WORKSHOP ON CRIMINAL TRIALS IN SERIOUS OFFENCES

[P-1246]

03rd & 04th April, 2021

Program Report

Programme Coordinators

Mr. Sumit Bhattacharya (Research Fellow)

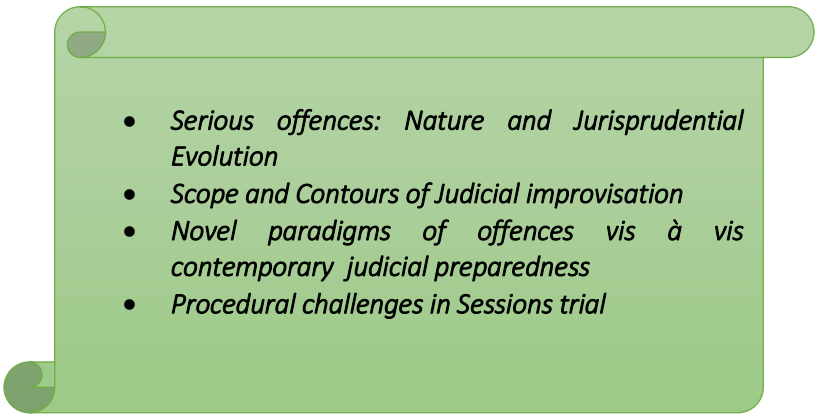
Mr. Prasidh Raj Singh (Law Associate)

Faculty, National Judicial Academy, Bhopal

A two day workshop on criminal trials in serious offences was organised at the Academy on a virtual platform. The online course sought to sensitize the participating judges dealing in serious offences and furnish them a platform for deliberating and sharing insights and experiences on contemporary themes viz. Jurisprudence and Trial Process in Serious offences; Preparation of Charge in Serious Offences; Appreciation of Evidence; and Witness Protection & Victim Compensation. An enabling capsule of best practices evolved through the case law jurisprudence formed part of discourse. The pedagogy and the discourse stimulated intense discussions on adhering to criminal law norms while adjudicating in serious offences.

Day-1	
Special Session	**Presentation by e-Committee, Supreme Court of India on e-Court Services**
Session 1	**Preparation of Charge in Serious Offences**
Session 2	**Appreciation of Evidence in Serious Offences**
Day-2	
Session 3	**Appreciation of Evidence in Serious Offences**
Session 4	**Witness Protection and Victim Compensation in Serious Offences**

Session-1: Jurisprudence and Trial Process in Serious Offences



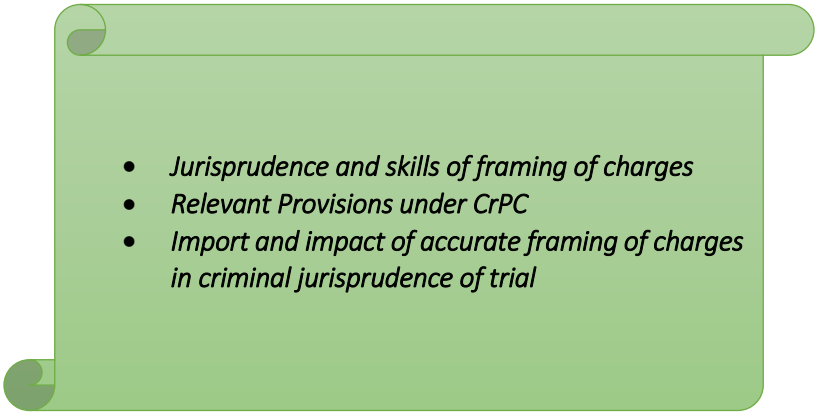
Speakers: *Justice R. Basant and Justice Ashutosh Kumar*

The session rolled out by elucidating the meaning and scope of the topic. It was advocated that the topic apart from tracing the contours of theories and principles, dilates to embrace psychological interest as well. Citing Edmund Burke it was exposited that, "annals of criminal jurisprudence, exhibit human nature in a variety of positions, at once the most striking, interesting, and affecting. They present tragedies of real life, often heightened in their effect by the grossness of the injustice, and the malignity of the prejudices which accompanied them. At the same time, real culprits, as original characters, stand forward on the canvas of humanity as prominent objects for our special study." The session was an attempt to define the precincts of "serious offence" or as to what constitutes a "serious offence"? For the purposes of the workshop the scope parenthesized the offens(es) triable by sessions court. Harping on the jurisprudential principles, certainty of punishment, and speed of justice delivery were emphasize to be the two potent immunities to ensure a crime free society. It was underscored that the efficacy and the efficiency of a criminal justice system thrives on an endeavor to effectively shrink the (inevitable) interstice between the criminal commission/omission and penal execution. The session was a binocular of traditional and the modern conception and evolution of serious offences in India. The conventional monocle depicted the four cardinal principles governing the trial process of serious offences assuming great jurisprudential values were deciphered as: "presumption of innocence"; "right to fair trial"; "proof beyond reasonable doubt"; and "exercise of discretion while sentencing". While demystifying the conception and applicability of the principle of "proof beyond reasonable doubt", it was compared

with its first cousin in the extended family *i.e.* "preponderance of probability" and was further examined through the lenses of jurists of eminence *viz.* Lord Denning and René Descartes. Premises of Descartes' philosophy of *cartesian doubt* was discussed, wherein he asserted "*dubito ergo cogito, cogito ergo sum*" (translates to "I doubt therefore I think, I think therefore I exist."). Evolution of new offences occupying myriad new areas and domains of social fabric considered as serious offences (not considered serious offences *hitherto*) was envisioned through the second lens. The evolution of the economic offences as serious offences from era of *license raj* (post-independence until early 1990s) to the newly evolved economic laws considering the public impact based on the concept of "larger harm to public" was chronicled. Case law jurisprudence *viz.* economic offences as "insider trading" (w.r.t. Raj Rajaratnam and Rajat Gupta case) formed part of discourse. The adversarial positions and the dichotomous views of Milton Friedman (advocating for "insider trading" as a victimless act and hence, not to be criminalized) *vis a vis* the modern jurisprudence of "larger harm to the *bonafide* investors" advocating "insider trading" to be a serious offence was parleyed. Case law jurisprudence was discussed citing *R.K. Garg v. UoI*, (1981) 4 SCC 675 (w.r.t. Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981). Resounding the apex court it was reiterated that laws relating to economic offences must be treated with much serious latitudes as against general legislations guarding civil liabilities owing to its intensity and magnitude of adverse impact on the public at large. *Akadasi Padhan v. State of Orissa*, 1963 AIR 1047 was discussed. With India embracing globalization and liberalization, a chronical of new legislations and systemic amendments to existing legislations to suit contemporary need of the hour were unfurled. These included the Prevention of Corruption Act, 1988; Prevention of Money Laundering Act, 2002; amendments to Income Tax Act, 1961 to address evasion of tax; amendments to Customs Act, 1962 to address issues relating to illicit traffic in contraband goods (COFEPOSA, 1974); amendments to Foreign Exchange Regulation Act, 1976 to check foreign contribution manipulations etc. India saw the dawn of new dimensions and contours of economic offences. The new paradigm not only gravitated a sense of self-regulation, diluted bureaucratic impediments, reduced government control (juxtaposed to *license raj*) and escalated degree of seriousness of economic offences. The courts evolved solid jurisprudential base to the edifice, supporting the demanding level of preparedness to the anticipated contemporary litigations. Judiciary upheld the validity and constitutionality of such legislations faced with the wrath of preceding circa of conventional inertia to change. *Vineet Narain v. Union*

of India, (1997) 1 SCC 226 (popular as *Jain Hawala case*) was discussed to underscore the judicial evolution of the nascent concept of "continuing mandamus" which further recommended an overhauling and reform of the institution of Criminal Bureau of Investigation (CBI). The court directed to make Central Vigilance Commission of India (CVC) a statutory body overseeing the accountability of CBI. Other such jurisprudential evolutions on serious offences discussed included the *M.C. Mehta v. Union of India*, AIR 1987 965 (*Oleum Gas leak case* establishing the concept of "absolute liability"); *Union Carbide Corporation v. Union of India*, 1989 SCC (2) 540 (*Bhopal Gas Tragedy*); T.N. *Godavarman Thirumulpad v. Union of India*, (1996) 9 SCC 982 (The *Omnibus Forests case*, one of the most drawn-out and longest standing case on "continuing mandamus"). Such broad novel contours of judicial improvisations embracing new horizons of serious offences along with innovative principles of law and doctrines consumed the discourse.

Session-2: Preparation of Charge in Serious Offences



Speakers: *Justice Joymalya Bagchi and Justice K.S. Ahluwalia*

The session kicked-off by discerning between "preparations" and "framing" of charges. It was succinctly held that preparation may be analogous to a bridge between executive to judicial transition of an alleged offence. It generally is a job of the prosecuting officer. However, the task ends in the form of framed "charge(s)" which essentially is the duty of the court (with assistance of the prosecuting officer). The session was premised on the relevant provision of Criminal Procedure Code, 1973 (CrPC), the necessary and desirable skills, in addition to the jurisprudence required for framing a "charge". A simile to the English adage "*morning shows the day*" was drawn

to expound "*a charge determines the fecundity of a trial*". "Charge" flows from the age old concept of having "fair trail". The trial procedure though may vary through jurisdictions, the ethos of basic human right to "fair trial" consensually devolves from Article 14(3)(a) of the International Covenant of Civil and Political Rights. The said human rights are conspicuous in the form of the constituting ingredients of a "charge". A "charge" is a *written notice*, of *accusation(s)* to a person (alleged of an offence) *to response* to such accusation(s) is "charge(s)". Therefore, *notice, accusation and* (opportunity to) *respond* (by the accused) are the three essential ingredients of a charge. *Notice* is a denominator of "How accusations are made?" meaning accusation are made in certain forms depending upon the type of a criminal case *viz.* Warrant/Sessions Case; Summons Case. As in the first instance a *notice* (in the form of a "charge" framed by the court) is prepared as per Section(s) 228/240 of the CrPC. However, those in the latter are guided as per Section 25 of CrPC. It was argued that although there exists standardized and prescribed "Forms" (Schedule II CrPC) for various (serious) offences *viz.* murder, rape etc. under the CrPC, what is intriguing is to explore and examine the existence of any such "Forms" in cases of (serious) offences governed under the special legislations *viz.* The Prevention of Corruption Act, 1988; The Unlawful Activities (Prevention) Act, 1967; The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (NDPS); The Prevention of Money-Laundering Act, 2002 (PMLA) etc. It was explained that as per Section 4(2) CrPC, it does not prescribes any such scheduled "Form" to frame "charge(s)". It was suggested that, in such cases the standards prescribed under CrPC (for a similar offence under the IPC) may be relied upon as *statute pari materia.* It was clarified that the framing of charge is not a mere mechanical exercise by courts, but of application of mind by an independent agency. Charging therefore, is firmly embedded and based upon and married to the preliminary job, diligently performed by the investigating agencies and the prosecution. Anchored on the above, rests the corollary rights of the accused to claim discharge is seminally based on the validity and reliability of the same. *Accusation* being the second limb of framing of "charge" deals primarily on "What is to be stated?" in the "charge(s)". It was explained the manner and the contents of expression needs to be in compliance to the guidelines covered under Section(s) 211 to 214 CrPC. There are generally four prongs to which must be stated *viz.* i) Name/Definition of the offence; ii) Time, Place, Identity of the person/thing against whom/which offence is committed; iii) Manner in which offence is committed (especially when definition does not sufficiently clarifies the offence) *viz.* theft & cheating; and iv) Language of the Court (interpreter,

whenever required, may be sought to enable accused). Clarifying on the ingredients a hierarchical of prioritization was suggested for consideration. While i) & ii) are jugular while framing of "charge", iii) i.e. "manner" may not be always pertinent (may be a discretionary and optional working as an auxiliary to suit a particular given occasion) when the definition of the offense is sufficient to describe the manner. It was further clarified by exemplifying the offence of "theft". When a person commits theft by trespass, it may not be necessary to establish which side of the door was vandalized as entry or exit generally (unless specifics are necessary to establish an implication on a collateral point of consideration). Whereas, in case of "cheating" the way in which the "dishonest representation" (the *sine qua non* to the offence as per Section 415 IPC) was done is not an alternative, but mandatory to be specified in a "charge" to be valid without flaw. The third limb i.e. *response* (to the accusation) completes the circuit of a proper "charge" under CrPC. For the "response" to be devoid of confusion or contradiction is dependent on the first two limbs. A "response" should not be muted or ambiguous owing to insufficiency or infirmity of "notice" or "accusation" to derail the trial process. The jurisprudence of accurate framing of charges under Section 218 (independent accusations), and the substratum of exceptions under Section(s) 219 – 223 (dependent, alternate charges etc. enabling a separate or joint trails) was elaborately discussed with examples. It was underscored that under Section 222 of CrPC the minor/cognate offences/attempts (generally) a "charge" may not be frame. Distinguishing a "minor offence" it was explained as to be an offence which is or ingredients of which are a sub-set to a "major/graver offence" *viz.* "theft : robbery". "cognate offences" may not be minor to a major offence; they generally are offences of same genus as different species (or mutants) with slight variations (which may not necessarily superimpose or subsume completely, but may have certain mutated variance: *viz.* Section 304B : 306 IPC). Whether "dowry death" (Section 304B IPC) is a minor offence/cognate to "murder" (Section(s) 302/306 IPC) was explained as a corollary w.r.t. apex court jurisprudence in *Shamnsaheb M. Multtani v. State Of Karnataka*, (2001) 2 SCC 577; *Narwinder Singh v. State of Punjab*, (2011) 2 SCC 47; *Dalbir Singh v. State of U.P.*, (2004) 5 SCC 334. A caution was sounded while effecting "alteration of charges". It was emphasized that if such alteration prejudices the accused in preparing his defense then adjournment to prepare defence (recalling witnesses or examining new witnesses under Section 217 CrPC; or *denovo trial*) is mandatory. Conviction under "alternative charge(s)" unilaterally without recall of witness(es) is illegal and corroborated by *R. Rachaiah v. Home Secretary, Bangalore*, (2016) 12 SCC 172; Anant

Prakash Sinha v. State of Haryana, AIR 2016 SC 1197*; Jasvinder Saini v. State (Govt. of NCT of Delhi)*, AIR 2014 SC 841. The jurisprudence on impact or effect of omission, absence or error in "charges" (w.r.t. 215, 464 & 465 CrPC) and on "prejudice" caused therein, was discussed with the help of *William Stanley v. State of Madhya Pradesh*, AIR 1956 SC 116; *Main Pal v. State of Haryana*, (2010) 10 SCC 130. The impacts of alterations and errors of "charge(s)"were discussed, which included protraction of trial, prolonged detention in prisons, loss of evidences, acquittals on technical grounds. Hence, it was adviced that abundant care and caution must be taken to avoid errors while framing "charge(s)" and "alteration of charge(s)".

Session-3: Appreciation of Evidence in Serious Offences

- *Assessing evidence in serious criminal offences – How to use/collect relevant information and the chain of appreciation of evidence.*
- *Oral & Circumstantial Evidence: A Reasonable doubt & proof beyond reasonable doubt*
- *Forensic and digital evidence*
- *Prospects of Artificial Intelligence (AI) in evidence*

Speakers: *Justice S. Nagamuthu and Justice P.N. Prakash*

The session commenced on the note that there is no distinction between serious and ordinary offences and it was underlined that virtually there is no classification on this point. A reference was made to Art. 21 of the Constitution to highlight that fair procedures and personal liberty has to be adhered, followed by the same standards and manner in which evidence is appreciated.

The admissibility of evidence whether it can be accepted or precluded has to be squared followed by the stages of appreciation. It was highlighted by the speaker that evidence can be accepted in respect of fact in issues and relevant facts considering the provision of Sec. 5 of the Indian Evidence Act. A reference was made to the interpretation clause whereby the word and expression "Proved", "Disproved" and "Not-Proved" were highlighted and discussed at length. The word "supposition" (supposition of a prudent man and probable supposition) was discussed by

illustrating different facts and situations. A reference was also made to Sec. 4 whereby the different rule of interpretation attached with the manifestation of – "May Presume", "Shall Presume" and "Conclusive Proof" was underlined. It is imperative to categorize that shall presume is the presumption of law and may presume is the presumption of fact. Similarly, the expression "Conclusive Proof" – used the word "declared" thereby the court shall on proof of the one fact, regards the other as proved.

During the course of discussion various facets of confession was discussed such as; oral and documented, judicial and extra-judicial confession - to abreast participants with the different methods of identification before placing any reliance upon an extra judicial confession. A reference was made to Sec. 24 of the Evidence Act, whereby the word "inducement", "threat or promise" along with the phrase "if the making of the confession appears to the court" was interpreted and discussed. It was suggested that even if there is slightest doubt about the voluntariness of the confession then it ought to be rejected. A reference was made to Sec. (s) 25, 26, 27 and 162 of the Evidence Act and Sec. 53 of the NDPS Act while elaborating the provisions relating to confession. Various landmark judgments on the subject were referred for discussion during the session such as *Charturbhuj Pandey and Others v. Collector Raigarh* (AIR 1969 Pg. 255) *Tofan Singh V. The State of Tamil Nadu* (Criminal App. No. 152 of 2013) and *Charan Singh v. State of Punjab* (1975 3 SCC pg. 39).

Session-4: Witness Protection and Victim Compensation in Serious Offences

- *Need for Witness protection and Victim Compensation*
- *Role of Judiciary in ensuring witness protection & Victim Compensation*
- *Witness protection scheme of 2018*

Speakers: *Justice Gita Mittal and Justice U.C. Dhyani*

The session threw light upon words of Jurist Jeremy Bentham that witness (es) are eyes and ears of justice delivery system and a criminal case is built on the edifice of evidence. When it comes to

protection of witness - eye witness (es) including victim need to be protected as they are most vulnerable and tend to turn hostile. The plight of witnesses right from the first day of prosecution evidence was highlighted. It was pointed out that repeated adjournments and apathy towards the witnesses have led to witnesses turning hostile. In this regard Sec 161 & Sec. 164 of the CrPC was referred. The session threw light upon the case of *Mahendra Chawla v. Union of India*, 2018 SCC Online SC 2678 which led to creation of the Witness Protection Scheme of 2018 and its implementation was discussed at length. Certain Acts which provide for protection of witness include Juvenile Justice Act, POCSO Act, National Investigation Agency Act, and Protection of Scheduled Caste & Scheduled Tribes Act were highlighted. It was pointed out that Indian Penal Code itself provides criminal intimidation of witness punishable with 7 years of imprisonment. It was underlined that a person who is capable of perceiving the facts can only testify before the court of law. The session further included discussion on whether the Witness Protection Scheme of 2018 is complete in all respects and if not, how to come up to expected standards of witness protection. It was suggested that while awarding compensation to victim(s) court have to be proactive and not reactive. In this regard the provisions of Sec 357A of CrPC and guidelines given by courts through judgments were highlighted.

Further, it was pointed out that witness has not been defined anywhere neither in CrPC nor in the Evidence Act. Sec 311 CrPC and Sec 118 of the Indian Evidence Act were referred to in this regard. The case of *Neelam Katara v. Union of India,* ILR 2003 II Del 377 was referred whereby, the witness was judicially defined. An emphasis was made on who is considered as vulnerable witness such as child witness, victims of sexual offence & victims and witness in dangerous crimes was identified and highlighted. It was stated that in case of child witness it is important to minimize secondary victimization keeping in mind the unique requirements of language, memory, cultural context and environment. Some important judicial decisions on the need for a witness protection scheme discussed at length included *NHRC v. State of Gujarat,* 2009 6 SCC 767; *Zahira Habibullah H. Sheikh vs. State of Gujarat,* (2004) 4 SCC 158; On the conduct of accused and bail conditions the case of *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Anr*, (2004) 7 SCC 528 was referred. With regard to victim of sexual offence *Delhi Domestic - Working Women's forum vs. UOI,* (1995) 1 SCC 14 was mentioned. Some other judgements highlighted during the session included *Sakshi v. UOI,* (2004) Supp (2) SCR 723; On Judicial recognition of UN Guidelines - *State vs. Sujith Kumar,* 2014 Delhi High Court; on Child Victim of Sexual Offences

– *Virendra v. State of NCT Delhi*, Crl.A.No 121/2008 was mentioned. The international perspective on victim compensation was also deliberated upon. On concerns for victims the following cases were mentioned - *Karan v. State of NCT of Delhi*, Crl.A. 352/2020, *and Vikas Yadav v. State of UP*, Crl.A.No. 910/2008.