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Misuse of the Unlawful Activities (Prevention) Act

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The Gadchiroli Sessions Court judgment sentencing G N Saibaba, Prashant Rahi, Hem Mishra, Mahesh Tirki, Pandu Narote to life imprisonment and Vijay Tirki to 10 years' rigorous imprisonment is flawed and shows clearly to what extent the draconian Unlawful Activities Prevention Act can be misused. Apart from citing irrelevant documents, it has ignored valid evidence and arguments presented by the defence, and accepted dubious versions of the same presented by the prosecution.

Life sentencing seems to be the order of the day in the largest democracy in the world, as India likes to call itself. Recent instances of life sentencing, all in March 2017, have dropped the veil of democracy off from the last institution meant to uphold it, the judiciary. This time, with the murder of judicial equity. We must beware the Ides of March!

In a shocking, highly controversial judgment delivered on 7 March 2017, Suryakant Shinde, sessions judge at Gadchiroli District Court, Maharashtra, convicted G N Saibaba (professor, Delhi University), Prashant Rahi (journalist from Uttarakhand), Hem Mishra (cultural activist and student at Jawaharlal Nehru University), Mahesh Tirki, Pandu Narote and Vijay Tirki (tribal residents of Gadchiroli) under Sections 13,18, 20, 38 and 39 of the Unlawful Activities (Prevention) Act (UAPA), 1967 and Section 120B of the Indian Penal Code (IPC). All but Vijay Tirki, who was given 10 years of rigorous imprisonment, were sentenced to life imprisonment.

Eleven days later, on 18 March 2017, Gurgaon Additional District and Sessions Judge R P Goyal, after acquitting 117 Maruti Suzuki workers, most of whom were behind bars for five years, held the 13 remaining workers guilty for the death of a manager at the Manesar plant and awarded them life sentences.

Now, we have Chief Justice of India (CJI) J S Khehar mourning that a terror convict gets access to justice while the victims do not. He was referring to the last-ditch attempts by the best legal minds in the country to stay the hanging of Yakub Memon. Just what is the CJI saying? That a man who is about to be executed ought not to get access to justice? Getting that access did not prevent the hanging. But, the ultranationalist rhetoric spitting venom at those lawyers harks back to the medieval ages of an eye for an eye and a tooth for a tooth. It

Economic&PoliticalWEEKLY

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was the very same Supreme Court—justifying an earlier hanging, that of Afzal Guru—that gave judicial import to the primordial instinct of "collective conscience." The quality of mercy is, indeed, strained!

Judge Shinde pronounced the verdict at 3 pm in a courtroom packed with heavy bandobast of police armed with sophisticated weapons, leaving little space for the lawyers and anxious relatives of the accused. By 5 pm, copies of the 827-page judgment in English were handed over to the accused, the defence lawyers, and the prosecution.

The judgment displays extreme animus, particularly directed at Saibaba, going to the extent of describing him thus: "though G N Saibaba is 90% disabled, he is mentally alert." This can only arise out of the state's vendetta against the man for the sympathy shown by the higher courts in granting him bail and for the widespread protests that resulted after his arrest in 2014. The sessions judge even refused to allow him the facilities granted by earlier orders regarding medical assistance, attendants, diet, and so on, leaving him at the mercy of the prison authorities!

Forty-eight-year-old wheelchair-bound G N Saibaba, professor of English at Delhi University, suffers from a spinal disorder that has resulted in the rapid deterioration of his muscles and nerves. The condition means that Saibaba cannot walk or use his left arm. His rib cage is collapsing onto his lungs. He has 90% disability and requires constant medical care to stop his condition from declining precipitously to an extent that could be a threat to his life. Extremely weak already (he had been hospitalised for acute pancreatic and heart ailments just prior to his conviction), he was being provided regular jail food instead of what was medically prescribed. Reports from those who have met him in jail suggest that despite vomiting bouts and two painful pancreatic attacks, no medical treatment has been given to him.

Procedural Lapses

Studying the 827-page judgment is an exercise by itself. But, reading it at length shows the vigorous and painstaking evidence mounted by the defence lawyers, which was completely ignored and rejected by the trial judge. For example, it is known that the first three accused—Mahesh Tirki, Pandu Narote and Hem Mishra—were arrested on 20 August 2013 from Ballarshah Junction railway station, in Chandrapur district, but the police framed a first information report (FIR) to show arrest two days later on 22 August 2013 and at the Aheri bus stand in Gadchiroli district. It was the defence's case that the three accused were kept in illegal custody for two days, and their confessions extracted and a false location of the arrest shown to bring it within the jurisdiction of the Naxal-affected Gadchiroli district.

The manner in which Saibaba was implicated in this case, almost a year later, is extremely suspicious. Soon after the arrest of Tirki, Narote and Mishra, there was a raid on Saibaba's official quarters in the Delhi University (DU) campus (at that time he was living in Gwyer Hall, the chief warden's residence allotted by DU authorities to Saibaba since he had 90%

Economic&PoliticalWEEKLY

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disability) and his computer and some books and papers were stolen by the Maharashtra police. There were no witnesses, nothing was sealed before him, and almost one year later he was arrested on a fictitious charge. Much later, the prosecution in its charge sheet could easily have planted incriminating material, since it was hell-bent on implicating Saibaba.

The sessions court has conveniently overlooked these procedural lapses in the judgment. The defence repeatedly sought the production of subscriber detail records (SDR) and call detail records (CDR) of the mobile SIM (subscriber identity module) cards, which would have established the defence's version and demolished the prosecution's case. But, the prosecution did not produce these records. The sessions judge, Shinde, ought to have, but did not draw adverse inference against the prosecution for what the Bombay High Court and other high courts have held to be "not just faulty investigation but withholding of best evidence."

A crucial "panch" witness in cross-examination deposed that he did not remember the name of the accused or for what purpose had been to Aheri police station as a panch witness in 2014. How could he then remember the instance of the *panchnama* done in 2013 against these three accused? Crucial evidence found on all the three accused were newspapers dated 19 August 2013 or 20 August 2013 and railway tickets to Ballarshah Junction. Nothing was found showing bus tickets to the Aheri bus stand. The defence lawyers effectively demolished the panchnamas of the allegedly incriminating 16GB memory card, in that the panch witness did not have any knowledge of being able to differentiate between a card reader, Bluetooth device, pen drive, and memory card, and hence was not a credible witness to identify a 16GB memory card.

According to a prosecution witness, the investigating officer had read the contents of a 16GB memory card in his presence and hence this points to the tampering of the same by the prosecution before it was sealed and sent to the forensic laboratory.

'Incriminating Articles'

What has Mahesh Tirki been found guilty of for inviting such a harsh punishment? That he was in possession of a pamphlet that opposed the Surjagad project and Operation Green Hunt, and another pamphlet condemning the Khairlanji massacre and the Maharashtra government, which has protected the perpetrators of the massacre and seeks to spread terror among Dalits, and so it showed his hatred towards the government?

Judge Shinde notes that from the personal search of Mahesh Tirki "incriminating articles" like a mobile phone, three pamphlets regarding naxal literature, a platform ticket of Ballarshah Junction dated 28 May 2013, along with personal documents like his election identity card, were seized; and from the possession of Pandu Narote "incriminating articles" like a platform ticket of Ballarshah Junction, a copy of *Lokmat* (Marathi newspaper), and an umbrella were seized along with personal documents like his State Bank of India passbook, his birth certificate and that of his daughter, caste certificate, domicile certificate, PAN

Economic&PoliticalWEEKLY

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card, election identity card, and registration certificate of a vehicle were seized. What is possibly incriminating about any of these articles?

As for Saibaba, of the 52 items seized from the raid on his quarters in Delhi on 12 September 2013, including such items as CDs—with titles like "Video on Sri Lankan War Crimes," "A Few Myths & Facts About Salwa Judum Concentration Camps," "Meeting on Kashmir-4, 21 October 2010 Arundhati Roy Amit Bhattacharayya," "Mati Ke Lal," "BBC Documentary on KASHMIR"—one magazine with the title "The Arrested" (Volume 2, December 2012), one magazine "People's March" dated 8 August 2007, and "one photograph of woman with gun"!

It was brought on record by the defence counsel that the panch witness—who is meant to be an independent witness—of the raid on the residence of Saibaba was accommodated at the police rest house when he came to depose before the Gadchiroli Sessions Court. The same witness deposed that on 12 September 2013, students and professors were gathered near Saibaba's house and that when his house was being searched, Saibaba requested that the search should happen in the presence of a professor or his advocate. He admitted that the police locked the gate of Saibaba's house and they did not allow any professor to enter the house and that inside the house around 20–25 members of Delhi police and 20–25 members of Maharashtra police were present.

An important omission brought on record by the defence during cross-examination of the panch witness was that the videography of the proceedings of the house search was taken, but the videographer was not examined to prove the fact that videography was in fact done, the investigating officer Suhas Bawche has not made any efforts to obtain the CD from the Delhi police, and the explanation given by Bawche is not proper, and, hence, adverse inference should be drawn against the prosecution for not producing the CD and not examining the videographer.

Whereas the judge is extremely lenient with the panch witness, who could not support the prosecution's case, by recording,

It is to be noted that this witness is illiterate witness. He cannot read and write English language and his cross examination was held in whole day that too by eminent lawyer having standing practice of more than 25 years and this witness might have frightened because of Court atmosphere.

In contrast, the judge chose to accept the confessional statements of Tirki and Narote while in police custody and under police torture as the unchallengeable truth, and has rejected the retraction affidavits filed by them subsequently in court.

The judgment further notes that, as for the 16GB memory card seized from the possession of Hem Mishra, there is no mention of unique identification numbers of electronic gadgets in the panchnamas, but it holds that this is not fatal to the prosecution's case. There is

Economic&PoliticalWEEKLY

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convoluted reasoning in the judgment:

it is clear that said crashed hard disk was sent to CFSL Bombay along with other electronic devices (Articles 1 to 41) and it could not be detected in the Cyber Forensic Scientific Laboratory. Hence, it reveals that the name 'Prakash' mentioned in Secretary's report at page no.17 of Exh.267 is nothing but accused no.6 Saibaba.100%.

A number of public meetings attended by Saibaba for the Committee for Release of Political Prisoners (CRPP) and Revolutionary Democratic Front (RDF) have been used to incriminate him because of the prosecution labelling these as front organisations of the Communist Party of India (CPI) (Maoist), when neither are banned organisations, nor are they front organisations, but are independent mass organisations.

A Flawed Judgment

To get an idea of why the judgment is so voluminous but devoid of independent judicial reasoning, take paragraph 533, which starts on page 401. This paragraph goes on to reproduce the entire programme and manifesto of the RDF (which is not a banned organisation) and concludes on page 434, thus taking up 33 pages of the judgment. Similarly, many documents are reproduced verbatim without any reasoning about their admissibility as incriminating evidence against the accused. From thereon, there is a line-up of various organisations with which these accused are allegedly associated. Their descriptions with photographs and video clips showing their active public activities run till page 460, covering up to paragraph 544 of the judgment.

What is even more problematic with the judgment is that it goes on to decide whether the RDF is a front organisation for the CPI (Maoist), almost arraigning it as a seventh accused in the case. There is no scope under the UAPA or under any law for a sessions court to decide whether or not a particular organisation is a front organisation. The court has, thus, exceeded its jurisdiction (from para 794 on page 674, to para 832 on page 700) in bringing this under its purview and in further concluding that "Saibaba is to be found as a founder of RDF and he is think tank of RDF organisation and high profile leader and he assisted the organisation in furtherance of their unlawful/terrorist activities as defined under Section 15 of UAPA wherein people have been exhorted to armed rebellion."

The sessions court has clearly overshot its jurisdiction, particularly when there is no notification to that effect issued by the Central Government under Section 3 of the UAPA declaring the RDF as an unlawful association.

The defence went further to argue that since none of the accused have been accused of taking part in terrorist activities, mere association is not sufficient to hold them guilty. This proposition has been upheld in the Supreme Court in the cases of *Arup Bhuyan v State of Assam* (2011, 3 SCC 377) and *Sri Indra Das v State of Assam* (2011, 3 SCC 380) to argue that merely being a member of a banned organisation does not incriminate the person and,

Economic&PoliticalWEEKLY

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therefore, even if it is found that the appellant was a member of a banned CPI (Marxist) and/or CPI (Marxist–Leninist) organisation, he cannot be held guilty of committing an offence under Section 124A of the IPC or for committing offences under the UAPA. The judge however held that since the prosecution has proved the case against the accused, the Supreme Court judgments are simply not applicable to their case!

Seeing the bent of mind of the sessions judge, except for the first accused pleading for leniency as he is an agriculturist with a family to look after, the remaining accused did not wish to say anything further, nor did the defence counsel, with the judge seemingly having made up his mind. The court went into recess at this point. When the court resumed at 3 pm, it elaborated from paragraphs 1005 to 1014 (pp 812–19) to further explore the nature of the Maoist movement in India before finally giving the maximum sentence to all except one of the accused.

It cannot be forgotten that the arrest of Saibaba and others gained national and international importance because of the ordeals that all the accused, particularly Saibaba, were made to go through. Despite having 90% disability, Saibaba was dragged, pulled, pushed, bundled into unhygienic police vans and forced to travel hundreds of kilometres on rough roads, all resulting in deterioration of his health. Because of this harassment, his ligaments were severed, nerves bruised, his heart problem aggravated, and his left arm and hand were completely paralysed. Hem Mishra has a disability of the hand, despite which he was tortured in custody. So too were the tribal youth and Prashant Rahi. Their bail applications were consistently rejected against medical advice and after huge national and international protests.

Draconian UAPA

The voluminous 827-page judgment cites so many irrelevant and unconnected issues that the prosecution has trotted out as evidence, including some request notes and leave letters written by Saibaba to the authorities of a Delhi college where his daughter was studying, and routine letters written by his wife to her bank regarding double entries. The major charge of the prosecution is that the accused in this case were waging war against the country and supporting the ideology of a banned organisation, CPI (Maoist). Anybody can easily understand that to “wage a war” somebody needs weapons and none of the six accused were shown as possessing any weapon on them when arrested, nor did the police find any in searching their houses. Supporting an ideology, even if the same ideology is adhered to by a banned organisation, cannot be a crime.

Such a verdict would not have been possible without the extreme provisions found in the draconian anti-terror UAPA, which has to be seen against the background of the gradual but steady constriction of Article 19, which guarantees the fundamental freedoms of expression, assembly, and association. Unlike its predecessors, Terrorist and Disruptive Activities (Prevention) Act, 1987 and Prevention of Terrorism Act, 2002, both of which had provisions

Economic&PoliticalWEEKLY

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for mandatory periodic review, or a sunset clause, the UAPA has no such provision. With periodic amendments since 2004, its provisions have only become more anti-constitutional. Since 2014, various civil liberty and democratic rights organisations throughout the country have initiated campaigns and movements for the repeal of the UAPA.

Both the Gadchiroli and Gurgaon judgments clearly are aimed to placate corporate greed for "industrial and other developments." The Gadchiroli Sessions Court judgment goes so far as to say that "the situation of Gadchiroli district from 1982 till today is in paralyzed condition and no industrial and other developments are taking place because of fear of naxal and their violent activities. Hence, in my opinion, the imprisonment for life is also not a sufficient punishment to the accused but the hands of the Court are closed with the mandate of Section 18 and 20 of UAPA and in my opinion it is a fit case to award sentence of imprisonment of life" (para 1013, pp 818–19). Civil Rights organisations and activists have condemned the judgment, pointing out that it is the culmination of the vicious campaign and propaganda against Saibaba, in particular, for lending his voice against the outright sell-out of Indian mineral resources to multinational corporations and to the corporates in India.

There have been a series of actual terror cases where the judiciary has had no harsh words at all—Malegaon, Ajmer Dargah, Samjhauta Express, Hyderabad's Mecca Masjid, and Modasa in Gujarat. All involved bomb blasts and killings authored by Hindu right-wing groups like Abhinav Bharat. Let alone being declared terror organisations, the accused are brazenly acquitted. It is revealing to contrast the Gadchiroli and Gurgaon verdicts with the one dispensed by Jaipur's National Investigation Agency Court on 8 March 2017, where Swami Aseemanand, and six others were acquitted in the Ajmer Dargah bomb blast case, which had killed three persons and injured dozens in 2007.

Indeed, beware the Ides of March!