Balancing Act

High Court Judgement on the 13th December 2001 case

After the conviction by the Special Court, the accused went on appeal to the High Court. The High Court gave its verdict on October 29, 2003. The High Court upheld the death sentence on Mohammad Afzal and Shaukat Hussain and indeed enhanced a sentence of life imprisonment under Section 121 of IPC to the death penalty. It exonerated S.A.R Gilani and Afsan Guru.

Predictably, there was intense and adverse reaction to the exoneration of S.A.R.Gilani and Afsan Guru. While some newspaper editorials welcomed it, other sections of the media, particularly television, portrayed it as a 'setback to India's war on terror'. The political elite, as much as the police, needed a summary punishment in the case to demonstrate their efficiency and resolve in the face of terrorism. The pressure to convict, that may have operated, even if unconsciously, on the Sessions Court, must have been equally enormous in the case of the High Court. Considering the context, the reversal of the Sessions Court's judgement in the two acquittals was a demonstration of the independence of the judiciary. The verdict may also be seen as a fruition of the concerted and collective efforts to defend individual rights, by a few committed lawyers, democratic right groups, and the Gilani Defence Committee.

While the exoneration of two of the accused was indeed a moment for redeeming one's faith in the judicial process, our reading of the judgement reveals that in the case of Shaukat Hussain Guru and Mohammad Afzal many of the concerns expressed in our report continue to hold. Wherever possible, and despite occasional glaring discrepancies in its account, the prosecution has been given the benefit of the doubt, leading us to the unfortunate conclusion that the judges have performed a balancing act. The obvious innocence of S.A.R. Gilani and Afsan Guru appears to have necessitated the conviction of Mohammad Afzal and Shaukat Hussain.

Since this case sets a precedent, not just for the conduct of POTA cases (a law which deserves to be abolished), but for the treatment of computer generated evidence and phone interceptions, we think it is important to record our concerns regarding the right to a fair trial. We will also comment on the assumptions and political context surrounding the case.

Outline of the Judgement

The High Court Judgment begins by framing eleven broad issues which need to be addressed: whether there were breaches of statutory safeguards during investigation, and if so, the consequences of this; the status of investigation till 18.12.2001 the ostensible day before POTA was applied; whether there were valid sanctions for trial under Explosive Substances Act, and POTA–; whether any charges could be framed against the accused under IPC; whether imperfect framing of charges had caused prejudice to the accused; whether there was a denial of justice to Afzal by denying him adequate legal aid; whether the trial stands vitiated by admission of inadmissible evidence; whether the Designated Judge had applied correct legal principles pertaining to conduct, disclosure, recovery and confessions; whether the evidence before the Designated Judge was proved and admissible; whether Sec 313 CrPC had been complied with and whether the judgment of the Designated Judge was sustainable. The first 140 pages or so give the sequence of events based on the evidence from the Special Court proceedings, covering the parliament attack and leading up to the arrest of the accused, their trial and their conviction. The Judgment then goes on to analyse the evidence, finally coming to its conclusions from page 362 onwards.

I
Trial by Media and Implications for the Rights of the Accused

One of the issues raised by the defense was the prejudice caused by the media. The media was allowed to interview Mohammad Afzal on 20 December 2003, and this was repeatedly broadcast for two days (20, 21 December) and then a hundred days after the attack. A Zee TV Film, which dramatised the parliament attack, based its version of events entirely on the prosecution account. The Supreme Court refused to stay the film, despite the clear defamation of the accused, even before they were convicted. The learned High Court Judges reiterated the SC stand, holding that even if the media influenced a jury, judges were beyond its reach. "Judges do not get influenced by propaganda or adverse publicity.... We may only add that Judges are trained, skilled and have sufficient experience to shut their minds receiving hearsay evidence or being influenced by the media." There are, however, several judgements of the European Court of Human Rights, and indeed the existence of the phrase 'trial by media' itself suggests that it is a common phenomenon, and not just in the case of jury trials.

The Judges did pass negative remarks against police conduct in allowing media interviews, in the first case because it weakened the independence of the test identification parade. Going beyond the procedural ramifications of the lapse, the judges also reflected on its implications for the rights of the accused, reminding the police/investigating authorities of their custodial responsibilities: "what is more fundamentally disturbing to our mind is the fact that police custody is given by the court to the investigation authorities on the premise that the accused is required for the purpose of investigation. This custody is not to be misused by allowing the media to interview the accused persons."

In this case the misuse was aggravated by the selective and premeditated use that the police made of the media – for instance Afzal's 'confession' was telecast but evidence given by one of the reporters in court revealed that the police did not allow the reporter to telecast Afzal's statement regarding Gilani's innocence. That the public has a right to know about cases, and

the media the right to tell/comment on them, cannot be disputed. When, however, the media obliterates vital aspects of information or disseminates it selectively, the people's right to know is seriously violated. An independent and mature media should have been aware and taken care to note that the public statement of a person in custody can never be entirely 'free' or 'uncoerced'.

Moreover, in a political context where particular communities get systematically targeted for having a different religion, such selective media coverage becomes complicit in creating the specter of 'suspect communities'. In India, minorities and certain nationalities like Kashmiris are particularly vulnerable to being labeled terrorists. Such labeling has significant social implications for the accused and his/her family. Once booked under POTA, a person becomes a marked figure in the public eye. Simple things – finding a place to live, a school to send one's children to, a job – all become difficult. Here, any irresponsible and prejudicial coverage by the media becomes a major problem for the accused.

While the trial by media took away the right of the accused to be considered innocent till proven guilty, at a deeper level, the entire sequence of events, manifests how processes of exclusion unfold in society. The press was convened by the police to witness Afzal's confession to having committed a crime of terror. Ultimately, the initiative to convene a press conference lay with the police, and the power to present it to the public lay with the media. Can the accused ever claim the right to speak and be heard? The answer is a resounding No! The accused, it appears, can only speak to condemn him/herself, never to put his/her own point across. S.A.R. Gilani wanted to speak after the trial court had handed down a death sentence to him and the other accused but was promptly shut up.

II
Violation of Safeguards

The defence had argued that since POTA charges were included only on 19 December 2001 and because POTA has certain safeguards, all evidence collected prior to 19.12.01 had to be ignored in relation to the POTA offences. In fact there is possibly reason to believe that the accused were charged under POTA from the beginning, but all its safeguards were violated during the investigation. In order to get around this, the prosecution claimed to have added it only later on. One piece of evidence for this comes from Air Tel.

A letter from Air Tel dated 17 December 2001, responding to a police request for the call records, refers to Section 3/4/5/21/22 POTO. It is inconceivable that AirTel would make up these sections on their own. However, according to the prosecution these charges were added only on 19 December. When the Defence raised this discrepancy in the High Court, the Judges gave the prosecution the benefit of the doubt. a.) The Court ruled that this point could not be admitted as it was not raised in the Special Court and did not therefore give the prosecution a right of reply. b.) More problematically, the Court accepted the prosecution plea that the date of 17.12.2001 on the Air Tel letter was a typographical error.

The Judges ruled that since Sec 43 of POTA dealing with interception in case of emergency situation and rule 419 of the Indian Telegraph Act Rules 1951 are virtually the same, it made little difference to the case whether the police used the former or the latter. However, the police both violated the Telegraph Act and avoided the safeguards provided under POTA:

***Violation of Telegraph Rules*:** Under Rule 419A of the Indian Telegraph Rules 1951, in case of emergency, permission to intercept phones has to be taken from the

Joint Secretary who is authorised to do so, subject to confirmation by the Secretary. In this case, permission was taken from the Joint Director, Information and Broadcasting on 13. 12. 2001 (who is an officer junior to the rank specified).

***Avoiding POTA safeguards*:** a.) Sec 45 of POTA states that the contents of any wire, electronic or oral interception shall be admissible as evidence only if each accused has been furnished with a copy of the order of the Competent Authority, and accompanying application, under which the interception was authorized or approved not less than ten days before trial, hearing or proceeding." This was avoided, and the sanction granted under the Telegraph Rules and confirmation obtained were not filed with the charge sheet "on the ground that for security reasons the name of the two officers could not be disclosed." Instead the main body of the letter was simply read out to the accused in court.

b.) Section 51 of POTA mandates that the investigation cannot be conducted by an officer less than the rank of a Deputy Superintendent of Police (DySP). This safeguard was violated even though the possibility of abuse by higher officials is equally likely, but even this minor safeguard was violated. This investigation was conducted by an ACP. The Court refused to recognise this as a problem, citing an earlier SC judgement, that an illegality or defect in the investigation did not affect the jurisdiction of the Court to take cognisance.

III
Police is let off despite glaring problems in the investigation

Throughout the judgment, the Judges have placed the utmost faith in the police, despite conceding instances of police violation of rules, for instance in the illegality of arrests (see below). Further, despite exonerating Gilani and Afsan Guru, the Judges have not questioned the police role in framing two innocent people.

1. *Identification of accused*: We have already pointed out in our report that no test identification parade had been conducted and that the accused were introduced to the witnesses as those involved in the Parliament attack. The Judges, however, discount this, arguing that the witnesses were members of the public who could have no motive for falsely implicating the accused. They also argue that the shopkeepers who sold the motorbike and the Sujata mixer grinder (in which the explosives were made), or the landlord of Christian colony (which Afzal had rented and where the attackers stayed) had sufficient time to interact with Afzal and Shaukat and identify them. We do not dispute the courts's observation that the motive of witnesses who were members of the public should not be suspected. We wish, however, to state emphatically that the entire gamut of procedural norms surrounding identification of accused by public witnesses exists precisely to ensure that while the public discharges its duties in an appropriate manner, the rights of the accused are also protected. While theoretically the witnesses should have no reason for false implicating the accused, no one can deny that the police in India wield tremendous power and the public – especially shopkeepers – would feel it unwise to go against the police. Secondly, given the prevalent stereotypes about Islamic, especially Kashmiri terrorism, witnesses are very likely to be biased. Thirdly, even without this bias, when people have been described by the police as implicated, the natural psychological tendency is to then 'recognise' them as involved.

2. *Illegal Arrests:* As we noted in the report, there were serious discrepancies in police accounts of the time and place of arrests of the four accused. The judgement accepts the illegality of arrests: "a very

disturbing feature pertaining to the arrest of the accused persons has been noted by us... the prosecution stands discredited qua the time of arrest of accused S.A.R. Gilani and accused Afsan Guru." (Judgement Pp.236-37) The judges also noted that "Bismillah (Gilani's brother) was in illegal confinement and was forced to sign papers." The High Court judges should have asked then for an enquiry into the blatant misuse of power by the police: the police were guilty of wrongful confinement (Sec 340 IPC) and attempt to fabricate and use false evidence (Sec 192, 196 IPC) by making Bismillah sign false papers. Offences under the latter Sections amount to obstruction of justice, and when committed by a public servant, call for not a mere reprimand but a more exemplary punishment. Yet no action has been taken against the police on this count.

3. *Violation of the rights of the accused*: Under section 52 of POTA (Arrest) an arrested person has (1) "the right to consult a legal practitioner as soon he is brought to the police station", (2) "person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person". Obviously, none of the safeguards has been followed in cases of S.A.R.Gilani and Afsan Guru as both were illegally arrested.

IV
Nature of Evidence

1. *Call records*: The prosecution used call records from AirTel and Essar to show that the three accused men were in touch with each other and one of the dead militants, around the time of the attack on parliament. However, there are problems in these records, including double entries (see page 14-15 of the main report and box on page 16), the fact that computer printouts of the call records were not certified, and that the two prosecution witnesses were not technical people. A major problem is that what was presented as call records was not the actual computer generated code but records from the billing system, which is an alterable text record.

The Judges did not address this aspect at all – instead they accepted the call records on the presumption that they pertained to the relevant period, and emphasised that there was no evidence to suggest that the computers had not been working properly (a condition in Sub section 2 of Section 65 (b) of the Indian Evidence Act). As for the double entries, they are explained away as a technical flaw, and in any case, not such as to affect the capacity of the computer to process information correctly. (p. 269)

However, the evidence of telecommunications engineer Farhan given to the Sessions Court, which was not challenged at the time, shows that the double entries were undoubtedly doctored. In this case, the second entry swapped the dialed and dialing numbers but showed that both calls were made at the same time. Since the call records show the location from where a call is made and to where, this is impossible. It is not clear how the Judges came to their conclusion about 'technical flaws'.

One must note that the entire case hinged on the telephone records of 9811489429. We must reiterate that the SIM card of this number was never found, and that there are doubts pertaining to whether it was ever sold to Afzal. In fact, the number came into use a month before the shopkeeper claims to have sold it to Afzal. In our opinion, the question is not of whether the computers were working properly during this period, but of whether they could have been and were doctored, and this has not been addressed. The only evidence, going by the Judgment itself that this number belonged to Afzal is his confession (given to the police). In other words, it is clearly the provisions of POTA –

admissibility of evidence given to the police – that forms the lynchpin here for conviction of Afzal.

2 . *Condoning the non-sealing of evidence*: One of the defence arguments pertained to the potential for tampering of evidence since certain critical evidence such as the slips on which phone numbers were listed or the I-cards were not sealed at the time of recovery. Potentially, the police could have put in slips bearing the numbers they wanted to frame. The Judges justified the failure to seal the evidence on the grounds that they furnished leads for future investigation. In any case, they argued, the phone numbers found on the body of the deceased terrorist Hamja (which the defence had implied were planted) were the same as those found on the bodies of the other terrorists, Raja and Rana.

3. *Problem of recoveries:* Despite accepting the illegality of arrests, the Judges do not concede that this vitiates the prosecution story of recoveries (of evidence). The Judges dispense with the problem caused by lack of independent witnesses at the time of arrest and recovery by citing 2000 (vii) A.D. (SC) 613 Government of NCT of Delhi vs. Sunil to the effect that the police must be trusted unless evidence could be proved to the contrary. It is not at all clear why the same police, who carried out arrests illegally, should have suddenly become honest when carrying out recoveries.

The police claimed to have recovered SIM card no. 9810446375 from Afsan at the time of her arrest. The prosecution argued on the basis of the call records that 9810446375 was in touch with a satellite phone and with what they term as Afzal's phone, 9811489429.

But given that the basis for saying that 9810446375 belonged to Shaukat is only his confession, this recovery is seriously doubtful. There are similar doubts about the other recoveries.

V
Confessions

It is in the Court's acceptance of the confessions made by Afzal and Shaukat that we see the challenge posed by POTA to the very concept of a fair trial. The fact that Gilani refused to confess was also held against Afzal and Shaukat, when they claimed that their confessions were not voluntary. Despite discrepancies between the two confessions, the Judges held that this did not vitiate the confessions in toto. The judges also note that when the confessions were recorded by the DCP, "there is nothing on record that the atmosphere was not free from threat or inducement." But surely, the police do not leave trails of evidence regarding torture. In fact, the judges themselves concede that Gilani's brother, Bismillah was "forced" to sign false papers. A delegation of Delhi University teachers, who met Gilani, soon after his arrest, noted in a public letter that he had been tortured. The gravest danger of POTA is that it gives free rein to police torture in order to extract suitable 'confessions'. That Gilani did not succumb to the torture in no way detracts from the fact that Shaukat and Afzal did.

In a positive vein, however, the Judges note that confessions made to police against co-accused, in the absence of any other evidence, are not valid, thus exonerating Gilani and Afsan Guru. (p. 350)

VI
Acquittal of S.A.R Gilani and Afsan Guru

In dismissing the conversation between Gilani and his brother as non incriminating (see report, page 17), the Judges have clearly exercised common sense. As they point out, if the charge rested on Gilani's brother asking him what he had done, surely this would have meant the brother had prior knowledge too, and this was not

even the police case. They also find that apart from this conversation, and apart from having been in telephonic touch with Shaukat and Afzal, whom he knew because they were also from Baramullah like him, there was no evidence against Gilani.

In the case of Afsan Guru, the Judges held that being in the house when meetings were held was not sufficient to impute knowledge of a conspiracy to her. As for the conversation she had with Shaukat on the 14th night (which according to the police showed that she was frightened and therefore aware of the conspiracy), by itself this is not incriminating (see report, page 17). The interception also had problems in that there are clear discrepancies between the duration of the conversation shown by the call records and the tape provided by the prosecution. Yet despite noting this, the Court does not call prosecution methods to account.

VII
Waging War Against the Government of India

While all concerned – prosecution, defense and Judge – agreed that the attack on parliament was a terrorist act, attracting the provisions of POTA, the defense disagreed that it constituted 'waging war on the Government of India' (Sec 121 of the IPC), since wars are normally waged between states, involve greater use of force etc.

The High Court, however, felt that 'Insurgency is treated to be an act of waging war against the Government of India'. According to the Court, the point was not the numbers of people involved or the firepower they had, but their intention to overthrow government or challenge its sovereignty. The various judgments it cites to substantiate this stand, however, are all taken from situations of rebellion against kingship or colonialism. Indeed, in a democracy, it is not possible to equate 'insurgency' with 'waging war' – insurgency may even be seen as a democratic right when all other institutions of democracy have failed, unlike a situation when howsoever terrible the king, people have no rights. In a democracy, people also have every right to want their own form of sovereignty, as they define it. Democracy demands that insurgency be addressed politically and not just as an act of war that needs to be militarily or legally defeated.

In this case, the High Court also concluded (page 205, para 216) that the firepower used was sufficient to constitute war. "The fire power was awesome. Enough to engage a battalion. Had the terrorists succeeded the entire building with all inside would have perished. The foundation of the country would have shaken. The act was clearly an act of waging war against the Government of India." Fortunately, some of us have more faith than the learned judges in the foundations of India, and do not think that they would have been so easily shaken. In a democracy, the people are sovereign, and the physical parliament building is only a symbol of this sovereignty. While an attack on parliament is extremely serious, it can by no means be construed as an attack on the sovereignty of the Indian people.

Most problematically, the judges have used the decision of the Government of India to station troops along the border, the snapping of ties and the subsequent tension to argue that for Afzal and Shaukat the punishment under Sec 121 should be enhanced from life imprisonment to death. The decision to escalate hostilities was an independent decision of the government of India and not an inevitable consequence of the attack itself. The Government could as easily have downplayed the incident, especially as the Pakistani Government had officially condemned the attack. How then, can Afzal and Shaukat be held responsible

for the "clouds of war" and much less, be given a death sentence for this? Ironically, moreover, since in the end there was no war, Afzal and Shaukat are being given an enhanced death penalty for something that they did not will, and which never happened.

VIII
Punishment: the problems with the death penalty

The Sessions Judge had given Shaukat and Afzal the death penalty under Sec 302 IPC read with 120 B IPC (conspiracy to murder), Sec 3(2) POTA (committing a terrorist act) and life imprisonment etc. under other sections (see table on page 23). The Delhi High Court upheld the sentences imposed by the Special Judge, POTA for the various offences, except for the offence u/s 121 of the Indian Penal Code (waging war against the state) in which the Special Judge had imposed the sentence for life imprisonment. The High Court enhanced the life sentence to that of death on the grounds of the serious national consequences flowing from the act. As mentioned above, this seems to us a flawed and legally incorrect approach.

Further, the judges play with semantics to argue that the definition of a terrorist act in POTA Sec 3(1) to include "any act or **thing**" includes help in procuring explosives, which is a 'thing'. Therefore even though Shaukat and Afzal did not carry out the attack themselves, the Judges hold both Shaukat and Afzal liable under Sec 3(2) POTA (committing a terrorist act) which can carry a death penalty. It is, however, no-one's case that Shaukat helped in the procurement of explosives.

PUDR views the death penalty as a barbaric form of punishment, and a violation of the right to life**.** Moreover, its imposition is both politically and legally unsound. We believe that it gives a potentially dangerous form of power in the hands of the State, and is an anachronism in a democracy that is grounded in principles of egalitarian jurisprudence. Being irrevocable, death penalty leaves no scope for redemption since a death conviction once carried out cannot be undone. In most cases, death penalty comes across as an arbitrary punishment since the baseline 'rarest of rare' is ambiguous. In this case we see that the High Court while exonerating Gilani and Afsan Guru, upheld the death sentence on Mohammad Afzal and Shaukat Hussain and enhanced their punishment to death under Section 121 IPC. Given the way in which the debilities and injustices of trial under POTA apply, sustaining and enhancing the death sentence of the latter seems more a measure to balance the acquittal of Gilani and Afsan Guru, than required by the facts of the case itself.

PUDR demands

1. A fair trial, which we believe, is not possible under POTA
2. Rejection of the death penalty
3. Action against police officers commensurate with the illegalities they have committed