

# NATIONAL JUDICIAL ACADEMY



## SE-11: ADJUDICATING TERRORISM CASES

National Judicial Academy of India - Federal Judicial Center (FJC) – CEELI Institute

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(Virtual – Facilitated from the CEELI Institute)

## PROGRAMME REPORT

PREPARED BY

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**Objectives of the seminar:** The National Judicial Academy in coordination with Federal Judicial Center, Washington DC and CEELI Institute, Prague organized a training of trainers seminar for directors and faculty members (judicial officers) of State Judicial Academies across the country on topic – Adjudicating Terrorism Cases. The object of the seminar was to create a cadre of trainers in SJAs to train the judges dealing with or likely to deal with the terrorism related cases about the unique features of terrorism trials, its nuances and procedural issues, international obligations and case and court management. A total of 48 participants from all 24 SJAs across the country participated in this seminar in online mode. Before the beginning of actual live sessions, participants were provided with a 60 minute pre-recorded session on topic – Cyber: Electronic Evidence from using Computers for Terrorist Purposes by Mr. Anthony Teelucksingh, Prosecutor, US Department of Justice. He gave overview and bottlenecks of electronic evidence and role of computers in terrorism cases.

### **Session 1**

#### **The Hague Memorandum and the Judicial Role in Countering Terrorism**

**Speaker: Hon. John Tunheim, Chief Judge, U.S. District Court for the District of Minnesota**

Cristobal Diaz welcomed all and introduced the theme of the conference and gave overview of resource persons, implementation teams and CEELI online portal. Judge Tunheim then took over and deliberated on most important topic – The Hague Memorandum. The Hague Memorandum is the most basic international document on terrorism trials. It enumerates nine good practices to be followed in terrorism trials viz. *Identifying and Assigning Specially Trained Judges; Supporting the Use of Continuous Trials in Terrorism and other National Security Cases; Developing Effective Trial Management Standards; Supporting Special Measures to Protect Victims and Witnesses in the Trial Process; Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation; Supporting the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods; Contributing to the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security; Developing and Articulating Media*

*Guidelines for the Court and Parties; & Ensuring Victims of Terrorism Access to Justice.* The Hague Memorandum is the product of Global Counter Terrorism Forum (GCTF), a task force which has worked very hard to create this very trustworthy document for judges across the globe dealing with terrorism trials. He suggested that many aspects enumerated in Hague Memorandum about judge's role are similar to what is traditionally expected in all criminal cases generally from judges viz. being impartial, fair, unbiased, neutral, giving opportunity to both sides etc. The role of a judge in terrorism trial as envisaged in Hague Memorandum is to be gatekeeper. Speaker then asked the participants to share their views on major challenges faced by judges dealing with terrorism trials. Many participants expressed that dealing with complex evidence, balancing the rights of victims and accused and providing the fair trial, cyber related evidentiary issues, large number of witnesses, managing media attention, trans-border nature of evidence and procedural issues in its collection, preservation and appreciation, security of witnesses and judges, etc. Judge Tunheim then moved on to discuss the problem of difficult and special nature of terrorism related laws and different evidentiary standards therein than the regular criminal laws. He discussed various aspects like solicitation in terrorism, terrorism finance and money laundering, abetting the terrorism/terrorists, harboring terrorists etc. and evidentiary aspects relating to it. He emphasized on the participants that '*don't presume that you understand the law fully*' and read the special laws again and get yourself familiar with special legislations and intricacies of investigation and evidence gathering therein. Speaker then went on to discuss issues relating to security in terrorism cases. The judge trying the terrorism case has to exercise strong leadership role from beginning and take law enforcement agencies in confidence to secure the inside and outside of courtroom, to develop a security plan for trial including security of witnesses, judges, accused persons, prosecutors and lawyers involved in case etc. He should ensure utmost clear coordination between court officers and law enforcement agencies and if possible designate special officer from court to deal with security agencies and law enforcement agencies. Judge should have plan for the worst and then only he can expect the best in terms of security for terrorism case. Speaker then went on to discuss issues like confidential evidences, cyber security issues, foreign evidence related modalities and ways to deal with it as envisaged under The Hague Memorandum. The importance of case management in terrorism trial and the active role of judge in managing the trial speed and other

modalities was emphasized. Speaker said delay is the enemy in criminal cases more so in terrorism cases, so judge should set time schedule for case and follow it strictly, he should make optimal use of court technology, he should outline the rules and expectations of each stage in case, he should anticipate and be ready to deal with any untoward incident. Speaker also discussed the issue of public pressure to be handled by judge and importance of reasoned orders and judgements. He concluded the session stating that judges should not be concerned about anything like media, public opinion etc. and should only focus on the law.

## **Session 2**

### **The Fair and Just Trial**

**Speaker: Hon. Barbara Rothstein, District Judge, U.S. District Court for the Western District of Washington**

Judge Barbara dealt with the topic fair and just trial in terrorism trials. She commenced with an observation that many countries are facing menace of terrorism and one must be ready to deal with it. She then asked the participants to express their views as to what the fair trial is, what makes the trial fair and what the elements of fair trial are. Many participants expressed their views as unbiased and impartial judge, open court, both parties to be treated equally, adherence to natural justice principles, legal representation to accused etc. She then summed up the fair trial principles as enumerated in The Hague Memorandum, International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR), and Convention against Torture viz. presumption of innocence, impartial and unbiased judge, right against self-incrimination, speedy trial, public hearing, right to appeal, right to defence etc. and emphasized on the judges that the responsibility is casted on the judge to see that accused gets a fair trial. To the question about balancing the rights of victim vis-à-vis rights of accused in fair trial, she explained that at the time of trial if judge starts thinking about victim it becomes very difficult for him to give fair trial to accused and to maintain the presumption of innocence, which is the very basis of fair trial. Judge should keep in mind that it is the accused who is on trial and not victim. He can think of victim at the time of sentencing but not before that. Before that the state has taken the care of victim and has launched the prosecution at the behest of victim considering

victim rights. Judge should not allow his feelings to come in a way of fair trial. She also stressed the importance of speedy and continuous trial as an element of fair trial and urged judges to be cautious of delays in hearing. No doubt in some cases delays are inevitable, but attempt should be to explain the delay and strive to curtail it. She then went on to discuss how factors such as horrors of terrorism, its impact on community, media coverage, pressure to abrogate the rights of accused etc. impacts the role of a presiding judge in terrorism trials. Many participants expressed their opinions as to how to deal with pressure and achieve the object of fair trial. She also made participants share their opinions about the hypothetical fact situation where prosecution witness (police chief investigating offence) is giving public interviews about the accused and making anti-Muslim comments in general. It was concluded that, it would be role of a judge to call prosecution and investigation chief and reprimand them from interfering the fair trial right of accused since public statement by witness can prejudice accused. It was emphasized that, 'the fair trial should not be only fair but it should also be seen as fair.' She also dwelled upon the right of accused under The Hague Memorandum to get a free and competent legal assistance. Speaker then discussed Article 15 of Convention Against Torture which states that any information received as a result of torture shall not be admitted as evidence in trial. She made participants to speak about the hypothetical fact situation where accused complains to the court that he has been tortured by police. Participants equivocally agreed that custodial torture should be deprecated. She concluded her session by urging the participants to follow The Hague Memorandum and the provisions of Indian Constitution.

### **Session 3**

#### **Guidelines for the Use and Protection of Evidence from Intelligence Sources**

**Speaker: Hon. Jeremy Fogel (Ret.), Director, Berkeley Judicial Institute**

Judge Jeremy Fogel commenced his presentation citing the judgement of Indian Supreme Court in case of *Manohar Lal Sharma vs Union of India & ors (SC order in Writ Petition (Crl.) No. 314 of 2021 dated 27 October 2021)* wherein it has been observed by the court that - "National security cannot be the bugbear that the judiciary shies away from, by virtue of its mere mentioning." He pressed that issue of national security evidence in criminal trial is very serious

issue. As a common law countries following adversarial system, we take it very seriously that any document that prosecution is relying should be provided to accused as a matter of fair trial. But in terrorism cases, particularly involving national security and intelligence evidence, secrecy is also very important. The judge has to balance this tension between secrecy of intelligence evidence and open trial right of accused. Speaker then went on to discuss the concept called classified information. He stressed that in some cases, particularly when it comes to national security, secrecy is the norm. He enumerated intelligence evidence as human informants, information from wired and wireless surveillances obtained by intelligence agencies, confidential intelligence reports, testimony from other confidential proceedings, documents relating to secret communications with foreign governments etc. He suggested that it is very important for governments to protect its secret intelligence sources from the eyes of adversaries. Exposing the secret sources or human intelligence sources to terror accused persons can cause serious damage to their ongoing activities and future responses to the terrorist activities. Explaining further the trial of terrorist and classified and intelligence evidence, speaker stated that it is one of the most challenging aspects of a terrorism trial as Competing interests viz. right to a fair trial of the accused, national security, and prosecution's interest in introducing relevant evidence which is relevant to convict the accused are at stake. He also made the participants to discuss the issue of balancing the interest of prosecution of preserving secret evidence and fair trial right of the accused. Speaker then gave overview of US legislation – The Classified Information Procedures Act which was specifically enacted to deal with terrorist cases. He stated that the government generally has an obligation to provide a criminal defendant with any exculpatory information. Failure to comply with this obligation violates the accused's Constitutional rights and may lead to dismissal of the criminal charges. He stated that under the above referred legislation, pretrial proceeding to determine whether the accused is entitled to the information the government has chosen not to disclose (such as the identity of the confidential informant) ordinarily are conducted in open court with active participation of defence counsel. He further elaborated the same saying under section 3 of the said Act (CIPA), if the government represents that undisclosed information implicates national security, the court reviews the information and decides the further. It has following alternatives – (a) the government provides information to the judge in camera, (b) Judge may himself peruse the

information and/or ask the defence counsel in appropriate cases to disclose his defence to see if any information is useful for defence, (c) if the judge decides that information is not exculpatory, he records the finding to that effect and proceed, & (d) if judge decides that some information is exculpatory and accused needs to be given access, he records the finding to that effect and may ask the government to disclose the information to accused in any manner in which it feels suitable considering the secrecy or on government's failure to do so, he may dismiss the charge and drop proceedings against the accused. He then made the participants to discuss the hypothetical situation where state does not want to disclose information to accused but accused is required to be given to access to it as it might be helpful to his defence. Many participants suggested that accused must get the access the information as it is important for his defence and his fair trial right will be prejudiced if access is not given to him. As far as information relating to the ongoing investigation, it was suggested by all that merely because investigation is going on, state cannot refuse access to information to accused unless it is shown that such information if disclosed, would be prejudicial to the ongoing investigation. At the conclusion speaker said that in such peculiar cases of terrorism and intelligence and national security evidence, you have two very important values fighting at each other, one of them being the protecting the health and safety of fellow citizens as well as security of your nation and on the other hand ensuring that accused has fair trial and his human rights are not compromised. At the end on asking what about accused's right under the due process clause of the US Constitution when accused is not provided information in criminal trial against him, he said that to some extent no doubt it goes against the right to due process, but in the greater interest of national life and safety of public at large, little curtailment of due process should be permissible but it should not be excessive at times.

#### **Session 4**

#### **Media**

**Speaker: Hon. David O. Carter, District Judge, U.S. District Court for the Central District of California**

Judge David Carter commenced his address telecasting a video of a terrorist attack and asking the participants to see how people see it. He then took poll from the participants as to how

important it is for the public to have access to what is going on inside the courtroom. Majority of the participants voted for “Important for certain types of cases, but not in all cases” and some of them voted for “Very Important”. Judge Carter concluded that as far as high profile cases like terrorist attack it is very important to keep public aware about what is going on inside the courtroom. He then went on to discuss Good Practice No. 8 of The Hague Memorandum which talks about media guidelines. It was stressed on the participants that timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. But at the same time, providing the trial judge with latitude to control the conduct of the proceedings so as to maintain decorum and prevent distractions, to ensure the safety of court staff, witnesses and other stakeholders, and to ensure fair and impartial administration of justice, was also emphasized. It was highlighted that, The Hague Memorandum also provides for developing rules and procedures for media coverage. In suitable cases viz. child witness, rape cases, sensitive matters justification must be provided for denial of or limitation on media coverage as fair trial also means open and public trial. Speaker also suggested that in managing the media, instead of allowing all media houses inside the courtroom, some media persons or houses can be selected as representative to act for all media houses and they can liaison the rest. He then went on to list the benefits of media access viz. it builds transparency and public confidence in the justice system, it increases the public awareness about the problems that justice system faces, and it also increases the parties’ confidence to say that the outcome will be just and fair. Thereafter, he went on to discuss the problems that might be encountered by the courts due to media access. One of them being issue of dignity of the courtroom, which may not be maintained if media persons are filled in courtroom with their devices. Secondly, it may be detrimental to the interests and privacy of sensitive and vulnerable witness as their identities might be disclosed to public exposing them to untoward incidents. He also shared his personal experiences in one terrorism case where he has to take care that witnesses are brought to court early and taken after all others have gone. The next problem he stated was about the nuisance to the neighbouring courtrooms in the premises. The excessive media coverage of a particular case creates unnecessary interferences in other courtroom and judges doing their normal work. He shared pictures of Mexican mafia trials in his court and the media issues. He then went on to discuss the methods to allow and



regular various kinds of media viz. television media, print media, radios and freelancers etc. Many participants expressed their opinions and concerns about media including social media and its impact on the sensitive cases. They also expressed opinions about in camera trials and media gag orders. Generally, it was view of many participants that media should not be unrestrained but should be effectively regulated so as to avoid the creation of unnecessary problems in court proceedings. Speaker also deliberated upon the responsible reporting by the media houses and importance of regulatory framework for media as regards court reporting. Discussion also focused on possibility of live streaming of courtroom proceedings albeit with riders and regulatory framework. Taking the discussion further, Judge Carter firmly submitted that transparency is something that our legislatures are going to want more and more from our courts, especially in high profile cases. He then shared his experiences dealing with sketch artists in courtroom in a high profile case of Aryan Brotherhood Trial of 2006 where court had to check the sketches of witnesses and accused going out. In the conclusion he suggested the participants to designate a special press space in courtroom to avoid overcrowding and disruption; to select local media representative as liaison with other media persons; and to establish a channel of liaison of court spokesperson, if required, with media representatives as some measures to regulate media in courtroom. As regards allowing camera in a courtroom, he suggested that media cameras should not cover spectators, confidential discussion between clients and attorneys and other in camera proceedings. Media persons should not leave courtroom frequently and should do so only in recess. If possible two or more media houses should make arrangement to share camera recordings to avoid multiplication of cameras in courtroom. At the conclusion of the session he advised the judges to have a clear and comprehensive media plan for each sensitive case they are trying.

## **Session 5**

### **Indian Legislation**

**Speaker: Hon. Justice Kotishwar Singh, Judge, Gauhati High Court**

Justice N. Kotiswar Singh commenced his address stating terrorism is a phenomenon which all the countries across the border are trying to deal with. Particularly, India since its independence

is experiencing menace of terrorism and trying to control it. He then moved on to discuss the international response to the menace of terrorism explaining documents condemning terrorism viz. UN General Assembly resolutions viz. Resolution 60/288 of 8 September 2006; Resolution 72/284 of 26 June 2018; & Reaffirmed by Resolution on 75/291 of 30 June 2021. He also explained the rationale of founding 'Global Counter Terrorism Forum' and documents like 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. He then asked the participants to respond as to whether there is any universally accepted definition of 'terrorism'. He then explained the definition under UN General Assembly Resolution 49/60 which states – terrorism means “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.” He then went on to explain the historical background of anti-terror legislations in India viz. POTA (repealed), TADA (repealed), UAPA, NSA, NIA Act etc. Various state legislations like Maharashtra Control of Organized Crime Act, 1999 (MCOCA), Chhattisgarh Vishesh Jan Suraksha Adhiniyam (Chhattisgarh Special Public Safety Act) 2005 (CVJSA), Karnataka Control of Organized Crime Act, 2000 (KCOKA) etc. Speaker then discussed provisions of Unlawful Activities (Prevention) Act, 1967 providing overview of important provisions like sec. 20, 38, 39, 43C, 43D, 43E, 48 etc. with relevant case-law jurisprudence viz. *Arup Bhuyan Vs State* (2011) 3 SCC 377; *Indira Das Vs State* (2011) 3 SCC 380; *Referred to larger Bench in 2015*; *Thwaha Fasal Vs Union of India* (2021 SCC Online SC 1000); *Yakub Abdul Razak Memon v. State of Maharashtra*, (2013) 13 SCC 1 etc. He also briefly explained the history of amendments to UAPA. He also discussed terrorism vis-à-vis waging war against state under IPC with relevant judicial pronouncements viz. *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602; *Nazir Khan v. State of Delhi*, (2003) 8 SCC 461 : 2003 SCC (Cri) 2033; *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600 : [Parliament attack]; *Mohd. Ajmal Amir Kasab Vs. State of Maharashtra*, (2012) 9 SCC 1; *Seeni Nainar Mohammed v. State*, (2017) 13 SCC 685; *Thwaha Fasal v. Union of India*; 2021 SCC Online SC 1000; *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769: AIR

*1962 SC 955; Kishorechandra Wangkhemcha v. Union of India, (2021) 6 SCC 177; Vinod Dua v. Union of India 2021 SCC OnLine SC 414* etc. He also explained the concept of reverse burden in terrorism laws with the help of case-laws like *Mohan Lal Vs State of Punjab (2018)17 SCC 627; & Mukesh Singh v. State (NCT of Delhi), (2020) 10 SCC 120*. Speaker also explained the role of courts and its extent at each stage viz. at pre-trial stage: general monitoring of investigation and remand and bail of accused, at trial stage: recording of evidence, confessions, etc., and at the stage of sentencing. Justice Singh also touched upon the interplay between terrorism legislations and Juvenile Justice Act. The modalities of appreciating the illegally recorded/procured evidence and right to privacy issues were discussed briefly. Bail jurisdiction of courts in terrorism cases was discussed in great detail with reference to various cases viz. *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)* etc. He concluded his session referring to the preamble of The Constitution of India and urging the participants to always keep in mind values like liberty, equality, fraternity, and principles of justice while deciding terrorism cases as this is what makes a difference between democratic and autocratic responses to terrorism.

## **Session 6**

### **Framing the Charges**

**Speaker: Hon. Justice P.N. Prakash, Judge, Madras High Court**

Justice P. N. Prakash commenced his address making reference to The Hague Memorandum Good Practice No. 5: Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation. He urged all the participants to always keep in mind The Hague Memorandum. Speaker then stated that the UDHR and the ICCPR identify a number of individual rights related to criminal prosecutions, which include - the right to a fair hearing without undue delay; the right to a public hearing and pronouncement of judgment with limited exceptions; presumption

of innocence; freedom from compulsory self-incrimination; the right to be informed promptly and in detail of the accusation; adequate time and facilities to prepare a defense; the right to legal assistance; the right to examine witnesses; the right to an interpreter; the right to appeal the conviction and sentence; and freedom from ex-post facto laws. He then asked the participants as to what are the bottlenecks you have confronted after a criminal case is committed to your Court and before charges are framed? Participants replied as frequent discharge applications, adjournments, absconding by accused etc. Speaker then submitted that bottlenecks that could be faced by judges before framing of charges and after framing of charges during trial include accused may ask for the documents and statements in his language, accused may simply not engage an advocate for defense, accused may not answer when charges are read, accused may ask for change of counsel frequently, accused may not cross-examine the witnesses or may file application for recalling witnesses for further cross-examination, accused may disturb the proceedings, accused may abscond when released on bail etc. Speaker also explained the interplay between UAPA, CrPC and General Clauses Act as regards the definitions under these Acts. Justice Prakash then explained the relevance of provision under Section 229A of Indian Penal Code, 1860 (IPC) which provides for punishment for absconding the bail bonds. The provision is sparingly used by courts but if used properly, can be very helpful in curbing the menace of absconding the bail by accused. Speaker then gave a group discussion topics regarding absconding accused and trial of offence. The participants were divided into four groups and asked to discuss the fact situation where some accused in case are absconding and some are facing trial. The leader of each group was supposed to make presentation to the larger group about discussions and outcome of their group discussion. Accordingly, the leaders of all four groups made their presentations and submitted that they can proceed with trial of accused who are present issuing warrants against absconding persons by separating the trial against them under the provisions of CrPC. They also submitted that they will initiate action against absconding accused persons under section 229A of IPC. Speaker for the session Justice Prakash then concluded the discussions and explained the procedure to be followed in initiating the action under section 229A of IPC. He then shared two model FIRs filed under section 229A, one by court officer and other by investigating officer for the reference by the participants. The session was concluded with the expression of vote of thanks.

## **Session 7**

### **Terrorism Trials, Security, and Witness Protections**

**Speaker: Hon. Justice Joymalya Bagchi, Judge, Calcutta High Court**

Justice Bagchi commenced his presentation citing the recent incident of deadly attack on the judicial magistrate by his subordinate staff in Tamil Nadu, India. To emphasize the importance of court security, he then played some videos showing some recent security lapses in Indian Courts viz. escape of accused from police custody in East Midnapore, West Bengal on 3rd October 2018, and also the CCTV footage of attack on a District Judge Mr. Uttam Anand, Dhanbad, Jhrkhad when he was on his usual morning walk. The videos of a turf war that broke out inside a crowded Rohini courtroom on 24th September 2021 between two rival gangs in which jailed gangster Jitender Maan alias Gogi and his two assailants posing as lawyers were killed in the dramatic shootout that also saw police fire bullets in retaliation was also played. Another blast occurred in Rohini court on 9 December 2021, which left one policeman injured was also shown. The video footage of explosion in Ludhiana court complex was also shown to participants. After this initial introduction to the importance of security of courtroom through videos, he moved on to discuss the importance of security in court and its various facets. He emphasized that the judges must impart justice without fear of physical and psychological harm to the stakeholders, i.e. Judges, Court staff, Witnesses, Accused persons, & Legal Professionals. Judicial process should not be deterred with the thoughts of after-effects on the stakeholders. The deliberation then was held on the role of a judge in security matter and it was concluded that the role of judge is that of facilitator in security matters. His role is to supervise the formulation and implementation of a security plan in consultation with law enforcement agencies by explaining the security issues and situations to the agencies and by initiating dialogue with stakeholders and law enforcement agencies to facilitate cooperation, information sharing and resource allocation. He further stressed that security is not a static, but rather it is a continuous goal which requires constant vigilance. At this point he shared the video of King County Courthouse Security showing the model security measures to be taken into consideration while devising court security plan. He also shared the pictures of security deployments at newly constructed High Court of Andhra Pradesh at Amaravati viz. security at

court entrance, use of metal detectors and hand machines for frisking, baggage check and gate pass, central police control room, CCTVs and Firefighting systems etc. He then explained the model security plan which included surveillance of court precincts, security of court rooms, security of judges' chambers, security control room, security to Judges beyond court premises, and protection of witnesses. He also shared the graphs of model court house plan showing separate accesses for judges, witnesses, lawyers, and general public. As regards the security at judges' chambers it was suggested that there must be a security personnel at the entrance to the chamber at all times, to regulate the entry of persons. Individuals entering the chamber of the judge must be frisked to check for prohibited items and be made to sign a logbook at the time of entry. CCTV cameras be set up outside of the chamber and if necessary, inside the chamber with due permission of the judge. A panic button should be available in judge's chamber. Judges should be made aware of threat perception arising out of any suspicious activity noticed e.g. unknown vehicle or person moving around their house etc. They should have 24X7 access to law enforcement agencies. He then had a discussion about the role of judge in security of courtroom in hypothetical fact situation wherein many participants expressed their views that in suitable cases judges can enhance the security and frisking at court entrance and in appropriate cases, can order the 'in camera' hearing of a case. But it was cautioned by the speaker that 'in camera' proceeding should be used as a last resort as open trial is the basic principle of fair trial as envisaged under The Hague Memorandum. Speaker then moved on to discuss another importance aspect which was about security of witnesses. He emphasized that witnesses are the eyes and ears of the court and court should take utmost care of their security. Section 44 of the Unlawful Activities Protection Act, 1967 which specifically talk about witness protection was discussed in detail explain the participant judges that in appropriate cases they can direct the identity of witness to be kept secret, his testimony can be taken in camera and its publication should be banned. He then went on to discuss the threat analysis report and its importance for witness protection. Upon considering threat analysis report and hearing the parties, the court may pass the following witness protection orders protecting Identity of witness by ensuring the witness does not come face to face with the accused during investigation or trial; by not disclosing the identity of witness in any police/court records including the application for witness protection etc. In extreme cases, identity of the witness may be changed

by giving him a new identity, i.e., name, address, profession, parentage, etc. with the help of government agencies. Special care should be taken of the security of vulnerable witness by providing them with emergency contacts details, alternative residence and financial aid, in camera trial etc. In the conclusion, he suggested that a security and witness protection committee be set up in every district comprising of the District Judge, Head of Police and Head of Prosecution to lay down and monitor in consultation with the Judge and other stakeholders. They should have a complete security plan for every court premises and witness protection measures in sensitive cases. The State/Union Territory may be approached to set up a Witness Protection Fund, from which the expenses incurred during the implementation of Witness Protection Order shall be met. Costs imposed by the court may be directed to be deposited in the Fund. Police administration in the state may be requested to set up Witness Protection Cell for the protection of witnesses and implementation of protection orders.

## **Session 8**

### **Judicial Management of Terrorism Cases**

**Speaker: Hon. Timothy Burgess, District Judge, U.S. District Court for the District of Alaska**

Judge Burgess commenced with explaining the outline of the session presentation in brief. At the outset he discussed The Hague Memorandum guidelines on case management in terrorism cases. He emphasized that fair and expeditious criminal trial is a fundamental component of a functioning and effective justice and also at the same time an inherent right of the person charged. Speaker then invited the comments from participants asking them to share the challenges faced by them in managing the terrorism trial. Many participants said that large number of witnesses and voluminous documents, adamant accused persons and defence counsels, complicated nature of evidences, forensic and medical evidence, security of judges and witnesses, victim protection, media trials, public perceptions etc. are some of the major challenges usually faced by judges dealing with terrorism trials. Speaker provided some ways out like having specially trained judges to try these cases, having special security measures, special courts etc. to deal with the issues. He then went on to discuss the goals of judicial case

management. He emphasized that basic aims of judicial case management are to enable fair, timely and effective justice delivery, to eliminate or reduce the delay, to eliminate or reduce the excessive expenses and to effectively manage the judicial workload. He urged the judges to be more active in judicial case management and not to be passive about it particularly in complicated and complex cases like terrorism trials. He emphasized that right to fair trial is very basic right of accused as per The Hague Memorandum and effective case management has direct impact on it. He suggested that judges should strive to avoid unnecessary delays in trial of a case, they should manage the case proactively by assuring timely presence of witnesses and production of documents, timely completion of examination of witnesses including the cross examination, and shall exercise full control over the speed of the trial. The he went on to discuss strategies to address case management challenges in terrorism trials. He referred to US Speedy Trials Act and timelines referred therein to conclude each stage of case in stipulated time. It was highlighted that terrorism trials usually involve very complex legal issues and it also poses challenges in effective case management. To address this judges should be fully aware of laws and materials in record as evidence. Judges should be able to deal with classified evidence and also to strike balance of national security and fair trial right of accused. The victim and witnesses should also be taken care of as case involves their issues and concerns also. As regards multiple defendant or multiple accused persons in terrorism trials is concerned, speaker suggested that trying together who are available and separating the trial for those who are absconding can be one of the solutions. Other challenges like involvement of multiple jurisdictions, multiple and multi-lingual witnesses and multi-lingual documents etc. were also discussed briefly. Speaker shared with the participants a discovery check-list like does evidence involve trade secret, classified evidence, secret and intelligence evidence etc. Does it involve national security related issues and what other special category evidence and investigation is involved. The judge trying such cases should be more vigilant about the legalities of evidence. Modalities relating to admissibility and appreciation electronic and digital evidence which is coming from across the borders also poses serious challenges to the case management in such high profile cases. After discussing many challenges, speaker submitted that the answer to many of the challenges is the continuous and speedy trial because the longer you take to decide difficult it will be to manage the case. Secondly continuous trial will also lessen the hardship



faced by witnesses and victims as well as for the accused as it will reduce their pre-trial detention. No doubt it will be difficult for a judge to manage and coordinate things for continuous trial but that will have more advantages. Many participants expressed their views about efficacy of continuous trial and bottlenecks in conducting it. Many admitted that law mandates continuous trial in criminal case (CrPC) but it is seldom conducted due to various factors like non-attendance of witness, adamant lawyers, investigation agency's failure to procure reports and documents in time etc. Speaker also urged the judges to make full use of pre-trial conferences to set a firm calendar for each stage of case and to scrupulously follow the deadlines already fixed. He also urged the participants to make optimal use of courtroom technology like video conferencing, recorded evidence etc. to expedite the terrorism trial.

### **Pulling it all Together & Closing Session**

**Speaker: Ms. Mira Gur-Arie, Director, International Judicial Relations Office, Federal Judicial Center (Washington, D.C.) & Hon. Justice A.P. Sahi, Director, National Judicial Academy (Bhopal)**

Ms. Mira Gur-Arie then in putting it all together thanked all the resource persons and participants. She then asked the participants to share one learning from the entire conference to which many participants replied saying case management, discovery checklist, pretrial conference, intelligence & classified evidence, media management etc. The floor was then handed over to Justice A. P. Sahi, Director NJA. Justice Sahi then briefly summarized the discussions in the sessions. The takeaways like use of technology and AI in judiciary and judicial training, human rights and constitutional issues involved in terrorism trials, media management etc. were highlighted by him to be one of its kind experiences to the participants from across the country. He specifically thanked all US and Indian judges for making lively deliberations in the sessions. At the end, he expressed his special thanks to all the participants & CEELI-FJC coordinators and concluded the seminar.

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