

India: The Shadow of Haren Pandya's Case Lies Long Over Justice Arun Mishra

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To say that the Supreme Court's verdict of contempt of court against Prashant Bhushan has shocked civil society in India would be an understatement. There has been an outpouring of dismay and anger in which even attorney general K.K. Venugopal has joined. Most of the protest has focussed on the blow that punishing Bhushan will deal to civil liberties, notably the freedom to express an opinion, the freedom to differ and the freedom to criticise - without which democracy cannot survive.

But one feature of the judgment has not received the attention it deserves: the Supreme Court is the court of final appeal in the country. But in this case, it is both prosecutor and judge. As the Latin phrase goes, *Quis custodiet ipsos custodes?*, or who will guard the guardians? By filing a suo moto case against Bhushan before itself, the Supreme Court has forced us to ask this question. And to it, there can be only one answer: that task has now devolved upon the people of India. Today the Supreme Court has forced us to sit in judgment upon it. We now have a duty to perform.

Of all the judges in the Supreme Court...

Let me start by asking one question: There are 33 judges in the Supreme Court apart from the chief justice. So why did Chief Justice S.A. Bobde not even notice Prashant Bhushan's application that another bench conduct the contempt proceedings and leave it to Justice Arun Mishra to head the bench that would hear this case? Did he not know that Mishra had a history of animosity with Prashant Bhushan?

That animosity was evident even as recently as a year ago when Mishra had severely chastised him in his court for daring to lodge a PIL seeking reinvestigation of the 2003 murder of BJP leader Haren Pandya in Ahmedabad. The CBI's investigation abounded with bloomers and the Gujarat high court had been constrained to acquit the 12 men convicted in 2007 of the killing by a trial court.

In the event, Mishra and his colleague on the bench, Justice Vineet Saran, reversed the Gujarat high court's 2011 acquittal, but more about their controversial verdict later.

Bhushan, appearing for the Centre for Public Interest Litigation (CPIL), had asked the Supreme Court to review the entire investigation because of the large amount of new information that had emerged - of police involvement in various encounter killings that had taken place in Gujarat since 2003, statements of police witnesses in those cases and their accusations made on oath in various courts, without the police even contradicting these, that not only exonerated the 12 who had been acquitted in 2011 but, more importantly, pointed to others.

Pandya's own family had consistently demanded reinvestigation as they believed the real culprits were never caught. Mishra, while reversing the high court's acquittals, fined the CPIL Rs 50,000 for "wasting" the Supreme Court's time.

So if CJI Bobde had wanted to safeguard the public's trust in the Supreme Court, should he not have paid heed to Bhushan's plea that any judge but Justice Mishra hear the contempt matter? Since the tweet for which the court wanted Bhushan to be punished concerned the CJI himself, Justice Bobde had a special obligation to ensure there would be no scope for anyone to feel the playing field was not level. Yet he did nothing, thus ensuring the contempt case would be dealt with by the one judge who was likely to ensure Bhushan would be punished.

The curious case of Haren Pandya

Why was CJI Bobde so sure of what Justice Mishra would do? The answer is that the Justice Arun Mishra bench's reversal of the Haren Pandya murder judgment of the Gujarat high court was probably the single most egregious judgement that any court of higher judiciary, and certainly the Supreme Court, had ever delivered. To see why, it is necessary to revisit the tortured history of the Haren Pandya murder and judgment in some detail.

Pandya was killed at around 7.20 am on March 26, 2003 while sitting in his car in the Law Gardens of Ahmedabad, where he used to take a walk every morning. According to the Gujarat Police, "Pandya had gone to Law Gardens for a walk, as he did every morning. As he parked his car, Asghar Ali (a known hit man from Hyderabad) had approached his car and shot him five times through a three-inch opening in the pane on the driver's side".

Asghar Ali's recruitment for the job, it claimed, was part of a plot hatched by Muslim elements - among them Mufti Sufian, a rabble-rousing cleric of Ahmedabad's Lal Masjid - that wanted to avenge the post-Godhra carnage. The investigation by the CBI, which took over the case three days after Pandya's murder, was headed by an Indian Police Service officer named Y.C Modi. Modi had no difficulty in accepting the police's theory, for he soon confirmed that the CBI had uncovered an elaborate conspiracy that included links with Pakistan's ISI and gang lords of the Muslim underworld in Gujarat and Andhra Pradesh. The CBI wrapped up investigations in less than six months and filed its charge-sheet on September 8, 2003.

Based on the CBI's finding, on June 25, 2007 a special court convened under the Prevention of Terrorism Act (POTA) convicted 12 people. For reasons that no one has ever bothered to explain, but under the tendentious pretext of "security", the entire trial was held inside the Sabarmati Jail, thus rendering it out of public and media gaze. Asghar Ali was sentenced to imprisonment till the end of his natural life; eight of the remaining 11 were awarded life imprisonment; two others got seven years and the third, a five-year jail sentence.

High court indicted CBI for shoddy probe

Six years later, on August 29, 2011, the Gujarat high court threw the conviction out. "What clearly stands out from the record of the present case" the court said derisively, "is that the investigation in the case of murder of Shri Haren Pandya has all throughout been botched up and blinkered and has left a lot to be desired".

It faulted the CBI for relying heavily on a single eyewitness, Anil Yaadram, whose testimony, it said, could not be believed owing to his behaviour, which it deemed "unnatural", it detailed the inconsistency between his supposedly eye-witness account and the forensic evidence, highlighted the absence of blood in the car after a man had been killed in it with six, possibly seven, shots from a pistol or revolver and concluded, "The investigating officers concerned ought to be held accountable for their inaptitude resulting into injustice, huge harassment of many persons concerned and enormous waste of public resources and public time of the courts".

Notwithstanding this searing indictment of his investigative competence, Y.C. Modi was elevated six years later, in 2017, as the head of the National Investigation Agency.

Of course, the CBI and the Gujarat government immediately appealed the acquittal to the Supreme Court. But little was heard of the case after that for seven long years – till October 2018, when it got marked to the two-judge bench headed by Justice Arun Mishra and the matter proceeded on a priority basis mid-November onwards.

Justice Arun Mishra overturns HC verdict

The bench announced on January 31, 2019 that it had “reserved” its verdict for a later, unspecified date. It was only on July 5, 2019 that Justice Mishra pronounced his judgment. This was six weeks after the Lok Sabha elections were over and Narendra Modi had been swept back to power. To the surprise and shock of the legal community, the Mishra bench took the unusual step of reversing the Gujarat high court’s acquittal, and convicted the 12 men accused of Pandya’s murder all over again.

Reversals of lower court judgments by the Supreme Court are not uncommon: A 2018 study carried out under the auspices of the National Law University, Delhi showed that it had reversed judgment in 55.3% of the criminal cases that had come to it on appeal. But the reversal of an acquittal by a high court has, to the best of this writer’s knowledge, happened very rarely. The guiding principles for a reversal of an acquittal in any court were laid down in 2008 by Justices R.V Raveendran and Dalveer Bhandari in *Ghurey Lal vs State Of UP*:

“We have endeavoured to set out the guidelines for the appellate courts in dealing with appeals against acquittal. An overriding theme emanates from the law on appeals against acquittals. The appellate court is given wide powers to review the evidence to come to its own conclusions. But this power must be exercised with great care and caution. In order to ensure that the innocents are not punished, the appellate court should attach due weight to the lower court’s acquittal because the presumption of innocence is further strengthened by the acquittal. The appellate court should, therefore, reverse an acquittal only when it has “very substantial and compelling reasons.” (emphasis added)

The Raveendran and Bhandari judgment laid down these guidelines in a case where the high court had found the defendant guilty of murder after the trial court had acquitted him. In the Haren Pandya case, the Justice Arun Mishra bench did the opposite. To do this in good conscience, they needed to overwhelm the immensely strengthened presumption of innocence bestowed upon the defendants by the high court judgment they were overturning. Did Justices Mishra and Saran succeed in doing so? Let us look at the record.

In their order, the judges said that the CBI had investigated the case “thoroughly and minutely” and that “the conspiracy between accused persons has been found established...It cannot be said that investigation was unfair, lopsided, botched up or misdirected in any manner whatsoever, as had been observed by the high court in the judgment which we have set aside.” The bench then sought to explain why it was rejecting the high court’s conclusions on crucial points.

How could bullets be fired through a 3-inch opening of the car window?

The high court had deduced from sole eyewitness Anil Yaadram Patel’s testimony that the right window glass of the car in which Pandya was sitting was rolled up so high that it would have been impossible for the accused to fire at him through the car window. So Pandya could not have been shot by Asghar Ali in the manner Yaadram described.

The Arun Mishra bench rejected the high court’s conclusion on the incredible grounds that the sole

eyewitness on whom the entire case rested may not have been reliable on this crucial question! Yaadram, it said, could not be expected to state accurately how far the window glass had been rolled up at the time of the murder. "Even if the witness had stated so, that would be merely his guesswork," the judgment added.

What Justice Mishra ignored was that the police photo taken at the spot, which police witnesses affirmed was the opening when Pandya's body was removed, also showed the opening to be just three inches or less.

What is more, considering that the case against Asghar Ali and his 11 supposed accomplices and conspirators had been built entirely upon the eyewitness testimony of Anil Yaadram, this decision to accept his credibility selectively cannot possibly meet the need to overcome the strengthened proof of innocence test laid down by the Raveendran-Bhandari bench.

How did five bullets cause seven injuries?

The Justice Arun Mishra bench also went out of its way to discredit the forensic evidence that the trial court had ignored but the Gujarat high court had resuscitated in order to arrive at its verdict. In particular, Justice Mishra went to great lengths to explain how there could have been seven gunshot wounds on Pandya's body, when only five bullets had been fired at him. The two extra wounds, the judges opined, were "'communicating wounds' that were caused when the bullet 'razes' the body without entering it." (One presumes they meant 'grazes', as the meaning of raze is 'to destroy completely')

This finding is utterly incomprehensible for two reasons: it makes a supposition and then treats it as a fact and, even more seriously, simply ignores the real facts - which are that the forensic laboratory found five bullet holes with an 8 mm diameter and one with a 5 mm diameter and another with a 4mm diameter, besides an elongated gash on the wrist. So, at least two weapons had to have been used while Yaadram testified to seeing only one being fired at Pandya.

A communicating or a graze wound suggests that the bullet has grazed the skin or flesh and fallen. Or if it marks a through and through entry and exit, again it must have fallen, besides leaving a track. But there was neither a fallen bullet nor a track. So, if five bullets were found in the body, where did the bullets causing the entry in the outer palm under the finger phalanx go? Where did the bullet that caused the graze on the wrist go? What wound was communicated and where?

How could Pandya have been shot upwards through the scrotum while seated?

The Gujarat high court had also held that Pandya could not have been shot up the scrotum through the barely open car window. To refute this finding, and in particular to explain how the bullet could have travelled upwards in Pandya's body from the scrotum to his abdomen, the Justice Arun Mishra bench falls back once more on Yaadram's eyewitness testimony: that when Pandya was shot, he "fell in the car and his legs went up".

They seem not to have realised that this finding violates another guideline prescribed by the Supreme Court as recently as 2013. In *Mritunjoy Biswas vs. Pranab @ Kuti Biswas*, it laid down that ". The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version" (emphasis added)

Let us see if Yaadram's deposition is 'credible' and 'meets the test of prudence': When he was shot, Pandya was supposedly sitting on the driver's seat in his vehicle, which was a Maruti 800, the smallest motorcar in the Indian market. So, when he was shot through the right side window at close

range, he slumped and his legs, were in the well of the car in front of his seat,. But how much could they possibly rise?

For, ten centimetres from the accelerator pedal, they would have encountered the side wall and 15 cms beyond that the door of the Maruti, which rises straight up from the floor of the well to its roof. There was, therefore, literally nowhere for his legs to go – no way for them to come out of the well, and therefore no way for his knees to have come above the steering, or for his scrotum to have risen high enough for a bullet fired downwards through the window to have moved up in his body to enter his abdomen.

Given the fact that Pandya's body and buttocks were found firmly on the driver's seat and only a portion of his head touched the left seat, it should have been obvious to the learned judges that Yaadram had lied outrageously, and that Pandya had likely been killed outside the car and his corpse shoved back into it head first from the driver's side so that his legs became, as the police claimed, under with the steering wheel.

This is, in fact, the only explanation for the final anomaly in Yaadram's testimony to which the high court drew pointed attention: the almost total absence of any blood anywhere in the car.

Why did a man shot many times inside a car leave no blood stains?

Claiming to rely upon "medical evidence", the Justice Arun Mishra bench dismissed the high court's concerns about the absence of blood stains, saying that the amount of blood would depend on several factors such as the position of the person and whether the injury was internal. This finding has set a new standard in imprecision and self-contradiction. For what the forensic examiners had found was not very little blood but no blood other than an infinitesimal smear on the left seat, too small even to examine, though his body was on the driver's seat on the right, and a little on the keychain.

And what medical evidence were they referring to that could show that a man would not bleed even a little from five .32 gauge bullets pumped into him at close range, and that all of the bleeding could be internal if the body was in the appropriate position. What is more, they had already interpreted Yaadram's testimony to infer that Pandya's legs were at, or above, the height of his body. So then how on earth could he not have bled into the car?

Finally, did the learned judges have any idea of how many major veins pass through the scrotum? The following diagram of one testicle, taken from Wikipedia, would have told them how many:

One of the veins connected to the scrotum is the Inferior Vena Cava, among the most important veins in the human body. It is inconceivable that a wound to the scrotum, let alone a bullet wound, would not have bled profusely all over the driver's seat and into the well at his feet.

But hubris is a disease in the Indian judiciary. Judges have grown so used to having their verdicts not scrutinised by the public that only the best among them now bother with such trivial issues as logic, consistency and clarity.

It is, therefore, difficult not to conclude that Justice Mishra was determined to prevent the question "Who really killed Haren Pandya?" from ever surfacing again. It is not for me to speculate on his reasons for doing so.

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