

## **Zoya Svetova (Moscow)**

### **Jury Duty is a Rotten Duty**

That is what the jurors who sat on Sutyagin's trial think

The "Russkiy Kurier" (Russian Courier) newspaper, August 18, 2004

*The story concerns the trial of Igor Sutyagin, a researcher with the Institute for US and Canada, accused of high treason. He is one of a half a dozen scientists, scholars, and journalists tried in recent years on charges of various offences against the state, such as divulging sensitive information or selling to foreign companies and governments military or double use technologies. Many ascribe this trend to the increased role played in today's Russia by the FSB (formerly the KGB).*

"From February 19 to June of 1998, in Birmingham and in London, Igor Sutyagin had been meeting with a representative of the US military intelligence service, Sean Kidd, and gave his consent to cooperate by collecting information about the Russian Federation and by subsequently transmitting it to a designated person..." says the jury foreman in a trembling voice. She stammers on every sentence, and she is almost in tears by the time she gets to "guilty...guilty...guilty...does not deserve leniency ...".

This is the verdict on the case of a Russian scientist, Igor Sutyagin, pronounced by the jury on April 5, 2004. The twelve jurors unanimously declared Sutyagin guilty of high treason through espionage. Wording of the court sentence based on the verdict sounded nothing short of Jesuitical:

"The court takes into account that Sutyagin has positive references from both his place of employment and from his place of residence, and that he has two dependent children, born in 1990 and 1991, as well as his state of health. According to the jury verdict, he does not deserve leniency. The court has not discovered any circumstances justifying either a lighter or a harsher penalty for Sutyagin and sentences him to 15 years of incarceration."

How did it happen that 12 randomly chosen people came to a unanimous conclusion, and it took them just two weeks of the trial to decide upon the life of a person? Considering that, in 2001, the Kaluga Regional Court had been hearing this case for almost a year and then sent the case back for further investigation<sup>1</sup>, the judge being dissatisfied with the evidentiary basis of the case.

Those 12 people had been on my mind a lot for a long time. The desire to understand their decision, to hear their arguments for it, prompted me to visit a few of them. For obvious reasons their names here have been altered.

### One of the Twelve

“We were not judges; we were just doing our allotted task. Now that it is over and done we will try and get it out of our minds as soon as we can.”, says Director General of a Moscow region company. There is a hint of military background in his ascetic features and alert posture. He is much surprised by my interest in the Sutyagin’s case. “I thought everybody have forgotten by now about it. Why should you worry?”

Our conversation is more like an interrogation: he insists on asking questions. What is it: the professional skills of an administrator and negotiator to extract information from an interlocutor, or the desire to make me do the answering so as to reduce the risk for himself of saying too much? As a juror in the closed trial, he has signed a non-disclosure pledge, but it should not prevent us from talking generally about the institutions of court and jury trial, the jobs of prosecution and defense, the role of the judge. I am more interested in psychological issues: what influenced the decision of the jury; does not their conscience bother them for sending a man to prison for 15 years?

My interest is understandable. I don’t consider Sutyagin a spy. I know he never had access to classified information, and even if he had been compiling analytical reports for a British consulting company, he used open sources material. Also, him being a Russian patriot, as he had repeatedly stated, there was no intent on his part to harm Russian interests. Assuming that my

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<sup>1</sup> The new Code of Criminal Procedure promulgated on July 1, 2002, limits to preliminary hearings the practice of referring a case back to the prosecution, thus eliminating, one may argue, “double jeopardy”. Nevertheless, protection against “double jeopardy” remains weak in Russian law, and recently has been further weakened by the decision of the Constitutional Court from May 11, 2005 that grants the prosecution broader rights to seek retrial of an acquitted defendant, virtually allowing it to retry the case until it gets a convictions.

vis-à-vis is not stupid and could tell, as well as I could, a “designated” spy from a real one, I am trying to understand whether he really believes in Sutyagin’s guilt.

He tells me that what makes Sutyagin guilty is that by analyzing information in newspaper and magazine articles he had “converted” this information into a classified one, one that contained state secrets, and that is how he was harming the state. Such men should be given no pity: “Had your daughter been raped, you would demand reinstatement of death penalty, would not you? As to your Sutyagin, the situation is quite simple. He is a smart guy. He wanted to make some money. But it would have been better, if he had acknowledged his guilt”, sums up the entrepreneur. “As to jury trial, we don’t need it in our country. Here in Russia, as well as in America, this is trial by housewives. They can be easily bought.”

“Why did not you then refuse to serve on the jury? You had every right to be excused considering how busy you are with the business. Let the housewives try Sutyagin.”

"I could not. This was the third summon, and I had already refused twice." He signs that the conversation is over.

His story, however, does not quite hold up. In Moscow, the institute of jury trial was introduced beginning January 1, 2003. But the Moscow City Court started to conduct jury trials only from the end of the last year’s summer. It seems rather strange that some Moscow region entrepreneur would be called for jury duty three times in a half a year. Actually, the consolidated list of potential jurors originates in district prefectures, where they randomly draw names from the registered voters’ lists. Jury candidates for a particular trial are then randomly chosen by the judge’s secretary or assistant from this consolidated list authorized by the Moscow Mayor. Random drawing of the names is done either by hand or by a computer. It looks like this particular computer favored some names over others.

“We would have acquitted him...”

It has turned out that the Sutyagin’s trial could have had a different conclusion, if the original jury panel chosen late October of the last year had not been dismissed.

“We would have acquitted him, if we had not been dismissed”, says Elena in a calm and sure voice. She wants to share her experience with somebody, and this is why she has readily agreed to see me.

“A half of the panel was for Sutyagin. Why? There was no evidence of guilt. They thought we were just pensioners and it would be easy to humbug us. But they were mistaken. It was enough for me to look into his eyes to see that he was not guilty.”

Elena was one of the 14 jurors who began to hear the case in the hearing chaired by Judge Pyotr Shtunder, on November 3, 2003. Already in the first session the judge stopped an attempt by the prosecution to bring additional charges against Sutyagin, which Sutyagin’s lawyers interpreted as “a certain small step over to the defense side”. Then, after several more sessions, they started postponing the trial.

“First, they called me to tell that the session had been moved to another date, and then they told me that I am discharged. We started calling each other and decided that there is something fishy about it. I, personally, simply have sympathy for Sutyagin. And I think I am not alone.”

Why then the original jury has been dismissed? Is it because somebody guessed the mood of the jury (and there had been plenty of opportunities to eavesdrop on them), and decided that this jury would not bring the “required” verdict?

### One Judge Follows Another

“Article 242 of the Code of Criminal Procedure lays down the principle of unchangeability of a court panel, which provides that a criminal case should be heard by one and the same judge and the court panel”, said Sutyagin’s lawyers in their appeal to a higher court. “The only exception this principle allows is that the judge in the criminal case can be replaced if he or she is incapable to continue to participate in the court proceedings. The judge who has begun hearing substantive issues of a case is under obligation to stay on the case until it is brought to conclusion.”

Judge Pyotr Shtunder began hearing the case November 3<sup>rd</sup>, but on November 25<sup>th</sup> the court resolved to postpone the hearing until medical quarantine is lifted at the Lefortovo investigative prison. But, as the Sutyagin’s lawyers appeal has pointed out, “According to the court transcripts, it was Defendant Sutyagin, and not Judge Shtunder, who had been unable to

participate in the court procedure.” They also point out to a document showing that the decision to change the court panel was taken already on November 25<sup>th</sup>, the next day after the postponement of the trial, although Judge Shtunder had had no compelling reasons to withdraw from the case. “In the case file, there is a decision issued by the chairman of the Moscow City Court on November 26<sup>th</sup> 2003 directing another judge, M.A. Komarova, to take the case”, explains a Sutyagin’s lawyer, Anna Stavitskaya . “Most interestingly, Judge Shtunder was perfectly able to continue hearing the case, but for some reason everything was put on hold for three and a half months while we waited for Judge Komarova to come in on the case.” The Code of Criminal Procedure does not say whether the old jury can be kept, if there is a new judge on the case. But since it does not say it cannot be kept, why not keep it? The defense believes that the judge was replaced precisely to justify replacement of the jury, with which those in power who wanted to convict Sutyagin were not satisfied.

### Not Accidental “Random” Drawing

For Judge Komarova, unlike Judge Shtunder, the Sutyagin case was to be her first jury trial. But lack of experience notwithstanding, she had had the advantage of being one of those servants of Themis specializing in the “cases of special importance”. No wonder, she had been provided with a specially selected jury panel. The suspicion that the new jury candidates hardly could have been selected by random drawing could be easily confirmed if one compares their composition with the composition of any other jury empanelled in the Moscow City Court. Besides, quite possibly the new hearing had been delayed to await confirmation by the Moscow government of the 2004 list of potential jurors.

“In the selection of this jury there are signs of work of a good psychologist”, says Judge L., the judge with more than ten years of experience in conducting jury trials in a provincial court. “First of all, what is surprising is the gender composition. There are 31 candidates on the list, and only 6 of them women. After the challenges by the judge and the parties, only three women have remained on the panel. But women, as a rule, are more charitable.”

Experience shows that, as a rule, pensioners and people of common occupations are well represented on jury panels. They have more free time, they are curious, and they willingly accept invitations to participate in court proceedings. Usually, pensioners comprise about a third of those who show up for jury selection. There were eight pensioners on the first jury panel assembled to try Sutyagin, the number well in accord with the statistics.

But among candidates for the second jury panel there was only three pensioners. The rest of the candidates dazzled the eyes of the lawyers, who had to choose 12 jurors and two alternates from heads of large companies, directors of manufacturing plants, businessmen, and translators.

Among the candidates was the coach of a national sports team, the chief physician of a psychiatric clinic, and other people in positions of responsibility.

For comparison, jury candidates for a rather well publicized case that came to the Moscow City Court a week later could only boast a designer, a realtor, and a production manager.

Going through the list of jury candidates for another trial in the Moscow City Court, the list of civic minded people willing to put aside their jobs to fulfill their civic duty, I came across a “senior engineer”, a “deputy director”, and a “chief accountant”. The rest of the list was represented by pensioners, drivers, unemployed, housewives, and stockmen.

According to the law, prosecution, defense, and the court are allowed both peremptory challenges and challenges for cause. The jury candidates themselves could ask to be excused, if for some reason they cannot serve. After the challenges have been exercised and some candidates excused, the judge appoints the jury panel from the first 12 on the list. So, theoretically, it is always possible to influence composition of the panel by putting the preferred candidates on the top of the list. “It was very difficult to select a panel from these candidates”, recall Sutyagin’s lawyers. “We were leaving the selection conference in a state of shock.” Fearing a trick, the defense was glad it had managed to remove from the list former FSB employees, or at least those who confessed their former employment by the FSB.<sup>2</sup>

“That is a strange jury bench”, said Judge M., who had seen dozens of them, looking at the list of Sutyagin’s jurors, and even whistled in surprise. “We don’t see this kind of people in our jury pools. The important people like that usually send us their secretaries with letters pleading to excuse them because of their heavy schedules. And they usually do get excused.”

The “important people” here were five heads of various companies and enterprises who got on the Sutyagin’s jury by “random drawing”. From the 14 jurors selected, 7 had been engaged in dealing with foreigners by virtue of their occupations.

“Generally, 2 – 3 people are enough to sway the jury”, the opinion I have heard from many judges, prosecutors, and defense attorneys with experience in jury trials.

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<sup>2</sup> Apparently, the author refers to the practice of inserting into jury panels people with state security or law enforcement background in order to allow the prosecution to appeal an acquittal, should there be one, on the grounds of “discovered” irregularities in the composition of the jury.

In America, there are psychology services advising prosecutors and defense attorneys involved in jury trials. For example, a psychologist advised the attorney of the Elvis Presley's doctor to make sure that old white women don't get on the panel, since, as a special poll had shown, they can be prejudiced against his client.

### "Etatists" Wanted

Probably, in the Sutyagin's case it had been decided that state-minded people are more likely to convict him. Or at least the people who, in some way, depended on goodwill of the state. This is the conclusion I came to by analyzing what the jurors told me in the interviews and what I managed to learn about them. "It has failed to become adversary proceedings", explains one of the jurors. "The defense attorneys were playacting for our benefit, as actors playing for the public. The prosecutors were drier and laconic. The defense sometimes went overboard, and irritation with them was building up. In any case they could not compete with the prosecution, because we felt that behind the prosecution stood the power of the state, and it was influencing us, emotionally as well."

Another important detail: although the first jury was told to be ready to spend several months, or even a half a year, in the jury box, Judge Marina Komarova managed to finish the trial in just two weeks. Apparently, the VIPs: the GEOs, the businessmen, the head conductor of a train transporting foreign tourists, the coach training a national team, could not be kept away from their jobs for long.

Certainly, the reader could accuse me of being excessively suspicious and of making it all sound too sinister. But there are other suspicious circumstances as well, besides the unusual composition of the jury. For one, the list of potential jurors for the Moscow City Court has become virtually a secret document. Neither Sutyagin's lawyers, nor even deputies of the Moscow City Council, have been able to get access to it to check whether the members of the second jury had been indeed on this list, as they should have been. In violation of the law, the list has not yet been published. But going through another list, the list of jurors for the Moscow Military District Court published by the "City Hall Herald", Sutyagin's attorneys found there a person who had served on the Sutyagin's jury. How could it have happened, if the lists are compiled separately, and a juror for the Moscow Military District Court is not supposed to serve on another court's jury?

## Informal Leaders

“I was the only blue collar worker there”, confessed juror K. She indeed looked to me as one of the few who really had been selected by random drawing. “There were important people there.” Indeed there were.

I would not exclude the possibility that there were among the jurors the so-called “informal leaders” whose task was to convince those who doubted Sutyagin’ guilt. My conjecture have been confirmed by the few jurors who, I think, were still bothered by their conscience and agreed to talk to me.

Judge Komarova had done everything she could to make the job of the “informal leaders” easier. The questions put to the jury ignored, on purpose, the legal qualification of the criminal offence allegedly committed by Sutyagin. The jurors were asked whether he is guilty of transmitting information to representatives of a foreign military intelligence. (Though it was never proved at the trial that people whom Sutyagin had met represented foreign military intelligence.) The defense insisted on the judge modifying the questions to ask whether “secret information” or “information comprising a state secret” had been transmitted. But Judge Komarova categorically refused. Her refusal to reword the questions confirms the suspicion that the prosecution needed to get, at all costs, the unanimous guilty verdict. Somebody wanted a show trial, the one that would demonstrate that all people as one in the outpouring of indignation condemned the spy and the traitor of the Motherland. What did it matter if the jurors, in effect, were answering the question as to whether Sutyagin had committed the action not considered criminal by Russian law? More important was to have the verdict of guilty.<sup>3</sup>

“He himself confessed to everything. How could he be doing this, transmitting information dangerous for the state to foreigners?”, says juror Marina nervously. She is agitated and is eager to explain to me the reasons for her decision. “You think we are enemies, but everyone of us has children. And we live in this country, while Sutyagin wanted to harm it.”

“If it were a case of a murder out of jealousy, there could have been differences of opinion among us. But here everybody felt we were citizens of one country, and we were taking interests of the state almost as if they were our personal interests”, says another juror.

How very patriotic! But was this patriotism spontaneous, I wonder.

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<sup>3</sup> The position taken by the defense, and by the author, that the transmitted information has to be secret for the action of transmittal to be a criminal offence under Russian law, is not unassailable. Article 275 of Penal Code reads: “High treason, that is espionage, disclosure of state secrets, or any other assistance rendered to a foreign State, a foreign organization, or their representatives, in conducting hostile activities to the detriment of the external security of the Russian Federation... shall be punishable by deprivation of liberty for a term of 12 to 20 years...” Thus, any contact with a representative of a “foreign organization” viewed by the Russian government as “conducting hostile activities” can be construed as high treason.



## Discreditation of Jury Trial

And here is the main thing: what lesson should we draw from this dramatic, for every one of the participants, story? My impression from the meetings with the jurors is that their participation in the trial proved to be an anxious, tiring, and tortuous experience. A rotten duty. And the reason for that was that having gone through all of the 11 court sessions of the trial they never felt they were the “judges of the facts” whose task was to establish the facts of the case. It is impossible to shake away the impression that they have been simply used. And what is even worse, they consented to be used. They had been forced to do their duty, and, as one of the jurors has summarized, “it was an unpleasant duty”. This middle age man compared his own participation in the Sutyagin’s case with serving in the army in Chechnya. A remarkable allusion. “The Russian court system is happily devouring trial by jury”, said one of the creators of the court reform, presently a retired judge, Sergei Pashin. I would add, “Not just devouring, but also discrediting”.

The Sutyagin case shows just how helpless is defense in the jury selection process. As we said before, selection of jury candidates for a trial is the judge’s province, and nobody knows exactly how it is done. Neither defense, nor prosecution has means to verify how random the random drawing has been. Though, prosecution, which has the “power of the state” behind it, as has been justly pointed out by a juror, has an important advantage. Should the prosecution fail, it can always dig up something in the jurors’ biographies that could possibly serve to overturn the verdict at the appeal hearing at the Supreme Court: an unexpunged criminal record or the like.<sup>4</sup> Defense, however, would have had difficulty employing this tactic, since it does not usually have access to this information.

This is how it happens that among jurors assembled to hear a high treason case there miraculously appear people with a certain kind of background: a graduate of the Academy of the General Staff, a graduate of a secret department of a military college. Today, these people are successful businessmen, and there are no lawful grounds to bar them, as such, from participating in the cases like Sutyagin’s. But you would agree, would not you, that selection of jurors for this particular trial raises some questions.

The reader could ask whether anything can be done to prevent a repeat of this situation in the future?

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<sup>4</sup> See the footnote 2.

We should fight for changing the procedure of jury selection and for amending the Code of Criminal Procedure. The selection procedure should become more transparent and open to inspection by all participants in the trial. The Sutyagin case should send a signal to the communities of judges, defense attorneys, and prosecutors. It should be a signal for all of us who may one day be summoned as a juror to perform our civic duty, not a rotten duty.

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