

**Why was Dhananjay Chatterjee Hanged?**

**Dead  
HUNG**



**PEOPLE'S UNION FOR DEMOCRATIC RIGHTS**  
Delhi, September 2015

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## P R E F A C E

On 14<sup>th</sup> August 2004, thirty-nine year old Dhananjoy Chatterjee was hanged in Kolkata's Alipore Correctional Home for the rape and murder of Hetal Parekh in March 1990. The hanging of Dhananjoy was upheld by the courts and by two Presidents as an instance of a “rarest of rare” crime which is punishable with death. Revisiting Dhananjoy's hanging, the focus of the present report, is a necessary exercise as it sheds some very valuable light on the contemporary debate on the efficacy of death penalty as a justifiable punishment. In 2004, on the eve of the hanging, PUDR did everything possible to prevent it—a last minute mercy petition signed by eminent individuals, an all-night vigil as a mark of protest and, distribution of leaflets for creating a wider public opinion against death penalty (see Box, p 23). Importantly, PUDR's opposition to Dhananjoy's execution was not based on his innocence or guilt; instead, the demand for the commutation of his sentence arose out of the opposition to death penalty. The demand was, as it is now, the abolition of death penalty.

A whole decade has elapsed since the time of Dhananjoy's hanging; so, why this report? Is it to prove that Dhananjoy was actually innocent? Significantly, two important events have happened in recent months which have prompted the need to revisit the past. One, an interim report based on an in depth investigation by two professors of the Indian Statistical Institute, Kolkata, released in June 2015, has raised serious doubts about Dhananjoy's conviction and execution. The report argues that a perfectly logical hypothesis, consistent with the facts produced by the prosecution, was overlooked by the courts—a hypothesis strong enough to warrant a fresh investigation, which, if pursued, could lead to retrial. In short, the interim report strongly argues that Dhananjoy was wrongly convicted.

Two, in the recent context of the Law Commission's recommendations on death penalty, the late President, Dr APJ Abdul Kalam, while reiterating his support for abolition, mentioned one case where he made an exception, that of Dhananjoy Chatterjee. In his memoir too, Dr Kalam had noted that in his tenure all pending mercy petitions had a “social and economic bias” which gave him “the impression that we were punishing the person who was least involved in the enmity and who did not have a direct motive in committing the crime.” However, recalling the case of Dhananjoy, Dr Kalam said, “In that case I affirmed the sentence”.

Taking the professors' findings as a starting point, PUDR returned to the case to re-examine whether the prosecution had established Dhananjoy's guilt beyond doubt, and whether, or not, the courts had fulfilled their task of subjecting the prosecution's case to adequate scrutiny. On the basis of the Sessions Court, High Court and Supreme Court judgments on Dhananjoy's case, contemporary newspaper reports, Dhananjoy's interview recorded in MS Sathyu's *The Right to Live*, and recent, landmark Supreme Court judgements on capital punishment, this report argues that the prosecution's story against Dhananjoy was full of loopholes and the courts' upholding of his death sentence was a flawed decision.

Additionally, the report reiterates what the ten eminent individuals had warned in their open letter of appeal for mercy for Dhananjoy in 2004, the “ever-present possibility of human error which becomes fatal in the case of capital punishment as it is irrevocable as it denies the right to review and redressal.” The irrevocability of death penalty is such that the matter can never be done and dusted as some might want it. The correctness of the sentence and the fairness of the trial are questions that remain and, remind what an actor in a well-known play by Bertolt Brecht had placed before the audience: “a curious way of coping—to close the play leaving the issue open”.

The thrust of the report is to argue against the justifiability of death penalty as the Dhananjay case serves as a solid illustration of how the process of a fair trial can be mired with errors, biases and prejudices. Besides reminding people that there can be no restitution in case of error due to the irreversible nature of death penalty, and that the punishment is inherently arbitrary as the concept of 'rarest of rare' fails the test of objectivity, the report emphatically reiterates that it is the poor who bear the cross.

## THE FOURTEEN YEARS

**D**hananjay Chatterjee was arrested in May 1990 from his home in Kuludihi village in Bankura district of West Bengal, two months after the gruesome rape and murder of Hetal Parekh in her flat in Kolkata's Bhowanipore area, allegedly committed by him. Dhananjay was sentenced to death by the Alipore Sessions Court in 1991 and the High Court confirmed it in 1992. The Supreme Court ratified it in 1994 when the two-member bench described the crime as 'rarest of rare', a "pre-planned cold blooded brutal murder" committed "without any provocation". Soon after the verdict, Dhananjay filed a review petition before the Supreme Court which was dismissed on 20<sup>th</sup> January 1994. He then filed a mercy petition before the Governor who refused to intervene. Next, Dhananjay filed a writ against the Governor's decision in the High Court and also obtained a stay on his execution as his petition for mercy was pending. In March 1994, the High Court extended his execution till the disposal of his petition. In the meantime, his wife and brother also petitioned the Supreme Court for a similar stay.

Between March 1994 and October 2003, Dhananjay lived a bizarre life on the death row as his writ against the Governor was forgotten by the High Court which also forgot to vacate the stay which he had obtained in March 1994! Significantly, in June 1994, the then President, Shankar Dayal Sharma, rejected his mercy petition, but his execution remained indefinitely deferred. It took the High Court nine years to discover the pending writ and vacate the stay as the matter came to the notice of the Judicial Department only in October 2003. The stay was vacated in November 2003 by a single judge of the High Court who also rejected Dhananjay's 1994 writ against the Governor. Dhananjay then filed a writ seeking commutation which was turned down by a division bench of the High Court in January 2004. Next, Dhananjay filed a special leave petition before the Supreme Court citing the matter of inordinate delay. The apex court declined it in March 2004 as it found nothing wrong in the role of the High Court or that of the Governor. Instead, it directed Dhananjay to file a fresh mercy petition before the Governor, which he did. When the Governor rejected it in June 2004, Dhananjay filed another appeal before the Supreme Court. The court declined the matter yet again, and asked, "How many times will he file?" Meanwhile, the date of his hanging was fixed for 25<sup>th</sup> June 2004—a decade after his first mercy petition was rejected.

However, the Home Ministry stayed the hanging as the matter was before the President who had also been petitioned by several human rights organizations. On 4<sup>th</sup> August 2004,

President Kalam rejected Dhananjay's second mercy petition. A last minute appeal filed by his brother before the Supreme Court on 11<sup>th</sup> August came to nought as it was rejected by a five-member bench. On 13<sup>th</sup> August, the Chief Justice of Calcutta High Court dismissed a PIL which sought a stay on the execution. On 14<sup>th</sup> August 2004, Dhananjay Chatterjee was hanged to death in Kolkata's Alipore Central Jail. On the day of execution, Dhananjay was exactly thirty nine years old.

Why was Dhananjay not worthy of mercy? For over fourteen years he was behind bars, the greater part in solitary confinement. He hailed from a poor Brahmin family which depended upon his earnings as a security guard. All through the trial he received inadequate legal assistance and he had maintained that he was innocent. He had no previous criminal record and none to show for his fourteen years of prison stay. He maintained that he was being hanged as he was poor. His lack of access to proper legal defence, a lack of awareness of his rights, the anti-poor nature of the criminal justice system were patently borne out in a small write-up that Peter Bleach, the well-known accused in the Purulia Arms Drop Case, had sent to *The Hindustan Times*, two days before the hanging.

### ***“Dhananjay’s Petition was a Mess”: Peter Bleach***

“I knew Dhananjay Chatterjee personally. We were imprisoned in adjacent blocks at the Alipore Central Correctional Home. I wrote some of the petitions that were heard in the high court a little while ago.

He is not a goonda or a mafia boss. He is polite, quiet and poor. Not for him designer clothes, flashy sunglasses or gold watches. He has none of the trappings of the jail mafia. He is also illiterate, at least in English. He also doesn't understand the judicial system.

When the government started making plans to hang him, somebody gave me his case papers to see if anything could be done. At face value, his case papers seemed to be in order. But his appeal for mercy, written and submitted years before, seemed to me to be a ridiculous document. It made no sense. Through an interpreter I asked him what he had said in his petition. He told me he didn't know what he had said — another prisoner who worked for the jail welfare department had written it. It was a disgrace and it is no wonder it was rejected.

When I read the trial record, it was obvious Dhananjay had been convicted on the basis of the most indecisive circumstantial evidence imaginable. There were serious defects in the evidence of certain witnesses. On that basis alone, a conviction, let alone a death sentence, could be safely ruled out. But apart from the defects in the trial evidence, the Supreme Court has specifically directed that when there is undue delay in the execution of a death sentence, that sentence must be commuted to life imprisonment.

I wrote a petition for Dhananjay on that basis. And I was absolutely right. That is amply proven by the extraordinary fact that the prosecutor's primary submission was that the delay in execution was Dhananjay Chatterjee's own fault! Even more extraordinary, the court accepted that submission. No one bothered to explain how an illiterate man incarcerated in a jail and with no personal access to the courts could possibly be held to blame for the delay in his own execution.

Let's not make any mistake about what is happening here. Dhananjay is going to be hanged because he is a poor man without any influence. Do we really think he would be hanged if he was a wealthy, upper caste man, a politician, a filmstar or a gang boss with political connections? Of course not. Ways are always found to acquit such people.”

**Source: *The Hindustan Times*, 12<sup>th</sup> August 2004**

## THE RAPIST MUST HANG! VS. THE RIGHT TO LIVE

In June 2004, while participating in an open debate on whether or not capital punishment was desirable, Mira Bhattacharjee, wife of former Chief Minister, Buddhadeb Bhattacharjee, said, "I have come here as a mother. Dhananjay has committed a heinous crime. He is a disease in society which has to be removed." Reacting sharply to the manifold ways in which Dhananjay's family was 'using' the media, she asked, "Where were those people who talk about human rights when Parekh's family had to leave the city after the ghastly incident?" Across party lines, people agreed and demanded that the 'beast' be hanged immediately.

The protesters demanding death must have known that death penalty does not have a deterrent effect on crimes like rape as there have been many shocking incidents in the past and which have continued well into our times. The question then is, why the clamour? In many ways, the Dhananjay case recalled the savagery of the rape and murder of a naval officer's children, Gita-Sanjay-Chopra, in the late 1970s for which, Billa and Ranga, the two accused were hanged in 1982. Since Dhananjay was the first convict accused of rape and murder in recent times, the protests represented a renewed consciousness, a belief that heinous crimes against women cannot be tolerated in society. Yet, it is significant to note that such a demand is *not* made in all instances of 'gruesome' rape.

For instance, in Deoria district of Uttar Pradesh, 3 dalit girls were found murdered in March 2015. Two of the girls were minor and, while the families alleged gang rape, the police were not ready to call it 'rape' as they believed that it was the fallout of a 'one-sided love affair'. In June 2014, a seventeen year old dalit girl was raped and murdered in Karur district of Tamil Nadu and her naked body was found by passers-by in a betel leaf farm. While the incident created tensions in the area, there was hardly any protest elsewhere. The same year, in May 2014, the incident of hanging and raping of two dalit cousins in Badaun, Uttar Pradesh, which sent shock waves, reached an entirely unpredictable ending as the initial post-mortem findings were set aside by the CBI which insisted that it wasn't a case of rape at all. These cases show that not only do the police doubt accounts provided by the victims' families, listless public protests prevent the matter from being taken seriously. Inevitably then, the need to protest and demand capital punishment has to be seen as limited to cases in which the protesters can identify themselves with outrage of the victims and their families.

Granted that the sensitivity of the urban population is limited to matters of middle-class conscience, what needs to be noted is the fury of the lynch mob in the Dhananjay episode. A well-known author and former journalist, Nimai Bhattacharjee, is reported to have said, "I am sure he will be hanged. But we want hanging in public to send a message to other Dhananjays in society". Actors and other celebrities joined the chorus and the hangman, Nata Mullick, not to be outdone, reportedly said that Dhananjay should be "thrown in a tiger's cage". Judging by the public furore, it was apparent that hardly anyone bothered to inquire whether Dhananjay had got a fair trial, whether his guilt was established or not.

On the eve of Dhananjay's execution, very few inquired why this case of March 1990 had hit the headlines and not the other—the grisly gang-rape of three health officers, two months later in May 1990, in which one of the victims died-- the Bantala case, which was the handiwork of CPM goons. Those who were baying for Dhananjay's blood chose to forget how the goons

murderously killed the driver of the vehicle, how the naked bodies of the women were found in the paddy field and how, during the post-mortem inquiry, a torch was found inside deceased, Anita Dewan's vagina. Shockingly, the then Chief Minister, Jyoti Basu, had dismissed the case by famously saying, "Such incidents do happen, don't they?" Rape as a political tool was not new and the intelligentsia of Kolkata was well aware of this dimension in the Bantala case. So, why Dhananjoy? Was it because he had no political godfathers to protect him from the gallows? Was it because the murky incident, of rape and murder of a defenceless middle-class girl by a security guard, particularly enraged the intelligentsia as it reminded them of their vulnerabilities?

Unfortunately for Dhananjoy, the repeated rejection of mercy petitions based on the judgment influenced public opinion as far as his guilt as a rapist-cum-murderer was concerned. Consequently, the campaign to save him was restricted to opposition to the barbaric, irrevocable and unjust nature of death penalty. In Kolkata where the divisions in public opinion were most sharp, the well-known film maker, Mrinal Sen's comments expressed in *Frontline* (August 14-24, 2004) appropriately summed up the sentiments of those who were opposed to death penalty: "I have always been against capital punishment. The death penalty is a cruel and brutal practice. I am not saying this in defence of Dhananjoy Chatterjee. I have nothing but contempt for that man. But I am against any kind of brutality. Let him be punished for the rest of his life for what he has done."

However there *was* one initiative to learn and tell Dhananjoy's story. In 1994, when the Supreme Court had given its verdict, the well-known film maker, MS Sathyu wanted to do a film on the issue as he was convinced that death penalty should have no place in a democratic polity. *The Right to Live* is a remarkable documentary which features an extended interview with Dhananjoy in his cell in Alipore Jail and it also shows the condition of the family—how they'd sunk into poverty because of trying to meet the legal expenses. The film opens the debate by interviewing many legal experts and capturing diverse opinions for and against, but makes clear its conviction, of abolishing death penalty. Most importantly, Dhananjoy maintains all through the interview that he is innocent and that he was framed. Although the interview was recorded in 1994, it tallied with what Dhananjoy purportedly told his brother, ten years later, on Sunday, 8<sup>th</sup> August, 2004: "I am being framed" (*Times of India*, 9<sup>th</sup> August, 2004). *The Right to Live* poses one question—why and what Dhananjoy was guilty of?

Given its relevance to the case, it comes as a shocking surprise that Sathyu had to wait till 2004 to screen the film. He had underestimated the bureaucratic problems that would beset him for wanting to interview Dhananjoy and was compelled to appeal to the Supreme Court to intervene. The legal delays in Dhananjoy's case had a strange consequence on Sathyu's endeavour as the Supreme Court gave permission for the interview but explicitly forbade its broadcast till the mercy petition was decided. As a result, Sathyu had to wait till August 2004 before he could show his film, *The Right to Live*. Subsequently, the rights of the film was sold to PSBT, Public Service Broadcasting Trust, a Delhi based NGO which screened it only once during its annual festival in 2012. Not surprisingly, very few people know about this film though it has been uploaded on the net. Given its relevance and the fact the only film which has an interview with Dhananjoy, the question to consider is whether there would have been a different story if it had been aired between 4<sup>th</sup> August and 14<sup>th</sup> August 2004, when the last desperate attempts were being made to save Dhananjoy's life.

## Bans on Documentaries

In March 2015 when the Government banned the broadcasting of Leslie Udwin's *India's Daughter*, it sparked off an immediate and furious debate on the matter of interviewing rapist-killer, Mukesh Kumar, whose case was underway before the Supreme Court. There were several arguments placed against Udwin, beginning with the fact that she had not revealed her intention while seeking permission from the MHA, Ministry of Home Affairs, and Tihar Prison Authorities. Via the Delhi Police's FIR before the Metropolitan Magistrate, the Government sought a ban on the film as it violated a number of sections of the Indian Penal Code and also that of the Information and Technology Act. A 'restraining order' was passed on the issue on 3rd March 2015 by the Magistrate. At about the same time, in a letter to NDTV, several noted feminists outlined their objections: the presence of hate speech, the apprehension that the broadcast would affect the course of trial, how the film infringed the rights of the victim and accused, the misogynistic views of the defence lawyer, the graphic visuals, the incitement to violence in Mukesh's statement that death penalty will encourage rapists to murder the victims, strengthening of the stereotype of rapists as always poor and remorseless, and how it made a mockery of women's rights associated with the International Women's Day. They did not ask for a 'ban'; instead, they asked for a 'postponement' until the legal procedures were over.

As the debate gathered steam and many more joined in, it became clear that the real issue was the right to speech and information. Udwin's interviewing of Mukesh was preceded by Sathyu's attempts and also before that by journalist Prabha Dutt. In 1981, when Dutt sought permission for interviewing Billa and Ranga, under Article 19 (1) (c), the Supreme Court in *Prabha Dutt vs. Union of India & Ors*, drew attention to Rule 549 (4) of the Jail Manual which allowed a death sentence convict the right to communication, including journalists. Noting that the President had rejected the mercy petitions, the court held that while there are restrictions on Art. 19 (1) (c), the right claimed by the petitioner was restricted to "the right to means of information through the medium of an interview of the two prisoners who are sentenced to death".

The court also allowed several other newspapers to interview the convicts as they too had sought similar permission. The same was reiterated in a subsequent judgment, *Sheela Barse vs. State of Maharashtra* (1987), where the Supreme Court upheld the rights of convicts and those incarcerated and stated that information can be collated by interviewers who must abide by conditions as laid down by authorities.

While the above two instances show how the court has dealt with the question of interview, allowing interviews as part of a right to information but imposing restraints if the matters is sub-judice, these precedents are not upheld in each and every case. Unlike in the Dhananjay or Mukesh Singh cases, where legal sanction had to be sought and the broadcast was restrained, the court did not feel it necessary to restrain the televised interview of Afzal Guru giving details of the crime or, consider the Nithari killer, Surinder Koli's appeal against his death sentence based on media misrepresentation.

## THE PROSECUTION'S CASE

Dhananjoy is dead and gone, but the question remains: was the apex court's decision correct in sending him to the gallows? His tryst with death began when the trial judge sentenced him to death on 12th August 1991. He was sentenced under three sections of the IPC, Indian Penal Code—for murder (s. 302), rape (s. 376) and theft (s. 380). He was given the death penalty for murder, life imprisonment for rape and was awarded rigorous imprisonment for five years for theft. The prosecution stated that Dhananjoy worked as a security guard in the apartment complex where the eighteen year old victim lived with her brother and parents. On the morning of 5th March 1990, the victim's father left for work followed by the brother who left for his college and work at around 11.am. The victim returned home after writing her board exam at around 1 pm. In the evening, the mother left for her daily temple visit at about 5.20 pm. When she returned at about 6.05 pm, she was informed by the liftman that Dhananjoy had gone up to the apartment on the pretext of making a phone call to his supervisor. She expressed annoyance, but proceeded upstairs. Despite ringing the doorbell repeatedly, she was unable to enter the apartment. She raised an alarm and the neighbours and security personnel had to break down the door. The body of her deceased daughter was lying in the bedroom, her face was battered, her clothes were torn and blood-stained, her hands were bloody and her private parts were exposed. Blood drops were on the floor. The victim had lost consciousness and was pronounced dead by a doctor who examined her in the lift as the mother tried to take her downstairs. Within an hour, at about 7 pm, her son returned and by this time another doctor also pronounced her dead. The father returned around 8.30 and called the local police station at 9.15 pm. The police rushed and came and recorded the mother's testimony at 9.50 pm. The following day the family reported the theft of a new 'ricoh' wrist watch which had been stolen from the almirah.

The prosecution held that the twin crimes of rape and murder were committed by Dhananjoy in the mother's absence. It provided 15 circumstances and "cogent" evidence which were sufficient to incriminate the accused. On the basis of examination of 29 witnesses, it presented these circumstances and evidences which can be broadly categorized in four kinds: conduct and motives of the accused, the post-mortem findings, recoveries made from the crime site and from Dhananjoy's house and the false 313 statement that the accused made without any corroborative proof.

**Conduct of the accused:** The mother and father's testimonies informed that the family had lodged a complaint with the security agency as the victim had complained against Dhananjoy for teasing and following her to school. He had, as per the father's complaint, specifically asked the victim to go to the cinema, three days before the incident. On receipt of the complaint, Dhananjoy was transferred, via a written transfer note, from 5th March onward to another apartment building in North Kolkata. In violation of the transfer note, he reported for duty at the victim's apartment complex on the morning of 5th March and continued to be on duty till afternoon.

The testimony of a security guard stated that Dhananjoy had gone to the flat in the mother's absence on the pretext of making a phone call to the supervisor. While in the flat he answered

the guard's calls from the victim's balcony as the supervisor had called in to find out if the guard who was to replace Dhananjay had reported for duty. On learning that he had not and that Dhananjay had done the duty as usual, the supervisor wanted to speak with him. The supervisor's testimony was vital as he met Dhananjay after the latter returned from the victim's flat. According to him, Dhananjay met him hurriedly downstairs and while he did not wish talk, he did confirm that he had received the transfer order. The supervisor then asked him to report to his new duty from the following day. Dhananjay's meeting with the guard and supervisor was corroborated by the liftman as he saw the accused descend from the third floor and meet the two men. These testimonies confirmed that in the mother's absence, Dhananjay went to the flat, was seen on the balcony of the flat and returned from it and was last seen near the flat before the discovery of the crime.

**Post-mortem findings:** The post-mortem report showed that the victim had sustained 21 injuries, mostly on the face and neck. The report noted fracture of the nasal bone and injuries across the face suggested that she had been hit forcefully. The abrasions on the right hip, elbow and face pointed to the fact that she had resisted the intruder, before dying. The report concluded that she had been smothered and strangulated to death. The internal examination showed fresh tears on the hymen and blood around the vagina. The discovery of the partially naked body in the bedroom and the status of her clothes and underwear suggested that considerable force had been used to remove the clothes. On the basis of the post-mortem findings, the medical examiner concluded that the victim had been and raped and murdered and that she resisted the attacker.

**Recoveries:** The recoveries made in Dhananjay's house at the time of his arrest in May 1990 tallied with some of the evidence gathered from the victim's apartment—a broken neck-chain, a shirt button and a missing Ricoh watch. A neighbour's domestic help identified the broken neck-chain as the very one that he had given Dhananjay, a month before the incident. The broken button matched the shirt which was found on the rack in his house. A Ricoh watch matching the description of the loss from the victim's house was also recovered from there. The recovery of the grey trouser and cream shirt from his house matched with what the security guard had seen Dhananjay wearing on that day.

**Abscondence:** Dhananjay's guilt was evident from his speedy disappearance as he was nowhere to be seen from the evening of 5th March onward and it took the police two months to find and arrest him. Although his house in Kuludihi village in Bankura district was searched within a few days of the incident, he could not be found. He was finally arrested on 12th May 1990 from his house and was found hiding behind a stack of straw. In his statement recorded under s. 313, Cr.P.C, Dhananjay maintained that he never visited the flat that day and claimed that he had gone to see a cinema after completing his duty, and returned to his village after making purchases for the sacred thread ceremony of his brother. He had no corroborative proof.

The prosecution argued that Dhananjay felt rebuked after the victim complained against him and remained on the premises to seek revenge. He found his opportunity when the mother was away and committed the crime out of revenge and lust. On the basis of the prosecution's evidence and witness testimonies, the trial judge accepted the findings and

placed the crime within the category of “rarest of rare”. He maintained that the murder was “brutal, savage and diabolical” and cited the Indira Gandhi murder case in which the apex court justified the death sentence as the murder was committed by the security guards who were “duty bound” to protect the former Prime Minister. The trial judge noted that “in the present instance the accused was the security guard of the apartment and his duty was to provide security to the residents of the apartment. Instead of providing security, he committed the gravest offence of rape and murder of an innocent and defenceless girl, ostensibly for no provocation on her part.” His punishment for murder, rape and theft were upheld a year after, in 1992, by the Calcutta High Court.

In *Dhananjay Chatterjee Alias Dhana vs. State of West Bengal* (11th January 1994), the Supreme Court re-considered the question of motives as Dhananjay appealed against his conviction and sentence passed by the High Court. The defence drew attention to the fact that the High Court had held that the father’s telephone call which was recorded in the police station as the FIR and not the mother’s testimony which was recorded half an hour later. The defence argued that the motive for murder had not been established: that the complaint letter and written transfer order were afterthoughts as they were produced only on 29.6.1990; that the corroboration provided by the security guard was suspect as no criminal would inform him in advance of his visit to the apartment; that the testimonies of the supervisor and the guard show that there were no signs of “perturbedness” on Dhananjay’s part when he met them; and, that the absence of the cash memo regarding the “ricoh” wrist watch was a substantial omission.

The apex court disagreed with the defence’s arguments regarding the improbability of a security firm giving written transfer order, as it held that there need be “no hard and fast rule regarding giving of oral or written transfer orders in private organisations”. The court argued that the testimonies of the security guard and that of the supervisor had not been impeached and that there was nothing improbable in Dhananjay informing the security guard about his trip up to the flat. At the same time, the court pointed out, that his hurried and shifty manner while conversing with his supervisor was “not normal” as a “supervisor would not normally be treated in this manner by a subordinate security guard.” On the matter of the FIR, the court held that the mother’s statement formed the legitimate basis of the FIR and not the father’s cryptic call. The court dismissed the defence’s argument about the non-production of the cash memo of the wrist watch, as it held that the mere non availability did not disqualify the statements of the salesman who identified it in court and testified that it had been bought by the parents of the victim.

Like the trial court, the apex court lent credence to the prosecution’s story and reiterated that: a) Dhananjay had “improper designs” on the victim as he used to tease her and seek her company for going to the movies; b) he felt spurned and decided to teach her a lesson for complaining against him; c) he wished to “gratify his lust”; d) that he did it in retaliation of the transfer order. Most importantly, it upheld the death sentence, reiterating that, “The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear.”

## MISSING LINKS

Arguably, crimes of passion inevitably demonstrate lust and revenge; however, what needs to be considered is whether these motives and their alleged outcomes were conclusively established in Dhananjoy's case. The trial court judge noted that in the absence of eye-witnesses, the onus was on the prosecution to provide an entire chain of evidence which was consistent with the guilt of the accused and inconsistent with his innocence. However, a closer perusal of the judgment strongly suggests that a credible chain of evidence was not really established as several questions regarding recoveries, testimonies and motives remained unresolved.

### **Where were the blood-stains?**

*No signs of struggle on Dhananjoy's appearance:* The post-mortem report had recorded that the victim had strongly resisted her attacker as even her hands had blood on them. But the security guard, supervisor and liftman who saw Dhananjoy after he had allegedly committed the crime and left the flat, did not report any injuries, scratches on his person or signs of a dishevelled appearance which would indicate that he had been in a scuffle.

*No blood-stains on Dhananjoy's clothes:* Neither the security guard nor the supervisor who met Dhananjoy after he had left the victim's flat mentioned witnessing any blood-stains on his shirt and trousers. The forensic expert who examined the shirt did not find any bloodstains. If Dhananjoy wore no signs of injury on his person and wore the clothes that were identified which were free of blood stains, how could he be the murderer?

*No fingerprints recovered:* If Dhananjoy allegedly committed the rape and murder of the victim and also stole a wrist-watch from an almirah in the bedroom, where were the fingerprints?

### **How was the victim killed?**

After his arrest in May 1990, the same medical examiner who had conducted the post-mortem, examined Dhananjoy and noted that the accused was capable of sexual intercourse and that he was sufficiently well built to overpower the victim. However, this did not establish how exactly Dhananjoy killed the victim after raping her. The post mortem records death due to asphyxiation and notes that the hyoid bone was broken. The serious injuries on the victim's face, jaw and head suggested the use of great force. There was blood on her face and her hair was matted with blood. The post-mortem findings are conclusive about the cause of death but they do not establish how Dhananjoy committed the act. Did he rain blows on her or smash her head against the foot of the bed, or use a heavy object like a jhoola or cradle in the bedroom? Or, did he hold her down smothering and asphyxiating her?

### **What did the witnesses say?**

*Who saw Dhananjoy go up to the victim's flat?* In order to prove that Dhananjoy had gone to the victim's flat in the mother's absence, the prosecution relied on the testimonies of the security guard (PW 7), the supervisor (PW 6) and the liftman (PW 8). The guard did not actually see Dhananjoy go to the victim's flat. He said Dhananjoy had told him he was going to do so. The supervisor, whose statement was regarded as corroborative by the trial court, only learnt of this from the guard. The liftman denied in court that he had taken Dhananjoy up to the third floor, refuting the mother's testimony. So, even though the guard claimed that Dhananjoy

told him so and the supervisor repeated what the guard told him, it is questionable whether anyone 'saw' Dhananjoy go upstairs.

### **Was Dhananjoy in the apartment?**

The prosecution's claim about Dhananjoy's presence in the flat and the complex rested primarily on his having been seen on the balcony by the guard, and in the staircase heading downstairs and his conversing with the supervisor. But, did anyone see him leave the flat? The liftman said that he had seen Dhananjoy descend from the staircase around 5.30/5.45, talk to the security guard and supervisor, and head out of the gate of the complex, ten minutes before the mother returned. The security guard reported that when the supervisor had called in at 5.45, he called out to Dhananjoy as he knew that Dhananjoy had gone up to the flat. On cue, Dhananjoy came out onto the balcony of the victim's flat on the third floor and replied he would come downstairs.

If the liftman saw him on the staircase going down at 5.30/ 5.45, how could the guard have seen him on the balcony of the victim's flat presumably a few minutes after 5.45 pm, when the supervisor arrived? Inaccuracies regarding time are possible particularly since the witnesses were not aware of what Dhananjoy had planned to do and execute too. But they become important if they form the basis for proving the accused's presence at the scene at the time the crime was allegedly committed. How could Dhananjoy be at the balcony, on the staircase outside the apartment, hold a conversation with the supervisor, and head out of the gates—all between 5.45- 5.50pm? The point was never addressed.

### **Non examination of crucial witness**

Why was Bijoy Thapa, the guard who was to replace Dhananjoy at the victim's apartment complex, not examined? The prosecution rested its case on the fact that Dhananjoy did not comply with his transfer order. But then, so didn't Bijoy Thapa who was to replace Dhananjoy from the morning of 5th March. The High Court noted this absence, but deemed it unnecessary and, by doing so, it glossed over an important lapse.

### **When did the mother go out?**

The mother stated that she went out of the flat, as was her regular practice, at about 5.20 pm and the same was corroborated by the security guard. However, the liftman had said that he had escorted the mother ten minutes after he resumed his duty after recess, at 4. pm. In which case, the mother would have left between 4.10 pm and 4.20 pm, and not at around 5.20 pm. When exactly did she go?

### **How much time did Dhananjoy have?**

The prosecution held that Dhananjoy had gone up to the victim's flat in the mother's absence (between 5.20 and 6 pm) to commit the deed. The question is how much time Dhananjoy had to do so. If Dhananjoy reached the flat soon after the mother left the house at 5.20 pm, and came down around 5.45pm, it means that he did the following: he entered the flat, struggled with the victim, beat her up, raped and killed her, stole the Ricoh watch from the almirah, stepped out on the balcony to speak to the guard, and exited. He did this all in the space of 25 minutes without showing any signs on his person. It is true that the victim was alone, but for a first time murderer and rapist, was that sufficient time to do all this? The question was never asked.

### **How valid was the prosecution's theory of motives?**

*Transfer order:* The apex court held that Dhananjoy's transfer on grounds of his "improper behaviour with the deceased was an aspersion on his character and that appears to have provided him the immediate motive for committing the crime in retaliation and even may be to remove the evidence of committing rape on the deceased." If the firm was in the habit of issuing such orders, a point noted by the apex court, then the other guards would have known about it. The security guard who claimed that Dhananjoy went up to the victim's flat should have objected to it. More importantly, Dhananjoy was never dismissed from service. Why would a poor man whose family depended heavily on his earnings, risk everything and take such an extreme step of rape and murder simply because he was transferred?

*Theft of watch:* The prosecution argued that the theft of the watch established Dhananjoy's presence in the flat and that the ricoh wrist watch was stolen by him after the crime. However, the evidence of the watch does not at all explain Dhananjoy's alleged motives of lust and revenge. Instead, it raises an obvious question: why would a rapist-murderer, who in a great state of rage battered his victim and throttled her, open an almirah and steal a watch before leaving the scene of crime? This obvious contradiction was never addressed.

### **Why was the forensic evidence not included?**

The post-mortem report nowhere mentioned rape and did not mention any semen stains. However, the forensic examination had shown semen traces in the victim's underclothes and on her pubic hair. Oddly, the trial judge argued at great length as to how the absence of semen should not be taken to imply that there was no rape. The blood examination showed that Dhananjoy could not be linked to the fact of sexual intercourse as his blood type was different from that found. Was the prosecution unaware of the forensic findings or did it choose to suppress it? More importantly, did the trial judge conveniently go along with the prosecution's story of rape while knowing that the forensic evidence did not really corroborate it?

## **WAS THAT A FAIR TRIAL?**

In its judgment on Dhananjoy, the apex court had firmly stated that, "It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinise the evidence lest suspicion takes the place of proof." Contrary to the court's injunctions, the trial proceeded along the lines of "mere indignation" and, wherever necessary, the court provided convenient glosses to inconvenient gaps. What's more, the apex court also did the same. For instance, the trial court and the High Court felt it necessary to answer the vexing question as to why Dhananjoy would answer the guard's call from inside the victim's flat. Both stated that he did so as he knew that the guard was aware of his presence in the flat. Likewise, in the case of Dhananjoy's unruffled demeanour, the apex court voluntarily explained that Dhananjoy must have taken good care to alter his expressions while meeting the supervisor as he knew fully well that no one was aware of the crime or that they suspected him of having committed it.

Besides providing glosses, the courts granted wide latitude to the prosecution and legitimated its convenient distinctions between acceptable and unacceptable testimonies. The liftman's testimony is a case in point. In his initial statement to the police, he never mentioned that he had seen Dhananjoy go up after the mother left. Subsequently he said so and also said that he had seen him descend the stairs before the mother returned. In court he denied seeing Dhananjoy go up. Instead of declaring him an unreliable witness, the court accepted part of his statement—seeing Dhananjoy return—whilst discarding the remainder. The apex court upheld the lower court's decision with the rider that care should be taken while analysing the excerpted testimony. Why was the prosecution so keen to retain the excerpted statement? Quite clearly, it helped corroborate what the guard and supervisor had said about Dhananjoy's movements later that evening. If, however, he was declared an unreliable witness, then not only the above corroboration, but also the mother's testimony naming Dhananjoy as the assailant (as she claimed that the liftman had told her that Dhananjoy had gone up in her absence) would collapse. Significantly, the High Court did agree that following the liftman's retraction, this part of the mother's testimony became hearsay and inadmissible. Yet, when the matter came up in the Supreme Court, the latter repeated the mother's testimony claiming that the liftman had said that Dhananjoy had gone up to the flat in her absence.

The trial court also made a convenient distinction between what it accepted from Dhananjoy's testimony to the police and what it did not. The investigating officer told the court that Dhananjoy had confessed to his crime and had also declared to show them where he had hidden the clothes he had worn and the watch he had stolen from the victim's flat after the commission of the crime. The trial court agreed that the confession statement could not be accepted as it was self-incriminating but the recoveries could be accepted as they came under the purview of section 27 of the Indian Evidence Act (how much information received from accused may be used as proof). Despite drawing attention to the inadmissible matter of confession, it said that the "accused categorically stated that he had committed the rape and murder by wearing the apparels, which he kept on the rack, and would be brought by him, and that he had committed the theft in respect to the wrist-watch which was also kept by him on the rack, and to be brought by him. Thus, it was argued that the statement made by the accused related to the discovery of facts, which are very much relevant under s. 27 of the IEA." The court noted with satisfaction that the due procedures laid down under s. 27 had been complied with. The question of the confession being extracted under duress, which forms the basis for s. 27 and the inadmissibility of confessions, was never considered.

Dhananjoy's statement under s. 313, Cr.P.C. was never considered in which he had stated the following: a) that he was wholly innocent and strongly denied that he was guilty of rape and murder of the victim and that he never visited the flat that day; b) that he never received any transfer order and stated that no formal notice was ever given by the firm for transfer; c) that the clothes which the police recovered from his house were new and gifted by his in-laws after his return from Kolkota and were inside a trunk. He maintained that the watch which was recovered from him was planted on him after being taken into custody. He alleged that the police seized his papers. He said that the supposed witnesses to the recoveries never accompanied the police to his home and that the seizure list was signed by a local resident inside the police station and that he was a friend and who was put under pressure by the police; d) that

he had been assaulted and tortured in custody and sustained a fracture on one of his fingers.

Dhananjoy's allegations were never investigated. Instead, the trial judge insisted that Dhananjoy had "cooked up all these stories for frustrating the claims made by the prosecution regarding the seizure of the wrist watch and wearing apparels from his residence." In item no 10 of the prosecution's "leading cogent and satisfactory evidence", the trial judge noted Dhananjoy's "false statement and false plea of alibi" in his statement and said that he had no corroborative proof to show that he had gone to watch a movie and returned to his village for the sacred thread ceremony of his brother.

### **Could there be another theory?**

The trial court held that the "the facts should be consistent only with the guilt of the accused and not his innocence", or that the "circumstances and facts should exclude every other hypothesis except the one to be proved." A study of the judgments shows that the police, the prosecution and the court took this all too literally. They assumed that there was only one possible hypothesis—of Dhananjoy having committed a pre-planned rape and murder driven by passion and revenge—and the entire judicial process worked backwards to prove it true. This hypothesis largely rested on the fact that Dhananjoy had been named in the mother's testimony and that he had disappeared from the evening of 5th March without a sustainable alibi. Interestingly, the apex court had observed that "abscondence by itself is not a circumstance which may lead to the only conclusion consistent with the guilt of the accused because it is not unknown that innocent persons, on being falsely implicated, may abscond to save themselves". The apex court did not follow up its own observations as it accepted the prosecution's case which hinged on Dhananjoy's "abscondence".

Curiously, the prosecution nowhere felt compelled to offer a reconstruction of how the crime was committed. Several questions remain unresolved which are strengthened by the fact that Dhananjoy repeatedly maintained that he was innocent and that he was being framed. For instance, how did Dhananjoy gain access into the flat? If Dhananjoy had been harassing the victim, would she let in her attacker? Was it a routine practice for Dhananjoy to make phone calls from the flats, so much so that neither the guard, nor the supervisor expressed any surprise over this? Significantly, in the film, *The Right to Live*, Dhananjoy said that he only went to the flats when called for maintenance work. Did other guards, including the liftman, also make routine unannounced visits to the flats? If that were so, why wasn't this angle probed? The defence alleged that the security guard's testimony was motivated by enmity as Dhananjoy had complained to the security agency about the guard's 'affair' with a maid-servant in the complex. The matter was never probed and when the defence brought it up, the court dismissed this as a baseless attempt to discredit the witness. No attempt was made to ascertain whether the security company was actually so very conscientious as to conduct checks on its employees. The question whether the supervisor's visit that day was an exception, was never addressed. The absence of Bijoy Thapa as a witness, the guard who was to replace Dhananjoy, is a very striking omission as he was just at fault as Dhananjoy in not obeying transfer orders.

The possibility of an alternate theory is furthered by questions around the time of the crime. While it was assumed that the twin crimes of rape and murder were committed in the 25 minutes interval, the exact time of death was not ascertained in the post-mortem report.

Could it have been committed earlier? In which case, did the mother leave the flat at 5.20 pm or 4.10 pm, as claimed by the liftman? Did anyone else visit the flat that day? Although not in the film, Dhananjay is supposed to have told the crew that the prosecution did not question everyone; that one person was specifically left out. Some news reports of the period suggest that the victim did not go home immediately after writing her examination; instead, she went to visit someone before going home. More importantly, how was the absence of injuries on the lower part of the victim's body accounted for? Could the murder be delinked from the rape? Were two different people involved? What is evident from the unanswered questions is that there were other lines of inquiry that were blatantly ignored.

### The findings by two professors

Over the last eleven years, Professors Probal Chaudhuri and Debasis Sengupta of the Indian Statistical Institute, Kolkata, have re-opened the case of the unfair verdict against Dhananjay. Based on extensive research of contemporary records, physical visits to the Bhowanipore area, interviews with doctors, neighbours and with Dhananjay's family members in Kuludihi village, their report, *"Re-analysis of the case of the murder of Hetal Parekh and the judicial killing of Dhananjay Chatterjee"*, horrifically affirms the fears of judicial error as the findings suggest that the prosecution theory could be a motivated one. Besides reiterating many of the loopholes suggested above, the report asks why the prosecution refrained from pursuing any alternative theory, despite the presence of possibilities.

The report questions the prosecution's theory which held that Dhananjay had committed the crime out of vengeance following the complaint and written transfer order from the agency. The production of the formal transfer note was crucial to establishing motive; but, as the report points out, the initial media accounts had only mentioned a verbal complaint by the victim's brother, but within a few weeks the story changed and the press reported that the agency had issued a written note of transfer based on the father's written complaint. The authors observe that such an action was highly unlikely for a firm which never gave appointment letters and which paid its employees only through vouchers.

The report raises doubts about guard's testimony, of having conversed with Dhananjay from the apartment balcony, as it shows the physical impossibility of doing so. The said balcony is grill encased and it does not overlook the security area on the ground floor. The prosecution's partisan view is also strengthened by the fact that it declared the liftman hostile halfway through the trial as his views contradicted the official story. The report points out that despite the absence of any weapon or blood stained clothes, no DNA tests were ever conducted to ascertain whether or not Dhananjay was the culprit of the rape and murder.

The report draws attention to the post-mortem findings, particularly to the presence of undigested food and nature of injuries which, if pursued, could have offered an alternate account of time of death. It could have allowed for rethinking of the rape and murder as two discrete incidents, instead of viewing them as a double crime committed by the accused. Since the post-mortem did not note any injuries in and around the sexual organs, the report raises the possibility of consensual sexual intercourse which could have led to an altercation between the mother and the victim. In this regard, the report particularly questions the mother's conduct as she did not try to reach her daughter through the intercom or telephone; instead, she demanded that the door be broken.

Besides directly naming Dhananjoy as the culprit, she also showed immense physical strength and singlehandedly dragged the body downstairs. Unlike the manner in which she raised the alarm and sought help to break in, she showed no such promptness in informing the police.

Since there was a delay of nearly three hours between the discovery of the body and the father's phone call to the police, the site of crime was disturbed as the body was moved about. The report reminds that the liftman testimony, which was declared hostile, had stated that he had taken the mother down from in the lift ten minutes after he had resumed his duty at 4.p.m. This suggests that the mother left much earlier than what the guard had said and draws suspicion on her testimony about leaving the flat at 5--5.15 pm. Strangely, within a week of the incident the mother left the city and was followed by the father and son in the next six months, notwithstanding the fact that it was a business family and that the son was to appear for his annual examinations. Given that the mother had spent the maximum amount of time with the victim on the fatal day, her abrupt departure from the city could have affected the findings as she repeatedly avoided appearance in court. Undoubtedly grief afflicted the family, but their role was never examined. Consequently, the report contests the apex court's belief that none of the witnesses had any motive for falsely implicating the accused and it states that the father was heard telling neighbours that Dhananjoy had brought dishonour to their family. The report also suggests that the favourable outcome could also have depended upon their position as a business family which had the backing of a powerful community.

Undoubtedly, the victim's family deserved justice, but as the findings suggest, there is reason to re-think whether Dhananjoy committed the rape and murder. Unfortunately, the lacunae remained unchallenged and unanswered as Dhananjoy's legal defence was lamentable to say the least. The defence counsel did not draw attention to the significant delay of over three hours between the discovery of the crime by the mother and its being reported to the police by the father. The body being moved, the entry and exit of people from the flat during this time, the resultant polluting of the crime scene and evidence—none of these were raised by Dhananjoy's defence. His counsel did not cross-question the neighbour's domestic help who identified the broken chain and who claimed that it belonged to him but that he had given Dhananjoy a month before the incident. The defence never challenged the father's discussion of Dhananjoy's inappropriate conduct with his two neighbours, his complaint to the security agency asking for a replacement, and the employer's handing over the written transfer order to Dhananjoy via another employee. The neighbour who corroborated the father's testimony was never cross examined. Even the investigating officer was not asked why the documents related to the transfer were procured as late as 26.6.1990. Surprisingly, none of Dhananjoy's family members, neighbours etc were asked to depose to establish character, familial circumstances, state of mind, i.e. provide knowledge about the accused which could have acted in his favour.

## A BIASED JUDGEMENT

While confirming the sentence of death penalty on Dhananjoy in 1994, the Supreme Court made certain important observations. First, it drew attention to the rising crime rate—particularly violent crimes against women. Second, it observed how a “shockingly large number” of criminals go unpunished. Third, it held that the “measure of punishment must depend upon the atrocity of the crime, the conduct of the criminal and the defenselessness of the victim”. Fourth, it said that “Justice demands that courts should impose punishment fitting to the crime so that courts reflect the public abhorrence of the crime.” Each of these observations is significant and deserves deliberations.

It is indeed true that the conviction rate in rape cases is abysmal. And that it needs to be corrected. But, Dhananjoy was convicted for rape based on the medical examiner’s testimony in court, in which rape was not mentioned. It was only in response to the police’s query, that the medical examiner had recorded that findings in the hymen and the matted pubic hair indicated that the victim had engaged in sexual intercourse. While the prosecution conflated sexual intercourse with rape, the trial judge strengthened it by giving the argument a legal turn. He maintained that absence of semen, as argued by the defence, did not rule out penetration and cited a prior judgment which corroborated the same.

However, the forensic findings had noted semen stains on the victim’s underclothes, though not on her skirt. More importantly, this evidence could not link the fact of sexual intercourse to Dhananjoy as the blood stains recovered showed Type B, whilst Dhananjoy’s medical examination had noted Group O. Strangely, during trial, both the defense counsel and the judge summarily ignored the forensic findings. Busy refuting that the victim was not raped, the trial court judge did not engage with the possibility of consensual sexual intercourse. The stark contrast, between the severe injuries around the victim’s face and neck and the complete absence of bruises in the genital and abdominal regions, went unremarked. Undoubtedly, the victim’s underclothes were severely torn and showed signs of great force having been used. But there were no corresponding marks of force around the waist and thighs. None of this was deliberated, nor the fact that there was nothing in the medical evidence which confirmed Dhananjoy to be the rapist cum murderer. Instead, the torn and blood stained clothes were assumed as proof of rape and Dhananjoy’s abscondence provided the remainder. When the case came up for appeal in the High Court, the latter noted that the defence did not contest the rape charge. When the matter came up in the Supreme Court, the latter also chose to ignore that the forensic and medical findings cast doubts on the issue of rape and that of Dhananjoy being the rapist. Astonishingly, Dhananjoy’s punishment was given without attending to the facts of the case.

Significantly, the apex court maintained that the “measure of punishment must depend upon the atrocity of the crime, the conduct of the criminal and the defenselessness of the victim”. Notwithstanding the fact that it never established the fact that Dhananjoy was the criminal, how justified was the court in enunciating that the “measure of punishment must depend upon the atrocity of the crime”? In a landmark judgment in 2009 (*Santosh Kumar Satish Bhushan vs. State of Maharashtra*), the Supreme Court held six of its previous decisions on death penalty as “per incuriam” (a decision/judgment which is given without refer-

ence to a statutory provision) as they relied on a 1995 judgment (*Ravji @ Ram Chandra vs. State of Rajasthan*) which had erroneously stated that: “It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.” The two member bench pointed out that the view taken in *Ravji* which did not take cognizance of the criminal’s circumstances certainly fell foul with the mandated provisions in *Bachan Singh vs. State of Punjab*, 1980, where the “mitigating circumstances or circumstances of the criminal” were emphasized. Significantly, in the 2009 judgment, the court acknowledged that “information relating to characteristics and socio-economic background of the offender” was often lacking and which affected the objective determination of the possibility of rehabilitation and reform of the accused. The court categorically held that the basic stated principle is that “life imprisonment is the rule and that death penalty an exception”. Taking particular note of the sentencing on Dhananjoy, the 2009 judgment reminded that the over-emphasis of factors such as “shockingly large number of criminals go unpunished” “cannot give a complete go-by to the legal principle laid down” in *Bachan Singh*.

Taking note of the increasingly “wide sentencing discretion”, the apex court in *Santosh Kumar* emphasized that each case must be examined in its specificity and that while sentencing, the onus should be on the state to prove that reform and rehabilitation of the accused is not possible. This, the court said, should be a necessary precondition for deciding the sentence. The import of this aspect, the circumstances of the criminal, was upheld in another judgment of the apex court in 2009, *Dilip Premnarayan Tiwari & Anr vs State of Maharashtra*, where the court adopted the principles laid down in *Bachan Singh* as opposed to the “narrow approach given in the *Ravji* case”. Consequently, in *Dilip Premnarayan*, the apex court did not confer death penalty on three accused who had been sentenced to death by the Bombay High Court. In this context it must be remembered that Dhananjoy had no past criminal record and his fourteen year prison also confirmed that his conduct was far from criminal. Why were these mitigating factors never considered by the apex court?

### **“Rarest of rare” and the burden of history**

The *Bachan Singh* and the *Machhi Singh vs. State of Punjab* (1983) remain landmark judgments as far as the imposition of death penalty in India is concerned as they put in place the concept of “rarest of rare” and that of mitigating and aggravating circumstances of the accused, supposedly to check judicial arbitrariness and overuse of the death penalty. However, it is important to locate these judgments in an older history, beginning with the amendment of s. 367 (v) of the Cr.PC in 1955. Originally, in the 1868 Act, s.367 (v) read: “If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reasons why sentence of death was not passed.” As is obvious, the import of this section greatly affected s. 302 of IPC as the punishment of death is noted in it.

In 1955, as part of the liberal postcolonial reforms, this subsection of s. 367 was amended which reverted the order of the previous Act and made life imprisonment the rule, not exception. In *Vadivelu Thevar vs. State of Madras* (1957), almost the first judgment after the amendment, the Supreme Court held that “the question of sentence

has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime.” In 1973 a further provision was amended, s. 354, for purpose of ensuring that judgments must offer reasons for awarding punishments or acquittal. s. 366-68 which deal with the powers of the High Court with regard to the confirmation of death sentence passed by the lower court, carries a caveat (s. 368 (c)) which says that confirmation cannot be made if an appeal is pending.

It is quite clear that the reforms of the 1980s were in tandem with the earlier reforms which upheld life over death, except in ‘rarest of cases’. However, as is noted above by the apex court, the wide latitude given in deciding ‘rarest of rare’ has jeopardized the very idea instead of narrowing the arena of judicial doubt, since there is absolutely no uniform criteria for determining ‘rarest of rare’ and much is left to the discretion of the courts, despite provisions to the contrary.

Admittedly, the 2009 judgment did not include the Dhananjoy’s case as an instance of erroneous sentencing while reviewing past judicial decisions. But it can definitely be regarded as such especially in the light of Supreme Court’s judgment in *Shatrughan Chouhan and Anr vs. Union of India* (2014)—where PUDR was a petitioner—commuting the sentence of 15 death row prisoners on grounds of inordinate delay in deciding mercy petitions, procedural lapses and insanity. The judgment ruled that inordinate delay caused by the executive in execution of death sentence constitutes torture, cruel and inhuman punishment, and is a violation of Article 21. Solitary or segregated confinement on the grounds that a person was sentenced to death, psychiatric condition of the prisoners, were other factors, as per the court, which could provide grounds for commutation. It also laid down procedural guidelines regarding mercy petitions, circumstances for commutation to life, such as the prisoner’s mental health, provisions for legal aid, and rights of prisoners after being sentenced to death. In a significant move, the court also ruled that a gap of 14 days had to be given between the prisoner’s being informed of the rejection of the mercy petition and his execution so as to prevent hurried and secret executions, and to allow for filing a petition before the apex court, informing and meeting with family members and, giving the prisoner time to prepare himself/herself.

Dhananjoy too it must be remembered had approached the apex court in March 2004 for commutation on grounds of inordinate delay, but it was turned down. What could be a greater instance of “undue, inordinate and unexplained delay” than the High Court forgetting to rule on his writ petition and to vacate the stay on his execution for nine years, from 1994 till 2003! Admittedly, judgments concerning delay have limited themselves to delay caused by the executive authorities. However, Dhananjoy’s case provides an instance for arguing that there can be instances of unexplained delay by the executive and by the judiciary. The substantive grounds cited by the apex court for commutation in case of delay—the cruel and inhuman nature of the punishment, of an extended incarceration living under constant fear of death as

a violation of Article 21—are surely pertinent in a case like Dhananjay's. Moreover, there were significant procedural lapses by the executive as well. The apex court had noted, in March 2004, that "all material facts, including mitigating factors, were not placed before the Governor. The appellant's mercy petition was rejected on 16.2.1994 without there being a proper consideration of all relevant facts." This is an astounding admission that the mercy petition was perused by the Governor in 1994 without "proper consideration of facts". What is still more shocking is that the apex court took note of this problem and chose to resolve it by saying that Dhananjay should re-send his mercy petition to the Governor. Naturally, the Governor summarily rejected it.

Dhananjay lived on death row and in solitary confinement for ten years after his mercy petition was turned down by the then President, Shankar Dayal Sharma, for the first time in 1994. When he appealed again in 2004, these facts were not considered as mitigating circumstances. What's more, none of this history of judicial delays and executive oversights had any influence on the then President, Dr Abdul Kalam's decision in rejecting his mercy petition, in August 2004. While reviewing Dhananjay's hanging in *The Right to Live*, former Supreme Court judge, J.L. Gupta, said that it was not fair to hang him after having kept him for so many years in solitary confinement, as the nature of this incarceration is, by itself, an extreme punishment. Solitary confinement/ segregation of a person awaiting execution had been ruled unconstitutional under *Sunil Batra vs. Delhi Administration and Others* (1978) and in *Triveniben vs State of Gujarat* 1989 (which also considered delay) as an "additional and separate punishment" not authorized by law.

Notwithstanding the concession made for the "concern for the dignity of human life", or the "rights of the criminal" in *Dhananjay Chatterjee Alias Dhana*, the apex court did not factor in Dhananjay's conduct, his lack of criminal record or his behaviour in jail. It failed to consider the very questions of reform and rehabilitation. The mitigating factors were ignored as the sentencing carried an extra weight that the judgment reposed upon itself, of safeguarding the rights of society. Precisely for this reason, the 2009 apex judgment had reiterated the need for judicial restraint and it cited the *Bachan Singh* case to remind that, "As Judges, we have to resist the temptation to substitute our own value choices for the will of the people."

Revisiting Dhananjay's case offers a sobering reminder of how public opinion, preconceived ideas of gender and class can colour 'impartial' processes of investigation and trial. What's worse, it demonstrates how facts and proof can become casualties when judges too share the received biases regarding sexual relations and violence. In their zeal to satisfy the public outpouring of moral outrage and desire for retribution in the Dhananjay case, the courts completely ignored the facts of the case. Instead of exhibiting moral outrage, the courts should have considered how rapes and other violent crimes associated with sexual relations demonstrate the turbulence surrounding sexual norms and values as the issue of consensus is a complicating factor. Far from engaging with such issues, the apex court too concurred with the prevailing discourse of heinousness of the crime and vengeance in ruling that Dhananjay be hanged.

## HANG THE POOR

The apex court's sentence on Dhananjay was pronounced with the assertion that the "object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it." Which and what section of society did the apex court have in mind while deciding this? Surely not that of the accused's as he did not belong to the same social class as the victim. The conclusion of the judgment is truly offensive as it uses phrases such as "the sordid episode of the security guard", whose "sacred duty" was to protect the residents of the flats. It goes further to say that the crime is even more heinous as the "security guard" subjected a "resident of one of the flat" to the brutal crime in order to "gratify his lust". It ends by rhetorically asking, "If the security guards behave in such a manner, who will guard the guards?" The inherent class bias of this judicial decision is shocking; that this bias is delivered in the interest of "society's satisfaction" is even more detestable. There is no other conclusion but the obvious: the judgment is a totally anti-poor one which panders to the sentiments of the middle class based on identification of common class interests and hatred for the poor.

The case against Dhananjay is closed but the issues remain open. One cannot help but remember that he was not competent enough to be able to write his own appeal convincingly. Neither was he resourceful and could not appoint an effective legal counsel at the trial stage. In the end, his dying words proved prophetic: he was hanged because he was poor. Judging by the state of the Chatterjee family, the punishment has been on the family. For fourteen years they had to spend their scarce resources to meet the trial expenses. Additionally, they had to cope with the social stigma of being known as a rapist's family. Over and above, since their appeals for mercy did not bear fruit, they had to deal with the horror of hanging and the normalcy of life thereafter. In *The Right to Live*, the father, Bangsidar Chatterjee, tells Sathyu that he had to sell off much of his land and ripe paddy in order to meet the expenses. While the camera remains focused on him, a girl, presumably his daughter suffers an epileptic fit and falls down on the ground. The father doesn't even look back and the mother continues to look listlessly away.

In his interview taken in his prison cell, Dhananjay tells that he was married on 28th February 1989 and that, despite, his short stay at home, he had a happy married life. When his wife and brother ran from pillar to post to prevent the hanging, an intrusive journalist asked his wife, Purnima, that everyone wished to know just one thing: how she could stand by a man accused of being a rapist and a murderer. Her answer was swift and straight: "Because I don't want to be a widow". According to a report which appeared in the *Telegraph* a year after the hanging, she suffered acute stress and its fallout was evident in her withdrawal from her in-laws. Dhananjay's family resented the fact that she had secured a government job and returned to her natal home. The father stated that she had demanded that her dowry be returned to her, knowing that it had been sold off to meet the trial expenses. The mother was stated to have lost her mind too and still hallucinated about Dhananjay returning home from Kolkata. Two years after, when another journalist met the remains of the family, one of male member told him, "Please leave us in peace. Why don't you people go to Delhi and ask Mohammad Afzal's family members about the death penalty?" Purnima said she wanted no one to die. "This happened with my husband. No more deaths please". Since then, their stories are lost.

Dhananjay Chatterjee's is a particular case of one individual. But it is a stark illustration of

why capital punishment must go, in toto. Dhananjay's conviction was based on a prosecution case which was full of anomalies. Nevertheless, the trial court still found him guilty. Besides trying and convicting him on inadequate evidence, the court further compounded the error by sentencing him to death. The higher courts too erred fatally in upholding the sentence.

Revisiting his case only reaffirms some of the main arguments against the death penalty—that it is arbitrary and discriminatory, a cruel and brutal form of punishment, a retributive form of justice which denies the right to life and, that death cannot be undone if there is a 'mistake'. Dhananjay's case underlines how the likelihood of 'error' by the criminal justice system is heightened in crimes like rape where retributive justice finds social sanction from dominant public opinion. It abundantly illustrates how inadequate access to legal aid further vitiates the possibility of a fair trial. Instead of functioning as an infallible guarantee of justice for the victim, the death penalty institutionalizes injustice, with the poor and marginalized paying the price. The purpose of this report was not to establish how the crime of rape and murder were committed or who the perpetrator was. What the report establishes is that from the facts presented, that is, even from a solely criminal jurisprudence angle, Dhananjay's hanging was a complete miscarriage of justice. The judicial murder of Dhananjay Chatterjee itself constitutes a heinous crime. No further evidence should be needed to sound the death knell of death penalty.

A recent news article, written in the wake of Dr Kalam's statement at the Law Commission's meeting, states that as per the figures released by the National Crime Records Bureau, there were 382 death row convicts by the end of 2013. (Sourjya Bhowmick, *Catch News*, 10th July 2015). While Dr Kalam may have faced grave difficulty in deciding mercy petitions, it needs to be remembered that he affirmed Dhananjay's execution. Unlike him, the present President, Mr Pranab Mukherjee, has already turned down 24 mercy petitions since assuming office in 2012 and has already sent three of them to the gallows: Ajmal Kasab (21 November 2012), Afzal Guru (9 February 2013) and Yakub Memon (30 July 2015). Presidents apart, in the last two years, between 2013 and 2014, as many as 1303 persons were awarded death penalty in different courts across the country. The above figures show that 'rarest of rare' is not a rarity any longer. Besides its barbarity, irrevocability and anti-poor bias, death penalty must be opposed for failing to live up to its principle of deterrence, which, as the history of death penalty shows, was designed to fail and it has failed. And above all else, if any other argument were needed, the nightmarish possibility of judicial error makes it absolutely necessary to campaign for the full and final abolition of death penalty. Remembering Dhananjay, let us demand complete abolition of the death penalty.

## **PUDR Demands**

1. The Supreme Court must acknowledge its death penalty judgment, *Dhananjay Chatterjee Alias Dhanavs State of West Bengal* (11<sup>th</sup> January 1994) as an instance of "*per incuriam*" and it must rectify its mistake by posthumously exonerating Dhananjay Chatterjee.
2. Immediate abolition of death penalty and commutation of all existing sentences.

## Why Must Dhananjoy Chatterjee Die?\*

13 August 2004

At 4.30 am on 14th August, Dhananjoy Chatterjee will be hanged till he dies. Dhananjay raped and brutally murdered a young girl in Kolkata in 1990. He was arrested in 1990 and was sentenced to death that very year. With the Supreme Court rejecting the final petition on 12th August 2004, all the doors of justice and compassion have been closed on the case. Dhananjay has been living in the shadow of death for the last 14 years. Is it fair to hang a man who has already lived in prison for 14 years for a crime committed 14 years ago?

- **Cruel and Inhuman punishment:** Death penalty is a shockingly cruel and barbaric form of punishment. By hanging Dhananjay the Indian state makes it clear that it believes in revenge, rather than reform of the criminal; and seeks justice through an act as heinous as the crime. Frankly, if the punishment for rape and murder is death penalty, there is little to choose between the crime and its punishment.

- **Right to life:** What's more, death penalty violates the inviolable right to life. Since it cannot be undone, it perpetually carries the risk of error and misjudgement. The only way is to remove the punishment of death from the statutes, once and for all. 117 countries have either abolished death penalty or do not use it. The International Criminal Court, constituted by 120 countries, does not allow itself to hand down the death sentence even though it oversees large-scale, heinous crimes.

- **No deterrence:** An argument in favour of Dhananjay's hanging is that it will deter future criminals. But all that the existing data has shown that there is no such correlation between the crime rate and death penalty. In fact, better conviction rates, more transparent mechanisms, less corrupt investigation and judicial structures would be effective deterrents against heinous crime

- **Rarest of rare?** In 1980, the Supreme Court had held that death penalty could be awarded only for "rarest of rare crimes". 'Rarest of rare' is a totally arbitrary category depending on the personal preferences of the judges hearing the case. It is clear that the political compulsions of the ruling party in West

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\* This leaflet was distributed in Delhi on the eve of Dhananjoy Chatterjee's execution when PUDR held an all-night vigil as a mark of protest.

Bengal today has more to do with Dhananjay's hanging than the merits of the case.

- ***Death Penalty and Rape:*** Extreme violence on women is rooted in a deeper, structural, patriarchy, which, more often than not, is protected and promoted by the State. And it certainly cannot be done away with by even more violence by the State, in the form of symbolic or exemplary punishments. Condemnable as Dhananjay's crime is, death penalty is not the answer to the crime of rape and murder.

- ***Powerful go scot free while the poor are hanged:*** In India those awarded death penalty are as a rule poor people. The rich criminals are not considered similarly dispensable. For, they come from the same sections that constitute the social and political elites of our country. Instances of this abound: in the 1984 carnage of Sikhs in Delhi, the courts convicted a poor man to death while those who planned the killing of 2733 people were acquitted and are powerful leaders of the ruling party. Giving legitimacy to the state to kill by legal means can only result in such duplicity.

Friends, we must challenge the legitimacy of the State in committing violence in the name of justice. We have to prevent the State from enacting these spectacles of power and revenge in our name. We cannot be mute spectators and passive participants.

**Let us join hands and demand the total abolition of death penalty.**

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**People's Union for Democratic Rights  
(PUDR)**





# SAY **NO** TO DEATH PENALTY

58 countries still persist with capital punishment. India is one of them. Death penalty is legislated murder, justified in the name of people, country, society. However capital punishment only kills the person not the crime. It does not deter crime, or ensure justice. Death penalty makes killers of us all.



**Published by** People's Union for Democratic Rights (PUDR)

**For Copies:** Dr. Moushumi Basu, A-6/1, Aditi Apartments, D Block, Janakpuri, New Delhi: 1100058

**Printed at** Progressive Printers, A21 Jhilmil Industrial Area, G T Road, Shahdra, Delhi: 1100095

**E-mail:** pudr@pudr.org, pudrdelhi@yahoo.com

**Suggested Contribution:** Rs. 10/-

