

WORKSHOP ON ADJUDICATING TERRORISM CASES

Module 5

Evidence, Mutual
Legal Assistance
Treaty (MLAT) and
Extradition



Introduction

- Motive is “Ideological Fulfilment” – Islamist or Political Islam – Establishment of Caliphate – Maoist – The CPI (Maoist) – Destruction of the Indian State – Establishment of the “Indian People’s Democratic Federal Republic” – Violent imposition of “Dominant Will” – S.15 of UAPA
- Terrorism trials attract media and public attention.
- Though every segment of the trial is important, cases are made or marred at the stage of evidence.
- The Judge, besides being an impartial adjudicator, also a “Sentinel on the Qui Vive”

Categories of Evidence

- Oral Evidence – 161 Cr.P.C, 164 Cr.P.C and 27 Evidence Act.
- Documentary Evidence – Physical and Digital
- Forensic Evidence – Medical, Ballistics and Toxicology

Assessment of Evidence at the Stage of Cognizance S. 190(1)(b) Cr.P.C

- Do not to mechanically take cognizance without careful scrutiny of the charge sheet.
- If evidence is inadequate, proceed under S. 156(3) Cr.P.C.
- Confer with the PP – See if potential witness are sent up trial as accused?
Focus on “Degree of Involvement”
- While ordering further investigation, order sheet ideally must disclose that cognizance has not been taken.

The Unlawful Activities Prevention Act, 1967

- The Principal Act which under which charge sheet would be filed is the UAP Act.
- Chapter III of UAP Act relates to offences pertaining to Unlawful Activities and Unlawful Association (sections 10 to 14).
- Where offences charged are under chapter III of the Act, examine if there is evidence with reference to Ss. 2(o) and 2(p) and Ss. 10 to 13.
- Evidence to be appreciated to examine jurisdiction of Court.
- Offences to be cognizable (S.14)

- Chapter IV – Punishment for Terrorist Activities.
- S. 15 defines Terrorist Act.
- Ss. 16 to 22, 22C and 23 provide for punishment for the various categories of Terrorist Activities.
- Chapter VI relates to offences arising from association with a Terrorist Organisation. Ss. 38 to 40.

- Illustration 1: S. 19 – Punishment for harbouring a terrorist – The charge sheet must reveal evidence that the accused (a) Voluntarily harboured/concealed the terrorist, evidence must be there to reveal the exercise of freewill on the part of the accused to harbour the terrorist and the absence of any coercion or threat offered by the terrorist (b) Attempts to harbour or conceal a terrorist – there must be evidence to show that the accused had knowledge of the person he was attempting to harbour/conceal was a terrorist – Evidence must reveal that the accused should have taken a step towards attempting to harbour/conceal the terrorist.

- Illustration 2: S. 38 – Offence relating to membership of a Terrorist Organisation – (a) Evidence in charge sheet must reveal that the accused is associated with a Terrorist Organisation (b) Evidence must further reveal that the association with the Terrorist Organisation is with the intention of furthering its activities (c) The accused is unable to establish that the organisation was not declared as a Terrorist Organisation when he became a member and (d) The accused is unable to show that he has not taken part in the activities of the organisation at anytime during its inclusion in in the Schedule as a Terrorist Organisation.
- Before cognizance, Trial Court to ensure availability of previous sanction u/s. 45 of UAPA

Admissibility of evidence collected through interception of communication – S. 46 UAPA

- Exclusion of Evidence Act
- Application of S. 65-B of the Evidence Act not applicable to evidence collected under S. 46 of the UAPA
- Order of competent authority directing interception – copy of – to be given to each accused ten days before trial, hearing or proceeding (Proviso 1)
- Period of ten days can be waived if the Judge concludes that it was not possible to give copy to accused and that no prejudice is caused to accused by such delay (Proviso 2)

Evidence during Trial

- Delay at the stage of prosecution evidence is undesirable.
- Delay in recording evidence is beneficial to the accused – opportunity to suborn witnesses – opportunity to claim prejudice due to denial of speedy trial.
- Summons to witnesses be served through the office of the Superintendent of Police.
- Alternate mode of service to witnesses– Eg. SMS, E-Mail, Social Messaging Services, Phone call.

- Dates for recording evidence for the prosecution be fixed in consultation with the Prosecutor and the Defence Counsel. Defence not to be given excessive latitude during this stage.
- Material witnesses to be examined at the earliest before formal witnesses.
- Where examination in chief is completed and the defence seeks an adjournment to cross examine the witness, the shortest possible date to be given in order to ensure that the witness is not suborned.
- The participation of the Judge in recording of evidence not to be partisan. He is expected to question the witness in such a manner that he does not step into the shoes of the prosecution.

- **Effective use of Information Technology (Video Conferencing) to record the Evidence of formal witnesses and those witnesses whose presence in court cannot be secured without waste of time and state resources.**

- Proper record of the chain of custody of material objects to be made.
- Preservation of MOs and their production during trial..
- Expert testimony – Court to put questions to elicit simple answers, comprehensible to common man, shorn of technical jargon that experts use in the course of testifying.

Mutual Legal Assistance Treaty (MLAT)

- MLAT is for the purpose of securing information available in a foreign country which is relevant in a case in India. India has MLAT with 39 Countries including the USA and UK
- India has Extradition Treaties with 49 Countries and Extradition Arrangement with 10.
- Germany has not entered into MLAT with India as India has the death penalty as a punishment. There is however an Extradition Treaty existing between India and Germany.
- Section 166-A Cr.P.C – Issuance of a Letters Rogatory to the Competent Authority to another Country seeking information available there.

MLAT - Access to Evidence in other Countries

- On site interrogation of suspects or witnesses in foreign lands
- Interrogation over video conferencing
- Collection and transfer of evidence
- Seizure of communication data and real time interception of communication

Expediting procedure under MLAT

- Standardization of request procedures between member states
- Previous consultation with counterparts in the requested state with regard to information required
- Sharing of first draft with the requested state – queries to be in simple language and preferably in the language of the requested State
- Request to be restricted only to questions requiring specific answers to ensure timely compliance

David Coleman Headley - A case in point

- Made available for interrogation by NA.
- Provided information about the LET and its activities in India
- Provided information about the association between the Pakistan Army and LET

Group Discussion

- What is the difference between the MLAT procedure and Extradition?
- Gmail communication relevant to an investigation is sought— Attempt to secure it from Google through MLAT and 166-A Cr.P.C fail. Investigation authority wants to prosecute Google/CEO, under what provisions, if any, will the Court take cognizance against Google/CEO?

Q&A

- The case involves an explosion in a crowded market place killing 26 people of which are 8 women and 3 children. In the course of investigation, the confession statements of the accused are recorded u/s. 164 Cr.P.C. On perusing the charge sheet (pre-cognizance stage) you find;
- that the Magistrate recording the confession has not given a warning to the accused persons that there is no compulsion to confess and that the statement can be used against them. The statement bears only the sign of the Magistrate and not of the accused.
- What would you do?

BrainstormSession/GD

- In a case, success of a terrorist act was communicated to 'X' via email. The email service provider gives the details of 'X' tracing him to Egypt. On a request from India, X is arrested and detained by the authorities in Egypt. Egypt wants to try 'X' and refuses his extradition. Police want to interrogate 'X' and approaches you. How would you proceed?