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.

Rajaguru Adhikari Mudiyanselage
Madhavi Buddhika Rajaguru
No. 43, 4th Lane,
Wewa Gedara Uyana,
Werapola,
Wariyapola.

Petitioner

S.C.(F.R.) Application No. 190/2019.

Vs.

1. Ashoka Wijemanne
Consultant Surgeon,
Kurunegala General Hospital,
Kurunegala.

2. Director,
Kurunegala General Hospital,
Kurunegala.

2. Director of Health,
"Suwasiripaya",
No.385,
Rev. Baddegama Wimalawansa
Thero Mawatha,
Clombo 10.

04. Secretary of Health,

"Suwasiripaya",
No.385,
Rev. Baddegama Wimalawansa
Thero Mawatha,
Clombo 10.

05. Minister of Health,
"Suwasiripaya",
No.385,
Rev. Baddegama Wimalawansa
Thero Mawatha,
Clombo 10.

06. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

****

BEFORE : **VIJITH K. MALALGODA, P.C., J.**
E.A.G.R. AMARASEKARA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Ms. E. Tegal with Shalomi Daniel on the Instructions of Wasana Wickramasekara for the Petitioner.
Eraj De Silva with Manjuka Fernandopulle and Janagen Sundramoorthy instructed by Dimuthu Kuruppuarachchi for the 1st Respondent.
Ms.Induni Punchihewa SC, for the Hon. Attorney General.

ARGUED ON : 21st June, 2022

DECIDED ON : 19th July, 2024

ACHALA WENGAPPULI, J.

In invoking the jurisdiction conferred on this Court by Articles 17 and 126 of the Constitution, the Petitioner seeks *inter alia* a declaration that her fundamental rights guaranteed by Article 11 and 12(1) were infringed by the 1st Respondent and the State; an order directing the State to commence disciplinary proceedings against the said Respondent and also to award compensation, in a sum deemed as just and equitable, by this Court.

After hearing learned Counsel who represented the Petitioner, the 1st Respondent and the State, this Court, by its order dated 26.06.2019, granted leave to proceed only in respect of the alleged infringement of Article 11. The 1st Respondent filed his Statement of Objections, resisting the application of the Petitioner and seeking its dismissal. He had denied certain factual averments in the petition of the Petitioner that are in relation to her allegation of torture. He had also taken up the position that the instant application is time barred.

The infringement complained of revolves around an incident during which the Petitioner suffered an injury to her head. The Petitioner's position is that the 1st Respondent had deliberately attacked her and caused the said injury while the 1st Respondent taken up the position that it was an accident. In view of the submissions made by the parties in support of their respective positions, it became incumbent for this Court to determine the said contested question of fact at the very outset of this judgment, before it proceeded to consider the entitlement of the Petitioner

to any of the reliefs she had prayed for. Hence, a brief reference to the relevant facts is made in the paragraphs below.

During the relevant time, the Petitioner functioned as a Nurse, attached to the surgical unit of *Kurunegala* General Hospital. The 1st Respondent also functioned in the same hospital as a Consultant Surgeon. On 12.03.2019, the Petitioner reported to her work shift commenced at 1.00 p.m.. The Petitioner was to function as the Assisting Nurse to the Surgeon in Charge during a surgery involving of an amputation of one of the toes of a diabetic patient. The 1st Respondent functioned as the Surgeon in Charge of that amputation. The incident complained of had taken place during that surgery.

When the patient was brought into the operating theatre, the Petitioner assisted a senior Doctor in the initial preparation of that patient for his surgery. When the surgical procedure commenced, the Petitioner assisted the 1st Respondent, by handing over surgical instruments that were required for the surgery, as it was the function of an Assisting Nurse.

During the said surgery, the 1st Respondent used an instrument described as a "bone cutter" on that patient. After using the bone cutter once, the 1st Respondent had placed the instrument, now soiled with blood, on the operating table, near the foot of the patient. The 1st Respondent had thereupon asked the Petitioner to "remove" the bone cutter from the place where he placed it. The Petitioner claims that, as a practice, used surgical instruments should not be left by the patient and on the operating table but should be handed back to the Assisting Nurse for

cleaning and proper placement. She had removed the instrument from the operating table as instructed and placed it on a trolley.

As the Petitioner placed the surgical instrument on the trolley, the 1st Respondent shouted at her in Sinhala which she translated into English as "*I did not ask you to remove it, I asked you to keep it here*". He then picked up the bone cutter from the trolley with his left hand and hit with it on top of her head. The impact of the said assault had resulted in a bleeding injury to the Petitioner. She immediately rushed out of the operating theatre crying in pain and sought treatment for that injury. The Petitioner was replaced by another nurse and the 1st Respondent continued with the surgery. The Petitioner informed of the incident to the Officer- in-Charge of the Surgical Theatre. Due to her inability to make a complaint by physically visiting *Kurunegala* Police Station, her mother had lodged a complaint on her behalf, later in the day.

The Petitioner states that the attack by the 1st Respondent on her with a bone cutter caused an injury measuring about one centimetre in length on the right side of her head. On 13.03.2019, she was examined by the Consultant JMO, who issued a report (P12) confirming a laceration on her head. Her diagnosis card issued by Dr. *Thilak Perera* (P11), a Consultant Surgeon of the Surgical Unit of *Kurunegala* Teaching Hospital, indicates a history of an assault by a metal object. After two days of inhouse treatment, the Petitioner was discharged from the hospital.

In his Statement of Objections, the 1st Respondent had taken up the position that the injury to the Petitioner was a result of the handle of the bone cutter accidently coming into contact with her head. This accident

occurred when he forcefully pulled out a bone off the patient during the surgery. The 1st Respondent further claims that he had devoted his full attention to the surgery as it became necessary to ensure not to leave any remnants of bone particles in the incision made. In that process, the 1st Respondent had momentarily lost realisation of the presence of the Petitioner, who was standing tangentially behind him and to his left. The relevance of the relative positions becomes important as the 1st Respondent is a left-handed person.

The 1st Respondent therefore specifically avers that he never deliberately or intentionally caused any injury to the Petitioner. He further denies that he committed any act or treated her in any way or manner that would constitute torture or cruel, inhuman or degrading treatment or punishment.

The Petitioner countered the assertion of the 1st Respondent that the injury was a result of an accident by stating that, in view of the relative heights of the two of them and of the operating table, it was impossible for the 1st Respondent to accidentally hit her on the head with the handle of bone cutter.

In making an allegation of an infringement of Article 11 of the Constitution, the Petitioner must establish her allegation to the required degree of proof. The fact that an injury was caused to the Petitioner's head by coming into contact with a bone cutter with force is not disputed by any of the Respondents. The independent medical evidence presented by the Petitioner corroborates her injury on the head along with its probable cause, and thereby strengthening her assertion.

The only point with which the parties are at variance, particularly the 1st Respondent, is in relation to the element of intention in causing the injury. While the Petitioner claimed it was due to a deliberate act of the 1st Respondent coupled with anger, he denies any intentional act on his part and claims that it was an accident. In these circumstances, the relative probabilities of the intentional causing of an injury must be considered first since it is for the Petitioner to establish that disputed question of fact to the required high degree of proof.

In doing so, the Petitioner attributed a certain utterance to the 1st Respondent, which he said to have made when she took away the bone cutter from the operating table and placed it on the trolly. The Petitioner had translated those words in her petition to read as "*I did not ask you to remove it, I asked you to keep it*". The Petitioner did not attach her statement made to the police along with her petition. Instead, she attached the B report dated 15.03.2019, filed by the Officer-in-Charge of *Kurunegala* Police Station, in case No. B 706/2019 (P14) reporting facts of her complaint to Court. In the summary of evidence, the Officer-in-Charge had referred to the contents of her statement. Her statement contained in P14; the said utterance was reported as "**ඕක ගන්න නෙමේ කිව්වෙ, මෙතනින් තියන්න.**". The said summary of statements also contained contents of statements made by several others and particularly by *Jayasiri* and *Shamila Samaratunge,* who also were present in the operating theatre during the incident. Their statements supported the Petitioner's narrative in this aspect.

The Petitioner also relied on affidavits of *Manel Pathiraja* and *Jayasiri* (P2 and P3). The affidavit P2 is dated 03.04.2019, while the affidavit P3 is dated 18.03.2019. The incident they spoke of happened on 13.03.2019 and

the two affidavits were sworn into within a short period since the incident. According to *Jayasiri* (in P3), the 1st Respondent was incensed (දරුණු ආකාරයෙන් කෝපාවිෂ්ඨ වූ) when the Petitioner took the bone cutter away from the operating table. However, he does not refer to the exact instruction issued to the Petitioner, which started the incident. *Jayasiri* states that the 1st Respondent thereafter hit the Petitioner with the bone cutter, on her head, resulting in a bleeding injury.

Thus, the material presented by the Petitioner is clearly indicative of the fact that the 1st Respondent, being enraged by the Petitioner's act of removing the bone cutter from the operating table, had intentionally hit on her head with that surgical instrument. The curt expression of the 1st Respondent, which was made just before the attack on the Petitioner, is indicative that he was not pleased with her act of removing the instrument from the operating table, contrary to his instructions.

The 1st Respondent, in his denial of a deliberate attack on the Petitioner, speaks of a slightly different version of events. The 1st Respondent states that after commencing the surgery by making an incision to expose the bone, he asked for the bone cutter from the Petitioner. After using the bone cutter once, the 1st Respondent realised that some tissue still remained attached to the bone, which had to be removed by making another incision. With that intention he returned the bone cutter back to the Petitioner, directing her to keep it near the foot of the patient, as he needed same immediately after making that incision. After removal of the remainder of the tissue with the incision, the 1st Respondent had looked for the bone cutter and, upon seeing that it had been placed back in the instrument trolly, had reached out to pick it up.

Thereafter, he used the bone cutter for the second time on the patient and used it to forcefully pull out the bone. It is in that process the handle of the bone cutter had hit the Petitioner's head, as she stood near him to his left.

The 1st Respondent, along with his Statement of Objections, tendered two affidavits that were obtained from two of his junior colleagues. They assisted him during the said surgery and their affidavits were tendered marked as 1R3(a) and 1R3(b) respectively. Dr. *Gihan Fonseka,* in 1R3(a), states that after using the bone cutter for the first time, the 1st Respondent instructed the Petitioner to keep it on the operating table. Instead, she had placed it on the trolly. The 1st Respondent then picked it up from the trolly, used same to pull out the bone. The witness then asserts "*then the surgeon's hand and the instrument came back and … hit the nurse's head*." Dr. *Achala Illangaratne* too supports her colleague by stating "*then the surgeon's hand and the instrument came back and … hit the nurse's head*."

It is evident from the narrative of the 1st Respondent that he had used the bone cutter, after picking it up from the trolley, for the second time to complete the surgery and then only its handle had "*accidently*" struck her head. The Petitioner, on the other hand, stated that the 1st Respondent, after expressing his displeasure for placing the instrument back on the trolley, had hit her with it after picking it up from the trolley. Hence, the question whether the injury was a result of an accident or a deliberate act on the part of the 1st Respondent had to be decided on the evidence, which indicate the intention entertained by the 1st Respondent at the time of the incident. None of the medical officers made any reference in their respective affidavits to the utterance attributed to the 1st Respondent, except to state that he instructed the Petitioner to leave the

instrument where it was. In these circumstances, the exact wording of the instructions, issued by the 1st Respondent, could only be deduced from the utterance attributed to him by the Petitioner.

After she removed the surgical instrument from the operating table, the 1st Respondent's abrupt response was "**ඕක ගන්න නෙමේ කිව්වෙ, මෙතනින් තියන්න.**" This pronouncement made by the 1st Respondent indicate that the Petitioner acted under a misunderstanding as to what exactly he intended and also, she had acted contrary to his instructions. In this respect, the words "**ඕක ගන්න නෙමේ කිව්වෙ, මෙතනින් තියන්න.**" points to what he initially said to the Petitioner. If the 1st Respondent said "**මෙතනින් තියන්න**" or "**තියන්න**" after using of the bone cutter for the first time, he would have meant to '*let that instrument be'*, rather than to pick it up and to place it back on the trolley.

If, in fact this was the intention the 1st Respondent had in his mind, the reason for his act of placing the bone cutter near the foot of the patient only momentarily, because he intended to use the same once more immediately after he removed the remaining part of the tissue from the bone after making another incision, is obviously not known to the Petitioner. Perhaps, he may have expected her to realise on her own that it was needed immediately after making the incision, and therefore to let it be on the operating table by complying with his instruction "**තියන්න**". In this scenario, it is highly probable that the instruction of the 1st Respondent to "**තියන්න**", the Petitioner's understanding was she was to take the instrument from the operating table and to place it on the trolley. The Petitioner, without knowing what the 1st Respondent exactly had in his mind when he said "**තියන්න**", obviously misunderstood the short

instruction issued by the 1st Respondent, as to what he wants is her to place the instrument back on the trolley, as per the usual procedure.

Whether he used the word "තියන්න" or another similar word, it is clear from the conduct of the Petitioner that she understood his instruction to take the bone cutter away from the operating table. The two medical officers, in their affidavits 1R3(a) and 1R3(b) also states that it is probable that the Petitioner did not clearly hear the instruction of the 1st Respondent, as she was not paying full attention, and had taken the surgical instrument from the operating table. This assertion also seemed to support the Petitioner's claim that her action of taking away the bone cutter was contrary to the 1st Respondent's instructions, which in turn made the 1st Respondent angry, leading to his instantaneous reaction involving an act of violence.

Irrespective of the apparent miscommunication regarding the placement of the bone cutter; whether to pick it up or to leave where it was, the 1st Respondent's explanation, as to how the Petitioner suffered a head injury, clearly presents an unrealistic proposition. The photograph P8 indicates that the injury is located on top of her head. The 1st Respondent does not claim that the Petitioner was bending down and had her head lowered to be in the same level of the bone cutter held by him, when its handle had "*accidently*" hit her. The 1st Respondent also averred that he was not aware where she was "standing". The word "standing" used by the 1st Respondent instead of bending is significant in this context.

The Petitioner, in her counter affidavit, had strongly refuted the 1st Respondent's claim of accident. She stated that the height of operating table was adjusted to be in same level with that of the trolley which is about three feet. She is five feet tall and was standing when she was hit, thereby negating the proposition that her head was positioned just above the table to be accidentally hit by the handle of the bone cutter, when the 1st Respondent pulled out the bone. If she was standing (according to the Petitioner, she was), it is highly improbable that the handle of the bone cutter, held by the 1st Respondent in his left hand, coming into contact with the Petitioner, on top of her head.

It is noted that the two junior medical officers, who described the sequence of events for the 1st Respondent, contradicted their senior colleague on an important factual issue. The 1st Respondent stated in his Statement of Objections that after using the bone cutter, he himself requested the Petitioner to place it at the foot of the patient. But the affidavits 1R3(a) and 1R3(b) indicate that it was the 1st Respondent, who kept the bone cutter near the foot of the patient, and not by the Petitioner, on the instructions of the surgeon. The medical officers therefore support the Petitioner's assertion that it was the 1st Respondent, who on his own, placed the instrument at the foot of the patient before issuing instructions to the Petitioner to '*let it be*' ("තියන්න") . The reason as to why this particular contradiction becomes important in the present consideration is that it was the starting point of the series of events that culminated with the attack on the Petitioner and it also provided a motive to the said attack.

It should be noted that the 1st Respondent did not annex his statement made to police soon after his arrest on 13.03.2019, to his

Statement of Objections. No explanation was provided in that regard. If that statement was available, it could have assisted this Court to assess the position taken up by the 1st Respondent in his Statement of Objections by considering whether it is a position taken by him from the first available opportunity to make it known and maintained consistently since then. In the absence of any such material, the only conclusion that could be deduced from the available material is that the said position was placed before this Court by the 1st Respondent for the first time. The two affidavits 1R3(a) and 1R3(b) are dated 18.12.2019 and were clearly made after about nine months since the incident and subsequent to the filing of the instant application by the Petitioner on 21.05.2019.

The 1st Respondent also admits in his objections that after the Petitioner made a complaint to Police, he had agreed with the proposal made by the Petitioner's father to pay a sum of Rs. 100,000.00 to the Petitioner and to settle the dispute. In return, the Petitioner was to withdraw her complaint. The 1st Respondent states why he agreed to the said proposal was to avoid the hazzle of going through a criminal prosecution. Learned Counsel for the Petitioner contended that the 1st Respondent offered to compensate the Petitioner only upon realisation of his own culpability for the injury caused to her client.

In view of the above considerations, I am satisfied that the Petitioner had established of her factual allegation, that the 1st Respondent had deliberately hit her on the head with a bone cutter, to the required high degree of certainty and thereby tilted the balance of probability in her favour. This is the consistently applied standard of proof when an allegation of infringement of Article 11 is made by a petitioner who seek a

declaration to that effect, per *Amerasinghe* J in ***Channa Peiris and Other v Attorney General and Others*** (1994) 1 Sri L.R. 1 (at p. 107).

Having resisted the Petitioner's factual claim of deliberate attack with an alternative of an accident, learned Counsel for the 1st Respondent made a strong submission that even if it is accepted that his client did hit the Petitioner with a bone cutter, his action could not be considered as "*executive and administrative action*" in terms of Article 126 of the Constitution, but as a mere private act, since he had no "*coercive power of the State*" over the Petitioner. Therefore, the 1st Respondent contended that act complained of is not an act which is justiciable before this Court. He also added that the act complained of had no "*colour of office*" to it and therefore essentially becomes a private act of the 1st Respondent. Learned Counsel relied on the dicta of ***Velmurugu v The Attorney General*** (1981) 1 Sri L.R. 406 and ***Mariadas v Attorney General*** FRD (2) 426 in support of his submissions.

Learned Counsel for the Petitioner, in her reply, contended that the impugned act of the 1st Respondent was committed as an employee of the State in his capacity as a Consultant Surgeon and therefore, when he assaulted her client, it was done in the course of carrying out his duties as a repository of State. Hence the Petitioner's contention that his intentional act falls well within the ambit of executive or administrative action, as stipulated in Article 126(1) of the Constitution.

The question, whether a particular action of a State official is a private act of that individual officer or whether the said impugned action could be considered as an infringement of a fundamental right by

executive or administrative action in terms of Article 126, has come up before this Court for consideration quite often since the conferment of fundamental rights jurisdiction on it.

In dealing with this particular issue, this Court had consistently preferred to adopt a wider construction to the words "*executive or administrative*" in Article 126. In this context, the divisional bench decision of ***Jayanetti v Land Reform Commission and Others*** (1984) 2 Sri L.R. 172, is helpful as it stated (at p.106); "*[T]his is not the first time such an argument has been raised before us to narrow the application of Article 126 and been rejected.*"

Wanasundera J, in ***Velmurugu v Attorney General and Others*** (supra), while dealing with the contention that the words "*executive*" and "*administrative*" in Article 126 stated that they are synonymous and interchangeable and meant the same thing. His Lordship further stated (at p. 451) "*… the terminology in Article 126 has been chosen with some care and the juxtaposition of these two terms conveys certain nuances of meaning suggesting that the liability of the State extends to the unlawful acts of a wider class of public officers, namely, subordinate officers at peripheral level who in no wise constitute the decision making core of the administration." Fernando J,* in ***Faiz v Attorney General and Others*** (1995) 1 Sri L.R. 372, observed in relation to Article 126 that (at p. 381) "*… that the need to include "Administrative" is because there are residual acts which do not fit neatly into this three -fold classification of legislative, executive and judicial*."

The 1st Respondent, also relied on the observations of *Wanasundera,* J, in the judgment of ***Thadchanamoorthi v Attorney General*** FRD, Vol 1,

p. 129, that if all acts of a public official, whether acting within the terms of his powers or acting under colour of office would be taken as State action, it would go " … *too far as there could be cases where an act of a public officer acting under colour of office ought to be considered purely as an individual or private act of the person concerned and not as an official act*".

In view of the 1st Respondent's said contention, the question whether the impugned act of his client, which said to have resulted in an infringement of a fundamental right, is an act which is caught up within the "*executive or administrative action*" in terms of Article 126 or is merely a private act, should be decided upon consideration of the relevant legal principles which impose liability on the State upon acts of its agents. This very question, brought up by the 1st Respondent in relation to an allegation of an infringement of Article 11, was decided by this Court in the judgment of ***Saman v Leeladasa and Others*** (1989) 1 Sri L.R. 1. That judgment concerned with a situation where a prison guard had assaulted an inmate for disobeying his instructions. In dealing with the contention of the respondents that the particular prison guard had not been assigned any duties in relation to the said inmate or to the ward in which he was detained and therefore had no authority over the inmate, *Amerasinghe J* held (at p. 15) that since the impugned act was within the general scope of his employment to "*preserve discipline*" among the inmates and therefore decided it was " … *not an act done while on his own business and for his own purposes*".

In describing the underlying rationale upon which the said determination was made, *vis a vis* the observation of *Wanasundera,* J in

Thadchanamoorthi v Attorney General (supra), as quoted above *Amerasinghe J* (at p. 16) stated thus;

> *"It must be observed with respect that an ultra vires or an unlawful (even criminal) act can be done by a servant " in the course of employment", and would render the master liable, (c) and accordingly that possibility was, of itself, not a good ground for refusing to apply the common law principles of liability. Observations made in that case also tend to suggest that the existence of an " administrative practice " may be relevant to State liability and to the question whether an infringement was by " executive or administrative action ".*

Since the promulgation of the present Constitution, this Court had consistently held the view that a person, whether public official or a private citizen, if clothed with State authority, becomes an agency or an instrumentality of the State, and thus his actions are justiciable under Article 126. A clear pronouncement to that effect could be found in ***Wijetunga v Insurance Corporation*** (1982) 1 Sri L.R. 1 where *Sharvananda* J (as he then was) observed (at p. 5-6), "*[W]hen private individuals or groups are endowed by the State with power and functions, governmental in nature, they become agencies or instrumentalities of the State …*". His Lordship further clarified in ***Perera v Universities Grants Commission*** (1978-79-80) 1 Sri L.R. 128, that (at p. 137), "*[T]he wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by the State authority, does it constitute a matter for complaint under Article 126.*"

Our country is one among very few countries in the world that provide free universal health care. In that regard the State had undertaken the responsibility to provide and maintain the hospitals placed under the central as well as provincial governments by allocation of public funds. *Kurunegala* Hospital is a hospital managed and funded by the State.

The Petitioner and the 1st Respondent are public officers paid by the State and were attached to the said hospital. The surgical team, that had been set up by the hospital administration to perform the surgery, led by the 1st Respondent as the Surgeon in Charge, included the Petitioner. She was tasked to assist him during the surgery. The 1st Respondent, being the lead surgeon was to effectively manage his team of medical professionals, in order to ensure the successful completion of the surgical procedure. The Petitioner, being a member of the said team, was expected to follow instructions issued by the 1st Respondent, during the surgery. The act which the Petitioner claims that impugned her fundamental right guaranteed under Article 11, was committed by the 1st Respondent during the course of the said surgery. The picking up of the bone cutter and placing it on the trolly was done by the Petitioner clearly on 'instructions' of the 1st Respondent, as part of routine acts during a surgery, although there appears to be a miscommunication between the two. In view of these considerations, I hold that the impugned act of the 1st Respondent, could not be taken as a "*wrongful act of any individual, unsupported by State authority*" but as an executive or administrative act, in terms of Article 126 and therefore is justiciable in these proceedings.

The said conclusion brings in another factor into consideration. That is whether the impugned act of the 1st Respondent could be considered as an infringement of the rights guaranteed to the Petitioner under Article 11?

Preamble of our Constitution also states that it was adopted and enacted to preserve the rights and privileges of our People "*… so that the Dignity and Freedom of the Individual may be assured, …*". This Court, in ***Dr. Ajith Perera v Daya Gamage and Others*** (SCFR 273/2018 – decided on 18.04.2019) observed that "… *the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountain head from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country*."

Article 11 of the Constitution in turn states that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In ***Ratnasiri and another v Devesurendran, Inspector of Police, Slave Island, and Others*** (1994) 3 Sri L.R. 127, *Kulatunge* J (at p. 134) reproduced a pronouncement of European Court of Human Rights from the judgment of ***Tyrer v The United Kingdom*** where that Court said one of the main purposes of Article 3 of ECHR (similar to Article 11 of our Constitution) is to protect a person's "*dignity and physical integrity*". The status and scope of Article 11, in terms of the Constitutional provisions were considered by *SN Silva* CJ in ***Sarjun v Kamaldeen and Others*** (2007) 2 Sri L.R. 67. His Lordship cited the following quotation with approval (at p. 73);

" … the freedom from torture is declared in Article 11 as an absolute right and entrenched by Article 83, which bars any inconsistent legislation without a two- third majority in Parliament and approved by the People at a Referendum and should be given its ordinary meaning as prohibiting any act by which severe pain or suffering whether physical or mental that is intentionally inflicted, without any requirement of proof of purpose."

Learned Counsel for the Petitioner contended during the hearing of this application that unlawful infliction of physical as well as mental trauma infringes the rights guaranteed under Article 11 and accordingly the act of the 1st Respondent falls well within the scope of actions envisaged in that Article.

It is well accepted that the protection guaranteed by Article 11 includes freedom from physical as well as mental pain or suffering. The injury caused by the 1st Respondent undoubtedly caused pain in her body and mind. However, when violation of Article 11 is alleged, a petitioner is expected to put his or her case beyond a mere physical or mental pain by satisfying Court that it is a case with the required level of severity needed for an act to be considered as violative of Article 11.

Amerasinghe J, in ***Kumarasena v Sub-Inspector Shriyantha et al*** (SC FR 257/93 – decided on 23.5.1994) observed, *"[T]he assessment of whether a person has been subjected to treatment violative of Article 11 depends on the nature of the act or acts complained of in the circumstances in which they were committed.*" In that assessment, his Lordship expected the petitioner to establish that the " … *suffering occasioned was of an aggravated kind and attained the required level of severity to be taken cognizance of as a violation of*

Article 11 of the Constitution." This requirement was applied in ***Adhikari and another v Amarasinghe and Others*** (2003) 1 Sri L.R. 270 (at p. 274). However, it must be noted that, by any means, the said assessment is not an easy task for a Court. An eloquent description of this responsibility could be found in the judgment of ***Wijayasiriwardene v Kumara, Inspector of Police, Kandy and Others*** (1989) 2 Sri L.R. 312. *Fernando* J observed thus (at p. 319);

> *"[T]o decide whether the force used in this instance was in violation of 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. … A series of successive decisions may serve as landmarks which will enable the boundary to be demarcated in the future, but today I do not have to draw the precise line. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."*

His Lordship, having stated that (at p. 319) *"[T]he 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 persons and the circumstances*"; continued to elaborate the point by stating *"[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*".

Coming back to the Petitioner's application before us, I cannot help but notice that the circumstances under which she alleged that the 1st

Respondent had infringed her right to freedom from torture are most unusual. Generally, allegations of torture are usually levelled against officers who are attached to law enforcement agencies of the State . These officers are allowed to use "*reasonable force*" sanctioned by law itself and in the exercise of their duties certain excesses could take place. This Court was consistently critical of such excesses and noted that " *[O]ver the past 40 years or so, this Court, has on innumerable instances handed down judgment where it had held that police officers had acted in excess of authority in scant disregard for the fundamental rights enshrined in the Constitution"* (vide SCFR 393/2008 – decided on 05.03.2018).

However, the Petitioner asserted that she was hit on her head with a bone cutter by a Consultant Surgeon, inside of an operating theatre, whilst carrying out a surgery on a patient. The 1st Respondent was angry over the action of the Petitioner when she removed a surgical instrument from the place where he placed it. After a sharp rebuke for acting contrary to instructions, the 1st Respondent had inflicted an injury on the head of the Petitioner resulting in a laceration of her scalp. The Petitioner claimed that even after two days since the incident, the shock and emotional distress caused by the 1st Respondent continued and she was still suffering from a headache.

In this context, it is necessary to consider the said use of force on the Petitioner causing an injury could be considered as excessive in relation to the attendant circumstances and thus crossing the threshold as adopted in ***Wijayasiriwardene v Kumara, Inspector of Police, Kandy and Others*** (supra). Clearly, the atmosphere of an operating theatre cannot be termed

as an atmosphere charged with tension and violence. Obviously, the common goal of the team of medical professionals that had been assembled by the State, would be to complete the surgery successfully and thereby making an attempt to improve the quality of life of the patient. In that regard, each member of the team was expected to pursue that goal with equal interest. Unlike in the case of ***Wijayasiriwardene***, where the Court found the conduct of the 1st Respondent before their Lordships, in striking a single blow on the petitioner as it "…, *does not show any element of indifference or pleasure in causing pain and suffering, or of intentional humiliation, or of brutal and unfeeling conduct*", in the instant application however, the words spoken by the 1st Respondent coupled with his conduct suggestive of an "… *element of indifference or pleasure in causing pain and suffering, or of intentional humiliation, or of brutal and unfeeling conduct*" on his part.

In ***Saman v Leeladasa*** (supra), *Amerasinghe J* adopted a view that is indicative of applying the proportionality test against the use of force, as it was also a situation where reasonable use of force was permitted by law. His Lordship was of the view that (at p.13);

> "*The enforcement of discipline may occasionally warrant the use of some force, and some latitude is, perhaps, permissible in deciding whether in the circumstances of a particular case the force used was excessive. Action and reaction can seldom be nicely balanced where a decision to use force has to be taken on the spur of the moment, and a strict application of Rule 132 may not always be practicable, A single blow even with a baton, would be unlawful, but, arguably, would seldom amount to cruel or inhuman or degrading treatment; but a brutal assault as in this case, commencing with*

kicks and blows, and continued in an aggravated form - by repeated blows with a baton - even after the Petitioner complied with the order given to him, amounts to cruel, inhuman and degrading treatment."

In relation to the circumstances that are before us, the proportional use of force does not arise for consideration. Clearly, the 1st Respondent had no authority over the Petitioner to impose any measure of discipline by imposing a '*punishment*' for any lapse on her part, even if there was one. In ***Adhikari and another v Amarasinghe and Others*** (supra) it was held (at p.274) that " … *the fundamental rights guaranteed in terms of Article 11 are not restricted to mere physical injury. The words used in Article 11, viz., 'torture, cruel, inhuman or degrading treatment or punishment' would take many forms of injuries which could be broadly categorised as physical and psychological and would embrace countless situations that could be faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such section."*

Although the marginal note to Article 11 states "Freedom from Torture", the said Article by no means restricted to its application only to a situation where the impugned act could be taken as an act of torture. In fact, the Petitioner stated in paragraph 30 of her petition that the "… *aforesaid conduct of the 1st Respondent and /or the State, constitute cruel, inhuman and degrading treatment*" which constitute a violation of her rights guaranteed under Article 11 of the Constitution. Even if the Petitioner alleged there was "torture" but she could not establish her allegation of torture, this Court could

still proceed to grant relief if there was material to hold that violation of other components of Article 11 are satisfied to the required degree of proof. *Fernando* J, in ***Diana Pearly v Premaratne, Acting Secretary Educational Services Board and another*** (1997) 3 Sri L.R. 77, stated;

> "*… mere overstatement of a case or a claim should not ordinarily debar a Court from granting relief on the basis of what the facts actually establish. A petitioner who unsuccessfully alleges torture in violation of Article 11, should nevertheless be granted relief if the facts show degrading treatment, even though not specifically pleaded. While pleadings in fundamental rights applications must undoubtedly be clear and adequate, the Constitutional time limit serves as a caution against undue technicality and formality.*"

Thus, the degree of force used in the infliction of the injury suffered by the Petitioner, its nature and the site of the injury coupled with the sharp rebuke of the 1st Respondent for her perceived lapse, made in the presence of her colleagues, doctors and particularly in the presence of the patient (who was only anesthetised below the waist), had the cumulative effect of degrading her role as a professional nurse, which in turn made the act of the 1st Respondent qualified to be taken as a cruel, inhuman and degrading as it clearly offends the "*dignity and physical integrity*" of the Petitioner. I have fortified my opinion on the reasoning of the judgment in ***Abeywickrema v Gunaratna and three Others*** (1997) 3 Sri L.R. 225, where it was stated (at p. 228); *"[T]his Court has expressed the view that an 'aggravated form of treatment or punishment' could satisfy the requirements*

under Article 11" and reproduced the following section from the book titled *Our Fundamental Rights of Personal Security and Physical Liberty* by *Dr. A.R.B. Amerasinghe; '[S]omething might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience*."

After a careful consideration of the totality of the circumstances, I hold that the Petitioner has satisfied her allegation "*cruel, inhuman and degrading treatment*" by the 1st Respondent before this Court to the required level of severity in order to qualify it as a violation of rights guaranteed to her under Article 11 of the Constitution and thereby making her entitled to a declaration as such.

No doubt the 1st Respondent, who earned respect and admiration from his peers for his dedicated professional work as a Consultant Surgeon (as indicative by many testimonials that are annexed to the Statement of Objections, marked as 1R2(a) to 1R2(h)), and, with his appointment to General Hospital, *Polonnaruwa* in 2003, saved many lives. He further stated that he had no similar allegation made against him, up until now.

His assertion that he was operating on patients continuously from 8.00 in the morning that day and expected to commence yet another surgery after the amputation was completed is uncontradicted. The incident happened at about 1.30 p.m. The attendant circumstances seemed to suggest that the incident was a result of 1st Respondent momentarily losing his self-control over his actions and his disproportionate reaction to a situation that had sprung up unexpectedly. It is a truism that all humans

are susceptible to such frailties at times. However, irrespective of the existence of such mitigatory circumstances, it is an undeniable fact that the 1st Respondent, without any sanction by law, had caused a serious injury to the Petitioner by his deliberate action, which could be taken in as an administrative action in terms of Article 126. Protection from such acts is the right guaranteed to the Petitioner by Article 11 of the Constitution. It is pertinent to note at this juncture that Article 118(b) of the Republican Constitution, promulgated on 07.09.1978, states that the Supreme Court shall, subject to its provisions, exercise jurisdiction "*for the protection of fundamental rights*".

Before I pronounce my finding with regard to the infringement, it is necessary to deal with an objection raised by the 1st Respondent. This objection was raised on the basis that the application of the Petitioner is time barred.

The incident complained of by the Petitioner happened on 12.03.2019 and her petition was tendered to the Registry of this Court only on 21.05.2019, after a lapse of almost over a period of six weeks since the mandatory one-month period. However, the Petitioner had, by then, already lodged a complaint with the Human Rights Commission of Sri Lanka. Her complaint to the Commission dated 21.03.2019 (P15), and it had been made well within the one-month period, as imposed by Section 14 of that Act. In that complaint she had expected the Commission to conduct a "*fair and an impartial investigation*" into her complaint of "*cruel and inhuman assault*". The Commission accepted her complaint under reference HRC/K/152/29-A and informed her on 02.04.2019 that her complaint is receiving its attention.

Leaned Counsel for the 1st Respondent relied on the judgments of this Court, ***Kithsiri v Faizer Mustapha*** (SCFR 362/2017 – decided on 10.01.2018) and ***Subasinghe v Inspector General of Police and Others*** (SC (Spl) No. 16/2019 – decided on 11.09.2000) in support of his objection. In ***Kithsiri v Faizer Mustapha*** (ibid) the time bar objection was upheld by this Court since it was established that the petitioner's complaint to Human Right Commission was not to have an inquiry conducted by that Commission but only with the desire of invoking jurisdiction under Article 126. In ***Subasinghe v Inspector General of Police and Others*** (ibid) the Court upheld the time bar objection as the petitioner had failed to adduce any material that there is an inquiry pending before the Commission. *Amaratunga J* upheld a similar objection in ***Ranaweera and Others v Sub Inspector Vinisias and Others*** (SCFR No. 654/2003 – decided on 13.05.2008) *" [I]n view of the failure of the petitioners to place any material before this Court to show that an inquiry into their complaint has been held by the Human Right Commission or that an inquiry is still pending, …".* In this instance, not only the Petitioner had adduced material to indicate that the Commission is attentive of her complaint, she tendered material which shows that her expectation was for the Commission to hold a fair and an impartial investigation into her complaint against the 1st Respondent. It is evident that the purpose of making a complaint to the Commission was not an attempt to circumvent the operation of the mandatory time period imposed by Article 126(2) but to seek justice to the infringement of her fundamental rights by compelling the authorities to hold an inquiry into the violent act of the 1st Respondent. In the Statement of Objections, dated 19.12.2019, that had been filed after five months since the instant

application was lodged by the Petitioner, the 1st Respondent does not state that he was not summoned by the Commission for an inquiry or it had rejected her compliant. Upon consideration of the material presented, I am of the view that the Petitioner satisfied this Court "*that an inquiry is still pending*" before the Commission (per *Amaratunge J* in ***Ranaweera and Others v Sub Inspector Vinisias and Others*****)** and therefore the provisions of Section 13 of the Human Rights Act do apply to the petition of the Petitioner. Accordingly, the objection of the 1st Respondent on time bar is overruled.

Learned State Counsel, in her submissions on behalf of the 6th Respondent, the Attorney General, informed Court that a disciplinary action was taken against the 1st Respondent after an initial inquiry by serving a charge sheet on him. This was one of the reliefs sought by the Petitioner from this Court. In addition, criminal proceedings too were instituted in the Magistrate's Court in case No. -28129 against the 1st Respondent with the accusation that he committed an offence punishable under Section 314 of the Penal Code, which is currently proceeding.

The Petitioner, in her prayer to the petition also moves Court for grant of compensation in a sum deemed just and equitable by this Court. In making an order for compensation over an infringement of a fundamental right under Article 11, the underlying rationale was referred to in ***Saman v Leeladasa and Others*** (supra) by *Fernando J* (at p. 25);

> "*An impairment of personality - the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be. a public or a private*

right - committed with wrongful intent establishes liability in the actio injuriarum; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered . When the Constitution recognised the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable ; and his master, too, if the wrong was committed in the course of employment."

However, His Lordship further held that it was not desirable to assess damages under each of these heads separately.

The 1st Respondent is thus liable in respect of the infliction of cruel, inhuman and degrading treatment and punishment on the Petitioner, for which the State is also liable as it was inflicted in the course, and within the scope, of his employment under the State.

In view of the above, following orders of Court are made;

(a) The Petitioner's fundamental rights, guaranteed to her by Article 11 had been violated by an administrative action of the 1st Respondent and by the State,

(b) The Petitioner is entitled to receive a total compensation in a sum of Rs. 60,000.00. The 1st Respondent is ordered to pay Rs. 50,000.00 from that amount from his private funds whereas the State is ordered to pay the balance Rs. 10,000.00 to the Petitioner,

(c) The 1st Respondent as well as the State are directed to pay the sum awarded as compensation by this Court within a period of three months commencing from the date of this judgment.

The application of the Petitioner is accordingly allowed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I had the opportunity of reading the judgment written by His Lordship Justice Wengappuli in its draft form. With all due respect to his Lordship's views, I expect to express my opinion as follows dissenting only with regard to the view expressed by his Lordship relating to the objection taken by the 1st Respondent that this application is time-barred.

As his Lordship correctly observed, the 1st Respondent was the lead surgeon who was entrusted with necessary powers to effectually manage the team under him, which included the Petitioner, to ensure the successful completion of the surgical procedure. The Petitioner was bound to follow the instructions and directions of the 1st Respondent and to remain there under the authority of the 1st Respondent to assist the 1st Respondent. While the Petitioner was subject to such power and authority which was conferred on the 1st Respondent by the State to perform his duties, the 1st Respondent apparently committed a criminal act of which the Petitioner was the victim. The criminal act may be a private act of the

1st Respondent against the State for which the 1st Respondent is separately liable but it is the exercise of the executive and/or administrative power of the State exercised through the 1st Respondent caused the Petitioner to remain there and being subjugated to the apparent criminal act of the 1st Respondent.

Causing a subordinate officer or a person, who is under the authority of an officer, a victim of a criminal act by the said officer through the authority the said officer holds, itself is an inhuman and degrading treatment on the said subordinate officer or the person as the case may be. If an officer entrusted with executive or administrative power himself commits or willingly and knowingly allows another to commit a criminal act on a subordinate officer or a person who is subject to his authority while using his authority and power in a manner that the subordinate officer or the person cannot avoid being subject to the said criminal act can constitute the inhuman and degrading treatment. Thus, the criminal act has to be proved as per the ingredients that is needed to constitute the offence, and the torture or inhuman and degrading treatment and punishment contemplated in Article 11 has to be established in relation to the use and abuse of the executive and /or administrative act of the relevant State officer or authority. Thus, the facts relate to this matter clearly establish that the Respondent violated the fundamental rights of the Petitioner guaranteed by Article 11 of the Constitution. It is also observed that presently torture itself has been made a criminal offence in terms of the Act No. 22 of 1994.

On the other hand, what the 1st Respondent did amounts to a degrading and inhuman punishment causing bodily and mental pain over

an apparent allegation of not following the instructions given by the 1st Respondent during the surgical procedure. Punishing the subordinate officer by a superior officer in the manner the 1st Respondent did, unless it was authorized by law, cannot be condoned by any Court as an act that respects human dignity. Thus, the act of the 1st Respondent falls within the term inhuman and degrading treatment and/or punishment. Hence, I concur with the conclusion of His Lordship in relation to the violation of FR in terms of Article 11.

However, with regard to the objection that this application is time barred, I observe that;

1. In terms of Article 126(2) of the Constitution, the application had to be filed within a period of one month and however, in terms of Section 13 of the Human Rights Commission Act No. 26 of 1996, when computing the said one month period, the period of time an inquiry relating to the same incident pending before the Human Right Commission (HRC) should be excluded. Thus, the Constitution itself requires an application under Article 126 to be filed within one month. However, said period has to be computed in the aforesaid manner.

2. It was held in ***Gamaethige V Siriwardena and Others (1988) 1 Sri. L. R. 384 at 402*** that "*Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when*

both infringement and knowledge exist (Siriwardena V Rodrigo)[1]*. The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit.* ***<u>While the time limit is mandatory</u>****, in exceptional cases, on the application of the principal lex non cogit ad impossiblia, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time." (*highlighted by me*)*

3. His Lordship Janak de Silva, J. while referring to previous decisions of this Court in ***Thilangani Kandambi V State Timber Corporation and Others S.C.F.R. Application No. 452/2019 SC minutes 14.12.2022,*** has stated that this Court had interpreted the aforesaid provisions and the jurisprudence establishes the following principles:

(quote)"

a) *The initial view was that mere production of a complaint made to the Human Rights Commission of Sri Lanka within one month of the alleged infringement is sufficient to get the benefit of the provision in section 13(1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996 [****Romesh Coorey v Jayalath (2008) 2 Sri. L. R 43, Alles V. Road Passenger Services Authority of the Western Province (S.C.F.R. 448/2009, S. C. M 22.02.2013)****]*

b) *However, the correct position is that a petitioner must show evidence that the Human Rights Commission of Sri Lanka has conducted an inquiry regarding the complaint or that an inquiry is pending. Simply lodging a complaint is inadequate. [* ***Subasinghe***

[1] (1986) 1 Sri. L. R. 384,387

V. Inspector General of Police, SC (Spl) 16/1999, S.C. M. 11.09.2000; Kariyawasam V. Southern Provincial Road Development Authority and 8 Others, (2007) 2 Sri L.R 33; Ranaweera and Others V. Sub-Inspector Wilson Siriwardene and Others (2008) 1 Sri. L. R. 260, K. H. G. Kithsiri V Faizer Musthapha, (S.C.F.R.362/2017,S.C.M. 10.01.2018); Wanasinghe v. Kamal Paliskara and Others, (S.C.F.R. 216/2014, S.C.M. 23.06.2021)]

c) *A party cannot benefit from the provisions in Section 13(1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996 where the complaint to the Human Rights Commission is made one month after the alleged violation. [**Alagaratnam Manoranjan V. G.A. Chandrasiri, Governor, Northern Province, (S.C.F.R. 261/2013, S.C. M. 11.09.2014)**]*

d) *The provisions of Section 13(1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996 is not available to a petitioner who has made a complaint to the Human Rights Commission only to obtain an advantage by bringing his application within Article 126(2) of the Constitution. [**K.H.G. Kithsiri V Faizer Musthapha, (S.C.F.R. 362/2017. S.C. M 10.01.2018)**]" (unquote)*

4. In this case, when an objection is raised that the application is time-barred, it is for the Petitioner to establish that she filed the application within the one-month period leaving aside the time the matter was pending before the HRC. Following are the facts relevant to the objection that the application is time-barred;

    i. Incident took place on 12.03.2019.

ii. Petition to this Court was filed on 16.05.2019

iii. Hence, there is a gap of 65 days in between above two days.

iv. The Complaint to the HRC was made on 29.03.2019- that was 17 days after the incident- vide the letter dated 02.04.2019 issued by the HRC marked as an annexure to P15. Thus, if there was no inquiry held by the HRC, the matter could have been time barred by 11th of April 2023 which is 13 days after 29.03.2019.

v. The said letter issued by the HRC indicates that the complaint made to it was receiving the attention of the Commission. The letter is dated 02.04.2019. It is further observed, that the afore-mentioned letter issued by the HRC only indicates that the said complaint was receiving the attention of the Commission by the date it was issued. As observed in the case of ***Ranaweera and Others V Sub Inspector Wilson and Others (2008) 1 Sri L R 260,*** HRC is not obliged to inquire into every complaint it receives. The contents of the aforesaid letter are not sufficient to establish that an inquiry had been commenced or at least the HRC was to commence an inquiry. Even if it is considered that the contents of the letter proves that an inquiry on the complaint was pending on the date it was issued, the letter covers only 4 days.

5. There is no evidence to show that the matter before the Commission was pending on the date the application before the Supreme Court was filed or at least on the date 13 days prior to the date the application before this Court was filed.

When Article 126(2) of the Constitution is read with Section 13 of the Human Rights Commission Act, in counting one month, the time an inquiry on the complaint was pending before the HRC can be excluded. If the HRC decided not to proceed with the complaint on 3rd of April, the matter before us is time barred by 16.04.2019. If the complaint was pending before the HRC on or after 03.05.2019 which is the date 13 days prior to the filing of this application before this court, the application to this Court can be considered within time. As it is prescribed by the Constitution itself to file the application within the one-month period which has to be computed in the afore-mentioned manner, when the time bar objection was taken in the objections filed by the Respondent, it was the responsibility of the Petitioner to submit necessary proof through her counter objections that the application was within time. In this regard, she just had to produce a letter from the office of the HRC indicating the present status of her application. No evidence has been placed at least to indicate that she requested such proof from the office of the Commission except the aforementioned letter (annexure to P15) of the HRC filed along with the petition. If there was any difficulty in obtaining necessary proof from the HRC office, she could have moved Court to call necessary proof from the HRC office. With all the ability to produce such evidence that it was pending before the HRC by 03.05.2019, no evidence has been placed by the Petitioner.

Unless this Court assume without proof that the complaint to the HRC was pending before HRC on or after 03.05.2019, this Court may not be able to say that time bar objection is not valid. Thus, the Petitioner failed in establishing that her application is not time barred.

Thus, the application has been filed after 65 days of the impugned incident and the Petitioner failed in establishing that she filed the application within the one-month period that has to be computed in the manner explained above. Thus, in my view, this application must be rejected and dismissed and relief cannot be granted.

JUDGE OF THE SUPREME COURT