

The Ishrat Jehan Case

■ Dr. M.N. Buch

The newspapers have reported in headlines in their issue dated 4th July 2013 that Delhi Special Police Establishment (hereinafter referred to as CBI for the sake of convenience) has put up a challan against eight police officers of Gujarat on a charge of murdering one Ishrat Jehan and three of her companions near Ahmedabad in 2004. The newspapers also report that CBI is trying to prosecute the present Special Director of the Intelligence Bureau for being party to the murders. It is alleged that Ishrat Jehan and her companions were abducted by the Gujarat Police, kept in illegal custody for two days, sedated, put in a car on the highway near Ahmedabad and were then shot dead after planting a weapon in the car. According to CBI the Gujarat Police made out a false case of an armed encounter in which the deceased were shot by the police. According to CBI this entire story was false. What is more, IB officers facilitated this by giving a false intelligence report that Ishrat Jehan had terrorist links with Pakistan and that she and her companions had come to Gujarat to assassinate the Chief Minister. According to the CBI this makes the IB Special Director very much a part of the conspiracy to kill Ishrat Jehan.

Ishrat Jehan was not a normal resident of Gujarat because she and her family were residents of Maharashtra. There is no record of any contact or enmity between Ishrat Jehan and the accused police officers. Even the CBI version that Ishrat Jehan and others were abducted by the Gujarat Police recognises that the deceased were travelling to Gujarat and were intercepted within the boundaries of that State. It is not alleged that the Gujarat Police went to Maharashtra and abducted Ishrat Jehan and others, bringing them forcibly to Gujarat. The one undisputed fact which emerges is that the deceased persons travelled from Bombay to Gujarat on their own volition. They were not forcibly removed or otherwise enticed to come to Gujarat.

Abduction has a specific legal connotation under the Indian Penal Code. Section 362 IPC defines abduction in the following words, "Whoever by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person". Kidnapping or abducting a person in order to murder him or her comes within the ambit of section 364 IPC and renders the accused, on conviction, to imprisonment for life or rigorous imprisonment up to a period of ten years. If the murder occurs, then section 302 IPC would also apply. Under section 365 IPC if kidnapping or abduction is done to secretly and wrongfully confine a person, then on conviction the accused will be liable to imprisonment of up to seven years rigorous imprisonment. In the present case if abduction did take place it was obviously for the purpose of murdering the abducted person and this would come within the definition of section 364 IPC. Was Ishrat Jehan abducted for this purpose? According to CBI that was the sole purpose. Let us assume that Ishrat Jehan and her companions were in fact abducted. Under Anglo Saxon Jurisprudence, the principles of which we follow in India, an accused person is deemed to be innocent till proved guilty. Under section 102 of the Indian Evidence Act the burden of proof lies on the person who makes an averment and whose case would fail if no evidence were to be produced either by the contender or the defendant. The accused in a criminal case does not have to prove his innocence. It is for the prosecution to establish by evidence beyond the shadow of a doubt that the accused has committed the offence as charged. That being the case, regardless of the challan, the eight indicted Gujarat police officers would also be entitled to a presumption of

innocence unless proved guilty. Therefore, it becomes all the more important to subject the Ishrat Jehan case to some very serious questions.

Behind every crime, especially murder, there has to be some motive. The Chambers 21st Century dictionary defines motive in the following words, “A reason for, or underlying cause of, action of a certain kind”. In other words, the Gujarat Police must have had some motive in abducting, illegally confining and then murdering Ishrat Jehan and her companions. Could it be that the Gujarat Police deliberately wanted to kill an innocent Muslim woman? Is there a shortage of such women in Gujarat that the police had to entice a woman living in Maharashtra to come to Gujarat so that they could abduct her, confine and then murder her? Does the Gujarat Police consists of psychopaths whose hunger for murder demands victims periodically? We are not living in ancient Greece where vestal virgins had to be sacrificed from time to time to satisfy the Gods, nor are we living in a Mayan or Aztec era when ritual human sacrifices were normal. What, then, could be the motive of the Gujarat Police to murder an innocent person with whom it did not have normal contact?

The police normally acts under the following circumstances:-

1. On registration of a First Information Report of the committing of a cognisable offence, on which the police commences investigation.
2. In a law and order situation when faced with an unlawful assembly the police uses necessary force to disperse the mob and restore order.
3. When faced with a situation in which armed people, whether dacoits, militants, terrorists, robbers, or a violent mob armed with guns and other weapons, clash with the police it may resort to fire arms in order to control the situation. Here the use of force can include causing death.
4. In a situation where there is armed insurrection, for example the Naxalite affected districts, where the police uses force to break an ambush, apprehend or liquidate armed hostile elements or deal with any similar situation which simulates war.
5. In exercise of the right of private defence or on the orders of a superior officer, an Executive Magistrate or a court of law, provided the order is lawful.
6. On receipt of intelligence reports about antinational, antisocial or criminal activities which affect law and order generally, national security and the territorial integrity of India. In fact the police is the executive agency which acts on such intelligence inputs.

In the case of Ishrat Jehan, of all the reasons why the police can and must act it appears to be the last one, that is, intelligence reports which indicate that a person or persons are planning some action which can cause harm to the national interests at large. The case made out by CBI is that false information was generated by the present Special Director, Intelligence Bureau, which was passed on to the Gujarat Police and on the basis of which and with the help of IB operatives, the Gujarat Police planned the murder of Ishrat Jehan and her companions. What

particular motive would the Intelligence Bureau have to feed false information to the Gujarat Police? What mens rea did the Gujarat police officers have, what malice overtook their minds that they should specifically target a young nineteen-year old girl from Maharashtra? One normally does not find policemen targeting people at random for murder. In fact even terrorists do not indulge in such kind of senseless murder because even where a terrorist attack kills innocent people the intention is to create an environment of fear, uncertainty and terror which paralyses society and causes the government to fall. Did the murder of Ishrat Jehan create such an environment of terror? Who was to be terrorised? The State of Gujarat had been very peaceful immediately after the post Godhra riots in 2002 and the Muslim community as such was cowed down and was maintaining a low profile. So how would the murder of a nineteen-year old girl have any relevance in a situation where things were already peaceful? Some inkling of the then current thinking can be glimpsed in the election campaign in Gujarat then in which the Congress accused Narendra Modi of being a merchant of death, or a 'maut ka saudagar'. Narendra Modi replied that he was indeed a maut ka saudagar, but only for terrorists like Sohrabuddin. In other words, the Gujarat Police was acutely aware that the post Godhra riots could lead to repercussions because of terrorist action. Therefore, terrorist outfits had to be hit very hard. Please note that the operative words are "terrorist outfits" and not the Muslim community at large. This is about the time when the Gujarat Government had evicted the Vishwa Hindu Parishad from government premises then occupied by this member of the Sangh Parivar. By a process of reductio ad absurdum one could safely conclude that if the Gujarat Police acted against Ishrat Jehan it had to be on account of intelligence reports indicating that this young woman either had terrorist links or was part of larger conspiracy to initiate terrorist activity. Because preemptive strikes are often made in order to abort a terrorist strike, Gujarat Police also probably decided on a preemptive strike.

In the instant case the Intelligence Bureau has quoted the Pakistan origin American terrorist, David Headley, as stating that Ishrat Jehan had terrorist links in Pakistan with L-e-T and Lashkar-e-Jhangvi. The National Investigation Agency, which is a close cousin of CBI, has discounted this statement of Headley, saying that it is based on hearsay, that is, Headley's conversation with terrorist leaders in Pakistan. Headley was not a member of the American or Pakistani police investigating a case in which evidence was being collected first hand against Ishrat Jehan. It is legitimate to take into account what a third party might have to say about the suspect, even if such conversation cannot be used as evidence in a court of law. Ultimately much of the information collected by intelligence agencies comes from third party sources, which means that a great deal of it is based on hearsay and would not be admissible in a court of law. Should an intelligence agency ignore all such information? If it does so the executive arm of government would remain without any knowledge, inkling or suspicion of any activity which could harm India and this would only encourage our enemy to strike anywhere at will. Let us take an example from the United States of America. Recently the police arrested two people who had planned to use some form of remote controlled X-ray weapon to kill President Obama. It is rumour, hearsay, information fed by informants which ultimately led FBI to the accused. If FBI had waited to collect primary evidence it could not have saved the President from an assassination attempt. An intelligence agency, therefore, must cast its net wide in gathering information and it must pass on all information which calls for action to the police. Of course the police is expected to act with due caution and within the general framework of law, but act it must.

Chapter IV of the Indian Penal Code gives the General Exceptions whereby an act which would otherwise be criminal is not a crime. For example, section 79 IPC says, “Act done by a person justified, or by mistake or fact believing himself justified by law – Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of mistake of law in good faith, believes himself to be justified by law in doing it”. Section 100 IPC states the circumstances under which the right of private defence of the body extends to the voluntary causing of death of an assailant. This is not to state that in the Ishrat Jehan case police may claim the right of private defence if indeed the deceased persons were deliberately murdered, but certainly when an intelligence report creates a reasonable apprehension that a person or persons may indulge in an act of terrorism or violence which can cause bodily harm to a targeted person, then if the police acts in good faith and even causes death the right of private defence can be claimed and will apply. Under section 102 the right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence and though the offence may not have been committed such right continues as long as such apprehension of danger to the body continues. In other words, if the police were to act in the right of private defence, then this right commenced on the day that the Intelligence Bureau report reached it and would continue till such time as such apprehension ended one way or the other.

From reports which have been published it would appear that CBI, while denying that Ishrat Jehan was member of a terrorist organisation, does accept that two of her companions had some links with terrorist outfits in Jammu & Kashmir. The IB’s reports, including those based on David Headley’s statements, are brushed aside by CBI; terrorist links of two of Ishrat Jehan’s companions are accepted. From where did CBI acquire this information or knowledge? Be that as it may, why was Ishrat Jehan travelling with three other people, two of them known to have terrorist links? According to Ishrat Jehan’s family she was an innocent young girl from a pious Muslim family. Her companions on the ill fated journey were not the kind of people with whom a pious family would allow their young daughter to undertake a journey alone. The reason for these four people being together, therefore, needs to be investigated in depth because it does not stand to reason that a young lady should undertake a long journey with people with whom she is not related, is not intimate or otherwise connected through business or any other similar cause. Unless all the questions raised in this paper are seriously and satisfactorily answered one would find it difficult to believe that this is a case of murder simpliciter by the police in which the CBI is acting completely objectively.

CBI has put up a challan and would naturally now claim that the matter is sub judice. Perhaps it is, but even those cases in which a challan is put up continue to be governed by the provisions of Chapter XII Cr.P.C. Under section 173 on completion of investigation the officer incharge of a police station is required to forward a report, referred to normally as a challan, to a Magistrate having jurisdiction, together with the accused in person if in custody or with a notice to appear before the court if he is on bail. This report may be submitted through a superior police officer designated under section 158 Cr.P.C. and such officer may direct the officer incharge of the police station to make further investigation. Similarly, under section 173 (8) even after the challan is submitted the police can investigate for the purpose of obtaining more evidence, oral or documentary. Therefore, raising of questions regarding the investigation itself at any stage is not prejudicial to a trial and it is on this account that this paper raises certain

questions which, if the investigating agency so desires, it can take into account for further investigation under section 173(8) IPC. In fact when the Magistrate having jurisdiction takes cognisance of an offence under section 190 Cr.P.C. he himself can raise these issues and direct the investigating agency to further investigate the matter. This issue is being raised because my submission is that at any stage up to the commencement of the trial the raising of questions relating to the investigation would not be debarred by the fact that the challan has been presented.

Let us assume that without any of these questions being addressed the court frames charges. That still opens the much wider question of whether or not the manner in the Ishrat Jehan case has been dealt with casts a shadow on the future functioning of Intelligence Bureau, R&AW, the Special Branch of State Police forces and other specialised intelligence agencies. Should they or should they not forward intelligence reports to the concerned government or agency? Unless the reports prima facie appear to be baseless, can the executive agencies ignore them? Who will be accountable if acts of terrorism occur because the executive agencies hesitate to take action? This is not to justify any illegal acts of the police and if in the case in question the police has acted outside the law it must pay the price. But let us not be left with a lingering suspicion that the objective in this case is not justice but rather the targeting of a particular individual or a political party in Gujarat to prevent it from coming to centre stage in the next general elections. One cannot help but believe that in the railway bribery case CBI has, under political pressure, acted swiftly to protect Pawan Bansal, whereas in the Ishrat Jehan case it has rushed to indictment of another kind, once again on account of political pressure.
