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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR 155/2009

1. W.B. Inoka Nadishani
   Koragahawetiya,
   Athungahakotuwa

2. Anuja Samantha Kahandawaarachchi
   No. 837/D, Gemunu Mawatha
   Athurugiriya Road,
   Homagama.

PETITIONERS

Vs.

1. K.D. Somapala
   Senior Superintendent of Police,
   Colombo North,
   SSP Office,
   Peliyagoda.

2. Chaminda Edirisuriya
   Officer-in-Charge,

Police Station,

Kiribathgoda.

2A. Ajantha Pushpakumara

Inspector of Police,

Police Station,

Peliyagoda.

3. Chandana Gamage

Inspector of Police,

Police Station,

Kiribathgoda.

4. Jayantha Wickramaratne

Inspector General of Police,

Police Headquarters,

Colombo 01.

4A. C.D. Wickramaratne

Inspector General of Police,

Police Headquarters,

Colombo 01.

5. Hon. Attorney-General

Attorney-General's Department,

Colombo 12.

RESPONDENTS

BEFORE: **S. THURAIRAJA, PC, J.**

A.H.M.D. NAWAZ, J. AND

A.L. SHIRAN GOONERATNE, J

COUNSEL: Swasthika Arulingam with Ms. Madara Gunawardana instructed by Lakmali Hemachandra for the Petitioners

Mr. A.M.E.B. Athapattu instructed by Mrs. H.D. Evonne Nirasha for the 2A Respondent

Sudarshana De Silva, SDSG for all 1st, 2nd, 3rd, 4A and 5th Respondents

WRITTEN SUBMISSIONS: 1st, 2nd, 3rd, 4A and 5th Respondents on 16th March 2022

Petitioners 18th August 2022

ARGUED ON: 06th February 2025

DECIDED ON: 04th April 2025

THURAIRAJA, PC, J.

1. The Petitioners, who were students of the University of Kelaniya (hereinafter "the University") at the time, invoked the fundamental rights jurisdiction of this Court, alleging violations of their fundamental rights guaranteed under Article 11 and 12(1) of the Constitution. Leave to proceed was granted against all the Respondents on both Article 11 and Article 12(1) of the Constitution.

2. 1st to 3rd Respondents are members of the Sri Lanka Police and are some of the police personnel who had arrived at the Kelaniya University premises on the 5th February 2009, at the Vice Chancellor's request and as directed by the Inspector General of Police.

FACTUAL MATRIX

3. The instant application relates to a state of turmoil involving violent clashes between two rival student groups which left one student with stab injuries. As the application is heavily dependent upon the volatility of this factual context, I have set out hereinbelow the circumstances leading up to the application in better detail.

The Petitioners' Narration of the Events

4. The Petitioners state that their second semester at the Kelaniya University commenced on 26th January 2009 and that some religious ceremonies including a *Pirith* Chanting ceremony were held in the University during this period. It is as this *Pirith* Ceremony was ongoing that the aforesaid clash between the two student groups had ensued.

5. The resulting tension within the University had culminated in yet another clash on or about 5th February 2009 between student cohorts from the Art and Science faculties, leading to absolute disorder within the University. In video recordings available before the Court, students can be seen behaving in an absolutely unruly manner, pelting stones at each other as well as the Police.

6. In the wake of this turmoil, a significant number of students who were not involved in the violence had found themselves stranded within the University, particularly near the University Library. The Petitioners state that police groups led by the 1st Respondent that arrived to control this unrest suddenly started firing tear gas and rubber bullets indiscriminately towards the University premises causing the students, including the Petitioners, to be trapped inside the campus.

7. Amidst this chaos, two lecturers who happened to be present at the University premises had requested the 2nd Respondent to facilitate the students so trapped to line up and proceed towards the hostel and away from the unrest.

8. According to the Petitioners, as the students were heading towards their hostel, the police team had erratically instigated a capricious assault on the students, apprehending a number of them. The 1st Petitioner alleges that she was dragged by her locks on full display to the public and manhandled into a police vehicle by a male officer whilst the 2nd Petitioner, too, was apprehended and assaulted by a police officer after he walked up to the police to mediate the sudden violence unleashed against the students. The lecturers present had also been dragged by their collars and thrown into police vehicles by the officers.

9. The Petitioners further assert that the incident was widely reported in television and printed media causing intense humiliation and public shame to the Petitioners.

The 1st, 2nd, 3rd 4A and 5th Respondents' Version of Events

10. The 1st Respondent, Senior Superintendent of Police of Kelaniya Division at the time material, is now retired having reached the age of retirement.

11. The counter-narrative offered by the 1st Respondent, explained that he visited the University of Kelaniya on 5th February 2009 as directed by the Inspector General of Police pursuant to a request from the Vice Chancellor of the University of Kelaniya to recommence an abruptly concluded meeting relating to the stabbing incident at the University.

12. In the aftermath of the aforementioned stabbing incident, which took place on or about 3rd February 2009, the police had stationed officers within the University to prevent further sporadic clashes among the students as there had been various altercations and breaches of peace following the stabbing. According to the Respondents, the University had ceased all academic activities during this period owing to the hostile conditions.

13. There had been occasional gatherings of students as well as large quantities of stones of various sizes found scattered around the University premises and on the road running through the University. As a precautionary measure, as specifically requested by the Vice Chancellor, riot squads of neighbouring police stations had been summoned to keep peace around the University and stay on top of any unforeseen incidents that may ensue.

14. On 5th February 2009, while the 1st, 2nd and 3rd Respondents were at the meeting with the Vice Chancellor, they had observed an assembly of students of the Arts faculty and the Science faculty attempting to break through the gates to enter the Vice Chancellor's compound. They had subsequently received information of students throwing sand-filled bottles and stones at the police officers who were on duty on the University premises and on the public road, causing injuries to several of the officers.

15. Owing to the unrest within the University premises and the blockage of the public road that runs through the University, the police had taken immediate steps to disperse the students—starting with verbal warnings in all three languages. Thereafter, the failure of the student gathering to heed such warnings had led to the firing of tear gas to disperse the crowd.

16. Officers had proceeded to arrest about 13 students, both male and female, on the grounds of, *inter alia,* instigating or physically participating in riots, unlawful assembly, engaging in assault, causing mischief as well as attempting to take the Vice Chancellor hostage. The arrestees had then been produced before the Magistrate of Colombo under the due procedure established by law. The 1st and 2nd Petitioners were also among the students so produced.[1]

[1] As evidenced by Magistrate's Court Record B/2711/05 marked **'P6'**

17. The Respondents further submit that all the police officers on duty, including those who had been summoned to restore peace within the University premises, acted *bona fide* in their official capacity to ensure the safety of persons, restore peace, minimise damages to the students as well as to the public and state property, with no malicious intention or ulterior motives towards any student, including the Petitioners.

ANALYSIS

Article 11 of the Constitution and Its Ambit

18. Article 11 of the Constitution states in the most absolute and unambiguous terms that, *"No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."*

19. Article 5 of the *Universal Declaration of Human Rights,* Article 7 of the *International Covenant on Civil and Political Rights* as well as Article 3 of the *European Convention on Human Rights* (which happens to not contain the word 'cruel') all espouses the prohibition against torture in near identical terms.[2]

20. Article 1(1) of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter '*Convention Against Torture*'), defines 'torture' in the following manner:

> *"For the purposes of this Convention, the term "torture" means any act by which* ***severe pain or suffering****, whether* ***physical or mental****, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is*

[2] See also *Ratnapala v. Dharmasiri* [1993] 1 Sri L.R. 224, at p. 234 (Kulatunga, J)

*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions**."*[3]

21. The Section 12 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994* (hereinafter '*Torture Act*') defines torture as follows;

> *""torture" with its grammatical variations and cognate expressions, means **any act which causes severe pain**, whether **physical or mental**, to any other person, being an act which is*
>
> *(a) done for any of the following purposes that is to say*
>
> *(i) obtaining from such other person or a third person, any information or confession; or*
>
> *(ii) punishing such other person for any act which he or a third person has committee [sic], or is suspected of having committed; or*
>
> *(iii) intimidating or coercing such other person or a third person; or*
>
> *(b) done for any reason based on discrimination,*
>
> *and being in every case, an act which is done by, or at the initiation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity."*[4]

22. It is well understood that Article 11 contains an entrenched right that is absolute and non-derogable—one that is available to all, from the best of men to the worst, and one that cannot be abridged even in times of war or absolute emergency.

[3] Emphasis added

[4] Emphasis added

23. As this Court held in ***Amal Sudath Silva v. Kodituwakku, Inspector of Police and Others***,[5]

> *"…It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee…"*

24. As Priyantha Fernando, J observed more recently in ***Wasana Niroshini Wickrama v. Nalaka and Others***,[6]

> *"…it is evident that the protection provided under Article 11 of the Constitution, unlike other fundamental safeguards, provides for absolute protection to an individual. It is recognized as an absolute right, which guarantees absolute protection. This means that, the freedom from torture cannot be tampered with, limited, or restricted under any circumstances. As it is observed in the case of Amal Silva(supra) the Courts of Sri Lanka have acted as guardians to ensure that this right is protected to its fullest measure."*

25. It is well understood that no restriction on Article 11 can be found in the Constitution itself or any other law. The absolute and non-derogable nature of the right is also apparent in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as well as the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994*.

26. Article 2(2) of the *Convention Against Torture* provides that "*[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any*

[5] [1987] 2 Sri L.R. 119, at p. 126

[6] SC FR 349/2014, SC Minutes of 16th October 2023 [29] (Emphasis omitted)

other public emergency, may be invoked as a justification of torture", whereas Section 3 of the *Torture Act* provides "*… the fact that any act constituting an offence under this Act was committed—(a) at a time when there was a state of war, threat of war, internal political instability or any public emergency; (b) on an order of a superior officer or a public authority…"* to not be tenable defences to any offence under the Act.

27. As this right is so clearly unqualified, there can be no defence, justification or excusable rationale for torture or cruel, inhuman or degrading treatment.

28. In applications of this nature, this Court is then left with a direct yet difficult question: Whether a person has been subject to such treatment that may constitute torture, inhuman or degrading treatment under the unique circumstances of each such application.

29. The instant case leaves no doubt that the 1st Petitioner was apprehended by grabbing her hair and that she was manhandled in to the police vehicle as she was arrested. These facts are amply clear from the audio-visual recordings available before the Court. However, insofar as the factual backdrop of this application is concerned, what those recordings further make clear is that the Petitioners' narratives do not reveal the full picture. This, I shall examine in greater detail later in the judgment.

The Prohibition of Torture: A Matter of Dignity

30. The conduct complained of in the case at hand, as I have already noted, is one that involves an element of physical force. However, the Petitioners' grievances, especially that of the 1st Petitioner, were hardly limited to the physical force used or any physical pain thereby caused. In addition to the corporeal pain and suffering alleged, her submissions also related to her dignity, as she claims to be aggrieved by how her image and reputation came to be scathed from the treatment she endured for the world to see.

31. In ***H.M. Punchimenike and Another v. D. M. Bandula Saman Dissanayake and Others***,[7] Obeyesekere, J began His Lordship's analysis of Article 11 with the following reminder with reference to the Svasti to our Constitution:

> *"It is clear that human dignity underpins the application of all fundamental rights, and is the fundamental virtue sought to be protected through the securement of fundamental rights and the Rule of Law, as demonstrated by the Svasti to our Constitution."*

32. I see this proposition as undeniable insofar as the prohibition of torture is concerned, for it is a right entrenched in one of the most rudimentary aspects of human character—the natural aversion to pain, whatever form it may come in. As the European Court of Human Rights (ECtHR) observed in ***Bouyid v. Belgium***,[8] *"…the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity"*.[9]

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[7] SC (FR) Application No. 233/2018, SC Minutes of 04th October 2023, at p. 8.
For other cases on human dignity and Article 11, see *Ajith C. S. Perera v. Minister of Social Services and Social Welfare and Others* [2019] 3 Sri L.R. 275, at p. 300; *Kandawalage Don Samantha Perera v. Officer in Charge, Hettipola Police Station and Others*, SC (FR) Application No. 296/2014, SC Minutes of 16th June 2020 (which Arjuna Obeyesekere, J has cited in support). See also *Ratnasiri and Another v. Devasurendran, Inspector of Police, Slave Island and Others* [1994] 3 Sri. L.R. 127, at p. 134 *Nandasenage Lalantha Anurdha Nandasena v. Head Quarter Police Inspector of Police, Police Station, Anuradhapura and Others,* SC/FR Application 369/2013, SC Minutes of 22nd October 2020, at p. 12; *Kankanan Arachchige Hemasiri v. Kamal Amarasinghe, Officer in Charge, Police Station, Hakmana and Others,* SC FR Application No. 12/2010, SC Minutes of 08th May 2024, at p. 9

[8] Application No. 23380/09, 28th September 2015 (ECtHR GC) [81]

[9] See also *Khachaturov v. Armenia*, Application No. 59687/17, 24th June 2021 (ECtHR First Section) [81]; *Schmidt and Šmigol v. Estonia*, Application Nos. 3501/20, 45907/20 and 43128/21, 28th November 2023 (ECtHR Third Section) [120]; *Ribar v. Slovakia*, Application No. 56545/21, 12th December 2024 (ECtHR First Section) [94]; *Panayotopoulos and Others v. Greece*, Application No. 44758/20, 21st January 2025 (ECtHR Third Section) [119]

33. For much of human history, the device of torture was considered a useful tool for various ends by those unconcerned with righteousness. The term 'righteousness' may well sound anomalous here, as torture was even regarded a tool of justice for a significant portion of history, both as a mode of trial and a form of punishment.[10] The notion of 'Judgment of God', which manifested in various forms of 'trial by ordeal', was such a barbarous form of inquiry prevalent in most parts of the world and can be seen as a precursor to the judicial use of torture.[11] Although torture, as a mode of extracting truth in judicial forums, survived for more than twenty-five centuries among most civilisations, from the Greeks, Romans to the British, among others,[12] some observe the common law of England to have been firmly against the use of torture from its very early days.[13]

34. In ***A (FC) and others (FC) v. Secretary of State for the Home Department***,[14] Lord Bingham for the House of Lords recounted how early English jurists sung praises of the common law rejection of torture:

> *"It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue (De Laudibus Legum Angliae, c. 1460-1470, ed S.B.*

[10] See generally A. Lawrence Lowell, 'The Judicial Use of Torture' (1897) 11:4 Harvard Law Review 220. See also Danny Friedman, 'Torture and the Common Law' (2006) Issue 2 E.H.R.LR. 180, at pp. 181-4

[11] Friedman op. cit., at p. 181; See also Sir John Fortescue, *De Laudibus Legum Angliae* (1775) Ch. XXII, pp. 63-70

[12] J.C. Welling, 'The Law of Torture: A Study in the Evolution of Law' (1892) 5:3 The American Anthropologist 193, at p. 195

[13] Cf. Friedman op. cit., at pp. 184-187 – Friedman notes that torture was in fact used despite the common law prohibition in certain cases (See at 187-189); *A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71 [12-13]

[14] [2005] UKHL 71 [11]

Chrimes, (1942), Chap 22, pp 47-53), Sir Thomas Smith (De Republica Anglorum, ed L Alston, 1906, book 2, chap 24, pp 104-107), Sir Edward Coke (Institutes of the Laws of England (1644), Part III, Chap 2, pp 34-36). Sir William Blackstone (Commentaries on the Laws of England, (1769) vol IV, chap 25, pp 320-321), and Sir James Stephen (A History of the Criminal Law of England, 1883, vol 1, p 222). That reliance was placed on sources of doubtful validity, such as chapter 39 of Magna Carta 1215 and Felton's Case as reported by Rushworth (Rushworth's Collections, vol (i), p 638) (see D. Jardine, A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth, 1837, pp 10-12, 60-62) did not weaken the strength of received opinion. The English rejection of torture was also the subject of admiring comment by foreign authorities such as Beccaria (An Essay on Crimes and Punishments, 1764, Chap XVI) and Voltaire (Commentary on Beccaria's Crimes and Punishments, 1766, Chap XII). This rejection was contrasted with the practice prevalent in the states of continental Europe who, seeking to discharge the strict standards of proof required by the Roman-canon models they had adopted, came routinely to rely on confessions procured by the infliction of torture: see A L Lowell, "The Judicial Use of Torture" (1897) 11 Harvard L Rev 220-233, 290-300; J Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime (1977); D. Hope, "Torture" [2004] 53 ICLQ 807 at pp 810-811. In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice."

35. Today, the prohibition against torture is a norm so well grounded that it is ubiquitous in international as well as domestic legal systems, having become a peremptory norm in

customary international law.[15] From the judicial use of torture to its absolute and non-derogable prohibition, the morality of law in this aspect has evolved considerably. We have now come to reject not only those abhorrent forms of corporeally torturous acts but also the more subtle forms of mistreatment that wounds the human dignity.

36. As I see it, the judicial and academic emphasis on the sanctity of human dignity marks one of the key steps in the evolutionary journey of our human rights jurisprudence. This Court has more than once accepted the proposition that human dignity underpins the right against torture as well as all other fundamental rights.[16] It is also a notion that finds support in a vast body of traditional knowledge, both religious and secular.

37. Commenting on the influence of Buddhism in governance, in his treatise **An Invitation to the Law**,[17] Justice Weeramantry observes the following:

> *"The Buddhist concept of right conduct became integral to Buddhist governments and legal systems (C2). Buddhism forbade the taking of life and many a Buddhist monarch emptied the jails of convicted prisoners and refused to countenance capital punishment…*
>
> *The highest embodiment of Buddhistic principles in law and government occurred in India in the third century BC during the reign of Emperor Asoka, which has been*

[15] See *Prosecutor v. Anto Furundzija* (Trial Judgment) IT-95-17/1-T, 10th December 1998 (ICYT) [144]; International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20th July 2012 [99]

[16] *Weheragedara Ranjith Sumangala v. Bandara, Police Officer, Police Station, Mirihana*, SC (FR) Application No. 107/2011, SC Minutes of 14th December 2023, at pp. 34, 48; *Hettiarachchige Gemunu Tissa v. W. Lionel Jayaratne, Sub Inspector of Police*, SC (FR) Application No: 417/2016, SC Minutes of 28th May 2024, at pp. 18-19; See also *Hasani v. Sweden,* Application No. 35950/20, 06th March 2025 (ECtHR First Section) [75] where the Strasbourg Court opined respect for human dignity and human freedom to be the very essence of the European Convention on Human Rights

[17] C.G. Weeramantry, *An Invitation to the Law* (Stamford Lake 2015) at p. 23 (Endnotes omitted)

described by H G Wells as "one of the brightest interludes in the troubled history of mankind". His rock edicts (C4) ordered the affairs of the entire country on principles of compassion towards all beings. Censors of piety were appointed expressly charged with the duty of enforcing throughout the community what we would today call human rights."

38. *Dasavidha-rājadhamma* or the 'Ten Royal Virtues' in Buddhism espouses ten qualities any righteous ruler must possess. Among them are the concepts of *Dāna* (charity, generosity or liberality), *Sīla* (morality), *Pariccāga* (altruism), *Maddava* (kindness and gentleness), *Akkodha* (freedom from hatred, ill-will or enmity), *Avihimsa* (non-violence), *Khanti* (forbearance, understanding and tolerance) and *Avirodhana* (non-obstruction or non-opposition).[18]

39. As it is abundantly clear, these concepts require the rulers to have a high level of respect towards the people and their dignity. *Sīla,* or morality, specifically directs that he must never destroy life or exploit others, whereas the *Avihimsa* requires not only that he harms no one but also that he must prevent harm and all that involves violence or destruction of life.[19]

40. Additionally, Buddhism also advocates that one must treat others with the same dignity and respect he expects towards himself from others. This principle known as the *Aththupanayaka Dhamma Pariyaya* is poetically indorsed in the revered *Dhammapada* as follows:

"Sabbe tasanti daṇḍassa/ සබ්බේ තසන්ති දණ්ඩස්ස,
sabbesaṁ jīvitaṁ piyaṁ/ සබ්බේසං ජීවිතං පියං,

[18] ibid at pp. 247-8

[19] ibid

attānaṁ upamaṁ katvā/ අත්තානං උපමං කත්වා,

na haneyya na ghātaye/ න හනෙය්‍ය න ඝාතයෙ.

[all fear the stick/punishment

all hold their lives dear

putting oneself in another's place

one must not commit violence nor kill]"[20]

41. As I have adverted to, Buddhism, in its most profound and benevolent philosophy, insisted that rulers respect not only the dignity of its human subjects but also the dignity of all living beings.

42. In Hindu philosophy, justice and governance are deeply rooted in the principles of *Dharma* (righteous duty) as reflected in ancient scriptures. Among the most profound expositions of just and moral governance is found in the *Ramayana*, where Lord Rama is depicted as the ideal ruler, embodying the highest ethical and leadership values. His reign, often referred to as *Rama Rajya*, is regarded as a model of righteous governance, ensuring justice, peace, and prosperity for all.

43. Like with Buddhism, the concept of *Rajadharma* (duty of a ruler) is central to governance in Hindu thought. A righteous ruler, as outlined in the *Ramayana*, must embody key virtues, including *Nyaya* (justice), *Karuna* (compassion), *Satya* (truthfulness), *Kshama* (forgiveness), and *Loka Sangraha* (welfare of society). Governance, according to this philosophy, is not merely about ruling but about fostering harmony, inclusivity, and social equity.

[20] *Dhammapada,* Ch X: Dhandavagga, Verse 130

44. Hinduism strongly advocates for non-violence (Ahimsa) as a guiding principle of governance. The *Mahabharata* declares, "*Ahimsa paramo dharmah*"—non-violence is the highest religious duty. A ruler is expected not only to refrain from harming others but also to actively prevent harm, ensuring that governance does not rely on cruelty, oppression, or unnecessary conflict. Even in battle, he is to uphold honour, treating his enemies with dignity, offering them paths to redemption.

Article 11: Different Thresholds and the Minimum Level of Severity Required

45. The existing jurisprudence of this Court makes it amply clear that both physical and psychological acts can amount to torture.[21] This position is stronger yet for pleas of 'cruel, inhuman or degrading treatment' for the threshold a petitioner is required to meet in such a plea is lower by comparison to a plea of 'torture' *per se*.

46. What constitutes torture and/or cruel, inhuman or degrading treatment is difficult to define, and I do not think more precise definitions than those already available are warranted. As Samarakoon, CJ held in ***Wickramanayake v. The State***,[22] *"the Article must draw its meaning from the evolving standards of decency that mark the progress of a maturing nation."*

[21] See *Mrs. W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation* [1989] 2 Sri L.R. 393, at pp. 403-4 (Amerasinghe, J); *Adhikari v. Amarasinghe* [2003] Sri L.R. 270, at p. 274; *Channa Pieris and Others v. Attorney-General and Other (Ratawesi Peramuna Case)*[1994] 1 Sri L.R. 1, at p. 107; *Puwakketiyage Sajith Suranga v. Prasad and Others* SC FR 527/2011, SC Minutes of 22nd July 2016; *Wasana Niroshini Wickrama v. Nalaka and Others*, SC FR 349/2014, SC Minutes of 16th October 2023 [15], [30-31]

[22] [1978-79-80] 1 Sri L.R. 299, at 310 citing the US Supreme Court interpretation of the corresponding provision in the Eights Amendment in *Trop v. Dulles* 356 U.S. 86

47. However, to come to a finding of Article 11 violation, as Amerasinghe, J observed in ***Channa Pieris and Others v. Attorney-General and Other (Ratawesi Peramuna Case)***,[23]

> *"…the **acts or conducts complained of must be qualitatively of a kind that the Court can take cognizance of**. Where it is not so, the Court will not declare that Article 11 has been violated…*
>
> *…As to whether a particular act satisfies the relevant criteria is not an easy matter to determine. **The assessment is in the nature of things, relative and depends on all the circumstances of the case including the nature and context of the act and the manner and method of its commission**. (Cf. the decision of the European Court of Human Rights in the Tyrer case. [European Court of Human Rights Decision of 25.04.1978] As it was observed in Gunasekera v. Kumara and Other (supra), adopting dicta from Hobbs v. London & S.W. Railway [(1875) LR 10 QB 111, 121], the decision whether an act is qualitatively of the kind that contravenes Article 11 "is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line you can say on which side of the line the case is."*

48. The case at hand, in my view, is one that falls on this twilight zone. While all forms of violence and force against any person by the State must only be met with the strongest reproach, different rights established under the fundamental rights chapter of our Constitution require the meeting of different thresholds. For instance, to establish a violation of Article 13(1), even the slightest use of force beyond that which is permitted

[23] [1994] 1 Sri L.R. 1, at p. 105

under Section 23 of the *Code of Criminal Procedure Act* may be sufficient. Where Article 11 is considered, that is far from the case.

49. Article 11 itself contains several thresholds. It prohibits 'torture', which is of the highest severity, as well as 'cruel', 'inhuman' or 'degrading' treatment, which are at lower thresholds of severity by comparison.[24] Whether an act is torturous, cruel, inhuman or degrading would most certainly depend on the facts and circumstances of each individual case.[25] As ECtHR expounded in ***Ireland v. The United Kingdom***,[26]

> *"In order to determine whether the… techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment. In the Court's view, this* ***distinction derives principally from a difference in the intensity of the suffering inflicted***.
>
> *The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its* ***distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.***

[24] *Wasana Niroshini Wickrama v. Nalaka and Others*, SC FR 349/2014, SC Minutes of 16th October 2023 [19]

[25] *Janidhu Charuka Daham v. Sub Inspector Nelumdeniya, Police Station, Mount Lavinia and* Others, SC (FR) Application No: 402/2015, SC Minutes of 21st May 2021, at p. 7

[26] Application No. 5310/71, 18th January 1978 (ECtHR Plenary) [167] (Emphasis added)

*Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "**Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment**"."*

50. While the Strasbourg Court, too, has clearly recognised a distinction between torture, inhuman and degrading treatment and punishment based on severity, it also acknowledges the difficulty in grasping a threshold in such differentiation, taking a considerably flexible approach which enables case-by-case decision making.[27]

51. In ***Gäfgen v. Germany***,[28] the Strasbourg Court observed,

In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25, and Jalloh v. Germany [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, inter alia, Aksoy v. Turkey, 18 December 1996, § 64, Reports 1996-VI; Egmez v. Cyprus, no. 30873/96, § 78, ECHR 2000-XII; and Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004), as well as its context, such as an atmosphere of heightened tension and emotions (compare, for instance, Selmouni, cited above, § 104, and Egmez, loc. cit.).

[27] R.L. Hassanova, 'The Prohibition of Torture and its Implications in the European Legal Sphere' (2023) 5:1 Central European Journal of Comparative Law 51, p. 62-63

[28] Application No. 22978/05, 01st June 2010 (ECtHR GC) [88-89]

The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering *(see Labita, cited above, § 120, and Ramirez Sanchez, cited above, § 118).* ***Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience*** *(see, inter alia, Keenan v. the United Kingdom, no. 27229/95, § 110, ECHR 2001-III, and Jalloh, cited above, § 68)."*[29]

52. Clearly, while a finding of inhuman and degrading treatment does not require the establishment of a threshold of suffering so high as it does with a finding of torture; even then, the maltreatment must result in a particular level of humiliation and debasement.

53. In ***X and Others v. Bulgaria***,[30] the ECtHR opined with reference to Article 3 of ECHR and the requirement of the 'minimum level of severity' the following:

"…Article 3 of the Convention enshrines one of the fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. ***Ill-treatment must attain a minimum level of severity*** *if it is to fall within the scope of Article 3.* ***The assessment of that level is, in the nature of things, relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*** *(see, among other*

[29] Emphasis added

[30] Application No. 22457/16, 02nd February 2021 (ECtHR GC) [176].

authorities, Nicolae Virgiliu Tănase v. Romania [GC], no. 41720/13, § 116, 25 June 2019)"[31]

54. As the ECtHR elucidated in ***Clipea and Grosu v. The Republic of Moldova***,[32] in determining whether ill-treatment attains the required minimum level of severity,

> *"…the Court also takes other factors into consideration, in particular (Khlaifia and Others v. Italy [GC], no. 16483/12, § 160, 15 December 2016):*
>
> *(a) The purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out its characterisation as "degrading" and therefore prohibited by Article 3.*
>
> *(b) The context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions.*
>
> *(c) Whether the victim is in a vulnerable situation."*

[31] Emphasis added.

In further support of this proposition, see, among many authorities, *Price v. The United Kingdom,* Application No. 33394/96, 10th July 2001 (ECtHR Third Section) [24]; *Mouisel v. France,* Application No. 67263/01, 14th Novermver 2002 (ECtHR First Section) [37]; *Jalloh v. Germany,* Application No. 54810/00, 11th July 2006 (ECtHR GC) [67]; *N. v. The United Kingdom,* Application No. 26565/05, 27th May 2008 (ECtHR GC) [29]; *Paposhvili v. Belgium,* Application No. 41738/10, 13th December 2016 (ECtHR GC) [174]; *Savran v. Denmark,* Application No. 57467/15, 07th December 2021 (ECtHR GC) [122]; *Clipea and Grosu v. The Republic of Moldov*a, Application No. 39468/17, 19th November 2024 (ECtHR Second Section) [59-60]; *Adamčo v. Slovakia (No. 2),* Application No. 55792/20, 12th December 2024 (ECtHR First Section) [81]

[32] Application No. 39468/17, 19th November 2024 (ECtHR Second Section) [60]; See also *Gafgen v. Germany,* Application No. 22978/05, 01st June 2010 (ECtHR GC) [88]

55. In this regard, this Court has taken the view that use of force *per se* does not amount to cruel inhuman or degrading treatment, consistently insisting upon a 'minimum level of severity'.[33]

56. ***Subasinghe v. Police Constable Sandun and Others***,[34] is one case where this Court specifically arrived at a finding of 'degrading treatment'. The petitioner, who was arrested and assaulted with hands, kicked and beaten with a belt, was thereafter handcuffed and taken to the Dankotuwa junction in a private bus and paraded around. The Court held that,

> *"The fact that the petitioner was taken handcuffed in a private vehicle to the Dankotuwa town and "exhibited" in the manner spoken to by the petitioner in my view, is an affront to the petitioner's dignity as a human being and amounts to "degrading treatment" within the meaning of Article 11."*

57. In ***Mrs. W.M.K. De Silva v. Chairman, Fertilizer Corporation***,[35] Jameel, J observes generally that *"…ill-treatment per se, whether physical or mental, is not enough;* ***a very high degree of maltreatment is required***." In this case, the petitioner, who was secretary to the Chairman of the Fertilizer Corporation had made a statement to the CID with respect to a potential impropriety which resulted in the latter being put under investigation. The sour relations so began, first caused the petitioner to be sent on compulsory leave. When she was eventually recalled, she was not given her old cubicle or allocated any work. She was given a broken table and a broken chair and made to sit in the verandah and even locked out at times. The Court found that, while the conditions

[33] *Wijayasiriwardena v. Kumara, Inspector of Police, Kandy and Two Others* [1989] 2 Sri L.R. 312, at p. 318-9; *Sisira Kumara v. Sergeant Perera and Others* [1998] 1 Sri L.R. 162, at p. 165; *Sri Thaminda, Dharshane and Mahalekam v. Inspector of Police and Others* [2007] 2 Sri L.R. 294, at p. 301

[34] [1999] 2 Sri L.R. 23, at p 27

[35] [1989] 2 Sri L.R. 393, at p. 401

were humiliating and intolerable, and did certainly amount to grossly unfair labour practice, it fell short of the degree of mental or physical coerciveness or viciousness required to be categorised as 'cruel, inhuman or degrading treatment'.[36]

58. As Dr. Amerasinghe, J observes in **Our Fundamental Rights of Personal Security and Physical Liberty,**

> "'*Torture*' *implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be* '*severe*'. *There must be the attainment of a* '*minimum level of severity*'. *There must (be) the crossing of the* '*threshold*' *set by the prohibition. There must be an attainment of* '*the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment.*"[37]

59. In ***Wijayasiriwardena v. Kumara, Inspector of Police, Kandy and Two Others***,[38] the petitioner, a 16-year-old student, with a split lip and an injury on the cheek complained of police assault and alleged that he was subjected to cruel, inhuman or degrading treatment. Even having found that the police had used excessive force in effecting the arrest of the petitioner, wherein one of the respondents had dealt the schoolboy a blow on the face, Mark Fernando, J found that this excessive force did not amount to cruel inhuman or degrading treatment.

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[36] ibid at 400-401

[37] Dr. ARB Amerasinghe, *Our Fundamental Rights of Personal Security and Physical Liberty* (Sarvodaya Book Publishing Services 1995) 29

[38] [1989] 2 Sri L.R. 312, at p. 319

60. In deciding so, His Lordship reasoned as follows:

> *"…Police are not entitled to lay a finger on a person being arrested, even if he be a hardened criminal, in the absence of attempts to resist or to escape. In the difficult situation that existed at 11.30 a.m. that day, I hold that the 1st Respondent restrained the Petitioner, holding him by the waist, while arresting him; upon the Petitioner attempting to go back to the sanctuary of the school premises, the 1st Respondent dealt him a blow on his face. While the use of some force was justified in the circumstances, this was a quite excessive use of force.* ***The use of excessive force may well found an action for damages in delict, but does not per se amount to cruel, inhuman or degrading treatment: that would depend on the person and the circumstances****. A degree of force which would be cruel in relation to a frail old lady would not necessarily be cruel in relation to a tough young man;* ***force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded if used in an atmosphere charged with tension and violence…*** *The 1st Respondent's conduct in striking a single blow, does not show any element of indifference or pleasure in causing pain and suffering, or of intentional humiliation, or of brutal and unfeeling conduct.* ***"It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency."*** *Banco de Portugal v. Waterlow & Sons [[1932] A.C. 452, 506]"*[39]

61. This approach taken by our courts is one that is very much consistent with that of the European Court of Human Rights, which I have already referred to hereinabove. Differing schools of thought exist as to the extent to which instruments such as the ECHR and

[39] ibid at pp. 318-9 (Emphasis added)

related decision of foreign courts should influence our legal thinking. While I do not think such instruments and judgments should dictate our legal thought, we may carefully derive therefrom such guidance as appropriate with due regard to jurisdictional dissimilarities and distinguishing features[40] of our own legal culture—especially so with *jus cogens* and *erga omnes* norms of international law that receives constitutional recognition, such as the prohibition of torture, for their universal relevance. In any event, this Court has oft been guided by jurisprudence of international courts—especially that of Strasbourg.

62. It is Article 3 of the European Convention on Human Rights (ECHR) that sets out the prohibition of torture. The exact words of the provision states that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*." This provision as can be seen, is nearly identical to Article 11 of our Constitution; however, with the notable absence of the term 'cruel'. The ECtHR as well as the English courts have interpreted Article 3 of the ECHR to impose a positive obligation on the state to prevent and investigate incidents of torture, inhuman or degrading treatment or punishment, in addition to the negative obligation to refrain from subjecting persons to torture, inhuman or degrading treatment or punishment.[41] Similarly, under Article 11 of the Sri Lankan

[40] One key dissimilarity between Strasbourg jusrisprudence and our own is the standard of proof applied in matters of this nature. While ECtHR has generally applied the standard of proof 'beyond reasonable doubt' when assessing evidence, this Court has consistently applied the standard of 'proof by a preponderance of probabilities' as in a civil case.

For the standard of proof in Sri Lanka, see *Goonewardene v. Perera* [1983] 1 Sri L.R. 305, at p. 313; *Kapugeekiyana v. Hettiarachchi and Others* [1984] 2 Sri L.R. 153, at p. 165; *Hettiarachchige Gemunu Tissa v. W. Lionel Jayaratne, Sub Inspector of Police*, SC (FR) Application No: 417/2016, SC Minutes of 28th May 2024, at pp. 11-13

[41] See among other authorities, for the English law position *OOO (and others) v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB) [143-49]; and for Strasbourg jurisprudence *Z and Others v. The United Kingdom*, Application No. 29392/95, 10th May 2001 (ECtHR GC)[72-73]; *M.C. v.* Bulgaria, Application No. 39272/98, 04th December 2003 (ECtHR) [151]; *X and Others v. Bulgaria,* Application No. 22457/16, 02nd February 2021 (ECtHR GC) [178]

Constitution, the State is enjoined to actively strive towards preventing incidents of torture, inhuman or degrading treatment just as it is required to refrain from doing such things that may constitute torture, inhuman or degrading treatment or punishment: A duty so clearly recognised in Article 4(d) of the Constitution.

63. Be that as it may, I find the Strasbourg jurisprudence particularly persuasive with respect to its direction towards understanding the terms 'torture,' 'inhuman,' and 'degrading,' as well as in setting a general standard against which a qualitative threshold may be set for establishing torture, inhuman or degrading treatment and punishment.

64. The definition of 'torture' set out in the *Convention Against Torture* (cited hereinabove), too, provides vital guidance in the instant case. The definition of 'torture' in the Convention is almost exactly adopted in the interpretation section in the *Torture Act*. While slight variations are observable, the latter was clearly influenced by the former—for the Act was brought to fore for the very purpose of giving effect to Sri Lanka's obligations under the Convention. One striking variation is that the *Torture Act* has omitted in its interpretation a vital explanation set out in the Convention text that "***…[torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions***". However, this aspect was reflected in the recent judgment of Priyantha Fernando, J in ***Wasana Niroshini Wickrama v. Nalaka and Others(supra)***:[42]

> *"… the petitioner has resisted lawful arrest… Accordingly, when the husband of the petitioner has asked the petitioner to go to the police station with the police officers,*

O'Keeffe v. Ireland, Application No. 35810/09, 28th January 2014 (ECtHR GC) [144-152] – emphasised crucially, at § 144 that "…This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources…"

[42] SC FR 349/2014, SC Minutes of 16th October 2023 [33]

she has resisted stating that, she cannot get into to the police jeep unless a woman police officer accompanies her. When a warrant has been issued, the person against whom the warrant is issued is expected to comply with such warrant. The petitioner could have avoided this entire course of events that allegedly caused her immense psychological torture if she had complied with the said police officers who were engaging in their official duty. ***One cannot make allegations of mental torture for the acts which are incidental to lawful actions of officials acting within their power****."*[43]

65. The ECtHR, too, has consistently stressed that, to come to a finding of torture or inhuman or degrading treatment, the suffering and humiliation involved must go beyond that inevitable element of suffering and humiliation connected with legitimate treatment or sanctions in terms of the law.[44]

What the Video Footage Indicates

66. Returning to the circumstances of the application before us, this Court had the benefit of carefully perusing certain video recordings. Among those videos were three news coverages by two separate private media channels—one clearly capturing the very moment the 1st Petitioner was arrested.

[43] Emphasis added

[44] See, among other authorities, *Kudla v. Poland,* Application No. 30210/96, 26th December 2000 (ECtHR GC) [92]; *Jalloh v. Germany,* Application No. 54810/00, 11th July 2006 (ECtHR GC) [68]; *Muršić v. Croatia*, Application No. 7334/13, 20th October 2016 (ECtHR GC) [99]; *Roth v. Germany,* Application Nos. 6780/18 and 30776/18, 22nd December 2020 (ECtHR Fifth Section) [64]; *Adamčo v. Slovakia (No. 2),* Application No. 55792/20, 12th December 2024 (ECtHR First Section) [81]; *Ribar v. Slovakia*, Application No. 56545/21, 12th December 2024 (ECtHR First Section) [94]

67. These videos clearly display an atmosphere charged with tension, violence and volatility. Students can be seen pelting stones at the police as the police throw teargas and clenched fists in return. The recordings also demonstrate a long line of students moving away from the site of violence, just as the Petitioners described, but without any obstruction from police officers. The officers can, in fact, be seen standing aside, allowing the students to move away from violence.

68. The video footage further went on to show the adjoining road being used by pedestrians including school children whilst the police were standing guard outside the University premises.

69. While many students were seen moving away from the violence, it could be observed that the 1st Petitioner had moved well towards the police and the site of tension. From the footage the 1st Petitioner also appears to be hurling something towards the police, before hasting back towards the University premises. It is at this point the police move to arrest the said Petitioner.

70. The force used in effecting her arrest, grabbing her by the locks and the general manhandling once arrested, is no doubt intense. The question is, however, is it so severe that it amounts to torture. cruel, inhuman or degrading treatment. Considering the specific circumstances of the instant application, I am inclined to answer this question in the negative.

71. I am mostly guided by the volatility of the surrounding circumstances associated with the events complained of. Had the circumstances been different—for instance, if the students were engaged in a peaceful protest or a vigil of sorts—my answer may have been different.

72. The Respondents were tasked with keeping peace when such tension that could escalate into a warzone in a split second prevailed. The circumstances did, in fact, result in the hospitalisation of many officers. When we now critique the conduct of these officers in retrospect, we must necessarily take cognisance of this tension and the anxiousness associated with the atmosphere.

73. While I am sympathetic to her plight, clearly, the whole ordeal could have been avoided if not for the questionable behaviour on the part of the 1st Petitioner herself.

74. The video footage also makes it clear that the Petitioners' have not made a full and honest disclosure before this Court, which compels me to take their narration of events with grain of salt. The 1st Petitioner, especially, asserted that she was unable to leave the University premises due to the commotion. I am at a loss to understand, then, as to why she would move towards the commotion, as the video footage indicates.

What is Alleged with Respect to the 2nd Petitioner

75. With respect to the 2nd Petitioner, not much material has been placed before this Court except for the assertion that he was severely assaulted and manhandled when he walked up to the police as well as on their way to the police station and later at the police station.

76. The Petitioners specifically assert that the 2nd Petitioner was assaulted brutally with batons at the time of arrest[45] and that he was further assaulted at night by drunken police officers while being kept at the police station.[46]

77. As the Petitioners do not complain of a violation of Article 13(2), it is clear that they have been procedure before the Magistrate within twenty-four hours. Moreover, the

[45] Petitioner of the Petitioner, para 17

[46] Petition of the Petitioner, paras 19 and 20

Magistrate's Court record of Case No. B/2711/05 produced before this Court indicates two entries, one on 05th February 2009, on the day of the incident itself and another on 06th February 2009, at which point the learned Magistrate had made an order remanding the Petitioners.

78. The alleged assaults are of such a nature that they should, in the ordinary course of things, manifest themselves in the form of physical injuries. However, there is no indication that any complaint was made to, or that any observation was made by, the Magistrate before whom they were produced with respect to any such injuries. Moreover, the Petitioners, including the others who were produced before the Magistrate, were all remanded for seven days. Despite this, there is no indication of the 2nd Petitioner receiving treatment at the prison, nor has he made any claim that such treatment was denied.

79. A medical report by an ENT Surgeon from the General Hospital of Kandy is attached, marked **'P2'**, which indicates apparent injuries to his eardrum.[47] There is no indication therein corroborating the fact that he was assaulted in any way, other than an injury to his eardrum. The date on this report appears to be either 14th or 19th February 2009, which is a reasonable time after the alleged assault. It does not indicate with certainty that the 2nd Petitioner suffered this injury at the hands of the Respondent or while in police custody.

80. It is trite law that, where Article 11 is concerned, some cogent proof with a high degree of certainty must be placed before this Court before the balance of probabilities could be said to tilt in favour of a petitioner.[48] For the reasons I have adverted to above, I am of the view that the Petitioners of the instant application have failed to produce sufficient proof

[47] Marked 'P2' appended to the Petition of the Petitioners

[48] *Channa Pieris and Others v. Attorney-General and Other (Ratawesi Peramuna Case)* [1994] 1 Sri L.R. 1, at p. 108

of such treatment that meet the severity threshold to establish torture or cruel, inhuman or degrading treatment or punishment.

81. The humiliating and degrading treatment the Petitioners claimed to have gone through is the inevitable and incidental suffering and humiliation associated with their arrest for allegedly being members of an unlawful assembly under the chaotic circumstances which prevailed at the time material. This, as already discussed, cannot be the basis of a finding of degrading treatment.

82. As such, I am of the view that Petitioners have failed to establish any violations of their rights guaranteed under Article 11 of the Constitution by the 2A Respondent or any other Respondents.

Alleged violation of Article 12(1) of the Constitution

83. In addition to Article 11, the Petitioners also alleged violations of their rights guaranteed under Article 12(1) of the Constitution. The Article 12(1) states that; *"All persons are equal before the law and are entitled to the equal protection of the law"*

84. Rights guaranteed under Article 12(1) of the Constitution can be violated by discriminatory and unequal treatment as against those similarly circumstanced, in the narrower sense, or by unlawful, arbitrary or *mala fide* actions and/or inactions that stands obnoxious to the Rule of Law,[49] in the wider and more complete sense.

[49] See, among other authorities, *Jayanetti v. Land Reform Commission* [1984] 2 Sri L.R. 172; *Chandrasena v. Kulathunga and Others* [1996] 2 Sri L.R. 327; *Priyangani v. Nanayakkara and Others* [1996] 1 Sri L.R. 399; *Pinnawala v. Sri Lanka Insurance Corporation and Others* [1997] 3 Sri L.R. 85; *Karunadasa v. Unique Gem Stones Ltd and Others* [1997] 1 Sri L.R. 256, at p.190; *Sangadasa Silva v. Anuruddha Ratwatte and Others* [1998] 1 Sri L.R. 350; *Kavirathne and Others v. Pushpakumara and Others*, SC FR 29/2012, SC Minutes of 25th June 2012, at p. 18; *Shanmugam Sivarajah v. OIC Terrorist Investigation Division and others*, SC FR 15/2010, at p. 13, SC Minutes of 27th July 2017; *Sampanthan v. Attorney-General*, SC FR 351-356 & 358-361/19, SC Minutes of 13th December 2018, at p. 87; *Dr. Athulasiri Kumara Samarakoon*

85. As I have already adverted to, the Respondents were tasked with maintaining peace in and around the University at a time when hostilities were at an all-time high, with an unlawful assembly literally afoot.

86. Section 23 of the *Code of Criminal Procedure Act, No. 15 of 1979* sets out the general procedural provisions on how an arrest must be made:

> *(1) "In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action…*
>
> *(2) If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person making the arrest may use such means as are reasonably necessary to effect the arrest…"*

87. Section 95 of the *Code of Criminal Procedure Act, No. 15 of 1979* provides for the dispersal of an unlawful assembly as follows:

> *(1) "Any Magistrate or police officer not below the rank of Inspector of Police may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace to disperse, and it shall thereupon be the duty of the member of such assembly to disperse accordingly.*
>
> *(2) If upon being so commanded any such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, the Magistrate or the police officer* ***may proceed***

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and Two Others v. Hon. Ranil Wickremesinghe, SC FR No. 195/2022, SC Minutes of 14th November 2023; *Mohamed Razik Mohamed Ramzy v. B.M.A.S.K. Senaratne and Others*, SC/FR Application No. 135/2020, SC Minutes of 14th November 2023; *Centre for Police Alternatives and Another v. Hon. Attorney-General and Others,* SC FR Application No. 449/2019, SC Minutes of 29th February 2024

to disperse such assembly by the use of <u>such force as is reasonably necessary</u> *to disperse the assembly and may require the assistance of any person (not being a member of the Army, Navy or Air Force, whether of Sri Lanka or of any other country, acting as such) for the purpose of dispersing such assembly and* ***if necessary arresting and confining the persons*** *who form part of it in order to disperse such assembly or that they may be punished according to law…"*

88. As it is apparent, the *Code of Criminal Procedure Act* empowers police officers not below the rank of Inspector of Police to command the dispersal of an unlawful assembly, as the Respondents have done in the instant case, and proceed to use 'such force as is reasonably necessary' for the dispersal where such commands for dispersal are to no avail.

89. As I have noted earlier in the judgment, the Petitioners were not able to establish much of the mistreatment complained of with evidence of sufficient cogency. In addition to this, the improbabilities in the Petitioners' pleadings undermine their credibility and leave me reluctant to place full confidence in their statements or accept them at face value. As such, this Court can only take cognisance of such mistreatment that has been established by evidence. What the Petitioners have satisfactorily established is that they were treated very harshly and that they were manhandled, as the Petitioners described, at the time of arrest. The 1st Petitioner particularly complained of being grabbed by her hair.

90. I cannot, for a moment, condone the use of such force in effecting arrests in general. The use of such force must not be the norm but the exception, to be deployed only when strictly necessary. No amount of force, howsoever small, is justified against those who are compliant and do not resist. While that may be so, whether the use of force was done as is reasonably necessary must necessarily be considered with reference to the circumstances. In the instance case, the arrested were effected when the atmosphere was

charged with such violence that resulted in the hospitalisation of several police officers as well as many University students.

91. In these circumstances, I take the view that the Respondents have acted within the bounds of the *Code of Criminal Procedure Act*. Moreover, the facts, in my view, do not disclose any *mala fide* treatment or treatment *ad hominem* with respect to any of the Petitioners on the part of the 2A Respondent or any of the other Respondents.

CONCLUSION

92. The Petitioners' case, first and foremost, related to Article 11 of the Constitution, which prohibits torture and cruel, inhuman or degrading treatment. No other allegation under fundamental rights jurisdiction carries a greater stigma. This severity has long compelled this Court to insist upon a high degree of proof before a violation can satisfactorily be found.

93. Though evocative, the Petitioners' narration of events itself, for its many inconsistencies and improbabilities, failed to meet this high threshold. In the video footage, the 1st Petitioner could be seen possibly hurling something at the police—certainly having moved towards them—when other students were peacefully moving away from the chaos without any obstructions from the officers present. This stands in stark contrast to what is averred in her affidavit.

94. While it was apparent that she was dealt a firm hand as she was apprehended, the precedent of this Court reveals that the mere use of force, and the suffering or humiliation inherent and incidental to lawful sanctions, cannot serve as the basis for a finding under Article 11. The revelation that she had played a part in the humiliating circumstances complained of, and that she had not been entirely truthful the Court, led this Court to consider her submissions with caution.

95. The evidence relied upon by the 2nd Petitioner was even less reliable. While physical injuries are by no means a *sine qua non* for establishing violations of Article 11, it is unimaginable that such severe assaults as the 2nd Petitioner complained of would leave no physical clues. Although he was produced before a Magistrate and remanded within twenty-four hours, he was not observed to have, nor has he complained of, any injuries or symptoms that should ordinarily result from such assaults he described.

96. While medical reports, especially from government institutions, ordinarily bear great probative value in cases of torture or cruel, inhuman or degrading treatment, the report produced by the 2nd Petitioner indicated no injuries other than damage to his eardrum. This injury, too, could not be incontestably attributed to the events in question, as the report was obtained a reasonable time after the said event.

97. As such, I am of the view that the Petitioners have failed to establish any violations of Article 11 of the Constitution with respect to either of the Petitioners by the 2nd Respondent or any of the other Respondents.

98. Insofar as Article 12(1) is concerned, Sections 23 and 95 of the *Code of Criminal Procedure Act, No. 15 of 1979* authorise police officers to use such force as may be reasonably necessary in order to arrest a person who forcibly resists and to disperse an unlawful assembly under certain specific conditions.

99. It was evident that the instant case is one that fall within such conditions. I am of the view that Respondents have acted in good faith within the limits of the *Code of Criminal Procedure Act*.

100. As such, I find no violations of Article 12(1) of the Constitution with respect to any of the Petitioners by the 2A Respondent or any one of the other Respondents.

101. Since I have found no violations of Article 11 or Article 12(1) of the Constitution hereinabove, the Petition is accordingly dismissed.

Application Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT