

Managing Media

In Adjudicating Terrorism Cases

Justice Subhasis Talapatra

High Court of Tripura

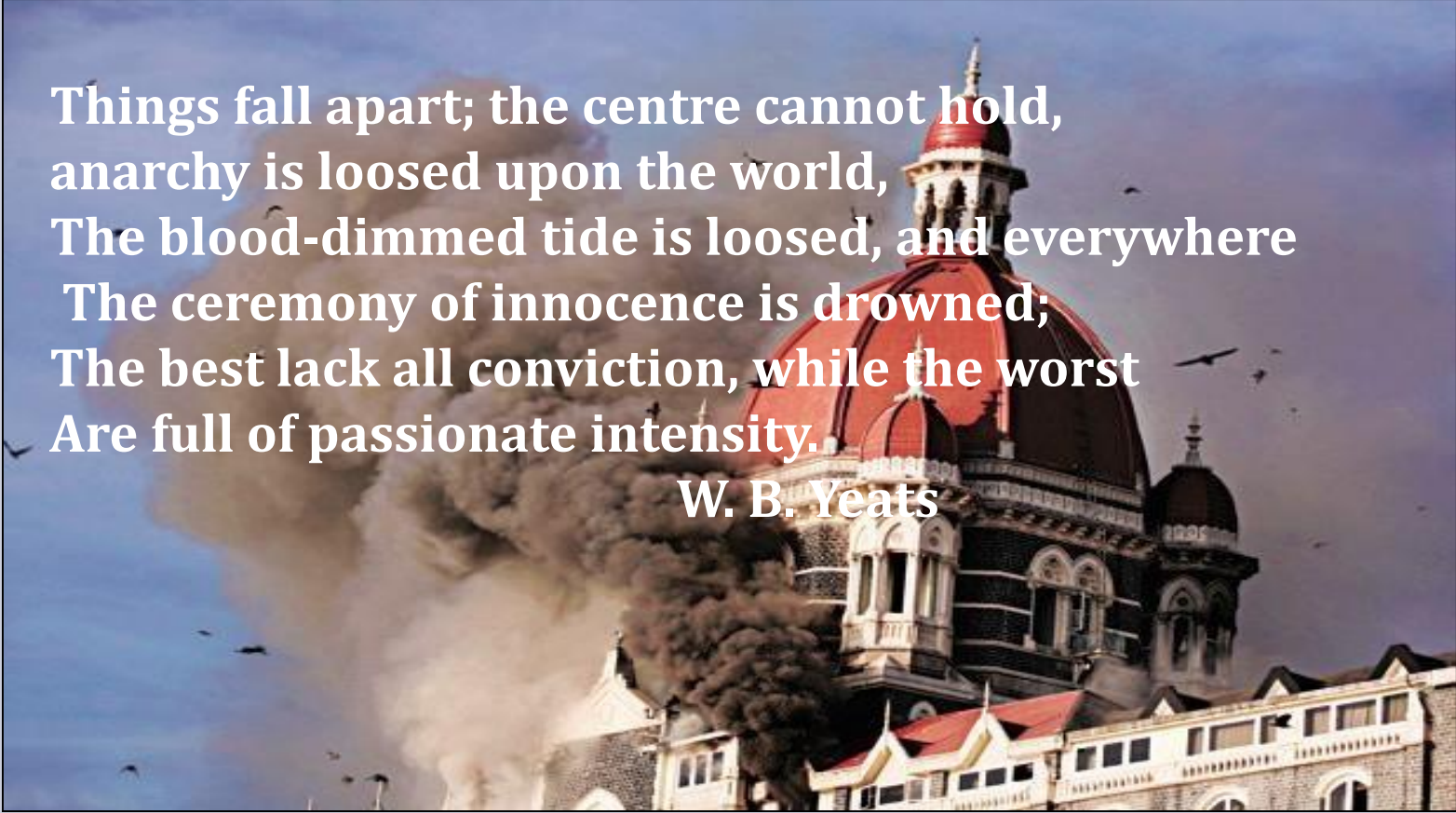


Photo By
Det. Greg Semendinger
NYC Police Aviation Unit

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Our Time: The reign of Terror?



Things fall apart; the centre cannot hold,
anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

W. B. Yeats

Media and Public Scrutiny

The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism

Attorney General vs Leveller magazine

**K. Anbazhagan v. Superintendent of Police and Ors.
(2004) 3 SCC 767.**

The jurisprudence of the right to a fair trial posits that the test is not to show whether the petitioner will be deprived of a fair trial, instead the test requires a demonstration that there are circumstances which create a “reasonable apprehension” that he/she might not get a fair trial.

The ways by which the media oversteps and hinders the right to fair trial of an accused

200th Report of the Law Commission of India

- (1) Publications concerning the character of accused or previous conclusions**
- (2) Publication of Confessions**
- (3) Publications which comment or reflect upon the merits of the case**
- (4) Photographs related to the case which may interfere with the identification of the accused**
- (5) Direct imputations of the accused's innocence**
- (6) Creating an atmosphere of prejudice**
- (7) Criticism of witnesses**
- (8) Premature publication of evidence**
- (9) Publication of interviews with witnesses**

**Nebraska Press Association vs Stuart
427 U.S. 539 (1976)**

Chief Justice Burger noted most of the other alternatives as discussed with approval in *Sheppard vs Maxwell* (1966)

- Change of trial venue;**
- Postponement of the trial to allow public attention to subside;**
- Screening out those with fixed opinions as to guilt or innocence**

Judicial Measures for Controlling Prejudice

Notwithstanding the free speech guarantee of open trials, there are some measures courts have implemented to protect the right of the accused to a fair judicial assessment Complete secrecy, however, is not tolerated by the public and therefore these devices are only limitations, rather than absolute restrictions, on coverage.

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.

Reliance Petrochemicals v. Proprietors of Indian
Express Newspapers, (1988) 4 SCC 592

**The observations of Learned Hand...indicate
'the gravity of the evil discounted by its
improbability, justifies such invasion of free
speech as is necessary to avoid the danger.'
Hence, we must examine the gravity of the
evil. In other words, a balance of
convenience...would perhaps be the proper
test to follow.**

Contempt of Courts Act, 1971

2. (c) criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises, or tends to scandalise, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner

Professor Aharon Barak

- **On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.**

**Sahara India Real Estate Corp. v. Securities and Exchange Board of India,
(2012) 10 SCC 603**

It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. 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.

Michael P. Goodwin, *A National Security Puzzle:
Mosaic Theory and the First amendment Right of
Access in the Federal Courts*

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

THE MEDIA'S IMPACT ON THE RIGHT TO A FAIR TRIAL: CONTENT ANALYSIS OF PRETRIAL PUBLICITY

Combined with the “presumption of innocence” that attaches to all criminal defendants at the start of trial, the fair trial principles require the judge to be indifferent, unbiased, and open to the evidence presented at trial. However, in an increasingly media-saturated society, defendants in high profile terrorist cases may be tried--and essentially found guilty by the news media before they reach a courthouse.

Depending on the nature and amount of the media coverage that surrounds a particular case, the judge may be profoundly affected by what the press reports. As a consequence, criminal defendants may be deprived of basic protections.

Studebaker & Penrod, 1997

Courts may continue to be reluctant to move trials to new venues, even in the most highly publicized cases, even though moving a trial to a new, untainted venue has been shown to be the only consistently successful means for dealing with the biasing effects of pre-trial publicity.

Article 14 International Covenant on Civil and Political Rights

The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice

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

The judiciary should develop rules and procedures for media coverage of public judicial proceedings, with good practices including the following:

Providing the trial judge with latitude to control the conduct of the proceedings to:

- (i) maintain decorum and prevent distractions;**
- (ii) guarantee the safety of any court official, party, witness, or juror (where applicable); and**
- (iii) ensure the fair and impartial administration of justice in the pending case.**

Sub-Conscious Bias

- **Lord Denning** was of the view that a professional judge will not be influenced by media coverage which affects only common man. This concept of judicial superiority was not endorsed by **Lord Dilhorne: Attorney General v. British Broadcasting Corporation, 1981 AC 303 (HL)**
- Even in United States the judiciary has been of the view that the court cannot function properly if a reporting is calculated to disturb the judicial mind. In **John D. Pennekamp vs. State of Florida:(1946) 328 US 331** it was observed,
“No Judge fit to be one is likely to be influenced consciously, except by what he see or hears in court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process—and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.”

Publication ban should only be ordered when

(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.

Pre-Trial Content to be Assessed

It is difficult to prove, however, except in the most extreme displays of prejudicial activity, that media coverage actually does result in Bias

Media Plan be laid before the Prosecutor Proposes the Charge

The media plan may encompass

- (i) Maintenance of court *decorum* and prevent distractions;**
- (ii) Guarantee the safety of any court official, party, witness;**
- (iii) Ensuring the fair and impartial administration of justice in the pending case by providing protection against prejudice from media and implicit bias, if any;**
- (iv) Place of Trial**

How to Exercise the Jurisdiction within the limited space

Where the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding or of information of the description and contrary which is published, is Contempt.

A finding of contempt depends upon proof that the publication has, as a matter of practical reality, a real (or clear) and definite tendency to interfere with the administration of justice, that is, to prejudice a fair trial

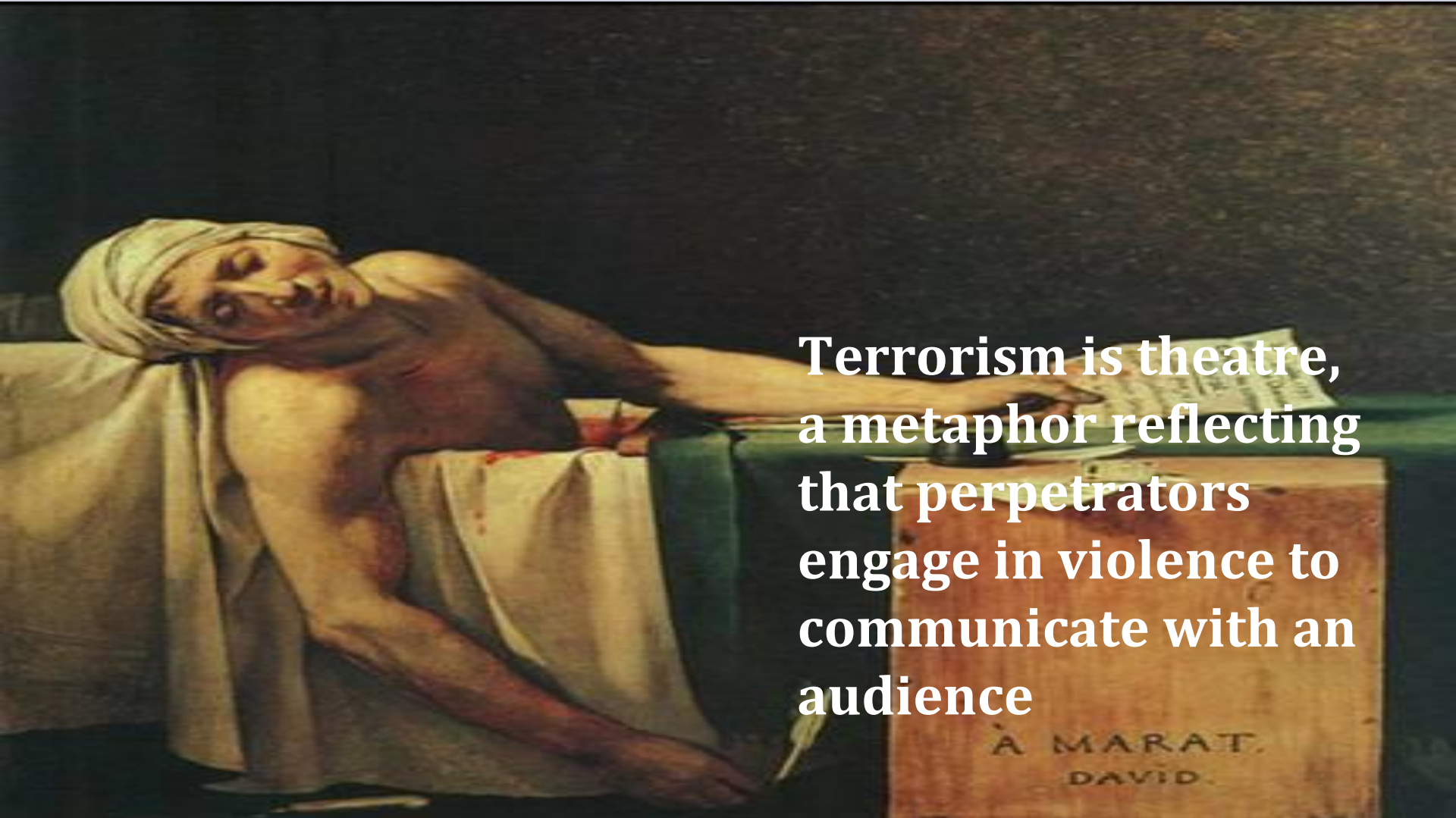
Lord Diplock in Attorney-General v. Times Newspaper Ltd.

Once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice or to undermine the public confidence that they will be observed is contempt of court.

Test of Substantial Probability of Prejudice

Order to be phrased cautiously to survive the test of Substantial Probability of Prejudice while restraining the media. Earlier the test was Reasonable Likelihood of Prejudice.

Thank you



**Terrorism is theatre,
a metaphor reflecting
that perpetrators
engage in violence to
communicate with an
audience**