

Media Trial?

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Afzal was handcuffed in the office of the Special Cell and before his trial could begin the police called in the media to broadcast a nationwide 'confession' on primetime television. Such a 'confession', though inadmissible in evidence had a huge impact in the country and a fair trial thereafter became nigh impossible.

Prior to making such statements, Afzal was not informed that he could consult a lawyer nor was he permitted to do so. He had a right to a lawyer from the moment of arrest. Any lawyer would have advised his client not to speak to the media. As a result of this trial by media, it was argued that both the trial court and the Amicus had been biased. Bias is insidious. The subconscious is affected. Trial by media is the anti-thesis of the rule of law and makes a fair trial impossible. ACP Rajbir Singh in the testimony stated, "I allowed media to interview accused Afzal in my office under the consent of my senior officer, namely DCP."

The High Court dealt with these arguments in detail setting out not only the Indian decisions but also the judgements of the European Court of Human Rights and also the US Supreme Court.

Though the arguments for a retrial were rejected, the High Court observed, "It has indeed become a disturbing feature that the accused persons are brazenly paraded before the press and are exposed to public glare in cases where test identification parade arises weakening the impact of identification. What is fundamentally disturbing is the fact that custody is given by the Court. This custody is not to be misused."

Legal Aid

Afzal was not given a lawyer in the trial court. He wrote to the judge saying that he needed a competent senior advocate and suggested four names. The judge enquired from two of the advocates present in court, who declined, and did not pursue the enquiry any further. He then appointed a lawyer for Afzal. When Afzal empathically said that he did not want this lawyer to represent him and the lawyer himself informed the court that he wished to withdraw, the court appointed the lawyer to assist the court. Assisting the court is one matter, a defence lawyer for the accused is another. Afzal's trial then proceeded without a defence lawyer.

Since he had no defence lawyer, many prosecution witnesses testifying directly against Afzal were discharged without effective and competent cross-

examination. No cross-examination was conducted of many witnesses regarding recoveries, including of the mobile phones and sim cards said to be implicating Afzal. No cross-examination was done of prosecution testimony showing Afzal allegedly identifying the dead terrorists. No cross-examination was done on seizure memos and alleged renting of rooms in Delhi. No cross-examination was done on the manner of the identification of the accused, alleged purchases of chemicals or the pointing out memos. The cross examination in respect of Afzal's arrest at Srinagar was done contrary to Afzal's case. On several dates presence of the advocate is not recorded. On some dates opportunity to examine the witness is not recorded. Critical questions regarding the media interview and the recording of the confession were not put to the investigating officer. As a result counsel did not consult with defendant Afzal on critical aspects of the trial, made no objections as to inadmissible evidence, made cursory closing arguments, did not make written submissions, presented no case law and often did only a formal cross examination.

It is inexplicable why the trial court insisted on the advocate continuing with the case once the accused had emphatically said that he did not want to be represented by him. it is unfair both to the accused as well as to the lawyer. No lawyer should be compelled to proceed with a trial, especially in a capital case, against his wishes.

The final arguments on behalf of Afzal in the High Court covers the illegality of the written confession, the illegal way in which the accused was identified by the prosecution witnesses, the non sealing of crucial evidence, the failure of the prosecution to call material witnesses, that testimony about the mobile phones and sim cards was fabricated and unreliable, that Afzal's fingerprints do not appear on a computer said to be recovered from him and so on.

Death Penalty

The Constitution permits the sentence of death provided there is a law to that effect. This law is to be found in 354 (5) of the Cr.P.C. which permits life to be taken but only by hanging, if this section is struck down by any court as constituting 'cruel, inhuman or degrading treatment', then there will be no law by which life can be taken and consequently the sentence of death cannot be imposed. The argument that 354 (5) Cr.P.C was unconstitutional was made several years ago in Bachan Singh's case and rejected on the basis that there was no medical evidence then to show that death by hanging was cruel, inhuman and degrading. The challenge to this section was again pleaded in Afzal's case with a view to having the section declared null and void so that if there is no law allowing for the death sentence, the sentence of death cannot be executed. The striking down of death by hanging and the consequent result of commutation to life has happened in several US states and in other countries as well. No argument was made that a new section ought to be introduced. As long as a statute enabling the taking of life does not exist subsequent to a court

pronouncement declaring it void, the result is that even a person sentenced to death cannot be executed.

No argument was made in Afzal's case that he be given the lethal injection. There is no reference to this in the 250-page final arguments. There is no reference to this in the High Court order.

Afzal's case before the President must be made on the basis of truth. It needs no embellishments. It certainly needs no falsehoods. The record of the trial court shows undoubtedly that he did not receive a fair trial. The arguments before the President should proceed on the basis of the evidence on record that would shock anyone's conscience. ✍✍