicated or concerned in the matter under inquiry (section 16). In the case of the former, the commission has the power **to summon him to attend any meeting of the commission to give evidence,** or to produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession (subsection 7 (1) (*c*)). Every person on whom a summons is served shall attend before the commission at the time and place mentioned therein, and give evidence (subsection 11 (3). In the case of the latter person (for convenience I may call person implicated), he **shall be so informed** by the commission and after he was so informed, be entitled to be represented by one or more Attorneys-at-law, at such state of inquiry as is relevant thereto. There is a third category of persons contemplated in section 16, who are neither summoned nor informed, that is persons who consider desirable that they should be represented at the commission; such persons may be represented only with leave of the commission. The SPCI Law thus makes provision for persons who may be affected by determinations and decisions of commissions to be heard and to be represented by lawyers.

So a witness is summoned to give evidence, whereas a person implicated is informed (but not summoned) and permitted legal representation, The law appears to be predicated upon that salutary principle *tenetur se ipsum accusare* – the law compels no man to be his own accuser or to give any testimony against himself. See also *Karunatilleke v. Ameen*[36].

If any person fails, in answer to the summons, appear before the commission, such a person is liable to be arrested and upon his arrest be produced before the commission and the commission may order the remand of that person to the custody of the fiscal of the highest court exercising original jurisdiction within the judicial zone of Colombo or any other convenient zone, or order his release upon such terms as a commission may determine (subsection 11 (4)). Subsection 12 (1) provides that a person on whom a summons is served, fails without cause, which in the opinion of the commission is reasonable, to appear before the commission at the time and place mentioned in the summons, such person shall be guilty of the offence of contempt against, or in disrespect of the commission. (The proviso to that subsection relates to other types of contempt). Where the commission determines that the person has committed any offence of contempt, the commission may cause its secretary to transmit to the Supreme Court, a certificate setting out such determination (subsection 12 (2)). Subsection 10 (1) provides that every offence of contempt committed against the authority of the commission, shall be punishable by the Supreme Court, as though it were an offence of contempt committed against such court. In any proceedings for punishment of an offence of contempt "which the Supreme Court may think fit to take cognizance" as provided by section 10, any document purporting to be a certificate (setting out the determination) shall (*a*) be received in evidence without further proof, unless contrary is proved, and (*b*) be conclusive evidence that the determination set out in the certificate was made and the facts stated in the determination (subsection 12 (3)).

I may straight away mention here that the Supreme Court does not act as a rubber stamp; first, it may take cognizance (or may not), second, it will inquire into whether an offence of contempt was committed, before it proceeds to convict and impose a sentence. (See Re U. N. Wijetunga[37] - contempt in respect of a commission appointed under the Commissions of Inquiry Act).

There is an added consequence of a conviction for contempt, whatever penalty the Supreme Court may impose. That is, the person so convicted, in terms of Article 89 of the Constitution become, disqualified from being and elector, if a period of seven years has

not elapsed since "the date of his being convicted". In terms of Articles 90 and 91, if a person is disqualified to be an elector he is disqualified to be elected as a Member of Parliament.

Let me now come to the facts leading to the petitioner being found guilty of contempt of the commission. On 12th April, 1996, a report of evidence given by an unnamed witness before the commission, that the petitioner was connected with alleged criminal activities of a person known as "Sotti Upali" and that some arms, etc., were found hidden in the garden of the petitioner's premises, was published in the Daily News. On 15th April, 1996, the petitioner wrote to the secretary of the commission, refuting those allegations. He wrote, "I write to inform the commission that the evidence is absolutely false. I am prepared to appear before the commission and testify that the evidence of this witness, so far as I am concerned, is a total fabrication". Refering to this letter the commission in its report at page 207 stated :

> "As far as the commission is concerned that item referred to by Cooray may have been mischievously reported. There was in fact no such evidence on record or according to commissioners' notes. The commission therefore had no reason to communicate with Mr Cooray on the subject. The proceedings would have been available for scrutiny. Therefore his reference merely to a news-paper report and not to the proceedings is both suspicious and suggestive".

On 1st May, 1996, the petitioner left the Island and returned on 18th June, 96. On 26th June, 96, the petitioner left to the USA. On 12th July, 1996, by notice dated 12th July, 1996 sent to the petitioner's residence, the commission informed the petitioner, that it was of opinion that the petitioner was a person whose conduct should be subject of inquiry and that he was entitled to legal representation. The petitioner was not required to appear before the commission. The 1st and 2nd respondents have admitted in their affidavits that this notice was issued in terms of section 16 of the SPCI Law. On 2nd August, 1996, when the petitioner was still out of the Island, the secretary

of the commission by its order wrote letter P3 to the petitioner, addressed to his residence, stating that :

"I refer to your letter dated 15. 4. 96 requesting me to afford you an opportunity to appear before the commission to give evidence.

Please attend the office of the commission on Friday 9th August so that your statement may be recorded in the 1st instance".

This letter was written despite the fact that "there was no such evidence on record or according to the commissioners' notes". But that is not the issue; was P3 a summons? There was no summons requiring the petitioner as a witness to attend before the commission and to give evidence. Learned DSG was unable to assist us with reference to any law which enabled the commission to require a person to attend the office of the commission in order to record a statement preparatory to giving evidence. Even if that was possible, such a communication was no summons.

On 8th August, 1996, the petitioner's son replied to P3 to say that it was received on the 7th August and it would be handed over to the petitioner on his return to the Island. On 19th December, 1996, the commissioners got the document P5 (in Sinhala) and P5A (in English) pasted on the front door of the petitioner's residence, while the petitioner was yet out of the Island. Material parts of P5A reads : –

"Whereas the commission has written to you (by) registered post that you are a person whose conduct should be the subject of inquiry in respect of matters referred to in the warrant issued by Her Excellency the President of Sri Lanka, to wit, a conspiracy to assassinate or aid and abet the assassination of the late Lalith Athulathmudali and other connected matter and informing you that you are entitled to representation by Attorneys-at-law.

Whereas the said commission further request you by letter of 2. 8. 1996 to attend the commission office on 9. 8. 1996 to make a statement.

Whereas your son Mr. Ajith Cooray has informed the commission that the said letter of 2. 8. 1996 written to you was received at your residence No. 226, Lake Drive, Colombo 8.

And, whereas your son Mr. Ajith Cooray has informed the commission that you are abroad.

And, whereas, the National Intelligence Bureau has informed the commission that you left Sri Lanka on 24. 6. 1996 with your wife Srimathi and your son B. M. Prasanna Cooray for one month's vacation to Hongkong.

And, whereas, statements made to the commission by your son Mr. Ajith Cooray show that you have been in Washington in the United States of America and that you are moving from place to place in India where he met you in New Delhi.

And, whereas, the evidence so far pleas (placed) before the Commission disclosed your complicity in the murder of the late Lalith Athulathmudali.

These are therefore to command you to be present and appear in person on 9. 1. 1997 at 11 am before the commission".

This document can neither be construed as a summons to a witness "to attend any meeting of the commission to give evidence" (subsections 7 (1) (*c*) and 11 (3)), nor a notice to a person implicated (section 9) where no personal attendance could be required. Was the petitioner told why he was commanded to appear? Certainly he was not; but the commission has provided the answer in its report at page 209 :

"We would have liked to have Mr. Cooray's views on the sacking of Athulathmudali from the UNP in August, 1991 and his views on the so-called impeachment motion under Article 38 (1) of the Constitution, which was never in fact presented to the Speaker.

The commission would also have liked to question Sirisena Cooray on the running of the Housing Ministry, the allocation of houses and flats to public officers, the source of the money to run Gam Udawas, why he transferred his pistol which was personal to him to Sothi Upali, about his dealings with the Mahaweli Marine Agency, the complaints of the public that by his political patronage Sothi Upali received protection from police officers, the state of his assets and finances abroad and in Sri Lanka since 1976. These are some of the matters he could have assisted the commission on. The commission would also have questioned him about the Terms of Reference in the Warrant and his views on the testimony of witnesses who tend to implicate him in the conspiracy to assassinate Athulathmudali. But it was not to be. He did not even answer the summons and kept away from the commission altogether. Instead he tried to introduce Attorney-at-law into these proceedings to watch his interests whereas he was required to be present in person".

The commissioners quite erroneously overlooked the fact that under the law the petitioner had the right of representation by lawyers; it is not a cheap "introduction" but a cherished right recognized through out the civilized world. Most of those matters mentioned by the commissioners clearly fell outside the ambit of the warrant. To come back to the narrative of events, on the 3rd January, 1997, in response to P5A, petitioner's attorney-at-law, sent to the secretary of commission a letter informing of the inability of the petitioner's retained counsel to appear before the commission on 9th January and seeking another date. On the 9th Mr. Anil Silva attorney-at-law appeared before the commission on behalf of the petitioner and moved for a date to enable senior counsel to appear for him. That application was refused on the ground that lawyers had no standing as the petitioner had failed to appear on summons. The commission thereafter proceeded on the same day to issue a warrant of arrest of the petitioner. I may mention here that for the reasons given by me earlier, the summons was flawed; and therefore the warrant too was flawed.

On the 18th of January, 97, the commission purported to make a determination that the petitioner was guilty of the offence of contempt

in terms of section 12 (1) of the SPCI Law. On hearing of the refusal to permit lawyers to appear for him and the issue of the warrant against him the petitioner, who was, in Australia at that time submitted through his attorney-at-law, to the commission on 14th February, 97, an affidavit sworn on 29. 1. 97 in Australia explaining, among other matters, why he chose to be away from the Island. The contents of that affidavit are immaterial for the decision of this application in view of our finding that the so-called summons has no validity in law. The commissioners expressed their suspicions even on the stamp affixed to the petitioner's affidavit, though they had a statement from the Inland Revenue Department that it was properly issued by that department on 13. 2. 97. commissioners observed : "The stamp on the affidavit is also controversial. We have a statement from the postal authorities that the stamp has long been invalid. It is ancient" (page 210).

The commission in its report, thereafter, proceeded to make a series of astounding propositions of law regarding its determination on contempt. It is right to say that the commission is not required by law to transmit a detemination made on contempt to the Supreme Court. The commission says : "there is a good reason for this discretion remaining with the commission. There is a legal principle that an offender should not be punished twice for the same offence" (page 210). The commission has no punitive power whatsoever. Its determination will remain a "damp squib" if the Supreme Court does not take cognizance of the offence. The commission then went on to say: "Certain Constitutional provisions now take over. The commission now considers certain provisions in chapter 14 of the Constitution. The chapter deals with The Franchise and Elections" (page 211). Then the commission having cited portions of Articles 89 – 91 relating to disqualifications from being an elector and being elected as a MP, on being convicted of an offence of contempt, stated : – "This disqualification applies to Mr. Cooray as he was convicted by this commission for avoiding the summons without reasonable cause. In the result Mr. Sirisena Cooray is disqualified from being elected to Paliament for a period of 7 years from the date of his conviction . . . This result the commission considers to be in the nature of a punishment". (page 212).

The commission has no power to "convict" any person of any offence and that is a power vested exclusively with the regular courts [see Article 13 (3) of the Constitution]. If legal representation was permitted on behalf of the petitioner, probably even the most junior lawyer would not have taken much time to convince the commission that it had no power to convict a person of an offence. The commissioners could have entertained doubts in their own minds as to their competence to convict a person and that is why probably they made a qualified recommendation in saying "we recommend that he be made subject to civil disability if our view of the consequences on the finding of contempt of the commission is unacceptable". That view is unlawful and unacceptable in law.

Decision that the petitioner was directly concerned in and was a member of the conspiracy to assassinate Mr. Athulathmudali and other decisions leading to the recommendation that the petitioner be made subject to civic disability.

The Penal Code states that a person abets doing of a thing firstly, if he instigates any person to do that thing; or secondly, if he engages in any conspiracy for the doing of that thing; or thirdly, if he intentionally aids, by any act or illegal omission, the doing of that thing (section 100). The natural meaning of "to aid" is to give help, support or assistance to; and of "to abet" is to incite, instigate or encourage (Smith and Hogan 8th edition). The offence of conspiracy is committed, in terms of the Penal Code, when two or more persons agree to commit or abet or to act together, with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation (section 113A). In his written submissions, learned counsel for the 1st respondent submitted that the ingredients to prove "abetment" and "conspiracy" at a commission appointed under the SPCI Law are different from what is required under the Penal Code; they are less in gravity; the reason for this difference, he stated, was that a violation of the penal laws entail in penal consequences; whereas if the recommendation of the commission is accepted by the legislature, it will impose only civic disability on the petitioner; civic

disability is not a punishment. We reject this dangerous heresy for two reasons. Firstly, norms of criminal culpability should be certain and they cannot take different shades depending on who applies them. Secondly, learned counsel's submission is based on the belief, (like the scant respect the commissioners had to the right of representation by lawyers) that the right to vote is an inferior kind of right of no consequence and therefore that a person could be deprived of that right less seriously. Article 21 (1) of the Universal Declaration of Human Rights states : "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". In *Bandaranaike v. de Alwis*[38] Samarakoon, CJ called that right "the most precious of them all". That right should not be lightly interfered with.

The petitioner in his petition stated that the resasons for the commissioners conclusion regarding his complicity with the assassination of Mr. Athulathmudali are set out at page, 213 and 214 of part 1 of the report (para 21). This was admitted by the 1st and 2nd respondents in their affidavits (vide para 19 of each respondent's affidavit). I mentioned this matter here, because when we inquired from the learned counsel for the commissioners, in the course of the hearing reasons for the conclusions reached by them, he did submit that some more reasons may have appeared in the proceedings, which were not stated in the report.

I shall now set out those reasons verbatim from the report, stated after the point at which the commission purported to "convict" the petitioner of contempt.

The question is, why is he avoiding being questioned respect of the terms of reference and other relevant matters? His conduct is not consistent with his innocence. Quite apart from the legal consequences that have followed his foolish conduct, the evidence before us concerning him shows :

(*a*) that President Premadasa found him a loyal ally, one who co-operates with and supports and helps him.

(*b*) President Premadasa had strong motive to eliminate Athulathmudali, a strong political opponent, one who has insulted him by the so-called impeachment motion, one whom he had sacked from the UNP, one who has severely criticised his co-operation with the enemy, the LTTE, by supplying them with modern weapons; cash and handcuffs to be used as instruments of torture, one who was seeking to expose him before international community. Mr. Sirisena Cooray sided with Premadasa on all these issues.

(*c*) being badly defeated by Athulathmudali in the number of preferential votes cast in the Colombo district which was Mr. Sirsena Cooray's stronghold, Mr. Sirisena Cooray as general secretary of the UNP moves to oust Athulathmudali from representing the Colombo district and send him to Kalutara district. That was the evidence. Mr. Cooray would have his own motives to get Athulathmudali out of the way.

(*d*) strong political links are shown among Messrs. Premadasa, B. S. Cooray, Weerasinghe Mallimarachchi and U. L. Seneviratne. Mr. Seneviratne is still not at national level. The other three were Ministers, leaders and his masters;

(*e*) there is reliable evidence which we accept, coming from several sources that Mr. U. L. Seneviratne played a key role in the assassination that took place in Kirulapone on 23. 04. 93; he has sought to contract a person to kill Athulathmudali; he has requested bombs to be made and supplied all the materials for same and they were in fact made and given to him. All the while the assassin Janaka *alias* Sudumahattaya was present and it was U. L. Seneviratne's own flat within President Premadasa's premises named "Sucharitha" in Keselwatta.

U. L. Seneviratne had earlier organised the physical attack on Athulathmudali at the Fort Railway Station on August 7, 1992 and the raiding party which formed an unlawful assembly had started off from his flat at Sucharitha. He too was present during the assault. But this shows the level of his organisational skill – an obvious frontal attack quite openly done, without guile with no effort made to disguise the operation or make identification difficult. But was such a man capable of all the elaborate planning and all the lies and deception

that has unfolded? Deception has been a paramount consideration! We think not.

On the contrary, that direction has to come from elsewhere, from people with exceptional organization skills, capable of having the support of a large number of public officials such as policemen to make such an event (ie); an assassination of a political leader in with a chance, a credible winning candidate, possible and to supply cover-up. Here we see just those things. The police withdraw security. After the event police tamper with evidence and continue to present a false picture to the public. Another person is killed and falsely presented as the assassin. Without this help the event is not possible. And to what length they have gone to falsly implicate the LTTE.

To get the co-operation of all these public officials needs someone at a high political level who would protect them by using his political powers, with money, with newspaper publicity, with weapons, etc. Seneviratne, the field manager of this enterprise using the underworld characters, thugs, drug dealers could not have got the co-operation of all these policemen from different police stations and authorities. But President Premadasa and Mr. Sirisena Cooray could have. They had the political clout to secure this assistance to get policemen to use their lawful powers in an improper unlawful manner. We see this over and over again, physical attacks and a police cover-up.

There is evidence of an admission by U. L. Seneviratne whilst in remand jail, where his company would be persons similarly placed, that it was Sirisena Cooray and Weerasinghe Mallimarachchi who wanted Athulathmudali destroyed as he was a political threat, and therefore U. L. Seneviratne spent money to get it done. What he did is mentioned (*supra*). We have evidence that the assassin Sudumahattaya was a friend and bodyguard of minister Mallimarachchi. We also have evidence that Mr. Ranjit Upali de Silva *alias* "Sothti Upali was bodyguard to Mr. Sirisena Cooray and worked closely with him participating in election campaigns, turfing Gam Udawas, given contracts by Cooray to run canteens at these shows, etc., and general security supervision. "Sothti Upali it was who held Ragunathan in captivity and had him killed and the scene where his body lay made up to simulate a case of suicide. These are compelling and irresistable inferences we draw from established circumstances".

This is followed by the conclusion reached by the commission in relation to the petitioner which I have referred to in full elsewhere in this judgment. Those conclusions are that the petitioner –

(1) was directly concerned in and was a member of the conspiracy to assassinate Mr. Lalith Athulathmudali whose murder amounts to political victimisation;

(2) procured police officers to assist, which amounts to corruption;

(3) made up a false scenario in respect of Ragunathan's death; a fraudulant act to subvert the course of justice.

Besides the double hearsay evidence of the prisoner there was only suspicion lurking throughout in the commissioners' minds as evidenced from the report that the petitioner "could have" done various acts. The technical rules of evidence certainly are not applicatble to the proceeding of the commission. But what probative value did the evidence of the prisoner who spoke about a confession of Seneviratne and involvement of the petitioner carry? Principles of natural justice require that a tribunal's decisions are based on some evidence of probative value. (See *Mahon v. Air New Zealand*[39] and *R. v. Deputy Industrial Injuries Cmr, ex p Moore*[40]. About Seneviratne the commissioners said : "U. L. Seneviratne did not respond in anyway to the notice. He was not represented by an attorney-at-law. He did not give evidence or wish to cross-examine anyone. He kept silent" (page 199). The commission did not want to examine him as a witness. Regarding a person called Somaratne who did respond to the section 16 notice, the commissioners said : "He kept silent as he was entitled to". The same silence, the petitioner was not entitiled to and the commissioners evinced a great anxiety to examine him as a witness. His lawyers were refused audience on the ground that the petitioner was absent. The commissioners have not been able to specify any act of commision or omision on the part of the petitioner to come to their conclusions. As Bacon has observed : "Suspicions amongst thoughts are like bats amongst birds, they ever fly by twilight. Certainly these are to be repressed or at least well-guarded; for they cloud the mind . . ."

We hold that the determination and recommendations are flawed in the first place, as being unreasonable in the sense that the

commissioners did not call their own attention to the matters which they were bound to consider (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (*supra*). Secondly, as they are not based on evidence of any probative value (see *Mahon v. Air New Zealand* (*supra*). Thirdly, because those determinations and recommendations have been reached without giving the petitioner a right of hearing through his lawyers, in breach of the principles of natural justice and in breach of the provisions of section 16 of the SPCI Law.

Conclusion

For the reasons given above we issue a mandate in the nature of a writ of certiorari setting aside and quashing –

(1) the determination of the commission that the petitioner is guilty of the offence of contempt against or in disrespect of the commission in terms of subsection 12 (1) of the SPCI Law;

(2) the finding and determination that the petitioner is disqualified under Article 89 of the Constitution from being an elector and under Article 91 from being elected as a Member of Parliament;

(3) the finding and determination that the petitioner was directly concerned and a member of the conspiracy to assassinate the late Mr. Athulathmudali, procurement of police officers, and making up a false scenario in respect of Ragunathan's death;

(4) the recommendation that the petitioner be made subject to civic disability if the commission's view of the consequences of (1) above are unacceptable, on the basis of their finding as at (3) above.

We make no order as to costs.

GUNAWARDANA, J. – I agree.

WEERASEKERA, J. – I agree.

Application allowed – certiorari issued.