TERRORISM AND THE SENTENCING POLICY OF THE SUPREME COURT

*Nandan Kamath**
*Ankit Majmudar**

In recent times, terrorism and disruption are spearheading many activities throughout the world. They are waging a domestic war against the sovereignty of their respective nations or against a race or community in order to create an embryonic imbalance and nervous disorder in society.

India is, and has been a country with a terminal terrorist problem. We have fallen in the grip of spiralling violence and have been caught up in the problems of disruptive activities. This has led to unprecedented and unprovoked repression and disruption, unmindful of security of the nation, personal liberty and rights. This terrorism can be understood as the systematic use of terror as a means of coercion, the most reprehensible part of which is that its victims are usually innocent persons.

Terrorism is an evil which cannot be tolerated by any society as it is opposed to democratic values and more importantly to basic humanity. Realising this, Parliament introduced the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985 which was re-promulgated in 1987 to curb this growing menace. 'Terrorism' and 'disruptive activities' were explained in an elaborate way, intending to include all types of activities committed by terrorists, even mere possession of unauthorised arms and ammunition. Some of the principal features of the Act with regard to judicial discretion are:

* Stringent punishments were prescribed.
* Minimum punishment prescribed in all cases (5 years).
* No judicial discretion given in any proviso for reducing this minium punishment under any circumstances by giving 'special reasons'.
* Possibility of forfeiture of property of the convicted, fines, life imprisonment and death penalty.
* Possible to detain person without bail for 1 year, no anticipatory bail permissible.
* Burden of proof on the accused.

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* II Year B.A., LL.B. (Hons.), NLSIU.

It is thus apparant that although to some extent discretion of the courts is limited, they have a major role to play, the provisions of the Act signifying Parliament's attempt to introduce many features of the inquisitorial system of trial. It will thus be an important exercise to trace the trends of the Supreme Court decisions in sentencing those convicted of terrorism. In *Usmanbhai Dawoodbhai Memon v. State of Gujarat*,[1] the Court explained that the Act should be resorted to only as an extreme measure when ordinary penal law does not suffice. As laid down in *N.S.K. Singh Punjabi v. J.B. Bijayya*,[2] TADA is a departure from ordinary law and therefore there is a higher responsibility and duty on the judge because of enhanced punishments. Thus, the Supreme Court, as the apex Court sets the standards to be followed throughout the country by the High Courts and the Designated Courts set up under TADA. The rationale behind the Supreme Court decisions therefore also becomes of vital importance.

CAPITAL PUNISHMENT

The Act prescribes that if death results out of the terrorist act, the court may impose life imprisonment, liability of fines and death penalty. Through cases, the guidelines for imposition of capital punishment may be traced.

In *Bachan Singh v. State of Punjab*,[3] the Court held that the death penalty must be tackled with a holistic perspective. In giving special reasons for this punishment, due regard must be paid to both the crime and the criminal. The Supreme Court held that the court must not venture to formulate rigid standards in an area in which the legislature so wearily treads. Thus it was held that except in the gravest cases of extreme culpability, death sentence should not be given. It should be used only when life imprisonment seems to be an altogether inadequate punishment. The *Muniappon*[4] and *Gayasi*[5] cases strictly adhered to these principles.

Later, in *Machhi Singh v. State of Punjab*,[6] where 17 persons had been killed by the accused, it was held that the judges should not be blood-thirsty. Mitigating circumstances were to be given liberal interpretation, only offences of exceptionally depraved and heinous character which constitute a source of grave danger to the society must be dealt with by resorting to capital punishment.

Mental distress, insane impulse, absence of premeditation, mental imbalance and provocation have been accepted as mitigating circumstances in various cases.

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1 (1988) 2 SCC 273.
2 (1990) 4 SCC 76.
3 AIR 1980 SC 898.
4 AIR 1981 SC 1220.
5 AIR 1981 SC 1160.
6 (1982) 3 SCC 470.

Thus there are a number of cases in this regard which have followed these principles. In *Lokpal Singh v. State of M.P.*,[7] persons had been killed in a cruel and heinous terrorist attack. The Court had little hesitation in giving death penalty. Also in *Henry Westmuller v. State of Assam*,[8] where a boy had been kidnapped for ransom and later killed, capital punishment was imposed. However, the Court compromised in its stance in *State of U.P. v. Lallo*,[9] where the death sentence for the brutal murder of a Gram Pradhan as commuted to life just because the offence had occurred 10 years previously. Nonetheless, this was a heinous crime, falling well within the parameters laid down. This decision therefore needs to be criticised, as delay would not substantially serve the purpose of deterrence.

Two of the leading cases of great relevance are *Kehar Singh v. State (Delhi Admn.)*[10] and *State of Maharashtra v. Sukhdev Singh*[11] involving the assassination of Smt. Indira Gandhi and General Vaidya respectively. Death sentence was imposed in both cases. In *Kehar Singh*, the reasoning used by the Court is that what made the crime a 'rarest of rare' case was that it was the assassination of an important person, not just an ordinary one, such perpetrator having to face the dreaded sentence of law. The Court therefore seems to have taken a deterrent standpoint in this case, trying to set a precedent. However, in *Sukhdev Singh*, the Court convicted the assassins of General Vaidya, reasoning that it was a well-planned, organised killing and harped on the fact that the accused had no desire for a lesser sentence, not having appealed on the decision. This decision relies on the expiative theory of punishment of eliminating such unwanted elements. The most striking feature of the Supreme Court logic is that it brings out the fallacy of death penalty as a deterrent punishment such brutal murderers not fearing a punishment of death, moreover, expecting it and yet committing the assassination.

Thus, it can be inferred from such decision that although the guidelines had been laid down for when to use capital punishment (the principle of 'rarest of rare' cases showing the reluctance of the Supreme Court to use death penalty elastically), one can only infer that no particular theory of punishment, either deterrence, retribution or expiation, has been relied upon consistently as sentencing policy.

BAIL, IMPRISONMENT AND FINES

As elucidated earlier, anticipatory bail is not permitted under TADA. It is also possible to detain persons without bail for a period of 1 year. Preventive detention of persons whose activities are prejudicial to public order is justified as laid down in *A.M. Qureshi v. Commissioner of Police*.[12] However, to obtain bail, the accused

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7 (1985) SCC (Cri.) 400.

8 (1985) SCC (Cri.) 364.

9 (1985) SCC (Cri.) 478.

10 (1988) 3 SCC 621.

11 (1992) SCC (Cri.) 705.

12 AIR 1994 SC 1333.

has to satisfy the Court that he was innocent and would not commit any offence while on bail. Thus, the Court has laid down stringent measures to control the accused from possibility of causing any further damage to life and property. The concept of incapacitation of the accused is thereby followed until it is proved beyond reasonable doubt that he was innocent. This attitude of the Court can be inferred from many cases such as *Mohan Singh v. State of Haryana*,[13] the *Usmanbhai Memon* case and *Sanjay Dutt's* case.[14] Therefore, it can be said that the policy of the courts in controlling terrorism starts at the trial stage itself. However, the very need of 1 year detention has to be questioned as the only reasons for this are the slowness of the bureaucratic and judicial system and an insufficient number of courts to handle the case load, both of which have to be remedied at the earliest.

The general attitude of the Court in the TADA cases has been that once the accused has been found guilty beyond reasonable doubt, there is often a reluctance to give life imprisonment, this attitude being summed up in the *N.S.K. Singh Punjabi* case where the Court categorically stated the intention to construe such statutes imposing life imprisonment very strictly. The settled trend has been to give between 5 and 10 years of Rigorous Imprisonment. Some of these cases are the following: in *Erram Santosh Reddy v. State of A.P.*[15] the Court sentenced the accused to 5 years plus 8 years under two other statutes for hurling a bomb at police officials during a riot, arms also being recovered. In *Rajbir Singh v. State of Haryana*,[16] *Ram Phal v. State of Haryana*,[17] *Anil v. State of Maharashtra*[18] and *Brij Pal v. State (Delhi Admin.)*[19] the court imposed 5 years RI and fines of Rs. 200 and 500 in the first and last mentioned cases. Also in *Mohd. Yusuf v. State of Gujarat*[20] 8 years RI was reduced to 5 years RI. Only in isolated instances such as *Sukhwinder Singh v. State of Punjab*[21] and *Darshan Singh v. State of Punjab*[22] the Court specified that guilt had been established beyond doubt in the kidnapping and murder of a child and in the latter case in the murder of 5 persons. Does this mean that in other cases the Court has not been very sure of the guilt of the accused and therefore not imposed life imprisonment? Even though there is no provision for the Court to give less than 5 years imprisonment, the Supreme Court has disregarded this rule, and in *Jaloba v. State of Haryana*[23] it gave only 1 year RI citing reasons of old

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13 (1995) SCC (Cri.) 428.
14 JT 1994 (5) SC 540.
15 (1991) 3 SCC 206.
16 (1994) SCC (Cri.) 155.
17 (1994) SCC (Cri.) 156
18 (1996) SCC (Cri.) 357.
19 (1996) SCC (Cri.) 392.
20 (1995) SCC (Cri.) 304.
21 (1994) SCC (Cri.) 1367.
22 (1983) SCC (Cri.) 523.
23 (1990) SCC (Cri) 46.

age of the accused and his liability for a large family! Also in *Kathula Somulu v. State of A.P.*[24] only 3 years RI and Rs. 100 fine was imposed. Are such circumstances valid for violation of legislative principles which have a specific purpose? Another decision which merits attention is that of *Avtar Singh v. State of Delhi*[25] wherein the death penalty imposed by the lower court was commuted to 10 years RI and not life imprisonment. The moot question is, is the Supreme Court treading too wearily in dealing with the deadly threat?

The recalcitrant attitude of the Supreme Court in imposing fines on those convicted must also be taken serious note of.[26] With the ever growing need for victim compensation in cases of such nature where much damage is caused to life and property at least some measure can be recovered from the convicted terrorist. Only in the *Sukhwinder Singh* decision was a fine of Rs. 5000 imposed whereas in other such cases, in addition to jail sentence, negligible fines ranging from Rs. 200-500 have been imposed. Although fines as a penalty may not provide enough deterrent value in cases of such magnitude, a rethink is necessary wherein the Supreme Court lays down the benchmark for victim compensation.

THE ATTITUDE OF UTMOST CARE

The Court recognising its responsibility in dealing with matters such as terrorism, and with the aim of not convicting an innocent man, has taken an attitude of undertaking measures to distinguish between the terrorists and the innocent.

However, in some cases the Court has taken a strict stance. In *Paras Ram v. State of Haryana*,[27] *Sukhpal Singh v. State of Haryana*[28] and once again in the *Brij Pal* case, the Supreme Court firstly held that even if the accused held *either* arms *or* ammunition, not necessarily both, he can be convicted and secondly that the intention to use them need not be proved.

But the above cited are isolated instances of the hard stance of the Supreme Court. In the *Erram Reddy* case it was held that the definition of 'terrorism' must be strictly construed from the statute. In the *N.S.K. Singh Punabi* case it had been reaffirmed that a mere statement that caused terror in minds of people is insufficient to constitute terrorism, innocent persons needing to be injured or killed for the purpose. This decision requires to be squarely criticised for narrowing the scope of terrorist activities. In *H.V. Thakur v. State of Maharashtra*[29] it was affirmed that

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24 (1991) SCC (Cri.) 611.

25 (1995) SCC (Cri.) 303.

26 This inspite of Sec. 357 Cr.P.C. which specifically provides for victim compensation from fines.

27 (1993) SCC (Cri.) 13.

28 (1995) SCC (Cri.) 3.

29 JT 1994(4) SC 255.

the prosecution has to prove beyond reasonable doubt that the accused was carrying on terrorist activities. This was further enunciation of the *State of U.P. v. Motiram*[30] principle wherein it was laid down that a diabolical, gruesome community murder of 13 was insufficient proof, the prosecution needing to prove guilt conclusively. This attitude can also be seen in the *Amarjit Singh* case[31] where the sentence was set aside due to unreliable evidence.

Another point requires reconsideration of the minimum punishment rule. With the Court adopting this attitude of utmost care, until they are absolutely sure, they will not be willing to convict the person, the punishment being quite stringent. The removal of this provision, and a provision for judicial discretion will ensure that the judges will have a more open mind.

Thus it can be said that the attitude of the Supreme Court is most admirable in protecting innocent persons, but at what cost? Can diabolical terrorists be allowed to go scot- free?

CONCLUSION

The most recent stand on punishment put forward by the Supreme Court can be seen in justice Ratnavel Pandian's judgment in *Kartar Singh v. State of Punjab*[32] wherein, although admitting the object of TADA was to provide deterrent punishment, he went on to say that while exercising power, the court should keep in mind not only liberty of the accused but also the interests of the victims, collective interest of the community and safety of the nation so that public may not lose faith in the system of judicial administration and indulge in private retribution. Further, he expressed the need to regulate the life of man in a society through law which serves as a measure of society's balance of order and compassion. Thus, the Court seems to have settled on the theory of retribution in the punishment of criminal elements, and at the same time has taken on the onus of bringing in the principles of victim compensation ("interests of the victims").

Thus it can be seen how the attitude of the court has changed from *Kehar Singh* to *Sukhdev Singh* to *Kartar Singh*, from deterrence, to expiation, to retribution. What however needs review in this context is the true role of the Court in controlling terrorism in a society, this can be a matter for animated debate.

Terrorism, it can be argued, is the result of a feeling of socio-economic or political injustice by an individual or group. The reason for this feeling no doubt lies in depravity or alleged depravity undergone by these terrorists due to a particular social condition. It is therefore the duty of a society to correct these social

30 (1990) SCC (Cri.) 587.

31 (1995) SCC 828.

32 (1994) 3 SCC 569.

ills if the terrorists point is valid, or else attempt to reform the terrorist's attitude and thinking by therapeutic means if his feeling is irrational. There can be little debate over this point. But is this the duty of the Supreme Court?

The position of an independent judiciary in society is one of great importance. Although it may be argued that the Court must give the society the chance to reform the criminal within the justice system, the fundamental question is whether this principle must extend to such acts as terrorism or any sort of disruptive activities. As can be evinced from the decisions provided, many of these terrorists are beyond reform, often preferring to die, via capital punishment, for their cause. No doubts can be cast as to the responsibility of the Court to the entire society. Retribution, reformation and expiation are often used in justifying sentencing. However, in tackling a problem such as terrorism which strikes at the very root of the nation's solidarity and sovereignty, a definite stand is required by the Supreme Court which categorically deters such heinous crimes. Retribution is mere counter-violence, expiation is the shirking of responsibility by the state, and reform important as a therapeutic measure. However, what is the need of the hour is a sentencing policy which actually deters the commission of future terrorist acts, prevention always being better than cure.