

We now turn to some of the facts that are germane to the issue before us namely whether the conduct of the Respondents was so serious an omission that in the end caused the destruction and desolation and thereby infringed the fundamental rights of the Petitioners.

Nilantha Jayawardena Senior Deputy Inspector General of Police, the then Director, State Intelligence Service (SIS) who figures as a Respondent in SC/FR/188/19, SC/FR/191/19, SC/FR/193/19, SC/FR/195/19, SC/FR/196/19, SC/FR/197/19, SC/FR/198/19 and SC/FR/293/19 sets out a chronology of these factual matters in a final affidavit filed before this Court on 15th November 2019. The Court will be making its observations thereto as and when it deems it appropriate.

On 04.04.2019, Nilantha Jayawardena personally received information from a highly delicate source (via WhatsApp), to the effect that the National Thawheeth Jama'ath (NTJ) leader and his associates were planning to carry out a suicide terror attack on important churches. The source also indicated that the attackers had conducted a reconnaissance of the Indian High Commission. On receipt of the same, a report was called for from the Deputy Director, Counter Terrorism and the Assistant Director of the SIS. The information received through WhatsApp on 04.04.2019 was subsequently confirmed in writing on 05. 04.2019 at 0900 hours. On the same day, a similar information was received in writing from another delicate source at 12.15 hours.

Nilantha Jayawardena goes on to state that immediate action was taken by him to instruct responsible officers to transform the above information into intelligence in order to establish the true identities of persons. After an initial briefing on the 6th April 2019, he wrote to the then Chief of National Intelligence (CNI) seeking instructions, and had informed the then Secretary, Defence Hemasiri Fernando on the evening of 6th April 2019.

Nilantha Jayawardena does not elaborate on the exact nature of the initial briefing on 6th April 2019. As to why he characterizes the information he received via WhatsApp on 04.04.2019 as just an input which does not amount to intelligence is also not explained in his affidavit. If that vital information needed transformation into intelligence, the rationale for the entertainment of such a view has not been put forth in the affidavit of Nilantha Jayawardena given the fact that the targeted entities for attack were churches and the Indian High Commission. If the provider of the vital information was believed to be a highly delicate source as described by Nilantha

Jayawardena, the reason for the Director of SIS to treat the information as a mere input and not intelligence must have been set forth and explained in the affidavit, leave alone his omission to refer to his source in his communications. There is ample material placed before this Court that the miscreants of this brand of terrorism had long been identified and having regard to the fact that the police had been keeping a tab on them since 2015, it strikes this Court as more than passing strange as to why the true identities of persons have to be established as the identities of these extremist elements had long been established.

Come 4th April 2019, it is undeniable that Nilantha Jayawardena himself was too well equipped with a large volume of material on the likely assassins to plead ignorance of their identities and in these circumstances, Nilantha Jayawardena cannot put forward a facile argument that the intelligence received on 04.04.2019 was nothing more than mere information.

According to the final affidavit tendered by Nilantha Jayawardena, he had submitted to Pujith Jayasundara - the IGP, a number of reports during the period 20.04.2016 to 29.04.2019 relating to ISIS and Radicalization, including information about Zahran Hashim and his network. The summary of reports titled “*Reports sent to IGP on ISIS & Radicalization in Sri Lanka (including Sahran’s network from 20th April 2016 to 30th April 2019*” shows a grand total of 97 reports, whilst reports sent to Secretary, Defence from 1st November 2018 to 25 April 2019 number around 11.

This testimony before this Court demonstrates that Nilantha Jayawardena, and Pujith Jayasundara were both aware of the potential threats by Zahran, his cohorts and the NTJ long prior to the Easter Sunday attacks. Even the Secretary, Defence cannot plead ignorance of the radicalization of Zahran and his complicit partners as he had continued to receive reports regarding this from November 2018.

The list provided by Nilantha Jayawardena, State Intelligence Service (SIS) to the IGP on the 31st of October 2017 shows that 94 individuals had been radicalized. Another list given on 31st January 2019 contains the name of 129 persons. It was three months thereafter that the Easter Sunday tragedy shook this country and sent unbearable tremors of fright and agony around the country.

Both these two lists invariably contained the names of one and the same persons. For instance, a person called Jameel was on top of each list, and they also contained the names of Zahran, Rilwan (the brother of Zahran) and Milhan – the names that were mentioned by the Indian counterpart in its message to Nilantha Jayawardena on the 4th of April 2019. Therefore, these likely attackers were far too notorious to be overlooked by the security brass of this country including the IGP and the Secretary, Defence. The likes of Zahran had long been known in the interlocking network of intelligence of this country, and when Nilantha Jayawardena received the message from India on the 4th of April 2019 naming the very same individuals, it is fatuous of Nilantha Jayawardena to contend before this Court that it was mere information and not intelligence.

In the circumstances, it cannot be accepted that Nilantha Jayawardena needed time to transform the so-called information into intelligence. In these circumstances it is too simplistic for him to aver in his affidavit that he needed to establish the true identities of the attackers, as the very names mentioned in the so-called information of 4th of April 2019, and the places they had been frequenting were far too entrenched in the knowledge and domain of national security mechanisms set up by the Ministry of Defence.

It has to be pointed out that in the reports sent to both the IGP and the Secretary, Defence, Nilantha Jayawardena had already identified the likely members of the imminent attack namely Mohamed Cassim Mohamed Zaharan, Mohamed Mufaisil Mohamed Milhan and Mohamedu Cassim Mohamedu Rilwan as those who had been disseminating ISIS ideology.

It is relevant to note that though there was a reference to planned attacks on some important churches, there is nary a narration of any consequential actions Nilantha Jayawardena took in regard to his own strategic intelligence and analysis of the degree of threat facing the churches. Easter Sunday was just a few weeks away when the heads-up about the imminent attack came from India, but there is little alertness or perceptiveness shown by officials to carry out any measures to safeguard any of the churches in the country.

The want of attention on the part of the important players heading the security apparatus of this country is unpardonable. There is evidence before this Court that in April 2018, a full one year before the Easter Sunday attacks, the Director, SIS had requested the IGP in April 2018 a closure

of investigations by others into Zahran, which resulted in the SIS becoming the sole investigator into Zahran. This casts upon Nilantha Jayawardena a greater burden and responsibility.

Except for the fact that Nilantha Jayawardena dispatched this warning to CNI who in turn communicated it to Secretary, Ministry of Defence, the final affidavit of Nilantha Jayawardena offers little assistance in the way of any evidence of an immediate launch of investigation and preventive action in light of the fact the Easter Sunday celebrations at all churches were in the offing.

Thus, this Court cannot get away from an irresistible conclusion that the churches lay vulnerable and exposed to imminent attacks. No evidence of consequential counter-measures taken to prevent the attack has been placed before this Court. This stark reality assumes greater importance when Nilantha Jayawardena himself avers in his final affidavit that “*as stated above, due to the importance of the information received in this regard, the Original Information was sent to Chief of National Intelligence (CNI) seeking instructions...*”.

Just three days after the receipt of the all-important initial information on the 4th April 2019, the first person to whom the Director, SIS transmitted the news was the CNI informing him of the alleged plan of attack. This was on the 7th of April 2019 where the letter carrying the logo “top secret” contains the following as its contents:

1. *As per an input, Sri Lanka based Zahran Hasmi of National Towheed Jamaat and his associates are planning to carry out suicide terror attack in Sri Lanka shortly. They are planning to target some important churches. It is further learned that they have conducted reconnaissance of the Indian high commission and it is one of the targets of the planned attack.*
2. *The input indicates that the terrorists may adopt any of the following modes of attack.*
 - a) *Suicide attack*
 - b) *weapon attack*
 - c) *knife attack*
 - d) *the truck attack*

3. *It is also learned that the following are the likely team members of the planned suicide terror attack.*

- i. *Zahran Hashmi*
- ii. *Jal Al Quithal*
- iii. *Rilwan*
- iv. *Sajid Moulavi*
- v. *Shahid*
- vi. *Milhan and Others*

4. *The input may kindly be enquired into on priority and a feedback given to us.”*

Thus, there was specificity, exactitude and clarity as to the likely attackers, modes of attack and their targets. Upon receipt of the above, Sisira Mendis the CNI, communicated it to the IGP Pujith Jayasundera on the 9th April 2019 by way of a letter. That letter too discloses the identities of the attackers as revealed in Nilantha Jayawardena’s document.

As is evident from the affidavit of the CNI, he is expected to have an “Intelligence Coordinating meeting” on every Monday prior to the main “Weekly Intelligence Coordinating Conference” (ICM) on Tuesday. Accordingly, the CNI had scheduled an Intelligence Coordinating Meeting (ICM) for the 9th of April 2019. Nilantha Jayawardena states in his affidavit that at this ICM held on the 9th of April 2019, he was not questioned regarding the information that he had provided to the CNI by way of his letter dated 7th of April 2019, nor was he instructed to provide further reports. But the agenda of the meeting on 9.04.2019 had an item titled “*Current Security/Intelligent update*” at which Director, SIS had to brief the participants. The fact remains that Nilantha Jayawardena provides no evidence that at this particular Intelligence Coordinating Meeting he alerted the participants to the looming likelihood of attacks on churches, except for a bare assertion to the following effect:

When I entered the meeting, the CNI showed me the Information Sheet that I had annexed to my letter dated 07.04.2019 addressed to him, and I requested him to take immediate action as it is important. On being questioned by Mr. Hemasiri Fernando regarding the action I was to take pertaining to the information sheet attached to my letter dated 07.04.2019 sent to the CNI, I informed Mr. Hemasiri Fernando, that I will

be submitting a special report to IGP and CID on the same evening, which I did. Having checked from the relevant sources and records, and being satisfied that the said information was "probably true", I sent the initial report to the IGP and CID on the 9th April 2019.

The agendas of the weekly Intelligence Coordinating Meetings (ICM) furnished to this Court reveal that National Security was a priority on the agendas and whilst, just one month prior to the attack in March 2019, the activities of Mohamed Cassim Mohamed Zahran had taken centre stage at ICMs, it is surprising that we hear nothing of any briefing by Nilantha Jayawardena at the meeting held on the 9th of April 2019 on an all-important and vital intelligence that he had received on the 4th of April 2019. Sisira Mendis, CNI in his affidavit dated 8th November 2019 is quite specific that the Director, SIS presented a briefing on several matters other than the vital intelligence referred to in his letter dated 7th April 2019.

The Chief of National Intelligence (CNI) is quite emphatic that Nilantha Jayawardena did not conduct a briefing on the information he had received on the 4th April 2019. This is not expressly contradicted by Nilantha Jayawardena himself in his affidavit. By recourse to Section 114 (e) of the Evidence Ordinance the learned Senior Additional Solicitor General sought to buttress his argument that common course of business may have been followed on the 9th April 2019. He invited this Court to draw the presumption in favor of Nilantha Jayawardena that he had raised the vital issue of the likely attack in the presence of all the participants at the meeting, but the facts do not lend themselves amenable to such a presumption being drawn. Though Nilantha Jayawardena's briefing figures prominently as one of the important items of the agenda for the meeting on 9th April 2019, there is no record provided to this Court that he addressed the specific security threat at the briefing.

In this regard, paragraph 36 of the affidavit of Sisira Mendis CNI, is as follows:

"I state that I discussed the contents of the letter sent by Director SIS with former Defence Secretary on the 8th April who directed that SIS presents the matter at the weekly intelligence meeting on the 9th April. I state that as a matter of practice that the Director of SIS is required to address the intelligence meeting first however Director SIS did not address the meeting on this issue although the meeting presented an ideal forum to alert the participants which included the commanders of the tri forces..."

What is asserted in the affidavit of Nilantha Jayawardena to some extent proves the veracity of what the CNI says had actually happened on the 9th April 2019. Except for a briefing by the Director SIS on the general situation in the country, it is clear that there had been no formal discussion or briefing by Nilantha Jayawardena on the intelligence that he had received on the 4th of April 2019.

Here is a Director of the State Intelligence Service who had given extensive briefing on the 13th of March 2019 on Zahran and his associates and by 9th April 2019, he had already written to the CNI about the delicate information from India. He had also personally briefed the Inspector General of Police via phone on the aforesaid intelligence information on the 7th April 2019. When he went for the ICM on 9th April 2019, there were ominous warnings of an impending disaster but he chose not to discuss the matter in his briefing, except for an informal discussion among himself, Sisira Mendis (CNI) and Secretary, Defence Hemasiri Fernando. This only shows that Nilantha Jayawardena attached little weight to the intelligence provided by the foreign counterpart. In view of the enormity of the intelligence gatherings, meetings, reports and events which had preceded the intelligence received on 04.04.2019, it is idle to contend that the information received was not actionable. It was of national interest that the Director, SIS should have brought this matter up at the ICM. In fact, he should have alerted and informed the Secretary to the President but he failed to do so.

We heard arguments that he maintained no close nexus to the President and this has been his consistent position in his affidavit. We will advert to this assertion sooner but the fact is glaring that nowhere does he assert that he sent a security report as regards the intelligence that he had received, to Secretary, Defence, who he says was his superior in the Ministry of Defence. The Director, SIS also does not take the position that he was seeking assistance from other agencies such as the Army, STF, CID and TID with regard to the intelligence given to him on 4th April 2019.

Though the accounts of Hemasiri Fernando, Secretary of Defence, Nilantha Jayawardena, Director SIS, and Sisira Mendis, CNI differ on the actual events of the Intelligence Coordinating Meeting, there is convergence among all three that the intelligence received from the foreign counterpart was not discussed at the meeting. The IGP had been present at that meeting on the 9th April 2019, and here was a Director, SIS who did not volunteer to speak when there was a

duty to speak formally at the meeting. There was no impediment to refer specifically to the intelligence in the course of his general briefing and this omission is quite blatant and egregious having regard to the fact that there were instances where the Director, SIS had previously briefed the participants of the ICM about Zahran Hashim.

All this signifies a lackadaisical approach and it is clear that it does not befit the office of Director, SIS. One cannot assert that one was actively engaged in collecting and collating intelligence, whilst the activity undertaken in the end was not anything but serving as a mere conduit for passing information. Nilantha Jayawardena was not a mere cog in the wheel but an indispensable adjunct to the wheels of counter terrorism caravan which had to move with lightning speed and dispatch. But its wheels were grinding not only unsurely but slowly.

The chronology of events unmistakably points to an indifferent approach to an obvious risk lurking in the corner and it is on this plinth that the Petitioners have rested their case.

All this shows that there was so much information that was available before Nilantha Jayawardena betokening doom and but it cannot be said that Nilantha Jayawardena acted with alacrity and promptitude. He never sent the information of the 4th April 2019 by way of a report to his constitutionally appointed supervisor, Secretary to the Ministry of Defence. He was quite content transmitting the so-called input only to the CNI. He was given the floor to apprise the participants of the meeting on 9th April 2019 but he never chose to share the information with those present at the meeting.

The Agenda of the ICM meeting on 9th April 2019 indicates items pertaining to National Security to be addressed by the CNI, CDS, Tri-Service Commanders and IGP. With such a powerful contingent in attendance it was incumbent on the Director, SIS to have briefed them on the vital intelligence he had received. This failure to speak becomes all the more culpable in the light of Nilantha Jayawardena's own admission in his affidavit pertaining to the meeting on 9th April 2019 to wit "... *However, or the intelligence agencies were aware of the activities of Zahran Hashim, and its desire to kill "non-believers", which was common knowledge amongst the attendees of the said conference...*".

If tri-service commanders who were aware of the propensities of Zahran had been present at the meeting, why was it that the Director, SIS kept them in the dark about the vital information that

he had received? By this time, Nilantha Jayawardena had reliable information that Zahran Hashim and Shahid had been hiding in Oluvil, Akkaraipattu. Rilvan-the brother of Zahran was also holed up in Oluvil and he was surfacing only in the nights to go to visit his family in Ariyampathy. By maintaining an air of confidentiality over these matters which were within his knowledge, the Director, SIS committed unpardonable lapses quite unbecoming of a super sleuth who should be heading such a powerful department under the Ministry of Defence. At this stage one must remember the duty of the CNI as well, By the 9th April 2019, he was fully acquainted with the facts of intelligence from India. If the Director, SIS kept quiet about this at the meeting, is it consonant with the requirements of CNI's duties not to broach the subject himself? As we have pointed out, there was an item on the agenda for both him and the Secretary, Defence to speak but both turned out to be mute bystanders. In summation all three of them, Hemasiri Fernando, Sisra Mendis and Nilantha Jayawardena kept the information to themselves and never bothered to edify those present at the meeting on the 9th April, 2019.

Post-meeting of the 9th April 2019, it has to be noted that Nilantha Jayawardena, Director SIS, wrote a letter to Pujith Jayasundara, IGP on the same day setting out in detail the activities of Zahran, Shahid and Rilwan and stated in the letter that Zahran was in a hideout at a place called Oluvil, Akkaraipattu. This letter in Sinhala also contains the logo "*Top Secret*".

At the end of the letter, Nilantha Jayawardena states that he was carrying out his secret investigation. If one were to recap, the IGP had two letters by 9th April 2019-one letter had arrived from the CNI whilst the other had come from Director SIS. The IGP then sent both these letters to SDIG (Western Province and Traffic), SDIG (Crimes and STF), DIG (Special Protection Range) and Director, CTID with a note "**F.N.A.**".

One could see a notable failure. The intelligence information received must have been shared with the DIG, Eastern Province. It was the bounden duty of the IGP, as the head of the police to have taken steps to keep his subordinates acquainted. We take the view that the IGP should have shared the intelligence information received with senior DIGs and other relevant parties in the police service. One conspicuous failure is to inform the DIG, Eastern Province, of the intelligence information received having regard to the fact that there was a dry run on 16.04.2019 in the Eastern Province namely in Palmunai, Kattankudy.

This failure to notify his men in the provinces is quite a flagrant violation of his police duties and we take the view that the IGP as the head of the police service should have taken all

necessary steps to keep the police and also the political leadership informed. The IGP also had ample opportunities to do this.

In the backdrop of all this, an important question arises. If the whereabouts of Zahran and his guilty associates were known to the security echelons of the country, the question looms large-why were these men on the prowl not apprehended before they could unleash their reign of terror? The State had the wherewithal to trace Zahran and arrest him because he had been around for too long a time for any police officer to feign ignorance. It is a question that goes a-begging. It is also a question that begs an answer from the IGP.

It has to be noted that despite the availability of intelligence information indicating a potential attack, no meeting of the ICM was held on the 16th April 2019-the week following 9th April 2019 and if the Director, SIS had been more outspoken about the impending attack or had even demanded or requested a constant gathering of the top brass, the importance of having a follow up meeting would not have passed muster. Let us also point out that no National Security Council Meeting (NSC) was summoned between the receipt of intelligence on the 4th April 2019 and the Easter Sunday Attack on the 21st April 2019. We will comment on the absence of this mechanism later in the judgment.

This Court is also apprised of a meeting that took place between the former President (the Minister of Defence) and some senior police officers on 8th April 2019. Udaya Seneviratne, the Secretary to the former President states in his affidavit dated 23rd July 2019 that the IGP, Senior DIGs from the CID and TID were all present at this meeting along with Nilantha Jayawardena-the Director, SIS. The President was never notified of the intelligence relating to the threat of a terrorist attack by Zahran Hashim and his associates. The President was due to visit Batticaloa on 12th April 2019-a city situated in close proximity to Kattankudy-the hometown of Zahran but the Director, SIS did not proffer any threat assessment of the situation to the President. This shows that Nilantha Jayawardena never gave any credence to the intelligence he had received from his foreign counterpart on the 4th April 2019. The intelligence was a foreboding of what was to follow but its weight was lost on the Director, SIS except for the fact that he had been investigating the information with his team fanning out to the East. Nilantha Jayawardena never wrote directly to his supervisor Hemasiri Fernando-the Secretary to the Defence for reasons best known to himself.

As the head of State Intelligence, could Nilantha Jayawardena have remained tight-lipped with his topmost executive in the Ministry -the Minister who was also the President?

It is not as though Nilantha Jayawardena had not maintained direct communication with the President of the country though Nilantha Jayawardena and the former President discount before this Court any such communication between them on intelligence matters. We will deal with this aspect after having dealt with the developments subsequent to the 9th April 2019 meeting.

There was information that was initially available to Nilantha Jayawardena and later transmitted to CNI and passed on to Hemasiri Fernando. Information and Intelligence received subsequent to the ICM on 9th April 2019 were quite ominous and required immediate action. This was on the eve of the bomb explosions on 21st April 2019. In the final affidavit dated 15.11.2019, Nilantha Jayawardena alludes to what he classifies as the most vital, specific and reliable intelligence which was received by him on 20.04.2019 at 16.12 hours - a day prior to the day of carnage. This message, received from a source via WhatsApp gave him a telling heads-up that Zahran Hashim of NTJ and his associates had planned to carry out the attack on or before 21.04.2019 and that they had reportedly selected 8 places including a Church and a Hotel. The source further revealed that they had conducted a dry run and caused a blast with an explosive laden motorcycle at Palamunai near Kattankudy on 16.04.2019.

On 20th April 2019, at 16.12 the foreign counterpart sent the following WhatsApp message:

“As per a reliable input, Zaharan Hasim of National Towheed Jamath of Sri Lanka and his associates have hatched a plan to carry out an Istishhad attack in Sri Lanka. It is further learnt that they have conducted a dry run and caused a blast with explosives laden Motorcycle at Palamunai near Kattankudy in Sri Lanka on 16.4.2019 as part of their plan.

The copies of WhatsApp messages have been appended to the affidavit of Director, SIS and another response goes as follows.

“It is learnt that they are likely to carry out their attack in Sri Lanka at any time on or before 21.04.2019. they have reportedly selected eight places including a church and a hotel where Indians inhabit in large numbers. Further details awaited”

According to the Director, SIS, he briefed the following officers accordingly via SMS and WhatsApp.

- a) Secretary Defence (1653 hrs) - WhatsApp
- b) SDIG / CID (1654 hrs) - WhatsApp
- c) CNI (1702 hrs) - SMS.
- d) IGP (1707 hrs) - SMS

The Director, SIS states before this Court that apart from sending information by WhatsApp and SMS, he personally briefed the following officers over the phone of the impending threat on 20th April 2019.

- a) Secretary, Defence (1802 hrs)
- b) IGP (1703 hrs)
- c) SDIG/WP (1755 hrs)
- d) SDIG/CID (1657 hrs)
- e) SDIG/STF (1927 hrs, 2009 hrs)
- f) DIG Colombo (1909 hrs, 2124 hrs)

One can immediately see an omission to transmit this message to DIG, Eastern Province where a dry run had been executed by Zahran and Company on 16.04.2019 - a fact which was peculiarly within the knowledge of the Director, SIS. In view of the fact that Zion Church in Batticaloa suffered its worst suicide attack on 21st April 2019 where 31 deaths occurred of which the majority were children, it is a serious omission on the part of Director, SIS to have kept the DIG, Eastern Province in the dark.

Eventually the Director SIS gives an account of the disappointing tale of not receiving any assistance, instructions or feedback from the Ministry of Defence, police or any other investigative agency and notwithstanding the negative response, the Director, SIS asserts that he carried on regardless gathering, sharing, briefing and debriefing of intelligence continuously.

That is how his account is told and retold as to how he had discharged his duties but despite such a declaration of fealty to his duties, the conclusion is inescapable. The intelligence received proved true but the mobilization of counter terrorism measures or its facilitation through an

effective dissemination of forebodings to stem the impending disaster was totally absent and this clearly shows how security mechanisms in the country remained fragile and in shambles. Sri Lanka experienced its worst moment in history when bombs began to explode at churches and hotels causing destruction and devastation.

The toll of destruction and decimation is a story of unspeakable grief, unbearable pain and agonizing loss of lives and Sri Lanka came to a standstill frozen in time seeing its people and foreigners who had visited this country getting snuffed away in bizarre tragedy. One of the Petitioners before this Court is an attorney at law who suffered irreparable injuries which have debilitated him. The Public Interest Litigations that the Petitioners have mounted testify to the gravity and enormity of the tragic events.

The unsuspecting faithful members of the Catholic community, children and families took a heavy brunt of this dastardly act of the terrorists for no fault of theirs. St. Sebastian's Church, Katuwapitiya, St. Anthony's Church, Kochchikade and Zion Church, Batticaloa as well as Kingsbury Hotel, Shangri-La Hotel and Cinnamon Grand Hotel, remain etched in memories and will remind the people of the country of the carnage of 21st April 2019 for a long time to come.

Some of the applications before this Court are motivated by public interest litigations and as we have said, all the applications urge that if not for the soft approach and lackadaisical treatment of warnings and signals adopted by the Respondents specifically referred to above, these consequences which put this country and its people asunder would not have occurred. The liability is sought to be cast on the police officers including the IGP and the President of the country based on illegal omissions and inaction. Before we proceed to determine the liability on the common denominators that we have enumerated above, certain preliminary observations have to be made.

If one were to look at the facts and circumstances pertaining to the Director, SIS, it is true that the warning signals all arrived at his doorstep. Did he carry out his duties in all earnest? or he infringed the fundamental rights of these Petitioners. We are compelled to observe that he undoubtedly presents the piteous story of a lonely boy on the burning deck with no one coming to his assistance.

As the head of State Intelligence Service - an indispensable component of the Defence mechanisms in the country, did he present before this Court a genuine story of commitment to national security? Can he declare to this Court that he was not bound to report to the President? Can the President justifiably support him in this defence? Can this Court give credence to his assertion that he had a dissociative nexus with the President of the country?

A salient feature of the affidavit of Nilantha Jayawardena is the overtly explicit attempt to disassociate himself from the then President of the country, Maithripala Sirisena who was holding the portfolio of the Ministry of Defence at the relevant time. Some of the averments in his affidavit seek to proclaim a distant relationship he had allegedly maintained with the Minister of Defence. This cautious approach is also adopted by the former President in his stolid acceptance of Nilantha Jayawardene's assertion that he was not required to report to the President. There is a studious choice in both affidavits to treat each other's functions as distinct and discrete. Both affidavits seek to make out that there existed between the Minister and a head of a Department under the Ministry a relationship as though they were dealing with each other at arm's length. Nilantha Jayawardena's account on a hands-off way of handling security in the country is put forth in two declarations by him in his affidavit which are to the following effect:

I state that I have not been instructed or directed, nor am I expected to report directly to His Excellency the President and /or the Prime Minister, or share directly with His Excellency the President and /or the Prime Minister, on actionable information relating to security.

As such, I state that I am not duty bound or expected to share with His Excellency the President and the Prime Minister, nor did I communicate to them the actionable information I had gathered and had already forwarded to the Inspector General of Police and the then Chief of National Intelligence, in regard to the possible bomb attacks, that eventually took place on 21st of April 2019.

We take the view that this is an impermissible attempt to disengage himself from any ministerial supervision and control. Both the affidavit of Nilantha Jayawardena and the former President echo the same language as regards Nilantha Jayawardena's accountability to his Minister. It has to be remembered that Nilantha Jayawardena was occupying the position of a head of a separate department under the Ministry of Defence. The three Gazettes where the former President

allocated powers and functions to himself with regard to national security, make it quite clear that State Intelligence Service (SIS) has always remained a distinct and separate department under the Minister of Defence. The Department of Police was brought under the Ministry of Defence only in November 2018 by Gazette Notification bearing No. 2096/17. It was only in November 2018 that the Department of Police was brought within the purview of the Ministry of Defence, whereas the State Intelligence Service had remained with the former President at all times since 2015. It is crystal clear that though Nilantha Jayawardena was a Senior Deputy Inspector General of Police, he continued to function as the head of a distinct and separate department called the State Intelligence Service, whereas Pujith Jayasundara-the IGP continued to remain as the Head of the Department of Police.

In a nutshell, State Intelligence Service and Department of Police were described as separate and distinct departments under the Ministry of Defence – see items 12 and 14 of the Gazettes bearing Nos. 2096/17 and 2103/33.

This bifurcation of State Intelligence Service and Department of Police make it patently clear that no one institution was above another, and this parity of status puts paid to any argument of a hierarchical distinction that can be made between two separate and different departments under the same portfolio – the Ministry of Defence. While not gainsaying the importance of a close nexus and coordination they must maintain between the two departments, it can in no way be argued that the IGP stands as *primus inter pares vis a vis* the Director, State Intelligence Service. Whilst serving the same cause of national security of the country, both the IGP and Director, SIS have one Minister who would have the same degree of oversight over the two departments. There is one Secretary to the Ministry who shall, subject to the direction and control of the Minister of Defence, exercise supervision over the ***departments of government or other institutions in the charge of his Minister*** – Article 52(2) of the Constitution.

This constitutional provision places the Minister at the apex of the hierarchy under whose charge the distinct and separate departments of his Ministry lie. In the circumstances, it is contrary to constitutional principle for the former President to make a distinction between SIS and the Department of Police. When Maithripala Sirisena, the former President contends in his affidavit that only the IGP and the Secretary, Defence are bound to report to him and not the Director, SIS, it goes against the constitutional grain.

When the Constitution itself places the several departments coming under the Ministry on a co-ordinate and parallel plane, it goes contrary to the constitutional scheme for the former President to put forward a preposterous position that a particular Head of his department is not bound to report to him. The proclivity to exclude the Director, SIS and only include the IGP and the Secretary, Defence under his ken is quite surprising and unconstitutional given that it amounts to an unequal and illegal treatment of two heads of his departments. In the same breath, it cannot lie in the mouth of Nilantha Jayawardena to say that he was not bound to report to the President who was the Minister of Defence at the relevant time.

We hold that Nilantha Jayawardena was under an obligation to report to the Minister of Defence who was the President of the country. Therefore, the assertions in the affidavits of both Maithripala Sirisena and Nilantha Jayawardena are misstatements of the long held constitutional principle that the departments and institutions in his charge under a Minister are equidistant and co-ordinate. Therefore, the fictitious distinctions that both the former President and Director, SIS are making in their affidavits are artificial and have no legal or constitutional basis. The distinction is selectively made for reasons best known to the deponents of the two affidavits.

An identical attempt was sought to be made to perpetuate this misconception by the contention advanced by the Senior Additional Solicitor General that the *Carltona* doctrine would apply only in the case of the Secretary of Defence, whilst there was a total absence of any reference of the applicability of this principle in the case of Director, SIS or the IGP. The distilled essence of the *Carltona* principle is that it applies equally to all the responsible officers of a Ministry and thus it applies to Nilantha Jayawardena with the same vigor as it does to Hemasiri Fernando and Pujith Jayasundera.

The general constitutional principle enunciated by Lord Greene in *Carltona Ltd v Commissioner of Works*³ has the effect that acts done by officials in the exercise of Ministerial functions are to be treated as the Minister's own acts regardless of whether these acts are done personally by the Minister himself or by a Junior Minister or departmental officials. The *Carltona* doctrine does not involve any question of agency or delegation but rather the idea of the official as alter ego of the Minister; the official's decision is seen to be the Minister's decision.

The application of the aforesaid constitutional principle to the facts of the case would boil down to just this proposition. The former President had assigned to himself a number of duties and

³ (1943) 2 All ER 560

functions by way of the Gazette notification and had also named departments to perform those duties and functions. The *Carltona* is to the effect that he need not personally perform those functions and duties. There is an implied delegation that his responsible officials heading the Departments can perform those functions and duties on his behalf. Thus the Secretary, Defence, Chief of National Intelligence, Inspector General of Police and Director, SIS can perform those functions on his behalf and they are not treated as agents but rather they are conceived as his alter ego. In other words, the performance of these officials is treated as the performance of the Minister. It does not mean that these officials, particularly senior officials and heads of departments in the case, can choose not to perform the functions and duties because Article 52 (2) of the Constitution places the supervision of performance on the Secretary subject to the direction and control of the Minister. The common law constitutional principle is added on by the accretion of the constitutional supervision imposed on both the Minister and the Secretary, Defence who is vested with national security not only by the Constitution but also by subordinate legislation published in the Gazette. The alter egos are obligated to perform and if they perform the acts, they are akin to performance of the acts by the Minister.

This aspect of performance subject to supervision therefore introduces the obligation of consulting the Minister in cases of extreme importance and the officials cannot get away with the argument that they cannot have direct access to the Minister who becomes answerable to Parliament if he has not properly exercised oversight and supervision. The Minister cannot absolve himself from his non-supervision by putting forward an argument that an officer concerned did not give him information or he is not bound to report to him.

The Minister remains the constant watchdog of his departments and any failure of supervision that results in a violation of fundamental rights will amount to a dereliction of duty on the part of the Minister. There is case law which imposes the requirement of personal attention to be paid by the Minister. For instance, orders drastically affecting the liberty of the person – e.g. deportation orders,⁴ detention orders made under wartime security regulations⁵ and perhaps discretionary

⁴ R v Chiswick Police Station Superintendent Ex p. Sacksteder [1918] 1 K.B. 578 at 585-586, 591-592 (dicta). The decision has in fact been taken by the Home Secretary personally (Cmnd 3387 (1967),16). In *Oladehinde v Secretary of State for the Home Department* [1991] 1 A.C. 254, which concerned the provisional decision to deport, the HL appeared to accept that the final decision to deport had to be taken by the Secretary of State personally or by a junior Home Office minister if he was unavailable. *R v Secretary of State for the Home Department ex p. Mensah* [1996] Imm. A.R. 223.

orders for the rendition of fugitive offenders⁶ require the personal attention of the minister.⁷ The above jurisprudence emphasizes the imperative requirement of consultation and personal attention by the Minister with his responsible officials and briefings of the Minister to be done by those officials necessarily take pride of place.

Just as much the Minister states that the Secretary, Defence and the IGP were bound to report to him, so was the Director, SIS placed under a constitutional duty to access his Minister and keep him abreast of the impediments and problems he was confronted with. That places the Minister under an obligation to treat his officials equally and not keep them disengaged and distant because non-performance of any of his duties and functions is bound to infringe the fundamental rights of those whom the Minister is sworn to serve, and as such he must take guard and exercise supervisory guardianship over the guardians of national security. Given the fact the Constitution accords Defence of the Nation to him, the President is obligated by the Constitution, subordinate legislation and common law (*Carltona*) to consult his officials. He has to set up his mechanisms and structures where there is a free flow of discussion.

The heads of the Department and responsible officers remain liable for the infractions of not performing their duties assigned to them to safeguard the security and integrity of the nation. The Minister becomes liable when he fails in his constitutional and common law duties to have robust systems and mechanisms to protect and promote national security. It is for this reason that there has to be constant supervision and control of his officials. There must be structures and mechanisms which facilitate transparent exchange of intelligence and information. A proper mechanism to acquaint himself with intelligence and information would serve the Minister proper notice of intelligence and information and such an absence of supervisory mechanism will expose the Minister to allegations of failure of his constitutional, statutory and common law duties.

Assessed with this yardstick and benchmark, we take the view that given the knowledge of warnings, caveats and intelligence information, there were several duties cast upon the Secretary, Defence, Chief of National Intelligence, Director, SIS and the Inspector General Police. From the chronology of the factual matrix that we have set out above, each one of them assigned with

⁵ *Liversidge v Anderson* [1942] A.C.206 at 223-224, 265, 281; *Point of Ayr* [1943] 2 All E.R. 546 at 548 (dicta).

⁶ *R v Brixton Prison Governor Ex p. Enaharo* [1963] 2 Q.B. 455 at 466.

⁷ See D. Lanham, "Delegation and the Alter Ego Principle" (1984) 100 L.Q.R. 587, 592-594 (who argues that where life or personal liberty are at stake, the alter ego principle may not apply).

constitutional and statutory duties to police the nation and prevent mayhem and disaster was derelict in their duties and had they exercised the duty of care that was mandatorily expected of them, this nation would not have been impaled in the horrible murders and destruction that followed the bomb explosions on 21st April 2019.

The assertion of no access is given the lie to by Nilantha Jayawardena himself as is evident on the facts.

There is a total misappreciation of *Carltona* doctrine in the way it was advanced in the arguments on behalf of the two Respondents against whom infringements of fundamental rights have been alleged namely Nilantha Jayawardena and the former President. Though Nilantha Jayawardena asserted in his affidavit that he had not been reporting to the President or he had no access except through the Secretary to the President, his statements before the Parliamentary Select Committee (PSC) show that if he wished to contact the President, there was no impediment at all. The minutes of evidence before the PSC have been appended to the affidavit of Hemasiri Fernando and at pages 879 and 880 of the minutes of evidence (Volume 2) we could see the prior statements made by Nilantha Jayawardena.

Q: Have you ever spoken to His Excellency the President? Have you ever spoken to him?

Nilantha Jayawardena: On what?

Q: On anything?

Nilantha Jayawardena: If he calls me and asks various things – so many people are going and giving him information and sometimes he calls me and asks, “Find this for me.” Then I look back to see whether it comes under my purview. Then I speak to him and say that. I do not speak to him over his mobile; never.

(This response of Director, SIS before the PSC shows that the President had called him)

Q: So, it has so happened - that he asks you for information, you get back to him on that. That has happened.

Nilantha Jayawardena: Yes.

Q: Then that happens directly? Direct communication between you and the President –

Nilantha Jayawardena: That is up to His Excellency to decide. Sometimes he sends messages through the Secretary. Secretary calls me and says, “මේක බලල කියන්න කිව්වා කියලා;” then sometimes when he is outside and something like that or not in office. He does not call me directly. He always comes through certain exchange or something like that. So, he has asked certain things from me. So, whatever he asks from me directly, I directly talk to him. If he asks whatever through the Secretary, I talk to the Secretary.

Q: In the evidence laid before this Committee, it transpired that you have direct access to the President on matters of serious security that you brief the President directly.

Nilantha Jayawardena: Sir, this is the same answer, I have to give. When others have not done their job, they cannot say I expected him to do it. So, I do not brief the President on information every day. It is not my practice. If somebody is telling that I am briefing the President on information, that is not correct. That is not correct because-the same answer, I have to give you if he calls me and ask certain things because people go and tell him this thing, I will reply, but I don't talk to him and say, “Sir, there is a thing like this or there is a thing like that.” No, it is not my practice. It is not done by me-not the Director-State intelligence. But I brief them at the Security Council.

The above shows without an iota of doubt that there were occasions when Director, SIS had briefed the President. There were occasions where he had briefed them at Security Council meetings. There were several opportunities that he had without any kind of impediment to reach the President. Given that law imposes an obligation to keep the President acquainted with intelligence and information, this Court entertains no doubt that he failed in his duty to keep his Minister informed. In the same way he admits that he had briefed the National Security Council meetings and that imputes knowledge of preceding events and threats posed by Zahran to the President. Given this background, had the supervision, either through himself or National Security Council meetings, been continued, the President ought to have been put on notice of the impending disaster. The President had been remiss in this duty of keeping abreast of the latest information on Zahran and his associates.

As the English cases cited above unmistakably point out, there is a reciprocal duty of consultation and briefings particularly when national security is bestowed on the Minister.

If the Director, SIS was confronting obstacles in the way of implementing the safety and security of the people, it was his obligation to have sought out his Minister and briefed him and he cannot take refuge under a tattered veil of a self-imposed restraint. By virtue of his previous evidence before the PSC, he has himself lifted the veil behind what had gone on as regards his communications with the President and in the same way it does not lie in the mouth of both Hemasiri Fernando and the IGP that they had been disabled by their own minister. They had opportunities to liaise with the Minister of Defence. The opportunity presented itself when they met the President to wish him for the Sinhala and Tamil New Year on 14th April 2019 and in view of the intelligence both of them were possessed of, they could have collectively appealed to their Minister to exercise his powers under both the Constitution and others statutes such as the Public Security Ordinance. It was an egregious omission on their part even if the President had grown alienated from them.

As for the President it is his obligation to have had a constant vigil over his ministerial functions, as National Security was his portfolio and he should have exercised his supervision over his Departmental Heads regardless of personal predilections for particular officers. When it was within the competence of the Director, SIS, he had not provided any information to the President, which fact is corroborated by the President. But that does not relieve the President from his constitutional obligation of ensuring the national security of the country by remaining engaged with the responsible officials of his Ministry given the fact that Article 4 (b) of the Constitution declares that the executive power of defence of Sri Lanka lies with him.

Based on the narrative of inaction and omissions on the part of Nilantha Jayawardena – Director, SIS we hold that Nilantha Jayawardena is liable for having violated the fundamental rights specified under Articles 12(1) and 14(1)(e) of the Constitution.

Having arrived at that finding, we now proceed to look at the lapses on the part of Hemasiri Fernando-the Secretary, Defence.

Hemasiri Fernando-Secretary, Defence

Under Article 52(1) of the Constitution a secretary is appointed for each Ministry by the President. Article 52(2) provides that “The Secretary to the Ministry Shall, subject to the direction and control of his Minister, exercise supervision over the Departments of Government or other institutions in the charge of his Minister”.