Judicial Terror

Death Penalty,
TADA,
and the
Rajiv Gandhi
Assassination Case

People's Union for Democratic Rights
Delhi
August 1998

Of 50 condemned.
One may be guiltless
Suppose he is innocent?

Suppose he is innocent
How will he go to his death?

- Bertolt Brecht

ON 21 MAY 1991, Rajiv Gandhi, former Prime Minister of India and Congress-I President was killed in a bomb blast at Sriperumbudur, Chengai Anna (West) district, Tamil Nadu at about 10.15 p.m. shortly after his arrival there to address an election meeting. Seventeen others including a suspected participant and accused Haribabu and the assassin Dhanu also died in the bomb blast. Forty-three others sustained simple to grievous injuries.

A Special Investigation Team (SIT) of the Central Bureau of Investigation (CBI) took-over the investigation, and filed its chargesheet on 20 May 1992. The chargesheet listed forty-one persons as accused. Of the forty-one, twelve were dead before the trial began. Of these twelve, one of the accused, Shanmugam, mysteriously committed "suicide" on 20 July 1991. But the most well-known suicides were at Konanakunte near Bangalore on 19 August 1991 where Sivarasan, who is believed to have led the squad, Subha and four others who were reported to be part of the conspiracy committed suicide to avoid arrest.

Three others — Prabhakaran, Pottu Omman, and Akila were deemed "absconding" and the case against them was separated from the remaining twenty-six accused. These three are still "absconding". The remaining 26 were arrested on various dates in 1991 and 1992.

The judgement records that, according to the CBI, 17 of the 26 accused gave "voluntary" confessions to the Superintendent of Police, CBI. These confessions became the fulcrum of the trial in the special TAD A designated court, which started on 19 January 1994 and concluded on 5 November 1997. Originally, Justice S.M Siddick was appointed to hear the case, but it was Justice V. Navneetham who finally convicted them under various provisions (see box on Main Charges, p. 4) and sentenced them to death. With TAD A provisions denying appeal to the High Court, the judgement awaits the final consideration by the Supreme Court.

This report seeks to highlight the dubious basis for the imposition in this case of the harshest penalty in the statute books. It brings out how the undemocratic provisions and procedures of a black law that had already lapsed have been used to condemn the accused. It also seeks to contribute to the small but growing campaign against death penalty in India.

I. Motive and Conspiracy

Before even going into how V Prabhakaran the LITE leader, and others entered into a criminal conspiracy to assassinate Rajiv Gandhi, the judgement attempts to establish their motive for doing so. This it attempts to do against the background of the movement for the secession of Tamil Eelam,

and the LTTE's desire to be recognised as its major, if not only, representative. It tries to lay out the motive through some reported general utterances by Prabhakaran and a series of very lay inferences, both psychological and political in nature. It thus refers to the LTTE's reservations about the July 1987 Indo-Sri Lanka Accord, and Prabhakaran's sense of betrayal by Rajiv Gandhi. It was when Prabhakaran was held captive in New Delhi one day before the accord was signed, the judgement states, that "the seed of hatred against Rajiv Gandhi was sown in the mind of Prabhakaran, the LTTE supremo". From "seed of hatred" to motive was a path strewn with many incidents such as the fast unto death of the LTTE functionary Thileepan in September 1987, and the suicide of twelve LTTE cadres out of the 17 captured by the Sri Lankan Navy. But in general the main influencing factor is said to be the sending in of the Indian Peace Keeping Force (IPKF) into Sri Lanka on 29 July 1987, its attempts to disarm the LTTE, and the threats it posed to the general political aims of the LTTE, the formation of a separate nation-state. Finally, there was the apprehension, in early 1991, of the imminent return of Rajiv Gandhi to power, of the possible reinduction of the IPKF, that he would help rival groups and "would be a stumbling block to achieve their sole aim of getting 'Tamil Eelam' "

What is surprising, indeed striking in this section of the judgement, is the uncritical acceptance by the judge of the official version. To give one example: even as the judgement refers to the rapes committed by the IPKF (linking them to the animosity of Nalini (Accused 1/A1) towards the IPKF and Rajiv Gandhi), the judge states: "As a result of Operation Pawan (by the IPKF), law and order was established and normalcy prevailed ... conditions were created to initiate the democratic process". It is difficult to see how law and order was established by the IPKF when it was, according to the very same evidence on record, committing rapes. This is significant because it reveals an uncritical, dominant mindset. A complete lack of criticality towards claims by the prosecution marks the judgement repeatedly.

Not merely is the question of motive based on some very commonplace and trite observations, establishing motive itself has limited and questionable value. Motive remains a matter of speculation. There is a yawning gap between establishing the motive (in a political killing in particular a large number of people might hypothetically have a motive) and actually proving the crime. The point really to be determined, as the judgement states, is "whether the case against accused nos. Al to A26 has been proved beyond all reasonable doubt".

The starting point for determining the culpability of each of the accused was their alleged participation in the conspiracy. Evidence relating to criminal conspiracy is rarely direct and the proof of conspiracy is largely inferential. It follows that this rule of inference is inherently open to a great deal of subjectivity. More so when the punishment awarded is the death penalty. To what extent are they all linked to the object of conspiracy? To what extent are twenty-six people guilty, particularly when it has not been possible to try the three centrally accused and the case against them has been separated from this case, and when twelve others are already dead? What then is one to make of those that are left, of the twenty-six 'conspirators'? As it is, a great deal of subjectivity comes into play, and from the same set of circumstances, one judge may convict the accused while another may acquit. But in cases of conspiracy, as there inherently are no eye-witnesses, judgement becomes even more arbitrary than in other cases.

This question of conspirators and the death penalty in fact arose nearly a decade ago. Kehar Singh, the supposed conspirator in the assassination of Indira Gandhi, had been awarded the death sentence. The evidence against him was highly inferential and weak. The inference was based simply on his family relationship with one of the main accused, Beant Singh, a fifteen minute "secret" conversation with him and a trip they made together to Amritsar. It was widely felt in legal and democratic circles that the conviction and execution of Kehar Singh (on 6 January 1989) was wrong and amounted to a miscarriage of justice.

According to the prosecution, in the present case, the conspiracy to assassinate Rajiv Gandhi, to cause disappearance of evidence, and escape from the clutches of law was hatched by Prabhakaran, Pottu Omman, chief of the intelligence wing of the LTTE, and Akila, chief of the women's wing of the LTTE, all three of whom were and still are absconding. The accomplish ment of the object of conspiracy was entrusted to the now deceased accused Sivarasan. According to the judge, the law requires the following to be confirmed to prove the hatching of criminal conspiracy:

1. that the accused agreed with one another;
2. that they do an act or cause it to be done:
3. that such an act was illegal or was done by illegal meatis; and
4. any overt act, even if the agreement was not an agreement to commit an offence."

According to the prosecution, the criminal conspiracy was to

"infiltrate India clandestinely, set up safe houses", to "set up unauthorised wireless communication with LTTE leaders in Sri Lanka", to "kill Rajiv Gandhi and others likely to be with him", and to "cause disappearance of evidence, to escape, to harbour the accused and to escape the clutches of law". Threads to the conspiracy were picked up solely from the confessions extracted from seventeen of the accused. The admissibility of extracted confessions, and voluntariness and veracity of the confessions are some legitimate questions which need to be asked.

Main Charges Against The Accused

Section	Description	Punishment
1. The Indian Penal Code		
302	Murder	Death or imprisonment for life
120B	Criminal conspiracy to commit offence punishable with death	Same as that described for the offence for which conspiracy was entered into
326	Voluntarily causing grievous hurt by dangerous weapons	Imprisonment for life or imprisonment to the extent of ten years
324	Voluntarily causing hurt by dangerous weapons	Imprisonment to the extent of three years
201	Cause disappearance of evidence or give false information to screen offender	Imprisonment to the extent of seven years
212	Harbouring offender of capital crime	Imprisonment to the extent of five years
216	Harbouring capital offender whose arrest has been ordered	Imprisonment upto seven years
2. The Terrorist and Disruptive Activities (Prevention) Act		
3 (2) (i)	Terrorist act (intent to overawe the government, to strike terror, etc.) which has resulted in death	Death or imprisonment for life
3(3)	Conspires, or attempts to commit, or abets a terrorist act	Five years to life imprisonment
4	Disruptive activity, to interfere with the sovereignty and territorial integrity, support any claim for cession or secession of any part of India	Five years to life imprisonment
5	Possession of unauthorised arms	Five years to life ;imprisonment

II. Confessions: The Perfect Proof

In our criminal law, confessions made to police are not admissible as evidence. For it is recognised that the police invariably threatens and tortures suspects to obtain confessions. However, in trial proceedings held under TAD A, confessions made by the accused before a police officer are admissible as evidence. Section 15 states: "Notwithstanding anything in the Code or in the Indian Evidence Act, a confession made by a person before a police officer not lower in rank than an S.P. ... shall be admissible in trial of such person under this Act". Such a provision makes a mockery of all the high sounding phrases of liberal jurisprudence and natural justice contained in our constitution.

Seventeen of the twenty-six accused in this case gave such confessions to the police which were admitted as evidence before the court, even though they retracted them later. A confession is an admission of guilt. It is considered an important piece of evidence since the accused is assumed to have made it in a state of remorse and repentance, and can therefore be assumed to be essentially true. Thus the court's precedents hold that even a retracted confession only needs to be tested in general and not in material particulars, i.e. not in those specifics that link the accused to the crime. But all this makes sense only if the confession is made due to remorse, and not under duress as has been alleged by all the accused. "Confessions' made under duress and torture are no confessions at all. For in order to stop physical pain, any ordinary person could confess to anything, however damning to oneself. In this case, having accepted the confessions made to the police, the Designated Court goes on to treat them at par with confessions made by an accused before a judicial magistrate. And therefore even though retracted do not need corroboration in material particulars.

The mysterious death of one of the accused, Shanmugam, in custody casts a grave doubt on the methods used by the prosecuting agency in extracting confessions, and hence on the conclusion of the judgement regarding the voluntariness of the confessions. Shanmugam had been arrested on 17 July 1991 and was remanded to police custody until 16 August 1991. He is reported to have given his confessional statement on the very day of his arrest. The police version of the events leading to his death is that immediately thereafter he managed to escape from the inspection bungalow in which he had been detained. The police were unable to find him. The next morning he was found hanging from a tree in a park nearby. -The postmortem report gives the cause of death as

"asphyxiation due to suicidal hanging". It is surprising that the diligent and high-powered Special Investigation Team, after having tracked down a suspect with great skill, could not prevent him escaping and was unable to locate him when he was in fact so close by. It is also absurd that someone who has escaped from police custody should choose to commit suicide, and that too close to where he has been detained. The possibility of custodial torture suggests itself strongly. Also, one relevant suggestive factor must be kept in mind: that this case being the killing of such an important political leader, the pressure to prove conspiracy and punish the conspirators would be overpowering; this seems to have been an influencing factor in the hanging of Kehar Singh. And hence untoward pressure would be applied to extract confessions to prove conspiracy. Shanmugam's death highlights the conditions of duress under which confessions were extracted.

All the seventeen accused swore before the Designated Court that the CB1 had obtained the confessions under threat and coercion, and that they had also taken their signatures on blank sheets of paper. All seventeen statements were dismissed by the judge on the specious grounds that "if the signatures were obtained under threat and coercion there was no necessity for the investigating agency to obtain signatures on blank papers". In a somewhat suspicious display of naivete, the judgement chooses to completely dismiss the allegations of the accused and shows unwarranted faith in the methods of the police. The judgement thus goes on to say, "it is the subjective satisfaction of PW52 (Prosecution Witness 52 — Superintendent of Police Thiagarajan) who recorded the confessions that should be given paramount consideration to decide about the acceptability and use of the confessions recorded under S. 15." A reasonable presumption would be that confessions taken in police custody in the absence of a judicial magistrate, the accused's lawyers or family members would not be voluntary unless proved by the police. In this case, it appears that the judge argued for the police, discharged the, burden bestowed upon them and absolved them of this responsibility. Secondly, the atmosphere in police custody in Ponnamalee sub-jail (which was converted from judicial to police custody by denotification of the jail), was assumed to be free of threat merely because the CBFs SIT office was situated not within the premises but thirty kilometres away.

In 1994, while upholding the constitutional validity of TADA, the Supreme Court found the provisions of admissibility of confessions to police officers as evidence to be antithetical to fair trial. Two of the five judges struck it down as unconstitutional. They questioned: how could

it be as-lumed that a police officer in charge of maintaining law and order, when Recording a confessions would "exhibit the even equanimity and objectivity of a trained judicial magistrate"? Therefore this provision was upheld only *by* a narrow margin of 3:2. And even the other three judges felt-that this provision leaves ample room for misuse and miscarriage of justice. Therefore they incorporated a set of guidelines into the provision. Notable among them being that the accused along with the confessional statement be produced before the court within 24 hours of recording the confession. The mag istrate would then ascertain whether the confessions were voluntary and also arrange for medical examination in case of any allegation of torture.

None of these guidelines were followed in these 17 confessional statements. The court held that the Supreme Court guidelines were not applicable since the recording of confessions preceded Supreme Court laying down the guidelines. What is not considered, and what is also true, is that the Supreme Court, recognising the possibility of innocents being convicted, set forth these guidelines three years before the Sessions Court delivered its judgement. It is also true that in 1995, in the face of public pressure and innumerable instances of blatant misuse, TADA was made to lapse by Parliament.

Both these facts make it incumbent on the Sessions Court to devise methods to ensure that the confessions recorded by the police were voluntarily given by the accused. As is obvious from the above, no such care was taken in this case.

The fact that not a single accused confirmed making the confessions voluntarily to the police, and that not a single accused made a confession to the judicial magistrate in itself raises suspicion. For it naturally demands an enquiry into the conditions in CBI custody that miraculously prompted fits of remorse in seventeen of the accused, fits that did not last beyond CBI custody.

Another significant aspect of the Rajiv Gandhi case is that some of the accused were produced before the magistrate after several days in illegal custody. Ranganath (A26) was arrrestedby the DSP, CBI on 19 August 1991 but was presented before the court after nine days on 28 August 1991. Irumborai (A19) was produced after a gap of six days. Santhan (A2) said that he had been arrested not on 22 July 1991 as claimed by the CBI but sixteen days earlier, on 6 July. Similarly Shankar (A4) said he was arrested not on 7 June 1991, but near the ThiruthuraipoondiBus Stand on 23 May 1991. Robert I Payas (A9) alleged that he was detained in illegal custody from 10 June 1991 to 19 June 1991. These alarming

allegations fit in completely with the ac-IK cused saying that confessions were extracted from them through coercion. Yet the judge disregarded these serious transgressions by the police.

Much of the material evidence is arranged so as to support the evidence collected in the form of confessions before the police. In the case of each of the accused it is these confessions that provide the key links in the story of grand conspiracy. As for the remaining nine accused — Shankar (A4), Vijaynandan *(AS),* Sivaruban (A6), Kanagasabapathy (A7), Shanthi (All), Selvaluxmi (A13), Bhaskaran (A14), Subha Sundaram (A22), and Ranganath (A26) — although they did not give confessional statements to the police, their guilt is sought to established by relying upon the confessions of the other seventeen along with accounts of witnesses who saw them with any of the accused, deceased or otherwise. In short, statements *they* did not make that would *not* be admissible in a normal court of law were used against them.

Also, in normal circumstances, the objects and testimonies related to a crime are utilised to reconstruct the crime and ascertain culpability. In this case, the procedures followed appears to have been the reverse. That is, the story of the roots of the conspiracy, psychological analysis of Prabhakaran and his objective of murdering Rajiv Gandhi, the entry of a killer squad into India, and the subsequent assassination seems to have been constructed first. The confessions extracted by the police provide the details of the planning — the arrival in India in different groups, some clandestinely, some under the guise of refugees; the setting up of safe houses; unauthorised wireless communication with the LTTE; and afterward the assistance of the accused in the disappearance of 'evidence'. These confessions are primarily the basis on which the participation of the accused in the conspiracy are determined.

Therefore, as far as linking the accused to the object of conspiracy is concerned, the judgment leaves much to be desired, for none of the confessions show any overt knowledge of the object of the conspiracy, i.e. to assassinate Rajiv Gandhi. For instance, A10 's confessional statement was, "I could know that he (Sivarasan) had been sent to India by LTTE to carry out a dangerous operation." A10 came to India in January 1991 and despite al leged activities for five months, he did not know the object clearly. Yet the court at various times concluded that as the prosecution states there was "a meeting of minds between various members of conspiracy in various parts of Tamil Nadu".

TADA and the Rajiv Gandhi Case

"Am I to hear the truth?"
"No, your lordship is to hear only the evidence."

And how far evidence can be from the truth is dictated by the procedure adopted in collecting the evidence and in conducting the trial. In addition is the question of the charge itself. In this connection, the use of the now lapsed TADA by the prosecution immediately raises substantial doubts regarding the conclusion reached by the judge. TADA provisions affect the outcome of the present case in the following ways:

1. The preparation of a chargesheet which included sections of TADA automatically shifted the hearing of the case to a TADA designated court. The case being heard by such a designated court is prejudicial to the accused. The mindset of the framers of the legislation imposes itself on the judicial authorities. The accused is perceived as a dangerous criminal who recklessly indulged in a heinous crime.
2. The charge under S. 3 of TADA does away with the requirements of proving murder, i.e. the accused is responsible for voluntarily causing death. S. 3(1) states "whoever with intent to overawe the government by law established or to strike terror in the people ... *does any act or thing* .... by using bombs, dynamite ... in such a manner as to cause or is likely to cause death of or injuries to any person or persons ... commits a terrorist act". S3(2)(i) adds, "whoever commits a terrorist act, shall if such an act has resulted in the death of a person, be punishable with death or imprisonment for life, and shall also be liable to fine." Thus under TADA a person needs to only be involved in a terrorist act and that act needs to result in death in order for the court to award the death penalty. And terrorist act covers virtually "any act or thing", the intention of the person notwithstanding. Also, disregarding the question of voluntariness, it goes on to award the most severe punishment.
3. The existence of force or a threatening atmosphere defeats the very basis of the confession being a piece of evidence at all. The Supreme Court in the Kartar Singh case upheld the constitutionality of this position. The argument presented was flimsy — it pertained to the legal competence of the legislature, the meaningful object of the legislation, and the gravity of the terrorism in which witnesses fear to give evidence. However, the power of the legislature to make a law does not ensure that all provisions are constitutionally valid. The legislature has *legislative* competence, not *legal* competence, which is why testing of a legislation by the courts becomes necessary. The

three arguments do not in any way enhance the acceptability of confessions taken under duress, in a threatening atmosphere.

4. Once the matter comes for hearing before a TADA court, S. 16(1) rules "notwithstanding anything in the code, all proceedings before a Designated Court shall be conducted *in camera*. Thus in matters considered to be of utmost public importance, the role of the public is completely ruled out. Even press reporting of court proceedings is banned.
5. Such secrecy is taken to an extreme. S 16(2) provides that "a Designated Court may, on application made by a witness ... or by a public prosecutor ... or on its own motion, take measures as it deems fit for keeping the *identity* and address of any witness secret." This was followed by the court in the present case for 179 witnesses.
6. For those convicted by the Designated Court their only right of appeal lies with the Supreme Court. This is provided only through S.19 (1) and S. 19(2). In our ordinary law, for any crime, the convicted person has the right to appeal to at least two higher courts, the High Court and the Supreme Court. In the present case, in which the Designated Court has pronounced death penalty on all the accused who were tried, the implications of the denial of the right to two levels of appeal is far more serious.

Finally, a number of the accused have been indicted for their involvement in the conspiracy *after* the bomb blast. For instance, Ranganath (A26) had taken up a house for the stay of Sivarasan, Subha and Nehru. Dhanasekhran (A23) had arranged for a tanker for them to go to Bangalore, and Vigneswaran (A25) had accompanied them in the tanker. Their offence at most could be that of harbouring the offenders, or participating incidentally.

However, the judgment laid no emphasis on the different degree of culpability of each of the accused and imposed the extreme sentence of death on all.

III. Corroborative Evidence and Inferences

In law, any evidence which is not direct and conclusive has to find support from related evidence for it to be considered reliable. This process of establishing reliability is called corroboration. This judgement proceeds on the basis that corroboration to confessions need not be

general. It would be sufficient if corroborative evidence connects the accused to the crime. Precisely what evidence does so is decided according to the subjective judgement of the current judge. The evidence presented by the prosecution shows a connection of each of the accused, directly or indirectly, to Sivarasan and therefore the LTTE. Why the LTTE would choose Sivarasan merits a threefold explanation by the court: his experience in ruthless killing, particularly his assassination of EPRLF leader Padmanabha; his being well-versed in the topography of the city, and ; his ability to speak Tamil like a local (this is taken from Nalini's confession). Again, merely inference comes into play. If stretched, such inference can have no limits. When such inference and not hard evidence forms the basis of the judgement, the implications are serious.

A major clue to the motive is sought from the wireless messages to the LTTE in Sri Lanka tapped by the Intelligence Wing from January 199 Ion-wards. They were largely relied upon to establish conspiracy, knowledge and motive. The defence objected to the admission of the log book containing coded messages, the reason being that there was no official seal on the log book. The court dismissed their objection as irrevelant. Importantly, the messages though received from January 1991 were decoded only after the assassination. The unsatisfactory explanation given for that was that prior to the assassination the wireless department did not have sufficient "key" numbers to be able to break the code. However, according to the person in charge (PW84) there existed an alternative procedure to decode. But no explanation was given as to why it was not resorted to. This apart from raising questions about the ineptness of state functioning also raises the legitimate doubt that evidence is formulated so as to suit the prosecution story.

Another piece of evidence largely relied upon by the prosecution was the book *The Satanic Forces* printed by a secret witness PW75, at the instance of a key member of the LTTE, Baby Subramanium. The contents of *The Satanic Forces* are interpreted to read in Prabhakaran's enmity shaping into "bitter animosity against Rajiv Gandhi". The defence tried to argue that PW75 was an accomplice. PW75 was engaged full time since 1989. The judge rejected the argument as according to the judge he is an "ordinary artist" and "his evidence inspires confidence and does not bristle with infirmities". Incidentally, the entire order of the book was confiscated before it could be sent elsewhere. So it appears that only the CBI had access to all existing copies of it and its contents.

A key photograph showing Dhanu with the LTTE flag in Jaffna published in the book is used to establish the identity of the human bomb.

This identification is done by PW103, a member of a rival militant group, EPRLF. The defence objected that he would be a partisan and interested witness. The court held that "PW103 was a militant and only such a person can identify another militant group whose military base was situated near their base." Here, wide inferences are again drawn by the court. Death while fasting of a senior LTTE leader and suicide of twelve LTTE members on Prabhakaran's orders on being caught by the Sri Lankan navy is said to have "hardened the mind of Prabhakaran against Rajiv Gandhi". One line in the letter written by Subha to Pottu Omman, "Rest if we meet in person" is inteipreted as proving the manner in which Rajiv Gandhi would be killed, that Dhanu would be the suicide bomber and Subha might consume cyanide after the assassination.

The character determination of Nalini that "Al is a dejected and frustrated person in life... Al is an overambitious lady who wanted to come up in life by buying cars, houses, bungalow," bring out the disturbing prejudices of the judge. A21 Padma, who is a nurse, is supposed to have treated Dhanu for a sprain. The judge concludes that "A21 by giving treatment to deceased accused Dhanu had made her hundred per cent physically fit so that she could accomplish the task given to her successfully." Reading in what does not exist and stretching the evidence to make it reach the tailored objective is a dangerous method of showing that all twenty-six conspired and participated in the crime, and could be fatal in this case.

Clearly, the corroborative evidence used is often tenuous and indirect. This, combined with the fact that the primary evidence hinges upon retracted 'confessions' exposes the flimsy grounds on which death penalty has been sought to be justified.

Live and Let Die

Jeeta Singh, Kashmira Singh and Harbans Singh, three accused, were ordained to death for playing equal parts in jointly murdering a family of four persons. The Andhra Pradesh High Court had passed a common judgement on 20 October 1975. Jeeta Singh's appeal came first before the Supreme Court but was dismissed by a bench of three judges. Then came Kashmira Singh's appeal which was allowed and his death sentence was converted into life imprisonment by a bench of two judges, different from the earlier bench. Meanwhile Jeeta Singh was executed on 6 October 1981. The appeal of Harbans Singh came before yet another bench and it was also dismissed. He filed a review petition which was also dismissed. The Registry of the Supreme Court omitted to mention the fortune of Kashmira Singh who had been saved from the gallows. Harbans Singh would have been executed as well. The fact of Kashmira Singh being spared from hanging was brought to the knowledge of the judges in yet another petition filed by him. This new bench stayed the execution of Harbans Singh and directed that the case be sent back to the President for reconsideration of the clemency petition. Jeeta Singh was hanged while Kashmira Singh and Harbans Singh live.

IV. Sentencing

The exercise of sentencing in the judgement confirms that the actual processes of law can be completely subjective. The Criminal Procedure Code, as interpreted by the Supreme Court, says that the Court should adjourn the matter to a future date after conviction. On that date, both prosecution and defence are called upon by the Court to place relevant material bearing on the severity of the sentence. In the Rajiv Gandhi case, both the hearing on conviction and sentencing was done on the same day, within two hours of each other, "with the consent of the counsels". Thereby, crucial rights of the accused were transgressed. It is also unclear what 'relevant material' was placed before the court. Precedents show that it is also the duty of the Court to elicit from the accused all information, personal and otherwise, which would be relevant in passing the sentence. The TADA court seems to have made no such effort, hence violating this requirement.

The law states that "sentencing an accused is a sensitive exercise of discretion and not a mechanical prescription acting on a hunch ... social background and personal factors are very relevant. It is the duty of the court to be activist enough to collect facts bearing on punishment with a

rehabilitating slant". For instance, the fact that Nalini is the mother of an infant (born while she was in jail) should have had a bearing on the sentence passed. Testing the procedure adopted by the court against law one finds a serious shortfall, as the court does not seem to have delved deeply into the special reasons that the accused had to offer. For a start, it would have been impossible for the judge to hear all twenty-six accused properly in just a few hours. Furthermore, going by the replies of the accused in the hearing for sentence, it appears that none of them were aware that the death penalty was being considered. They seemed to have believed that the hearing was being held to decide whether or not they were going to be convicted and not to determine the exact sentence. Other factors such as the age of the accused were not considered (Athirai is the youngest at 22 years and Kanagasabapathy is the oldest at 76 years). That Shanti and Selvaluxmi are mothers of minor children were not taken into account. The general prejudice against criminals and the crime perhaps provide answers as to why shortcuts find their way into law and procedure.

While upholding the constitutional validity of death penalty in the Bachan Singh case by a majority of four to one, the Supreme Court also stated that in pronouncing death penalty the state was required to show that: a) it was probable that the accused would commit criminal acts of violence as would constitute a continuing threat to society, and b) that the accused could not be reformed and rehabilitated in society. It is clear that this was not ascertained in this case. Nor were efforts made in the extraordinarily brief section of the judgement devoted to the sentence to explain why there was no alternative but to impose death penalty.

However, the judge did give a few common 'special reasons' as to why this case fell into the category of "rarest of the rare" as per the requirements of law. This case would have to be proved rare indeed if death penalty not on one or two but on twenty-six accused would have to be justified. The special reasons have, however, been given collectively for all accused. Was it not necessary to give individual special reasons for *each* of the accused?

The foremost 'special reason' set down in the judgement is that the former prime minister, an important political figure, was brutally assassinated as a result of a "diabolical plot" laid by the LTTE. It goes on to say that consequently the general elections had to be postponed. A similar reason had been given by the Supreme Court for hanging Satwant Singh and Kehar Singh. The Supreme Court at the time had held that "the act of the

accused not only takes away the life of a popular leader but also undermines our system, which has been working so well for the last forty years". The stature of the victim worked against Kehar Singh against whom the evidence was weak. In the present case, the emphasis is apparent and the importance of the victim justified death sentence vis-a-vis each of the accused. The assassination of a political figure immediately puts the case into the category 'rarest of the rare'. All of us are equal before the law, but some, it seems, are more equal than others.

Another special reason stated in the judgement is that the nature of the crime was "heinous". There being no absolute measure by which the gravity of the crime can be measured, this is again completely subjective. Justice P.N. Bhagwati implied in the minority dissenting judgement in the Bachan Singh case that the condition of giving special reasons for awarding death penalty in rare cases is a problematic one for the special reasons would depend on the value system, responses and social philosophy of the particular judge.

Finally the judgement states that "giving deterrent punishment alone can deter other potential offenders and in future dissuade people from associ ating with any terrorist organisation to do such diabolical and heinous crimes." The principle of deterrence is a totally dubious one. The assassin of Mahatma Gandhi and one conspirator hung to death as did Satwant Singh who killed Indira Gandhi and Kehar Singh who "conspired to kill." These death sentences did not deter those who killed Rajiv Gandhi. Particularly where political crimes are concerned it is clear that the principle of deterrence invariably fails to prevent the commission of crimes. Their solution lies in the political arena itself, by resolving the issues, addressing grievances that give rise to these crimes rather than exemplary punitive action and physical elimination of the accused of these crimes. Contrary to the reasoning of the judge, there is no evidence to show that death penalty has a greater deterrent effect on crime than other punishment. If anything, all the available evidence from India and abroad confirms that having death penalty on the statutes does not deter serious crime at all.

Why, after all, should the life of a person, or in this case twenty-six persons be judicially exterminated in the present under the mistaken understanding, that it would deter more crime by acting as an example or threat and secure a crime-free future? Why should a person or persons pay now with their lives for crimes that someone may or not commit in the future?

The Andhra Case

Twenty year old Vijayavardhana Rao and seventeen year old Chalapathi Rao were poor dalit youths from Guntur district, Andhra Pradesh, who desperately needed money, the former to provide medical treatment for his sick and aged mother, and the latter to get his sister married. On reading a news report of a bus robbery in which the robbers had sprinkled petrol in the bus and threatened to set it on fire, they decided to copy the crime. On 8 March 1993, they boarded a bus in Guntur and poured petrol in the bus. However, the driver of the bus smelt the petrol and raised an alarm. The passengers woke up, started screaming and rushed towards the doors where the two were standing. Both of them panicked and tried to escape. In the ensuing melee, the petrol caught fire and within seconds the bus robbery turned into a ghastly nightmare. Twenty-three passengers died in the tragedy.

The two were sentenced to death by the Sessions Court in Guntur on 7 September 1995. They were denied legal aid in the crucial early stage of the case, during the first year, in contravention of Rule 36 (1) of the Criminal Rules of Practice and Circular Orders issued by the A.P High Court in 1990 as well as article 21 (right to life) and article 14 (right to equality) of our Constitution and article 14 (3) of the International Covenant on Civil and Political Rights, the U.N. General Assembly Resolution (1956) ratified by India. It was this issue as well as the fact that the two youths had been kept in solitary confinement since the date of the Sessions Court judgement, in violation of their right to life and liberty, that they were first time offenders, their deprived socioeconomic background, the absence of intention, the accidental nature of the crime, their youth, etc. that prompted various groups to take up the issue.

The death sentence was subsequently confirmed by the High Court and the Supreme Court. A mercy petition was presented to the President by the accused under Article 72 of the Constitution on 8 November 1996. Even as the mercy petition was pending before the President the date of execution was announced by the Sessions Judge, Guntur as

18.12.96. The Supreme Court stayed the execution on 17.12. 96, one day before the execution.

The Supreme Court then ordered the accused to get a stay on the execution by the end of February 1997. The President rejected the mercy petition. This was communicated to the parents of Vijayavardhana Rao and Chalapathi Rao by a telegram dated 26.3.97. The date of execution was set for three days later, on 29.3.97 at 5 a.m.

On 27 March in Delhi, what began as a press statement condemning the impending hanging was by chance transformed into a second mercy petition to the President on behalf of social and human rights activists. The Supreme Court, in a writ petition filed by PUDR, stayed the execution on the night of 28 March at about 11.30 p.m. until 5 April 1997 pending the President's verdict on the second mercy petition. The Supreme Court had no machinery to communicate the order. The typing of the order, the wireless message and telegram took another couple of hours. The Superintendent of the Rajahmundry Jail where the accused were being kept refused to act upon the telephone call made by democratic rights activists and lawyers communicating the stay order, without any official communication. Finally, the official communication reached Rajahmundry barely two hours before they were supposed to be hanged. In the next week several eminent persons joined in the campaign to commute the death penalty on the two youths to life imprisonment. As a result the stay was prolonged, and finally in June 1998, the cabinet and the President commuted the sentence to life imprisonment.

The role of coincidence and chance is apparent in this entire process. If civil rights groups had not filed a second mercy petition two days before the date of execution, the stay order itself would not have been acquired. And if the Supreme Court stay order had not reached the jail on time, the two would have hung to death. No official redress would have been possible, for this penalty is irrevocable. Moreover, few of the cases come to the notice of and are taken up by democratic rights organisations and dalit groups and therefore are able to gain media attention in the way this case was. It is a statistical and social fact that most of those executed by the state belong mainly to the socially and economically underprivileged sections of society. For equal access to courts and legal expertise at the crucial early stages of the case, prior to and immediately after the conviction and sentencing is denied to them. Also, not all cases go beyond the High Courts and execution is routinely carried out at this stage, as those convicted do not often have the awareness or the resources to appeal to the Supreme Court. Thus which sentence gets commuted and which does not gets decided in totally arbitrary and unequal ways.

And a wrong decision or even a slow communication system could mean the loss of a life.

The civilised goal of criminal justice is the reformation of the criminal, and death penalty merely means abandonment of this goal. It negates the social basis of criminalisation and shifts the entire onus onto the accused.

It is the finality and irrevocability of the death penalty that makes the implications of this arbitrariness even more serious. For there is no possibility of taking back this sentence once it is executed. Given the possibility of new evidence coming to light, or of error in judgment, it is only just to demand the abolition of the death penalty, the one punishment which, if ordered erroneously, is impossible to rectify.

If putting the criminal to death is a requirement of justice, such a judgment must meet two fundamental conditions: it must be infallible (which it can never be), and the individuals it condemns to death must be solely and completely responsible for their acts. The fact remains that these fundamental conditions cannot possibly be ever met. For finally the death sentence rests on the personal judgment of four to six judges in three courts, which, through the intervention of TAD A in this case, has been reduced to 3-4 judges in two courts.

Even as the Rajiv Gandhi assassination case awaits the consideration of the Supreme Court, PUDR strongly protests the imposition of death penalty on the twenty-six persons. More so in light of the dubious process of trial, the nature of evidence adduced by the prosecution, and the special law under which the trial and prosecution took place. This is also the *largest* collective death sentence ever passed in India. In view of these factors, it is only just and proper that the evidence be re-examined, a re-trial of all the accused be held under normal law, and a judicial enquiry be held into the death of Shanmugam. We appeal to all the readers of this report to oppose this particular sentencing and mobilise support for the total abolition of death penalty in India.

Custodial Validity of Death Penalty

The validity of giving death sentence was considered by Supreme Court in the case Bachan Singh vs Atate of Punjab, in 1982. Four of the five judges upheld the constitutional validity of death sentence. One of them Justice P.N. Bhagwati, held it to be violative of constitutional principles and stated:

a. Confement of an untrammelled, unfettered, standardless and unguided discretion upon the court under section 354(3) CrPC to choose between life and death by providing totally vague, indefinite and ad-hoc criteria of 'special reason' rendered the death penalty for murder arbitrary and unreasonable and hence violative of article 14 and 21 of Constitution.
b. In its actual operation death penalty is discriminatory for it strikes mostly against the poor and deprived section of the community and rich and affluent mostly escape from its clutches.
c. Death Penalty is barbaric and inhuman in its effect, mental and physical, upon the condemned man and is positively cruel. Further it is irrevocable, it cannot be recalled. It extinguished the flame of life forever and is plainly destructive of the right to life, the most precious right of all.
d. Rule of law (read in to article 14, 19, 21) require that the sentence imposed must be proportionate to the offence and a disproportionate sentence would be arbitrary. Death sentence under all circumstances is disproportionate to the offence of murder.
e. The state has failed to show that death penalty has a greater deterrence effect than life sentence. Death penalty has no rational nexus with any legitimate penological goal or any rational penulogical purpose. More than the severity of the punishment it is the certainty of the detention and punishment that acts as a deterrent.

Behind the prison wall

"The day before an execution, the prisoner is weighed, measured for length, of drop to assure the breaking of the neck, body measurements, etc. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes out of his mouth, and rope many times takes large portions of his skin and flesh from the side of the face that the noose is on. He urinates, he defecates and droppings fall to the floor while witnesses look on. The prisoner remains dangling from the end of the rope for eight to fourteen minutes before the doctor, who has climbed up a small ladder and listens to his heartbeat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady because during the first few minutes there is usually considerable struggling in an effort to breathe.

----First hand account of the hanging process by a jail warden

Published by: Secretary, People's Union for Democratic Rights, Delhi
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