Open Letter

Post-mortem of Afzal Guru Case

Friday 12 January 2007, by KANNABIRAN K. G. (Date first published: 14 November 2006).

If the proceedings of the Trial of Afzal and three others before the Designated Judge under POTA were to be video-graphed one would have understood the trivialization of Rule of law in this country.

The case itself was a highly publicized affair, the Investigation parading the accused before the print and electronic media in what can be described as a trial before committal stage; the screaming headlines and the news reporting in both the media prevents any disinterested endeavour to understand the case and assess the evidence for and against the accused. The media attention the case received foreclosed any possibility of a just conduct of the case, and in such a case conformity to procedure is the only visible guarantee of justice.

The attack on the parliament generated such hostility all around that nobody was willing to appear for the accused in the first instance Advocate Alam was appointed as Amicus, who is a practitioner in the courts in Patiala House and the proceedings date 10/1/01 show that the said counsel was to be informed. Obviously he did not respond. Ms Seema Gulati, a regular experienced lawyer appearing in criminal courts was appointed as Amicus. Afzal requested for the discharge of Seema Gulati as Amicus. On a written application she states that she has neither taken her instruction nor had discussed the case with the accused Afzal. She also applied for discharging her from the Amicus brief as the other accused Geelani in the same case engaged her. In her place a raw junior Mr Niraj Bansal was appointed as Amicus by order on 1/7/02. The trial commenced on the 8th July.

On that day Afzal petitions the Court as follows

Hon'ble Sir,

Respectfully I am not satisfied with state council (Counsel) appointed by the court. That I need a Competent Senior Advocate as Amicus Curiae to meet the ends of justice from this court. The way the Court is treating me I could not get justice. It is there fore requested to appoint one of the following lawyers: 1. Ashok Agarwal; 2. Pandit R K Naseem; 3. R K Dham; 4. Mr Taufil.

On 12/7/02 the court passed the following order: After recording 20 prosecution witnesses and after protest again by Afzal the learned judge passed the following order: "Afzal states that he does not want the amicus curiae Niraj Bansal to represent him. He had earlier given the list of four advocates namely, R M Tuffail, Dham, Ashok Agarwal, R K Naseem. This Court had enquired from R M Tuffail and Pt R K Naseem who appeared in was of the view his case was entirely different from the case of the rest of the accused. Hence, his insistence with reference to R M Tufail and Pandit R K Naseem the court records that the judge ascertained their willingness to appear as amicus for Afzal when they happened to appear before him in another case, but both of them expressed their inability to become amicus curiae in this case.

Ashok Agarwal had earlier appeared in this case on behalf of one of the accused and argued the bail application. Thereafter he did not appear"The court further observed that"I consider that if accused wants a lawyer of his choice, he is free to engage himself the lawyer of his choice, but if he has not engaged a lawyer of his choice and has asked the court to appoint amicus curiae, the court can appoint amicus curiae out of panel available with it or out of the willing advocates. Afzal has been given the liberty to cross-examine the witnesses. Neeraj Bansal has requested for withdrawal from this case, but he is requested to assist the court during trial" Mr Bansal cannot act, as court Amicus, even purport to act for Afzal.

After performing this ritualistic exercise according to his understanding of Rule of law, the judge, very much like the Procurator of Judea, washed his hands off the case! The result was Afzal was undefended through out and that does vitiate the conviction and sentence. He understood the seriousness of the charge he is

facing and so wanted the services of an experienced lawyer. Two lawyers refused to appear and he did not ask the other two. After young Mr Bansal was discharged of his right to represent Afzal there has bee no other advocate defending him. No doubt there were advocates engaged to defend the other three accused. But they had no brief to defend Afzal for he did not consent to such a course as is evident from the representations made to the court. In these circumstances it is impossible either to presume or infer that cross-examination was common. The designated judge sentenced to death the three accused did not order the forfeiture of life of the wife of Shoukat. Her newborn child was with her in prison.

These death sentences have to be confirmed by Bench of two judges under the provisions of the Code of Criminal Procedure. It is again a detailed re- trial on the basis of recorded evidence with wide powers for courts to do justice. Every aspect of the case has to be and can be brought under scrutiny. In the Final submissions filed on behalf of Afzal this aspect of the case is brought to sharp focus. Articles 14, 21, 22, and 39A ensure that the accused will be tried according to procedure established by law, where procedure means not any procedure but a fair and just procedure including access to justice. The court giving Afzal the liberty to cross-examine is a vacuous liberty where such liberty implies a comprehensive understanding of the Evidence Act and the Criminal Procedure. This freedom given by the court without discharging its Constitutional obligation is itself a total denial of his Constitutional Right to defend himself effectively.

The High Court in the Referred Case, record these facts in Para 133 of its judgment, and the court goes on to record that Accused Afzal has in fact cross examined eighty prosecution witnesses. The High Court held, "Mohd Afzal continued the trial without any objection or grievance." This conclusion is not supported by the proceedings of the trial court. Afzal had more than once requested for Counsel to be appointed by the court. But the court at the trial stage gave Afzal a Hobson’s choice. Either accept the lawyer appointed by the court or cross examine the

witnesses yourself was what the court had told the accused. The gravity of the case is writ large and such a case cannot be disposed of in the manner it was done both at the Designated Judge's level and the High Court.

This issue was not raised before the Supreme Court. When one waives the right to counsel it should be informed by competence and intelligence. The failure to appoint by the designated judge was on account of the self imposed limitation that he cannot traverse beyond the panel of lawyers available to the court. It is not that lawyers were not available, but lawyers were avoiding handling Afzal's brief. Non-availability and declined to appear are two different categories. The latter is outright denial of equal opportunity before law. This would amount to refusal of access to justice.

The position taken by the High Court appears to be wholly untenable. The Right to be defended by a Lawyer is not only a Fundamental Right but a right guaranteed under the International Covenant on Civil and Political Rights which have become mandatory thanks to their recognition by the Protection of Human Rights Act. 1993. Article 8 gives a person a right to an effective remedy for the enforcement of the fundamental rights recognized by the Constitution or by law and Article 14(c) which guarantees the right to the accused to be tried in his presence and to be defended by a competent lawyer. The Supreme Court has read these clauses in the Covenant along with the clauses dealing with equality and equal protection of laws (Article 14) Right to be tried according to procedure established by law (Article21) Right to be assisted by counsel from the time of arrest and during the trial (22 (1&2) and 39A which deals with equal justice and frees legal aid.

According to the Court Article 39A is interpretative of Article 21 and pointed out that courts cannot be inert in the face of these Articles. In one of the decisions cited by the Counsel the Supreme Court approvingly quoted the opinion of Judge Douglas of the US Supreme Court in Raymond vs Hamlin The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even

the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires a guiding hand of counsel at every step in the proceeding against him. ŠIf that be true of men of intelligence how much more true of is it of the ignoring and illiterate or those of feeble intellect." After quoting this passage there is no discussion of this decision and its applicability to the facts of this case. Reference to the passage relied upon by the counsel is not considering the ratio of the case. Without deciding the denial of the right to be assisted and defended by the lawyer the Court proceeds to the issue of the performance of a counsel and points out the difficulties of lawyers in performing this task.

While being mechanical in dealing with the fundamental obligation of the Court to provide lawyer assistance for defending the accused. the Court proceeds on a short dilation into the competence of defending counsel who was not there and that was the major complaint It would be very unfair to conclude that permitting Afzal to cross examine the witnesses would be compliance with Art 21 22, and 39A of the Constitution and the related international covenants.

The great debate that took place in the decades of the seventies of the last century one issue, which had the consensus of all the contending groups and intellectuals, was that Rule of Law should inform our understanding the Constitution and Governance. Yet within a matter of two decades Rule of Law stands discredited as never before, not even in the dark days of ’75 Emergency. Political prejudices are parading as juridical principles and communal prejudices have entered the decision-making processes of the justice system sometimes as judicial activism. The failure of the criminal justice to the

victims Sikh massacre in 1984, the indifference to the crimes perpetrated by the majority community in the Mumbai riots in Mumbai in 1992 leading to the appointment of Sri Krishna Commission and the attention Rule of law to the sequel by the violence of minority community in the Mumbai blasts, the Riots in Coimbatore where crores worth of property was consigned to flames and around two scores of Muslims killed went unnoticed while the sequential blasts a few days thereafter led to arrest and pre trial incarceration of around one hundred seventy five for around a decade and prosecution, the Gujarat riots where the killings led to no accountability, the Best Bakery case and the reopening of investigations that have been closed, by legal proceedings are the index of major failures of the criminal justice system by partial suspension of Rule of Law. in those cases.

At the same time we have the strident assertion of partial justice in the death sentences on Kehar Singh and Afzal. These two are instances of the operation of Rule of Law in its paranoid state. One became a victim of substantive injustice and the other the victim of processual injustice.

In India law has never been logic, justifying Justice Holmes and the replacement to logic he offered, namely,: "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed and unconscious even prejudices judges share with their fellow menŠ The decision will depend upon a more subtle than any articulate major premise.' in its unexpurgated sense applies to this country now. This is a major reason why the human rights activists campaign against death penalty In a death penalty casein 1994 (Collins vs. Collins) justice Black mum's dissent is to the point. "The problem is that the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants. Blackmum acknowledges error to be inevitable and injustice unavoidable Šit seems that a decision whether a human being should live or die is so inherently subjective, rife with all of life's understandings, experiences, prejudices and passions, that it inevitably defies the rationality and consistency required by the

Constitution".

Wherever and whenever courts overlook the importance of political justice, as a head of the Sovereign Democratic Republic, Mr President, Sir, should intervene to make amends in this regard and maintain democracy. Mr President, Sir in this case political justice failed and therefore calls for your intervention and commute the sentence of death into one of life.

For more information on the Afzal Guru case use the link below:

http://www.justiceforafzalguru.org

P.S.

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