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(P-1284)

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE FOR ADDITIONAL DISTRICT AND SESSIONS JUDGES

(P-1284)

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The course was conceived to identify and address areas of adjudication that critically impact justice delivery at the District level. The course focused on cardinal aspects of a trial starting from institution to disposal and involved discussions to curb bottlenecks for quick and robust justice delivery. The course had provided a platform to share views and insights and get a better understanding of the intricacies and nuances of law relating to bail. The course further aimed to deliberate upon the nuances and contemporary application of the Alternative Dispute Resolution mechanism (ADR) to effectuate prompt settlement between parties.

Session 1 – Fair Session Trial

Speakers- Justice R. Basant & Justice Shalini S. P. Joshi

On the theme “*Fair Sessions Trial*”, it has been mentioned that the fair trial has its jurisprudence across the world from ancient times till modern times. A fair trial in the context of protecting fundamental rights in a democracy was discussed. It was highlighted that a fair trial must reflect fairness to all the stakeholders in a case. It was iterated that in the criminal trial there is unequal power relation. The accused is pressed against the most powerful machinery of the State. An individual against the State clearly shows the unbalanced status between the parties. Therefore, the principles of a fair trial were evolved. Further, a fair trial is a judicial process that is conducted fairly, justly, and with procedural regularity before an impartial judge. It was mentioned fair trial requires fairness at all stages namely; investigation, pre-trial, trial, and post-trial. It was highlighted that fair trial is the *sine qua non* of Article 21 of the Constitution of India. It is not only a fundamental right but also a human right. Imbalance in fair trial is considered a violation of Article 14 of the Constitution of India. Jurisprudentially, the principles of fair trial are contained in the Universal Declaration of Human Rights (UDHR) 1948. Attributes of fair trial like the

presumption of innocence, burden of proof, principles of natural justice, etc. were discussed during the discourse. Further, the rights of the accused to know the accusation, to defend, to be heard on bail, and on the question of sentences were also formed part of the discussion.

It was stressed that fair trial is not only for the accused but also for the victim and the society as a whole including witnesses as well. The State is responsible for protecting the citizen from external aggression and internal disturbances, especially from crime, and from the threat of crime. It was iterated that be it a traditionally conservative State or a modern, constitutional, democratic, republic, or socialist, the State must provide a crime-free State. Judiciary is a part of the sublime State and every stakeholder has a responsibility in achieving the objective of a crime-free state. It was opined that the function of a judge is not only to punish the guilty or exonerate the innocent but also to deter people from committing a crime. It was stated that the primary function of a trial is the adjudication of the guilt and identifying the nature or response for the crime. It was mentioned that the punishment of the guilty is as crucial as exonerating the innocent. The concepts on the burden of proof and presumption of innocence are the virtues equally to be pursued.

In *Zahira Habibulla H Sheikh and Anr v. State of Gujarat* (2004) 4 SCC 158, the Supreme Court mentioned that a trial must be before an impartial judge. It must be conducted by a fair prosecutor and in an atmosphere of judicial calm. Further, ample powers were given to the court to have a fair trial under Section 311, Section 313 of the Criminal Procedure Code (CrPC), and Section 165 of the Evidence Act. A reference was made to *Himanshu Singh Sabharwal v. The State of M.P. and Ors.* (2008) 3 SCC 602., wherein it was mentioned that witnesses are the eyes and ears of the justice, and if witnesses are incapacitated then the trial gets putrefied, paralyzed and it no longer can constitute a fair trial. In *P. Sanjeev Rao v. the State of A.P.* (2021) 7 SCC 56, it was held grant of the fairest opportunity to the accused to prove his innocence is the object of every fair trial.

Fairness of the trial has to be seen not only from the point of view of the accused but also from the point of view of the victim and society as held in *A.G. v. Shiv Kumar Yadav* (2016) 2 SCC 402.

Session 2 - Electronic Evidence: Protocols and Caution

Speakers- Justice Raja Vijayaraghavan V. & Dr. Debasis Nayak

On the theme “*Electronic Evidence: Protocols and Caution*”, information that is stored/transmitted electronically is said to be “digital” as it is broken down into digits namely binary units of '0s' and '1s' marked the beginning of the session. Further, digital evidence is data or information that exists in a digital format that can be relied upon and used in a court of law. It was mentioned that digital evidence is broadly categorized into two groups first, evidence from data at rest (obtained from any device that stores digital information), and second, data intercepted while being transmitted (interception of data transmission and communication). The fundamentals of investigation like tracking the physical location of the IP Address, identifying the suspect computer to which the IP addressed were allotted, etc. were touched upon. It was highlighted that digital evidence has a wider scope and can be more sensitive. It was iterated that digital devices are used as a tool, target, or both in the commission of a crime. It requires special tools to retrieve, requiring special precautions to properly collect, preserve, examine, and worth to be admissible in a court of law. The importance and uniqueness of digital evidence were also discussed during the discourse. It was stated that 'Volatile' evidence and 'Non-Volatile' evidence are the two major types of digital evidence. Metadata and Locard’s Exchange Principle were touched upon. The four forensic processes namely Identification and Collection, Analysis, Reporting, and Presentation, and how digital evidence documentation is prepared were deliberated upon. About the *Daubert v. Merrerl-Dow* 509 US 579 (1993), it was highlighted that judges should be the gatekeepers of the

scientific evidence and they must ensure that scientific evidence is not only relevant but also reliable. The integrity of digital evidence should be maintained starting from seizure till analysis.

The production of an electronic record as a piece of evidence in the court of law and its admissibility can only be made under Sections 65A and 65B of the Indian Evidence Act was discussed. In detail, the contours of Section 65B were discussed, including who is to issue the certificates and the nature of the certificates. The jurisprudential development of admissibility of electronic evidence under Section 65B of the Indian Evidence Act was discussed in detail concerning the judgments in *State v. Navjot Sandhu* (2005) 11 SCC 600, *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473, *Shafi Mohammed v. the State of Rajasthan* (2018) 2 SCC 801. In the recent judgment of *Arjun Panditrao Khotkar v. Kushanrao Gorantyal & Ors.* (2020) 3 SCC 216, When all the steps for obtaining the certificate have failed, then the obligation for production must be relieved. Additionally, it was stated that every case has to be determined individually. Lastly, the admissibility of WhatsApp messages, social media sites, CCTV footage, websites, and emails were discussed during the discourse. It was opined that the Indian judiciary though has come a long way in recognizing, accepting, appreciating, and assimilating the aspects of digital evidence, its importance and complexity but there remains a lot of challenges in the areas as technology keeps changing at a fast pace throwing up new challenges and the law has a rather slower pace in keeping abreast with.

Session 3 - Intricacies & Nuances of Law relating to Bail.

Speakers- Justice R. Basant & Mr. Sidharth Luthra

Session 3 which was on *Intricacies & Nuances of Law relating to Bail* emphasized on balancing personal liberty with societal interest. Curtailment of liberty was discussed in the light of Section

41 of CrPC. It was highlighted that consistency and uniformity in grant of bail is the need of the hour and the judge should not misuse their discretion while disposing off the bail application. It was delineated that the importance of constitutional values of freedom and liberty should not be forgotten and presumption of innocence should be kept in mind until and unless the accused is found guilty. Judicial officers should ensure that the fundamental constitutional rights of liberty are protected. It was emphasized that India has a disproportionate number of under-trials in custody. 'Bail should be a rule' and 'jail should be an exception' as liberty is the most sacrosanct right. It was opined that adequate reforms in the police system are needed, until then the judges need to protect the liberty of the accused.

It was iterated that reasonable opportunity for the accused to defend himself will be illusionary the if accused is confined to a cell for a longer period. It was opined that the accused has a right to arrange finances in order to engage a good lawyer which practically cannot be possible if the accused is incarcerated for too long. The balance between the freedom of liberty and the interest of a fair trial should be taken into consideration while disposing off bail applications. It was emphasized that the discretion of the judge for granting bail should be independent subject to the law of precedents and need to exercise properly and judiciously.

The intricacies and nuances of anticipatory bail was discussed in the light of *State Rep. by the C.B.I. v. Anil Sharma*, (1997) 7 SCC 187, *Lavesh v. State (NCT of Delhi)* (2012)8SCC730 and *Sushila Agarwal v. State (NCT of Delhi)* (2020) 5 SCC 1. The judgment *Shri Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 was emphasized upon, where it was held that when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence.

In the light of *Noor Aga v. State of Punjab and Ors.* (2008)16 SCC 417 Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was discussed in reference to the restrictions to grant of bail. It contains a non-obstante clause in terms whereof restrictions have been imposed upon the power of the court to release an accused on bail unless the following conditions are satisfied:

- (i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and
- (ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that his offense is guilty of such offence and that he is no offense to commit any offence while on bail.

The concept and intricacies of default bail and transit bail were also discussed. It was stated that judicial officers have the freedom to dispense justice as per the judicial conscience. It was emphasized that the judge should not be worried by the criticism of media as done in media channel discussion. The decision of a judge should transcend any fear or favour. Principles of bail should be kept in mind while granting/denying bail. It was highlighted that judges have a powerful tool to impose conditions while granting bail. However, such conditions should be used wisely and judiciously. It was stated that unnecessary incarceration should be avoided and unless absolutely necessary one should not be put in prison. The inference of the proper investigation like time taken to complete the investigation, seriousness of the offense etc. needs to be considered while granting bail. The Supreme Court judgments *Bashira v. State of Uttar Pradesh* AIR1968SC 1313, *Anokhilal v. State of Madhya Pradesh* AIR2020SC 232 also formed the part of the discussion.

Session 4 - Challenges in Implementation of ADR System.

Speakers- Justice Roshan Dalvi & Dr. Sudhir Kumar Jain

Session 4 Challenges *in Implementation of ADR System* emphasized that mediation is by far the most preferred mode of settlement and conciliation are used in few kind of disputes only. The history of pre CPC and post CPC amendments was discussed. Types of Alternative dispute Resolution (ADR) practiced in the USA includes mediation, arbitration, neutral evaluation, settlement conference, Mediation – arbitration etc. were referred during the discourse. It was iterated that conflict resolutions includes identifying problems, generating options and reaching the best solutions. Discussion pertaining to the matters that may be amenable to mediation and the cases that cannot not be referred to the mediation were emphasized upon. It was iterated that the matters related to the government policy under challenge, crime against women and children, matters pertaining to elections, matters related to taxation etc. cannot be referred for mediation process. Procedure for reference to mediation process was also deliberated upon.

Due to the backlog and delay in the disposal of pending cases there is an urgent necessity to adopt ADR mechanism. However, ADR is not a substitute to court system. It was highlighted that efficient judicial system produces just solutions with speed and efficiency. ADR system is a complementary mechanism to reduce workload/ pressure on court system. Benefits and advantages of ADR system were discussed. In reference to Section 89 of Civil Procedure Code various modes of ADR was discussed that includes arbitration, conciliation, judicial settlement, lok adalat and mediation. It was iterated that mediation is a structured process in which an impartial person, a mediator, facilitates the parties in amicable resolution of disputes by using specialized communication and negotiation techniques. It was iterated that mediation proceedings should be confidential and qualitative in nature. It is a win-win situation. It was delineated that

judges can act as a mediator as well as a conciliator. The challenges in the mediation process was also deliberated upon that includes introduction of mediation in judicial system, selection and training of mediators, establishment and management of mediation Centre etc. The Supreme Court Judgments *Salem Advocate Bar Association v. Union of India*, (2003) 1 SCC 59, *Salem Advocate Bar Association, Tamil Nadu v. Union of India*; 2005 (6) SCC 344 and *Afcons Infrastructure Ltd. And anr. v. Cherian Varkey Construction Co. (P) Ltd. And Ors.* (2010) 8 SCC 24 also formed the part of discussion.