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# NATIONAL JUDICIAL ACADEMY



## REFRESHER COURSE FOR CBI COURTS

**13<sup>th</sup>-16<sup>th</sup> August 2015**

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**7<sup>th</sup> Semester, B.B.A., LL.B (Hons.)**

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## MINUTES/ REPORT

Dr. Geeta Oberoi, Director and Professor, National Judicial Academy welcomed the gathering of august judges from various states. The session initially began with an ice-breaking session of the judges and the speakers. She brought to the notice of the judges as per the conferences so conducted previously, the following challenges faced by CBI Court was collected like as follows were , insufficient infrastructure, even entrusted with other cases and CBI officials due to fear of senior officers seize all unnecessary documents and witness, IO's filing charge sheet without submission order and reports of FSL, no assistance is given to public prosecutors, every order is challenged and stays are granted by High Courts, Media pressure is very high, frequent change of public prosecutor and procedure prescribed for passing order of attachment is cumbersome. The question was thrown on the floor by Hon'ble Director whether these problems were addressed? All judges unanimously agreed to the matter. Also Dr. Geeta emphasized the need to learn to tackle these problems as professionals.

Some suggestion revision against CBI court should not be entertained by High Court except in circumstances where substantial injustice is done to the parties, requirement of sanction under Sec. 19 under Prevention of Corruption Act should be thought about as it acts as a shield for the honest person and sword for the corrupt person. She emphasized within the limited span of time of this event as CBI Court have only one event in this year, there should be more peer interaction than classroom consultation. Also time for library reading has been necessarily been prescribed so that you get more aware. Computer skills have to be enhanced since the gambit of evidence has changed to digital evidence. She iterated that we should try to narrow down the differences by learning from each other's experience; this is the objective of the conference to deal with specific issues.

The baton for discussion was handed over to Justice Akbar Ali.

DAY 1: SESSION 1: 9:00 AM-10:00 AM-

## **CONVICTION RATES FOR SPECIALIZED CRIMES**

**Speaker: Justice G.M. Akbar Ali**

**Former Judge of Madras High Court**

**Senior Advocate, Supreme Court of India**

The outcome of constituting a special court such as CBI court has to be certainly be understood. The pendency of cases are at least 100 (Judges do agree). Justice very much emphasized on the burden of 100 cases itself will remain volumes as stands to be about 1500 cases in a regular court. He exclaimed that judges of CBI courts are heavyweight champions. He also posed a question to the gathering regarding the years since the cases are having pendency? The majority of courts had a pendency of 10-15 years as affirmed by all especially state directed matter. The inception of such courts seems to defeat its objective with high no. of pendency. CBI courts can also be called as a passenger train as it is slowly disposes the cases. It was also very observed and affirmed by judges that most of the cases were related to PCA and certain sensitive murder trial like the Aarushi Murder Case.

In PCA, It categorizes the offences and punishment and gives you the picture to deal with the case and gives enormous power to investigating agencies.

It was also very much analyzed as to how to approach bank fraud case or disproportion of assets (D.A.) cases, What is the basis, the question was thrown on the floor. The response and participation of the judges was very much high. All the judges pointed out to that it should be measured as sort of income, found and period, not properly explained income, personal income v. accumulation of huge income. All were said to be right. There would tonnes of evidences but how to tackle it. Justice Ali emphatically gave an example of simple Income Tax case, where there is opening balance, after 12 months Closing balance is affected by two or three factors like the expenditure and investment. If there is no tally between the opening balance and closing balance which actually happened in Jayalalitha's Case in Karnataka. The judgment happened to be in no less than 1000 pages and the effort so taken by the judge was very much appreciated. The charges were that of accumulation of assets worth 96 crores by A in the name of B and C in their firm and establishment in the names of 2, 3 and 4.

If the assets and income, have disproportionate difference there has to be proper reasons. How do you explain for someone assets? It is the duty of the prosecution as mentioned in Sec. 26 and 20 the PCA. The burden is certainly on the prosecution to explain. Section 13(1)(e) punishes public servants, or any person on their behalf, who are in possession, or who have been in possession of pecuniary resources or property disproportionate to their known sources of income, at any time

during the period of their office. Known sources of income have further been explained as income received from a lawful source only.

It was also mooted justice the role of a CBI judge stands to be crucial as at times the proceedings can be controlled by the CBI but it was very much rejected that there exists no such fear. Even though there will be certain factors/pressures on the judges like media pressures, administrating judges in the High Court, the society etc., so firstly such matters must not exist in our mind. As matter of fact, when the CBI files the reports, they want convictions for all their cases. All their charges are right. They even submit proposed charges to be framed.

As in Jayalalitha's case, the charge were framed in Tamil Nadu and was translated by a court in Karnataka, they only missed a word. As a trial judge of a special court, the judge should learn to face CBI prosecution. Another problem is tackling witnesses, More than 100 mehsar will run into pages. It stands to be really bulky.

Talking about the plight of burden of courts, it was pointed out that New Delhi has 27 CBI Courts, which is certainly humongous no. for a small state like Delhi. There were cases transferred to Delhi for the purpose of fair trial.

The dilemma of dealing with bulky cases was very much an issue brought up. One of the judges of Delhi dealing with Common Wealth Scam pointed out that there might be 500-600 pages of a document but the relevancy shall be of 5-6 pages for the specific issues. There should be issue based selection of the document. The discrepancy has to be identified from the relevant document. A suggestion to combat such cases was to leave the matter for the prosecutor to scrutinize and submit a report/brief or pinpoint the documents but it was pointed that scrutiny will lead to inference from certain facts and the matter relevant may not necessarily be covered.

It was also pointed out that the disposal of older cases is certainly a tedious task. In most of the case, the Investigation Officer must be dead and the prosecutor spins around everywhere in search for certain evidence. Even for such matters, 5 witnesses are brought forward to testify each fact.

It was very well suggested by a judge from Delhi that in DA cases, through admission denial of documents it cut shorts the controversy like a property that a person has brought a sale deed, which he cannot deny. Secondly, they do not file any witness calendar that proves only limited witness for specific issues otherwise CBI prosecutors have to be dictated that more witnesses will cause chance of contradiction. Thirdly, the agency has relied and unrelid documents in the case file kept in the branch, the accused keeps on filing applications for the copy of unrelid document that may be favorable to him so that he has a chance of fair trial, so it should be given as they have right for revision in HC and SC.

It was asserted by another judge that exercising power under S. 294 of Cr. PC is a good practice for bulky documents. There was 300 documents submitted but 270 was admitted.

Justice Akbar emphasized that judge should be able to reach the crux of the matter and make your own conclusion. The problem with CBI courts, the agency does think that they are master; even the prosecutor has no power to drop the witnesses as he is bound by the investigating officer.

90% of the cases, it only having technical defenses to the accused. A fair amount of accused may be involved innocently. Imagine a spectrum you have one side black, who always do wrong on the other side you have the green colour where you have people who can do no wrong that moves yellow, orange etc. The judge gets to know the black sheep the moment he sits for the matter though he is bound by evidence and rule of law. Then, we should follow the procedure in relevance with the evidence. Never think that what Media thinks, Administrating HC judge thinks and follow to write a judgment. On this background, We are to ultimately go by Rule of law and Evidence.

Presumption under the specific act has to be taken into consideration to a great extent.

Justice Akbar also pointed out the fact that there is going to be amendment in the arrest matter of Money Laundering. Specifically as in regard to the matter if the agency feels the accused is guilty.

Also mentioning about expert evidence, Justice Akbar explained the significance of S.45 and 51 and suggested that while dealing with a third party that only one question is asked to the expert how did you arrive at this conclusion? An example was narrated, A forwarded indecent photographs to another person. The said laptop was seized. The expert extracted the matter obscenity but after the seizure of hard disk, the photos were inserted to the drive and then moved to the experts. So how do you deal with it? the defense counsel was able to demonstrate that the dates of registry on the drive were a proof.

In the context of electronic evidence, Sec.47A i.e. Relevancy of Opinion as to electronic signature was referred. When the court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying authority which has issued the Electronic Signature Certificate, is relevant.

The question arises whether an electronic signature is of A. The certifying authority which has issued the electronic signature opines that A is not the person who has applied or approached for getting an electronic signature. Thus A is not the owner of the electronic signature in question. It belongs to someone else. The opinion of Certifying authority may be accepted by the court.

It was pointed out as in S. 67A. “Except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved.”

Similarly a case of the voice of person that depicts corruption spoken on the phone where there is digitalization of the matter is the most recent form electronic evidence.

The Conclusion was made with:

1. Observation notes of the computer expert not usually sent to court, thus court is unable to effectively review the findings of the expert.
2. The Report submitted by the expert does not contain the methodology employed to arrive a particular conclusion.
3. Instead of providing a complete picture of the evidence recovered, the reports usually mention that the “relevant data” is “extracted and put in a soft copy”.
4. The Court is not provided with material by which it can verify the direct evidentiary value of the “relevant data” that is so extracted as it was present in the original.
5. The Expert usually does not endeavor to demonstrate the manner in which the findings were arrived at during their deposition. They just reproduce the report that is marked as exhibit.
6. In Digital evidence, the expert after examination is to pack up the material in a manner that will ensure its preservation throughout the trial. In current cases, the experts pack the devices in newspaper parcels. There is a high chance that the electronic devices would be completely unusable by the end of the trial.
7. The manner of packing up the devices also influences the capability to demonstrate the findings before the court during trial.
8. The Expert can provide a copy of the software used to extract the evidence along with the report to the court.

This helps the court to view the evidence directly with the technique available at the relevant point of time.

Also a query came from the audience that as CBI gives a CD? Whether accused to entitled for a copy? The query was unanimously answered as the copy so provided for the judge come along with no. of copies as the no. of accused to be given to them from Central Forensic Labs. It was very much accepted that electronic evidence has its own nuances.

**Thus, it was concluded with dispersing for tea.**

DAY-1: Session 2: 10:30-11:30 AM-

**Framing of Charges By CBI Courts: Provisions under Cr. PC**

**Speaker: Justice G.M. Akbar Ali**

**Former Judge of Madras High Court  
Senior Advocate, Supreme Court of India**

The session was also chaired by Dr. Geeta Oberoi.

This session had started with discussion of the following problem.

**Problem-1:** “Mr. Ram (A-1) was working as Branch Manager at Punjab National Bank Coimbatore from 23.8.2000-1.9.2002. During this period he came into contact with Mr. Amit(A2) C.E.O of Apple Inc. and Mr. Laxman M.D of Golf INC (A-3). A 1 entered into a criminal conspiracy with A 2- A 3 to cheat Punjab National Bank.

24 applications were received for availing consumer loan of 1,00,000 each in the name of employees of Mr.Amit and Mr.Laxman’s companies. These loans were sanctioned by A-1 without verifying the genuineness of the applicant within his powers and funds were deposited into the account of the applicant companies. During an audit it came to light that 11 applications proved that the applicants (employees) are non-existent. Thus A-1 had misused or abused his official position by illegal means as in charge of the branch.

In pursuance of Criminal Conspiracy each accused had committed the following illegal acts. The Branch manager had never seen and verified the applicants but fraudulently and dishonestly attested the photos attached to the applications. He never verified the end use or checked the security but dishonestly certified verifying the same. A-2 and A-3 fraudulently and dishonestly submitted false documents to get the loan from the bank using fictitious names of employees when there were no such in their companies. They also submitted false documents to show that the fictitious employees were working under them.

Thus, A-1 Mr. Ram misused his official position, fraudulently and dishonestly entered into criminal conspiracy A-2 and A-3 in order to cheat Punjab National Bank and fabricated records and used the same as genuine and cost a wrongful loss to the tune of Rs11,00,000 and corresponding wrongful gain to themselves and thereby committed offences punishable under section 120 b read with 420, 467, 468 and 471 IPC and 13(2) read with 13(1) of Prevention of Corruption Act 1988. Frame charge?”

Discussion

**Problem-2:** “Mr. Vijay while working as a public servant in the capacity of Manager, NLC had accumulated properties and pecuniary resources in his name to the tune of Rs.45,00,000 which is disproportionate to his known sources of income.

*Investigation disclosed that during the check period from 1.4.04-25.3.10 Mr. Vijay and his family members had acquired Movable Assets in the form of fixed deposit and credit balances. Mr. Vijay was also found to be in possession of hard cash to the tune of Rs.10,00,000 which was seized from his possession.*

*On investigation it was revealed that Mr. Vijay had demanded bribes from several engineers and contractors and falsely enriched himself on several occasions. At the end of the investigation excluding certain assets acquired before the check period it was evidentially established that Mr. Vijay was in possession of Rs.30,00,000 disproportionate to his known sources of income which amount to the commission of punishable offences. Frame Charges?”*

### **Discussion**

#### **Problem-3:**

Kavitha, being a public servant was working as an Examiner in Chennai Customs during the period 19.2.2010-24-6-2010. Her basic duty is registration/inspection examination of goods which are imported/exported through M/s NERO Container Freight Station, Chennai.

On 11.5.2010 Ramu, Rajendaran, were directed to go to clear goods in M/s NERO CFS Chennai to clear goods. Ms. Kavitha while working as an examiner in Chennai Customs entered into a criminal conspiracy with Ramu and Rajendaran to commit criminal misconduct and to indulge in corrupt practices for accepting illegal gratification as motive or reward in the matter of registration of goods, inspection/examination of goods and clearing import consignments. She demanded bribes from companies for performing her official duty while Ramu and Rajendaran abetted the commission of offence i.e. accepting illegal gratification and obtaining valuable things without consideration by Ms. Kavitha employed as Examiner in Chennai Customs. During a surprise check all of the above said employees were caught and all unaccountable goods and cash were recovered from their possession.

### **Discussion**

DAY-1: Session 3: 12-1 PM:



## **COLLECTION OF EVIDENCE BY CBI: PRIMARY V. SECONDARY EVIDENCE**

**Speaker: Manoj Gorkela**  
**Advocate, Supreme Court of India**

### **PROBLEM -1.Facts of the Case**

Council of Architecture an autonomous body constituted under Architecture Act, 1972. [Hereinafter called as an Act] Where the Central Government as empowered under Section 44 OF The Architecture Act, 1972, framed the Council of Architecture Rules, 1973 and these were published in the Gazette of India on 20/02/1973.

This Act provides for the registration of architects and for matters connected therewith. It also regulates all architecture colleges and recognized it.

The Council of Architecture prescribed the Revised Minimum Qualification and Experience for teaching posts in Degree level Technical Institutions.

On, 20/04/2004, An advertisement published for the post of “Principal” in Lukhnow College of Architecture. Apart from 10 years of practice, the mandatory qualification for applying to the above said post was that the candidate should possess a Ph.D degree.

Mr. Sharma is a qualified architect and is registered with the Council of Architecture and in the year 1984 obtained a Bachelor’s degree in the first class division. He was also gold medalist. In the year 2000 the petitioner obtained a Post Graduate degree of Master of Architecture. Also, he was serving as Assistant professor in Lukhnow College of Architect.

Mr. Sharma is in practice since 1984 and continued to do so till 2004 and was working as Architect

In 2004 the petitioner paid Rs. 5 lacs to Ashwood University, America and obtained an online Ph.D. degree on the basis of his experience as he wants to secure the post of principal in the above College.

Thus, to secure the job of principal in the Lukhnow College of Architect, Mr. Sharma submitted his documents to the concerned authority on the basis of his practical experience.

After submission of the above documents to the concerned authority, the University has appointed Mr. Sharma to the post of “Principal” and according to which his pay scale get advanced.

On 15/10/2007, the Council of Architecture received a complaint from one Mr. Prakash in respect of Mr. Sharma as to his getting post of the Principal by furnishing wrong and misleading

particulars (tampered and artificial made degree) which clearly made out a case of professional misconduct. Also contend that there is no such University exist in the name of Ashwood University.

After listening to the complaint, Council of Architect made FIR against alleged misconduct, which was rejected to register by Police officers.

Thus, Council of Architect filed complaints Under Section 156(3) of Cr.PC before magistrate. Further, Magistrate gave direction to Police to register the case and investigate the same and make arrests also.

However, the investigation made by Lukhnow Police was not proper and made unnecessary delay of 9 months in filing the final report and wasted the time.

Thus, Council of Architect being aggrieved by this behavior filed Writ Petition before High Court under Article 226 of the Constitution of India and prayed that this is a very complicated case and important case in the Architecture filed as a very big organization is engaged in illegal work of forgery and forged degree distribution and requested for CBI investigation. Consequently, the High Court allowed the prayer.

Further, after investigation by CBI, CBI filed the chargesheet under Section 173 of Cr.P.C. before CBI Court, where the said chargsheet was against the Council of Architect and no charge made out. After this whole story, Registrar of Council of Architecture had filed a protest petition before CBI Court, and proved each and every contents of chargsheet to be false. Registrar gave documentary evidence of University affiliated to them and list of Ph.D. colleges/ University acceptable to required post. Moreover the documents submitted by Registrar were the true copy of the original, relying on which CBI court issued process and framed charges against Mr. Sharma under Section 420, 468,471 of Indian Penal Code 1860. Then trial takes place.

#### **Council of Architecture/ Prosecution submission**

On 23/04/2004 even though Mr. Sharma did not possess any recognized Ph.D. degree and other necessary qualification then also he applied for the above said post by furnishing misleading information.

On 24/06/2004 Mr Sharma was appointed to the post of principal of Lukhnow College of Architecture.

On 22/11/2006 it was now established that the said Ashwood University is not recognized by the Council of Higher Education Accreditation or by the US Department of Education. This fact is apparent from the E-mail dated November 22, 2006 received from the Association of Indian Universities. The fact that the said Ashwood University is not recognized by the Council of Higher Education Accreditation or by the US Department of Education. This fact is apparent

from the letter dated 06/12/2006 received from the Association of Indian Universities received from the Association of Indian Universities.

The alleged misconduct is amounts to professional misconduct because Mr. Sharma applied for the post of Principal, based on a Ph.D degree obtained by him from Ashwood University, America, and as the said Ph.D. Degree is not recognized and the said University is not approved affiliate by Council of Architecture. Mr. Sharma had deliberately submitted his degree to obtain the post of Principal and get advanced in the pay scale of the Principal.

30/01/2008 the Council of Architecture after being satisfied that there is a prima facie case of professional misconduct was made out against Mr. Sharma, issued notice to Mr. Sharma informing him that an inquiry will be held against him by the disciplinary committee.

### **Accused/Mr. Sharma's submissions**

Mr. Sharma contented that he is a qualified architect and is registered with the Council of Architecture. Mr.Sharma in the year 1984 obtained a Bachelor's degree in the first class. He was a gold medalist. In the year 2000 the petitioner obtained a Post Graduate degree of Master of Architecture.

In 2004 the petitioner obtained online Ph.D. from Ashwood University, America and the said Ashwood University gave a Ph.D. degree on a practical experience basis. Thus the degree is genuine. He also contented that he doesn't have an original copy of the said degree and he requested to the University to give him original copy but he was not provided with it. Though this is the true copy of original degree and this is not forged document nor obtained by illegal means.

### **Point of determination**

1. Whether the Ph.D. degree of Mr. Sharma is forged?
2. Whether the copy of the Ph.D. degree is Primary or Secondary Evidence? And whether it is admissible or not?
3. Whether Mr. Sharma is guilty of an offense Under Section 420, 467, 468 of Indian Penal Code, 1860?

### **Relevant Provision**

#### **62. Primary evidence**

Primary evidence means the documents itself produced for the inspection of the Court.

**Explanation 1**—Where a document is executed in several parts, each part is primary evidence of the document :

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

**Explanation 2-** Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest ; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

### **Illustrations**

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

## **63. Secondary evidence**

Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained;
- (2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.
- (3) copies made from or compared with the original ;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a documents given by some person who has himself seen it.

### **Illustration**

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

## **Discussion**

### **PROBLEM-2.Facts of the Case**

The Transport Department was constituted in 1945 under the provisions of Section 133 A of the Motor Vehicles' Act 1939.

State Transport Department of Government of Uttarakhand through vide order dated XX/2009 under Recruitment Rules, 2006 issued a notification for appointment of 25 Drivers (Group C Operational Staff) in the State Transport Department of Government of Uttarakhand.

The minimum eligibility qualification for the post of Driver were fixed up to High School passed (Matriculation Passed) from any board.

Thus, several requests and application for the 25 vacancies came across the State of Uttarakhand for the said post. However, this 25 vacancies get filled. Out of 25 posts 3 Driver was appointed from Uttar Pradesh and 2 from Delhi.

Before appointment as Driver under the State Transport Department of Uttarakhand Government, An affidavit from all the Drivers received, complying with the legitimacy of documents submitted to the Transport Department for the securing the post. Also, Transport Department received undertaking that if any document found to be false and dubious then his service is liable to terminate at any time without notice/ assigning any reason also Criminal Case will be initiated against that Driver.

Thus, all the 25 Drivers have submitted their Affidavit/ Undertaking that they are fit to do the job and also will be liable for all the consequences if documents related to their appointment found to be dubious.

However, One RTI activist namely Mr. A asked in RTI, certificates and all the detail information regarding the appointment of Drivers in the State Transport Department, Government of Uttarakhand. Consequently the said query replied and all the certificate has been provided to Mr. A.

Later Mr. A (RTI Activist) wrote letters to concerning Boards, who issued those Matriculation Certificate and asked them that Whether those Certificates has been issued from that Board or not? Thus, after receiving all the certificate, it is found that out of 25 certificates, 20 certificates were genuine and over 5 certificate found to be forged.

It is pertinent to note that out of those 5 certificates, 3 certificate were belongs to the Uttar Pradesh State Government and 2 from Delhi, CBSE. In all this 5 certificates the concern authority stated that no entry has been found in perusal to above certificates. This submission in the form of report has been made to the RTI activist and Director of Transport Department.

Thus, after examining the above report, the Director had filed an Application before the Hon'ble High Court for CBI Investigation to find out people involved in this misconduct and to ascertain Whether Selection Committee or Staff is involved in above recruitment.

However, CBI investigated the said matter and found the document similar to the other original documents. So, CBI deeply entered into the investigation and started checking each and every document. After examining the several documents the CBI came to the conclusion that student's had appeared in the matriculation exam. But their entry as to allotment of the certificate was not found in the Register. Also allotment register were very old in which entry cannot be adjusted. Further, in 2 (two) register evidence that the students' appeared for the exam found by CBI as well as admit card of the student's appeared in the said exam. Thus Conclusion made by CBI, that there is no entry in allotment register. All the five names as and an entry of issued Certificate were misplaced in the Register. Moreover the certificates were similar as compared to other original documents and no tampering found. All the five Drivers were having certified and attested copy of the Certificates issued by the Board.

### **PROSECUTION SUBMISSION**

1. That, the accused/ drivers, Mr. W, Mr. X, Mr. Y Mr. Z and Mr. B were appointed as Bus driver and allotted the post of driver subject to the condition that he would be on probation for a period of two years as per the provision contained in the Utrakhhand State Transport Department Service (Group 'C'- Operational staff) Recruitments Rules, 2006 and that during the period of probation, his services are liable to be terminated at any time without any notice/ assigning any reason.
2. That the appointment of the applicant was also subject to the verification of his character and antecedents, certificates of educational/ technical qualification/ caste certificates (SC/OBC's) and driving license.
3. That the certificate of Matriculation submitted by the applicant, being issued from the Secretary, Central Board of Higher Education, New Delhi and State Board of Uttar Pradesh was sent for verification on dated --/08/2011 that the Central Board of Higher Education and State Board of Uttar Pradesh identified as a fake certificate. As the entry of the said certificate in allotment register were not found and all the five entries were misplaced. Also the record of the said certificate not found. Merely appearing in the exam does not prove certificate to be genuine and legitimate. CBI only adduced the evidence that students' appeared in the exam. But whether they passed or fail in the exam cannot be ascertained through the register entry. Thus the certificates submitted by the driver are dubious.
4. Moreover, drivers don't have an original copy of the matriculation certificate, thus this drivers' did fraud and cheated to transport department, thus they should be charged under Indian Penal Code, 1860.
5. That since the accused/ drivers did not meet the basic educational qualification requirements for the post of Bus Driver as per the recruitment rules, the service of the accused/ driver was dismissed with immediate effect.

### **ACCUSED/ DRIVER'S SUBMISSION.**

1. That, the accused/ drivers, was appointed as Bus driver and allotted the post of driver subject to the condition that he would be on probation for a period of two years as per the provision contained in the Uttarakhand State Transport Department Service (Group 'C'- Operational staff) Recruitments Rules, 2006 and that during the period of probation.
2. The Certificate submitted to the State Transport Department for recruitment in the said post indicated that all drivers had appeared at the time of examination.
3. It is submitted that all the drivers have their admit card and also appeared in the exam which is concluded by CBI.
4. Moreover, the said certificate is the genuine and certified and attested copy of the original documents and no tampering to the certificate has been found by CBI.
5. That, drivers have lost their original documents related to passing the there matriculation exam. Also Board also misplaced their same documents.
6. Thus, it is Board mistake by which the drivers are suffering. Thus, even we cannot apply for the original copy also. Thus we are not liable for any forgery of documents and not being in possession of original copy of the certificate.

### **POINTS OF DETERMINATION**

Judges in the case have to decide Whether drivers in the case should be charged or not?

#### **Relevant Provision**

##### **62. Primary evidence**

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**Explanation 2-** Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest ; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

#### **Illustrations**

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##### **63. Secondary evidence**

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(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

**65. Cases in which secondary evidence relating to documents may be given**

Secondary evidence may be given of the existence, condition, or contents of a documents in the following cases:-

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved , or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in <sup>40</sup>[India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

**DISCUSSION**



The session thereby concludes.

DAY -1: Session 4: 2-3 PM:

## **SCRUTINY AND EVALUATION OF EVIDENCES BY CBI COURTS**

**Speaker:**

**Dr. DebashisNayak**

**Director,**

**Asian School of Cyber Law**

Dr. Debahis initiated a discussion with the lacunas that exist in dealing with search and seizure. There is no tool or legislation except in like NDPS Act, there exist certain procedure. At presently, the procedure followed is a standard that is practiced and accepted throughout the world. There is no specific provision that specifies that these steps should be taken for the said matter. It is an emerging area, it is the court will have to lead.

There are two cases by the SC which put some light but leave many things unanswered. But before start, the nature of a cybercrime has to be understood. How will you define a cybercrime?

Cybercrime is an illegal Act when a Computer is used as tool or target or both, or Electronic Evidence. The definition for a computer as in IT Act is very broad, Even in 2009 Amend, the definition for communication device also came up. Now the def. of a computer and communication device includes all devices. Even a smart LG TV connected to internet also becomes computer.

To differentiate a cybercrime, He gave the following illustration- A throws a computer without the slightest provocation on you. Is it a cybercrime? It is not a cybercrime. Therefore, Cybercrime is something deals with data and information liking hacking into your computer. It is not an act with physical hardware.

Information can be data, software or data base. All most all the cybercrimes are mostly done for the purpose to deriving the said information and it was therefore, the need for a new legislation had come because it cumbersome to apply the same laws for intangible property as the concept of property and possession has changed.

If it is said that a book or music that was composed by A has been stolen by B does not mean that B is depriving A from possession. It only means that it has been illegally copied by B. Therefore, transfer of information does not exclude A from possession and certain characteristics of property. Hence, Theft under IPC is not attracted and need for Copyright Act and S.66 of IT Act comes into the picture.

Let's go to physical crimes, people have started to use tablets, mobiles and computers instead paper, diaries and files which is used as a conventional mode of documentary evidence presented in the court. In these circumstances, information gets stored into such devices. How it has to presented in court of law is certainly a question? How do you extract the information? All these question shall be dealt.

Information by nature is intangible and easy to tamper. If an electronic document is corroborative to evidence to be proved before a court, usually it gets tampered when produced before the court because it happens due to the lack of proper knowledge how to deal with the information or document in a drive or flash disk. For eg., As in case of a murder case, a bullet or a knife with which the murder has occurred is produced before a court in original whereas for information in hard disk, the original is never sent to the court. It is a clone or copy is sent because dealing with the drive will certainly tamper the information. The copy is made in a manner that there is no information difference from the original without losing any bit of information. Then, the original is stored. The copy also includes expert report too. The moment original document is stored and not exhibited so necessarily the copy or clone over which the expert report that is talked about is secondary evidence. When talking about secondary evidence S. 65 of the Evidence Act comes to the picture but only applies for documents. The evidence in hand is inside the electronic device, and then what is the legal status of the information in the said device so that it becomes admissible in court? therefore, Sec. 65A was inserted into the Evidence Act.

Now in this background, let's look into certain cases, as to how we can go about electronic evidence:-

### **Compromising Evidence**

In the U.S. Doorframe Case, the FBI had seized certain devices from a hacker's house in New York City. When the devices were checked at the lab the folders in the disk were all corrupt. So leaving the case futile with no evidence, the officials went back to the house and reinvestigated. They found electromagnets on the doors leaving burned the information.

### **Logic Bombs**

It is actually certain algorithms that are fed to the computer which in the background do all the damage. A clever criminal can insert a setting that when the computer is set to shut down at the same time in the background the data that is present in the hardware may be deleted. It actually a set logical process that triggers certain command at the users instance. For the user it may be normal shutting down the computer.

Admissibility of the evidence which is not collected through illegal method is certainly a different question not more than the extent whether it is relevant or not has been established? Interesting fact, unless a certain procedure is strictly followed the allegation relevancy of the evidence stands. The defence usually takes the route, the SC has effectively laid a lot of precedence. The proposition stands that procedure of procuring the evidence does not have much relevance.

How do u prove the copying authentic?

**The computer forensics process include the following**

- Acquire
- Authenticate
- Analyze
- Document

It is the report by using the hash function that integrates the software. It is mathematical algorithm that takes input of variable length and give output of fixed length. Like if an input is given, there would be output with an hash function, if even if there has been tampering of the document of even coma, the hash function will be different.

If with the original, the copy has same Hash output function then document stands to be same, if not, then the data has been tampered( length would be same not the sequence).

Typically, the procedure after seizure, seal it and send it to the forensic, make a copy and start analyzing the info in the clone. By making hash function and store the original. Even in the expert report, the software that have been used to analyze has to be specifically been mentioned. The prosecution has to prove if there is any difference in the hash function if at all when compared between the original and clone.

Thus, Using hash functions to ensure authenticity of image. If acquisition hash equals verification hash, image is authentic.

Second, it is to Document. There is Chain-of-custody log, when the no. of evidence has been transferred or changed like in instance when sent to the state forensic lab to analyze a voice recording but does not have the infrastructure to study it. Then, it sends to another agency, so leg actually records the evidence changing hands.It actually tracks evidence from source when it is seized to courtroom.

The five “Ws” of chain-of-custody log that can very much handy. They are as follows:-

Who – took possession of the evidence, What– description of evidence, Where – did they take it to, When – time and date and Why – purpose for taking evidence. These can be essential to determine basic information for investigation. Every report should be accompanied with this record for authenticity and transparency.

Now lets look into a case-what kind of evidence should be collected?-The Omega Case

On July 31, 1996, The Servers of CNC department in Omega Corporation are booted. There is Message flash saying file server is being fixed. Subsequently system crashes. Even the storage backup tapes were not found. All programs got deleted, manufacturing halts. All programs and code generators destroyed. It affected 25, 000 products to customize 500, 000 designs. It took 34 years of growth and all the information lost in 1 year because of a network administrator who was not happy with the job. He was fired because of non – cooperation. Network Administrator's house searched. Computers, CDs, motherboards, 500 disks, 12 hard drives, 2 formatted backup tapes. Backup tapes were labeled 14/5/96 and 1/7/96. The cause of deletion, a six line program

System Log that was found:-

30/7/96 (Trigger Date)

F: (Accessing the server)

F:\LOGIN\LOGIN 12345 (first user logs in with supervisory rights and no password)

CD\PUBLIC (gives access to the PUBLIC directory, a file system area)

FIX.EXE /Y F:\ \*.\* (Run code, A=Yes, All files)

PURGE F:\ /ALL

It was actually the FIX.EXE/YF:\ \*.\* (Run code, A=Yes, All files) was a setting that was included to erase all the data. In common parlance, a user will have no clue as to what actually is being done by the computer in the background.

The evidence that was seized by the agency included all items seized from the suspect's house: CDs, HDD, formatted Back up tapes, etc.

But what is needed to establish guilt beyond reasonable doubt?

- Correct procedure having been followed by IO
- The function of the 6 line program (Expert Opinion)-there should be clarity and should remove all doubts in a the mind of the court.

The fact that it could only have been installed by the suspect. It trace only brings you to the computer and not to the person, so it has to be proved that it can only be done by the suspect.

As we come to Internet based crimes, whether it may be DNS spoofing, Web defacement, FTP attacks, Bogus Websites, Web spoofing, Website based launch of malicious code, cheating and fraud. It was reported by the FBI that the amount that is derived through a cybercrime is much more than Drug crimes. With an example, A is a person living in the middle-east and his sons are living in the US, He wants to shift to India. He goes to a particular Bank which has 3-4 crores rupees of his life saving. He wants to send money in USD to his son, studying in the US. The bank says that A would have to sign an A2 form under FEMA as per RBI regulation after signing the document, the money can be transferred. The bank then asks to leave four blank cheques and A2 forms so that A does not have to come back again and again from the middle east. Since for 20 year, A has account in that bank, so certainly there is a trust.

In the first month, an email comes from A to transfer 2500USD to his son account. Similarly, an email comes in the second month but for third month, the same email directs the bank to send the money to another account about 28000USD. The son is no more the beneficiary. Even for the fourth month this happens.

A after some months visits the bank and they ask him to pay an interest amount for 36 lakhs as there was Over draft. It is 36 lakh with just two emails, think of the whole population in India, so this is really a great problem.

Lets get familiar with certain internet works, the Information travels in data packets. Files get broken at their source then, reassembled and “joined” at the destination. The file can take various routes before it reaches the destination because the all packets are able to reach the user, even if some routes are congested.

What is Server basically? It’s a software programme that can install in a laptop or bigger computer. Usually, data to be computed by the server requires a much larger computer.

For an internet crime, Internet Service Providers (ISP) is an indispensable. It provide access to the Internet and also provide direct connection from a company's networks to the Internet. It connect users through POP (points of presence). Each user is given a unique IP address when he logs on to the Internet that is necessary trace the crime. Typically, the internet line comes through telephone line through the router, when email is used router takes over. Every protocol is bound to a port. Think of a situation of accessing a website that is of a different country is shown on the monitor in 30 millisecond and this is the beauty of information.

The Internet Protocol (IP) Address is a 32 – bit address separated by periods.Each field can contain a value between 0-255, known as octets. To trace IP’s, Internet backbone has to be very much understood in common parlance. It is referred to the central network that linked all parts of the Internet. It mainly consists of optic fiber cables.Now consists entirely of ISPs and private networks. It is actually router has to configure the path for the data to move and reach. Lets come to a Domain Name System, It is actually an intermediary that translates the name to IP Address. We actually write the name of the website and not the IP address like www.

Hotmail.com,so this name is translated to the IP address by this intermediary. It allows independence from knowledge of physical location of host. A resolver grants access to the system when the necessary requests are given to it.

Even IP address, can only trace a suspect computer. At instances, even the IP address can be changed through certain software like by using proxy servers. If a cybercrime is committed in India using proxy server, it can certainly shows an IP address belonging to another country. Now the log generated would be foreign server. Unless and until, the foreign proxy server gives you the address of the Indian IP address which used to generate the foreign website, no investigation can be proceeded.

If at any instance we do not have the correct IP address and time, the probability of landing to a wrong person is more. It can referred to a case, Shivaji Maharaj Orkut case, at this instance the investigation agencies landed up in arresting the wrong person. It was a case of Orkut, a social networking website. Somebody uploaded a fake photo Shivaji on Orkut saying that he was incompetent. That moment, a case was registered as it hurt the feelings of Maharashtrians. Orkut gave the IP address to authority and was found to be belonging to Airtel. Then, Airtel was requested to deliver the information as to whom the IP address on this date and time. They delivered address of a person living in Bangalore. Pune Police went and raided the house and arrested him. It was only on the basis of IP address without any corroborative evidence.

The Pune police again requested Airtel to analyze and verify the information that was delivered to them. The service provider responded that the information so delivered was wrong. They actually delivered the address of the person using the IP address at 11:32 PM and not 11: 32 AM. Now they even found corroborative evidence. But what about the person arrested for two months? The State Human Rights Commission gives a showcause notice to Assistant Commissioner. Therefore, Evidence must be scrutinized first otherwise it can certainly lead to very scary state of affairs.

The criminals today have become sophisticated in their own way. It can be said that if I need to commit a cybercrime even at some instances like the guys who kept electromagnets at the doors. He will not be in a situation to leave any trace. Even in which country's jurisdiction does not incriminate the said offence? The cybercriminal will use that country's IP address and no one catch him for that matter. The computers are becoming obsolete, now it's coming to mobile but even it would be complex. The scrutiny methodology shall differ from certainly a computer to mobile.

Look at a possibility, if Flipkart earns 10 Crores of Business a day, a cybercriminal gives threatening to the said Flipkart to crash the website for 48 hours. At least a loss of 10 crore would be there. The cybercriminal would also demonstrate for 30 second by crashing the website. So they would think how much is asked by the cybercriminal? 1 crore. They would be immensely willing to give it to him. Where is kidnapping, ransom and killing? Not required.

Even app that is used in our phones that strangulates the location through normal telephone lines as used by new taxi cabs like Ola cabs etc.

Android and Microsoft phones are used by everybody. Does anybody read the terms and conditions while downloading an app? Nobody. It says that you have given the right to extract, use, communicate and advertise through your contacts like true caller. Even a flash light using torch app uses such terms. In such case, evidence becomes really complex and difficult to comprehend.

The session concludes.

Day-2: Session 5: 9-10 AM:

## **SEARCH AND SEIZURE OF DIGITAL DATA**

### **Speakers:**

#### **Nisha Menon**

Ms. Nisha Menon started the session by illustrating the frame work of the topics being dealt by her as namely regular forensic sciences, QDE, finger printing, video examination and forensic tape authentication. These are very much commonly used methods. Any basic application basic science for the purpose of law is forensic sciences. It basically stands on the Locard's principle, that whenever two things meet, they leave traces of each other. Every criminal can be connected to his crime by contact traces carried from the scene of crime or left by him at the scene of crime.

Now moving to QDE (Questioned Document Examination), What actually is Questioned Document Examination? Any document that is doubtful, alleged or doubt in a legal dispute.

1. A "questioned" document is any signature, handwriting, typewriting, or other mark whose source or authenticity is in dispute.
2. The types of documents that come under the examiner's purview include wills, contracts, letters, threatening photos, lottery tickets, passports, voter registrations, drivers licenses, cheques, tax returns, sales receipts, torn pieces of paper, photocopies, carbon paper, charred paper, faxes etc.

Photocopies' having tampered the original signature is one of the most common activity but it is highly complicated for experts to analyze the matter. Now moving to scope of QDE, it includes the following: Handwriting analysis, Signatures and initial analysis, Writing and disguised writings, Alteration, Erasure, Obliteration and over-writings, Sequence of strokes in a handwritten or printed matter, Digital written document analysis, Identify different types of paper, ink, water-marks, copymachines, printer cartridges, stamp impressions etc.

Later, She explained certain facts that are very much common malpractices as through the following pictures. It is to show in which all forms there can be forgery, alteration etc and the relevancy of the scope of QDE.



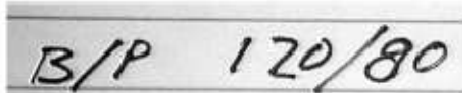
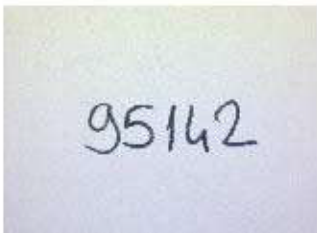


Figure 1 Viewed by the "naked eye"



Figure 2 Viewed at 665 nanometers  
Infrared luminescence

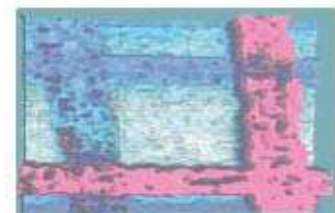
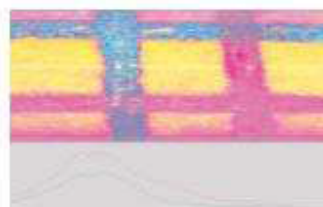
In the above picture, Figure1, shows a manuscript marking 120/ 80 but when it was analyzed the original marking was 170 /90 and it was altered later to 120/80. The white mark in Figure 2 shows that it was actually made later.



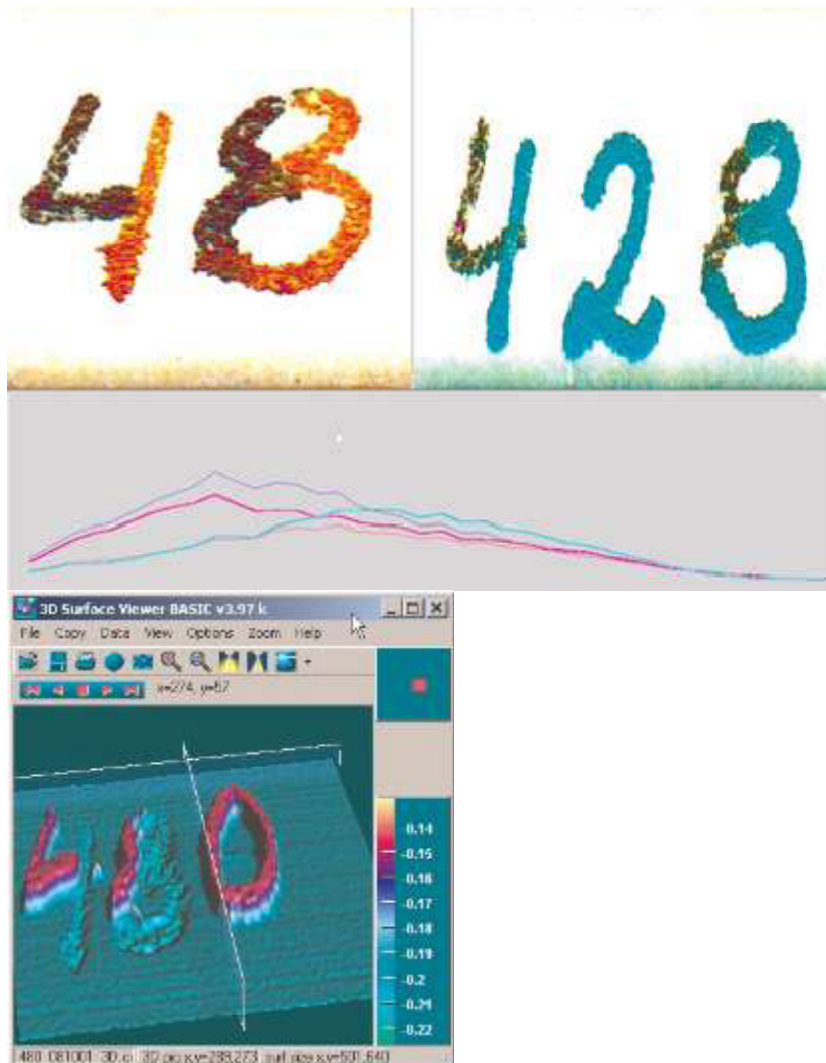
Similarly it can be marked for the above diagrams. Where 9 is actually not mentioned in the original manuscript. Through the third picture, it can be highly understood that 9 was mentioned later on.



The above picture illustrates revealing concealed or masked writing.



For the above picture, the stroke sequence determination using micro-hyperspectral measurements in intersecting areas is done. Pink line is being overlapped by blue. It means that blue was added first with pen.



Now through most modern techniques, we can lay down 3D imagery that does give us as to exact results which digit have been altered. It is actually 123 that has been altered and made as 428.

There are certain characteristics of handwriting. Identification of the author of disputed handwriting, and/or signatures is to determine if it is genuine or a forged. It is a proved fact that handwriting is “Brain Writing” controlled by the signals sent by the nervous system through hand. Thus, it is unique to every individual. The neurons get activated and command the neuro muscular system and hand to write so, no two people will have identical handwriting. Factors to consider include the arrangement of the writing on the paper, such as margins, spacing, crowding, insertions, and alignment. The final conclusion must be based on a sufficient number

of common characteristics between the known and questioned writing samples; it is a judgment call made by the expert examiner in the context of each case. A person cannot produce in a mechanical manner exactly what has been written first. There must be some natural variation in the writing of the same person. If two signatures are precisely alike then one of them must be a forged signature.

Handwriting characteristics can be classified into Class and Individual Characteristics. Under class characteristics, it includes general characteristics which may be common to more than one individual. Also similarities between individuals who learned the same type of writing systems is looked into, whereas, individual characteristics are characteristics that are true only to a specific writer. It is a combination of individual characteristics that make handwriting unique to him/her. Penmanship is inclusive thing with everyone who writes like someone writes slowly, fast, takes a pause or fluently so either the penmanship is inferior or superior. Slant quality, pen movement, the pressure and tremors certainly describe many factors about a person based on which we categorise them. Nearly there are 50 categories that experts have to fill and come to a conclusion.

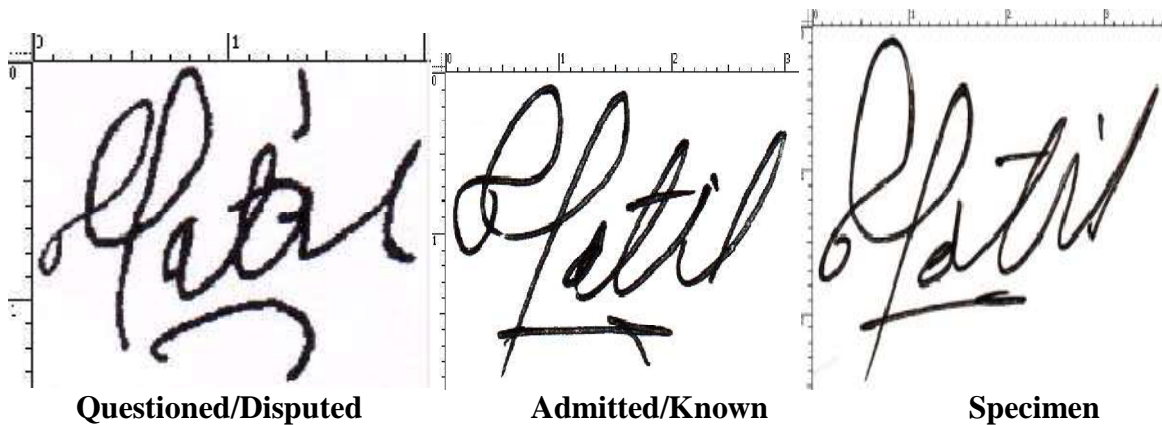
There are numerous types of individual characteristics like Penmanship, Slant, Line Quality, Pen Movement, Proportions, Height, "I" Dot, "t" Crossing, Loops, Pressure, Baseline Alignment, Pen Lifts, Speed, Embellishments, Entry/Exit Strokes, Retracing, Spelling/Spacing, Format, Case.

There is a lot of commotion as to what kind of evidence actually has to be collected?

What are standards of comparison? What are the documents to be taken?

It is actually the admitted writing has to be seen in respect of the disputed writing. Slightly earlier, a signature which is admitted is 10 years old does not mean that it is immune from comparison. If the person is present, a specimen signature can be requested from the person in front of the court, wherein, the expert dictates and submitted to the expert.

Standard Comparisons include sample to be analyzed called as Questioned / Disputed. Samples from an individual include collected writing comes from prior to the beginning of the investigation (helps prevent or indicate when a person is disguising their handwriting) known as Admitted/ Known and requested writing is a dictated text using the same type of paper known as Specimen. As in the following illustration, Please can it be judged whether the signature is forged writing or not? Along with reasons.



It is Forged- The signature has different curves than the admitted and specimen signature.

In regards, to specimen signature, we take 10-15 signatures from the person at different time periods. A break is given at 20 minutes in between as the individual characteristics might get tampered.

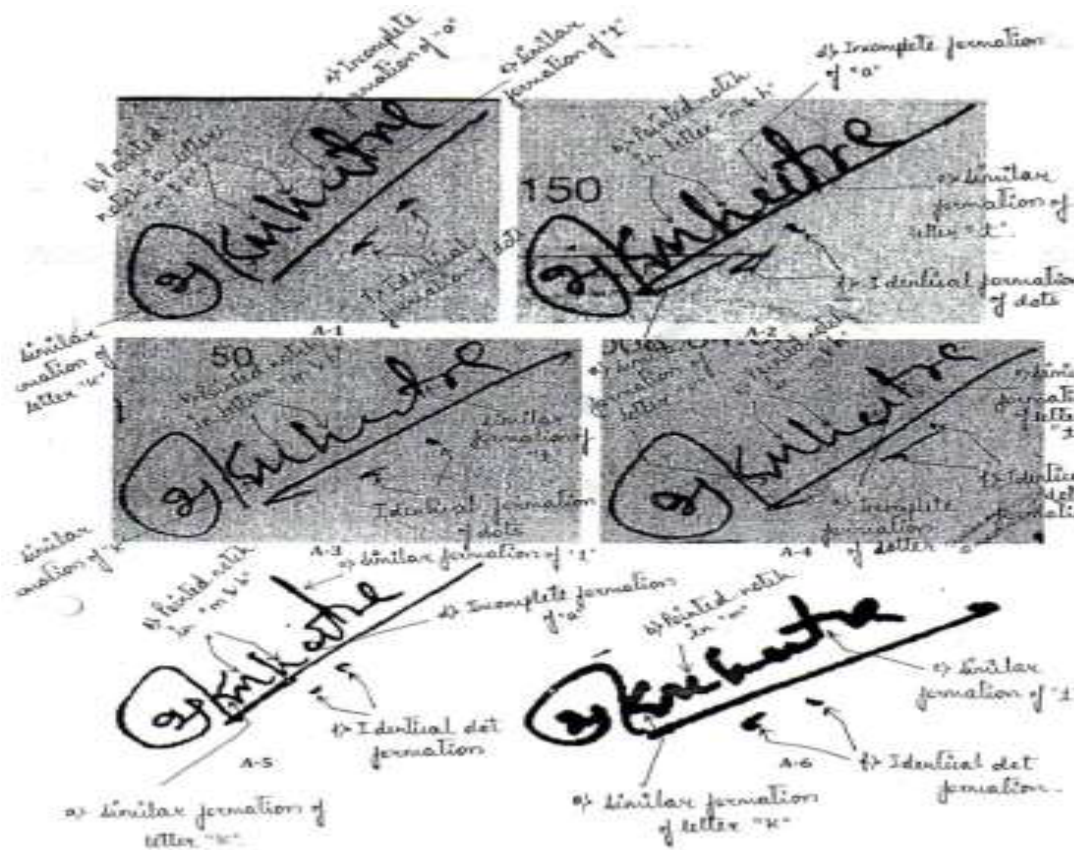
Even there are many types of forgery namely:

1. Freehand, Simulated or copied forgery- the above said example is classic case of simulated forgery. It is wherein the a person tries to make a signature and tries replicate a persons signature with practice.
2. Traced Forgery- It is wherein a person applies tracing or carbon paper, to replicate a signature from the original.
3. Forged by memory- It is a type of forgery wherein a person has seen another making signature and through his memory recollects the signature and makes a signature.
4. Forgery without model or forgery by impersonation- It is very crude form of forgery. Any lay man can make it without knowing that how the signature is made.

There is another concept called Disguise Handwriting. A deliberate departure from the normal handwriting habits generally referred to as “Disguise”. Even disguised handwriting will exhibit some of the person’s individual characteristics

Eg., where a person tries to make a signature without showing the other person on a cheque. It gets bounced due to the fact that it does not match. This is disguise. Experts can certainly 100% recognize a disguised signature.

Lets consider the following case.



The above signature was made by a person on a sale deed 10 year before. The left hand signature is not the signature claimed by the person but the signatures made on the right can be claimed as the genuine signature. Whether the signature are made by the same person?

The movement of the pen shows that it is a classic example of disguised signature. In this case, the person had brought two expert evidence to the court that the signature stands to be forged but this is made by the same person. There has been a detail recreation of each and every portion of the handwriting that has been mentioned. Since it is actually brain writing, a person cannot manipulate continuously, it may only be to an extent. Especially formation of h and k, stands to be same except a that stands to be different. The marking are the main reason as in the picture.

9/7/2002	Dr. A.R. Maslum	400 → 160	(31)	21/6/2002	Dr. Navesh Vaghela	400 → 160	(25)
	Dr. M.L. Jain	300 → 120		24/6/2002	Dr. R.P. Suri	300 → 120	
	"	100 → 40			Dr. A.R. Maslum	400 → 160	
	Direct (2 p15)	600 → 0		25/6/2002	Dr. Manisha Bhagwat	300 → 0	
	(Blumal Jain)				"	250 → 0	
	Dr. S.B. Slutty	300 → 120			Dr. Lalit Jain	400 → 160	
	Dr. C.A. Panwar	200 → 80		27/6/2002	Dr. Mukesh Alakh	300 → 0	
	direct	100 → 0			Direct (F.U.)	300 → 0	
	Dr. H.H. Kuradia	400 → 160			"	400 → 0	
	Dr. Navesh Vaghela	400 → 160		28/6/2002	Direct (hosp pt)	1000 → 0	
	home visit	1500 → 0			" (F.U.)	100 → 0	
10/7/2002	Dr. A.R. Maslum	200 → 80			" (F.U.)	200 → 0	
	Direct	500 → 0			Dr. Lalit Jain	400 → 160	
	Dr. Chetan Lypal	200 → 80			direct (F.U.)	200 → 0	
	direct (F.U.)	200 → 0			Dr. D.B. Vakharia	300 → 120	

Similarly the above document, the above is made by the same person. Whenever a person tries to disguise is they first try to change the slant.



MAY IT PLEASE YOUR HONOUR

The above matter is kept for the cross of the respondent. The Advocate for the Petitioner has suddenly taken ill. Be pleased therefore to adjourn the above matter to any date convenient to this Honorable Court.

Bombay dated this 27<sup>th</sup> day of February 2002.

Dr. Laxmi Sharma  
May It Please Your Honour.

The above matter is kept for the cross of the respondent. The Advocate for the Petitioner has suddenly taken ill. Be pleased therefore to adjourn the above matter to any date convenient to this Honorable Court.

Bombay dated this 27<sup>th</sup> day of February 2002

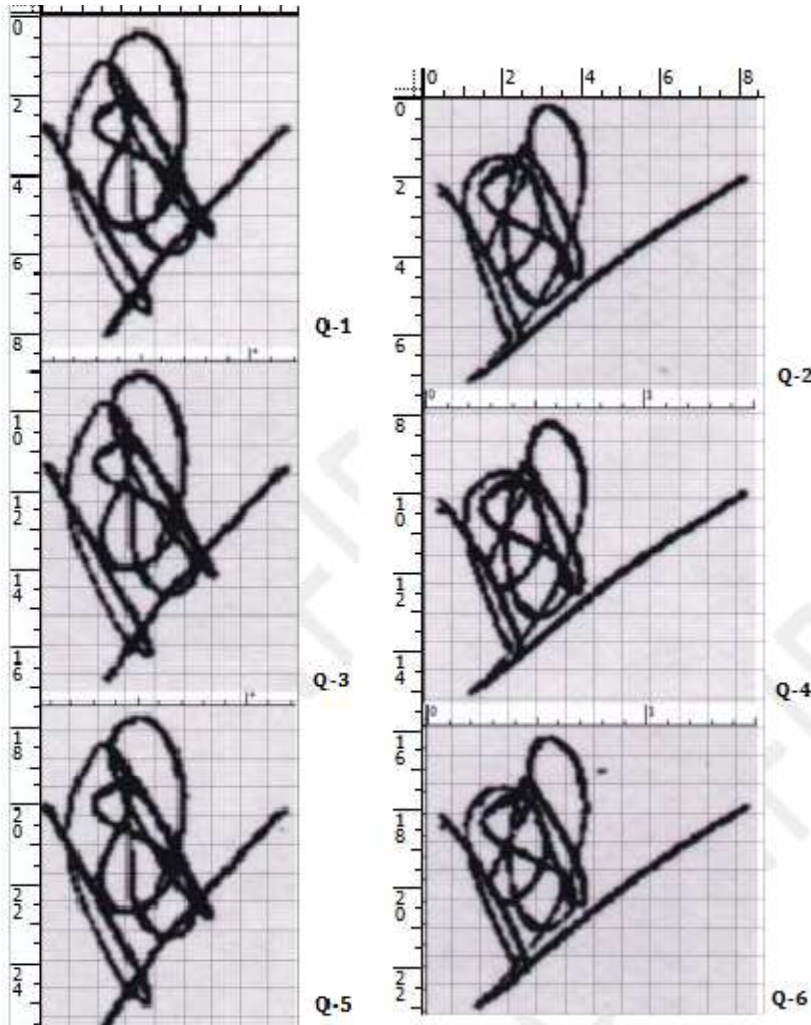
The first picture is admitted document and the second is the specimen document. Also for the above said document, It was actually the slant that was changed by it was actually same person who has made the signature.



The first two signatures are the disputed signature, K1 and K2 are the admitted signatures and S1 and S2 are the specimen signature. It was in this case that the person actually wanted to analyze the signature claimed that it was not made by him but it was actually made by the same person cause there was no difference at all.

### LATEST QDE TECHNOLOGY

Any mechanical device, result in wear and damage to the machine’s moving parts and leave behind identifying features on a piece of paper. Examiners compare transitory defect marks, fax machine headers, toner, toner application methods, and mechanical and printing characteristics.



As in the above case, It is a classic case of a signature being forged by a brother who derived the paternal property worth 400 Crores. The signature of the sister was received through a medium of a gift deed that was given by the brother. From the deed, the brother got the signature. The sister gave consensus to register the deed but the brother refused and she went to registrar's office. Where she found that the paternal property worth 400 Crores had been transferred to his brother without her notice.

When analyzed, the signature made on the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> page was a cut and paste signature and from another document a signature was cut and pasted on 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> page. It was with the principle of rule and square method.



It is a font analysis of the Computer Generated Document mentioned below.

---

**and and**

Exh-Q (11)

**and**

Exh-Q (1)

**and and**

Exh-Q (2)

**and**

Exh-Q (5)

**and**

Exh-Q (6)

**between**

Exh-Q (11)

**between**

Exh-Q (9)

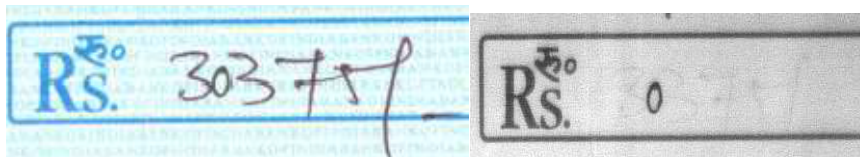
# Sadrudin Hassanali Jiwani

Exh-Q (11)

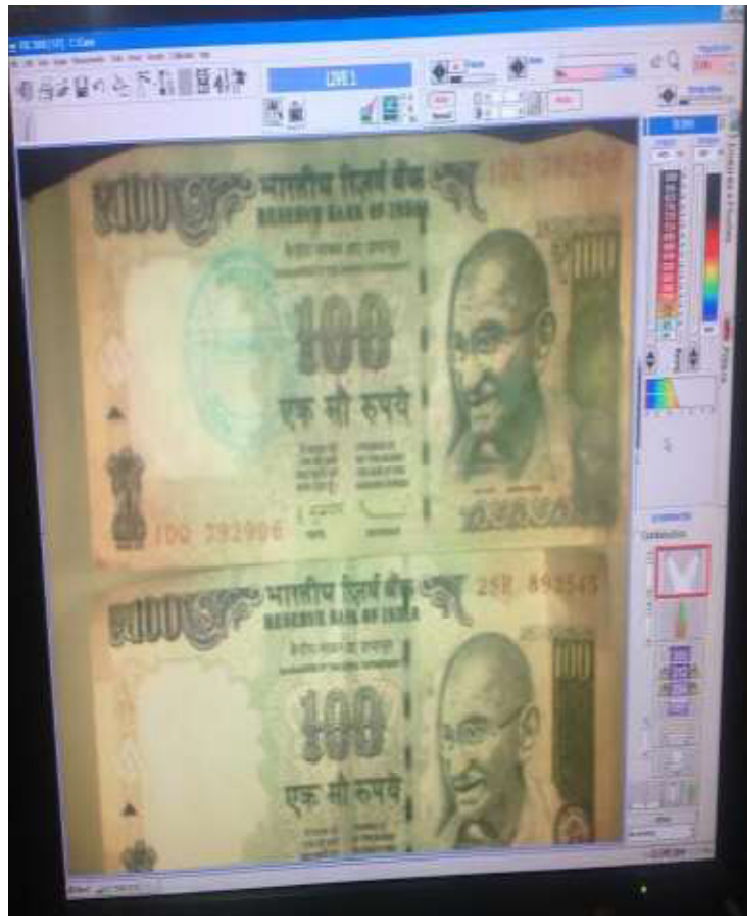
# Sadrudin Hassanali Jiwani,

Exh-Q (1)

It can easily found that even through forensic analysis, that each ink of the printer has a different wavelength. Even in case of the font it can be very minutely seen that there have been classic differences in the size and font of the word in all the above instances it can be easily be proved.



The above mentioned picture is of a cheque which actually mention Rs. 3,375 that has been altered and made to naked eye looks like Rs. 30, 375. The third picture shows that through forensic analysis that 0 was added later to the cheque. Even if the pen is the same, still we can find out.



The above said picture depicts an example of counterfeit currency.



Exch A



Exh-B

Even stamp impressions can be forged. The presence of Lion emblem in Exh-B which is absent in Exh-A. The difference of font type and style, Defects in Stamps Exh-A &Exh-B.

It is Forensic Stylometry, wherein authorship analysis to determine author of anonymous emails is found. Stylometry determines a pattern of authorship for each individual suspect author in an investigation. The features include character based features, word based features including measures of function word frequencies, the word length frequency distribution of a email, the use of letter and collocation frequencies. The set of authors is reduced from an initial large list of possible suspects.

There is a classic case where an email was sent to RBI and FCC, confidential information known to the top five employees shared with these two organizations. It was shared to two of them. Even the top five people of the company were shortlisted comparing their random previous 500 mails sent by each one of them, which showed that 2 from the five were involved in it. It is a complex mechanism where sentence phrasing, dialogue, punctuation, language and grammar that is statistically analyzed. This procedure is yet to be validated by Science And Technology and is not presently accepted in our legal system.

Important Points to be kept in mind:-

1. Determination of the authorship of a FORGED SIGNATURE produced by tracing or by simulation with suspect forger or forgers cannot be done.
2. Comparison of handwriting of any language can be done.
3. Determination of the authorship of the altered or the over written strokes over the original writing.
4. Determination of the authorship of a writing or signature by comparison of its photo state reproduction with the specimen writings of the suspect.
5. Determination of absolute age of INK AND PAPER
6. Determination of the identity of a particular pen or pencil alleged to have been used in producing the questioned document.
7. To determine whether a person is a left handed or right handed cannot be determined
8. Signatures with signatures and Initials with Initials
9. Use of photocopies of the signature.
10. Exhibits required to check alterations.
11. Personality assessment reports based on the handwriting sample do not have any validity in the court of law.

## **Dr. Harold D'Costa**

Computer forensics is the practice of collecting, analysing and reporting on digital data in a way that is legally admissible. It can be used in the detection and prevention of crime and in any dispute where evidence is stored digitally. Computer forensics follows a similar process to other forensic disciplines, and faces similar issues. There are enormous issues as to the regard of the procedure of investigation. The job profile of the speaker is closely associated with law enforcement agencies.

A computer forensic examination may reveal when a document first appeared on a computer, when it was last edited, when it was last saved or printed and which user carried out these actions.

More recently, commercial organisations have used computer forensics to their benefit in a variety of cases such as;

- \* Intellectual Property theft
- \* Industrial espionage
- \* Employment disputes
- \* Fraud investigations
- \* Forgeries
- \* Bankruptcy investigations
- \* Inappropriate email and internet use in the work place
- \* Regulatory compliance

Hard-disk- is a data storage device used for storing and retrieving digital information using one or more rigid ("hard") rapidly rotating disks (platters) coated with magnetic material. Memory Flash- A memory card or flash card is an electronic flash memory data storage device used for storing digital information.

The process of seizure of devices should be followed according to particular standard.

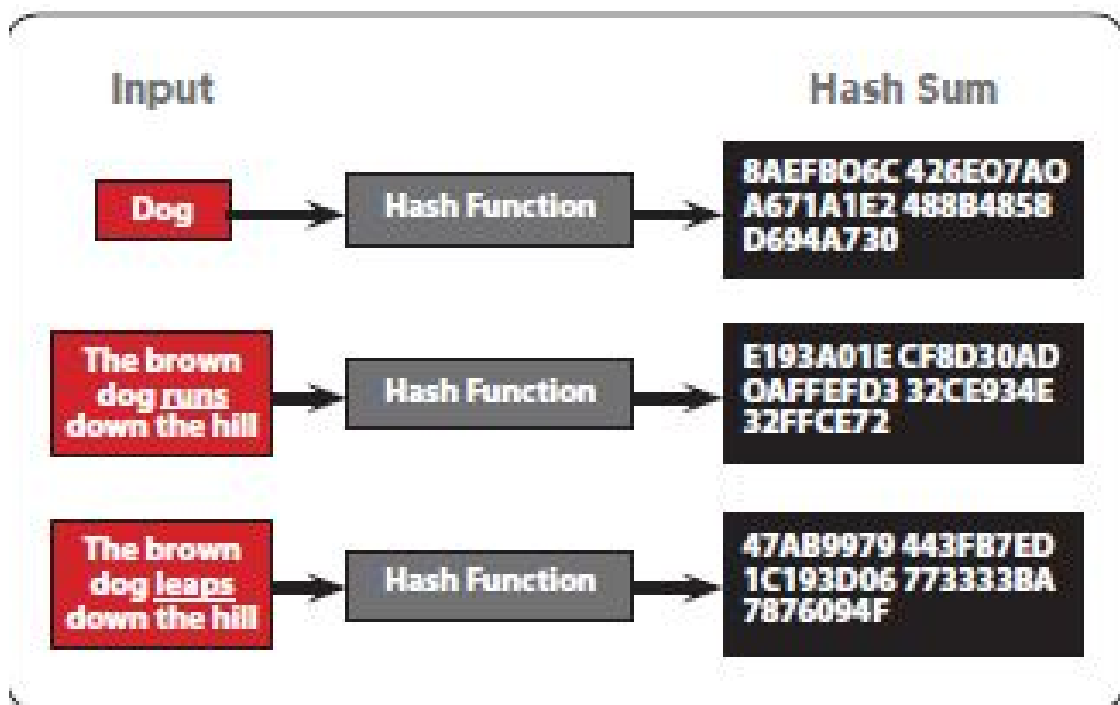
- When it comes to collection of evidence, the procedure for gathering evidences from switched-off systems and live systems have to be complied with the search and seizure.
- Devices seizure include, seizure of system(Desktop/Laptop),Memory devices/storage media.

## Hashing

- Hashing used to ensure the integrity of the digital evidence and the media content.
- Before hashing a Write-Blocker hardware must be used Hashing is done using a hashing algorithm in which certain mathematical computations are used which creates a unique value called Hash Value.
- If the evidence is *altered* in any way, the hash value will also change.

## Hash Value

- A hash value is a result of a calculation (hash algorithm) that can be performed on a string of text, electronic file or entire hard drives contents.
- Each hashing algorithm uses a specific number of bytes to store a “thumbprint” of the contents.



Examples of hash values for the same text file using different Algorithms

MD5: 464668D58274A7840E264E8739884247

SHA-1: 4698215F643BECFF6C6F3D2BF447ACE0C067149E

SHA-

256: F2ADD4D612E23C9B18B0166BBDE1DB839BFB8A376ED01E32FADB03A0D1B720C  
7

SHA-384:2707F06FE57800134129D8E10BBE08E2FEB622B76537A7C4295802FBB94755B  
BEE814B101ED18CC2D0126BD66E5D77B6

SHA-

512:C526BC709E2C771F9EC039C25965C91EAA3451A8CB43651EA4CD813F338235F495D  
37891DD25FE456FE2A8CA89457629378BE63FB3A9A5AD54D9E11E4272D60C

RIPEMD-128: A868B98EAEC84891A7B7BA620EDDE621

TIGER: F31A22CEED5848E69316649D4BAFBE8F9274DED53E25C02D

PANAMA:

7E703B1798A26A0AF21ECD661CBADB9C72B419455814CA7B82E29EE0C03FA493

It should be noted that without a write blocker, there can be no seizure. Write blockers are devices that allow acquisition of information on a drive without creating the possibility of accidentally damaging the drive contents. It is very much essential for digital compliance of law. In many cases, hard disk is removed from the computer and noted in the punchnama without noting as to how the seizure took place. It then actually n-case, winnax etc., software that can be with this used to display the hash value.

Disk cloning is the process of copying the contents of one computer hard disk to another disk or to an "image" file.

Section 65(B) of Indian Evidence Act. :Admissibility Of Electronic Records.

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be

also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in the Sub-section (1) in respect to the computer output shall be following, namely:

(a) the computer output containing the information was produced by computer during the period over which computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(b) during the said period the information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for that part of the period, was not such to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into computer in ordinary course of said activities.

(3) Where over any period, the function of storing and processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by the computers, whether-

(a) by a combination of computer operating over that period, or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period of time; or

(d) in any other manner involving successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

**Thus, the session was concluded.**



**Day- 2: Session 6: 10: 30-11: 30 AM**

## **CYBER CRIMES INVESTIGATION AND CYBER FORENSIC**

### **Speakers:**

**Dr. DebashisNayak**

The session started with discussing DNS caching. A DNS caches information received about a mapping. A later query for the same mapping uses the cached result. DNS caches are updated periodically.

The spoofed email are most contemporary form electronic crimes. The spoofing example is:-

The link appears as:

[www.noodlebank.com](http://www.noodlebank.com) (i.e NOODLEBANK.com)

But actually it links to

[www.nood1ebank.com](http://www.nood1ebank.com) (i.e NOOD1EBANK.com)

The fake siteactually is a “steal”.

When username-password at the spoofed website is entered, the username-password was sent across to the criminal carrying out the phishing attack.

The KEY to almost all web based crimes

The IP Address can be found under Figures in server logs, Figures in email headers and Identify the correct IP address. Time zones can change the IP address of a place as happened in ShivajiMaharaj (Airtel case).

The Fundamentals of investigation can be track physical location of the IP Address and identify the suspect computer to which the IP address was allotted. Also, Collect corroborative evidence from suspect computer.

Server Logs are as mentioned.

#Software: Microsoft Internet Information Services 6.0

#Version: 1.0

#Date: 2007-10-13 06:45:10

2007-10-13 00:45:26 172.224.24.114 -67.19.217.53 80 GET /index.htm - 200 7930 248 31  
Mozilla/4.0+(compatible;+MSIE+5.01;+Windows+2000+Server)

The Evidence that can be collected for in phishing cases.

Who is the victim's ISP?Is there a copy of the email?Who is the purported sender?What is the domain name and IP address of the suspect site?

When was the site visited by the complainant and from where?

The Evidence in phishing cases can be extracted through these questions. Whether it is a copy of the website saved or do screenshots exist? To which bank acc. were payments made?Is there any contact email address? Who are the relevant service providers?Have headers been examined?

The admissibility of Digital Evidence. Sec 65B (Indian Evidence Act)

Computer output shall be deemed to be a document if the conditions mentioned in Sec 65B(2) section are satisfied. It shall be admissible in any proceedings, without further proof of the original.As evidence of any contents of the original

Admissibility of Digital Evidence. Sec 65B(2)(a)(Evidence Act)

That the computer output was produced during the period over which the computer was used regularly to store or process information..... by the person having lawful control over the use of the computer

Admissibility of Digital Evidence Sec 65B(2)(b)(Evidence Act)

During the said period, information of the kind contained in the electronic record..... was regularly fed into the computer in the ordinary course of the said activities;

Admissibility of Digital Evidence Sec 65B(2)(c)(Evidence Act)

Throughout the material part of the said period, the computer was operating properly or, if not, .....it was not such as to affect the electronic record or the accuracy of its contents;

Admissibility of Digital Evidence Sec 65B(2)(d)(Evidence Act)

The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

Section 65B(4)

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a *certificate*.....” Identifying the electronic record..and describing the manner in which it was

produced;giving such particulars of any device involved ..dealing with any of the matters to which the conditions mentioned in subsection (2) relate,

and purporting to be *signed by a person occupying responsible official position* in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate.

Who will give the Certificate under 65B(4)?In criminal cases, where accused's computer is seized and his HDD is cloned. The cyber forensic analyst cloning the HDD and presenting evidence after analysis of the clone.In civil cases,the Plaintiff or the Defendant who desires to furnish evidence from his computer.

The Amendment to Bankers' Books Evidence Act, the Printout/Copy of entry or the book shall be accompanied by Cert. by Manager identifying the entry. Cert. by computer-in-charge giving details of data storage, safeguards and computer where such data is stored.Cert. by comp-in-charge (manner of affidavit) relating to integrity of printout and computer

In State Vs. Navjot Sandhu (Parliament attack case), Laptop, storage devices recovered from a truck in Srinagar.Laptop contained files relating to identity cards, stickers used by terrorists. The Defense issues and Files created after the laptop was seized. The date setting can be edited. In the absence of verified time setting and concrete proof about the originality of the hard disk, evidence is inadmissible. The Findings of the case that was pointed out:-

- If accuracy of computer evidence is to be challenged, burden lies on the side who makes such a challenge
- User created files and system files, difference
- Mere theoretical doubts cannot be cast on evidence

As per the facts, the laptop was deposited in the malkhana on 16.1.2002. The Analysis revealed that two of the files were last written on 21.1.2001. One file was last accessed and last written on the same day. The case diary noting - the laptop was accessed at the malkhana on 21.1.2002.

While cross examining PW73, a question was put as to how a file could be written without it being accessed.The witness answered that the file can be written without being accessed by copying it on a different storage media. The learned counsel for the State is justified in his comment that the said answer was not a response pertaining to system files, which are self-generating and self-written.There was no suggestion to any witness that the date or time setting has been modified in the instant case so as to facilitate tampering.A mountain out of mole hill is sought to be made out by reason of the observation of PW73 that some of the files were last written after the date of seizure and the answer given by PW73 with reference to a general, hypothetical question. The certificate under 65B(4) is an alternative method to prove electronic

record. Irrespective of the compliance of the requirements of Section 65B, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, Ss. 63 & 65

Certificate containing details in S.Sec (4) of Section 65B may not have been filed. That does not mean that secondary evidence cannot be given, *even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65.*

- Gist of findings
  - Accessing a suspect computer after date of seizure *ipso facto* does not render evidence inadmissible;
  - If accuracy of computer evidence is challenged, burden is on party making such challenge;
  - Certificate under 65(B)(4) is not mandatory for making electronic evidence admissible

It is in Anwar V. PK Basheer, SC Sep '14, The Electronic record by way of secondary evidence is inadmissible unless accompanied by cert. at the time of taking the document. Earlier proposition laid down regarding no mandatory requirement of Cert. in 65B is bad in law and is overruled

The Position of law is actually what happens to all those cases where 65B(4) certificates were not furnished because Navjot Sandhu held the field?

The Examiner of electronic evidence is appointed through Central Govt. may notify in O.G. Then, Any agency/dept/body of Central Government or State Government send for expert opinion on electronic evidence. The opinion becomes relevant fact u/s 45A (new) of the Evidence Act.

For Admissibility of Text Messages, the procedure is that Printouts of text message may be admitted following the usual method under Section 65B. Court may summon the service provider to give details of text messages from a particular number. Printouts must contain date, time, telephone number of each text message for verification. The admissibility of Whatsapp Messages, it is the same procedure to be followed like in case of text messages. However, Whatsapp messages are not stored on Whatsapp servers unlike TSPs in text messages. The reliability must be established, if questioned.

Audio/Video clippings in Mobile Phones. It is Admissible as per Procedure under Section 65B to be followed. If 65B cert. exists, oral evidence necessary only when authenticity is questioned. If 65B conditions are met, phone itself is not necessary as an exhibit. Only when trial court is not satisfied with evidence led, it may require original phone. In Emails, the Procedure under Section 65B is the contents of e-mails as evidence. If parties admit the contents and email is digitally

signed. By subsequent conduct of parties or in the alternative, by an IP address trace. Finally, by the examination of witnesses.

If emails have been produced after, following procedure in 65B. The genuineness has been proved by witnesses and subsequent deletion is inconsequential. It under 65B(1) admitted as direct evidence and 65(c) – When the original has been lost or destroyed.

The Tampering of evidence can be checked through the following:

- Hash value
- Expert report about file creation, access and modification
- In the absence of standard procedures being followed, by examination of witnesses

In MagrajPatodiaVs. R.K.Birla, SC 1972, the Documents illegally produced as evidence in prosecution relating to election case. The Documents recovered illegally from person who was neither witness nor party to the case. “the fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved”

In Pooran Mal Vs. Director of Inspection, SC 1973, The case was relating to Income Tax. The Documents alleged to have been seized illegally during search and seizure. “...Neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search”

The State (N.C.T of Delhi) Vs. Navjot Sandhu, SC 2005, the CDR produced by illegal interception. “The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility.”

As per IT Act 2000, No Procedure for search and seizure specifically can be described. In 65B, Evidence Act talks only about admissibility on basis of Cert. under 65B(4).

**Nisha Menon and Dr. Harold D’Costa had responded to certain queries raised by the judges and the session was concluded.**

**Day- 2: Session 7: 12-1 PM**

## **PROTECTION OF WITNESS AND INFORMANTS**

**Speaker: AnupJairamBhambhani**

The main objective of the courts otherwise is to reconstruct event of crimes episodes and then to decide on the basis of whatever factual matrix the judge can or the court can decipher and see of course there are lawyers to assist judges but the lawyers you know hold briefs specially in criminal matters there is no obligation really other than disclosing the law for the lawyer to actually stand up and speak against his own case that in fact even against his very ethics of his profession..

Therefore the eyes and ears of the courts are actually the witnesses. In fact many centuries ago Jeremy Bentham the British philosopher in Jurisprudence has said in so many words that witnesses are the eyes and ears of justice so being the hub of criminal prosecution witnesses are also in the most vulnerable position, the sheer importance and the relevance of the reality of witnesses and informants makes them very soft target and also makes them very central to the justice delivery system itself. So any vulnerability of the witnesses results in the vulnerability of the justice delivery system itself and now recent experience shows that there is urgent needs to sort this issue.

Now before I site some examples, let me say that I am acutely conscious of the fact that two out of these three cases that I will just mention that are pending matters, they are subjudicetherefore I would not deal into the merits of such cases and whatever I say will not reflect upon the merits however there is information in relation to witnesses etc. relating to these very matters are available very much in the public domain therefore I think and it will be wrong of me if I atleast highlight some of these cases, one of the cases is from Delhi, this was sometime in 2000-2001, this is Jessica Lal case, there was a young lady who was moonlighting as a bartender she was shot brutally in cold blood at head for refusing to serve someone a drink the matter came news there was tremendous public interest in the matter when the matter went to trial in May 2001. One of the key witnesses, the informant himself turned hostile and others also turned hostile and sayanmuni who was the complainant in the matter was in the bar during the matter happened but during the trial he disowned his very own statement saying that he dint know Hindi and he dint even understand the word bayan or testimony. The high court judgment in the matter says that the FIR was recorded in Hindi while he narrated everything in English he didn't know Hindi at all. The Court says that we do not find his statement to be convincing and regarding two guns the judgment says in court he has taken the came out with the version that there were two men at the bar counter we have no manner of doubt that in this aspect he is telling a complete lie" that being the observation of the Court however please appreciate the position of the trial court where the judge in the matter he has a report in his file where the same witness says something in writing and he is entitled to believe that what the police has recorded is what the witness says but now the witness goes back on his words now obviously that leaves the judge...

Later, a sting operation was conducted by Tehelkamagazine, what appeared on the show was that the witnesses were bribed and coerced to change their testimony. The father of one of the main accused was named in the exposure as the one who has paid money to the witnesses.

Another very important witness in the very same case who turned hostile was the ballistics expert, PremSagar, this person was the expert of forensic from the laboratory in Jaipur, in Rajasthan. He was the key witness in the case who turned hostile like Munshi. Earlier he was of the opinion that there was only one weapon involved but later he changed his testimony to what came to be known as the two weapon theory namely that there was also another person with another gun at the bar at the same time.

However in May 2013 the Delhi High Court ordered the prosecution of SayanMunsi who was a budding actor as well as the ballistic expert.

More recently we have been reading the case of a godman, AsharamBapu, whose matter is still pending therefore, will not go in details but here again on the official complains of rape. Twenty two in number, which is pending against the godman. There has been three witness who have been killed and nine of them have been attacked, this information is what we gather from the public domain. Certainly not saying that whatever it is true or false but this is something which has happened in a high profile trial as a matter of fact it would interest you to know that the session judge who was hearing the case, got a letter through post warning him of dire consequences if the accused was not allowed to walk out on bail, so forget witness, even judges are threatened even Supreme Court judges which therefore brings me to the point where I started which is that if witness and informants protection is not put in the Centre of the agenda, the day is not far when courts will act because judges are also human beings. They have families, so other than these two cases, there is another case which has also been now hogging the limelight and there has also been, this is the Vyapam Case. Its under investigation at the moment therefore I will not deal into the depth except to say that there has been forty nine deaths in this one case and the causes of death have been varied suicides have been seven road accidents. We may choose to ignore this but at heart of hearts all of us know that this has something to do with the matter.

However this is not new, in 2003, the Supreme Court has traced, in regard to the law to protect witness and this happened in the context of the Gujarat riots, the title of the case is NHRC v State of Gujarat and the petitioner itself was the NHRC because certain complaints were received at the NHRC. This is what the Supreme Court had to say 2003 9 SCALE 329 and Zahira is also an important case. Yes, Malimath committee has in para 7 of this reported the court. you are aware that the committee has dealt into several aspects of criminal law administration and one of the aspect related to witness, this is what was said:

This Court regretted that "no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses."

Then, on the question of protection of witnesses, the Supreme Court referred to the absence of a statute on the subject, as follows: "No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the

criminals have often access to the police and the influential people. We may also place on record that the conviction rate in the country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over. In this view of the matter, we are of opinion that this petition (by NHRC) be treated to be one under Art. 32 of the Constitution of India as public interest litigation.”

It is very obvious and evident that sometime due to delay in trial the witnesses disappear they die and they relocate but delay in trial is often created by accused person so that trial only goes on as the Supreme Court says that the trial does not start till the witnesses are over..

Then in para 10 the Supreme Court says that.....however in 2003 in PUCL v Union of India, Supreme Court had another occasion to refer to witness protection now this judgment I am referring to has citation 2003 10 scale 967..the case referred to POTA constitutional validity had been challenged but in the process of doing that the supreme court also made certain relevant and material observation in regard to witness says and I will draw everybody’s attention to this now section 30 of POTA provides the court certain powers to hold proceedings in camera to explain briefly ..

### 30. Protection of witnesses.—

(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reason to be recorded in writing, be held in camera if the Special Court so desires.

(2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Special Court may take under that sub-section may include—

(a) the holding of the proceedings at a place to be decided by the Special Court;

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any decision or direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees.



Now the challenge essentially was that you cannot keep witness's identity secret because that leads to the very right to the accused to cross examine and therefore it defeats natural justice, reading para 57 and section 16 of POTA is similar to section 13 of TADA.

The validity of these special provisions of the TADA was upheld in *Kartar Singh vs. State of Punjab* 1994(3) SCC 569 and of the POTA in *PUCL vs. Union of India*: 2003(10) SCALE 967.

while dealing with the validity of section 30 of the Prevention of Terrorism Act, 2002, the Supreme Court has referred in detail to the subject of 'protection of the witnesses' and to the need to maintain a just balance between the rights of the accused for a fair trial (which includes the right to cross examine the prosecution witnesses in open court) and to the need to enable (1) prosecution witnesses whose identity is known to the accused to give evidence freely with being overawed by the presence of the accused in the Court and (2) protection of the identity of witnesses who are not known to the accused, – by means of devices like video-screen which preclude the accused from seeing the witness even though the Court and defense counsel will be able to see and watch his demeanor.

The Court in *PUCL* has pointed out that the need for existence and exercise of power to grant protection to a witness and preserve his or her identity in a criminal trial has been universally recognized. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interests of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and persons found guilty are 277 punished and to prevent reprisals. Under compelling circumstances, the disclosure of identity of the witnesses can be dispensed with by evolving a mechanism which complies with natural justice and this ensures a fair trial. The reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. A mechanism can be evolved whereby the Special Court is obliged to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected.

The point I am only highlighting is often times as lawyers, as judges and as people. We see these things happening all the time and we get desensitized to the position of the victim so the Supreme Court further goes on to say I have read...and then..

“This is done by devising a mechanism or arrangement to preserve anonymity of the witness when there is an identifiable threat to the 280 life or physical safety of the witness or others whereby the Court satisfies itself about the weight to be attached to the evidence of the witness. In some jurisdictions, an independent counsel has been appointed for the purpose to act as *amicus curiae* and after going through the deposition evidence assist the Court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the question formulated and given to him by either of the parties.

Useful reference may be made in this context to the recommendation of the Law Commission of New Zealand.”

“The present position is that section 30 (2) requires the Court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an accused to a fair trial and basic requirements of the due process, a mechanism can be evolved whereby the Special Court is obligated to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected.” Finally, the Court while upholding the validity of section 30, observed (in para 62) as follows: “ It is not feasible for us to suggest the procedure that has to be adopted by the special Courts for keeping the identity of witness secret. It shall be appropriate for the concerned courts to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness.”

Then, It could be cited a subsequent case which is that of Sakshi Case. Now Sakshi, again is a PI, Sakshi was an NGO which helped woman in distress and a PIL then came to be filed in the matter of sexual offences and then are asked to depose as witnesses..

Now here the supreme court further clarifies certain other aspects which would be useful in day to day administration of justice and that would its Sakshi v Union of India<sup>1</sup> and am reading para 31.

The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-à-vis Section 272 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra vs. Dr. Praful B. Desai<sup>2</sup>. There is a major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties.

The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to

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<sup>1</sup> 2004 6 Scale 15

<sup>2</sup> 2003(4) SCC 601

undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC.”

It is for the presiding officer to tell the council to please give those questions in writing and I will frame it in my own words, in a way that it is not offensive.

The Court in Sakshi referred to State of Punjab vs. Gurmit Singh<sup>3</sup> where the Supreme Court had highlighted the importance of section 327(2) and (3) of the Cr.P.C. which require evidence to be recorded in camera in relation to holding rape and other sexual offences. The Court gave the following directions, in addition to those given in Gurmit Singh’s case, namely,

The provisions of sub-section (2) of section 327 Cr.P.C. shall, in addition to the offences mentioned 284 in that sub-section, would also apply in inquiry or trial of offences under sections 354 and 377 IPC. (2) In holding trial of child sex abuse or rape:

- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Therefore, the Court in Sakshicase gave two measures;

One to screen and the other to the question which may be embarrassing can be given to the presiding officer, who may then reframe and put, then coming to ZahiraHabibullah, this again is a very important case, the best bakery case where the Supreme Court again had the chance of dealing...how witnesses can be turned hostile? the citation of Zahira is 2004 4 SCC 158 paragraph which are relevant will read para 2.

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<sup>3</sup> 1996(2) SCC 384

In this case, the Supreme Court dealt with 'witness protection' and the need for a fair trial, whereby fairness is meted out not only to the accused but to the victims/witnesses. On the question of 'witness protection', the Court observed:

“Witnesses, are the eyes and ears of justice as Bentham said. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not suffer ... there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power. ...As a protector of its citizens, it has to ensure that during trial in court, the witness could safely depose truth without any fear of being haunted by those against whom he has deposed.”

Participant Judge: instead of looking too much into the scheme of witness protection we must focus on the fact as to why witnesses turn hostile...in most of the cases where 80 percent may be not lesser with most respect the lawyers of the IOs are involved hostile turning.

Mr. Anup: as a systemic answer we can never look into the minds of men but as a system we can put a framework in place which will ensure that an honest person will not turn dishonest due to fear that I think is not a full solution but it a large step forward, it is a good step forward, there is no antidote to corruption...if it is family members, then at times the victim also turns hostile..its is also the case where money power may not be the answer. There are several reasons why this happens? there is a nine judge decision of the New Jersey Supreme Court, it was on validity of a TIP and the supreme court came to the decision that when we do a TI the person does not use his memory but his related judgment.

Participant: Identity issue is the most difficult part in a trial.

Mr. Anup: let me now bring you to some of the existing provisions of the law for example 273..now this is not an absolute right at all, the other is 317..and 327 which says that...now one

of the law is the Unlawful Activities Prevention Act of 1967..and the provision is section 44..it says...

44. Protection of witnesses.—

(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the court so desires.

(2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—

(a) the holding of the proceedings at a place to be decided by the court;

(b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.

(4) Any person, who contravenes any decision or direction issued under sub-section (3), shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.

198th report of law commission dealt with witness protection in court..I will point of section parts of that:

There are three categories of witnesses:

(i) victim-witnesses who are known to the accused;

(ii)victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and

(iii)witnesses whose identity is not known to the accused. Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity

In category (i) above, as the victim is known to the accused, there is no need to protect the identity of the victim but still the victim may desire that his or her examination in the Court may

be allowed to be given separately and not in the immediate presence of the accused because if he or she were to depose in the physical presence of the accused, there can be tremendous trauma and it may be difficult for the witness to depose without fear or trepidation. But, in categories (ii) and (iii), victims and witnesses who are not known to the accused have a more serious problem if there is likelihood of danger to their lives or property or to the lives and properties of their close relatives, in case their identity kept secret at all stages of a criminal case, namely, investigation, inquiry and trial.

The law commission said that:

We are of the opinion that witness protection is necessary even at the stage of investigation. This can be provided by the prosecutor moving the Magistrate to a conduct a preliminary inquiry or voirdire, in his chambers, i.e. 4 in camera. The Magistrate will have to consider the material relied upon by the prosecutor for substantiating the danger to the witness or his property or those of his relatives, and, if necessary, the Magistrate can examine the witness. The suspect is not entitled to be heard at this stage during investigation. If the Magistrate comes to the conclusion that there is likelihood of danger, he can grant identity will, however, be disclosed to the Magistrate and none else. Further, the real identity will not be reflected in the court records but the witness will be described by a pseudonym or a letter from the alphabet. The Magistrate, which passing the order will, however, keep in mind the various matters listed in sec. 5(6) of the Bill. Such an anonymity order passed at the investigation stage will ensure only during the 'investigation' period.

On the point of during inquiry and before recording evidence at the trial the law commission says that:

In the inquiry before the Magistrate or Court of Session (before the trial starts), the prosecutor or the witness has to make a fresh application and this is necessary even if some of the witnesses have been allowed anonymity and given a new identity during investigation. The Magistrate or judge has to pass a fresh preliminary order granting anonymity. The reason is that, unlike at the stage of investigation, in the case of identity protection during inquiry/or before trial, such protection can be granted only after giving a reasonable opportunity to the accused. We have evolved a procedure in which inquiry before the Magistrate or before the Sessions Judge before recording of evidence at the trial, the Magistrate or Judge will consider the material produced by the prosecutor or the witness as to the danger to his life or property or that of his relatives, and will, if necessary, hear the witness. All this has to be in camera and the accused/his lawyer will not be present. However, the Magistrate or Judge will have to hear the accused or his lawyer separately and disclose to them the material relating to the alleged danger to the witness, but not any facts which may enable the accused or his lawyer to discover the real identity of the witness. This, we have pointed, satisfies the requirement of law where rights of the accuse and the rights of the witness get balanced. If, during inquiry, the Magistrate or Judge grants identity protection by a preliminary order, it will ensure not only for the period during inquiry, trial, but at the later

stages of appeal or revision and even after the case has been finally concluded. The record of the proceedings shall not, however, contain the real identity of the witness or any facts from which identity can be discovered.

The law commission suggested regarding recording of evidence during trial..here is what it says:

Recording evidence during the trial in the Sessions Court: two-way closed circuit television : The next stage is the final stage of trial in the Sessions Court. The witness, if he had already been granted anonymity by the Magistrate or Judge, as stated above, he need not apply again for anonymity. In respect of the evidence during the trial a two-way closed-circuit television or video link and two-way audio link is proposed and these will be installed connecting two rooms.....

In one room, (A), the Presiding Judge, the courtmaster, the stenographer, the public prosecutor, the threatened witness and the technical personnel (who will be employees of the court) will be present. In another room, which we may call (B), the accused, his pleader and the technical persons operating the system will alone be present. Both rooms will be connected y a two-way closed circuit television or video link coupled with a two-way audio link.

The threatened witness (i.e. victim or witness not known to the accused) will be examined by the prosecutor in Room A directly. The witness may identify the accused on the video screen in his room but the camera in Room A where the witness is present shall not be focused on the witness and therefore his image will not be visible in Room B where the accused is present.

Participant judge: in Delhi something like this has already been done..

Mr. Anup: on the point of witness protection programme the law commission says that:

We are not providing a Bill on this subject in as much as the question of funding is and important issue. We have recommended that the Central and State Government must bear the expenditure equally. Witness Protection Programmerefer witness protection outside the Court. At the instance of the public prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependants till be trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Aid Authority through the District Legal Aid Authority. The witness has to sign an MOU which will list out the obligations of the State as well as the witness. Being admitted to the programme, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MOU by the witness will result in his being taken out of the programme....

We have also dealt with complex situations where the witness has to prosecute or defend or be a witness in another civil or criminal case without disclosing his identity. Under the Act, we have

provided for punishment to those who violate the provisions of the Act and reveal the identity of protected witnesses. In our recommendations, we have provided a detailed framework for Witness Identity Protection and Witness Protection Programmes. We may add a word of caution that this subject is different from the law which is now being enacted to deal with the problem of hostile witness. What we have recommended in this Report is totally different, it relates to witness identity protection during investigation and in Court; and witness protection programmes outside Court.

**Day- 2: Session 8: 2-3 PM**

### **ARREST OF PUBLIC SERVANT IN CBI CASES**

**Speaker: Sonia Mathur, Advocate**

**Supreme Court of India**

The speaker very much started the session with the definition of Public Servants. Bribery and Corruption amongst public servants was defined originally in the IPC but the inadequacy of law was felt; and thereby Prevention of Corruption Act, 1947 enacted. The definition of public servant provided U/S 2 of the PC Act, 1947 to mean, “as defined under section 21 of IPC.” It was still vague, paving the way for amending Act of 1988 enlarged the definition of 'Public Servant' to include performance of 'public duty'.

As per Section 2 (c) (viii):-Any person who holds an office by virtue of which he is authorized or required to perform any public duty

➤ “Public duty” is defined in section 2 (b):-

“Public duty” means a duty in the discharge of which the State, the public or the community at large has an interest. Strengthened certain provisions such as :-

➤ Provision for day to day trial,

➤ Prohibitory provisions with regard to stay of proceedings,



- Prohibitory provisions with regard to exercise of power of revision against interlocutory order, etc.

It was in *Dr. Subramanian Swamy V. Director CBI*<sup>4</sup> noted,

“Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences.”

In *Manjeet Singh Khera V. State of Maharashtra*<sup>5</sup>, the Supreme Court acknowledges right of the Agency not to disclose identity of the Complainant and contents of the complaint. Accused persons not prejudiced by such non-disclosure. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their life. The complaint only triggered an enquiry.

As in regards to arrest of a person, the term is Anglo-Norman in origin and is related to the French word *arrêt*, meaning “stop”. An arrest is the act of depriving a person of their liberty usually in relation to the purported investigation or prevention of crime and presenting (the arrestee) to a procedure as part of the criminal justice system.

It was in *Joginder Kumar Vs. State of UP and Ors.*<sup>6</sup>, the existence of power of arrest and justification for exercise of arrest are two different things. The Law of arrest is one of balancing individual rights, liberties and privileges on one hand and individual duties, obligations and responsibilities on the other hand. Protection should be provided of individual from oppression and abuse by the police and other enforcement agencies

The grounds for arrest that were pointed out:-

- To prevent further offence
- For proper investigation
- To prevent tampering with evidence in any manner
- Influencing witnesses\*
- Flight risk

The circumstances under which arrest could be made at the following instances:-

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<sup>4</sup>*2014 AIR SC 2140*

<sup>5</sup>(2013) 9 SCC 276

<sup>6</sup>1994 (4) SCC 260

- Credible information / Source Information
- Accused of cognizable offence punishable with greater than seven years or with death sentence
- Proclaimed Offender
- Possession of suspected stolen property and suspected to be obtained in the offence
- Obstruction of justice\*

The procedure of arrest and duties of officer making arrest:-

- Bear accurate name which would be visible and clear identification
- Prepare a memorandum of arrest
  - Attested by atleast one witness, who is a member of the family of the person arrested or member of the locality
  - Countersigned by the person arrested
- Person arrested to be informed that he has a right to have a relative or friend named by him to be informed of his arrest.

The circumstances for arrest of public servants in CBI cases (Per CBI Manual)

- Necessary in the interest of investigation
- Prevent the accused from absconding
- After decision taken to launch prosecution and necessary sanction for it has been obtained
- IO should obtain concurrence of the SP before making arrest
- IO and SP should take utmost care and discretion in deciding arrest
- Satisfy the requirements of law
- Proper steps to be taken especially where the person is on operational duty
- Timely information of intention to arrest may be conveyed to immediate superior
- If arrest cannot be postponed for exceptional reason, inform superior immediately after making arrest
- Report to be sent to HO detailing the reason for affecting arrest

The Serious Consequences that follows:-

- When placed under arrest, suspension is automatic.
- Employee reduced to subsistence allowance.

There can be Economic death - in certain cases

- Traumatic - adverse consequences at the place of work and in Society.
- In case of prolonged trial\*

## CHECKS AND BALANCES

Certain checks to protect officers from frivolous prosecution / investigation:-

- Section 17 - who can arrest / investigate?
- Section 19 - sanction for prosecution
- State Inspector of Police v/s Surya Sankaram Karri (2006) 7 SCC 172
- Section 17 provides for investigation by a person authorized in this behalf with a *non-obstante* clause.
- It makes investigation only by police officer of the ranks specified therein to be imperative in character. Authorization by a Superintendent of Police in favour of an officer is a statutory one.
- Uses the expression "shall". Ex-facie mandatory in character.
- The burden, undoubtedly, was on the prosecution to prove the same.
- When a statutory functionary passes an order, that too authorizing a person to carry out a public function like investigation into an offence, an order in writing was required to be passed.
- Issuance of an oral direction is not contemplated.
- The statutory functionaries are enjoined with a duty to pass written orders.

In Anil Kumar &Ors. Vs M.K. Aiyappa<sup>7</sup>

- In a private complaint under section 200 Cr.P.C. filed before a Special Judge for Prevention of Corruption.

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<sup>7</sup>(2013) 10 SCC 705

- Challenge made to the order of investigation under section 156 (3) of CrPC, for want of prior sanction.

#### Necessary Precautions

- Preliminary inquiry is desirable in corruption charges
- Such preliminary enquiry has the sanction of Hon'ble Supreme Court, in P. Sirajuddin v. State of Madras<sup>8</sup>.
- However, Police cannot disregard provisions of the Cr. P.C. while proceeding further after such preliminary enquiry.

It was in LalitaKumari vs Govt. of UP and Ors.<sup>9</sup>

- Preliminary enquiry could be carried out in case of cognizable offences even if it strictly needs to be recorded under section 154 crpc
- Arrest during investigation of cognizable offence may be considered in the facts and circumstances of the case.

**The Session concludes with a tea break.**

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<sup>8</sup> (AIR 1971 SC 520)

<sup>9</sup>2014 (1) JCC 1

Day-3: Session 9: 9-10 AM:

## **TRIAL OF ECONOMIC OFFENCES BY CBI COURTS: A CASE STUDY**

**Speaker: Dr. Justice S. Murlidhar**

**High Court of Delhi**

Dr. Geeta Oberoi introduced Justice Muralidhar, Judge of Delhi High Court, who has given a bench mark decision in Dharmveer V. CBI. She described Justice Muralidhar as techno-savvy judge and the baton of discussion was given to Justice. Justice Muralidhar greeted the gathering and introduced the speaker for the next session, Mr. Dayan Krishnan. Justice invited for even his opinion due to his experience in dealing with CBI matter. He initiated the discussion with the questions whether CBI is a statutory body? Is it established under Delhi Special Police Establishment Act? CBI has vast powers but how is it setup? CBI stands to have immense importance recalling the fact that day before Pre- Medical Exam case was handed over to CBI for investigation. Every other day the High Court or Supreme Court hands out dozen of cases to CBI. Why the CBI is such an important body and not still a statutory body? It was through Supreme Court Judgments that CBI was actually formed under Delhi Special Police Establishment Act. Under the Constitution, in Entry 8, List 1 of Schedule 7, it reads as Central Bureau of Intelligence and Investigation so the list do not adopt the source power but rather are topics over which there can be legislation. It was debated in the Constituent Assembly, when the Constitution was being made, that CBI can be through Central Govt. as investigative body and the clarification was investigation in the entry was not meant to be criminal investigation but just for a sort of enquiry. It was certainly not kept in mind because Police is certainly a state subject in List II so that there is no encroachment in states powers.

What is then CBI? A person then filed a petition in the Guwahati High Court who was actually accused under the Prevention of Corruption Act that the CBI has been constituted and functioning without the authority of law.

So when the court ordered for the files, it found that CBI has been constituted through an executive function in 1963 for the first time. The judges interpreted that it was not necessary that there should be specified statute also it was felt by the Secretary that mere mentioning of the CBI in the Entry list would be enough to give it a constitutional basis and going back to legislation that encroaches the states powers would certainly be a long way and create problems. So there was Delhi Special Police establishment Act, 1946 applicable for the CBI. It is actually a pre-independence statute and through slate of a note that it became a part.

The Guwahati case, Navender Kumar(2013), It was certainly pointed out that it is not sufficient mere mentioning of a topic under Entry List so as to become a Source of Law but has

recognized CBI under this Act. The Add. Solicitor General argued the matter saying that the CBI is recognized under Delhi Special Police Establishment Act. The Supreme Court has even moved with the fact that the agency come within the purview of this Act. To mention, in this Act, if look in the background it was initially constituted for the crimes that were committed in Union Territories. As under Sec. 6, the agency cannot takeover an investigation in a state, until and unless there is a request from the state so the issue arose when there has been cross-border state crimes? So in the note it was mentioned that when you have interstate ramifications it is useful to have a central body because it is impossible for state agencies to communicate with each other.

There are certain cases when the consent of the state govt. has been given and later when there is a change in the power that consent is withdrawn. It was in Sikkim and Supreme Court said that it was not possible. The question lies whether state declines to grant consent to the matter and can courts give permission? It was actually settled in State of West Bengal V. Commission of Democratic reforms<sup>10</sup>, similarly in PS Achuthanathan V. State of Kerala, Ice Cream Parlour Scam. It can also very much understood the fact that once a trial has been initiated or FIR has been lodged, the higher court does not interfere into the matter but if the trial court feels that that there is more investigation required in the case then there are enough powers conferred under the Cr. P.C. In the matter of Nirmal Singh Kahlon V. State of Punjab<sup>11</sup>, this involved scam for the post of Panchayat Secretary under Punjab Panchayati Raj Act which certainly had a different note. In future, there will have to be reconciliation of the approaches.

As per the Guwahati Judgment which has been stayed by the Supreme Court. There many things to come in the pipeline for as such specific legislation for CBI. Even in Delhi Special Police Establishment Act, there has been numerous amendments as in regards to the appointment of Director, where a committee has to be constituted of Prime Minister and the leader of Opposition but recently due to prevalent circumstances it was put as leader of opposition of the single largest party. Still the lacunas are not being filled in by the amendments. As the Guwahati Judgment has been stayed and there shall be no problem to any investigation at presently going on.

So in this background, Why do think it is necessary to have a CBI Court altogether? should it reflect the character of the investigative agency i.e. CBI. It can be very much be a necessity in terms of interstate ramifications but there actually situation where there are no ramifications. As per the experience is it really speedy disposal?

It also addresses the concern of the interference of the executive or political interests. In Madhya Pradesh, the Vyapam Scam, the accused are to be people in high position of power so the investigation will not take place in a fair manner, so such a concern is there in almost all these cases. It is very much necessary that CBI should be insulated from the executive but the CBI

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<sup>10</sup> (2010) 3 SCC 571

<sup>11</sup> AIR 2009 SC 984

officials are answerable to someone in the central government, thus it is a conundrum. Therefore, the VineetNarain Case, so it was clarified as to who can order the CBI Officials like courts cannot necessarily direct the CBI to investigate in a manner but nothing prevents the executive to do so but the entire idea of CBI courts and the agency was to insulate itself from the executive.

Even agency was meant to reflect such a nature that it should be an exclusive court that should deal with the matter like in 2G Cases, it is since 2011, Mr Saini (Spe. Judge Delhi) there has been only increase in the size of docket and many issues have cropped up. Even many more cases have been added up. It's a massive case anyway, so the idea that through constitution of CBI court shall deliver speedy justice but whenever the prosecutor appears there always a list of 18 to 100 witnesses. Why does CBI has such a long list of witnesses? At least there are 18 to 100 witnesses in CBI matters so it is not possible for any efficient judge to examine such high no. of witnesses in a short manner, all to stick to their versions and all to be given witnesses protection. Once you have a long line of prosecution witnesses, the defense is bound to come up with some witnesses, so this manner of having court has not served its purpose. It takes nearly 10-15 years to conclude the trial for even a trial of the CBI court. Even for a bribery of Rs. 1000-10000a Govt. Servant has to go such a long way and then appeal that makes it nearly 25 years. So a person who is wrongly accused his life gets destroyed.

The first of judgment of 2G Scam, CPIL V. UOI<sup>12</sup>, the auction of spectrum and policy was of first come first serve there was no auction during the time of NDA govt. in 2001. When the UPA govt. took over whether it is required to go with the same method or call for an auction?The govt. called for bids, received large no. of applications, much more than what they can receive. Mr. Krishnan represented one of the petitioners. After submission of all the applications the cutoff date was advanced. Those who applied after September 25, the applications were rejected and no reasons were provide for cutoff date. The advancement of cutoff was rejected after submission of all the applications. The Delhi HC said that the cutoff date cannot be extended after submission of all the application. It was even upheld by the Division Bench of which Justice was a part of, reasoning that you can't change the rules of the game after it started so it struck down the press note with which it was declared.

Another NGO, Peoples Watch, that had gone to the CVC with a detailed report on the irregularities conducted and awarding the spectrum. Here, two of the bidders, got it by 1537 Crores, kept it for a week and sold it for about 4500 Crores to a foreign player. Then, Unitech which got the spectrum for about 1600 Crores sold it to Telenor for 6000 Crores, so it was obvious that the real value was much higher. They also got some favors. CVC on the report submitted recommended to the CBI that a case be registered but the case was already registered. When the SC was approached the CBI had already registered two FIRs. So the anxiety was that CBI will not be able to investigate in a fair manner so the prayer in the Writ Petition before the Delhi High Court dismissed and therefore went to the Supreme Court. The prayer was that the

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<sup>12</sup> 2011 1 SCC 560

court should take up the monitoring of the investigation by the CBI and the SC felt it to be necessary so under the SC directions. The special court was constituted through a notification and also appoints a special public prosecutor as such that's How Mr. Lalit is a judge of the Supreme Court and Mr. Anand Grover, Senior Counsel has been entrusted. There was one order dated 11 April 2011, no other court shall order that hampers the investigation. A large no. of case application under Sec. 482 of the Cr. PC. was applied in Delhi HC but when the SC found it was the situation. ON 9<sup>th</sup> November 2102, the SC stayed all the petitions and said no other court in the country could pass an order in the matter touching the 2G Scam. In the second judgment, so the petitioner went to SC and said this without jurisdiction. The court cannot take the power of questioning an order under the Cr. PC. Even powers cannot be exercised under Art. 32 or 142, to do that. It is actually interfering with the trial court would do and it is contrary to all the previous judgments like Fodder Scam, Taj Corridor and Vineet Narain. Once a charge sheet has been filed, the monitoring should stop. So the petitioner challenges that they cannot be prevented to file writ in High court or any court. The SC judgment in Shahid Balwa V. UOI<sup>13</sup>, negative the objection, the directions were to enhance and protect the trial. It was also brought that they can approach the court if they are aggrieved. The court also said that only one aspect was only investigated. There was certainly a consideration of Prevention of Money Laundering Act but licensing issue till related 2001.

Third judgment of 2G Scam, in Sunil Bharati Mittal V. CBI, dated 19<sup>th</sup> January 2015, during 2001-07, the time of allocation of the spectrum additional to existing stakeholders while the policy of first come first serve was very much valid. At that time, the public offer by Bharati Mittal Group was already announced but for some reason, it was not subscribed enough but it was when they purchased the additional spectrum, next day the issue got oversubscribed. The unique thing is spectrum has been accepted on a revenue sharing basis but in this case 1% revenue sharing basis. The complaint therefore was that this policy cost loss of Rs. 846 Crores to the government. There were three companies namely, Airtel, Hutch and Sterling Cellular had benefited from this additional allocation at a much lower rate of revenue sharing. Chargesheet was filed, Mr. Pramod Mahajan was the Minister at that time in collusion with secretaries were held. The filed a charge sheet and CBI Court heard the matter and said there will be some brain in the cellular company. Ravi Ruia said that he was not an accused in the charge sheet as by the CBI and argued this before the Supreme Court. The CBI argued with the Alter Ego Theory, saying that Sunil Mittal is the alter ego of Airtel cellular but was not accepted by the Supreme Court with the reason that the company has not been sued in the same manner but there is no liability for vicarious liability in the IPC likewise nothing has been mentioned in Prevention of Corruption Act.

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<sup>13</sup> 2014 2 SSC 687



The instance where a company can be sued with the company under Sec. 120 B and Managing Director can be sued or not? The Supreme Court does not permit you to stretch, which is the ratio of the judgement, saying that mere alter ego theory will not make both Sunil Mittal and Ravi Ruia as accused. Justice also emphasized that lacunas in law are to be always pointed out otherwise the legislature will never correct it. If a law has to be uniformly exercised throughout the country then, the statute must be clear and so the parliament should step in. In Criminal view, there should be technical view. In Parliament case, how do you prove telephone conversation? as long as a person is able to file an affidavit it can be proved. As in Anvar's case, S. 65 B stands to be an exception altogether it is a substitution for secondary evidence. It has been evidently laid by case law that a managing director cannot be sued until unless a company has been sued.

In a peculiar case of Baazi.com Case, two students of Delhi Public School uploaded a MMS clip on a website which had sexual content and placed on sale. The complaint could be filed and blocked on the site. Two days had passed and nearly 23 people had bought the clip. The question was to what extent the MD of Baazi.com can be held liable? At that time, the law was dormant as Anita Haada's case did not come. So lifting of Veil is only available in a limited manner only when it is prescribed criminal statutes which have penal consequences. Since vicarious liability is not there in IPC, it is extremely difficult in fixing corporate criminality as in the case of Bhopal Gas Tragedy. Even to know provision of Company law especially M & A, at times when a company merges with another similarly Union Carbide which amalgamated. In such cases, it extremely difficult.

While talking about prosecution not producing documents that are favorable to the accused the Film named IN THE NAME OF THE FATHER, the incident in the Film was discussed similarly the prosecution can certainly held back the documents that are favorable to the accused. So it is certainly a question what happens to the things that are collected by the prosecution and does not produce it before the court of law. Such question have no answer? Also unfortunately the way we maintain case diaries. Even SIT appointed by HC or SC, what is the status in Cr. PC? can it be a report under S. 173 and there can be conflict with the report of the local police force. There should be considered stand as consider FIR by local police or CBI. The case of Vinay Tyagi was quoted.

**Thus, Session Concluded for a Tea Break.**

Day-3: Session 10: 10:30-11:30 AM:

## **EXTRADITION OF FUGITIVES: ROLE OF CBI COURTS**

**Speaker: Dayan Krishnan,**

**Senior Advocate**

Mr. Dayan actually emphasized the role Of CBI Courts in Extradition stands to be very much significant. He very much illustrated the nuances of extradition that takes place in the procedure of CBI courts.

“In a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime.” said by Justice Kirby, Dissent in Foster v. Minister of Customs and Justice<sup>14</sup>, High Court of Australia. There are many extradition law principles. Firstly is principle of double criminality, it was in Bartle-Ex Parte Pinochet<sup>15</sup>. Then in Carlos Cabal Extradition<sup>16</sup>

Section 2(c) Indian Extradition Act; Article 2 UN Model Treaty; Section 3 UN Model Law

It was in Principle Of Speciality, that the case of Daya Singh Lahoria<sup>17</sup> was extensively been discussed. In Abu Salem (I)<sup>18</sup> modified by Abu Salem (II)<sup>19</sup> – Lesser offences excluded by the Ministerial order.

In Om Prakash Srivastava<sup>20</sup>, Section 21 Indian Extradition Act; Article 14 UN Model Treaty; Section 34 UN Model Law talks about all these laws in the Indian Context. The Indian Extradition Act, 1962 is very much obsolete with its present application. The most crucial sections are as follows:

SECTION 2(c) Double Criminality

SECTION 21 Specialty

SECTION 31 Political Exception

SECTION 34C Death Penalty

SECTION 7 Powers of the Magistrate

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<sup>14</sup> (2000) 200 CLR 442 at 474

<sup>15</sup> 1998 UKHL 41, 1998 4 ALL ER 897

<sup>16</sup> 2000 (186) ALR

<sup>17</sup> (2001) 4 SCC 516

<sup>18</sup> (2011) 11 SCC 214

<sup>19</sup> (2013) 12 SCC 1

<sup>20</sup> (2004) 112 DLT 123

## SECTION 8 Powers of the Central Government

Let us also consider certain, UK EXTRADITION ACT, 2003, they are as follows:-

Section 11 Bars to Extradition

Section 21 Human Rights (Requiring ECHR compliance)

Section 25 Physical or mental condition of the detainee

Sections 26-34 Appellate procedure

Sections 166-171 Treatment following arrest including fingerprints, samples and photographs

Part 4 Police powers

There are certain UN MODEL CODES namely:-

The UN Model Treaty on Extradition, 1990

Provides for human rights safeguards such as protection against torture, prejudices arising out of religion, sex, race or political opinion or status (Articles 2 and 3)

The UN Model Law on Extradition, 2004

Grounds for refusal: offences of political nature, discrimination, torture, fair trial standards, ne bis in idem, death penalty (Sections 4-13). Also Autdedere, autjudicare (Section 15 of the UN Model Law)

There can be Approaches on Abuse of Process. The case of McKinnon v. The Government of the United States of America<sup>21</sup> and USA v Cobb<sup>22</sup>. Similarly as in the context with India, Nadeem Akhtar Saifi v. The Governor of Brixton Prison and The Union of India<sup>23</sup>, Ravi Shankaran v. The Government of India<sup>24</sup> and Maninder Pal Singh Kohli v. Union Of India<sup>25</sup>.

Acceptance of India's Position on Abuse of Process and Torture

Hanif Mohammed Umerji Patel @ Tiger Hanif v. The Government of India<sup>26</sup>

The test applied by Courts in the United Kingdom is that of a "case to answer"; which lays down that the prosecution must establish a strong prima facie case to show that there is a sustainable

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<sup>21</sup> [2008]UKHL 59

<sup>22</sup> [2001] 1 SCR 587

<sup>23</sup> 2000 EWHC ADMN 437

<sup>24</sup> [2014] EWHC 957 (Admin)

<sup>25</sup> (2007) 97 DRJ 178

<sup>26</sup> 2013 EWHC 819 (Admin)

case against the defendant whose extradition is being sought. What must be shown is that there is sufficient evidence to build a case and prosecute the defendant. If it cannot be shown that there is a sustainable case the same would amount to an abuse of process.

Relying upon the statements made by the co-accused, the English Court in the case of Tiger Hanif was of the opinion that a “case to answer” had been put forth by the prosecution.

Another, Principle of Extradition was the Principle of Political Exception being discussed.

In, T v. Immigration Officer<sup>27</sup> Case - “international terrorism must be fought and the vague outlines of political exception are of no help” (per Lord Mustill). As in Cabal case<sup>28</sup>, holds that it requires strict proof to show that the extradition was sought to prosecute the fugitive solely on account of his political opinion. There must be material to show that the decision to seek extradition was because of the applicants political opinion.

The view of the House of Lords in RB (Algeria)<sup>29</sup> sounds the death knell of this defence – “it should be recognized too, and counterveiling, that there may be compelling reasons in favour of extradition rather than that the suspect should enjoy an undeserved safe heaven from prosecution”- per Lord Brown.

Section 31(1)(a) – Offence of a political character

Also, in UNSC Resolutions Concerning Terrorism Exclude the Defence of Political Exception

Resolution 1373 dated 28.09.2001-Political motivation is not a ground to refuse extradition requests. “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”

Resolution 1566 dated 08.12.2004-Imposes obligations such as, Deny safe haven, Bring justice on the basis of the principle of “extradite or prosecute”

In Secy. of State v. Rehman<sup>30</sup>, National security includes international cooperation against terrorism. Lord Slynn: “... the reciprocal cooperation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security...”

Lord Hoffmann’s postscript: “I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist

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<sup>27</sup> (1996) UKHL 8

<sup>28</sup> 2000(186) ALR 188

<sup>29</sup> 2009 UKHL 10

<sup>30</sup> [2001] UKHL 47

activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”

Also there were discussion too certain subjects like International Mutual Legal Assistance In Investigations. Reciprocal arrangements regarding processes (Section 105(1)(ii) and 105(2) Cr.P.C.)

Reciprocal arrangements for assistance in securing transfer of persons, attachment/forfeiture of property, identification/ seizure of unlawfully acquired property (Sections 105-B to 105E Cr.P.C.) Letters Rogatory (Sections 166A & 166B Cr.P.C.) .

Statutory Provisions relating to MLATs Cr.P.C. Compliance should be there.

Using the LR under Section 166A does not give the investigating agency any greater legal advantage. The deeming provision under 166A(3) is only to the effect that statements recorded etc. shall be deemed to be evidence collected during the course of investigation. All that this means is that this will be a part of the charge sheet.

Evidence received by an MLAT or an LR will still have to be proved by leading evidence. The MLAT is much faster, efficient and less cumbersome.

There has also been extensive use of the MLAT procedure in the Headley Trial. The examination of doctors from Singapore, in the Delhi Gang Rape case, by video conferencing using the MLAT process is an example in point.

Mutual Assistance in Criminal Matters Statutes

To aid and regulate international co-operation, requests for mutual assistance in criminal matters including extradition.

Examples:

Switzerland: The Federal Act on International Mutual Assistance in Criminal Matters, 1981 (IMAC)

New Zealand: The Mutual Assistance in Criminal Matters Act, 1992 (MACMA)

Singapore: The Mutual Assistance in Criminal Matters Act, 2000 (MACMA)

Malaysia: Mutual Assistance in Criminal Matters Act, 2002

UK: The Crime (International Cooperation) Act, 2003

There was as such no such statute in India.

## RED CORNER NOTICES AND EXTRADITION

Bhavesh Jayanti Lakhani v. State of Maharashtra<sup>31</sup>

A red corner notice, by itself, cannot be the basis of arrest or transfer of an Indian citizen. It actually, Extradition is subject to the Indian Extradition Act, 1962 as well as other municipal laws of the country. Arrest and/or extradition severely affects civil liberties, and is therefore, subject to judicial review on the ground of violation of fundamental rights. This matter, in any event, related to a matrimonial dispute, where a Red Corner Notice ought not to have been issued in terms of Article 83 of the INTERPOL's Rules on the Processing of Data.

Also the case of Assange v. Swedish Prosecution Authority<sup>32</sup>, the specific case of Diplomatic Asylum was cited. It Extradition for investigation

The session therefore came to an end.

Day-3: Session 11: 12-1 PM:

## MEDIA TRIAL IN CBI CASES

**Speaker: Geeta Ramaseshan**

As per Article 19 of the Constitution, it makes no distinction between the media and the citizen. Media has the same rights as that of the citizen. Understanding Media trial and the approach of courts in this regard is that there should be no trial by media. The media should not 'prejudge' the case. The right to judge a case should 'belong' to the judiciary.

In re Mohandas Karamchand Gandhi<sup>33</sup>, they charged of contempt- Gandhiji argued that it was the duty of a person to criticise a litigant if what it decided or said was contrary to the truth or was morally wrong. The court in the judgment drew a distinction between the liberty of the press and the duties which accompany along with it.

In Gopal Vinayak Godse vs Union of India<sup>34</sup>, The High court permitted the media to watch the proceedings but restricted the media from reporting them.

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<sup>31</sup>(2009) 9 SCC 551

<sup>32</sup>2012 UKSC 22

<sup>33</sup>AIR 1920 Bom, 175

<sup>34</sup>AIR 1971 Bom 56

The Media Trial in larger public interest like Bhopal disaster case i.e. Union Carbide Corporation V. Union of India<sup>35</sup> protecting the rights of the vulnerable. Similarly in Manu Sharma vs NCT Delhi<sup>36</sup> Jessica Lal case, the criticism of the acquittal in the media led to the Supreme Court stressing the importance of section 311 Cr. PC. and the role of the judge in using the provision to summon witnesses.

In R K Anand vs Delhi High Court<sup>37</sup>, the sting operation by NDTV in the BMW case on role of defence lawyer and the Prosecutor. “Telecast of sting operation exposing collusion between defence lawyer and the public prosecutor in respect of summoning witnesses pending in a court is not an obstruction of justice. Programme telecast showed a conspiracy was afoot to undermine the BMW hit and run case and was proved to be substantially true and accurate. Telecast was in larger public interest and served a public cause.”

⊙ Stages of such “trials by media”

The main reason of trial by media is leaking of records before the case gets to the courts. Leaking by investigating agencies to support their cases-

- ⊙ Interviews of investigation agencies Aarushi’s case
- ⊙ Leaking of evidences such as letters etc- Madhumita’s case
- ⊙ Playing recordings of confessional statements
- ⊙ Interviewing the accused violating his fair trial
- ⊙ Publishing of photos of accused before identifying parade ?
- ⊙ Media pressure resulting in a legal action affecting the rights of persons negatively.

In Sanjog’s case, At the stage of trial, Opinionated analysis of the evidence- fair comment and rash comments. Its building up public opinion on the case including asking for e votes. Taking positions on sentencing and punishment and taking e polls. Lack of understanding of evidence, process etc. It is creates an atmosphere where judicial process is blamed. It affect’s fair trials of parties by creating a perception of guilt irrespective of the judgment. Movie Black Friday, it violates the privacy forcing a life of public scrutiny.

It impacts their reputation and puts the parties and their families at great risk. The interviews and statements in the media are often used by lawyers to discredit the witness.

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<sup>35</sup>1989 (1) SCC 674

<sup>36</sup>2010 6 SCC 1

<sup>37</sup>2009 8 SCC 106

In some cases it was quoted, “A trial by media is the very antithesis of the rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against such pressure and he is to be guided strictly by rules of law.” (State of Maharashtra vs Jawanmal Gandhi<sup>38</sup>).

In cases of public scandals regarding to companies, it is the duty of a free press to comment on it so as to bring them to the attention of the public(A K Gopalan vs Noordeen<sup>39</sup>)

Constitutional powers of dispensing justice rests with the judiciary and cannot be usurped by others. Media discussion is part of the freedom of speech and needs to be allowed. It ought to be restricted only in instances where there is an actual and immediate danger of the trial being affected. Media needs to develop a protocol on covering court cases especially in the context of privacy and protection of witnesses.

Thus, Session was concluded.

Day-3: Session 12: 1-2 PM:

## **PRESUMPTIONS UNDER PC ACT VIS A VIS PRESUMPTION OF INNOCENCE**

**Speaker: Geeta Ramaseshan**

As in presumption of Innocence, the innocent unless proven guilty coined by Sir William Garrow( 1760 -1840). It is the golden thread in criminal law. Proof having been met if there is no plausible reason to believe otherwise. The prosecution must prove the guilt of the accused. Accused is presumed to be innocent unless proved guilty. Accused has the right to remain silent and cannot self- incriminate (exceptions examples, photos can be taken, samples such as blood etc. can be collected, fingerprints taken etc.).

As in Babu v. State of Kerala<sup>40</sup>, Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction.

There can also be a shifting of burden of proof. The same acts burden shifts example in a civil case the plaintiff has to prove that the defendant had borrowed the money. Under 138 Negotiable Instruments Act the burden shifts on the defendant if a negotiable instrument is drawn. Prevention of Corruption Act, where burden is shifted under section 7, 11, 12, 13 ( clause a or b

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<sup>38</sup>1997 8 SCC 386

<sup>39</sup>1969 2 SCC 734

<sup>40</sup>(2010) 9 SCC 189



of sub section 1) or 14 ( clause b).Other examples, Excise and Customs laws evidential burden imposed on accused who has special knowledge of transactions. The Terrorist and Disruptive Activities (Prevention) Act, 1987, In all these statutes guilt is presumed if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution.

In Kali Ram Vs Himachal Pradesh<sup>41</sup>, (Justices HR Khanna, Hans Raj, Talagirisamy, Sarkaria and Ranjit Singh) there are certain cases in which statutory presumptions arise regarding the guilt of the accused but the burden even in those cases is upon the, prosecution to prove the existence of facts which have to be present before the presumption can be drawn.”

If two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

Also in Kali Ram’s case, It was said that “If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.”

*Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled.*

The Presumption under the PC Act, Under section 20, once the prosecution has proved that the accused has received any gratification, for the offences cited therein the presumption is raised and the onus shifts to the accused to explain the same.

While the statute does not use the word preponderance of probability, this concept in common law has been recognised by courts.It was pointed out that in V.D Jhingan vs State of U.P<sup>42</sup>, Other statutes on shifting of burden of proof in NDPS, POCSO. As in

- 35 (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- Explanation- In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

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<sup>41</sup>AIR 1973 SC 2773

<sup>42</sup>AIR 1966 SC 1672

- (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.
- Additional requirements for reverse burden

Under Section 313 Cr.PC., the object is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. The failure to elicit an answer from the accused on a crucial aspect against the accused will cause serious prejudice to the accused, particularly when the Court is required to raise a statutory presumption against the accused on his failure to explain such circumstance (*Avatar Singh vs state of Punjab*<sup>43</sup>). This duty of the Court assumes great significance whenever the Court is to raise any such statutory presumption making an inroad into the traditional criminal jurisprudential concept of the accused's right of silence. Although such statutory presumptions are held to be constitutional, it will be unfair to the accused to raise statutory presumptions like the one under Section 25 or Section 35 of the NDPS Act without putting appropriate questions to the accused under Section 313 Cr.PC., (especially when he has not examined himself as a witness or led any evidence) and without cautioning the accused that in view of the statutory presumption failure to answer questions on crucial aspects being put to the accused may result into conviction of the accused for the offence for which he is being tried.

In *Noor Agha vs State of Punjab*<sup>44</sup>, "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? However, in our opinion, limited inroad on presumption would be justified. We may consider the question from another angle. The doctrine of *res ipsa loquitur* providing for a reverse burden has been applied not only in civil proceedings but also in criminal proceedings. [See *Alimuddin Vs. King Emperor*<sup>45</sup>. In *Home vs. Dorset Yacht Company*<sup>46</sup>, House of Lords developed the common law principle and evolved a presumptive duty to care. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight be given to prosecutorial efficiency in the regulatory establishment.

It was in *Surjit Biswas V.State of Assam*, May 2013, a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. *audi alterum partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances

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<sup>43</sup>2002 (4) SCC 719

<sup>44</sup> 2008 SCC ( 16) 417

<sup>45</sup>1945 Nagpur Law Journal 300

<sup>46</sup>1970 (2) ALL E.R. 294

associated with him, and the court must take note of such explanation. It was in Phula Singh V.State of H.P<sup>47</sup>, at the stage of questioning, the accused may choose to remain in silence or in complete denial, but the court will be entitled to draw an inference against the accused as permissible in accordance with law.Also cases namely RaghubirSingh V.State of Haryana, <sup>48</sup>N NarisingaRao V.State of Andhra Pradesh<sup>49</sup>, Suraj Mal V. State of Delhi administration<sup>50</sup>, Hazari Lal V.State of NCT <sup>51</sup>, Madhukar Joshi V.State of Maharashtra<sup>52</sup>through the discussion were cited.

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<sup>47</sup>AIR 2014 SC 1256

<sup>48</sup> 1974 4 SCC 560

<sup>49</sup> 2001 (1) SCC 691

<sup>50</sup> 1979 (2) SCC 725

<sup>51</sup> 1980 (2) SCC 390

<sup>52</sup> JT 2000 (supple 2) SC 458

DAY-4: Session 13: 9-10 AM

## **FLAWS IN INVESTIGATION IN CBI TRIALS: ROLE OF SPECIAL JUDGES**

### **Speakers:**

**Mr. O.P. Verma,**

**Director of Prosecution, CBI Headquarters, New Delhi**

**Mr. R.P. Agarwal,**

**Joint Director, CBI Headquarters, New Delhi**

**(The Answer to the queries have been answered by both the speakers)**

The panel was chaired by Dr. Geeta Oberoi where she initially emphasized that CBI officials or police blames the judges and judicial officers allege that cops shorty investigation. Therefore, It is necessary to reach a point of convergence as it is a loop. So as stakeholders, in this session the gathering judges would have the opportunity to hear the opinion from both the sides to adjust with limited time and space. It was unanimously agreed to make the session on a question and answer, to make it effective. The session started with the queries as following:

Lucknow-The investigation chargesheet is filed by the IO, without the sanction of prosecutor and it creates a problem and the accused stands to be arrested. As in the situation, the accused files application for bail but for the IO to get sanction itself takes 15 days. The accused asks the court whether he can file for bail or not? so what can be remedies taken by IO or CBI in this matter?

Answer. Usually CBI's policy is that it does not arrest initially. It is majorly dealing with offences under the PC Act, so the agency does not expect the public servant to run away with it until such circumstances. The agency also does not file a chargesheet without the sanction of the prosecution. It is except in certain trap cases, there is a policy of arresting a person and then investigation takes place in 60 days. After 60 days, the arrested person would get default bail but the agency thinks that a person who has committed the offence bribery should not walk away therefore, that agency files the chargesheet even before sanction from the prosecution. The effort always remains to get prosecution sanction as soon as possible so as to expedite the trial.

Lucknow- Even for DA cases, there assets/property that are not quite relevant for the purpose of trial as evidence, so it should returned to the accused with the sanction of the prosecutor. They keep buying the time of the court requesting return those seized goods like passbook before filing the charge sheet.

Answer. Normally when the agency gets search warrant from the court, it submits a report to the court for all the matters that have been seized by the agency. It therefore not possible to release any useful or useless item by the agency, it is for the court to pass an order in that manner.

Bombay- I deal with bank fraud cases mainly pending since prior 1995, at presently the initial investigating officer gets transfer and witness die or are unavailable. Even to prove a document, the prosecutor brings in about 100 witnesses, so it makes the case bulky and voluminous. Similarly to drop a witness, it has a cumbersome process. It actually is done in consultation with the senior officer in the presence of purview officer, SP and Prosecutor. It seems to be more theoretical than logical?

Answer. The major problem of courts in Maharashtra is that they deal with the cases chronologically that means even if the agency files a charge sheet it would take 15 year to complete the trial. Also the special court has only district jurisdiction unlike other states which ash state jurisdiction. Even the special court do not exclusively deal with the CBI matter alone, they also deal with even other matter. The major reason is that for calling out such large no. of persons are called for the purpose of authenticity. It may be with the idea that more than that the reason for witness being dropped through record with discussion with 2 or 3 people as team work. Similarly the I.O cannot by himself drop any witness as in normal courts, many malpractice takes place in this name. Even there is purview officer is assigned for the matter that everything goes transparently even though it consumes sometime.

Bombay judge- The matters other than CBI are asked by judge because it affects the track record of the judge and affect service benefits than any other court when his posting is done in the CBI court. It shall be looked into by the administrating judge in the HC, that disposal is not being done.

Answer. The weightage of units that are given for disposal of CBI case is usually double than usual cases in almost by special regulation of all High Courts.

Amravatti- They should certainly abolish CBI court in Amravatti. Even MCOCA and TADA Case, which are very much sensitive are extremely delayed. It should attach more district and recruit local persons on board to help in investigation knowing the local language. A prosecutor is having the charge of 11 districts and does not have time. Also with voluminous document – Notes should be given at this stage but statement alone are not enough. The prosecutors should do homework and submit certain notes necessarily as if there are 100 page document which arev the more important parts that have been relied by him.

Answer. All the special courts are funded by the Govt. of India. It was created with the soul purpose of expediting the trial of CBI cases. The purpose is not being served. The suggestions were noted down.

Guwahati- The Investigating Officer is not conversant with the law like in a company matter, the company has not been sued and the individuals of the company have been charged with the crime. There is extreme detriment in writing the judgment. Even though, the case was interpreted made as individual capacity can be sued and therefore, they were convicted. The prosecutor is not familiar with the cases and is not regularly appointed.

Answer. Not taking Company as accused may be a specific case where the mistake has been made. There have been prosecutors have been immense shortage and contractual basis prosecutors are appointed. There is difficulty in assigning even though the agency has recently got 80 prosecutors. There are three types prosecutors namely selected through UPSC, another a panel of local advocates and contractual basis. In CBI courts, the contractual advocates are more but their term comes to an end where the case is at crucial stage so the panel of lawyers is given in every state that all the cases are taken care off.

Hyderabad- Immense problem in infrastructure? There were 4 in Hyderabad but 3 are in Govt. complex. The former Joint Director made a plan to shift the court back to the Govt. complex. It was a certain amount but the state govt. has only sanctioned the half for the purpose of setting up the court. It is also pointed out that useless staff is employed in the CBI court and also special allowances should be given to the employees who work in the court.

The suggestions were noted.

Vizag- In Bank fraud case, without the company being sued Managing Director has been sued under S. 319. But since there is precedent by the apex court, that such cases should not be taken the merits are also not taken into consideration. The matter is fast end of disposal and the judge is bound to follow precedent. If allowed to exercise discretion under Sec. 390 to add the company as a party, then it would be tedious process to call all the witnesses and retry the matter. The accused irrespective that he is a culprit has to be left free. The sanctioning authority is not brought a duty from the agency; even they are not given within a time period. It is used as defense by the other counsel summoning the sanctioning document as a precedent in Ashok Kumar Agrawal's Case. The court is not in a position to understand what actually is enclosed in the sanctioning document? If it is possible the sanctioning document can be sent without mentioning the enclosures. The courts are bound to follow precedent of the apex court as in Nishant Sareen's Case.

Answer-The sanctioning authority will differ from case to case as they might be high positioned officer involved to deal with it. When such a pretext comes up, the document can be summoned by the court. Usually the file is kept with the department, the only possibility that the sanctioning authority come with the file. It can be certainly be done for some cases but it is usually for internal matter. At least the draft sanction can be sent but usually the agency does not. Only result of the investigation and other documents that are relevant are sent by the agency. The zerox of the sanctioning authority is not a file of the agency and cannot produce before the court. It can only be summoned by the court.

Raipur- No clarification or suggestion as newly posted.

Gujarat- Revision and appeal are pending from 2001, drafting of an appeal in Ahmedabad and vetting by senior officers in New Delhi so it is taken as excuse. At least a general order has to be mentioned that such flimsy defenses are not to be taken. It is even closure report is of the CBI

then why is response has to be filled? But closure reports of 2002 and 2003, then why is it has to be taken ? Do not change the purview officers often?The prosecutors appointed by CBI courts are only harping over exhibiting the evidence and not actually proving the matter. The contents of the document are not proved at all and there is no endeavor on their part to take effort. They must read the document and do their homework. When the agency is sends some tape or recording it should always be enclosed with a forwarding letter. The mode has not been recorded. The procedure that has been used reach such conclusion. Witnesses are dropping when there is contradicting, then IO's should drop the witnesses but they also have negated state.

Answer. The purview officer is only to free the IO from the documents. Usually they are retired inspector or sub-inspector from the police, unless and until the term of the purview officer gets over there exists no other barrier. The suggestions were noted. At the branch level, the decision is taken to drop the witness and there is fear of senior officers. The prosecutor has to point out to senior officer that's all. There is no matter or least 10% comes to Joint Director level for decision. There should be a memorandum for the witnesses.As per office order, there should be a prosecution plan that has to be submitted to the agency by the said prosecutor and categorize them into A, B and C Segment, in the order as to importance of the issues in the case. If A list has done everything there is no relevance of B and C.

Then, the gathering has been dispersed for Tea.

DAY-4: Session 13: 10:30 AM-12 PM

## **CHALLENGES FACED IN CBI COURTS: A PRACTICAL INSIGHT**

### **Speakers:**

**Mr. O.P. Verma,**

**Director of Prosecution, CBI Headquarters, New Delhi**

**Mr. R.P. Agarwal,**

**Joint Director, CBI Headquarters, New Delhi**

### **Session Contd.**

Assansole, W.B- There was no prosecutor appointed for a month since the appointment of the judge to the court. After writing to many authorities, a prosecutor has been recently appointed even though on a contractual basis. The Court had no work and the witnesses kept on coming to the court but everything was in vain due to absence of a prosecutor. The problem at presently has been solved. Many trap cases. The nature of the witness is of the same nature. This delays the disposal. If only one witness are required to brought forth to the court. In cases like postal fraud cases, 100 of witness exist. In instances of bribe of Rs. 1000 or 2000, there should not be production of witness more than one. Also, the prosecutor has extreme fear of the superior branch official to whom he has to obey often. There is no proper infrastructure in the courts.

Answer. The lack of appointment prosecutor is certainly a problem in the instance for contractual basis. Usually the tenure can be extended but even other alternatives would be sought by the concerned Director. It was analyzed that there were certain vacancies. The prosecutor will be told about the matter of witness through concerned branch. If there is a genuine point to drop the witness, it shall be considered.

As per DoPT regulations, there is a minimum infrastructure prescribed for the special courts like CBI specifically. It is actually the state government and high court do not find the necessity to implement the so required. They actually distort the central govt. funds that are to be reimbursed and do not use it effectively. It was also accepted that the funds are used even for other courts too. It depends to state to state, the courts in Assam has all the infrastructure.

Ahmedabad (Other Judge)- No queries or clarification.

Delhi- The main problem is HIO, this person is understood to be more than IO. He does not know anything virtually. The existing IO's are transferred to HQ on deputation. The best



prosecutors are transferred to some other courts. Nobody knows about the matter properly. How can this be resolved?

Answer. The HIO and IO have much difference. HIO is only to assist the prosecutor and IO is mainly concerned with the physical investigation through the agency. The points shall be noted and addressed soon.

Madurai- The problem is that of the branch of agency stands to be in Chennai. At the same time, the charge vested upon is of 14 districts. The list of memorandum of the witnesses and most of the .....Further while submitting the.....

Madras- For even normal 311 application, it takes 3-4 adjournments. The arguments that are set forth is that the prosecutor requires certain approvals from the agency and therefore the adjournments. It consumes at least 3-4 hearings of the matter.

Next is in regards to 207 copies, D1 entire file but the copies are giving with missing files. The prosecutor say that those portions are not relevant for the present matter and the defense raises the argument that those documents are favorable to them.

Also the principal judge taking charge sheet on file without mentioning any public servant whereas only private people have been sued. So far there is no public servant and the court has said that it does not have jurisdiction.

Answer. Internal matter will be resolved and concerned branches shall be informed but particularly certain cases might be an exception. Secondly, if the relied upon documents are relevant then the court can certainly pass an order in that manner to summon the segregated papers. Thirdly, the agency shall ponder upon the matter and inform the concerned branches.

Jabalpur- dealing with Cases of IPC-420, 409, 467 MP amendment. Being dealt with all pending case and one new matter, there should be responsible prosecutor. When the witnesses are summoned, they don't appear. The CBI official says that witness is busy in some other matter etc., so it should be looked at the time of the court should not be wasted. The jurisdiction extends to about 22 districts.

The fresh matter is of FICN matter, in which the court was satisfied with the investigation. The only lacuna was that the persons belonged to West Bengal and on appearing before the court the case diary was not produced as and when required, although it was later produced.

Jodhpur- The procedure has not been satisfactorily even under the law, where only one FIR was registered for an offence done in February and December, done with different people by a person. At times, S. 409 and 420 is charged to a same person. How is it possible?

Answer. If it is permissible under the Cr. PC is not offended then it can certainly be used without any disturbance.

Jaipur- The subordinate courts language use the local language and the FIR submitted by the CBI is always in English, the accused always files application for a translation copy otherwise they are unable to defend their case. The translation takes place in nearly years.

Answer. Shall be dealt.

Bangalore- A concurrent charge of NIA cases too. The 4 days are used for NIA and 2 days for CBI matters. The charge of CBI court should not be mixed with any other charge of a court. The monthly progress of a case has to be submitted to CJ of the HC. CBI cases should not be entangled with any other court. For Bank Compliance cases, the banks have moved to other cities, once summoned they directly come to court without any preparation and waste the time of the court. The witness thus are not able to answer properly.

Answer. Noted

Ghaziabad- Different IO s investigating different phases of investigation, everyone tries to pass the buck on other. Now the court has to summon all the IO's. A soft copy and hardcopy has to be given of the 161 statement. In West UP, Saturday is taken as a holiday as it is leave for Central Government. The prosecutors do not appear on Saturday but still for certain matters, there presence is very much required. The prosecutor must do his homework and not do things in the court premises. The security concern of CBI judge is very important through central government and has to be provided with security.

Patna- The judge does not have any problem.

Patna( Other Judge)- The fellow brother judges have already spoken.

Indore- Closed cases, there cases only one or two witness are remaining. The case remains at the threshold of the disposal but IO's are absent for months. One of the IO is settled in Canada and responds that he cannot come. Next, the latest development of law so that the judges are highly updated. Lastly, please superior official should not put a sword of disposal on the neck of CBI court judge.

Answer. Canada case, it can be tried through videoconferencing. The ultimate decision is to drop the person and get another IO for the case.

Himachal Pradesh-No special problems- they have already been dealt.

Hazaribagh- No experience as appointed for dealing with vigilance cases.

Uttarakhand- No special problems.

Haryana- The post is being held for more than 2 years. Therefore,more problems and suggestions are there on behalf of the judge. First, A purview from Delhi unit are not being appointed to help prosecutor. Secondly, three list for witness are prepared but the prosecutor is not producing it.

Thirdly, there is a pooling car provided to CBI officers. Fourthly, prosecutor is not in possession of the document mentioned in the charge sheet. Fifth is regarding voice recording under PC Act, there is no mechanism that voice recorder was near to the mobile. It is not able to prove beyond reasonable doubt. The complete transcription is not provided to the court. The recorder has to be played in the court and it takes nearly 3-4 hours. It buys a lot of time of the court. Sometimes the record that is produced to the court is neither English nor Hindi. It also makes a tremendous problem.

The two other Delhi Judges cited similar issues and problems. CBI officials answered positively and assured the judges that they shall deal with the problems and consider the suggestions.

Therefore, the session was concluded and with this the refresher course came to an end.