LAWS RELATING TO TERRORISM CASES

JUSTICE N. KOTISWAR SINGH
Judge, Gauhati High Court

- Important facets of Indian law (substantive and procedural), concerning terrorism related cases.

- Insight into differences between ordinary criminal laws (substantive and procedure) and laws specifically governing terrorism and terrorism -related cases; peculiarities and the significance of the latter.

International Response To Terrorism

UN General Assembly :

- Resolution 60/288 of 8 September, 2006
- Resolution 72/284 of 26 June, 2018
- Reaffirmed by Resolution on 75/291 of 30 June, 2021

Global Counter Terrorism Forum

- Founded in 2011 with 30 country members including India
- Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector
- The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences

The Hague Memorandum

Good Practices for the Judiciary in Adjudicating Terrorism Offences:

1 Identify and Assign Specially Trained Judges.

2: Support the Use of Continuous Trials in Terrorism and other National Security Cases.

3: Develop Effective Trial Management Standards.

4: Support Special Measures to Protect Victims and Witnesses in the Trial Process.

5: Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation.

6: Support the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods.

7: Contribute to the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security.

8: Develop and Articulate Media Guidelines for the Court and Parties.

Cr.P.C, Indian Penal Code and Evidence Act
Trinity of the Criminal Justice System in India

- The Code of Criminal Procedure, 1973 provides the procedural backbone of the criminal justice system in this country. In it one finds the consolidated law relating to procedures to be followed by the authorities including the courts whenever the criminal justice system is activated, right from the stage of filing of complaint till its culmination with trial and conviction and imposition of punishment and all the incidental matters.
- Section 4 (1) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of the Code.
- **Section 4(2) of the Code further provides that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or face of investigating, inquiring into, trying or otherwise dealing with such offence.**
- Section 5 of the Code also provides that nothing contained in the Code shall, in absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Central Acts:

TADA ✗	• Lapsed [1985-1995]
POTA ✗	• Repealed [2002 – 2004]
UA (P) Act	• Unlawful Activities (Prevention) Act, 1967 • Amendments in the years - ***2004, 2008*** and ***2013***
NIA Act	• National Investigating Agency Act, 2008

STATE ACTS :

MCOCA	• Maharashtra Control of Organised Crime Act, 1999
CVJSA	• Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005 (Chhattisgarh Special Public Safety Act)
KCOKA	• Karnataka Control of Organised Crime Act 2000
GCTOCA	• Gujarat Control of Terrorism and Organized Crime Act 2015

State Acts addresses a broader range of criminal activities or organised crimes, as unlawful activities.

Domestic laws :: Terrorism cases

1. Unlawful Activities (Prevention) Act, 1967
2. Prevention of Money Laundering Act, 2002
3. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
4. The Narcotic Drugs and Psychotropic Substances Act, 1985
5. Maharashtra Control of Organised Crime Act, 1999
6. National Investigation Agency Act, 2008
7. Information Technology Act 2000
8. Passports Act, 1967
9. Arms Act, 1959
10. Explosive Substances Act, 1908
11. Extradition Act, 1962
12. Prevention of Seditious Meetings Act, 1911
13. Foreigners Act 1946
14. National Security Act, 1980
15. The Preventive Detention Act (PDA), 1950

Schedule to the NIA Act

- 1. The Atomic Energy Act, 1962
- 2. The Unlawful Activities (Prevention) Act, 1967
- 3. The Anti-Hijacking Act, 1982
- 4. The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982
- 5. The SAARC Convention (Suppression of Terrorism) Act, 1993
- 6. The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002
- 7. The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005
- 8. Offences under—(a) Chapter VI of the Indian Penal Code (45 of 1860) [sections 121 to 130 (both inclusive)]

  --- (b) Sections 489-A to 489-E (both inclusive) of the Indian Penal Code(45 of 1860).

Terrorist Act :: Definition

15. Terrorist act (UAP Act) -- Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause—

(i) death of, or injuries to, any person or persons;

or

(ii) loss of, or damage to, or destruction of, property;

or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country;

or

(iii-a) damage to, the monetary stability of India by way of production or smuggling or circulation of high-quality counterfeit Indian paper currency, coin or of any other material;

or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies;

or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or 6[an international or inter-governmental organization or any other person to do or abstain from doing any act; or], commits a terrorist act.

General Assembly Resolution 49/60:

- “Acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”

Unlawful Activities (Prevention) Act, 1967

- **Presently, the Principal Statute dealing with terrorist related cases.**
- **Amendments in UA(P)A in the years - 2004, 2008 and 2013.**
- **Important facets –**

Sec 15

- *Defines* : **Terrorist act:** Amendment Act 2013- Added : "***intent*** to threaten economic security of India"

Sec 17 & Sec 40

- Generating & raising funds for terrorist act and terrorist organisations.

Sec 20 & Sec 38

- Any person who is a "**member**" of a terrorist gang or terrorist organisation is liable for imprisonment. ***Arup Bhuyan Vs. State (2011)3 SCC 377; India Das Vs State (2011)3 SCC 380.*** This issue has been referred to a larger bench in 2015.
- ***Thwaha Fasal Vs UOI, Crl Appeal No. 1302 of 2021 :*** intention to further activities of a terrorist organization is essential ingredient for offences under Sec 38 and 39.

Sec 35 & Sec 36

- **By 2019 Amendment Act-** Central Govt. conferred power to designate "**individual**" as terrorist. [Constitutional validity challenged in the Supreme Court]

Unlawful Activities (Prevention) Act, 1967

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- **Important facets –**

Sec 43C, 43 (D)	• S. 43C: Application of provisions of the Code • S. 43D: Modified application of certain provisions of the Code [Bail & Remand]
Sec 44	• Protection of Witnesses: **Sect. 17 of the NIA Act** [For reasons to be recorded in writing]
Sec 45	• Cognizance of Offences/Prosecution Sanction
Sec 43E, 46	• Presumption as to offences under Section 15 • Admissibility of evidence collected through interception of communications
Sec 48	• Effect of the Act & rules etc. inconsistent with other enactments.

Terrorist Act :: Meaning :: Sec. 15 UAP Act

Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602

- *7. ……"Terrorism" has not been defined under TADA nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. …. the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity.*
- *……What distinguishes "terrorism" from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation.*
- *……Every "terrorist" may be a criminal but every criminal cannot be given the label of a "terrorist" only to set in motion the more stringent provisions of TADA. The criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by Section 3(1) of the Act by use of such weapons as have been enumerated.*

Seeni Nainar Mohammed v. State, (2017) 13 SCC 685

- 20. We would, therefore, make it abundantly clear that these relied upon cases do not help the respondent to make a case under the provisions of TADA in the **absence of intention** to cause terror in the minds of the people or strike on them with terror.

Membership of Terrorist Organisation :: Sec. 38 UAP Act

Thwaha Fasal v. Union of India; 2021 SCC OnLine SC 1000

- Para 13. ....The person committing an offence under Section 38 may be a member of a terrorist organization or he may not be a member. If the accused is a member of terrorist organisation which indulges in terrorist act covered by Section 15, stringent offence under Section 20 may be attracted.
- .....If the accused is associated with a terrorist organisation, the offence punishable under Section 38 relating to membership of a terrorist organisation is attracted only if he associates with terrorist organisation or professes to be associated with a terrorist organisation with intention to further its activities.
- .....The association must be with intention to further the activities of a terrorist organisation. The activity has to be in connection with terrorist act as defined in Section 15.

Section 48 of UAP Act

Section 48 of UAP Act:

The provisions of this Act or any rule or order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

Section 1 (4) of the JJ (C & P C) Act, 2015:

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including --

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

Section 48 of UAP Act

Question: Does it have the effect of overriding the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, if a juvenile is charged under the UAP Act?

Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1

1555. Thus, we do not think that the JJ Act would have an overriding effect on TADA which was not in existence on the date of commencement of the provisions of Section 1(4) of the JJ Act.
1556. TADA, being a special Act, meant to curb the menace of terrorist and disruptive activities will have effect notwithstanding the fact that the JJ Act is general and beneficial legislation. On perusal of aims and objects of TADA, it is clear that the act is brought into the statute books to deal with a special category of persons viz. terrorists.

Waging War :: Section 121 IPC

Nazir Khan v. State of Delhi, (2003) 8 SCC 461 : 2003 SCC (Cri) 2033 :

> … in order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have…….. used the rifles and ammunition so obtained against the government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposit**ion……**

State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 :

- (1) The most important is the intention or purpose behind the defiance or rising against the Government
- (2) If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war.
- (3) Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

Waging War :: Section 121 IPC

(5) The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties, etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives.

(6) The expression “waging war” should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression “waging war” irrespective of how it was viewed in the long long past.

(7) The single most important factor which impels us to think that this is a case of waging or attempting to wage war against the Government of India is the target of attack chosen by the slain terrorists and conspirators and the immediate objective sought to be achieved thereby. ..The target chosen was Parliament - a symbol of the sovereignty of the Indian republic.

Waging War :: Section 121 IPC

Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1

- **(1) The expression "Government of India" is surely not used in this narrow and restricted sense in Section 121. It implies the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people.**
- **(2) Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.**
- **Terrorist acts and the acts of waging war have overlapping features. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by Section 121-A."**
- **What matters is that the attack was aimed at India and Indians. It was by foreign nationals. People were killed for no other reason than they were Indians; in case of foreigners, they were killed because their killing on Indian soil would embarrass India. The conspiracy, in furtherance of which the attack was made, was, inter alia, to hit at India; to hit at its financial centre; to try to give rise to communal tensions and create internal strife and insurgency; to demand that India should withdraw from Kashmir; and to dictate its relations with other countries. It was in furtherance of those objectives that the attack was made, causing the loss of a large number of people and injury to an even greater number of people. Nothing could have been more "in like manner and by like means as a foreign enemy would do".**

Sedition :: Section 124A IPC

Kedar Nath Singh v. State of Bihar, 1962 Supp (2) SCR 769 : AIR 1962 SC 955

- .....The *ratio decidendi* in that case, in our opinion, applied to the case in hand insofar as we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace.

***Kishorechandra Wangkhemcha v. Union of India*, (2021) 6 SCC 177**

- **Notice issued for reconsideration of the** *Kedar Nath Singh* v. *State of Bihar* [Supra]

Nazir Khan v. State of Delhi, (2003) 8 SCC 461 :

- 37. .....Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the country. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. "Sedition" has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disord

Sedition :: Section 124A IPC

Vinod Dua v. Union of India 2021 SCC OnLine SC 414,

- decided on June 3, 2021
- **[Para 69].** In our view, the statements by the petitioner ……., if read in the light of the principles emanating from the decision in *Kedar Nath Singh* and against the backdrop of the circumstances when they were made,
- can at best be termed as expression of disapprobation of actions of the Government and its functionaries so that prevailing situation could be addressed quickly and efficiently.
- They were certainly not made with the intent to incite people or showed tendency to create disorder or disturbance of public peace by resort to violence.

National Investigation Agency Act, 2008

- The Act empowers the ***Central Government*** to constitute a special agency to be called the National Investigation Agency for investigation and prosecution of offences specified in the schedule to the Act.

- The Schedule to the Act includes offences under the UAPA Act, Chapter VI of the Indian Penal Code.

- **Unique feature** – The Central Govt. u/s 6(4) and 6(5) of the Act , if is of the opinion that a Schedule offence is required to be investigated under this Act, it may, suo motto, direct the Agency to investigate the same and, whereafter, the State u/s 6(6) is to transmit the records to the NIA and not proceed with investigation.

*[Constitutional validity of the provisions of the Act challenged in the Supreme Court of India by the State of Chhattisgarh]

- The Full Bench of Patna High Court in ***Bahadur Kora vs. State of Bihar, 2015 Cri LJ 2134 (FB)*** after delineating the purpose and the objective of the law and interpreting Section 22 in the light of the procedures to be followed under Sections 6 and 7 of the Act, rejected the opinion held in ***Aasif, P.K. Vs. State of Bihar, 2015(1)PLJR 1017*** *case*.
- The Court observed that the objective of the NIA Act is not to make the Scheduled Offences triable "invariably and exclusively" under the NIA Act or the Special Courts constituted under it. It is only when the offences are entrusted for an investigation to the NIA that they become triable by the Special Courts. The role and purpose of Section 22 of the Act stems from Section 7 of the Act. Section 7(b) gives discretion to the NIA to transfer the case to the state government for investigation and trial of the offence, with the previous approval of the Central Government.
- Therefore, the state government can conduct the investigation and trial of the case under the NIA Act only if Section 7(b) is invoked. Otherwise, the state government or its investigating agency does not have any authority or discretion to choose or pick up cases, in which the Scheduled Offences have been alleged, for investigation under the NIA Act.
- **The judgment in *Bahadur Kora* was not challenged before the Supreme Court of India.**
- In an appeal under Section 21(4) before the Division Bench of the Rajasthan High Court, ***Jagdish Singh Vs. State of Rajasthan, 2016 SCC OnLine Raj 5312,*** NIA submitted that the NIA had accepted the *Bahadur Kora* judgment as the correct position of law.
- Thus, the NIA accepted that unless the investigation of a matter was entrusted to the NIA or the NIA transferred the same to the state investigating agency, the state investigating agency did not get the power to investigate or try the matter in accordance with the provisions of the NIA Act.

Court's Role :: Important areas

1. Pretrial	(I) INVESTIGATION
	(II) BAIL/REMAND
2. Trial	Appreciation of Evidence
	CONFESSION : RETRACTION : USE AGAINST CO -ACCUSED : ADMISSIBILITY : DISCOVERY
3. Sentencing	

INVESTIGATION

Sec 154 – Sec 173 CrPC

Role and Duties of Magistrates during investigation.

Vinubhai Haribhai Malaviya v. State of Gujarat
(2019) 17 SCC 1

Judicial Pronouncement

* **Sec 156(3) & Sec 173(8) CrPC :** Magistrate has supervisory power to ensure proper and fair investigation. Such power flows from Article 21 of the Constitution of India.
* Such power can be exercised at a stage prior to commencement of trial. Trial means after framing of charge. [**Para 27**]
* Magistrate has the power to suo motu direct further investigation.

Pre-trial stages

ARREST

- 43A of the UAP Act, inserted in 2008.

ARREST/SUMMONS TO A PERSON/ACCUSED IN A FOREIGN COUNTRY

- Section 105 Cr.P.C.
- Sections 105A to 105L Cr.P.C.
- Guidelines on Mutual Legal Assistance in Criminal Matters

43C: Provisions of the CrPC shall apply unless inconsistent with the provisions of the UAP Act to all arrests, searches and seizures under the Act.

ANTICIPATORY BAIL

Sec 438 (1) CrPC

- When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

Sec 43 D – UA (P) Act

- **No Anticipatory Bail** for offences under the UA (P) Act.

BAIL

Sec 439 CrPC

- A High Court or Court of Session may direct that any person accused of an offence and in custody be released on bail.

Sec 43-D of UA (P) Act

- Power substantially circumscribed.

Sec 43-D (5) of UA (P) Act

- **Notwithstanding anything contained in the Code…….**
- **Bail can be denied if the Court believes that the accusation made against the accused is *prima facie* true.**
- **The court must take care that the power of the court to grant bail should not be stretched too far.**
- ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294***
- ***NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.*** **[Not to hold a mini trial, examine totality of the report under Sec 173 CrPC and accompanying documents and evidences before the court wether the accusations are prima facie true or not]**
- ***Union of India v. K.A. Najeeb, (2021) 3 SCC 713.*** **[Long incarceration and unlikelihood of trial being completed in near future can be a ground of bail]**

Release on bail under UA (P) Act has been made more difficult

Sec 43 D (2)	• Period under Sec. 167 Cr.P.C. increased to 90 days – then to 180 days.
Sec 43 D (2) 2nd Proviso	• Police custody of an accused already under judicial custody is permissible on application supported by affidavit.
Sec 43 D (4)	• No anticipatory bail.
Sec 43 D (7)	• No bail for non Indian citizen entering the country unauthorizedly or illegally.

BAIL
Judicial Pronouncements

Shaheen Welfare Association versus Union of India, (1996) 2 SCC 616.

Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC

NIA versus Zahoor Ahmed Shah Watali, (2019) 5 SCC 1.

Union of India v. K.A. Najeeb, (2021) 3 SCC 713:

Thwaha Fasal v. Union of India, 2021 SCC Online SC 1000

Iqbal Ahmed Kabir Ahmed vs. The State of Maharashtra (Cril Appeal No.355 OF 20210 : Bombay High Court: DOJ 13 August 2021.

[Under TADA]

Shaheen Welfare Association versus Union of India (1996) 2 SCC 616.

[Para 13, 14, 16]

--- Classification of undertrials into 3 categories:

(a) hardcore undertrials

(b) acts/involvement Section 3 and/or 4 of the TADA Act :

(c) roped in, not directly attracting Section 3 and/or 4 of the TADA Act

(d) who are in position of incriminating articles in notified areas and booked under Section 5 of TADA

Bail can be grated to

(b) if in detention for 5 yrs or more + Rs.50000

(c) if in detention for 3 yrs + Rs3000

(d) if in detention for 2 yrs + Rs3000

- **Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 [Under MCOCA]**

- "**35.** Presumption of innocence is a human right…… Sub-section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. ……
- **36.** Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?
- **37.** Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.
- **38.** We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. …... The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA.
- **44.** The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. …….
- **46.** The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

NIA versus Zahoor Ahmed Shah Watali, (2019) 5 SCC 1. [Under UAP Act]

- **23.** By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "*prima facie*" true. By its very nature, the expression "*prima facie* true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "*prima facie* true", as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. Nevertheless, we may take guidance from the exposition in *Ranjitsing Brahmajeetsing Sharma*12, wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paras 36 to 38, the Court observed thus: (SCC pp. 316-17).....
- **24.** A priori, the exercise to be undertaken by the Court at this stage—of giving reasons for grant or non-grant of bail—is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.
- **32.** Accordingly, we have analysed the matter not only in light of the accusations in the FIR and the charge-sheet or the police report made under Section 173, but also the documentary evidence and statements of the prospective witnesses recorded under Sections 161 and 164, including the redacted statements of the protected witnesses, for considering the prayer for bail.

Union of India v. K.A. Najeeb, (2021) 3 SCC 713: [Under UAP Act]

[On speedy trial: Sec 43D less stringent: Constitutional power]

15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)* v. *Union of India*15, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

- **19.** Yet another reason which persuades us to enlarge the respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D(5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion, etc.

Thwaha Fasal v. Union of India, 2021 SCC Online SC 1000 [Under UAP Act]

34. Now the question is whether on the basis of the materials forming part of the charge sheet, there are reasonable grounds for believing that accusation of commission of offences under Sections 38 and 39 against the accused nos.1 and 2 is true. As held earlier, mere association with a terrorist organisation is not sufficient to attract Section 38 and mere support given to a terrorist organisation is not sufficient to attract Section 39. The association and the support have to be with intention of furthering the activities of a terrorist organisation. In a given case, such intention can be inferred from the overt acts or acts of active participation of the accused in the activities of a terrorist organization which are borne out from the materials forming a part of charge sheet. At formative young age, the accused nos.1 and 2 might have been fascinated by what is propagated by CPI (Maoist). Therefore, they may be in possession of various documents/books concerning CPI (Maoist) in soft or hard form. Apart from the allegation that certain photographs showing that the accused participated in a protest/gathering organised by an organisation allegedly linked with CPI (Maoist), prima facie there is no material in the charge sheet to project active participation of the accused nos.1 and 2 in the activities of CPI (Maoist) from which even an inference can be drawn that there was an intention on their part of furthering the activities or terrorist acts of the terrorist organisation. An allegation is made that they were found in the company of the accused no.3 on 30th November, 2019. That itself may not be sufficient to infer the presence of intention. But that is not sufficient at this stage to draw an inference of presence of intention on their part which is an ingredient of Sections 38 and 39 of the 1967 Act. Apart from the fact that overt acts on their part for showing the presence of the required intention or state of mind are not borne out from the charge sheet, prima facie, their constant association or support of the organization for a long period of time is not borne out from the charge sheet.

36. .....By applying the law laid down in the case of Watali (supra), there were no reasonable grounds for believing that the accusations against the accused nos.1 and 2 of commission of offences under Sections 38 and 39 were prima facie true.

Iqbal Ahmed Kabir Ahmed vs. The State of Maharashtra (Cril Appeal No.355 OF 20210 : Bombay High Court: DOJ 13 August 2021. [Under UAP Act]

28. In our considered opinion, if the expression, "reasonable grounds to believe that the accusation is prima facie true" and "reasonable grounds for believing that the accused is not guilty" are compared and contrasted, a greater degree of satisfaction is required to record an opinion that there are reasonable grounds to believe that the accused is not guilty of the alleged offence, albeit prima facie. The restriction on grant of bail under the special enactments which provide for recording a satisfaction that there are reasonable grounds to believe that the accused is not guilty of the offences charged under those enactments, appears to be more stringent.

34. This takes us to the submission on behalf of the respondent that the fact that electric switch board in the house of the accused No. 3 was used to solder the material to prepare a bomb leads to no other inference than that of accused No. 3 being a confederate in the conspiracy to commit terrorist acts. Two factors are of critical signifcance. One, nothing incriminating has been recovered from the possession of the accused No. 3 in the context of charge of preparing IED. Two, the accused No. 3 has not been charged with the offence punishable under the Explosives Substances Act, 1908. The fact that the co-accused has pointed the switch board in the house of the accused, where the material was allegedly soldered, without seizure of any article or material therefrom, prima facie, may not amount to the discovery of a fact which distinctly relates to the said disclosure statement. Nor the said statement can be admitted against the accused No. 3, under sec.10 of the Evidence Act, as with the arrest of accused No. 1, the conspiracy came to an end. For these reasons, at this juncture, in our view, the alleged discovery can not be, prima facie, fastened against the appellant.

35. The upshot of aforesaid consideration is that the material which is pressed into service against the appellant, prima facie, does not appear to be of such quality as to sustain a reasonable belief that the accusation against the appellant is true. In the totality of the circumstances, the bar envisaged by section 43-D(5) may not operate with full force and vigor.

What is the difference between:

EXERCISE

UAP Act	MCOC Act	NDPS Act	POTA	TADA Act
Section 43-D:	Section 21 (4):	Section 49:	Section 37:	Section 20 (8):
….accused person shall not be released on bail ……if Court, on a perusal the of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the **accusation against such person is *prima facie* true.**	…… no person accused ……. shall, ……. be released on bail …….. unless…….. the Court is satisfied that there are **reasonable grounds for believing that he is not guilty of such offence** and that he is not likely to commit any offence while on bail.	…… no person accused of an offence punishable under this Act or any rule made there under shall be released on bail until the court is satisfied that there are grounds for **believing that he is not guilty** of committing such offence	….. shall be released …..the court is satisfied that there are reasonable grounds for believing that **he is not guilty of such offence** and that he is **not likely to commit any offence** while on bail	…… no person accused ……. shall, ……. be released on bail …….. unless…….. the Court is satisfied that there are **reasonable grounds for believing that he is not guilty of such offence** and that he is not likely to commit any offence while on bail.

Appreciation of evidence

Though the actual execution of the terrorist act may leave a heap of evidences, yet it is extremely difficult to get evidences about the plotting and conspiracy of such terrorist act, as these are done in utter secrecy.

The prosecution has to rely mostly on confessional statements, witnesses who turn approver as well as scientific and electronic evidence.

It is in this context that the trial court judges have to deal carefully with confessional statements.

Appreciation of evidence

Confession before police –

- MCOCA – Section 18 - Confession before police not below the rank of Superintendent of Police is admissible.

  [Guidelines :: ***Prakash Kumar v. State of Gujarat 2005 (2) SCC 409***]

- UAP Act – No such provision available.

Appreciation of evidence

LAW ON CONFESSION

A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.

An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession.

The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case.

When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. **Bombay Blast Case**: ***Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1 [Para 180-180.5]***

Retracted confession

- **Retracted confession,** however, stands on a slightly different footing.
- A court may take into account the retracted confession
- But it must **look for the reasons**
  - ✓(i) **for the making of the confession** as well as
  - ✓(ii) for its retraction, and
  - ✓(iii) ***must weigh the two*** **to determine** whether the retraction **affects the voluntary nature** of the confession or not.
- If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user.
- All the same, the courts do not act upon the retracted confession without ***finding assurance from some other sources*** as to the guilt of the accused.
- **Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true.** ***[Bharat v. State of U.P.*, (1971) 3 SCC 950]**

Retracted confession

- A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made.
- But it has been held that a court shall not base a conviction on such a confession without corroboration.
- It is not a rule of law, but is only rule of prudence.
- **General rule of practice** that it is **unsafe to rely upon a confession**, ***much less on a retracted confession***, unless the court is satisfied that the retracted confession is **true and voluntarily made** and has been **corroborated in material particulars**."
- **[*Pyare Lal Bhargava v. State of Rajasthan AIR 1963 SC 1094*]**

Corroboration of Retracted confession

There need not be meticulous examination of the entire material particulars.

It is enough that there is broad corroboration in conformity with the general trend of the confession.

As to the extent of corroboration required, each and every circumstance mentioned in the retracted confession regarding the complicity of the maker need not be separately and independently corroborated.

"It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession." [***Subramania Goundan Vs. State of Madras, 1958 SCR 428***]

Use of Retracted confession against a co-accused

A confession can only be used to "lend assurance to other evidence against a co-accused".

"…In dealing with a case against an accused person, the court cannot start with the confession of a co-accused person;

it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence,

then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."

CONFESSION OF CO-ACCUSED

Indian Evidence Act– Sec 30

When more persons than one are being **tried jointly for the same offence,** and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Evidentiary value

Confession of one accused cannot be treated as substantive evidence against his co-accused. Keeping excluded the confession of a co-accused, when the evidence, adduced on record, otherwise, satisfy the court of the guilt of the accused**, the confession of the co-accused can be used as an aid** for strengthening the conclusion.

Surinder Kumar Khanna v IO, DIR of Revenue Intelligence
(2018) 8 SCC 271

Judicial Pronouncement

[Para 12]: …in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30…

CONFESSION OF CO-ACCUSED

TADA - Sec 15 (1)

Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person **[or co-accused, abettor or conspirator]** for an offence under this Act or rules made thereunder

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

CONFESSION OF CO-ACCUSED

POTA - Sec 31 (1)

Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

Saquib Abdul Hameed Nachan v. State of Maharashtra – 2010 (3) SCC Crl 1146 - reiterated the decision in ***Navjot Sandhu's*** case [2005 (11) SCC 600] that confession /statement made u/s 32 of POTA by an accused person cannot be used as a piece of evidence for any purpose against the other co-accused.

Presumption

- **Section 111 A –Indian Evidence Act** - Applicable to disturbed areas.
- **Section 43 E of UAP Act** - Presumption unless the contrary is shown that the accused has committed terrorist act defined under section 15.
- **Section 17 of Maharashtra Control of Organized Crime Act, 1999** – Once possession is established, the burden is on the accused to show that he was not in conscious possession.
- *Where it is proves that the accused has kidnapped or abducted any person, the Special Court under the MCOCA Act shall presume that it was for ransom.*

REVERSE BURDEN OF PROOF

TADA Sec 21

Under section 21 of the Act, the person who is accused of committing a terrorist act where arms and explosives were recovered or provided financial assistance for the commission of the terrorist act, then the person shall be presumed to be guilty unless contrary is proved.

POTA Sec 53

Presumption as to offences under section 3.—**Similar as in TADA**

UA (P) Act Sec 43 E

Presumption as to offences under section 15. — Similar provision, with addition of the following : ….. (b) that by the evidence of the expert, the finger-prints of the accused or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence, *the Court shall presume, unless the contrary is shown, that the accused has committed such offence.*

Judicial Pronouncement

Noor Aga v State of Punjab & Anr (2008) 16 SCC 417

[Judgment delivered in context of Sec 35 and 54 of the NDPS Act, which also provides for presumption & reverse burden of proof]

42. The presumption raised in a case of this nature is one for shifting the burden subject to fulfilment of the conditions precedent therefor.

52. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution.

Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

54.....Provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.

Evidence of Accomplice

Section 133 Indian Evidence Act, Section 114 (b) Indian Evidence Act, Section 306 to 308 CrPC)

- Requires strict scrutiny.

Corroboration as Rule of Prudence is statutorily ordained

- ***Bhiva Doulu Patil v State of Maharashtra – AIR 1963 SC 599 [Para 7 at Page 601]***

Leading to Discovery

Section 27 of Indian Evidence Act:

Discovery of fact is distinguishable from material object/ things

- ***State of Maharashtra v Damu, (2000) 6 SCC 269***

Accused must be in direct or indirect custody of police at the time of making the statement

- ***Mohd. Inayatullah v. State of Maharashtra, (1976) 1 SCC 828***

Conspiracy

Section 10 – Indian Evidence Act:

Reasonable ground to believe that the conspirators have conspired.

Conspiracy must be to commit an offence or actionable wrong.

Standard of proof to hold that there is a conspiracy has to be beyond reasonable doubt.

Conspiracies are proved mostly by circumstantial evidence.

Section 120-A IPC – Defines Conspiracy

State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 [Para 69]

PROTECTION OF WITNESSES

- Sec 17 of the National Investigation Act, 2008
- Sec 44 of UAP Act.
- On 5th Dec, 2018, Hon'ble Supreme Court of India in *Mahendra Chawla and Others vs. Union of India and Others, (2019) 14 SCC 615*, approved the Centre's draft witness protection scheme and directed all the states to implement it until parliament comes out with a legislation.

WITNESS PROTECTION SCHEME:

Protection of Identity

During the course of investigation or trial or any offence, an application for seeking identity protection can be filed in the prescribed form before the competent authority , whereupon the threat analysis report will be called for, witness/family members/or any other person will be examined to ascertain whether there is necessity to pass an Identity Protection order.

Relocation of Witness

In appropriate case where there is a request from the witness and based on the Threat Analysis Report, a decision can be taken for relocation of the witness to a safer place, keeping in view the safety, welfare and wellbeing of the witness. The expenses will be borne from the Witness Protection Fund.

Monitoring and Review

Once protection order is passed, its implementation is to be monitored and reviewed in terms of the follow up report received from Witness Protection Cell.

NATIONAL JUDICIAL ACADEMY

धर्मेण धार्यते लोक