

## RIGHT TO FAIR TRIAL

*This chapter addresses the fair trial protections afforded to individual accused in criminal cases, particularly the right to a speedy and public trial by an independent and impartial court or tribunal established by law.<sup>1</sup> These rights are examined in the light of the role of investigating and prosecuting authorities, the court and other institutions as well as victims' expectations of justice and accountability.*

Little significant progress can be reported during the year in relation to securing the right to fair trial under ordinary criminal laws. Despite formal separation of the lower judiciary from the executive, the conduct of many cases illustrated that there had been little positive change in the dispensation of criminal justice, at least for ordinary citizens. Further, apparently overt political manipulation by the government of the judicial process in nationally important cases undermined people's confidence in the integrity of the justice delivery system and its institutions. Judgments and orders in a series of cases relating to corruption and other offences being tried under the Emergency Powers Rules raised questions about the consistent, objective application of the law.

### **No bail, Bail**

Although the issue of bail relates principally to the right to liberty, this discussion is relevant to what ordinary citizens can expect from the judiciary in terms of procedural justice and fairness in the course of a criminal prosecution.

The Appellate Division, in *State v Moyez Uddin Sikder and others*,<sup>2</sup> reversed the 2007 High Court judgment which had held that the High Court's powers to grant bail were not affected by the blanket ban on bail for offences brought under the Emergency Power Rules (EPR). It did so subject to three exceptions where bail could be granted in such cases, for example, if of the order had been made 'without jurisdiction' or *coram non judice*,<sup>3</sup> or if, upon final adjudication of a matter, the High Court found that the allegations were *mala fide* (in bad faith), or if the applicant was arrested on suspicion under Rule 16(2) of the EPR, therefore was not yet an accused within the meaning of Section 19(Gha) of the EPR.

While this could potentially be viewed as having relaxed the draconian provisions of the law of bail under emergency rules, the position was not clear by any means. From a plain reading, it appeared that this judgment would prevent the High Court from granting bail until after final hearing of the application, which would unduly lengthen incarceration pending trial in many cases.

An attempt<sup>4</sup> was made to review the Appellate Division judgment for clarification and to seek a more expansive interpretation, but this was not taken up for hearing. In the meantime, one or two benches of the High Court began to grant bail in an unprecedented manner to persons accused in cases brought under the EPR. Reportedly, seventy six persons accused for corruption were granted bail by a single High Court bench between 14 July and 14 August 2008.<sup>5</sup> The same bench reportedly took 63 seconds on average to pass orders in a total of 298 cases on a single day.<sup>6</sup> In many cases the Government reportedly did not oppose bail applications, apparently signalling that political concession had been made to certain persons accused in such

1 Article 35 of the Constitution.

2 28 BLD(AD) (2008) 135.

3 A case is said to be *coram non judice* when the court in which it is brought has no jurisdiction to settle the dispute, or has not been constituted according to the law.

4 Advocate Idrisur Rahman on 28 May 2008 filed a petition for elucidation and a review of the judgment.

5 "Durnitir mamlai ek bench-e ek mashey 76 jon-ke jameen", *Prothom Alo*, 20 August 2008.

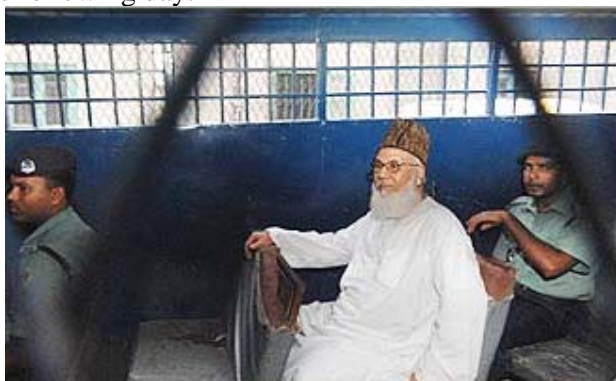
6 "315 minute 298 mamlai adesh", *Prothom Alo*, 9 November 2008.

cases. It was widely reported that former Prime Minister Khaleda Zia and her son were released on bail following protracted political negotiations.<sup>7</sup>

The Appellate Division took no action regarding this obvious disregard of its own judgment by a subordinate court. Although release on bail *prima facie* is conducive to the right to fair trial, the confusion about the law of bail under emergency will not be helpful in the long term. The whole episode of indiscriminate suppression of bail followed by the manner of release of ‘powerful’ politicians and businesspeople – in sharp contrast to the treatment of other under-trial prisoners – has raised questions about procedural justice. This ought to be viewed in the context that thousands of ordinary people have been languishing in prisons awaiting trial across the country who cannot either afford to move for bail or climb up the court hierarchy to seek remedies.

### Case Study: ‘Super-sonic release’

Jamaat-e-Islami leader, Matiur Rahman Nizami<sup>8</sup> obtained release from jail exactly one day after the High Court granted him bail. Although seven politicians were granted bail by the same bench on 14 July 2008, only Nizami was released the following day.<sup>9</sup>



Nizami in Prison Van

While this might have been reported as a positive example of efficient file disposal, if it had affected a wider group of people, it was clear that in Nizami’s case it was just a one-off exception. Usually, in the High Court, litigants have to wait at least several days to obtain a copy of an order signed by the concerned judges. There are of course exceptions – and the one made in this particular case – relating, as it did, to a powerful former Minister – underlined the plight of ordinary litigants who suffer delay as a matter of norm in benefiting from a remedy that has already been declared by the Court.

### Release by executive orders

In at least three instances the Government bypassed the legal system to release persons accused of corruption. Former Prime Minister Sheikh Hasina, former Prime Minister Khaleda Zia’s younger son, Arafat Rahman (Coco) and Awami League General Secretary Abdul Jalil were freed and allowed to go abroad for treatment under ‘executive orders’ on grounds of urgent medical treatment. Prior to these orders, extensive media reports suggested that the Government was taking these steps as a part of political bargaining with AL and BNP so that they would engage in dialogue with the government.<sup>10</sup> These perceptions were further

7 Both Khaleda Zia and her son Tarique Rahman, facing corruption charges, were released dramatically on bail on 9 September 2008 and 3 September 2008, respectively. Newspapers reported that Khaleda Zia would engage in dialogue with the government only after her sons were released and allowed to go abroad for treatment and she was released on bail. See “Tarique freed on bail: May go abroad for treatment”, *The Daily Star* and “Tarique released on bail”, *New age*, 4 September 2008.

8 In 1971, he was a commander of Al-Badr, a militia group responsible for genocide and other war crimes against pro-independence citizens and intellectuals. See “List of 1,597 war criminals released”, *The Daily Star*, 4 April 2008.

9 “Nizami-r druto jaminey mukti jebhabey”, *Prothom Alo*, 18 July 2008.

10 “Parole-e mukti pelen Jolil”, *Inqilab*, 3 March 2008; “Khaleda wants talks to resolve crisis”, *New Age*, 10 July 2008.

heightened when the Commerce Advisor pronounced publicly that these persons would be released on bail, *whatever the Court decided*.

This begs the question - was the Government holding those persons in captivity as a bargaining chip to further its political reform process, or did it decide to bow to political pressure in letting them free, compromising the course of justice? The validity of the procedure of releasing an accused by executive order has been called in question.<sup>11</sup>

### **Withdrawal of complaints**

Complainants in at least four sensitive graft cases, three against sheikh Hasina and one against Tarique Rahman, sought to backtrack from their complaints of extortion in an extraordinary way. Except in one case, where the police decided to drop the charge, prosecutions have not yet been withdrawn formally. Azam Jahangir Chowdhury, a businessman, prayed to the Government Advisor for Home Affairs for withdrawing his extortion case against Hasina saying he had not 'directly' accused her.<sup>12</sup> Kazi Tajul Islam Farook followed him suit and dropped his allegations that Hasina had extorted Taka thirty million off him. Retracting his allegation, Farook at a press conference claimed that he had filed the extortion case 'because of an adverse situation'.<sup>13</sup> Another businessman, Noor Ali, said he had been coerced by a "small quarter of the caretaker government" into filing an extortion case against Hasina.<sup>14</sup> The police had already dropped charges against Hasina on a lack of evidence. Noor Ali later apologised to Hasina in a public rally.<sup>15</sup> Similarly Amin Ahmed Bhuiyan, a businessman, applied to withdraw his extortion case against Tarique Rahman, claiming that he was forced to file the case "amid an adverse situation against his will"<sup>16</sup>. These developments cast serious doubt on the bases of the so-called anti-corruption cases pursuant to which the government arrested and detained the dethroned political heavy-weights. Whether the complainants took the u-turns sensing shift in the political wind, or whether they were puppets in the hands of the caretaker government, may never be discovered. In any event, the fairness of these prosecutions has been seriously tarnished in the public perception.

### **Special Tribunal cases**

Many corruption trials in the Special Tribunals<sup>17</sup> came to a halt following the Supreme Court's interventions regarding procedural errors in some of the prosecutions. According to the Anti-Corruption Commission (ACC), on 31 July 2008, 50 out of 100 corruption cases pending in the Special Tribunals had been stayed by the High Court.<sup>18</sup> More cases were stayed by the High Court after publication of those statistics throwing the anti-corruption drive into question.

In most such cases, the High Court had asked the ACC to explain whether the process of investigation or institution of the prosecution had failed to comply with specific procedural requirements. Although most of the applications for quashing trial court proceedings still await final disposal by the High Court, the trend is indicative of High Court's view that the case against the prosecuting authorities is *prima facie* sustainable. If

11 During the hearing of a bail petition filed by Sheikh Hasina, the High Court questioned the validity of the procedure of releasing her by an executive order for overseas treatment: "Govt asked not to harass Hasina till Oct 20", *New Age*, 6 October 2008.

12 "Azam Chy applies to withdraw case against Hasina", *New Nation*, 15 December 2008. According to this report, he said he filed the case due to "a misunderstanding at an adverse environment" persisting at that time.

13 "Tajul appeals to lift extortion case against Hasina", *New Nation*, 24 December 2008.

14 "I was coerced into suing Hasina: Noor Ali", *bdnews24.com*, 25 December 2008.

15 "Noor Ali apologises at Hasina rally", *bdnews24.com*, 25 December 2008.

16 "Plaintiff wants to drop case against Tarique", *The Daily Star*, 18 December 2008.

17 The government formed 18 Special Tribunals on 2 May 2007 pursuant to the Criminal Procedure (Amendment) Act 2004. Five more were formed subsequently with the increasing caseload, *Inquilab*, 1 September 2008.

18 "Odhikangsho urnitir mamlai sthogeet: gutiyey neya hochche bishesh tribunal", *Inquilab*, 1 September 2008.

these applications are eventually allowed on technical grounds, a question will arise as to how and whether the Government would address the substance of the allegations in each case.

### Truth Commission

The 'Truth and Accountability Commission' was set up on 3 August, pursuant to the Right to Voluntary Disclosure Ordinance 2008, which allows citizens to avoid imprisonment by making voluntary disclosures regarding any unearned income and depositing the same with the Commission. The tenure of the Commission was set to end on 2 January 2009. Up to November, some 389 people, mainly government officials and medium-level businessmen, applied for voluntary disclosure; 259 of them admitted to possessing assets beyond their known source of income amounting to some Taka 27.79 crores (277.9 million) and deposited Taka 14.46 crores (144.6 million) with the public exchequer.<sup>19</sup>

However, the High Court, on 13 November, declared the Ordinance, the formation of the Commission, and all its functions illegal and unconstitutional, in a public interest litigation.<sup>20</sup> The Court observed that the Commission was unconstitutional as it had by allowing offenders to be exonerated without trial in the courts, effectively by-passed the judiciary.<sup>21</sup> The writ petitioners argued that the provisions of the Ordinance which allowed the conduct of private hearing by the Commission, the reliance on self-incriminating evidence and the confiscation of private property were in violation of fair trial protections under Article 35 of the Constitution. The Appellate Division, on 16 November, stayed the High Court order for one month, allowing the Commission to function in the mean time.<sup>22</sup> However, the Commission had completed all its hearings before the High Court order, and functioned only administratively following this order.

### Fresh charge in 21 August grenade attack case

The Speedy Trial Tribunal No. 1 at Dhaka on 29 October framed charges against Abdus Salam Pintu, a former junior minister of the BNP and 21 Islamists (member of Harkatul Jihad), in two cases filed in relation to the grenade attacks on an AL rally in August 2004.<sup>23</sup> The trial in that case began on 17 November 2008 (no progress having been made on it for two years under the BNP led alliance). This marked an end to the scapegoating of two innocent men, Joj Miah, and Partha Shaha, who had been arrested and faced ill-treatment in connection with this incident.<sup>24</sup> Under the caretaker government, the case was reinvestigated and Mufti Abdul Hannan, leader of the banned Islamist party, Harkat-ul-Jihad confessed to plotting and leading several grenade and bomb attacks, including the one on the AL rally.<sup>25</sup>

This development also highlighted the fundamental divergence between the prosecution case and the conclusions of the one-member judicial inquiry commission of Justice Joyнал Abedin of the Appellate Division. The Commission had stated, without any reference to any sources or reasons, that "the intelligence agency of 'a big foreign power' that "helped the emergence of Bangladesh by cessation from Pakistan with oblique motive to make it a subservient state...orchestrated this dastardly and mindless attack... this mindless attack..., like some other attacks in the past, was made with the desire and expectation that it would arouse support and sympathy also from the Western world because the AL is acclaimed as a secular political organisation."<sup>26</sup>

19 Ashutosh Sarkar, "Judicial powers of Tac led to HC verdict against it", *The Daily Star*, 15 November 2008.

20 It was filed Adilur Rahman Khan and ASM Nasir Uddin Elan of Odhikar (a human rights group), Farida Akhter, Executive Director of UBINIG, an NGO, and Dr. Dipu Moni, a political leader.

21 "Truth Commission not legal", *The Daily Star*, 14 November 2008.

22 Also see Chapter 2 on Institutional Development.

23 "Aug 21 case goes to trial", *The Daily Star*, 30 October 2008.

24 Joj Mia, had been arrested in June 2005 allegedly in connection with the attack and was forced to give a self-incriminating confession involving several other listed criminals. Also see *Human Rights in Bangladesh 2007* at page 26.

25 Shahiduzzaman, "August 21 Grenade Attack: Judicial probe report shelved", *New Age*, 21 August 2008.

26 Shahiduzzaman, "August 21 Grenade Attack: Judicial probe report shelved", *New Age*, 21 August 2008. The Commission had been formed by the BNP-led government the day after the attack; its conclusions were rejected by the AL.

### Mass acquittals in 2005 Concurrent Explosion Cases

Judgments in several cases regarding the concurrent explosions of 2005<sup>27</sup> were pronounced in 2008. In several, the accused were acquitted for lack of evidence. For example, in judgments in eight of the twelve cases filed in Barisal, the accused in seven cases were acquitted.<sup>28</sup> The Public Prosecutor for Barisal accused the police of lacklustre investigation in those cases. In Chittagong, the judge on acquitting all three accused in a case, recommended disciplinary action be taken against the informant and the investigating officer in that case.<sup>29</sup> These judgments underline the severe lack of police capacity regarding criminal investigation and the lack of any effective monitoring mechanisms in this regard.

### High Court Acquittals in Jail Killing Case

The High Court on 28 August<sup>30</sup> acquitted six former army officers in the Jail Killing Case.<sup>31</sup> The Court upheld the death sentence of Risaldar (ret'd) Muslemuddin, after his trial in absentia. It observed that the evidence and statements of the witnesses did not prove beyond doubt the allegations except those against Muslemuddin but made no comment on the failure to ensure prompt and effective investigations into these killings. The families of the bereaved vowed to appeal against the judgment.<sup>32</sup>

A day after the killing in 1975, the then Deputy Inspector General of Police had filed a case with Lalbagh Police Station against four persons including Muslemuddin,<sup>33</sup> but no action was taken to investigate the matter for over twenty one years, as successive governments continued protecting and patronizing those responsible. The case was ultimately reactivated only after the AL came into power in 1996. After two years of investigations, the charge sheet was finally filed on 15 October 1998, some 23 years after the killing, against 23 people. The Metropolitan Sessions Judge's Court in Dhaka concluded the trial and gave judgment on 20 October 2004, twenty nine years after the incident, sentencing three people to death and twelve to life imprisonment.

Commenting on the judgment, experts noted that the High Court did not appear to have taken into consideration either the political motive behind the killing or the subsequent prolonged suppression of the judicial process. This case is a glaring example of how the criminal justice system – particularly where there is an over-reliance on technical rules of evidence in the context of extraordinarily prolonged delays in investigation and prosecution – effectively prevents accountability for gross crimes, and deprives victims of justice.

27 An Islamist organisation, the Jama'atul Mujahidin Bangladesh (JMB), was initially widely reported to be responsible for concurrent explosions at various court premises across the country on 17 August 2005, where leaflets in their name were found there denouncing temporal law and calling for the establishment of "Allah's law".

28 "17 August boma hamla: Borishal-e arekti mamlar rai, shob ashami khalash", *Prothom Alo*, 22 September 2008.

29 "Boma bishforon mamla: Chottogram-e police-er gafhilotir karoney 3 jongi khalash; byaboshtha neyar nirdesh", *Ittefaq*, 11 September 2008.

30 "HC Verdict in Jail Killing Case: Muslem to die; Farook, Shahriar, Huda, Mohiuddin acquitted", *The Daily Star*, 29 August 2008.

31 Syed Nazrul Islam, Tajuddin Ahmed, M Mansur Ali and AHM Qamruzzaman, leaders of the liberation movement and the war of independence, and Ministers in the first post-independence AL Cabinet were killed on 4 November 1975 in their prison cells in Dhaka Central Jail, a little over two and a half months after the assassination of Bangabandhu Sheikh Mujibur Rahman.

32 "Jati Stombhito hotobak Khubddho", *Janakantha*, 30 August 2008.

33 "HC Verdict in Jail Killing Case: Muslem to die; Farook, Shahriar, Huda, Mohiuddin acquitted", *The Daily Star*, 29 August 2008.