

LAWS RELATING TO TERRORISM CASES

JUSTICE N. KOTISWAR SINGH
Judge, Gauhati High Court

AN OVERVIEW

The background features a light blue gradient on the left side, transitioning into a complex geometric pattern of overlapping triangles and polygons in various shades of blue (from light to dark) on the right side. The overall aesthetic is clean and modern.

Court's Role :: Important areas

1. Pre-trial :: **(I) INVESTIGATION**
(II) BAIL/REMAND
2. Trial :: Appreciation of Evidence
CONFESSION : RETRACTION : USE AGAINST
CO -ACCUSED : ADMISSIBILITY : DISCOVERY
3. Sentencing

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences.

- **Good Practices:**
- Good Practice 1: Identify and Assign Specially Trained Judges.
- Good Practice 2: Support the Use of Continuous Trials in Terrorism and other National Security Cases.
- Good Practice 3: Develop Effective Trial Management Standards.
- ***Good Practice 4: Support Special Measures to Protect Victims and Witnesses in the Trial Process.***
- ***Good Practice 5: Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation.***
- ***Good Practice 6: Support the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods.***
- Good Practice 7: Contribute to the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security.
- Good Practice 8: Develop and Articulate Media Guidelines for the Court and Parties.

Domestic laws :: Terrorism cases.

1. Unlawful Activities (Prevention) Act, 1967
2. Prevention of Money Laundering Act, 2002
3. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
4. The Narcotic Drugs and Psychotropic Substances Act, 1985
5. Maharashtra Control of Organised Crime Act, 1999
6. National Investigation Agency Act, 2008
7. Information Technology Act 2000
8. Passports Act, 1967
9. Arms Act, 1959
10. Explosives Act 1884
11. Inflammable Substances Act, 1952
12. Explosive Substances Act, 1908
13. Motor Vehicles Act, 1988

Domestic laws :: Terrorism cases.

14. Prevention of Seditious Meetings Act, 1911
15. Extradition Act, 1962
16. Foreigners Act 1946
17. Telegraph Act 1885
18. The Defence of India Act, 1962
19. Terrorist Affected Areas (Special Courts) Act, 1984
20. National Security Act, 1980
21. The Preventive Detention Act (PDA), 1950
22. Armed Forces Special Powers (Assam and Manipur) Act, 1958
23. Armed Forces (Punjab and Chandigarh) Special Powers Act (1983)
24. Assam Preventive Detention Act (1980)
25. Jammu and Kashmir Public Safety Act (1978);
26. Punjab Disturbed Areas Act (1983);
27. Chandigarh Disturbed Areas Act (1983)
28. Assam Disturbed Area Act, 1955

TADA

X

POTA

X

UAPA

✓

Important points to be kept in mind by trial judges

1. The Unlawful Activities Prevention Act, 1967 :: Principal Statute.

2. Amendments in UAP

2004

2008

2013

Important amendments made in 2004:

- (i) **Sec.2** (*Definitions*).
- (ii) **Sec. 10** (*Penalty for being a member of an unlawful association etc.*).
- (iii) **Sec. 15** (*Defines what amounts to a terrorist act*).

Important amendments made in 2008

- (i) **Sec.2** (Definitions).
- (ii) **Sec. 15** (Terrorist act. Made it more expansive and comprehensive).
- (iii) **Sec.18A** (Punishment for organizing terrorist camps).
- (iv) **Sec. 43D** (Extended the investigation period under Section 176).
- (v) **Sec. 43E** (Presumption as to offences under Section15).
- (vi) **Sec. 43F** (Obligation to furnish information).

Important amendments made in 2013

[Mostly pertaining to financial transactions]

- (i) **Sec. 15** (insertion of the words “economic security”).
- (ii) **Sec. 17** (raising funds for the terrorists).
- (iii) **Sec. 22A** (Offence by companies).
- (iv) **Sec. 22B** (Offence by societies and trusts).
- (v) **Sec. 23C** (Punishment for offences by companies or trusts).
- (vi) **Sec. 24** (Reference to proceeds to terrorism in include any property intended to be used for terrorism).
- (vii) **Sec.24A** Forfeiture of proceeds of terrorism.

Pre-trial stages

ARREST

43A of the UAP Act, inserted in 2008.

ARREST/SUMMONS TO A

PERSON/ACCUSED IN A FOREIGN COUNTRY

Section 105 Cr.P.C.

Sections 105A to 105L Cr.P.C.

Release on bail under the Act has been made more difficult

Sec 43 D (2) Period under Sec. 167 Cr.P.C. increased to 90 days - and on the request with report of the Public Prosecutor to 180 days.

Sec 43 D (2) 2nd Proviso: Police custody of an accused already under judicial custody is permissible on application supported by affidavit.

Sec 43D (4) - No anticipatory bail.

Sec 43D (5): Bail can be denied if the Court believes that the accusation made against the accused *is prima facie true*. [*Under TADA, MCOCA, NDPS, the court is required to record its opinion that there are reasonable grounds for believing that the accused is NOT GUILTY of the alleged offence*].

The court must take care that the power of the court to grant bail should not be stretched too far. ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005)***

Sec. 43D (7) No bail for non Indian citizen entering the country unauthorizedly or illegally.

Exercise:

What is the difference between -

- UAP Act: **Section 43-D** :accused person shall not be released on bailif the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the **accusation against such person is *prima facie* true.**

AND

- POTA: **Section 49**:no person accused of an offence punishable under this Act or any rule made thereunder shall be released on bail until the court is satisfied that there are grounds for **believing that he is not guilty** of committing such offence.
- **NDPS Section 37**: the court is satisfied that there are reasonable grounds for believing that **he is not guilty of such offence** and that he **is not likely to commit any offence** while on bail.

FAIR TRIAL

- Ensure all accused are represented by defence lawyers.
- Those who have not engaged their counsel, must be provided with one.
- Section 304 (1) of the Code of Criminal Procedure. Free Legal Aid Counsel. **NOT ONLY FREE BUT COMPETENT LAWYER.**
- Article 14 (3) (d) of the International Covenant on Civil and Political Rights.

EXERCISE: An accused 'X' was not represented by lawyer when giving confessional statement under Section 164 Cr.F.C.?

- Will it vitiate the trial?
- If yes, why? And if not why?

SANCTION

- Sec 45 : UAP Act: Cognizance cannot be taken without proper and valid sanction from the appropriate Government.

PROTECTION OF WITNESSES

- Sec 17 of the National Investigation Act, 2008
- Sec 44 of UAP Act.
- *Witness Protection Scheme, 2018*
[Mahender Chawla Vs. Union of India (5/12/2018)].

Appreciation of evidence

- Though the actual execution of the terrorist act may leave a heap of evidences, yet it is extremely difficult to get evidences about the plotting and conspiracy of such terrorist act, as these are done in utter secrecy.
- The prosecution has to rely mostly on confessional statements, witnesses who turn approver as well as scientific and electronic evidence.
- It is in this context that the trial court judges have to deal carefully with confessional statements.

Appreciation of evidence

CONFESSION

- Confession before police -
 - MCOCA - Section 18 - Confession before police not below the rank of Superintendent of Police is admissible. [Guidelines :: *Prakash Kumar v State of Gujarat 2005 (2) SCC 409*]
 - UAP Act - No such provision available.

Exercise

The following accused was charged under section 3(3) TADA, for collecting funds for terrorist activities and distributing the same for propaganda against the Hindus after the riots in Bombay after the demolition of Babri Masjid in December 1992. The evidence against him was his confessional statement and confessional statement of other accused

- “My name is Mohiuddin Abdul Kadar, age: 30 years, occupation: Sales Representative, Dubai, Place of residence: 52/5, Zakaria Masjid Street, Mumbai 9. I passed SSC in the year 1978.
 - I passed SSC in the year 1978.
 - I myself informed the Inspector of Crime Branch that I wanted to make the confessional statement voluntarily.
 - I was arrested by Bombay Police on 3-4-1993 from my residence at Dongri in connection with the Bombay Bomb Blast Case.
 - For this reason, I wanted to give my confessional statement.
 - I have been explained about my making the confessional statement that the confessional statement, which I am going to make will be used against me.
 - In this connection, I was given 48 hours for reflection. I will be produced on 17-5-1993, if I want to make the confessional statement.”
- ? Though he was not warned when he was first produced when the aforesaid statement was made, subsequently when the second part of the confessional statement was made, he was duly warned.
 - ? Is this warning during the second part of the confessional statement sufficient ?
 - ? What is the procedure for recording confessional statement?
 - ? Can an accused be convicted only on the basis of confessional statements AND
 - ? Does confessional statement require corroborative evidence?

Decision

- The Special Judge under TADA has discarded all the confessional statements on the ground that the officer who recorded the confessional statement of the respondent and other co-accused did not fulfil the requirement of law by giving any warning to the said persons telling/informing:
 - (i) that they were *not bound to make* a confession, and
 - (ii) *if made*, it could be used against them as evidence.
- The Trial Court acquitted them of all the charges. The Supreme Court affirmed it.

Appreciation of evidence

LAW ON CONFESSION

- A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.
- An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession.
- The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case.
- When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Bombay Blast Case: **[Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1 Para 180-180.5]**

Retracted confession

- Retracted confession, however, stands on a slightly different footing.
- A court may take into account the retracted confession
- But it must **look for the reasons**
 - ✓ (i) for the making of the confession as well as
 - ✓ (ii) for its retraction, and
 - ✓ (ii) ***must weigh the two to determine*** whether the retraction affects the voluntary nature of the confession or not.
- If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user.
- All the same, the courts do not act upon the retracted confession without ***finding assurance from some other sources*** as to the guilt of the accused.
- Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true. [***Bharat v. State of U.P., (1971) 3 SCC 950***]

Corroboration of Retracted confession

- There need not be meticulous examination of the entire material particulars.
- It is enough that there is broad corroboration in conformity with the general trend of the confession.
- As to the extent of corroboration required, each and every circumstance mentioned in the retracted confession regarding the complicity of the maker need not be separately and independently corroborated.
- “It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.” [*Subramania Goundan Vs. State of Madras, 1958 SCR 428*].

Retracted confession

- A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made.
- But it has been held that a court shall not base a conviction on such a confession without corroboration.
- It is not a rule of law, but is only rule of prudence.
- **General rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.”**
- [**Pyare Lal Bhargava v. State of Rajasthan AIR 1963 SC 1094**]

Use of Retracted confession against a co-accused

- A confession can only be used to “lend assurance to other evidence against a co-accused”.
- “...In dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.”

Hari Charan Kurmi v. State of Bihar, (1964) 6 SCR 623

Evidence of Accomplice

- Section 133 Indian Evidence Act, Section 114 (b) Indian Evidence Act, Section 306 to 308 CrPC)
- Requires strict scrutiny.
- Corroboration as Rule of Prudence is statutorily ordained

**[*Bhiva Doulu Patil v State of Maharashtra - AIR 1963 SC 599*
(Para 7 at Page 601)]**

Electronic/ Scientific Evidence

- Sec : 46 UAP Act - Permits interception of electronic or oral communication & makes them admissible as evidence.
- Magistrate has the power to direct an accused to provide his voice samples for investigation even without his consent. [*Ritesh Sinha vs State of UP Crl Appeal No. 2003 of 2012 decided on - 2nd August, 2019*].
- CDR analysis- Call Records - Mode of Proof - Procedure explained in *Mohd Arif @ Ashfaq v State (NCT of Delhi) 2011 (13) SCC 621* - IMEI number along with IMSI and hash value relevant in establishing the link.
- Email & Social Media content - Possessor of electronic evidence has to testify as to its receipt.
- Compulsory involuntary administration of Narco Analysis, polygraph examination and the brain electrical activation profile (DDT : Deception Detection Test) violates the right against self incrimination - Permissible only when consent is recorded before judicial Magistrate. [*Selvi & Others v State of Karnataka - AIR 2010 SC 1974 (Para 262)*]

Tape recorded conversations: Ram Singh v. Col. Ram Singh [1985 Supp SCC 611 at p. 623 in para 32.

- (1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
- (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence – direct or circumstantial.
- (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
- (4) The statement must be relevant according to the rules of Evidence Act.
- (5) The recorded cassette must be carefully sealed and kept in safe or official custody.
- (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

Leading to Discovery

Section 27 of Indian Evidence Act:

- Discovery of fact is distinguishable from material object/ things

[*State of Maharashtra v Damu, (2000) 6 SCC 269*]

- Accused must be in direct or indirect custody of police at the time of making the statement

[*Mohd. Inayatullah v. State of Maharashtra, (1976) 1 SCC 828*]

Exercise

→ “... About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya.”

→ *[Pulukuri Kottaya vs. Emperor, AIR 1947 PC 67]*

→ ***How much of the aforesaid statement will be admissible under Section 27 of the Evidence Act?***

Answer:

- The whole of that statement *EXCEPT* the passage ‘I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come’ is inadmissible.”
- only “so much of the information” as relates *distinctly* to the fact *thereby discovered* is admissible. The rest of the information has to be excluded. The word “distinctly” means “directly”, “indubitably”, “strictly”, “unmistakably”. The word has been advisedly used to limit and define the scope of the provable information. The phrase “distinctly relates to the fact thereby discovered” is the linchpin of the provision.

Conspiracy

Section 10 - Indian Evidence Act

- Reasonable ground to believe that the conspirators have conspired.
- Conspiracy must be to commit an offence or actionable wrong.
- Conspiracies are proved mostly by circumstantial evidence.
- Standard of proof to hold that there is a conspiracy has to be beyond reasonable doubt.
- Section 120-A IPC - Defines Conspiracy

[*State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (Para 69)*]

Exercise:

'A', an Indian, 'B and C' both Pakistanis, meet in Dubai and plot to attack the Indian Parliament.

'A' is the strategist and master mind, makes the plan for carrying out the attack, where to take safe shelter, procure arms and ammunitions in India, how to attack the Parliament, how to get safe shelter and get out of India.

'B' and 'C' enter India with Rs. 10 lacs in cash illegally with the help of 'D'. As 'B' and 'C' enter India, 'A' remains incommunicado with both 'B' and 'C' not to attract the attention of the security agencies, but monitors the activities of 'B' and 'C', through his informers and other sources.

'B' and 'C' procure arms and ammunitions from 'E' and attacks the Parliament and kills a number of persons and damages the gates of the Parliament.

Question : Under what offences A, B, C, D and E can be charged?

Presumption

- Section 111 A - Indian Evidence Act - Applicable to disturbed areas.
- Section 43 E of UAP Act - Presumption unless the contrary is shown that the accused has committed terrorist act defined under section 15.
- Section 17 of Maharashtra Control of Organized Crime Act, 1999 - Once possession is established, the burden is on the accused to show that he was not in conscious possession
- Where it is proved that the accused has kidnapped or abducted any person, the Special Court under the MCOCA Act shall presume that it was for ransom

Cyber Terrorism

- Section 66 F of the Information Technology Act - makes provision for punishment for cyber terrorism.
- **Essential ingredients include:**
 - ❖ knowing or intentionally penetrating or assessing a computer resource without authorisation, thereby obtaining access to restricted informations, data or computer data base.

Modes: (a) Data Theft (b) Network damages (c) Privacy Breach (d) unauthorised access etc.

Sentencing

- While determining the quantum of punishments the precise act committed by an individual accused is of prime consideration.

Yakub Abdul Razak Memon v. State of Maharashtra, (2013)
13 SCC 1



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