

**WORKSHOP FOR PRINCIPAL DISTRICT & SESSIONS JUDGES ON
ADJUDICATING TERRORISM CASES (P-1283)**

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The National Judicial Academy, Bhopal organized a two day Online Workshop for Principal District & Sessions Judges on Adjudicating Terrorism Cases on 19th & 20th February, 2022. The workshop provided a platform for participant judges to deliberate upon, share experiences, insights on the adjudication of terrorism cases. The workshop facilitated transmission of knowledge and skills towards better, speedier and quality adjudication in terrorism & related cases. The discussions were guided by eight Hon'ble High Court Justices who were trained as master trainers in the collaborative programme of NJA with the Federal Judicial Center, Washington D.C. and the CEELI Institute, Prague.

In the introductory session Justice A P Sahi, Director NJA explained the background theme of the seminar and stressed its importance in the contemporary times. Speaker for session on ***Laws Relating to Terrorism Cases*** then took over and gave brief overview of all the legislations relating to terrorism laws in India which included – substantive laws like Unlawful Activities Prevention Act, National Investigating Agency Act, National Security Act, NDPS Act, Prevention of Money Laundering Act, MCOCA etc. and procedural laws like The Code of Criminal Procedure, 1973 (CrPC), Indian Evidence Act (IEA), IT Act etc. He also enumerated the nine Good Practices for the Judiciary in Adjudicating Terrorism Offences as provided in The Hague Memorandum viz. trained judges, continuous trials and effective management of trial, witness and court protection etc. He also explained the definition of terrorist act as provided under UAP Act with relevant cases like *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602; *Seeni Nainar Mohammed v. State*, (2017) 13 SCC 685; *Arup Bhuyan v. State* (2011)3 SCC 377; *India Das v. State* (2011)3 SCC 380; & *Thwaha Fasal v. Union of India*, (Crl Appeal No. 1302 of 2021). He also discussed the provisions under IPC like sedition and its relevance to terrorism trials. The nuances of bail including anticipatory bail, pre-trial stages, recording and appreciation of evidence & evidentiary presumptions and its rebuttal in terrorism cases were explained in detail with the help of relevant precedents viz. *Prakash Kumar v. State of Gujarat* 2005 (2) SCC 409; *Yakub Abdul Razak Memon v. State of*

Maharashtra, (2013) 13 SCC 1; *Surinder Kumar Khanna v. IO, DIR of Revenue Intelligence* (2018) 8 SCC 271; and *Noor Aga v. State of Punjab & Anr* (2008) 16 SCC 417. Emphasis was placed on the need to have robust witness protection in terrorism trials.

Second session was themed at ***Framing of Charges and Unique Features of Terrorism Trials***. At the outset speaker stressed on the importance of good practice no. 5 in Hague Memorandum relating to fair trial of accused of terrorism. The relevance of Hague Memorandum and rights enumerated in Universal Declaration of Human Rights (UDHR) & International Covenant on Civil and Political Rights (ICCPR) as regards trial of accused under terrorist acts was explained in brief. Speaker also discussed various bottlenecks that judge may face in terrorism trials that included misbehaviour by the accused, non-engagement of lawyer or frequent changes in lawyers, refusal to answer by accused, etc. He stressed on the participants that appropriate framing of charge is pivotal in terrorism trial as it put accused to full notice of what he has to defend. He also discussed the roles of various stakeholders *viz.* lawyers, prosecutor, investigators, judges etc. in terrorism trials. Recording of evidence in absence of accused, especially relevant when some accused in terror attack are apprehended and some are absconding, and procedural and evidentiary issues attached to it were discussed in great details with special reference to Section 299 of the CrPC.

On the theme ***Case Management in Terrorism Cases and Offences against National Security***, speaker discussed various facets of case management *viz.* Judicial leadership, Time schedule, Continuous trial, Managing Evidentiary issues, Potential delays, Courtroom technology, and Guidelines in the Hague Memorandum. On judicial leadership it was stressed on the participants that judge trying the terrorism case should hold absolute control of the proceedings before him, he should have mastery over the nuances on substantive and procedural law and shall also have knowledge of the latest judicial pronouncement on the topic. It was also emphasized on the participants that continuous trial is the *sine qua non* for every criminal trial and it is more so in terrorism trials given its unique nature. Participants were cautioned about the potential delays and delaying tactics of the stakeholders and provided with solutions to deal with it like use of courtroom technology for recording evidence, service of summons, dictating orders etc. It was suggested that many times reserving orders also adds to the delay in trials so judges should strive to pass orders on interim applications as expeditiously as possible. The practice of reserving the orders should be deprecated. At the end of the session guidelines

provided in Hague Memorandum relating to terrorism trials were emphasized on the participants.

Fourth session was themed as *Fair Trial*. Speaker for the session opened the session stating that Open Trial, Impartial Judges and proceeding where all parties are treated equally are the basic elements of every criminal trial. On the concept of open trial he emphasized the participants that as a general rule all criminal trials including trials should be conducted in an open court, unless for reasons to be recorded judge decides to hold in-camera trial. In short, open trial should be the rule and in-camera trial an exception. He said open trial is the foundation of fair trial as the sun is considered as a best disinfectant. As regards the impartial judge, it was suggested that everybody has some biases conscious and sub-conscious but as judge one has to be aware of these biases and shall strive to overcome it consciously. He further discussed the importance of equal access to justice to both the parties as one of the basic element of fair trial. For any civilization, equal access to justice is very important and accused in a criminal trial is more in need of it to fight for his defence against the might of the state. He also enumerated various other important facets of fair trial viz. presumption of innocence, speedy trial, open hearing, right to cross examination and right to counsel, right against self-incrimination, rule of *audi alteram partem* etc. referring to various International documents viz. UDHR, ICCPR etc. and national laws like Constitution of India (Art. 20, 21 etc.), CrPC etc. He concluded the session citing the importance of fair trial to terrorist accused as terrorism trial has much of media attention, public perception is high, and internationally also it is important to display the credibility of justice system.

On the theme *Evidence, MLAT and Extradition*, the distinction between normal offences and terrorism crimes was drawn. The various types of evidence in terrorism cases were highlighted. The participants were advised to ensure the following at the stage of assessment of evidence -

- Do not mechanically take cognizance without careful scrutiny of the charge sheet.
- If evidence is inadequate, proceed under Section 156(3) Cr.P.C.
- Confer with the Public Prosecutor to see if potential witnesses are being sent up trial as accused. The degree of involvement of the persons must be scrutinised.
- While ordering further investigation, order sheet ideally must disclose that cognizance has not been taken.

The admissibility of evidence collected through interception of communication as per Section 46, UAPA was discussed. With regard to evidence during trial, emphasis was placed on timely recording of evidence and minimisation of delays. The participants were advised to examine the material witness and record their evidence at the earliest. Further, the dates for recording evidence for prosecution be fixed in consultation with the prosecutor and defence counsel, and excessive latitude should not be given to the defence at this stage. In case of adjournment requests by the defence for cross-examination, the shortest possible date must be given in order to ensure that the witness is not suborned. Emphasis was also placed on maintaining proper chain of custody of material objects. Mutual Legal Assistance Treaty (MLAT) and its purposes and uses in accessing evidence in other countries were explained. The participants were made aware of Section 166-A Cr.P.C. which empowers the court to seek information from other countries through the issuance of Letters Rogatory. A distinction was drawn between MLAT and extradition.

In the session on ***Digital Evidence***, it was stated that the fragility, intangibility, volatility of electronic evidence makes it unique, thereby requiring special tools for extraction, collection and preservation. The discussions focussed on crucial aspects in the collection of evidence including maintaining chain of custody, transfer documentation, verified data extraction and maintenance of administrative records of the collection and storage of evidence. Emphasis was placed on the maintenance and verification of the integrity of the digital evidence to ensure that the same is not altered or destroyed. Maintenance of chain of custody was stressed upon and the participants were advised to ensure that the evidence is accompanied with the chain of custody forms, and to establish integrity of seized evidence through forensically proven procedure of hashing. Reliability of digital evidence was stated to be a pre-requisite for the admissibility of evidence, and the reliability test laid down in *Daubert v Merrel-Dow* [509 US 579 (1993)] was discussed. Reference was made to *Selvi v. State of Karnataka* [(2010) 7 SCC 263] and *Kumho Tire Company Ltd. v Carmichael* [119 S. Ct. 1167 (1999)]. The myth of primary and secondary evidence in digital evidence was highlighted. Discussion was undertaken on Section 65B, IEA and the implications of the judgment in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others* [(2020) 7 SCC 1]. In the course of the discussions, reference was made to the judgments in *P. Gopalakrishnan @ Dileep v. State of Kerala* [(2020) 9 SCC 161], *Lokayukta, Police Station Bengaluru v Hiremath* [(2019) 7 SCC 515].

On the theme *Judicial and Courtroom Security*, the need for judicial and courtroom security and the role of the judge as a facilitator in ensuring courtroom security were highlighted. Emphasis was placed on continuous supervision and review of court security plans to assess and reassess stakeholder vulnerability and emerging exigencies requiring review of security plans. The King County courthouse security arrangement and the security arrangements at High Court of Andhra Pradesh at Amaravati were highlighted as best practices. It was stated that a model security plan must provide for surveillance of court precincts, security of court rooms and judge's chambers, establishment of security control room, provision of security to judges beyond court premises, and protection of witnesses. Measures to provide security to judges beyond the court precincts were highlighted. Protection of witnesses and measures provided under Section 44 of UAPA for protection of witnesses were discussed. Measures emphasised in the discussion include –

- Regular and periodic patrol of court precincts
- Provision of sufficient lighting of court perimeter
- Installation of CCTV cameras, metal detectors, screening wards and explosive trace detectors
- Regulation of entry by issuing authenticated cards to judges, court staff and legal professionals, and daily gate passes to visitors
- Review of landscaping to eliminate sheltered spots which may be used to launch an attack
- Provision of proper security arrangements to escort accused to and from the courtroom
- Provision of a security alarm underneath the judge's desk.
- Establishment of a security control room
- Establishment of a Security and Witness Protection Committee be set up in every district
- Setting up of a Witness Protection Fund in collaboration with the State/Union Territory and a Witness Protection Cell in collaboration with the police administration.

On the theme *Managing Media in Adjudicating Terrorism Cases*, emphasis was placed on eliminating distractions in judicial proceedings and ensuring safety of the stakeholders and court personnel. The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences was discussed as a standard for adjudication of terrorism cases. Emphasis was placed on Section 44(3)(d) of UAPA which empowers the court to order that all or any of

the proceedings pending before such a court shall not be published in any manner. The judicial measures employed to control prejudice and to ensure fair trial were discussed. Gag orders were stated to be one of the strictest devices available to curtail potentially prejudicial media coverage. Reference was made to the judgments in *K. Anbazhagan v. Superintendent of Police and Ors.* [(2004) 3 SCC 767] and *Nebraska Press Association v. Stuart* [427 U.S. 539 (1976)]. Emphasis was placed on the need for balance between transparency and accessibility to information of court proceedings and restrictions in the interests of fair trial. In this context, it was stated that the media plays the role of providing information and acts as a check against miscarriage of justice. The potential ways by which media coverage impacts fair trial were discussed with reference to the 200th report of the Law Commission of India. The need for assessing the balance of convenience was emphasised citing *Reliance Petrochemicals v. Proprietors of Indian Express Newspapers* [(1988) 4 SCC 592] and *Sahara India Real Estate Corp. v. Securities and Exchange Board of India* [(2012) 10 SCC 603]. Sub-conscious bias due to media coverage and the impact of media coverage on the judicial mind were discussed at length. Reference was made to *Attorney General v. British Broadcasting Corporation* [1981 AC 303 (HL)] and *John D. Pennekamp v. State of Florida* [(1946) 328 US 331]. Section 2 (c) of the Contempt of Courts Act, 1971 was discussed.
