WORKSHOP ON ADJUDICATING TERRORISM CASES

(Implementing the Hague Memorandum in India: Good Practices for the Adjudication of Terrorism Cases)

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Program Report

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The National Judicial Academy (NJA) organized a two-day online Workshop on Adjudicating Terrorism Cases from 23rd & 24th January, 2021 at the NJA. Eight Hon'ble High Court Justices trained as master trainers shared their experiences and knowledge to a larger cross section of District & Sessions Judges dealing with cases of extremism/terrorism trials, and allied areas involving national security issues during the workshop. The workshop was participated by 42 District & Sessions judges from different jurisdictions. The purpose of the workshop was to sensitize judges to contemporaneous best practices and jurisprudence pertaining to counter-terrorism control norms, adjudication protocols and allied areas. The workshop provided a forum to participating judges to discuss and suggest good practices on issues arising while adjudicating terrorism trials. The workshop facilitated transmission of skills towards better, speedier and quality adjudication in terrorism & related cases.

Day-1

Special Session - Presentation by e-Committee, Supreme Court of India on e-Court Services.

Session 1:

Theme I. Laws Relating to Terrorism Cases

Theme II. Case Management in Terrorism Cases & Offences against National Security

Session 2:

Theme III. Framing Charges and Unique Features of Terrorism Trial

Theme IV. Fair Trial

Day-2

Session 3:

Theme V. Evidence, Mutual Legal Assistance Treaty (MLAT) and Extradition

Theme VI. Digital Evidence

Session 4:

Theme VII. Judicial and Courtroom Security

Theme VIII. Managing Media in Adjudicating Terrorism Cases

Session 1

Theme: Laws Relating to Terrorism Cases

Speaker: Justice N. Kotiswar Singh

The definition and the scope of "terrorism" and/or "terrorist act" was probed and traced. The General Assembly resolution 49/60, namely "Activities considered to be 'terrorist' in nature" was referred to. The Indian perspective on the proposition was examined through the lenses of Unlawful Activities Prevention Act, 1967 (UAPA).An overview of the nexus, interplay and comparison between the principal legislation on the topic i.e. UAPA *vis-à-vis* other criminal major and special legislation(s) *viz*. IPC, CrPC, IEA, TADA, POTA, MLA, Arms Act, Explosives Act, Passport Act, NDPS Act etc. was drawn. An exhaustive list of nearly 30 domestic legislations, discretely covering several aspects, linked proximately or distantly with terroristic activities were unfolded. The role of a competent court in dealing with terrorist offenses was schematically considered at three levels *viz.* Pretrial stage; Trial; and Sentencing stage. Delineating the "best practices" in dealing with the terrorist cases the mother guideline drawn through *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences* was extensively discussed. The need and impact of the recent amendments made to the UAPA (*viz.* 2004, 2008 7 2013) were delved into. The provisions relating to 2013 Amendment to the UAPA in light of aid to terroristic financial transactions were underscored. The amendments made covering the "Pre-Trial" stage under Section(s) 43A of the UAPA and 105, 105A through 105L CrPC was discussed in light of arrest and summoning in foreign jurisdictions. Moreover, the statutory stringency roped –in on issues of release on bail under Section 43D and its sub-clauses was discussed. Case law jurisprudence relied upon included *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*, (2005) 5 SCC 294; *NIA v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1. The difference between Section 43D UAPA *versus* Section(s) 49 POTA and 37 of NDPS was discussed. The discussions on "Trial" stage covered essentials of fair trial; protection of witness (w.r.t. Witness Protection Scheme, 2018), Section 17 of NIA and Section 44 of UAPA were discussed. *Mahender Chawla v. UoI*, (2018) SCC Online para 25 was corroborated. Importance of appreciation of evidence during trial was underscored with special reference to relevant law on "confession" *Prakash Kumar v. State of Gujarat,* 2005 (2) SCC 409;*Yakub Abdul Razak Memon v. State of Maharashtra*, (2013) 13 SCC 1 Para 180-180.5 and "retracted confession" *Bharat v. State of U.P*., (1971) 3 SCC 950. The standards of

corroboration in "retracted confession" was highlighted w.r.t. *Subramania Goundanv. State of Madras,* 1958 SCR 428. Reliability on "retracted confession" was examined in light of *Pyare Lal Bhargava v. State of Rajasthan*, AIR 1963 SC 1094. Use of "retracted confession" against a co-accused was delved into w.r.t. *Hari Charan Kurmi v. State of Bihar*, (1964) 6 SCR 623. Corroboration as a rule of prudence in cases of evidence by accomplice was discussed w.r.t. *Bhiva Doulu Patil v. State of Maharashtra* AIR 1963 SC 599 (Para 7 at Page 601). Aspects of appreciation of electronic and scientific evidence were discussed with help of case law jurisprudence. Other areas discussed included law relating to "conspiracy"; "presumption"; "cyber terrorism" and "Sentencing" practices and issues.

Theme: Case Management in Terrorism Cases & Offences against National Security

Speaker: Justice G.S. Kulkarni

Chair: Justice P.D. Kode

The session was rolled-out with examining the key elements constituting "Case Management" especially considering trials relating to terrorist acts. It was emphasized that the very nature of such trial attracts certain exceptional considerations *viz.* speed of trial, socio-political sensitivity and moral accounts, popular sentiments, international impacts etc. Hence, case management in such trials involves and demands certain standardized and defined approaches. With the aforesaid blueprint the entire trial management may be constructed and approached through the lenses of seven elementary bedrocks *viz.* judicial leadership; time scheduling; trial continuity and consistency; management of evidentiary issues; factoring-in potential delays; leveraging courtroom technology; and adherence to the guidelines laid down by the "*Hague Memorandum*". The part of the session confined to sequentially examining these seven key elements. It may be asserted that out of the seven atleast three are under absolute (or major and direct) control of the judge. Domains like judicial leadership; factoring-in potential delays; and leveraging courtroom technology can be effectively judge-managed and are largely under the direct control of the judge. Whereas, the remaining four may not have as much complete control, but definitely be greatly influenced by the presiding officer. Elaborate discussions on the aspects unfolded explain and deliberating upon each of these seven premises. While dealing with "judicial leadership" it was asserted that for a judge to have and reflect complete control must be proficient and adept in substantive law, dexterous with the procedural law, and *au fait* with the contemporary nuances in

case law jurisprudence. It was emphatically asserted under no point in trial a judge must countenance a situation wherein the counsel advocating exhibits better acquaintance on the subject than the judge. The aforesaid attributes control for a speedy adjudication. Dilating on the aspect of prospective factoring-in of "potential delays" it was underscored that crime is partly said to be condoned, when justice is postponed. Therefore, the primary consumer of delay is the accused. Lapse of time softens the eagerness of the prosecution, impairs the rigor and fortifies a fictitious defense. Further the notion of delay was broadly classified at all three stages namely, pre-trial (e.g. remand, bail etc.), trial and pronouncement of judgment (final stage). It was urged upon that at pre-trial stage if the FIR is carefully scrutinized at the remand stage (to examine correct recording of name, sex, age etc.) shall eliminate unwarranted future novel challenges on facts and law (*Ankush Maruti Shinde v. State Of Maharashtra,* 2014 (1) SCC 129 was cited in corroboration). Likewise negotiating delays at the remaining to stages were dealt with exemplifications. A clinical tour on the element of "leveraging courtroom technology" (much under the voluntary control and ingenious thinking of the judge) was delved into. Optimizing the use of technology to conduct trial was reinforced. Video-conferencing; video recording of evidence, electronic back-up of evidences; use of softwares *viz.* "Dragon" dicta-phones etc. was insisted to augment a speedy and fair trial.

Session 2

Theme: Framing Charges and Unique Features of Terrorism Trial

Speaker: Justice P.N. Prakash

The discourse flagged-off by contemplating the anticipated bottlenecks to be faced by a trial court (especially prior to the framing of a charge) in trying a case on terrorism. It was observed that predominantly these issues would be behavioral in nature and accused centric. An account of such bottlenecks included: asserting for all the documents in vernacular language known to accused; denial to engage a defense lawyer; exhibition of inertness and being non-responsive to the charges (readout); frequent demand to alter defense advocate; deny cross-examination of witness or unwarranted recalling them for further cross-examination; accused may show extreme non-cooperativeness; disturb or attempt to derail proceedings; abscond while on bail etc. It was distinctly averred that there exists a express nexus between the UAPA, CrPC and IPC with respect to interpretation. Section(s) 2(q) UAPA; 2(i) NIA; and 2(y) of CrPC were referred *inter*

se, to explain the relationship and as to where to look for the meaning of a statutory word. As the language of the legislation expresses "words and expressions used but not defined in (UAPA) and defined in the (CrPC) shall have the meanings respectively assigned to them in the (CrPC). The importance of framing of charges in terrorism cases were further highlighted by emphasizing that since the same is amenable to judicial review and is a potential seed for unwarranted delay in trial. Hypothetical cases were posed to the participants to provoke them and simulate an exercise of framing of charges.

The charges framed in the (in)famous Rajiv Gandhi assassination case (Crime No. RC 9/S/91 of CBI.SIT. Madras) under Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), was discussed as a model. Case law precedence referred included: *State of Andhra Pradesh v. Cheemalapati Ganeswara Ra*o, AIR 1963 SC 1850; *Banwari Lal Jhunjhunwala v. Union of India*, AIR 1963 SC 1620; *Ajay Agarwal v. Union of India*, 1993 (3) SCC 609; *Bimbadhar Pradhan v. State of Orissa*, AIR 1956 SC 469.

Theme: Fair Trial

Speaker: Justice Sanjeev Kumar

Objective of the topical deliberation circumscribed the concepts and mechanisms enabling a judge to ensure fair trial in spite of inherent difficulties in a terrorism trial. Moreover, concept of "reverse burden of proof", and best practices ensuring a speedy trial, differences between an "open" *versus* "in-camera" trial, and the impact of "subconscious bias" and "pre-conceived notions" of a judge also formed adjunct part of discussion. The law relating to "burden of proof", doctrine of "presumption of innocence" or of "guilt", and "shifting of onus" formed part of discourse. Corroboration of the doctrine of "presumption of innocence" *Woolmington v Director of Public Prosecutions* 1935 AC 462,[1935] UKHL 1. The standard of proof was discussed by referring to *Noor Aga v. State of Punjab*, (2008) 16 SCC 417

Lord Shaw in *Scott v. Scott*, held that publicity in delivery of justice is "one of the surest guarantees of our liberties." J. William Brennan in *Richmond Newspapers v. Virginia,* [1980] 448 U.S. 555 opined that "Open trials are bulwarks of our free and democratic government. Public access to court proceedings is one of the numerous 'checks and balances' of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Louis Brandeis J. the first Jewish to the Supreme Court of US

had famously remarked that "Sunlight is the best disinfectant". Further Lord Atkinson in *Scott v. Scott*[1] held:

> Hearing of a case in public, may be, and often is, no doubt, painful, humiliating, and deterrent both to parties and to witnesses, and in many cases, especially those of criminal nature, the details may be so incident as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for wining for it public confidence and respect.

The importance of the said concept was further corroborated by referring to the Article 145(4) of Constitution of India resounding unequivocally "No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court". The international roots to the concept may be traced to the Hague Memorandum asserting "the right to a public hearing and pronouncement of judgment with limited exceptions". However, the exception to the concept was dealt squarely with the help of *Naresh Shridhar Mirajkar v. State of Maharashtra*1966 SCR (3) 744.

Section 44 UAPA, 1967 provides for holding *in camera* trial in terrorism cases, ostensibly for the purpose of protecting witnesses. It was also reasoned that Section 327of CrPC, advocates open trial with exception in the trials in rape cases to be held *in camera.*

Session 3

Theme: Evidence, Mutual Legal Assistance Treaty (MLAT) and Extradition

Speaker: Justice Atul Sreedharan

An introduction to the complex process of assessing evidence in terrorism cases was dealt with during the discourse. Elucidation of the MLAT process, in terms of how to access evidence from foreign sources, and impact of confidentiality was discussed. The best practices and the standard procedures and steps involved in acquiring relevant evidence from international sources formed part of the presentation. Assessment of evidence at the stage of cognizance under Section 190(1)(b) CrPC, admissibility of evidence collected through interception of communication under Section46 UAPA, technicalities of adducing and appreciating evidence during trial stage

[1] [1913] A.C. 417, 463.

were discussed involving hypothetical cases. Two vital propositions were asserted especially while dealing in terrorism cases. These were: While on one hand terrorism cases attracts media and public attention, often these cases are seen to be made or marred at stage of evidence. It was underscored that keen assessment of evidence prior to taking cognizance under Section 190(1)(b) CrPC must be considered as a very important stage-gate. Instead of a mundane and mechanical process a hawk's eye approach is necessary. In the event of analyzing if the judge finds the evidence to be inadequate or insufficient, an order to proceed under Section 156(3) CrPC must be preferred. It was advised that a diligent conference with the public prosecutor to identify and sift potential witness(es), ensuring that they are not sent to be tried as accused may be yet another good practice. It was flagged to the judicial officers that an express order clearly pronouncing pendency of cognizance while directing further investigations should be a *sine qua non.* Section 19 of UAPA was illustrated dealing with voluntary harboring and attempting to harbor a terrorist. Participants were provoked and quizzed over hypothetical situations relating to charging under UAPA, jurisdictions, etc.

Theme: Digital Evidence

Speaker Justice Raja Vijaya Raghavan

The theme focused on addressing the nuances and the challenges faced while dealing with digital evidence. Areas pertaining to physical involvement and the diligence involved while collection, preservation, chain of custody of digital evidence were discussed. Insight into valuable skills for trial judges when tasked with assessing relevancy and admissibility formed part of the discourse. Case law jurisprudence on admissibility of electronic evidence were relied upon to trace the evolution of law in the domain as interpreted by the judiciary. There are four major attributes which makes the specie of digital evidence unique. These are: intangibility, volatility, fragility, and requirement of specialized tools (for extraction, collection and its preservation). The digital evidence can be classified as residents of social networks, big data, back-up servers, cloud storage, legacy systems, group shares etc. The sources may still be studied to be either conventional or traditional or new. Examples of the first include: desktop & laptop computers, multi-disk servers, CDs/DVDs and floppy disks, etc. The newer generation includes: smart phones, GPS enabled navigators, Multi-Function Printers (MFPs), digital recorders (audio & video), cloud storage platforms, digi-lockers etc. An insight into the types of digital evidence w.r.t. its locations were explained. These can be located as: i) Files & Logs; ii) Documents and

Files (created or modified by user); iii) System & Program Files; iv) Temporary & Cache Files; and v) Deleted Files. The types of Logs & Files were further exemplified including system log; program log; activity log; time stamps & Meta data. It was reiterated the Section 65A and 65B of the Indian Evidence Act, are complete Code in themselves in terms of admissibility of electronic evidence. The technical and non-technical conditions resorted to by Section 65B while laying down the special procedure for presenting electronic records as admissible evidence before the court of law was explained in detail. The myth of "primary evidence" w.r.t. electronic evidence was dealt with. It was explained that while the physical document itself constitutes "primary evidence", the electronically recorded form of the same would always be (machine readable form) a secondary evidence. It was underscored that the "chain of custody" in evidence handling is of paramount importance especially because of its tamperability, fragility, mutability, volatility etc. Therefore to ascertain the integrity of an electronic evidence, a proper record of accounts needs to be maintained to trace as to who, what, when, where and why an electronic evidence was entrusted to. A set of suggested "best practice" was shared to control integrity of electronic evidence. These were:

- ✓ Mandatory well documented Chain of Custody Form.
- ✓ Marking the evidence with legible permanent ink for identification (assigning unique identification).
- ✓ Assigning "Hash value" or "hashing". It helps IO to prove integrity of the evidence against even the minutest attempted changes.

It was asserted that there exists a tug of war between the ever and fast changing technology and flexibility in the procedural and substantive law in adopting and appreciating the change to enable ends of justice to prevail.

Session 4

Theme: Judicial and Courtroom Security

Speaker: Justice Joymalya Bagchi

It focused on the importance of providing security to the stakeholders of the justice delivery system. The importance of ensuring security for the justice delivery system was underscored. It was asserted that judges must impart justice without fear of physical and psychological harm to the stakeholders, *viz.* judge, accused, witnesses, legal professionals, court staff etc. The session

included discussion on role of judge as a facilitator to prepare and implement a security plan, including witness protection measures, and to continuously monitor and supervise execution such of security plan throughout the trial. It was mentioned that security is not static, it is a continuous goal which requires constant vigilance and continuous supervision and review of court security plans. Continuous supervision and review of court security plans is imperative to meet evolving vulnerabilities of stakeholders and confronting emerging exigencies arising out of ground realities. Some key aspects of a model security plan was suggested which included, surveillance of court precincts; security of court rooms; security of judges' chambers; a security control room; security to judges beyond court premises; and protection of witness. It was asserted that witnesses being the eyes and the ears of justice are key stake holder whose security may at times be considered by the court on its own motion subsequent to the calling of a "threat analysis report" by an assigned investigating agency. The witness may be secured based on the gravity and imminence of the threat analyzed. Key aspects of a witness protection order was discussed. Several case study simulated exercises were conducted to involve participation, understand and decipher prevalent security issues face by officers, garner suggestions and share best practices.

Theme: Managing Media in Adjudicating Terrorism Cases

Speaker: Justice S. Talapatra

The contours of the deliberation covered aspects posing difficulty in managing media attention in a high-profile terrorism case. Moreover, the importance of timely access to accurate information of court proceedings to enhance transparency and public confidence was debated. Strategies to regulate conduct of the proceedings, maintenance of decorum, prevent distractions, and ensuring safety of courthouse personnel were also adequately addressed. An overview of the delicately poised relationship between media and public scrutiny as against personal rights (fundamental, constitutional or statutory) was discerned and distinguished. The importance of media was emphasized by quoting *Attorney General v. Leveller magazine*, [I979] 1 AC 440. The limited test of securing "fair trial" on grounds of "reasonable apprehension" was resounded by citing *K. Anbazhagan v. Superintendent of Police,* (2004) 3 SCC 767. Order against media trial must be phrased cautiously to survive the test of "substantial probability of prejudice" while restraining the media. Earlier the test was "reasonable likelihood of prejudice". The impleading media

overreach "fair trial" was discussed w.r.t. 200th Report of the Law Commission of India. Effectively dealing with the media opinion was discussed w.r.t. *Nebraska Press Association vs Stuart*, 427 U.S. 539 (1976) and *Sheppard v. Maxwell*, 384 U.S. 333, (1966). It was asserted that, one of the strictest devices available to curtail potentially prejudicial media coverage is the "gag order". Judges use "gag orders" to restrict the press from reporting on the proceedings and events surrounding certain trials. The statutory provisions to balance media interferences in the terrorism trials were also discussed w.r.t. Section 2(c) of Contempt of Courts Act, 1971. The balance of "free speech" v. "fair trial" was discussed in the backdrop of *Sahara India Real Estate Corp. v. Securities and Exchange Board of India*, (2012) 10 SCC 603, wherein it was held that:

> Under our Constitution, probably, no values are absolute. All-important values, therefore, must be qualified and balanced against, other important, and often competing, values…. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial.

The militating concept of impact of media trial on judicial mind was discussed with reference to standpoints taken by judicial stalwarts *viz.* Lord Denning (who was of the opinion that whereas media trial may impact a common man, it shall not a trained professional judge) as against Lord Dilhorne (who discounted any form of judicial superiority over common citizen, as judge's also human being). *Attorney General v. British Broadcasting Corporation*, 1981 AC 303 (HL); *John D. Pennekamp v. State of Florida*, (1946) 328 US 331. Caveats to ban on publication was delineated to conditions *viz.*:

a. Such ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
b. The salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban.

It was suggested that, it is difficult to prove, (except in the most extreme displays of prejudicial activity), that media coverage actually does result in bias. Hence a pre-trial content assessment may be helpful.