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Convictions should be based on fair procedure, not collective conscience: Aarushi Case Lawyer

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Journalist Avirook Sen (centre) and advocate Tanveer Ahmed Mir in conversation with lawyer Geeta Ramaseshan, at the Hindu Lit For Life in Chennai on January 15, 2016. Photo: R. Ravindran

How effectively does the criminal justice system in India work? ***Vasundhara Sirnate*** *and* ***Saptarshi Bhattacharya*** *gleaned an insight into India's investigative agencies and the court system by speaking to two people affiliated with one of India's most high profile criminal cases — the double murder of Aarushi Talwar and Hemraj. The following is the interview with Talwars' defence counsel,* ***Tanveer Ahmed Mir****, and* ***Avirook Sen****, a journalist and the author of Aarushi – Anatomy of a Murder.*

Vasundhara Sirnate: *Mr. Mir, you had the unenviable task of defending the parents of Aarushi in a trial that seemed to be stacked, as Avirook Sen's book says. It is very telling that the judgment was already being written by the supervising judge at least a month before he delivered it. Now, we always think that institutions of this country are democratic, they have the capacity to be fair and, finally, that they are worthy of the citizen's trust. But, upon reading the book, one feels that what need to be interrogated are exactly these three things. Second, maybe the*

institutions are not always so fair because of procedures. Third, what about perceived biases of individuals holding these exalted positions? Do you think that this is a systemic problem?

T.A. Mir: I feel that there are two aspects to the delivery of criminal justice in India at the trial court level. You start from whether it is a case of a celebrity or any other ordinary citizen of this country and we have to definitely have a system that lives up to the citizens' trust. As far as this case is concerned, I will only say that it is an aberration. It is not something that will resonate in the next 100 cases. Particularly from the point of the conversation Avirook had with the judge and his son (post his retirement on March 11, 2014). What has clearly emerged from that conversation is that the son travelled from Allahabad to Ghaziabad a month before (the judgment) to assist his father in writing the judgment, which, according to me, is a colossal blunder. It is a patent illegality. It is something for which both the lawyer and the judge should be made accountable, either by the supervising high court or by the bar regulatory authority and our effort and endeavour [has been] to bring it to their notice.

If that conversation is truthfully believed, what we see is that a very important portion of the judgment, as it stands today, written by the judge even before the defence began its argument. Even if that is pardonable, what is unpardonable is that a trial judge [has flouted] the law of the land [which requires that] he assesses the evidence after final arguments on his own without any undue and outside influence.

The legal system very [clearly] says that a judge cannot delegate judgment- writing to a person on whom there is no accountability, on whom the state has not reposed any trust or enjoined any kind of obligation to do that kind of a process. So, that consequentially breaches the fundamental aspect of fairness. The judge takes his judgment to a stenographer after he has assimilated the entire evidence, [which] is a thought-provoking process. There is an internal conscience. There is a weighing of evidence. There is a sound struggle within him. Then he comes to a conclusion. He cannot delegate it to someone else and cannot take an opinion from someone else. [If he does so] then the fundamental aspects of [his] conclusion being unbiased are put to strong questioning.

The Aarushi Talwar–Hemraj double murders as they stand today are in breach of faith, in breach of those guidelines [which are] now express guidelines of the Supreme Court. The Supreme Court clearly says that no judge can ever permit his kith and kin, being a lawyer, to get associated with him in any case that he is adjudicating. Why is this done? Because a stenographer cannot tell a judge what is to be done; but inevitably, if two lawyers discuss a case, they will discuss evidence. If they discuss evidence, how is it then guaranteed that that inner feeling to convict or acquit was not concluded out of outside influence. So, to that extent, the judgment is totally vitiated.

Now, we cannot say that this is happening in every case. Why did the son have to [go from] Allahabad and station himself in Ghaziabad and assist his father? What was the reason? Did the son go down in every judgment that the judge was writing? No. So why did he [do that] in the Aarushi Talwar-Hemraj murder trial?

Vasundhara Sirnate: *Was this because this was a high profile case?*

Avirook Sen: To make a gross generalisation on the basis of one case that the whole system is screwed up is illogical. To prove this, I would have to go through every case and come to a conclusion. What is undeniable [though] is that though this is not supposed to happen, it has been permitted to happen.

Not just in the judiciary, even in the investigation you find a situation where there are gross manipulations: forgery, pressuring of witnesses, evidence tampering. All of these are not legal. So really, you have to go back to the basics here. It is not that Indian law advises you to do any of this. The law, as it is written, and if followed, prevents all of

this. It is in the execution of this by individuals that the trouble really starts and the acceptance of these illegalities by superiors in the system. Not just at the investigation stage but also in the judicial process.

For example, an Email ID was created. Someone made an Email ID completely illegally, and communicated [using it] with suspects. Whatever the motive may be, it is patently illegal. Now, he is allowed to do this by his agency, which stands by him to the extent of denying that such a thing happened. But the same agency, having denied all this, presents the same evidence in three courts — the lower court, the Allahabad High Court and the Supreme Court. Not a single court has anything to say about the impropriety of this. Judge Shyamlal already writes in his judgment something, which is bland. It just says the investigative officer created this email ID to communicate with the clients. There is no mention of why he did so or the fact that this is illegal. It is perverse and illegal. The system is at a stage where there is acceptability to this kind of behaviour or this kind of tactic. The system itself is not bad. It is the individuals who are making it dirty.

Vasundhara Sirnate: *Is it your argument that since the Aarushi-Hemraj trial was high profile, so more than evidence, prejudice and bias have played a role in deciding who is guilty?*

T.A. Mir: I can tell you that the Aarushi Talwar case is easiest on evidence. But it is the most difficult case any lawyer can face on perception. My problem with the perception is that this was deliberately built up, initially by the investigative agencies by selective leaking of certain things in the media to psyche the Talwars and build public opinion against them; then I think for the unregulated media houses and mostly electronic media, the Talwars were, perversely, a story to sell. And, the story was not selling if it was propagated that there could be other murderers as well.

Avirook Sen: There was a cyclonic aspect to this. It becomes easier if in the public mind a person's conduct is poor. It becomes more credible if you then lay a charge of murder or theft or robbery on that person, because he is already cast as somebody of poor character. So, what happens here is — how the agency has worked in this case — it first casts the Talwars as social deviants. The media laps up this story because there is an aroma of sex in it.

T.A. Mir: It is salacious, there is crime, there is sex, and there are cops.

Avirook Sen: A perception is built up in the public about the character of the Talwars. At the moment, they are not talking murder, but only that they are certain types of human beings. Now judges are not outside of society. It is very clear and there are many eminent jurors who say this that you cannot tell yourself that I am above influence. It is absurd to do that. Now what happens is that when the judicial process starts, the public sentiment is already weighted in one direction and it is much easier for any judge or any investigator to follow that and confirm it. The moment it is confirmed by the judiciary, the media then says we were right all along. And the investigating officer, who actually did the planting, says, 'Look I told you so.' He is laughing. So, what you have is that from one to the other, it is all self-fulfilling. It is happening again in the Sheena Bora/Indrani Bora case.

There are no similarities between the two cases. But [by] the [alleged] conduct of these people — [whether] they are guilty or not, a court will decide — these people are being cast as deviants. This is exactly what happened with the Talwars. The point is that if you loathe a person, or paint a picture of a person to be a deviant human being, then the leap to [making them] murderers is that much easier in the public mind. And then, this leap suspends all rationality.

T.A. Mir: I will add to this. I will tell you what happened when I was doing my final arguments as a marathon for 14-15 days. Obviously, my fellow opponent, Mr. R.K Saini had to rebut something. Everyone in the law is allowed and supposed to do an argument based on evidence. Now Mr. Saini had a very strange argument and rebuttal. He said that whatever Mr. Mir says is nothing. It is fabricated and what happened is that after committing both the murders (beyond any evidence, beyond any document), both Talwars were drinking and watching porn. Now, you are making this statement before the trial court and the judge is laughing. And we are looking like idiots. So I am expecting the judge to say to the prosecutor, 'Are you nuts? Have you lost your mind? If you are making such a strong argument in a court of law, you had better have some evidence.' But the judge never said anything.

Why was Mr. Saini making these kind of reckless arguments? This was not for the consumption of the court but for the consumption of TV channels outside. Mr. Saini was not saying for the sake of a judgment, he was saying that so that tomorrow's papers would make the Talwars lose their reputation.

Avirook Sen: What happens with the coverage is that once again everybody in the court, including the judge, is looking at it and reading it.

Vasundhara SIrnate: *There is no sequestering?*

Avirook Sen and T.A. Mir: No nothing. It is his personal choice.

Avirook Sen: So this starts there. The judge now understands that media ne bol diya, means public ne believe kardiya. Main inke khilaaf likhoon ga to phir it is a disincentive for me. (If the media has spoken, the public will believe it. If I write [a judgment] against them, it is a disincentive for me).

T.A. Mir: In media highlighted cases, the general perspective of what I have learned in the last 19 cases is that the moment a case gets "media spiked" the judges get very apprehensive; they are always on edge. [In cases like] 2G Spectrum, Sheena Bora, Parliament Attacks, [or] any case, which gets spiked, [there] the judges find it very difficult to bring themselves to exercise their discretion on plain reading and understanding of evidence.

Avirook Sen: Even in the 2G Spectrum case, two judges recused themselves. Why should that situation even arise? See there is so much pressure. If I am a judge and I say there is pressure on me, I must then make a claim to everybody where that pressure is coming from, what the nature of that pressure is. So what is established here is that pressure can be applied and people are susceptible to pressure, otherwise you will not recuse yourself. But try telling that to the Supreme Court. They will haul you over the coals.

Saptarshi Bhattacharya: *You mentioned the Parliament Attack case and the subsequent hanging of Afzal Guru. A very interesting aspect of that case is the use of one particular phrase by the Supreme Court, which is "collective conscience of society".*

T.A. Mir: I am opposed to that as a lawyer.

Saptarshi: *If you string in all the cases you mentioned is that the one common thread? Collective conscience?*

Avirook Sen: Really, conscience in this case is not the secular meaning of the term. They mean collective sentiment, not conscience. Conscience is something that is internal.

T.A. Mir: Though the Supreme Court has done that, it is absolutely absurd. [Consider what] the same Supreme Court [did] in its revolutionary days of the 1970s and early 80s [when] it was at its best. [Now] it is going through a very steep decline as far as its calibre is concerned and every legal jurist says that. In the 70s in the Maneka Gandhi case and before that in the Royappah case, the Supreme Court said that the procedure [established by law] had to be "fair procedure". So the US [United States] 14th Amendment was read into Article 21 of the Indian Constitution that you cannot be deprived of your liberty and life except according to procedure established by law. The Supreme Court said that procedure established by law is due process of law. Now due process of law is fair procedure, substantial as well as procedural.

When you talk about all these cases, when you talk about collective conscience of society, that is again in violation of fair proedure, because fair procedure for convicting somebody is hard evidence and proof without reasonable doubt established by the prosecuting agency against the accused. Now you cannot wither that down and say that although there is no proof beyond reasonable doubt I am still going to hang you for the collective conscience of society. So the collective conscience of society is a [later] phenomenon inculcated by the Supreme Court, which is liable to be struck down, liable to be criticised and liable to be basically thrown off the books.

Avirook Sen: There is a corollary to this that is quite interesting. The phrase collective conscience is the converse of the phrase collective punishment. Which is a situation you will find in riots. Some Muslim has perhaps slit some guy's throat or set fire to some building or train so all Muslims need to be punished. So, the collective in any of these forms is like the flagrant violation of the rule of law and its principles.

Vasundhara Sirnate: *You said earlier that the Aarushi case is an aberration and that it wont find resonance in the next 100 cases. But right now, you have actually listed out cases where institutionally the judges decide the fate on other bases apart from hard evidence. How do you explain this emergent pattern in legal institutions?*

Avirook Sen: Are things wrong with the legal system? Yes they are. Let's recognise them and talk about them. There are tools within the system to correct them. You don't have to reinvent the whole structure. This doesn't need a revolution. It just requires people to, first and foremost, think rationally and think fairly. That's it.

T.A. Mir: I remember in 2014 when I went for my bail argument to Allahabad High Court, the lead judge there after two days of argument decided my bail application. When I told him that please bail my clients out as my clients are ordinary dentists, and besides this aberration in their lives, which is so unfortunate, it is not expected that they will show any deviant or abhorrent behaviour. [Further that)] The trial judge also says that they are not some kind of danger to society, so why not give them bail because fundamentally the law says that a person on bail is better suited to espouse the cause of his adjudication or dispute before a court of law. Then the judge had to say that 'you guys have argued for two days. This mater is in international media scrutiny; higher judiciary scrutiny and you see you put us in a difficult situation. So we will do the needful'.

Judges work on a basic principle that we shall deliver judgments without fear and favour. There is no dispute in this proposition. When the judge says that the matter is under media scrutiny, higher judiciary scrutiny, what is he conveying? That he is in fear of the matter? This shows that even before the matter has been decided that there is some kind of a very strong sentiment in the mind of the judge, which is basically clearly vented out even during the course of the bail argument. It may be just a slip up, but it shows your mind.

Avirook Sen: The judiciary [and the system have] built for themselves a lovely fortress. [Yet] the idea that this system will and can be continued runs very deep. Lawyers don't want to take them on. They are thinking of who

will be on the bench of the Supreme Court in 2021. So in fact, there are a whole line of stakeholders who keep this fortress very well guarded. So, judges really have to do very little because there is an army of lawyers and an army of media, which won't question.

Vasundhara Sirnate: *Our next set of questions is linked to evidence gathering and presentation in the Aarushi case. The evidence collection in the Aarushi case is botched from day one. There is a complete dead body, which is missed on the terrace…*

Avirook Sen: I just want to interject. I am fine with the word botched but not only the word botched. That is a mistake that is made overall in the media. It is not merely botched. Some of it is manipulated and maligned. That has to be included in that phrase. It is botched, but it is also manipulated in a way that is patently illegal. Fraudulent. Forgeries have happened. Those are evident.

T.A. Mir: Let me give you this example. During the course of the investigation after the Central Bureau of Investigation (CBI) came into the picture on June 1, 2008, the 56 exhibits that were seized by the CBI on first and second June were sent to Central Forensic Science Laboratory (CFSL) for DNA analysis, chemical examination, etc. Now this included two pillow covers. One was a pillow cover in purple, which was seized on 14 June 2008 from the room of the erstwhile-accused Krishna who was arrested and who was for about a year and a half the main accused. A *khukri* (curved Nepali dagger) was also recovered from him. Another was this pillow cover, which was Hemraj's pillow cover, which was erroneously brought into the record that this was seized from Aarushi's room. But during the course of the trial, it was clear that it was seized from his room alone. This was sent to Centre for DNA, Fingerprinting and Diagnostics (CDFD) in Hyderabad. In 2008, they submitted a report. According to that report from the pillow cover of Krishna, they get blood and DNA of deceased Hemraj. This report is there. It is in the CBI file and nobody questions it. CBI completes its investigation and files a final report. This final report culminates into a trial against the Talwars. Talwars are summoned. They get documents. They read these documents and they go running to the Allahabad High Court in revision. They say, "Why are you calling us to face a trial, when you have killing DNA evidence against Krishna Nepal?" (There is some confusion here. How did Hemraj's pillow cover get into Krishna's room? Did he carry it with him? If blood and DNA of Hemraj were recovered from "pillow cover of Krishna", what happened to the second pillow cover?)

After a period of almost two and a half years now the moment this application is filed and this evidence is placed before the judge in the Allahabad High Court, [what] the CBI people do is without actually filing they get certain photos. But they don't file them on record. Very strangely, which is actually deviant procedure because anything that you want to rely upon you have to first file it on record. They show it to a judge and they say that 'Sir, there is a mistake. Actually at CDFD, these two pillow covers have got swapped and there is a typographical error'. So the judge says, 'All right.' Now how does this typographical error come? There are certain coded tags. The main investigating officer goes down there, talks to those honchos at CDFD Hyderabad and they issue a clarification. They say that 'sorry sir, in our report of 6 November, 2008, we have committed a typographical error'. The question is how can this be a typographical error in the first place? We make a hue and cry about this. But ultimately, the tampering doesn't happen there. Where does the tampering happen? I'll tell you where. We brought this out during the trial in cross-examinations.

When we cross-examined SPR Prasad, the DNA forensic from CDFD, he said all his case property (56 exhibits) was in the court. All of them were torn open. I asked him a question, 'What do you have to say about your stationary being torn open?' He said that 'I cannot tell you. I am not in a position to. When I examined it we had properly

sealed them and I don't know who has opened my parcels, why these have been opened and when they have been opened'. So somebody has opened. Now the question is who has opened them?

Vasundhara Sirnate: *There is no log of who was accessing these pieces of evidence?*

T.A Mir: No there is no log.

Avirook Sen: To open this evidence you need the permission of a court of law.

T.A Mir: When we hit Allahabad High Court, these guys went helter skelter. They took the case property and tore them open. When they saw these two pillow covers, they simply swapped the tags. CDFD witness said 'these tags don't belong to me'. I'll tell you the sequence. If I am the last lab, then from my lab, once a case property is sealed — and it is in a lac seal, it bears my signature — it goes back to the law enforcement agency. Law enforcement agency parks it in a godown. From there, it is to go to the court. And in the court, it is to be opened. So if I am the last lab on the line, when the case property has to be opened in the court, it has to be in my parcel. When Aarushi's 56 exhibits were opened, there were not in the envelopes of CDFD, they were in brown envelopes of CFSL. So what CBI did is in order to have a face saving there in Allahabad, they opened all the samples tampered with the CDFD seals, re-packed in CFSL seals, connived with them and brought it before a court of law.

Avirook Sen: The tampering is established at the very beginning of the story. The moment the investigating officer shows the photographs. How does he take a photograph of a sealed sample? How can he do that? And the judge once again doesn't ask him this question?

So in a fair court you're nailed right there. There is another issue that comes up. I am glad Tanveer touched upon this. I have not expanded on this in my book. This is the relationship between the forensic lab and the CBI. There are several forensic labs all over the country. The one that the CBI most depends on is its own. This is CFSL-CBI. In my view [there is] a conflict of interest here. Any kind of forensic testing has to be independent of the enforcement agency. It has to be objective and independent. I can't say I'll test in my lab and I'll prove in my lab and I'll go to my court and I'll prove my case in my court. It's a problematic thing. So that relationship itself has to be explored because that goes to the heart of the investigative procedure. See, forensic evidence is going to become more and more important. You need integrity and accountability.

Vasundhara Sirnate: *How was that done and where are the logs?*

T.A. Mir: When CDFD said we have committed a typo, who is to prove that there is a typo? I being a defence counsel cannot be under the obligation to prove that the prosecution witness committed a typographical error. If CDFD Hyderabad chaps have committed a typographical error, the burden was on them and the burden was also on the prosecution to establish the typo. When we were examining this witness, we asked him how was probity maintained in your lab, what happens to an exhibit? He said that there is an inventory maintained, there is an inventory register. Then it is sent to a coding man who codes them. And there is a coding register. Then from the coding it goes to examiners. They examine and prepare another inventory. The report is prepared, it is sent back to the coding officer, who decodes it and again makes an inventory. Then it is packed and sent back to the dispatcher. This witness came to the court and said we have committed a typo. He did not even provide a wee bit of evidence as to how the typo was committed, in what circumstances it was committed and exactly when it was committed. He also says that the investigating officer did not record my statement. He did not collect any of the

chain of records, the coding registers, the inventories, the computers, and the printouts — anything to establish where this typo occurred.

In fact this witness said, 'We have prepared a written report as to how the typo happened.' This is also not seized by the investigating officer. In the final argument, I said, 'Your honour, these people are saying that there is a typographical error. Now please see the cross-examination and decide whether they have discharged the burden of proving the typo.' In the absence of this burden being discharged, this typo theory has to be rejected. So the judge was discomfited. He had only two words to write against all the examination and evaluation of evidence. He wrote 'CDFD committed a faux pas'.

The intent also becomes clear. Intent becomes that now you are getting blind to evidence. You consume most of the time in replacing English with Latin and when it came to evaluating evidence, common sense took an adjournment. On critical junctures, you invented evidence.

Vasundhara Sirnate: *What about the narco-analysis, which was conducted? The three narco-analysis reports from three people have a fair bit of information pertaining to the crime. But those cannot be admitted as evidence? How did the court treat these?*

Avirook Sen: At the very least, and this is very legal, what you can do as an investigating agency is follow the leads provided in the narco-analysis for investigation. But the narco-analysis itself is problematic. It is a problem of drafting. What it does (and this is because in my view there is a lack of understanding of these procedures that has led to a writing of an order like that) is that it clubs all scientific tests together. So the narco, the brain mapping and the polygraph is clubbed together and read as a summary. The order, which actually has become standard, now, fails to take into account that only the narco-analysis is a situation where the procedure is intrusive and in which you are not in control of your senses or responses. But the brain mapping is non-intrusive and you are very much in control of your senses and vitals. Polygraph is just like that. In that case, you can leave the narco aside but what about admitting the other two things into evidence?

Vasundhara Sirnate: *What about the leads the narco-analysis provided?*

T.A. Mir: I have a slightly different take. If you look at the current law situation in England, even there these forensic exams in the nature of a polygraph, brain mapping or narco-analysis are used for intelligence gathering. Intent was that. Now in the Aarushi Talwar murder trial, it is a peculiar situation because to a certain extent the results of these scientific tests on these three men [who were held by the first CBI team to be suspects] were consistent. They were providing some details as regards their presence in the apartment that night. I would say that there is difficulty in saying that all of them gave graphic details. As against that, the parents have nothing in their analysis. So, we did try to go to the Supreme Court and the High Court that these documents are exculpatory and they should also be placed on record and then the judge should take a view.

If you test the fundamental premise that a 13-year-old kid and a 48-year-old grandfather are having sexual intercourse on her bed in the dead of the night and somehow the parents get awakened and seeing this by an accident or otherwise, the father gets enraged and he goes clubbing both of them. Then the body of the servant is wrapped in some kind of a bed sheet, dragged through the apartment, and taken up the stairs and concealed on the terrace. It is this fundamental premise that had to be tested. Now the case fails on these fundamental premises. It is the CBI itself, which in its report, says that from the entire investigation conducted, no blood of Hemraj was

ever found in Aarushi's room. Now that was itself one of the biggest reasons enabling the judge to debunk the theory on a fundamental edifice.

This is a classic case where the CBI flouted all basic canons of common law, constitutional law, fair trail, fair investigation, fair forensic scientific investigation in order to cull out the truth. Here was a case, which started on fair parameters, but then a new investigating officer was appointed. He came with the purpose that 'according to me it is Talwars and Talwars alone'.

What is it that he holds against the Talwars? Nothing! What does the CBI hold against the Talwars? Nothing. What happens is sometimes you become the slave of a personal hunch. You are an investigating officer. You see a crime scene scenario. Then you say according to me it is they and they alone. Then you build the entire evidence around the premise. So therefore, the investigative methods of this person were not clean.

Vasundhara Sirnate: *Would you say that in this case the evidence is almost secondary to the case?*

Avirook Sen: Just to go back to the narcos. Narco-analysis not being admitted into evidence is one part of it and you can have any number of arguments about this. But here in this particular case, there was a very curious double standard. The narco-analysis reports of the Talwar are attachments in at least five different applications in the closure report. They have gone to court.

T.A. Mir: So if you can place my narcos on record, why not the other ones?

Avirook Sen: Exactly. And the clever part is this: If you go through the bound copy, what it says is that the polygraph of some of the servants is attached as an annexure. There's a letter. In the list of annexures, it says "narco report". All that it does is attach the first page of one particular polygraph. Now this is a really clever ploy. So, unless someone is actually going through it and takes the time and has the patience, nobody will spot this. So, to the court they look at the annexures and say oh everyone's is attached.

Vasundhara Sirnate: *So they created a narrative and were held prisoners to that narrative and they stuck to it, they wanted to just go ahead with that narrative. So it's a trial by narrative, not trial on evidence?*
T.A Mir: There were three things that happened. CBI very clearly tapped the media and knew that the media will find this very salacious. Secondly, based on that, they will move the court and feed the public sentiment. Then the third aspect was a judge who was fundamentally antithetical to acquitting people.

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