20.07.2022, 26.07.2022, 27.07.2022, 02.08.2022, 29.09.2022, 04.10.2022 and 05.10.2022.

Decided on : 12.01.2023

On the ill-fated day of 21st of April 2019, this island home was awoken rudely to witness one of its most tragic events in the annuls of its history and in a series of bomb explosions that sent the nation reeling in shock and disbelief, scores of innocent worshippers at several churches as well as citizens in several locations were plucked away from their loved ones in the most macabre and dastardly acts of terrorism that this country has ever seen. In what has now come to be known as the Easter Sunday Attack or the Easter Sunday Tragedy in its melancholy sense, there was desolation and despair all-round the country and it may not be denied that it took a long while for this country to limp back to normalcy from the ravages of this tragedy. The trail of destruction and dislocation that the Easter Sunday Attack has left in its wake is a memory that this country will long live with and this Court is not spared its reverberations.

Several Petitioners have moved this Court in its fundamental rights jurisdiction invoking just and equitable remedies against some of the Respondents for what they plead as circumstances of inaction. It is only when the executive or administrative action or inaction gives rise to an infringement of a fundamental right, liability is predicated under Article 126 of the Constitution and the range of Respondents against whom declarations of infringement of fundamental rights are sought includes *Maithripala Sirisena* who held the office of the President in 2019, *Hemasiri Fernando*, the then Secretary to the Ministry of Defence, *Pujith Jayasundera*, the then Inspector General of Police (IGP), *Sisira Mendis*, the Chief of National Intelligence (CNI) and *Nilantha Jayawardena* [the then Director, State Intelligence Service (SIS)], to name but a few.

The Petitioners who allege inaction against these Respondents and attribute the Easter Sunday Blasts to the Respondents range from the President, Bar Association of Sri Lanka and 4 others (SC/FR/ Application No.195/2019), to several others who have filed similar public interest litigation and some who have suffered personal tragedies themselves. The Petitioners include an Attorney-at-law who sustained grievous injuries in the blast and a father who lost his children, while they were engaged in their religious worship at St. Anthony's Church, Kochchikade. This judgment will uniformly apply to all these applications namely SC/FR/163/19,SC/FR/165/19,

SC/FR/166/19, SC/FR/184/19, 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.

These applications deal with the aftermath of the Easter Sunday attacks that took place on the 21st of April 2019. Easter Sunday is a sacred day in the annals of the Christian Church. Easter Sunday is really a climax of a holy period, signalling a sacrificial period. The Easter Sunday service commemorates the most significant importance of the Resurrection of the Christ in the calendar of the Christians and Roman Catholics when churches are packed to capacity on this day. It is on such a day that these acts of terrorism were planned to be perpetrated on innocent worshippers and as a result more than 200 people died and several grievously injured. The terrorists set off their horrendous atrocities, not only on churches but also on hotels of the country, killing several people including overseas visitors and causing gruesome injuries on those who happened to be present at the places.

The petitions before us narrate harrowing tales of woe and seek redress from this Court by virtue of its sole and exclusive jurisdiction under Article 126 of the Constitution, which could afford just and equitable relief for action or inaction on the part of the Executive branch of the country. Some of the allegations of violations of Fundamental Rights engage the following articles of the Constitution- Article 12(1) (equal protection of the law), Article 14(1)(b) (the freedom of peaceful assembly), Article 14(1)(e) (the freedom either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching), Article 14(1)(g) (the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise) and Article 10 (every person is entitled to the freedom of thought, conscience and religion, including the freedom to have or to adapt the religion or belief of his choice).

In a conspectus the applications allege that these guarantees recognized by the Constitution have been infringed by some of the Respondents by their not acting with due care and attention so as to ensure the personal liberty and national security of this country.

The applications contain revelations of reckless failure on the part of the Executive Branch of the government and the Petitioners allege that these illegal omissions effectively betray the people and public trust by recklessly failing to take cognizance and accord due priority to intelligence information received regarding the premeditation of the attacks which could have been prevented if proactive and timely response had been taken. The Petitioners also submit that procrastination

in proscribing the terrorist groups and non-declaration of a state of emergency as a vital pre-emptive strike, contributed in no small measure to the growing menace of terrorism resulting in the most gruesome bomb blast and massacres that this country witnessed on the 21st of April 2019. The Petitioners further allege that no supporting structures were put in place in order to deal with an event of such magnitude that shocked this nation on the 21st of April 2019.

The Court will presently deal with the allegations which are relevant to the articles in which leave to proceed was granted-Articles 12(1) and 14(1)(e).

Thus, it becomes necessary to look at the powers, functions and duties of the state functionaries and ascertain as to how any breach of the obligations or omissions to discharge those obligations has resulted in deprivation of Fundamental Rights as alleged by the petitioners.

In order to indulge in this task, this Court will look at the constitutional, statutory and common law duties and functions entrusted to the Executive Branch and collate the facts and law in order to arrive at our conclusions.

We begin with a subordinate legislation that had been promulgated from time to time setting out the duties and functions of the President who was the Minister of Defence at all times material to the matter in issue.

By virtue of the Gazette bearing No. 2103/33 and dated 28th December 2018, Former President Maithripala Sirisena acting in terms of Article 43(1) and Article 46(1)(a) of the Constitution had issued a notification pertaining to the allocation of duties, functions, subjects, departments and instructions to Ministers and the responsibilities of such Ministers to implement specific laws of Parliament. This was the prevailing gazette at the time of the Easter Sunday attack.

Immediately at the end of the introductory paragraph of the said Gazette, one finds in bold letters numbered (1), the words **"Minister of Defence**". The Schedule pertaining to the Minister of Defence is divided into three columns.

Column I of the Gazette deals with duties and functions of the Minister of Defence. Whilst Column II deals with departments, statutory institutions and public corporations, Column III contains the laws and ordinances to be implemented by the Ministry of Defence. Item No.1 under Column I titled duties and functions contains the following as those of the Minister:

(i) *Formulation of policies, programmes and projects;* ***implementation, monitoring and evaluation in relation to the subject of Defence****, and those subjects that come under the purview of Departments, Statutory Institutions and Public Corporations listed in Column II.*

Apart from Sri Lanka Army, Navy and Air Force, some of the departments specified in Column II are Department of Civil Security, State Intelligence Service, Department of Police etc. In item No.2 in Column I, a duty to ensure the defence of the country by facilitation of the functions of the defence services is cast upon the Minister of Defence. In Item No.3, the Minister of Defence is tasked with the maintenance of internal security. The maintenance of defence and internal security related intelligence services, is another duty devolving on the Minister of Defence in terms of Item No.4. In Column III, the following laws *inter alia* are specified to be within the purview of the Minister of Defence:

- Prevention of Terrorism Act, No. 48 of 1979
- Public Security Ordinance, No 25 of 1947
- Suppression of Terrorist Bombings Act, No. 11 of 1999

In the last item of Column III, a residual power is vested in the Minister of Defence in the following tenor:

> All other legislations pertaining to the subjects specified in Column I and II, and not specifically brought under the purview of any other Minister.

It is pertinent to observe at this stage that State Intelligence Service (SIS) and the Department of Police are two separate departments existing respectively as items No. 11 and 15 in the Gazette. A comparison of the previous Gazette notifications namely, Gazettes bearing No. 1897/15 dated 18th January 2015, No. 1933/13 dated 21st September 2015 and No.2906/17 of 5th November 2018 *vis a vis* the Gazette bearing No. 2103/03 of 28th December 2018, shows a recognizable and increasing spectrum of powers assigned to the Minister of Defence over all aspects of public security, internal security, law enforcement and intelligence agencies as well as the relevant Acts of Parliament. For instance, whilst the Gazette Extraordinary bearing No.1897/15 listed out only 14 items of duties and functions of the Minister of Defence, the second Gazette issued in 2015

namely No.1933/13 dated 21st September 2015 set out 15 duties and functions. The first Gazette in the year 2018 bearing No.2096/17 contained 22 duties. The second gazette issued in the year 2018 namely Gazette Extraordinary bearing No.2103/33 and dated 28th of December 2018 bestowed on the President 23 duties as a Minister of Defence.

Thus, there was an increase of duties vested in the Minister. As for the departments, statutory institutions and public corporations, initially there were only 14 departments that were brought under the Minister of Defence in the year 2015 but come the year 2018, the number of departments rose to 17 in the first Gazette and ended at 21 in the second Gazette. The Department of Police itself was never there under the Minister of Defence in 2015 until it was brought under his purview in the year 2018. It has to be pointed out that the State Intelligence Service (SIS) continued to be vested in the charge of the Minister of Defence from the year 2015. One can thus observe that an exponential range of powers over security continued to be bestowed on Minister of Defence as the years rolled by and it cannot be gainsaid that the Minister of Defence was the repository of the national security of the country.

In other words, it could be said that the custody of personal liberty and security of the nation were enshrined in this long list of duties and functions and bestowed in the hands of the Minister of Defence. Around the fateful day of the Easter Sunday Attack namely 21st of April 2019, the source of specific duties and functions of the then President with regard to national security of the country had all been set down in the aforesaid Gazette notification bearing No. 2103/03 and dated 28th December 2018.

These are the duties and functions which the President had assigned to himself in terms of Article 44(2) of the Constitution.

If one may take a look at the Constitution, Article 4(b) of the Constitution pinpointedly declares that the executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the people. Article 30(1) of the Constitution states that there shall be a President of the Republic of Sri Lanka, who is the Head of the State, Head of the Executive and of the government and the Commander-in-Chief of the Armed Forces. Article 52(2) of the Constitution vests with the Minister of Defence the power of direction and control of

the Secretary to the Ministry of Defence. Put in a nutshell, the Minister himself is enjoined to personally direct and exercise control over the Secretary as regards supervision over the departments and other institutions in charge of the Minister. As was stated before, it has to be kept in mind that the duties and functions enumerated in the relevant Gazette on the day of the disaster (Gazette No 2103 of 28th December 2018) had brought under the purview of the Minister of Defence, two different pivotal departments of national security namely the State Intelligence Service (SIS) and the Department of Police.

The Constitution casts upon the Minister of Defence, a duty to give directions and exercise control as regards the supervision of these departments. A conjoint reading of the constitutional imperatives such as Articles 4(b), 30(1), 44(2) and 52(2) makes it patently clear that the Minister of Defence is placed under a charter of duties and obligations from which he cannot resile as regards national security and internal security of the country. It is often said that national security and liberty of individuals stand out as two sides of a coin which binds the state to a strong commitment. On the day in question, to wit the 21st of April 2019, the President of the country who was also the Commander-in-Chief of the Armed Forces had undertaken these obligations, which our Constitution, domestic laws and regulations, amply declare aloud demanding allegiance to the commitment of maintaining defence and security of the nation.

The Magna Carta of 1215 was the earliest example of such an undertaking to protect the liberty and security of the citizen given by King John of England.

Just as the declarations in the Magna Carta, solemnly executed by the King and the barons on 15 June 1215 at Runnymede, in the meadows outside Windsor, proclaim the underpinnings of the age old fundamental rights and the rule of law, so does our Constitution have their modern articulations writ large in 1978, and with the people of the country solidly behind it appealing to the venerable undertakings in our Charter to be respected, upheld and advanced by all arms of the government viz the legislature, executive and the judiciary.

As this Court said at the outset, the gravamen of the serious allegations of infractions made in the several petitions would boil down to an assertion of inaction, that is made actionable at the instance of an aggrieved party under Article 126 of the Constitution. The Petitioners allege in unison that when the tragedy struck this country on 21 April 2019 and innocent lives were taken away and property damaged and razed to the ground, there had been indications that a disaster

would be a long time coming. The Petitioners further contend that the executive branch of the government chose to ignore the semaphore signals and turned a Nelsonian eye to an obvious catastrophe. This would appear to be the nub of the Petitions and this Court would proceed to assay and appraise the facts which are either uncontested or common denominators among the parties.

The allegation of executive inaction springs from security warnings, intelligence messages, concept papers and correspondence that took place among some principal protagonists of the executive branch i.e *Nilantha Jayawardena* (the then Director, SIS), *Sisira Mendis* (the then Chief of National Intelligence, CNI), *Pujith Jayasundera* (the then Inspector General of Police) and *Hemasiri Fernando* (the then Secretary to the Ministry of Defence). The Petitioners make the pinpointed allegation of executive inertia against the then President *Maithripala Sirisena* for not taking steps to avert the bizarre mayhem and destruction and they contend that it was within his powers to have ensured the personal liberty and security of the people and prevented the precarious slide into anarchy.

After having indulged in an analysis of what we would call notorious facts and other collateral facts, we propose to deal with individual aspects of liability under Article 126 of the Constitution. These facts indicate the extent of the gravity of a threat that had snowballed into an alarming incubus and we must state that coming events had cast their shadows long prior to 2019 - the annus horribilis. The prior events foretold the incalculable disaster that was about to unfold and we point out that the pleadings and accompanying documents are rife with warnings and danger signals that had existed since 2015. There were visible signs of a growing menace of extremism and an open warrant had long been issued against Zahran Hassim-the enfant terrible of this extremist outfit. The writing on the wall notwithstanding, this purveyor of terrorism and his cohorts were allowed to remain at large and there was inadequate and inadvertent response to an obvious risk. The above would constitute the pith and substance of the cumulative submissions of all learned Counsel for the Petitioners.

We would, albeit the danger signals emanating from 2015, focus on the more immediate red flags on the eve of the disaster, which principally form the fulcrum of the complaints of the Petitioners. We would begin from 4th April 2019 - a few hoots away from the tragic events of 21st April 2019. In this process we would make the preliminary observation that there were different proceedings at different times in relation to the tragic events of 21st April 2019 before

several fora and some Respondents have appended to their statements of objections the Minutes of Evidence before the Select Committee of Parliament that had been appointed to look into and report to Parliament on the Terrorist Attacks of 21st April 2019. Some of the Respondents before this Court had given evidence before the Parliamentary Select Committee (PSC) and those minutes of evidence pertaining to their evidence are before this Court. Some of the Petitioners rely on the prior evidence given by the Respondents before the PSC and seek to juxtapose the later statements before this Court *vis a vis* the previous out of Court statements of the Respondents. We bear in mind that Section 57 (4) of the Evidence Ordinance which states that the Court shall take judicial notice of the course of proceedings of Parliament and of the legislature of Ceylon. Section 2 of the Parliament (Powers and Privileges) Act, No 21 of 1953 as amended defines Parliament to mean the Parliament of Sri Lanka, and to include a committee. In the case of ***S.N. Kodakan Pillai v P.B. Mudunayake***[1] the Privy Council declared that judicial notice may be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature where the Citizenship Act and the Parliamentary Elections Amendment Act were passed. The use of the words "such matters", in our view, would include a previous statement made by a witness who subsequently becomes a Respondent in judicial review proceedings such as under Article 126 of the Constitution.

The Indian Supreme Court repeated the same dictum as in ***Kodakan Pillai v P.B. Mudunayake*** in ***Additional Commissioner of Income Tax (C.I.T) v Surat Art Silk etc***.[2] Thus it is open to this Court to test the veracity of the statements made before this Court vis-à-vis a previous statement made by a Respondent in his evidence before the Parliamentary Select Committee (PSC). Both Section 57 (4) of the Evidence Ordinance and the case law permit this Court to take judicial notice of the proceedings before the Parliamentary Select Committee, more particularly when such proceedings have been brought to the notice of this Court. In fact, no serious objection as to the admissibility of the evidence given by some of the Respondents before the PSC was ever raised before this Court.

[1] (1953), 54 N.L.R 433
[2] A.I.R. (1980) S.C.387.

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 it 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 regulations[5] 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 offenders[6] 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

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[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 may 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".

On 30th October 2018, the President acting in terms of Article 52(1) had appointed Hemasiri Fernando who has been cited as a respondent in all these applications. He had been entrusted with the responsibility of steering and / or conducting the affairs of the government departments and other establishments on the direction and control of the Minister to whom such departments and establishments are assigned.[8] Fernando has served in this capacity until he resigned on 25th of April, 2019.

In December 2018, the President acting in terms of Article 44(1)(a) had allocated *inter alia* Sri Lanka Army, Sri Lanka Navy, Sri Lanka Air Force, State Intelligence Service and Police Department to the Minister of Defence. It is also pertinent to observe that Public Security Ordinance, Prevention of Terrorism Act No 48 of 1979 and Suppression of Terrorist Bombings Act No 11 of 1999 are three laws among others that are to be implemented by the Ministry of Defence.

In the afternoon of Monday, 08th April 2019, the Chief of National Intelligence had brought to the attention of Hemasiri Fernando, the contents of the communication he had received from the Director State Intelligence Services on the same day. Upon receipt of this information, the former secretary, defence had discussed with the CNI its content and wanted the matter to be raised and discussed at the weekly intelligence coordinating meeting that was already scheduled for the following day (09 April 2019). As we said before, on 9th April 2019, the former secretary, defence had chaired the ICM but surprisingly, the former Secretary Defence under whose supervision the State Intelligence Service was placed did not take any initiative to open a discussion on this vital piece of intelligence. In our view the former secretary had failed in his duty as the supervisory authority of the State Intelligence Service as he remained silent without raising this issue at the meeting.

The failure on the part of the Director SIS to brief the audience as well as the failure on the former Secretary, Defence to raise it with the Director SIS in the presence of other attendees, including the tri-force commanders, Heads of Intelligence units of tri-forces and the IGP resulted in the loss of an opportunity to strategize a proper plan of action with the collaboration of all important defence establishments to prevent any possible attack as had been forecast in the said intelligence report. However, Hemasiri Fernando himself having recognized the importance of taking precautionary measures at that initial stage itself later on instructed the CNI to share that information with the IGP. It is difficult to comprehend the reason for the failure to raise this

[8] 2R3 in SC FR 195/19.

matter at the Weekly Intelligence meeting, the first earliest opportunity that arose. The failure on the part of the Director SIS and the former Secretary Defence in this regard resulted in the tri-force commanders being completely kept in the dark on any possible threat to security as revealed in the information, until the attacks took place twelve days later. The Secretary himself admitted in his affidavit before this Court that "*if the said matters adverted to in the said letter was discussed at the said weekly intelligence meeting, all those present at the said meeting would have been adequately apprised of the matters adverted to therein".*

Hemasiri Fernando has placed the full responsibility on the Director SIS for the failure to raise this matter at the Weekly Intelligence Meeting. Furthermore, he attributes the responsibility to the Director SIS for the failure to draw his personal attention to the information and the omission to highlight what counter-measures should be adopted to neutralize the threat of any attack and claims that the Director SIS had acted in complete dereliction of duty.

As we have already observed, the responsibility for the failure to raise this matter at the Weekly Intelligence Meeting rests not only on the Director, SIS but also the Secretary, Defence. Additionally, the CNI could have coordinated the initiation of the discussion. The Secretary cannot absolve himself from this responsibility by shifting it to the Director, SIS, because his supervisory role mandates him to raise it himself. Hemasiri Fernando claims that he could have "*put in motion a coordinated security plan with the assistance / participation of the different law enforcement agencies, including the Police and Armed Forces with the concurrence of the political leadership of the country".*

In fact the CNI on the 09th April 2019, after the weekly intelligence meeting, had conveyed to the IGP the intelligence information he had received from the Director, SIS highlighting the importance to alert Law Enforcement Agencies to be vigilant concerning the information. The CNI signed this communication on behalf of the Secretary, Defence. However, the Secretary, Defence thereafter took no steps on his own or through the CNI to seek any verifications or reports either from the Director, SIS or from the IGP on any further developments relating to the information on the planned attacks.

There had been complete silence on the part of the Secretary on this matter until he received a text message from the Director, SIS. The said message was delivered to Hemasiri Fernando's phone at 16.53 on 20th April 2019. According to Hemasiri Fernando, he read this message only after Director SIS called him and drew his attention. At 18.23 Hemasiri Fernando replied "*well received*". Hemasiri Fernando claims that he was not in the habit of perusing WhatsApp

messages as he did not consider it a secure mode of communication. However, at 21.10, on the same day he had sent another message to the Director SIS saying "*Discussed with IGP on your advice*".

Has Hemasiri Fernando paid necessary attention and taken sufficient measures consequent to the receipt of the aforesaid text message? The said message not only discloses the dry run explosion that took place in *Palamunai, Kattankudi* on the 16th April 2019 but proceeds to warn of the likelihood of an attack anytime on or before 21st April 2019 targeting eight places including a church and a hotel. Having himself procliamed his ability that he had the capacity to put in place a coordinated security plan with the participation of law enforcement agencies with the concurrence of the political leadership of the country, did he take reasonable measures in response to the reported threat? According to his own version, he had not taken any steps other than having a discussion with the IGP. Did he not have a duty to apprise the Defence Minister who was the President and seek his directions in this situation? It is undisputed that Hemasiri Fernando did not apprise the Minister nor did he make any attempt to do so at any time from the time he came to know of the intelligence information on the possible attack. It is his position that the President himself had informed him that the Director SIS briefed him on all matters pertaining to intelligence and the need for the Secretary, Defence to apprise him on such matters did not arise. However, Hemasiri Fernando at no stage takes up the position that there was no need for the President to have been briefed regarding the intelligence information on the possible attack.

In our view it is the duty of the Secretary under whose supervision the State Intelligence Service was placed to take necessary measures to brief the President by himself or through any other source. Hemasiri Fernando at no stage inquired from the Director, SIS whether he took necessary steps to brief the President on the situation. It remained his responsibility to ensure that the President was briefed given the gravity of the situation at least after the information he received in the evening of the 20th April. Furthermore, at no stage he notified the Secretary to the President on this matter. Considering all the circumstances relating to the matters under consideration, in our view the Secretary, Defence failed to exercise his duties with due diligence. He was derelict in his duties by failing to take necessary measures in the given situation and his inaction contributed to the violation of the right to equal protection of the law guaranteed to all persons including petitioners. There was a constitutional duty imposed on the Secretary to exercise control over the departments but in the circumstances, there had been a flagrant dereliction of the duty. Thus, there has been inaction on the part of the Secretary resulting in the

infringement of the fundamental rights of the citizens under Article 12(1) and 14(1)(e) of the Constitution.

Sisira Mendis-Chief of National Intelligence

In his affidavit dated 8th November 2019, he speaks of the scope of his duties and functions. He was appointed to the position with effect from 10TH April 2015. The position of the Chief of National intelligence (CNI) had been established in order to ensure coordination between intelligence agencies. This would appear to be the pivotal role of the CNI.

Despite an absence of a list of duties specifically assigned to him, he had been signing letters and reports on behalf of the Secretary, Defence. Upon a perusal of documents appended to his affidavit, this Court observes that he had forwarded a concept paper to Secretary, Defence on 20th July 2016 titled "*Countering the threat posed by the Islamic State of Iraq and Syria*" (ISIS). Emphasizing the need for capacity building training, he states in the concept paper "it is vital that officials are provided training on the United Nations Security Council Resolution 2178 to ensure a foundational understanding of countering violent extremism (CVE). He also lists out threats to Sri Lanka and states that the most visible efforts to count of the ISIS threat are in the areas of Law, Policing and Intelligence. In November 2017, he sends a report on the same topic to Inspector General of Police drawing attention to the United Nations Security Resolution 2253 of 2015 (UN SCR 2253), to come to the activities of ISIS. In fact, it is worth quoting the UN SCR 2253;

> "*terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed, and reiterating its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIS, also known as Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability…"*

Even in March, 2019 - one month away from the attack, this Court finds Sisira Mendis distributing to Chief of Defence Staff, Commander of the Army, Commander of the Navy, Commander of the Air Force, Director, State Intelligence Service and Director, Military Intelligence a document titled "***Matters discussed at the weekly intelligence coordinating***

meeting." One of the items that had been discussed at the meeting was pertaining to the activities of Mohammed Cassim Mohammed Saharan.

All this shows that he had been sensitive to the ideology of Zahran and cohorts since 2016. Even on 4th April 2019, he had collated information on Zahran and distributed it.

But subsequent events clearly show that he falls short of his duties. It is the CNI to whom the Director, SIS first passed his intelligence he had received on 4th April 2019. The CNI received this information on the 7th and passed it on to the Secretary, Defence on the 8th April. He forwarded it to the IGP. Other than for bringing it to the attention of IGP and Secretary, Defence, there was no one whom he informed.

Then the ICM took place on 9th April 2019 where the IGP himself was a participant. There is no evidence before us whether he checked with the IGP as to the counter measures taken by Police having regard to the intelligence received. Submissions were made that a large number of officials worked under the CNI. There is no evidence that he took immediate steps to have the intelligence information verified by his own staff apart from his failure to share it with all other relevant officials.

The facts established before this Court clearly show that he fell short of his primary duty of sharing intelligence. It is in evidence that he omitted to ensure that the intelligence received on 4 April 2019 was disseminated to other intelligence agencies, for instance Director of Military Intelligence. This becomes critical given that the largest force of intelligence officials is with the DMI.

At the crucial ICM on 9 April 2019, he complains that the Director, SIS did not take the opportunity to discuss the intelligence that he was possessed of. But this failure does not relieve the CNI from his obligation to raise this issue as his primary duty was one of coordinating intelligence among agencies of the state and moreover the item No 3 of the agenda for the 9th meeting shows clearly that he was entrusted with a duty to brief the participants on National Security.

AGENDA FOR THE WEEKLY INTELLIGENCE MEETING 19 MARCH 2019

1. *Opening Statement by the Secretary Defence.*
2. *Current Security/Intelligence Update*
    a. *Briefing by Director/ State Intelligence Service*
    b. *Briefing by Director Military Intelligence*
3. ***Any other matters pertaining to the National Security – to be taken by CNI, CDS, Tri-Services Commanders and IGP.***
    a. ***Activities of Mohammed Cassim Mohammed Saharan – Leader of National Thowheeth Jama'ath (NTJ)***
    b. *Usage of pro LTTE symbols at the School Sports Meet in North.*
    c. *Poaching by Indian fishermen in territorial waters of Sri Lanka.*
    d. *ISIS returnees to Sri Lanka*
    e. *40th session of the United Nations Human Rights Council (25 February – 22 March 2019).*
4. *Any other intelligence related matters – to be briefed by Naval and Air Intelligence Directors.*

Closing Remarks

His failure to share Nilantha Jaywardena's information created a lack of awareness among crucial intelligence officials and had that duty been discharged by the CNI, a well-coordinated plan to locate and apprehend the dangerous outfit of terrorists could have been launched. By virtue of his office, the CNI Sisira Mendis had known the extent of infiltration of destructive ideologies having regard to the fact he himself produced reports on them and he ought to have realized the threat brought to light by the intelligence.

But the CNI failed in his duties by turning a blind eye to the onerous responsibilities attendant upon his office. In the circumstances this Court is of the view that Sisira Mendis stands liable for infringement of fundamental rights guaranteed under Articles 12(1) and 14(1)(e) of the Constitution.

Pujith Jayasundera-Inspector General of Police

It could be said that it is in the same way that the IGP has committed his own omissions, when there were obvious risks to which he paid no attention. His inadvertence to those obvious risks

amounts to a violation of his statutory duties which he owes the citizenry and there is a clear infraction of his duty to implement the provisions of the legislation guaranteeing national security and integrity to every citizen in the country. One need not trawl through a whole host of duties enjoined upon the IGP. The IGP is bound by the Police Ordinance and it cannot be denied that it is the Inspector General of Police, who had the statutory authority, and the machinery under him, to act.

Section 56 of the Police Ordinance on the duties and liabilities of police officer states:

> *Every police Officer shall for all purposes in this Ordinance be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka. It shall be his duty (a) to use his best endeavors and ability to prevent all crimes, offenses, and public nuisances; (b) to preserve the peace….. (f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority*.

It is quite clear from the above that each policeman is notionally equal as being answerable to the law alone, and being obliged to enforce it.

The main objective of police is to apprehend offenders, to investigate crimes and to prosecute them before the Courts and also to prevent commission of crime and above all to ensure law and order to protect the citizens life and property. It is unfortunate that these objectives have remained unfulfilled in this case. Even if the President had become estranged with the IGP, the IGP had the statutory authority to seek out and apprehend Zahran and his associates. There could have been a well coordinated network put in motion by the IGP to go after and stake out Zahran as he was an absconder and his whereabouts were well known. Urgent and accurate Indian warnings elicited a tardy and confused response and it does not augur well for the Police Department to let go of a fugitive from justice to flee from town to town and allow him to let loose his trail of devastation.

If one may list out some of the other omissions on the part of the IGP, so glaring are the following:

The IGP had been briefed of the intelligence by 8th April 2019 when he attended the meeting with the President. The obvious question arises-why is it that he did not apprise the President at this meeting? We have already referred to his limited dissemination of intelligence to a few subordinates on the 9th April 2019. The IGP never took steps to inform the President, Prime

Minister and the relevant security personnel. Even if he had been alienated by the President, the IGP did meet the President and the closer association of the head of another department with the President is no ground for refusing to broach intelligence related matters with the Minister. Though he was notified of the dry run in Palamunai, this vital intelligence was not shared by him with a wide spectrum of personnel.

He had also not given sufficient instructions to his subordinates as to the measures that should be taken at the ground level. Statutorily enjoined as he was, more could have been done to either prevent or at the very least mitigate the attacks if the IGP had taken robust and speedy measures and given clear instructions for preparations on the ground. Churches could have been informed and there could have been a public alert.

What earthly use did the IGP make of the periodical reports that the Director, SIS had sent him? These reports constantly refer to Zahran's preaching and extremist views. We have seen efforts made by the IGP to take some proactive action in regard to extremism but several factors indicate that his responses were inadequate and are not emblematic of the head of the Police Force.

The fact that he signed some of the reports with notations such as *F.N.A and Report Back* show that he acquired knowledge of the magnitude of the rising extremism. In light of these reports provided by the SIS, was he not put on notice? Did not this mass of information trigger a response so as to activate the TID and CID to arrest Zaharan, Rilwan et al from their hideouts? If there was a failure to arrest these aberrant fugitives on the run, why did not that failure engage his attention and gnaw at his conscience? Did he remain engaged with all the SDIGs from the 9 provinces? Why did not he hold a face-to-face conference with the highest police officials from the provinces *ex abundanti cautela*? Did he seek responses with the 4 senior police officers to whom he had copied the intelligence?

What was the strategic counter measure which he devised in the face of the mounting intelligence? These questions remain unanswered. The dry run explosion on 16th April 2019 in Kattankudy indicated the magnitude of the danger facing the nation but it does not appear that the IGP took any step further than putting minutes to the effect- "for necessary action".

In view of the voluminous nature of information and intelligence the IGP had in his possession (for instance 97 reports between 20.04.2016 and 29.04.2019 and subsequent information and

intelligence), the IGP had a duty of care towards the nation and we do not feel satisfied that the IGP took all steps necessary to avert the likelihood of the disaster. Despite the most proximate relationship that both the Secretary, Defence and IGP say Nilantha Jayawardena was having with the then President, it was incumbent on both of them to have also raised these matters of national interest with the President. The mere assumption that Nilantha Jayawardena would convey the information to the Minister of Defence is an omission on their part as they were both aware of the serious consequences of the intelligence and they should have ascertained whether extra steps should be taken or they should have acted over and above their call of duty. Even if the President had been averse to the information being provided by them, the rest of the political leadership including the Prime Minister should have been informed.

What takes the cake is what the IGP did on 21st April 2019. There is evidence before this Court that though Nilantha Jayawardena had submitted reports to the IGP on the 18th, 19th and 20th April 2019, the IGP made an endorsement on the report only on 21st April 2019 calling upon Nilantha Jayawardena to submit further reports on 5th May 2019. If one may elaborate on these reports, the report on the 18th April 2019 was delivered to the IGP indicating the findings of the State Intelligence Service with regard to the dry run explosion in Kattankudy on 16th April 2019, which was attributed to Mohamed Cassim Mohamed Zahran and NTJ. The report requested the IGP to alert all police stations about another motorcycle which had been purchased by the outfit. The report sent to the IGP on 19th April 2019 provided details of additional persons suspected to be behind the explosion of the motorcycle on 16th April 2019 and requested the IGP to conduct inquiries into the explosion in order to thwart future plans of Zahran Hashim. On 20 April 2019, another report had been delivered to SDIG/CID with a copy to the IGP indicating the closest network of Zahran Hashim. This report revealed the names of 14 persons out of which 06 died in the Easter Sunday Explosions. Undoubtedly this Court finds a quick frequency with which the Director, SIS kept the other officers including the IGP informed but we must make the observation that the same degree of enthusiasm was not displayed by the Director, SIS at an anterior point of time, when he had received tell-tale signs of the impending disaster by way of information and intelligence. The enthusiasm to inform the other officers including the CID appears to have assumed greater proportions only when the danger was right round the corner.

Be that as it may, what this Court observes is a total lack of attention of the IGP to these reports. On all these 3 reports the IGP appended his endorsements only on 21st April 2019, long after the destruction and desolation had been wrought upon the country by the terrorists and as if this

dereliction was not glaring enough, the IGP proceeded to call for a report from the Director, SIS by 5th May 2019.

Nothing is more lackadaisical than this approach and it is indubitable that the IGP acted with a serious want of care and devotion towards his duties and functions.

These omissions on the part of the IGP exposes him to infringements of fundamental rights the Petitioners have alleged against him and we conclude that by his inaction and omissions he has committed the infringement of the fundamental rights under Articles 12(1) and 14(1)(e).

Next, we turn to the Minister of Defence for his accountability in regard to the tragedy that engulfed this nation on 21st April 2019 and we must observe that we have already alluded to his constitutional, statutory and common law duties and functions elsewhere in the judgment.

Maithripala Sirisena-Former President/Minister of Defence

We have made some preliminary observations before on the executive powers which the President enjoy under the Constitution. We also look to case law to ascertain the extent of his powers. We would advert to them briefly.

Article 4(b) of the Constitution directs that the executive power of the People including the defence of Sri Lanka shall be exercised by the President of the Republic elected by the People. We have already adverted to Articles 30 (1), 44 (2) and 52 (2) of the Constitution. We have already alluded to his duties and functions assigned to him under the Gazette bearing No. 2103/33 and dated 28th December 2018.

In ***Re Nineteenth Amendment to the Constitution*** (***Special determination 04/2015 to 10/2015, 14/2015 to 17/2015 & 19 of 2015***) the Supreme Court declared as follows:

> *"…The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the people…."*

The above observation puts it beyond doubt that the President has to exercise constant supervision and monitoring of his subordinates and there is no warrant for the former President's

assertion that certain heads of departments are not under an obligation to report to him, while others are. An absence of such a monitoring mechanism on his part leads to a prejudicial impact on the sovereignty of the people and we certainly see a failure in this regard on the part of the then President Sirisena.

The Supreme Court had occasion to make its pronouncement on the nature and extent of the powers of the Minister of Defence in a reference sought by the then President Chandrika Bandaranaike in terms of Article 129 (1) of the Constitution. The Supreme Court observed in that determination (***SC Reference No 2/2003)*** that the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka and that the Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President.

The following observations of the Supreme Court bears repeating:

> *We have to express our opinion in accordance with the constitutional determination made by a bench of 7 Judges of this Court that the executive power being a component of the sovereignty of the people, including the Defence of Sri Lanka, is reposed in and exercised by the President and any transfer, relinquishment or removal of such power from the President would be an alienation of sovereignty which is inconsistent with the Constitution.*
>
> *A balance is struck in relation to the executive power thus vested in the President by Article 42 which provides as:*
>
> *the President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law related to public security…."*

Apart from the above, the scope and ambit of the executive power exercised by the President are delineated and expatiated by the several notifications that appear from time to time and such notifications were published in Gazettes extraordinary No 1896/28 as amended by No 1897/15 dated 18th January 2015 and No 1933/13 of 21st September 2015. At the relevant time the Gazette bearing No. 2103/33 and dated 28th December 2018 governed the scope and ambit of the presidential powers under the Ministry of Defence.

Prior to 4th April 2019, the National Security Council (NSC) had been in existence for several years and it would appear that it had functioned without any legal framework. It was given statutory recognition under the Public Security Ordinance in terms of Emergency (National Security Council) Regulation No 1 of 1999 published in Gazette Extraordinary No 1081/19 and dated 27th May 1999. This subordinate legislation established an NSC with the President as its head, tasked with the maintenance of national security with authority to direct security operations and matters incidental to it.

This Court heard submissions that prior to January 2015, the NSC used to meet every week on Wednesdays under the chairmanship of the President, before which an intelligence coordination meeting was held on Tuesdays presided over by the Secretary, Defence. This arrangement paved the way for many an aspect of national security to be thrashed out at these meetings and intelligence and other useful information used to be freely exchanged at these meetings. It is how the executive was kept apprised of the national security situation in the country and that facilitated the discussion of all matters pertaining to national security.

It would appear that under the presidency of the former President Sirisena the NSC meetings were sporadic and not regular. If one were to formulate policies with regard to national security and exercise supervision over the security echelons of the Government, the NSC was a useful tool in the hands of the President but a notorious misappreciation of the duties and functions of the Minister of Defence has led to an appalling lack of appreciation of the importance of the National Security Council. The dangers posed by Zahran and his terrorist outfit could have been effectively appreciated and dealt with had this mechanism been in place but its efficacy had been lost on the then President.

The Court finds that there was no meeting summoned for of either ICM or NSC after 9 April 2019 and in our view, it is a serious lapse having regard to the nature of intelligence information received and following the 16 April 2019 dry run explosion. It would appear that despite the 1999 Gazette which provided for the Constitution of the NSC, the attendance at the NSC had been determined solely by the President with no reasons given for the exclusion of key members who should have been an indispensable part of security and intelligence briefings such as the Prime Minister, State Minister for Defence and the IGP. There was extensive submission that the Prime Minister was kept out of the NSC and was not provided with any information.

All this is a stark reality that strikes this Court as a serious omission on the part of the then President. In 2019 there had been only two NSC meetings convened by him. One was on 14th January before the discovery of the Wanathawilluwa explosives and arms cache and the next on 19th February. This was one of the largest discoveries of explosives after the end of the war in 2009. It cannot be gainsaid that the former President Sirisena was made aware of these discoveries at Wanathawilluwa. In these circumstances it was obligatory on the part of the former President Sirisena to have convened the NSC every week and put in place a mechanism to address the threat posed by Zahran and his cohorts. This was never done much to the discomfiture and dislocation of the security apparatus. It has to be pointed out that only after the bombs ripped through the nooks and crannies of this country, wisdom dawned upon the importance of NSC meetings.

This dismal failure on the part of the former President Sirisena resulted in disastrous consequences for this country and not only lives were lost and properties destroyed but inter racial tension and inter-ethnic hatred began to raise their ugly heads causing the very fabric of this nation to be broken and become fragile. There were fear psychosis, apprehension and inter-ethnic alienation that were palpable through the length and breadth of the country. The due care with which the Minister of Defence must have exercised his wide powers in the greater good of the country was totally non-existent having regard to the evidence that has been placed before this Court. The consistent declaration of this Court that "Public Trust" doctrine is not a mere matter of contract bears particular repetition at this stage.

> "*We are not concerned with contractual rights, but with the safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred-not at the whim and fancy of officials, for political advantage or personal gain*."-see ***Pryangani v Nanayakkara***[9]

Given the constitutional, statutory and common law duties as expounded by ***Carltona***, other case law both domestic and overseas and SC determination in regard to national security, it was the bounden duty of the former President Sirisena to have supervised his departments. The then

[9] (1996) 1 Sri.LR 399 at 404-405.

President Sirisena presided over several of the NSC meetings until he terminated the mechanism and he cannot deny that he was fed with a large volume of information on Zahran and his destructive tendencies. If he was not informed by the Secretary, Defence, IGP or even Director, SIS as he puts an unconstitutional and illegal muzzle on this officer for reasons best known to himself, the question arises as to how he was getting his information regarding national security, which is constitutionally vested in him. As we have pointed out, his personal attention is required in extreme cases of emergency and it is for this reason Public Security Ordinance clothes him with awesome powers. The citizenry is entitled to the protection that the Constitution and laws accord them.

In a nutshell the importance of not only the NSC, but other established structures and practices enjoined by case law and determinations of this Court appear to have been shelved aside by the President and his own Secretary, Defence and IGP have not been directed to share information and though this Court does not look at the conduct of the officials themselves with favor, it strikes us that this non communicative and distant style of handling the all-important Ministry of Defence has caused fissures in the national security mechanisms of the country and thus there was a collapse of the structures and practices that should be in place to strengthen and ensure the efficient and effective security apparatus.

We conclude that the former President Sirisena has been lax in affording the protection and guarantees enjoined under the Constitution and other laws and he has breached his duty to protect. Thus we hold that he has infringed the fundamental rights enshrined under Article 12(1) and 14(1)(e) of the Constitution.

Further on the question of liability the learned President's Counsel in SC/FR /293/2019 submitted that the cabinet of ministers must also be held liable on the strength of **Section 12 of the Suppression of Terrorist Bombings Act 1999** which reads as follows:

> *The Government of Sri Lanka shall take appropriate measures to prevent any person or group of persons from committing or encouraging, instigating, organizing or knowingly financing the commission of, an offence under this Act, or of an offence specified in the Schedule to this Act, whether in or outside Sri Lanka.*

The learned President's Counsel relied on Section 2 (bb) of the Interpretation which goes as follows:

"the Government" where no other meaning is indicated by any descriptive or qualifying words or by the context, and the "the Ceylon Government" or the "Government of Ceylon" or "the Government of this Island" or the "Government of the Island of Ceylon", shall notwithstanding any provisions of written law to the contrary, mean the Cabinet of Ministers appointed under the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947:

Though the Constitution does not define the term 'government", the interpretation offered by the Interpretation Ordinance does not serve as a useful guide, as it deals with a cabinet of a bygone era and such interpretation will be inappropriate in the context when the executive power of the people, including the defence of Sri Lanka is to be exercised by the President. In any event leave to proceed in these applications was given only against some respondents and not all members of the Cabinet. In the circumstances we do not subscribe to the argument of the learned President's Counsel that the Cabinet must be imputed with liability as the facts and circumstances prove otherwise. The specific assignment and supervision of Defence in the President will militate against any member of the Cabinet being fixed with liability when there is no evidence before this Court that none of them was invested with intelligence with reference to the impending attack. Some of the members of the Cabinet including the Prime Minister were kept out of what appears to be a jealously guarded intelligence and in the circumstances it is inequitable to hold them liable as they are not similarly circumstanced as the respondents we have found liable.

Having dealt with the accountability and liability of the respondents we have identified as culpable, we now turn to set down the general principles that guide us in arriving at the accountability of the State and the Respondents we have referred to above.

It is often the case that today the Courts do take cognizance of tortious or delictual principles in the adjudication of fundamental rights violations and who can deny the intrusion of private law principles into public law domain?

Do the Courts of Sri Lanka have to sit idly by when several jurisdictions abroad have embraced the concept of constitutional torts in human rights law adjudications? Our Constitution states in Article 126 that the Supreme Court has the exclusive jurisdiction to deal with cases involving infringement of fundamental rights. Indeed, in ***Vivien Gunawardena v Hector Perera***[10] Soza J stated that the Constitution of 1978 provided a special forum and machinery for enforcement of

[10] (1983) 1 Sri LR 305 at 320.

fundamental rights but that "old remedies co-exist with the new". Even in ***Saman v Leeladasa***[11] Justice Mark Fernando proceeded to link the constitutional remedy and the delict remedy. He went on to hold that the delictual liability provides a basis for awarding compensation against the State according to the ordinary common law principles of vicarious liability in delict. He drew on the concept of vicarious liability in delict to determine the liability of the State under the Constitution to pay compensation to the victim of a violation. Justice Fernando famously said[12]

> "*The principles whereby an employer or principal is to be made responsible for the act of his employee or agent have not been laid down by the Constitution and there must be determined by reference to other (statutory or common law) principles of law..*"

It is apparent that Justice Mark Fernando had in mind constitutional delicts and this Court agrees that such principles (statutory or common law) could be engrafted onto public law remedies to determine liability.

A constitutional tort is a violation of the fundamental rights of a person or citizen by the State or any of its agencies or instrumentalities, as distinct from tortious injuries caused by private person or entity. The development of this judicial device was predominantly informed by the need to hold a government vicariously liable for the acts of its agencies or employees. One of the ways in which a constitutional tort action differs from a tort action is that the former is a public law remedy for violation of fundamental rights in which the Supreme Court awards compensation- see ***Chairman, Railway Board v Chandrima Das***[13]**.** For a recent pronouncement by the Indian Supreme Court on constitutional torts, see ***Kaushal Kishor v State of UP***[14]

There are other relevant factors that determine the standard of care of the individual respondents in regard to omission liability. The Courts will take into account all the circumstances of the case. This will possibly involve consideration of a number of other relevant factors including

- the magnitude of the risk
- the cost and practicability of precautions
- the social value of the respondent's activities
- what reasonable man would have foreseen.

[11] (1989) 1 Sri.LR 1
[12] Ibid at p 25.
[13] (2000) 2 SCC 465.
[14] Writ Petition 113/2016 decided on 3rd January 2023.

The magnitude of the risk is determined by the likelihood of the risk occurring and the seriousness of the potential injury. In ***Blyth v Birmingham Waterworks***[15] Alderson B defined breach of duty of care as

> *the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct human affairs would do, or doing something which a prudent and reasonable man would not do.*

It is quite clear that that the enormity of the risk was so great and the potential injury was so serious that a reasonable man placed in the position of the respondents whose omissions we have referred to above would have acted but the respondents did not. So even on the basis of delictual principles infusing Article 126 adjudication, the respondents we have alluded to become liable for infringement of the fundamental rights of the Petitioners.

Comparative jurisprudence reminds us that the Petitioners in these applications would not be shut out from pursuing their claims in most of the world's leading jurisdictions. In Canada Courts have acknowledged the existence of these types of claims against public service notably police: ***Doe v Board of Commissioners of Police for Metropolitan Toronto***[16] ; ***Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto***[17] ; ***Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto***[18]; ***Odhavji Estate v Woodhouse and others***[19]**.**

Similarly, in South Africa the Constitutional Court did not follow the negative approach of the English Courts that had been adopted in the well known case of ***Hill v Chief constable of Yorkshire***[20]. For the fresh winds of change in South Africa see the groundbreaking decision of its Constitutional Court in ***Carmichele v Minister of Safety and Security***[21]; ***Hamilton v Minister of Safety and Security***[22].

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[15] (1856) 11 Exch 781.
[16] (1989) 58 DL (4th) 396
[17] (1990) 72 DLR (4th) 580
[18] (1998) 168 DLR (4th) 697
[19] (2003) 3 SCR 263.
[20] (1983) AC 53.
[21] (2001) 12 BHRC 60.
[22] (2003) (7) BCLR723 (c)

In ***Carmichele***, the Constitutional Court of South Africa held that "in some circumstances" the guarantees in the Bill of Rights ought to be read to include "a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

Our understanding of German law, derived from Professor Sir Basil Markensinis's magisterial work on the *German Law of Torts*[23] leads this Court to think that the German Courts, relying on Article 14 of the Constitution and Section 839 of the BGB, would find the public service liable for infractions of rights based on the facts before us. It would be necessary to show fault, understood in a broad way, and clearly demonstrable on the facts, and also, importantly, a duty owed to the individual and not only to the public at large. Fairness and justice are held to require the state to be held liable to the individual, except where the duty is owed to the public at large.

Jurisprudence Across the Palk Strait

In ***Kamla Devi v Government of NCT***,[24] Uday Singh died in a terrorist related incident. Kamla Devi-the widow moved the Delhi High Court which famously held:

> *Apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi. It was their responsibility to see that dangerous explosives such as RDX were not available to criminals and terrorists. The incident occurred as there was a failure on the part of state to prevent it. There was failure of intelligences they did not pick up the movement of this known and dangerous terrorist. So, it would be extremely difficult even to suggest that the State did not fail in its duty towards the late Uday Singh and his family.*

The Court went on to state

> *A crime has been committed. A wrong has been done and a citizen has lost his life because the State was not vigilant enough. A fundamental right has been violated. But, mere declarations such as these will not provide any succour to the petitioner.*

[23] 4th edn (Hart Publishing, 202), pp 893-899.
[24] 114 (2004) DLT 57.

She needs to be compensated. It is too late in the day to now suggest, that in a situation such as this, the petitioner should be relegated to the ordinary civil Courts to seek her tort law remedy.

The learned single judge of the Delhi High Court Justice Badar Durrez Ahmed while invoking the power under Article 226 of the Constitution directed the government of NCT of Delhi to pay compensation to the petitioner who was a victim of a bomb blast due to a terrorist attack. The learned single judge also laid down the following principles which would govern the award of compensation:

The principles which emerge from this case can be summarized as follows:-

1. Whenever an innocent citizen is killed as a result of a crime, particularly when it is an act of terror or communal violence or a case of custodial death, the State would have failed in its public duty to ensure the guarantee enshrined in Article 21 of the Constitution.
2. The modern trend and the international norm is to focus on the victims of crime (and their families) by, inter alia, ensuring that they are promptly compensated by the State in adequate measure under a well-laid out scheme.
3. In India, there is no such criminal injury compensation scheme in place and the private law remedies of damages and compensation are grossly inadequate. Legislation on this aspect is not forthcoming.
4. In such a situation the High Court, in exercise of its powers under Article 226 of the Constitution can and ought to direct the State to compensate the crime victim and/or his family.
5. The compensation to be awarded by the Courts, based on international norms and previous decisions of the Supreme Court, comprises of two parts:-
   (a) 'Standard compensation' or the so-called 'conventional amount' (or sum) for non-pecuniary losses such as loss of consortium, loss of parent, pain and suffering and loss of amenities; and
   (b) Compensation for pecuniary loss of dependency.
6. The 'standard compensation' or the 'conventional amount has to be revised from time to time to counter inflation and the consequent erosion of the value of the rupee. Keeping this in mind, in case of death, the standard compensation in 1996 is worked out at Rs. 97,700. This needs to be updated for subsequent years on the basis of the Consumer Price

Index for Industrial Workers (CPI-IW) brought out by the Labor Bureau, Government of India.

7. Compensation for pecuniary loss of dependency is to be computed on the basis of loss of earnings for which the multiplier method is to be employed. The table given in Schedule II of the MV Act, 1988 cannot be relied upon; however, the appropriate multiplier can be taken therefrom. The multiplicand is the yearly income of the deceased less the amount he would have spent upon himself. This is calculated by dividing the family into units – 2 for each adult member, and 1 for each minor. The yearly income is then to be divided by the total number of units to get the value of each unit. The annual dependency loss is then calculated by multiplying the value of each unit by the number of units excluding the two units for the deceased adult member. This becomes the multiplicand and is multiplied by the appropriate multiplier to arrive at the figure for compensation of pecuniary loss of dependency.
8. The total amount paid under 6 and 7 above is to be awarded by the Court along with simple interest thereon calculated on the basis of the inflation rate based on the Consumer Price as disclosed by the Government of India for the period commencing from the date of death of the deceased till the date of payment by the State.
9. The amount paid by the State as indicated above would be liable to be adjusted against any amount which may be awarded to the claimants by way of damages in a civil suit or compensation under the Criminal Procedure Code."

It has to be noted that some of the criterial that the Delhi High Court refers to above find no parallels in Sri Lanka and it is only a persuasive guide for law reform in this country on computation of compensation.

Ashwini Gupta v Government of India[25] was a case where the Petitioner aged about 19 years suffered 90 per cent disabilities of permanent nature as a result of a bomb blast. The incident had completely derailed his life and drastically affected his earning capacity and potential for a job. He had been granted only an ex-gratia payment of Rs 25,000. The Petitioner pleaded the issue of monetary compensation as the respondents had refused to pay anything more than Rs 25,000.

[25] ILR (2005) 1 DELHI 7.

The Delhi High Court held:

> *In a civic society, there is not only to be a punishment for the crime of violation of the laws of the society, but also compensation to the victim of the crime. The very object of creating a State giving a governor for governance of the society to adhere to the norms itself imposes a responsibility on the Governors. The inability to protect life and limb of the citizen must result in a consequential remedy for the citizen to be paid by the Governors…"*

If a member of the public whom public service exists to serve suffers irreparable injury or loss though the culpable fault or reprehensible failure of that service to act as it should have, is it not consistent with ethical and, perhaps, democratic principle that the many, responsible for discharging that service in public trust, shall bear the cost of compensating the victim? This Court cannot leave that as a rhetorical question, and stand as mute bystanders, as we are confident that our own answer on the law and facts is as clear as a pikestaff.

It follows as the crow flies that if laws and structures are declared to the public as the benchmarks of safeguarding the security of the country and thus the protection of its people, it is no defensive argument that subordinates who were delegated with the powers both by Constitution and statute failed the repository of the main powers. These subordinates like the Secretary to the Defence or the heads of department such as Director, SIS and the IGP were only alter egos of the President and the Director, SIS, the IGP and the Secretary, Defence are really liable for their omissions and in addition to their non-performance which impacts on the Minister who had undertaken such enormous powers under the Ministry of Defence, the Minister is also liable for serious omissions to have put in place mechanisms and structures which could have easily averted the disaster the country faced. We take the view that the Petitioners have established a violation of fundamental rights by the Respondents we have named namely the then *President*, the then *Secretary, Defence*, *the then Chief of National Intelligence (CNI)*, the then *Inspector General of Police (IGP)* and the then *Director, SIS.*

We declare that all these Respondents named above have violated the fundamental rights enshrined in Articles 12 (1) and 14 (1) (e) of the Constitution.

In the exercise of the just and equitable jurisdiction of this Court, we proceed to hold the above respondents liable to pay compensation to the victims and the families of the deceased. This Court orders that the former President Maithripala Sirisena who held the office of the Minister of Defence pays a sum of Rs 100 million as compensation. The former IGP, Pujith Jayasundera and

Director, SIS, Nilantha Jayawardena are each ordered to pay a sum of Rs.75 million as compensation. The former Secretary, Defence Hemasiri Fernando is ordered to pay a sum of Rs 50 million as compensation. Sisira Mendis, the former Director, CNI is ordered to pay compensation in a sum of Rs 10 million. The above sums of money ordered as compensation are ordered to be paid out of the personal funds of the aforesaid respondents. These payments have to be made to a Victim Fund to be set up at the Office for Reparations and maintained in an escrow.

We will set out the mode of payments after having dealt with the submissions on state liability.

State Liability

As regards state liability for the infringements we would like to observe that by putting the lives and liberty of common citizens at risk, the Respondents caused the possible collapse of public order and of the rule of law and it cannot be denied that it entailed the potential to destroy the faith of citizens in its state and erode its legitimacy. Large scale destruction, disruption and consequential violence can threaten a country's social fabric, endanger national unity and destroy prospects for economic growth and development. If there is a failure of public order, it is because of the inadequacies of the branches of government and we need to address them holistically in order to change things for the better.

A human being cries out for justice when he feels that the insensible act has crucified his personal liberty and family. That warrants grant of compensation under the public law remedy against the state as well. We are absolutely conscious that compensation was decided upon by the State to be paid to the victims.

Submissions have been made that the Ministry of Public Administration and Disaster Management was notified to ensure that the funeral expenses of the deceased were borne by the State. The then Cabinet of Ministers, by way of a decision dated 23.04.2019, directed the Office for Reparations to pay a sum of Rupees One Million to each of the families of the persons who died and those who were permanently disabled. Further, a decision had also been taken to pay compensation in a sum of Rupees Five Hundred Thousand each to persons who were injured in the said explosions and, such instruction, it was submitted, has been given to the Office for Reparations.

But the learned President's Counsel who appeared for the Respondent Archbishop of Colombo) in SC/FR/195/2019 submits in his written submissions that there has been not only an underpayment of compensation but also nonpayment as far as the majority of the victims and families are concerned.

This Court orders this fact of the matter to be investigated by the Office for Reparation and an accurate information by way of a motion should be made available to this Court as to the above facts within 3 months from the date of this judgment. The Attorney General is directed to liaise with the Office for Reparation and notify this Court of the same.

Be that as it may, quite contrary to the voluntary payment the State has decided to make for the benefit of the victims and families, the learned Senior Additional Solicitor General adverted to a requirement to prove an *"administrative practice*" on the part of the State to make it liable. However, this view of "*administrative practice*" that was first expressed by Wanasundera J in ***Thadchanamoorthi v AG***[26] no longer holds good in this country. It has to be recalled that even in ***Velmurugu v Attorney General***[27] Wanasundera J repeated his view in ***Thadchanamoorthi'*** s case. Both cases involved allegations of torture against police officers and in Velmurugu's case there was also an allegation against Army Personnel.

The view of Wanasundera J in ***Thadchanamoorthi*** on the question of the liability of the State is long recognized as *obiter* as the concept of administrative practice was not necessary for the *ratio decidendi* of the two cases. In ***Thadchanamoorthi*** the Court held on the facts that there was no infringement of fundamental rights. In ***Velmurugu*** too, the majority view was that on the facts, there was no infringement of fundamental rights and as such Wanasundera J's view on administrative practice is clearly obiter. In any event what is alleged against the Respondents is an omission on their part and therefore an imposition of a requirement for establishing an *administrative practice* in regard to omissions would be preposterous and illogical.

As for state liability, recourse must also be had to the decision of the Privy Council in ***Maharaj vs. Attorney-General of Trinidad and Tobago (No.2),***[28] wherein it was said in relation to the liability of the state for fundamental rights:

[26] (1978) 1 Sri.LR 154
[27] (1981) 1 Sri.LR 406 at 454.
[28] (1978) 2 All ER 670

"*This is not vicarious liability; it is a liability of the State itself. It is not a liability in tort at all; it is a liability in the public law of the State*"

In ***Nilabati Behera v. State of Orissa***[29], the Supreme Court of India delineated the principles on which compensation can be directed to be paid by the state or its agency in a writ petition under either Article 32 by the Supreme Court or Article 226 by a High Court, and explained it in the following words.[30]

> *"It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in action on tort. It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.."*

It follows then that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental rights is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Article 126 of the Constitution. In the circumstances this Court

[29] (1993) 2 SCC 746
[30] Id p 758.

would hold that the State is liable to compensate the victims for the incalculable harm and damage that have caused to people and property.

Right to Life

There is another basis through which state liability is predicated. Though leave was not granted under Article 13(4) of the Constitution, this Article has been declared by previous dicta of this Court to recognize right to life.

> "*No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law*".

A careful consideration of Article 13(4) of our Constitution makes it clear that if there is no order from a competent Court, no person should be visited with death and unless and otherwise such an order is made by a competent Court, any person has a right to live. Considering the content of Article 13(4) of the Constitution, Justice Mark Fernando made the pronouncement in ***Kotabandu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station, Payagala***[31]

> "*expressed positively that provision means that a person has a right to live, unless a Court orders otherwise..*"

This aspect was considered by the Supreme Court at the leave to proceed stage in ***Kotabandu Durage Sriyani Silva***[32] as well as ***Wewalage Rani Fernando v Officer-in-Charge, Police Station, Seeduwa***[33] and the Court took the view that when Article 13 (4) of the Constitution creates a right even impliedly, there cannot be a situation where such right is without a remedy. Alluding to the decision in ***Kotabadu Durage Sriyani*** Silva it was stated in ***Wewalage Rani Fernando***:

> "*this concept, viz. a right must have a remedy is based on the principle which is accepted and recognized by the maxim 'ubi ius ibi remedium' viz. there is no right without a remedy'. One cannot therefore think of a right without a remedy as the right of a person*

[31] SC Application No 471/2000, SC Minutes of 08.08,2003; Reported in (2003) 2 Sri.LR 63.
[32] SC Application No 471/2000, SC minutes of 10.12.2002
[33] SC (Application) No. 700/2002, S.C. Minutes of 26.07.2004

and the remedy based on the said right would be reciprocal. Furthermore, when the rights of a person who has been subjected to torture or to cruel, inhuman or degrading treatment or punishment is protected by Article 11 of the Constitution which could be treated as a lesser infringement, compared with the situation where the death occurs as a result of torture or cruel, inhuman or degrading treatment or punishment, it is difficult to comprehend as to how the graver infringement could be ignored."

It was therefore held in ***Wewalage Rani Fernando***'s case that Article 13(4) should be interpreted broadly to mean that the Article recognizes the right to life and Article 13(4) read with Article 126(2) of the Constitution would include the lawful heirs and/or dependents to be able to bring an action in a situation where death has occurred as a result of violation of Article 11.

We hold that when either executive action or inaction infringes the fundamental right of right to life resulting in harm or loss to a person or citizen, it is actionable as a constitutional tort and security lapses and anomalies on the part of the executive that are writ large upon the facts in the case render the socially harmful behaviour liable to be cast in compensation and though the value of the lives lost is inestimable and beyond measure, it is not just and equitable that the state is not ordered to make amends and reparation and the Berlin Declaration on Upholding Human Rights and the Rule of Law on Combating Terrorism adopted by the ICJ affirms that in suppression of terrorism, States must give full effect to the principle of duty to protect. The cardinal duty is couched in the following tenor:

"All states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination."[34]

None of the protections granted by Chapter III of the Constitution can really be enjoyed without the provision of safe, secure and protective environment in which a citizen of Sri Lanka may realize full potential of his existence. A person's right to life is, thus, not negotiable. The inability of the State to provide for such secure environment is, thus, clearly in breach of and in violation

[34] International Commission of Jurists, adopted on 28 August 2004

of the constitutional mandate and the privilege provided to a citizen of this country under the Constitution.

The Supreme Court has in the exercise of its just and equitable jurisdiction awarded compensation concurrently against both the State and individual actors or omitters- see ***Sirisena and Others v Ernest Perera and Others***[35] ("*..In fact relief has been freely granted previously not only against the State but also against Respondents who were found to have been personally responsible for infringement of fundamental rights. Even if the liability is not based on delict but liability sui generis under public law, this Court has the power under Article 126(4) read with Article 4(d) to grant relief against the offending public officer and the State…") ;* ***Samanthilaka v Ernest Perera and Others***[36] (.. "*The State, necessarily, acts through its servants, agencies and institutions: But it is the liability of the State and not that of its servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the State itself….*"); ***Amal Sudath Silva v Kodituwakku, Inspector of Police and Others***[37] ("…*Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this Court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion*…").

Based on these indicia the State should pay fair compensation for the pain, agony, distress, suffering and destruction undergone by the victims and families as a result of the contraventions by the Respondents we have identified. We direct the State to pay Rs 1 million as such compensation to the Victim Fund we have already ordered to be established at the Office for Reparation. This sum would be in addition to the compensation that the State had decided to pay by way of its cabinet decision, on which we have called for a report through the Attorney General.

[35] (1991) (2) Sri.LR 97 at 125 and 127
[36] (1990) 1 Sri.LR 318 at 324
[37] (1987) 2 Sri.LR 119 at 126

Recommendations

Before we proceed to summarize the compensation payable and part with the judgment, we must express our shock and dismay at the deplorable want of oversight and inaction that we have seen in the conduct of affairs pertaining to Security, Law and Order and Intelligence. There are glaring examples of a lack of strategic co-ordination, expertise and preparedness that need a critical examination as to the way forward. The failures that eventuated in the Easter Sunday attacks and the concomitant deaths and devastations have left behind an indelible blot on the security apparatus of the Country and this Country which is blessed by a multi-cultural and multi religious polity cannot be left to the vagaries of these follies and made to suffer leading to violence, fear, apprehension and uncertainty. These events must recede into oblivion but they remind us starkly of the necessity to effect legislative, structural and administrative changes.

It is evident from the evidence placed before us that there is an urgent need to place the National Security Council (NSC) on a statutory footing and its composition specified with clarity so that there are no maneuvers to manipulate hostile exclusions and selective inclusions. The affidavit testimonies and the large volume of documents we have perused highlight the necessity to revamp the security systems and intelligence structures so that the expanding threats of terrorism and emerging challenges could be nipped in the bud and arrested as this Country cannot descend into anarchy once more. The course of conduct we have scrutinized demonstrates a woeful lack of expertise in intelligence gathering and dissemination among important individuals entrusted with the task. For instance, the office of Director, SIS and CNI must be occupied by individuals with necessary skill and expertise and the conduct of the Respondents who held the office, upon receiving sensitive intelligence, shows a lack of awareness and understanding of strategic vision. We recommend that the duties and functions of the office of Chief of National Intelligence (CNI) must be stipulated with definite certainty and the office should be occupied by a person having the necessary expertise, training and qualification.

We now turn to crystallize the orders we would make in addition to the orders, recommendations and directions we have indicated above.

Summary of Orders

1) A Victim Fund must be established at the Office for Reparation, which must formulate a scheme to award the sums ordered as compensation in a fair and equitable manner to the victims and families.
2) The former President, Mathripala Sirisena is ordered to pay a sum of Rs 100 million as compensation.
3) The former IGP Pujith Jayasundera and the former Director, SIS Nilantha Jayawardena are directed to pay Rs 75 million each as compensation.
4) The former Secretary, Defence Hemasiri Fernando is ordered to pay Rs 50 million as compensation.
5) The former CNI Sisira Mendis is directed to pay Rs 10 million as compensation.
6) The State is ordered to pay Rs 1 million as compensation.

The State and the individual respondents named above must make their payment of compensation to the victim fund maintained at the Office for Reparation. Respondents are directed to pay the aforesaid sums out of their personal funds.

7) The Office for Reparation must also investigate the alleged underpayment and nonpayment with regard to the cabinet decision taken to compensate the victims.

8) We also direct the Office for Reparations to invite any generous benefactors and donors to contribute towards the Victim Fund, by way of notifications in the media.

9) A progress report on the scheme of payment and the details about payments made by the above respondents and any benefactors must be made available to this Court within 6 months from today.

10) The Attorney General is directed to coordinate and liaise with the Office for Reparation in giving effect to this order.

11) In view of the observations we have already made as regards the conduct of Director, SIS, we direct that the State take appropriate disciplinary action forthwith against the former Director, SIS Nilantha Jayawardena for his aforesaid lapses and failures.

We wish to place our appreciation of all learned counsel both from the official and unofficial bar for the exemplary manner in which they presented their cases consistent with the highest traditions of the Bar.

Jayantha Jayasuriya, PC
Chief Justice

Buwaneka Aluwihare, PC
Judge of the Supreme Court

L.T.B. Dehideniya
Judge of the Supreme Court

Murdu N.B. Fernando, PC
Judge of the Supreme Court

S. Thurairaja, PC
Judge of the Supreme Court

A.H.M.D. Nawaz
Judge of the Supreme Court

A.L. Shiran Gooneratne
Judge of the Supreme Court