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Letter: Ghosts of ADM Jabalpur in SC Order on Prof. Saibaba

By: People's Union for Civil Liberties

"It's troubling that a well reasoned judgment of the Bombay HC acquitting Prof. Saibaba and others which pointed out to serious shortcomings in the prosecution case relating to mandatory procedural safeguards was suspended."

PUCL expresses its serious concern over the hurried manner by which the Supreme Court permitted the Government of Maharashtra to move an urgent appeal on Saturday 16 October, 2022 against the acquittal/discharge of Prof. Saibaba and 5 others by the Nagpur Bench of the Bombay High Court on 14 October, 2022. It's troubling that a well reasoned judgment of the Bombay High Court acquitting Prof. Saibaba and others which pointed out to serious shortcomings in the prosecution case relating to mandatory procedural safeguards was suspended.

What is extraordinary about the CJI's decision to permit hearing of the Maharashtra Government's appeal against the acquittal, is that the State Government represented by Solicitor General Tushar Mehta, had orally mentioned the matter to the Second Bench headed by Justice DY Chandrachud and sought stay of the acquittal by the Bombay HC. Justice Chandrachud is reported by Live Law to have remarked in open court that the appeal could be listed only on the following Monday (October 17), thereby in effect, refusing to list the matter on Saturday (October 15). Justice Chandrachud is also reported to have noted that "He has got an acquittal in his favour. Even if we take it up on Monday, and assuming we issue notice, we cannot stay the order". It is thereafter that the Chief Justice, on the administrative side, chose to permit a hearing before a specially constituted Bench of Justices M.R. Shah and Bela Trivedi, on a non working day, Saturday, 15 October, 2022.

Two issues of grave importance arise from the decision to permit the State's appeal to be heard before a Special Bench on a non-working day:

(i) Previously, extraordinary sittings beyond regular working hours/ days of the court were permitted only in exceptional circumstances when issues of imminent threat to personal liberty or a situation threatening grave constitutional crisis required urgent intervention of the court. Midnight hearings were permitted to stop the imminent hanging of prisoners in Yakub Menon's case or Nirbhaya killers or threat to personal liberty as for example in Arnab Goswami or Vinod Dua cases or in the context of status of Legislative Assemblies in cases arising from Maharashtra and Karnataka. It is highly debatable as to whether the present case of Prof Saibaba and his co-convicts, who were legally and properly acquitted by the Bombay High Court, constitutes 'a grave and extraordinary situation' warranting special hearing on a holiday'.

(ii) What is also worrying is that the Supreme Court stayed an order of acquittal passed by a competent court in a criminal appeal. It is not as though the State has no remedies to challenge acquittals through `due process of law'. However, when the State, by invoking an extraordinary procedure ensures a stay of a judicial order of acquittal, it seriously threatens the very basis of `Rule of Law'. It raises the question as to whether a person convicted under the UAPA will ever benefit from an appellate court acquitting him or her. This has implications for the very fundamentals of criminal and constitutional jurisprudence in India. The fact that this order is a precedent of the highest court of the land, will embolden states to press for stay of acquittal orders, thereby threatening the right to personal liberty. This extraordinary alacrity shown by the Supreme Court in disregarding established conventions is not disregard of procedure to serve justice better; rather it is a disregard of procedure to suspend a jurisprudentially rigorous judgment of the Bombay High Court which has kept faith with the Constitution.

The substantive contribution of the Bombay High Court in Prof. Saibaba's appeal was to insist that with respect to statutes such as the UAPA, which deviate significantly from established procedural safeguards, the State (prosecution) is under an obligation to comply strictly with existing procedural safeguards. The reason why procedural safeguards should be mandatory is because of the history of the misuse of anti-terror laws. The Bombay High Court referenced TADA and POTA, (which pre-dated UAPA), stating that they were 'perceived as legislation bordering on the draconian' and that 'cutting across political and ideological lines, the provisions of the aforesaid statutes faced severe criticism as susceptible to egregious misuse and weapon of stifling the voice of dissent.'

The procedural safeguards the Bombay High Court references in the UAPA are in Section 45 of the Act. The Bombay High Court held that the procedural safeguard of sanction by the Central or State Government must be strictly complied with before the Court takes

cognizance. Under Section 45 (2), sanction for prosecution can be given by the Central/ State Government only after 'considering the report of such authority appointed by the Central/State Government'. The purpose of Section 45(2) is to ensure an 'independent review of the evidence gathered during the investigation' and on that basis to 'make a recommendation' to the Central Government within the prescribed time limit.

While the Bombay High Court wrongly holds that the submission of the report within the prescribed time limit of seven working days is not 'mandatory', it rightly recognizes that, 'Sanction serves the salutary object of providing safeguard to the accused from unwarranted prosecution and the agony and trauma of trial, and in the context of the stringent provisions of the UAPA, is an integral facet of due process of law.' It goes on to hold that sanction must be based upon an independent review of evidence as mandated by Section 45(2) and this is a mandatory requirement. It draws support for its conclusion from the statement of Mr Chidambaram, the then Home Minister who when piloting the Bill in Parliament (in 2008-09), stated that, 'let the Executive arm register the case, let the Executive arm investigate the case, but before you sanction prosecution, the evidence gathered in the investigation must be reviewed by an independent authority.'

On the mandatory nature of an independent review of evidence, the Bombay High Court rightly concluded that 'We are inclined to hold, that every safeguard, however miniscule, legislatively provided to the accused, must be zealously protected.'

It is this finding of the High Court of the importance of procedural safeguards and in particular, the mandatory nature of an' independent review of the evidence' which the Supreme Court completely ignores.

One is sadly reminded of one of the low points in the history of the Supreme Court, the decision in `ADM Jabalpur v Shivkant Shukla' (AIR 1976 SC 1207) when the majority held that during the duration of the Emergency, there was no need for the executive to comply with the procedure laid down for detaining persons under MISA as the right to life under Article 21 stood suspended. This cavalier approach to procedure was castigated by Justice Khanna in his historic dissent in ADM Jabalpur who rightly opined that, 'The history of personal liberty, we must bear in mind, is largely the history of insistence upon procedure'.

If the Supreme Court were to go on to conclude that non-compliance with sanction requirements, especially in special enactments like UAPA are only procedural and directory and not substantive and mandatory, it would indeed be a tragedy. If that happens, the ghosts of ADM Jabalpur would have truly come home to roost.

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