CONFIRMATION BIAS- THE PITFALLS

Abstract

The criminal justice administration is dependent on the investigation wing and the prosecution system in its quest for truth. The investigation agencies sometimes picks up innocents as accused that fit into the 'criminal category' and the prosecution, perhaps suffering from a confirmation bias falls for the plot. Confirmation bias has the effect of believing in police suspects who conform to the prosecution favour theory ignoring the discrepancies which may otherwise be so evident and the prosecutors' aid in wrongful prosecution. The case of *Ankur Maruti Shinde* v. *State of Maharashtra* of wrongful conviction prods us to investigate the possible reasons that may have caused the accused to be on death row for so many years. It is time that confirmation bias is taken seriously in criminal trials and we start recognizing the problem of confirmation bias so as to prevent future miscarriage of justice.

I Introduction

THE EXTENT and efficacy of criminal justice administration are parameters of the level of advancement of a particular social group. With great advancements in science and technology and behavioral sciences, criminal justice administration in India has also undergone a complete overhaul. The evidence collection has become more scientific,[1] punishment has ostensibly moved from a retributive phenomenon to a reformatory endeavor. Theoretically all seems to be perfect. However, the reality is not so simple and linear but complex and convoluted. One must not lose sight of the fact that the arrests, the evidence collection, appreciation of evidence by the courts and checks and balances in the Evidence Act,1872 decision of guilt or innocence and, so on and so forth, are all regulated and controlled by human beings who may falter at times and make serious errors of judgment. It is also assumed (rightly so) that the hierarchical court system in India, with appeals at all stages, should ideally be enough to check prosecutorial (mis)adventurism! But an analysis of case law bear testimony to the fact that it always does not work that way and innocents could be behind bars and even is on death row for years together![2] But this is not to make a claim for artificial intelligence or to undermine human minds. This paper is an attempt to understand where the courts are faltering (in some cases) so that awareness of the fault lines can help them against it. The paper attempts to examine a very recent case of *Ankush Maruti Shinde* v. *State of Maharashtra*[3] taking help from psychological science to assess whether confirmation bias could possibly be the case in criminal (in)justice administration in cases of this kind.

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1 Explanation to s. 53 Criminal Procedure Code, 1973.

2 *Adambhai Suleman Bhai Ajmeri* v. *Union of India* (2014) 7 SCC 716.

3 2019 (4) SCALE 266.

II Criminal justice administration

Before analyzing the case, a brief run through of the operationalization of the criminal process is in order. Criminal justice process is a complex one with many actors involved in it. As soon as a crime is reported, the state machinery is pressed into action as crime is considered as a wrong against the state. The state takes upon itself to avenge the crime committed against the victim by booking the guilty and producing them before the courts which are presided by neutral and impartial judges who decide the guilt and award adequate punishment as per the law. The first role in this whole process is that of the investigation agency, *i.e.,* the police which collects evidence and arrest the accused. Now, the police has a dubious record (many reasons are attributed to it which is beyond the scope of this paper). Quite often to keep a good record, or due to pressure from above to crack the case *etc.* it may pick up innocent targets as suspects who fit into the 'criminal category' and sometimes even plant evidence![4] Then comes the role of the prosecution which is supposed to be impartial and independent. It may be axiomatic to mention the relevant UN Guidelines on the role of prosecutors which states thus:[5]

> The office of prosecutors shall be strictly separated from judicial functions. Prosecutors shall perform an active role in criminal proceedings including institution of prosecution and where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
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> Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

This means that it is not a case that the prosecution has to secure a conviction at any cost but has to apply its mind to the evidence both incriminating and exculpating and present it before the courts.[6] Once the matter is before the court the magistrate sits as an impartial judge to decide the case where a strict scrutiny of evidence is done. The right to legal aid is firmly entrenched in the system so that the accused does not suffer from inadequate representation before the courts. Once all this is done, there is a provision of appeal. In cases of death sentence being awarded the case is sent for confirmation to the high court which is a final court of evidence. The case is contested again to decide whether the trial conviction needs to be upheld or overturned. Finally,

4 *Supra* note 2, para 17.What else can explain a letter written in Urdu and a gel pen with which the letter was written.

5 Guidelines 10-16, *Available at*: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Role Of Prosecutors.aspx. (last visited on June 20, 2019).

6 See *Babu* v. *State of Kerala* (1984) Cri LJ 1060 (Ker.).

the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) 1970, *inter alia*, provides that "an appeal shall lie to the Supreme Court from any judgment, final order of sentence in a criminal proceeding of a high court in the territory of India if the high court-(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years"[7]

III Confirmation bias at work?

On the face of it this seems to be a perfectly thought out system where ideally there should not be a scope for any wrongful conviction. How is it then that mishaps happen in cases like *Adambhai* [8] and most recently *Ankush Maruti Shinde.* If the investigation was shoddy or manipulative – the prosecution should have seen through it. But our experience with prosecution, in spite of criminal law amendments mandating Director of Prosecution, has not been very encouraging.[9] The investigation wing and the prosecution wings need to be overhauled to actualize the right of the victims to get justice or strengthening of the criminal justice administration. But the issue in this paper is not of 'victim justice' which undoubtedly remains the very basis of having a criminal justice administration. The issue here is that of innocent persons getting caught up in the system due to shoddy investigation and unethical prosecutorial practices. Ideally one would assume that since we have a very competent and independent judiciary and our highest court is touted as the most powerful court and has some stellar judgments to its credit, investigation laxity and prosecutorial indiscretion will be taken care of and innocents will sooner than later be freed.[10] But unfortunately that has not always been the case. We know that in *Adambhai* case the accused were on death row till the Supreme Court intervened and rectified the error but in the most recent *Ankush Shinde* case, shockingly, the Supreme Court also faltered miserably and it was only through a review petition that six innocent people were ultimately saved. These people were on death row for 16 years, and the victimization that they and their families went through is unfathomable.[11] The author is of the opinion that it is not a

7 *Supra* note 2.

8 *Ibid*.

9 Criminal Procedure Code, 1973, s. 25 A.

10 In the sense that real culprits may never be caught but innocents will not be punished! This I concede is a huge failure but the paper is not pointed to that direction.

11 I had shared some early thoughts on this case in NLUD and a senior professor of law was not comfortable by my calling these people as victims and kept referring to them as 'secondary victims' and underplaying their victimhood. For me there is no hierarchy of victims into primary and secondary. In a crime situation the fellow societal members are the perpetrators and thankfully the state stands up for the victim and takes on the perpetrator but in a *Ankush Shinde* situation the very state and its machinery is the perpetrator of crime! In the latter case the savior becomes the perpetrator leaving the victim totally helpless which definitely is an equally frightening situation if not more.

legal problem alone; law needs to engage with other disciplines to unravel the mystery of wrongful convictions and since we are talking of human mind, psychology may provide the required answers.

Saul Kassin, a professor of psychology at John Jay College of Criminal Justice, categorically stated that: 'a warehouse of psychology research suggests that once people form an impression, they unwittingly seek, interpret, and create behavioural data that verify it'[12] Nickerson in his paper "Confirmation Bias: an Ubiquitous Phenomena" asserts that 'if one were to attempt to identify a single problematic aspect of human reasoning that deserves attention above all others, the confirmation bias would have to be among the candidates for consideration'[13]

And if this merits any consideration then in an adversarial system that we follow, 'Confirmation Bias' may result in gross injustice where the real culprits may never be caught and the innocent may get enmeshed in the criminal process. As C. Mackay famously said, "when men wish to construct or support a theory, how they torture facts into service."[14]

IV *Ankush Shinde* in prospect

With these psychological studies in the background, let us analyse the case [15] and see if the confirmation bias may be considered as the culprit. On the night of June 5, 2003 a group of 7-8 men in banyans and half pants entered a hut where a family with their guests (seven members) were chit chatting post dinner. They demanded money and took away the ornaments and departed. But they came back with weapons and assaulted the house members. The two women were tied and beaten and one of them was taken out – allegedly raped - and was brought back naked in an injured condition. They left after being convinced that all were dead. However, two members – the son, Manoj, PW1 and his mother, Vimlabai, prosecution witness 8 survived and they were the 'star' prosecution witnesses. Investigation started – medical evidence, clothes, weapons were seized and sent for analysis. Two accused number 1 and 2 were arrested on June 23, 2003 and on June 27, 2003; three more were arrested, number 3,4 and 5 (through transfer application as they were in custody for some other crime). The accused number 1, 2 and 4 had injuries which, according to the medical report, were about three weeks

12 Saul M. Kassin, "On the Psychology of Confession: Does Innocence put Innocents at Risk" 60 *American Psychologi*st 219 (2005).

13 2 *Review of General Psychology* 175(1998).

14 C. Mackay, *Extraordinary Popular Delusions And The Madness Of Crowds* 532 (2nd rd. Boscon, 1932).

15 The analysis is base on the high court judgment and Supreme Court judgment and subsequently the judgment in the review petition.

old. No specifications of the injuries have been given either in the high court judgment[16]or the Supreme Court judgment.[17]

A test identification parade of the accused was held on July 25, 2003 by the executive magistrate. Prosecution witness 8 identified all the accused persons and PW 1 identified all but one – accused no. 2 and accused no. 6 was arrested on October 7, 2004 and on October 9, 2004, another test identification parade (TIP) was conducted and accused no. 6 was identified by both the prosecution witnesses. The court of sessions found all the six accused persons guilty under sections 395, 302 read with 34 IPC, 376(2) and 307 read with 34. All the accused were, apart from imprisonment for specific offences, sentenced to death subject to confirmation by the high court. The case came before the High Court of Judicature at Bombay[18] as a confirmation case and a criminal appeal was filed by the accused persons against the order of conviction. This paper attempts to closely analyse the high court and the Supreme Court judgment to proffer an argument of sub conscious confirmation bias in the criminal justice administration.

Test identification parade

The test identification parade (TIP) was very important in this case as it was vital in convicting the accused persons. The defense counsel argued before the court that prosecution witness 1 was unreliable as during cross examination he had stated that he lost consciousness after the accused entered and started assaulting the victims. He had also made a statement before the police that when the accused entered the hut they started assaulting the inmates and raised the voice of the tape recorder and switched off the lights. So the witness could not have possibly identified the accused.

As far as the other witness prosecution witness 8 was concerned, her dying declaration was to be recorded (as per the order of the court). For this, files containing photographs of history sheeters were shown to her and she identified four accused persons from those photographs! The persons identified were of the ages 22, 19, 20 and 35. By God's grace she survived and it was no longer a dying declaration but her identifying the accused persons was a recorded fact which was produced before the court as exhibit 122.The high court underlined this fact and held that, "Exhibit 122 in any case cannot be called as a dying declaration when Vimlabai survived and it could be at the most termed as her previous statement during the course of investigation" However, when the TIP was conducted she identified the present accused persons whose photographs were not there in the files shown to her! Imagine, god forbid, had she

16 *State of Maharashtra* v. *Ankush Maruti Shinde* , Confirmation Case No. 2 of 2006 with Criminal Appeal No. 590 of 2006. Reserved on Mar. 8, 2007, Pronounced on Mar. 22, 2007.

17 *Ankush Maruti Shinde* v. *State of Maharashtra*, Cri. App. No. 1008-09 of 2007. Date of judgment Apr. 30, 2009.

18 *Supra* note 16.

died those history sheeters would have been the accused persons due to the admissibility of dying declaration under section 32(1) of the Evidence Act, 1872. Had the courts wanted to exonerate the accused persons they may have taken note of the fact that this statement was recorded by a magistrate and hence credible. What is surprising also is that the trial court judge passed an order declining to exhibit the requisition date June 7, 2003 received by prosecution witness 13 by the investigating officer for such identification.[19]

The defense counsel also brought other anomalies in the TIP to the attention of the court. They might seem insignificant but since the case was entirely dependent on the identification of the accused persons that these anomalies becomes extremely important and worth the consideration of the courts. The counsel submitted a list of very detailed objections some of which were as follows:[20]

> [T]he TI Parade … was in utter breach of the guidelines as contained in the Criminal Manual framed by this court. When the TI Parade was being conducted … the police and the jail personnel were present in the parade hall, the witnesses were made to sit in such a way that they could see the accused persons while being brought from the jail to the hall., the selection of respectable persons was not done by the magistrate…. While selecting the dummies it was necessary to ensure that they had similar features like age, height, complexion and general appearance. … in any case the said TI Parade was not proved by examining PW 25 Mr. Alhate in the original trial and if that be so, there was no basis for the prosecution to file the charge sheet against them.

Another very important point that deserves attention is that the weapons produced before the courts as weapons of assault were not 'recovery evidence' as laid down in section 27 of the Evidence Act, 1872. The weapons were the ones which were 'seized from the spot of the incident *i.e.,* the hut of Trambak and brought before the trial court". No matching of finger prints to link the accused to the crime was found. So, as such, the accused could not have been (apart from identification by star witnesses) linked to the crime objectively.

Lot of literature is available on test identification parades but even if one was to ignore academic writings, the courts should have found glaring omission in the TIP given the fact that the case depended so much on this identification. But the high court had this to say:[21]

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19 *Ibid.*

20 *Ibid.*

21 *Supra* note 16 at para 10.

> …[T]he defense failed to bring any material defects so as to vitiate the TI parade held on 25/7/2003 or in any way make it doubtful. Merely saying that in the report submitted by PW25 the height and age of every person used as dummy was not mentioned and, therefore the Magistrate failed to conduct the parade as required, cannot vitiate the TI parade. Even otherwise we have noted that PW 8 could not identify accused no. 2 Rajya Appe Shinde as is clear from the depositions of PW 25 and she identified the remaining four accused persons whereas PW1 Manoj identified all the accused. This is an additional factor in support of the TI parade being genuine and not casual exercise undertaken by PW 25.

In any given case, there are two scenarios available – one is that you present a case in a manner that justifies your hypothesis , for example, the prosecution presents the case (deliberately) in a manner that justifies the hypothesis and the defense argues the case in a manner(again deliberately) that justifies the hypothesis of innocence; the other and the second is to evaluate the case independently, scrutinize the evidence and then reach a very objective conclusion of either guilt or innocence. The courts are trained and their function is designed to do the latter and the courts are extremely conscious of that fact. But it may be argued that human mind (and that would include judges who are after all human beings) may sometimes sub- consciously already reach a conclusion and then build the case and appreciate the evidence that conforms to its sub-conscious decision. Inadvertently, human mind may trace patterns where none exist. And this becomes a classic case of confirmation bias. Raymond S. Nickerson defines confirmation bias as "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations or hypothesis in mind". This confirmation bias is responsible for evaluators to sometimes side with evidence which is compatible to sub conscious hypothesized guilt.

In the high court judgment, after affirming that TI parade suffers no infirmity, the court quotes from *Suresh* v. *State of Maharashtra,*[22] *inter alia*, to remind itself the settled principle that "we remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes." Brilliant reminder, but did the court then follow it? The paras 14- 18 where the court is attempting to examine the evidence of the two star witnesses is actually endorsing whatever the witnesses said – accused 2 did this , accused 3 did this and so on and so forth but surprisingly except for the TIP, there is nothing else to corroborate the assertions of these witnesses. The age of the accused persons identified in the album is mentioned in the high court judgment but nowhere is the age mentioned of the accused persons identified in the TIP. Why did the court not go into these minute details when life of six men was involved? The mother-son duo were not even consistent with the source of light

22 (2000)1 SCC 471.

available at the time of incident. Was it the bulb or the torches they allegedly carried! Court after court fell for the narrative of these survived victims. It is in no way suggested that the narrative was totally wrong – the details were spot on as far as the assault is concerned as was corroborated by medical evidence in the form of post mortem reports, but the actors of that assault may or may not have been the guilty persons and the court had to engage itself with this very crucial scrutiny. But the court had almost decided that they were the guilty persons and to pin the guilt and connect the dots it makes a profound statement that "the medical injuries she stated to have been caused to all the family members … almost tally with the medical certificate issued by the medical officer concerned."[23] Obviously it would, as these two have been the victims of the assault and to recognize faces in such a setting may be extremely difficult and dependent on too many variables. But to recall the incident vividly is not so difficult unless one goes into a state of total shock and is numbed. But does that corroboration suffice to hold the present accused persons guilty. The answer is a resounding NO. Criminal jurisprudence has evolved over decades and underlines the principle that the case has to be proved beyond a reasonable doubt. When one says 'case', it does not mean that the alleged incident has to be proved – that in most cases is easy – the dead bodies are there, assaulted victims are present, the vandalized place becomes a site of *res ipsa luquitor* and so on and so forth; but what it means is that the guilt of the accused persons has to be proved beyond a reasonable doubt.

Medical evidence

The medical examination of the accused persons, which is a mandate of the Cr PC, revealed injuries on the accused persons that were about three weeks old (*i.e.,* around the time of the alleged incident) and medical opinion was that "these injuries can be caused to a person who suffered resistance from the victim cannot be discarded." True, it cannot be discarded but other scenarios would also have to be considered. It was not a decisive statement – it was just an opinion and one of the possibilities. For example, the doctor also opined that injuries found on one of the accused were possible during agricultural work. Why did the court not engage critically with the doctor's opinion of injuries due to resistance? Why was the alternative not explored? The simple answer is that the court had made up a hypothesis of guilt (subconsciously) and was picking up all that buttressed the hypothesis and hence validated the trial court rejection by saying that it has been "rightly rejected by the trial court".

What was the basis for such validation or for picking up the medical opinion (which it is reiterated is an opinion which needs to be considered and not taken as gospel truth) and validating it without further scrutiny?. If this was not enough, the court surprisingly mentions that "considering the evidence of prosecution witness 9 Gadakh that deceased

23 *Supra* note 16, para 15.

24 *Supra* note 16, para 18.

Savita was subjected to sexual assault by the accused nos. 1,2 and 4".[24] How on earth could the doctor give such an evidence when the medical evidence of 1,2 and 4 was never mentioned anywhere – there was no semen traces, or skin or anything which matched with that of the accused. The doctor in those circumstances could only conclusively say that the deceased had been sexually assaulted and nothing more and she did do that, as is mentioned in the post mortem report reproduced in the high court judgment.[25] It was the investigation agencies that needed to prove objectively that these three were the persons responsible for the sexual assault – but nothing of the sort happened. As far as the judgment is concerned, it does give details of the post mortem reports. What is mentioned about Savita's injuries leading to her death, as per Gsadakh, *inter alia*, is "vaginal oedema present, bluish discolouration of vaginal mucosa, hymen ruptured, bleeding through vagina present". So the sexual assault stands confirmed by the report but it is only the testimony of PW 8 which attributed this sexual assault to these four accused persons. The author's objection is that could the doctor in that case conclusively say that or is it that the doctor only mentioned about rape and the narrative was provided by prosecution witness 12 and the courts inadvertently and subconsciously connected and perhaps joined the two statements and based their judgment on this fallacy. All the medical evidence that was available was of the victims. The report of the medical examination of the accused persons was there which was independent of the crime situation. Since the weapons had been seized from the house, the accused had been identified, then why was the finger print matching not done or if it was done why was there no mention of that fact. The truth is no scientific scrutiny was even attempted to link the accused with the crime. If this is what happened then it is a clear case of confirmation bias and nothing else. Scholars working on confirmation bias have held that "A final manifestation of the confirmation bias is that people play an active role in the *production of confirming information*"[26] And Shinde's case analysis scaringly is proving them right.

The high court, accordingly, upheld the conviction of the accused persons but differed from the trial court in reducing the sentence of capital punishment in the case of accused 2, 3 and 6. It upheld the death penalty in the case of 1, 2 and 4 who the court alleged were involved in rape along with dacoity and murders and came within the rarest of rare category. .

Scrutiny before the highest court

The high court judgment runs into 81 pages and the apex court judgment consists of merely ten pages. Brevity is a virtue but not in all cases! The appeals were interlinked and were disposed by a common judgment.[27] The State of Maharashtra appealed

25 *Id*., para 7

26 Eric Rassin *et al.,* "Let's find the evidence: An analogue study of Confirmation Bias in Criminal Investigations" 7 *Journal of Investigative Psychology and Offender Profiling* 232(2010). *Emphasis added.*

27 *Supra* note 17.

questioning alteration of death sentence to life sentence and acquittal of three of the accused persons for offences punishable under section 376 IPC and the accused persons filed criminal appeals against their conviction. The apex court cryptically dealt with TIP which was the contentious issue. It noted that the high court found the TIP to be credible and endorsing that stand observed that "if potholes were to be ferreted out from the proceedings of the Magistrate holding such parades possibly no TI Parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated to be vitiated every TI Parade would become unusable." The court was right in saying that one or two lapses in the TIP are not to be taken seriously, provided it is being used only for investigation as was reiterated by the court by quoting *Amitsingh Bhikamsing Thakur* v. *State of Maharashtra*,[28] but not when that identification alone becomes the basis for conviction. The apex court in para 11 fell in the same trap as the high court and linked the medical evidence and the prosecution evidence when it held thus:[29]

> The evidence of PW1 and 8 have been analysed in great detail by the trial court and the High Court to find their evidence to be cogent and credible. Apart from that , the evidence of medical officer PWs. 9 and 15 clearly established the allegation of rape. It is stated that Savita had suffered bleeding injury on her private part and her hymen was ruptured. She was found to be of the age of 15 years and Vimlabai stated that she (Savita) was dragged out of hut by three accused and was brought back naked and dead by the very same accused and thrown in the hut.

Rape and homicide is confirmed but the identification of accused is only through TIP – no other corroboration was there and so the apex court also failed in its duty and fell in the same trap as the lower courts. The guilt was fixed and so the alternative argument held no weightage for the court. It only wanted to deal with the question of capital punishment and with Arijit Pasayat J as the author of the judgment perhaps it was a foregone conclusion that death penalty will be awarded.[30] Out of the ten pages, five pages deal with death penalty and the judgment ends thus: "In essence all the six accused persons deserve death sentence".

Ideally a case has to be impartially assessed which entails that the evidence available is evaluated impartially and based on that conclusions of guilt or innocence is arrived at. But what happens in a case of confirmation bias (and this happens sub consciously, it is not averred that a conscious bias is being orchestrated) is that the conclusion is already reached, and the case is built around that conclusion. This subconscious process

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28 (2007) 2 SCC 310.

29 *Supra* note 17, para 11.

30 The judge has the dubious distinction of awarding maximum death penalty in India.

tends to give undue weightage to the evidence which supports one's hypothesis while discarding or paying scant attention to evidence which counter the hypothesis."A warehouse of psychology research suggests that once people form an impression, they unwittingly seek, interpret and create behavioral data that verify it."[31] And this seems to have been the case in court after court in the instant case.

Review petition

The judgment and order of the apex court dated April 4, 2009 in which the accused 3, 5 and 6 were also given death penalty by the apex court was sought to be reviewed by these accused on the ground that they were given no opportunity to be heard by the bench before it enhanced the punishment. The three judge bench, by its order dated October 31, 2018, allowed the review and following the rule of law decided to recall the entire judgment and directed that the appeals be placed before the appropriate bench to be heard afresh. And a fresh hearing commenced! The entire evidence was under scrutiny. It was again brought to the notice of the court by the counsel of the original accused, that it was not possible for the survived victims who were the eye witnesses to identify the accused persons as either there was no light in the hut or as per their version the light had been switched off and the ghastly incident was done in torchlight which the dacoits were carrying. In either case, identification became suspect! The counsel pointed out that six people have been sentenced to death "upon the evidence of identification",[32] and that there were "no recoveries, finger print evidence, CA evidence or DNA evidence linking the accused to the crime.,[33] One new fact was brought to light in the review judgment by the counsel and which should have come to the contemplation of the trial court –prosecution witness 1 had, in his statement, stated that the culprits spoke to them in Hindi, whereas the victims and the accused persons were Marathi speaking. Would they then not have spoken in Marathi?[34] The dubiousness of the Prosecution (whose role has been highlighted in the beginning of the paper) was also highlighted before the court when it was brought to its notice that the DNA samples were collected from the accused persons but none of them matched with any of the victims and hence, the report was not presented by the prosecution as it would have exonerated the accused persons. Slippers found at the site did not match the foot size of these accused persons, the silver chain recovered from them could not conclusively be held to be stolen, and the injuries on their bodies could well be due to agricultural work or some other way. The list is endless. What is important, in this case is the fact that no new evidence had come up. All these and much more were available before both the trial court and the high court. Instead of appreciating the evidence,

31 Saul M. Cassin, "On the Psychology of Confessions" 60(3*) American Psychologist* 219(2005).

32 *Supra* note 3, para 5.3.

33 *Ibid.*

34 *Supra* note 3, para 9.5.

what happened was that a hypothesis of guilt was formed by the court based on the prosecution story. And a sub conscious confirmation made them not to process this evidence critically and look for alternative explanations and reasoning. The problem has been well researched within cognitive psychology and it is now well established that the human mind is super refined and can process diverse information but also operates subconsciously in a manner where it almost "lends to case building instead of fact gathering"[35] by a process where the information is processed and filtered in a manner which is in conformity with its hypothesis.

The review bench examined the case without bias[36]and identified the glaring loopholes in the case and dealt comprehensively with the evidence in detail in paras 9-17. The court, while underlining that murder and rape are abominable acts and the perpetrators need to be punished with utmost severity and expeditiously, cautioned that "however, this is only possible when guilt has been proved beyond reasonable doubt"[37]. It is submitted that in the instant case the guilt was not even proved on a balance of probabilities. The court was very critical of the role of investigation/prosecution and not of the special executive magistrate who conducted the TIP and made an observation that "special executive magistrate being an independent witness was supposed to state the correct facts before the court. At this stage, it is required t be noted that— is the same Special Executive Magistrate who conducted the TI parade subsequently".[38] It is shocking, to say the least, that the photo album was shown by the same officer who then was a part of the parade which did not have the persons identified in the album!

The court was not oblivious of the fact that the "primary" victims have not got justice. As such, it ordered further investigation under section 173(8).[39] The court taking a serious note of these "secondary" victims who were innocent persons and all but one were in jail for 16 years with the Damocles sword of death penalty hanging over their heads not only acquitted them but also ordered the state government to give them compensation and rehabilitate them. As far as the glaring lapses were concerned, the court directed the Chief Secretary, Home Department, State of Maharashtra to identify the erring officers/officials responsible for the same and take departmental action against them. The relevant portions of *Kishanbhai* judgment[40] were reproduced which, *inter alia*, held as follows:

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35 Wayne A. Wallace, "The Effect of Confirmation Bias on Criminal Investigation Decision Making" 135(Walder Dissertation and Doctoral Studies, 2015).

36 Bias is something which is not conscious and hence the idea is not to falter the other courts but to make them aware of the phenomena so that they consciously work towards eliminating it.

37 *Supra* note 3, para 10.5.

38 *Supra* note 3, para 11.

39 *Id.,* para 13.

40 *State of Gujarat* v. *Kishanbhai* (2014) 5 SCC 108.

> The Home Department of every State Government will incorporate in its existing training programme for junior investigation/prosecution officials course content …. Judgments like the one in hand (depicting more than ten glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programme. We further direct that the above training programmes be put in place… This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to do the same.

And so, through the review, justice was delivered to these innocent persons. But at this juncture it will be axiomatic to look at the history of review. In the pre *Mohd. Arif*[41] era the Supreme Court Rules 1966(6) Order XL in Part VIII dealt with the subject of review. The rules laid down as follows:

> Rule 1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.
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> …
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> Rule 3. (added on 9th August, 1978 with effect from 19th August, 1978)Unless otherwise ordered by the Court an application for *review shall be disposed of by circulation without any oral arguments*, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

In *Mohd. Arif* case,[42] a group of petitions came to be placed before a Constitution bench by a referral order dated April, 28, 2014. In each petition the death sentence had been stayed and two very fundamental issues were raised: i) in a case where death penalty is awarded, the hearing shall be by three, if not, five judges; ii) hearing of review petitions as per Order XL Rule 3 of the Supreme Court should be held as unconstitutional if it denies oral hearing of persons on death row. It was averred that hearing in review petitions to be held in open court and not through circulation.

The court held that henceforth, in all cases in which death sentence has been awarded by the high court in appeals pending before the Supreme Court, only a bench of three

41 *Mohd. Arif* v. *The Reg. , Supreme Court of India*, Writ Petitin (Criminal) no. 77 of 2014.

42 *Ibid.*

judges will hear the same. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure outlined above. At present, we are not persuaded to have a minimum of 5 learned Judges hear all death sentence cases."[43] The court also held that "the justice of the situation in this class of cases demands a limited oral hearing"[44]

And it is thanks to *Mohd. Arif's* dictum that these six innocent persons were spared

V Conclusion

Courts are not infallible – including the Supreme Court. So, what needs to be done is to identify the weak links and try and deal with them. As far as the case under review is concerned the apex court exercised its powers under article 145 and the amended Supreme Court Rules post *Arif* case and heard *Ankush Shinde* case in open court. One shudders at the fact that if it was done only by circulation what may have been the fate of the convicted accused in this case. However, the aim of this paper is not to fault the system but to jolt the system out of its complacency. The review court came heavily on the prosecution/investigation agencies, directing departmental inquiries. It reiterated the need for training programmes to include such judgments as case studies for prosecutors and investigators. However, in all this, it failed to set its own house in order in so far as it failed to identify the courts' justice delivery mechanism which is the weakest link. It did not bother to engage with the psyche of the courts, the subconscious psyche- which made them commit this horrendous mistake. It did not even bother to acknowledge that the courts, including the Supreme Court need serious introspection. This was perhaps because, as was mentioned in the beginning of this paper that the prosecution and the investigation hypothesize and then present the case consciously, the courts being the neutral umpires. That position is never ever challenged or scrutinized, lest it lowers the majesty of the courts! But the analysis of the case makes one rethink this position. The judges, undoubtedly, are neutral but they may do and act sub-consciously. Psychological studies may be useful to understand this phenomenon. But the fact remains that legally trained minds do not like to look at other disciplines and reexamine their positions. In conferences and seminars one keeps talking about inter-disciplinary approaches; and social sciences have to a large extent created a culture of inter-disciplinary studies. However, law remains insulated from that influence especially in India.[45] Legal education trains students (future lawyers and judges) to read and apply law in a rational manner derived from legal texts – the black

43 *Id.*, para 39.

44 *Id.*, para 41.

45 A senior professor had this to say on my analysis. "It sounds good but this is not law – this is psychology". The point is when law fails me I need to seek answers in other disciplines!

letter law. This case invariably makes one realize that it is important to develop and encourage critical and interdisciplinary study of laws. *Ankur Shinde* demonstrates the co-relation between case law and psychology. It is important to discuss and engage with this case through the lens of psychology in training programmes for judges and lawyers. The role of psychological science needs to be taken seriously in criminal law. Engagement with psychological sciences may go a long way in preventing wrongful convictions.

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