

Rough justice

Jerome A. Cohen says Bo Xilai's wife, Gu Kailai, who once praised the mainland's swift approach to death penalty cases, will now experience first-hand the pitfalls of unfair, arbitrary and political prosecutions

In 1998, Gu Kailai (谷開來), already a successful lawyer married to then rising political star Bo Xilai (薄熙來), published a book about the American legal system. She praised the mainland's swift and certain death-penalty prosecutions of alleged murderers, in contrast to the lengthy, exhaustive scrutiny that capital prosecutions are subjected to in American courts.

Gu undoubtedly never thought that she might become a world symbol for the failings of the country's criminal justice. Yet, her forthcoming trial in Hefei (合肥), for the murder of Briton Neil Heywood, is sure to focus international attention on the unfairness of prosecution on the mainland.

The crime occurred in Chongqing (重慶). Why is Hefei, the capital of remote Anhui (安徽) province, the place of prosecution? One can understand why a Chongqing trial would raise many doubts about its fairness, with the case being handled by prosecutors and judges who



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may have been appointed, promoted or adversely affected during her husband's reign of terror as Communist Party secretary there. But why Hefei rather than a dozen more legally sophisticated jurisdictions?

Some observers believe that Anhui courts are even more unsympathetic to the rights of criminal defendants and their lawyers than most other mainland courts. Could it be that Wang Shengjun (王勝俊), the president of the Supreme People's Court, who has deep roots in Anhui, seeks to maximise his influence in the case? For many years, despite his lack of legal education and judicial experience, Wang ran the party committee that controls Anhui's police, prosecutors, lawyers and judges.

Why was Gu indicted only for murder and not for the secret and presumably illegal international financial transactions that authorities say caused a rift between her and her victim? Would the latter implicate her still influential husband, whose fate has yet to be determined by the disciplinary commission that has detained him incommunicado for more than four months? Will corruption charges be the subject of a separate or joint trial of the spouses?

What kind of trial can Gu and her present co-defendant, a former assistant, expect? Will it be open to the public and foreign and domestic media? Thus far, the indictment has not been released and we do not know whether the trial

has been officially characterised as secret. It is likely to be closed if the authorities believe there might be a risk of disclosing, for example, either how the defendants allegedly obtained the cyanide that reportedly killed their victim or lurid details of personal and business relations among Bo, Gu, Heywood and others. An open trial might also risk a defendant's revealing emotional outburst.

Will the accused have capable, independent defence counsel? They have been denied the right to select their own lawyers. Their families retained experienced Beijing attorneys many weeks ago, but neither lawyers nor family members have been allowed to contact defendants. Instead, Hefei authorities have reportedly appointed local lawyers, who are plainly under their control and can be relied on to follow orders. This is common practice in "sensitive" mainland cases, including that of Chen Guangcheng's (陳光誠) nephew, Chen Kegui (陳克貴), for attempted murder.

To be sure, even a courageous, competent counsel's role would be severely limited. Prosecution witnesses rarely appear in mainland criminal courts. Instead, prosecutors simply read witnesses' pre-trial statements into the trial record. This prevents defence lawyers from exercising their right of cross-examination. Moreover, if prosecution witnesses do not appear, judges often refuse to allow defence witnesses to do so, sometimes claiming, ludicrously, that it would be unfair to hear from one side's live witnesses but not the other's.

Moreover, it would be challenging for lawyers to prepare a defence in the brief period they have apparently been allotted before trial. Government investigators and prosecutors have been preparing their charges for months while defence lawyers in this complex capital case seem to have been appointed very recently. Even if given pre-trial access to the prosecution's witnesses and evidence, which is unlikely, if, as expected, the trial opens soon, defenders cannot possibly confront the prosecution on a level playing field, especially since meetings with their clients will have been limited in time and closely monitored.

We do not know whether defenders will be allowed to argue in favour of not-guilty verdicts or merely restricted to pleading mitigating circumstances that might lead to reduced sentences. Widespread rumours that Gu has long suffered from depression suggest that her lawyers might seek a judgment of diminished responsibility based on mental illness. Although



mainland courts seldom find murder defendants not guilty by reason of insanity, they sometimes sentence the mentally ill to life imprisonment or 15 years rather than death.

Gu is more likely to receive a death sentence subject to two-year reprieve of execution, a unique mainland punishment that is converted to a life sentence if the defendant does not intentionally commit an additional crime during the reprieve. Although the official announcement of her prosecution did not mention mental illness, it did hint at the existence of another possible mitigating circumstance by stating that Gu committed murder to protect her son, whose safety had allegedly been threatened by the victim. She might also "demonstrate merit" by becoming a prosecution witness against her husband and others.

Whatever her sentence, a defence appeal

from the Hefei Intermediate People's Court to Anhui Provincial High Court is unlikely to alter it. Indeed, the court may well secretly direct the lower court trial. In any event, since the sentence will be determined politically, amongst Beijing's highest leaders, it will not be subject to change, even by the Supreme People's Court.

One wonders if Gu still harbours doubts about the protections accorded US death-penalty defendants. Perhaps she now takes more seriously the admonition of Mao Zedong (毛澤東) – no amateur when it came to killing – that "people's heads are not like leeks. When you cut them off, they will not grow again".

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