

ADMINISTRATION OF CRIMINAL JUSTICE RELATING TO OFFENCES

UNDER

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 AND NECESSITY FOR A FRESH LOOK

by

R K Tewari

[Member, INSA and former Member, Central Board of Excise & Customs and former Member, Appellate Tribunal for Forfeited Property]

1. **BACKGROUND LEADING TO ENACTMENT OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (“the NDPS Act”)**
 - 1.1. Narcotic drugs have a unique place in medical science to relieve human suffering and ailments. The ambivalent character of these substances – being indispensable for relief of pain and suffering but addictive and destructive when misused or abused – led the community of nations to provide for regulatory mechanism for restricting the availability of such substances to medical and scientific purposes through a number of treaties and conventions.
 - 1.2. In India, the legislative intervention had started very early. The Bengal Regulations for superintendence of opium cultivation and sale/purchase, distribution etc. of opium in the British India were consolidated in two very important legislative pieces called the Opium Act, 1857 and the Opium Act, 1878 to mainly protect the British monopoly on Indian opium and to control the related activities. In 1930, the Dangerous Drug Act, 1930 (“**the Dangerous Drugs Act**”) was enacted primarily to give effect to the provisions of Geneva Opium Convention of 1925 which aimed to control drug trafficking in general. After Independence, two very important international conventions namely the 1961 Convention on Narcotic Drugs (“**the 1961 Convention**”) and the 1971 Convention on Psychotropic Substances (“**the 1971 Convention**”) were adopted by the United Nations to which India is a party. Therefore, with a view to giving effect to the provisions of aforesaid conventions and also in response to India’s post Independence needs to control abuse of and trafficking in non-conventional drugs like morphine, heroin, hashish etc. that started affecting India in the later part of the last century and also to fight the increasing transit trafficking in drugs emanating from the neighbouring two major sources called 'Golden Triangle' and 'Golden Crescent', the NDPS Act was enacted replacing the three archaic legislations mentioned above which were found deficient to deal with the then existing problems of drug abuse and trafficking.
 - 1.3. The NDPS Act was enacted mainly to provide deterrent punishment for the traffickers and to invest various Central and State Governmental agencies with the powers of investigation and also to improve co-ordination and cooperation mechanism nationally and internationally. Originally, the NDPS Act prescribed for all major offences minimum mandatory punishment of ten years with a fine of rupees one lakh extendable to 20 years with a fine of rupees two lakh as against the

normal punishment of three years with nominal fine which was mandated under its predecessor the Dangerous Drugs Act.

- 1.4. The NDPS Act was strengthened in 1989 when stringent provisions for bail, creation of special courts, death penalty for drug offences etc. were introduced. Further, suitable control mechanism for precursor chemicals and for forfeiture of illegally acquired properties derived from drug trafficking were also incorporated in 1989 in the NDPS Act with a view to giving effect to 1988 International Convention Against Illicit Traffic in Narcotic Drugs (**“the 1988 Convention”**) which was adopted in 1989.
- 1.5. The enforcement over a period of time of the NDPS Act had invited criticism with regard to its effectiveness particularly in the areas of administration of the criminal justice mainly with regard to the prescribed minimum mandatory punishments. Penal provisions for drug consumers and addicts as contained under section 27 of the NDPS Act were considered impracticable. The NDPS Act was therefore amended in 2001 with a view to rationalising the penal structure and accordingly existing penal provisions were replaced by provisions mandating graded punishments for offences. Many other provisions relating to those of forfeiture of illegally acquired properties were also streamlined.

2. **ADMINISTRATION OF CRIMINAL JUSTICE**

- 2.1. Drug offences fall within the category of criminal offences. These criminal offences are a class by themselves. These offenses are not committed against a particular person and are in fact detrimental to the whole society. Further, drug offences are not standalone offences in as much as they have nexus with other offences like arms smuggling, terrorism etc. According to many, these offences should be considered more heinous than even murder. A trafficker in drugs in a way commits murder of the humanity and destroys the social fabric not by any weapon but by causing mass murders through use of drugs. According to criminologists, drug offences are victimless offences, where there is no immediate victim. Instead, the drug offender does violence to the society at large as also to himself. A drug offence is a criminal offence which involves three Ms namely, money, material and man. The existence of contraband drug and proceeds of the crime are two important factors to constitute clinching evidence to proceed against the man who commits the crime. All this creates a great challenge to enforcement agencies to administer the drug laws. Administration of criminal justice in drug cases is very difficult as is evident from a large number of acquittals in the last ten years. The Annexure to this article reflects the position prior to 2001 and after 2001 (when the graded punishment was introduced) and there does not seem to be any improvement in the matter of convictions of the offenders even.

- 2.1.1. The objective of the NDPS Act is to prevent drug trafficking and drug abuse and ensuring availability of the drugs for medical and scientific needs through effective enforcement. Administration of criminal justice under the NDPS Act is aimed at ensuring that the object and intent for the purpose for which the law was enacted are achieved.

2.2. **Applicability of the provisions of the Code of Criminal Procedure, 1973 (“the**

Cr.PC”)

- 2.2.1. The Cr.PC is a general procedural law relating to investigation of criminal offences and trial etc. thereof. By virtue of sub-section (2) of section 4 of the Cr.PC, all offences under any other law are required to be investigated, inquired into, tried or otherwise dealt with in accordance with the relevant provisions of the Cr.PC provided there is no specific enactment regulating the manner or place of investigation, inquiry, trial, etc. of a particular case. Section 5 thereof provides that the Cr.PC would not affect any special or local Law unless the provisions of the Cr.PC are accorded an overriding effect by such special or local law. Though the NDPS Act is a special law dealing with the crimes relating to the narcotic drugs and psychotropic substances, yet this law is not self-contained and has to depend upon the Cr.PC, particularly in the areas of search, seizure, arrest, conducting of investigation, trial, etc.
- 2.2.2. The procedure set out in Chapter XVID of the Cr.PC for trial of offences under the NDPS Act before a Court of Sessions is required to be followed. Section 31 and 31A of the NDPS Act respectively provide for enhanced punishments and death penalty for certain offences after previous conviction. It is, therefore, necessary that the charges framed under section 211 of Chapter XVII of the Cr.PC by the prosecution should indicate in clear terms the details of the previous conviction. The procedure of obtaining confirmation of judgment from the High Court under Chapter XXVID of the Cr.PC are also required to be followed in case of death sentence awarded under section 31A of the NDPS Act. However, as regards the provisions for granting bail as contained in Chapter XXXIII of the Cr.PC, the same have been made inapplicable by a specific provision under section 37 of the NDPS Act. The provisions contained in Chapter XXXVI of the NDPS Act relating to limitation for taking cognizance of offences are not applicable to the offences punishable under sections 15 to 25 and sections 28 to 31A of the NDPS Act. The limitation prescribed under the aforesaid Chapter of Cr.PC is however applicable to sections 26 and 32 of the NDPS Act.
- 2.2.3. In view of the peculiar nature of most of the offences covered by the NDPS Act, special procedures have been prescribed in Chapter V thereof to warrants issued and arrests, searches and seizures made thereunder. Since these provisions are not complete in themselves, section 51 of the NDPS Act imports the relevant provisions of the Cr.PC to warrants issued and arrests, searches and seizures made under the Act. Although the expression 'summons' is missing in the section 51 of the NDPS Act, sections 61 to 69 of the Cr.PC relating to summons also apply to summons issued under the NDPS Act. Section 36C of the NDPS Act also provides that the provisions of the Cr.PC (including the provisions as to bail and bond) shall apply to the proceedings before a special court.

2.2.4. In the following areas of the NDPS Act, the provisions of the Cr.PC have, however, been rendered inapplicable:

<u>Sl. No.</u>	<u>Sections of the NDPS Act</u>	<u>Sections of the Cr.PC</u>	<u>Areas</u>
1.	33	360	Release of the persons on probation due to good conduct or after admonition.
2.	32A	432 & 433	The sentences under the Act shall not be suspended, remitted or commuted.
3.	37	1st Schedule	All offences under the NDPS Act are cognizable irrespective of the length of punishment.
4.	37	437	When bail may be granted in case of non-bailable offences.
5.	37	438	Direction for grant of bail to persons apprehending arrest.
6.	37	439	Special powers of High Court or Session Court on bail.

2.2.5. Another important feature of the NDPS Act is that it provides for certain presumptions to be made in terms of sections 35, 54 and 66 thereof. Section 35 requires that the court shall presume the existence of 'culpable mental state' of the accused and it is for the accused to prove the contrary beyond reasonable doubt and not based on preponderance of probability. Section 54 provides for making of presumption as to commission of offence arising from the possession of drugs and materials. This section contains a rule of evidence and lays down that in any trial the accused has to rebut the presumption that he did not consciously possess the drugs or things. Similarly, presumption has been provided for under section 66 of the NDPS Act regarding the genuineness of documents tendered in evidence during prosecution. In the Cr.PC, on the other hand, there is no room for presumption, whereas under NDPS Act, as a rule of evidence, presumption plays an important role. The presumptive provisions have "high degree of probability and hold the field in the absence of evidence but when facts appear presumption recede". "Presumptions", as happily stated by a light hearted jurist, "may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts". They have no place in the presence of actual facts.

2.2.6. Thus, by virtue of provisions of section 35, section 54 and section 66 of the NDPS Act, administration of criminal justice, particularly in the matter of bail and trial, becomes easier and less cumbersome for the prosecution. From the perspective of the enforcement agencies, this position of law should yield better results.

2.3. Specific areas relating to administration of criminal justice under the NDPS Act

2.3.1. Having made general observations as above, it would be appropriate to analyze the specific areas relating to administration of criminal justice under the NDPS Act. Analysis can be made under following heads:

- Prohibitory and regulatory provisions
- Penal Scheme
- Rehabilitation process of convicts while under imprisonment especially of addicts.
- Procedure for search, seizure and arrest
- Procedure for bail and trial
- Procedure for forfeiture of drug related properties
- Suggestions for further improvement

Prohibitory and regulatory provisions

2.3.1.1. International conventions require the Governments to establish certain operations and activities as offences in their domestic legislation. Article 36 of the 1961 Convention and Article 22 of the 1971 Convention and Article 3 of 1988 Convention specifically provide what operations and activities in relation to drugs should be established as offences. These operations and activities include cultivation of opium poppy, coca bush, cannabis plant, production, manufacture, distribution, import and export, etc. of narcotic drugs contrary to the provisions of 1961 Convention and 1971 Convention. Section 8, section 8A, section 12, section 68C and section 68Y of the NDPS Act contain prohibitory/regulatory provisions to implement the penal scheme as envisaged in the international conventions.

2.3.1.2. Section 8 of the NDPS Act encapsulates the principal legislative policy on control of drugs in India. As per the legislative policy, no narcotic drug or psychotropic substance shall be used in India except for medical or scientific purpose. Even for these purposes, use has to be as permitted by the provisions of the NDPS Act or the rules or orders made thereunder. Unauthorized use of any narcotic drug or psychotropic substance, even if it is for medical or scientific purposes, shall be a contravention of the NDPS Act. Seen in this context, answer to the question as to what constitutes an offence under the NDPS Act would be: (i) all activities relating to narcotic drugs and psychotropic substances, such as cultivation, production, manufacture, distribution, import and export, etc. prohibited for the time being would constitute offence; and /or (ii) any or all of such operations which may be for medical or scientific purposes but done in contravention of the rules or orders made under the NDPS Act would also constitute an offence.

2.3.1.3. Section 8A has been incorporated in the NDPS Act to take care of the provisions contained in Article 3 (l) (b) of the 1988 Convention which requires a contracting government, *inter alia*, to establish as criminal offences under its domestic law when the conversion or transfer of property derived from a drug offence committed in domestic law or under any other corresponding law of any other country takes place.

2.3.1.4. Section 12 of the NDPS Act criminalises the external dealings in drugs by any person outside India without the authorization of the Central Government. This offence has been treated as a serious offence and stringent provisions for punishment have been provided for such offences in terms of section 24 the NDPS Act. As a matter of fact, drug offences committed outside India involve dual criminality. A person committing such act contravenes the provisions of national law of such person and also the provisions of law of other country where the offence is committed. Taking into account this aspect, the international conventions provide for extraditing the offenders on a request made by the country to which the offender belongs as a citizen.

2.3.1.5. Section 68 C of the NDPS Act prohibits holding of drug related properties. Section 68Y of the NDPS Act criminalizes even the activity of conscious acquisition of any property in relation to which forfeiture proceedings under the NDPS Act are pending.

2.3.2. Penal Scheme

2.3.2.1. Under the penal scheme of the NDPS Act, graded punishments have been provided for major drug offences depending on the quantity of drugs involved. For this purpose, the NDPS Act defines three quantities, namely, 'small quantities', 'commercial quantities' and 'quantities lesser than commercial quantity but greater than small quantity'. The amounts of drugs for the purposes of such quantities are required to be specified. There are thus three scales of punishments which are as follows:-

<u>Offence (Quantity-wise)</u>	<u>Punishment provided</u>
Contravention involving small quantity	Rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both
Contravention involving quantity lesser than commercial quantity but greater than small quantity	Rigorous imprisonment for a term which may extend to ten years, and with a fine which may extend to one lakh rupees
Contravention involving commercial quantity	Rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and fine which shall not be less than one lakh rupees but which may extend to two lakh rupees

2.3.2.2. The above scheme of punishment is applicable to the offences under the following sections:-

<u>Sl. No.</u>	<u>Section no.</u>	<u>Offence</u>
1.	15	Contravention in relation to poppy straw
2.	18	Contravention in relation to opium poppy and opium
3.	20	Contravention in relation to cannabis plant and cannabis
4.	21	Contravention in relation to manufactured drugs
5.	22	Contravention in relation to psychotropic substances
6.	23	Contravention relating to import and export of narcotic drugs and psychotropic substances

2.3.2.3. The NDPS Act also prescribes penalty for- (1) attempt to commit offence (section 28); (2) preparation for committing offence (section 30); (3) abetment and criminal conspiracy (section 29). Besides, the minimum mandatory punishment for embezzlement of opium (section 19), external dealings of drugs (section 24) and financing illicit trafficking and harbouring offenders (section 27A) have also been provided.

2.3.2.4. Section 31 of the NDPS Act provides for enhanced punishment for certain offences after previous conviction in major offences. Under this Section, the minimum punishment shall be one half of the minimum term of imprisonment and one half of the minimum amount of fine. The Courts have been given discretion to impose higher fine on recording reason to do so. The NDPS Act also provides under section 31A death penalty for certain offences on previous conviction. The death penalty after previous conviction has been prescribed on the basis of the quantities of drugs notified by Central Government. Financing directly or indirectly any of the criminal activities specified in relation to the notified quantities of drug or committing the offence of abetment or criminal conspiracy are also covered for death penalty under the aforesaid section.

2.3.3. Rehabilitation process of convicts while under imprisonment especially of addicts.

2.3.3.1. Whereas deterrent punishments have been prescribed for trafficking offences, the law deals with the addict offenders with leniency. So, the NDPS Act treats the addicts differently. Section 27 of the NDPS Act fixes punishment for consumption up to one year for hard drugs with a fine extendable to Rs.20,000 rupees or with both and for soft drugs an imprisonment for a term up to six months or with fine which may extend to Rs 10,000 rupees or with both. These scales of punishment are applicable to the offender who is found to have consumed small quantity of drugs as notified for the purpose of section 27. This has been done keeping in view that an addict should not be treated as a criminal; rather he needs the sympathy of the society and the Government.

- 2.3.3.2. It must be pointed out that opinions on criminalisation of possession of drugs for personal consumption are divided. Some are of the view that such possession should not be treated as an offence mainly on the ground that if a person, unfortunately having become an addict lives under fear of the legal action, he would not come forward for treatment. Such a scenario also renders assessment of the nature and the extent of drug addiction by the Government somewhat difficult. On the other hand, some experts subscribe to the view that putting the fear of law in the mind of an addict is necessary and he should be made accountable for the demand he generates. Unless this is done, they feel, the demand reduction efforts will not succeed particularly when the bulk of the drugs gets distributed amongst the addicts in the normal dosage, and for sustaining their own doses the addicts too become pedlars.
- 2.3.3.3. The 1936 Convention had granted mandate for punishing even consumption or possession for consumption. The 1961 and 1971 Conventions, however, provided for obligatory penal sanction for such activities. The 1988 Convention follows the earlier two conventions. This convention urged that subject to their constitutional, legal and administrative systems, the States may establish possession as an offence in their criminal law. It is in compliance of requirements of these conventions that possession of drugs of specified quantity has been treated as an offence in the NDPS Act. The Central Government has issued Notification No. 12/85 dated 14.11.1985 specifying the drugs and quantities for the purpose of section 27 of the NDPS Act.
- 2.3.3.4. As per section 64A of the NDPS Act, any addict, who is charged for an offence under section 27 or for an offence involving small quantity of drugs and who voluntarily seeks to undergo medical treatment from a hospital or a notified institution, shall not be liable to prosecution. Section 39 of the NDPS Act provides that having regard to the age, character antecedents, or physical or mental condition of the addict offender the court may with his consent direct that he be released for undergoing medical treatment. The Courts are also given power to release the addict offender after due admonition on his entering into a bond for abstaining from commission of an offence.

2.3.4. Entry, search, seizure and arrest

- 2.3.4.1. In any system of jurisprudence, power of search and seizure is an overriding power of the State for the protection of social security but law has to necessarily regulate this power. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction on the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law.
- 2.3.4.2. Sections 41, 42, 43 and 44 of the NDPS Act make specific provisions laying down procedure for entry into premises, search of premises and persons, seizure and arrest by authorized authorities. Further, as per section 51 of the NDPS Act, the provisions of Cr.PC are applicable to search, seizure and arrest in so far as those are consistent with the procedure prescribed in sections 41, 42, 43, 44. This means that the provisions of the NDPS Act with regard to entry, search, seizure

and arrest are not self-contained. The provisions relating to search of a place under occupation of a person sought to be arrested is required to be done in accordance with the procedure prescribed under the relevant provisions of the Cr.PC.

2.3.4.3. A question arises as to why special provisions in relation to entry into premises, search of premises and persons, seizure and arrest have been made for the narcotics offences. The answer is that the narcotics law is enforceable by a number of Central and State Govt. agencies and not by police alone. Therefore, the scope of relevant sections 41, 42, 43, and 44 has been made wider than the relevant sections of Cr.PC.

2.3.4.4. There are a good number of landmark judicial pronouncements on the question of infraction of the mandatory provisions of NDPS Act pertaining to search, seizure and arrest. The Hon'ble Supreme Court has held that non-compliance of the legal requirement as contained in various sections may vitiate the proceedings. In the case of *State of Punjab Vs. Balbir Singh [1994 SCC (3) 299]*, it was held by the Apex Court that only empowered Magistrate or Officer can issue warrant/authorization under section 41 of the NDPS Act. If this requirement is not followed, the arrest or search shall be illegal. The Police do not have *suo moto* powers to investigate cases under the NDPS Act. The expression Police Officer occurring in the definition of 'cognizable offence' in Section 2 of the Cr.PC would not mean that all the police officers can take action under the NDPS Act. The police officer has to be an authorized officer while dealing with the issue of recording reason for issuing authorization under section 42 of the NDPS Act. The Supreme Court has ruled that such an officer should record ground for his belief. Under Section 42, non-compliance of the requirement of authorizing the search affects the prosecution. The compliance of the procedural safeguards contained in section 50 are intended to serve dual purpose of protecting a person against frivolous accusation and frivolous charges and also of lending credibility to the search and seizure conducted by the empowered officer. Though in every case the end result is important, the means to achieve it must also remain above board.

2.3.4.5. The Courts have also held that the valuable right of an accused enshrined in section 50 of the NDPS Act to know the reason for a search should be given primary importance and his desire to be searched before a Gazetted Officer or a Magistrate should be fulfilled. A three member bench of the Supreme Court in the case of *State of Punjab Vs. Baldev Singh [LAW(SC)-1999-7-82]* came to following conclusions:

- That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under sub-section (1) of section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
- That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.

- That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of section 50 of the NDPS Act.
- That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards made by Section 50 at the trial, would render the trial unfair.
- That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial.
- That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.
- That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused,

notwithstanding the recovery of that material during an illegal search.

- A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

2.3.5. Investigation

- 2.3.5.1. It is of utmost importance for any administration of criminal justice that investigation of the offences should be done by complying with requirements laid down under the legal frame-work. Half-hearted investigation without going into the origin of the contraband exposes the law enforcement agencies to the comment that they have made a perfunctory effort. A flawed investigation also invites ridicule that "law governs the poor, and the rich and influential govern the law.'" An imperfect investigation results in a situation where the mastermind organizing the trafficking and the mighty hands engaged in the distribution of deadly drugs and substances remain undetected and free to carry on their nefarious activities.
- 2.3.5.2. Prior to enactment of the NDPS Act, the Dangerous Drugs Act provided for investigation to be conducted by officers of various departments as authorized by the respective State Governments. The Police was however competent to investigate into the drug offences. In practice only Police and State excise officers were conducting investigation. As the drug laws were being enforced by a number of Central and State Governmental agencies and such agencies (other than police and State excise) not being authorized to conduct investigations, the situation was detrimental to the proper administration of drug laws in the country. This legal deficiency was removed by the NDPS Act the section 53 of which invested the officers of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or of any other authorised department of Central Government, including para-military forces or armed forces or any class of such officers with the powers of an officers in charge of a police station for the investigation of the offences under the NDPS Act. The State Governments were also authorized to invest any officer of department of drug control, Revenue or Excise or any other officer with the power of investigation. So empowered officers have the powers of an officer in charge of a police station while investigating a cognizable offence. These powers are limited and are available only for the purpose of investigation for specific offences.
- 2.3.5.3. The expression 'investigation' has not been defined under the NDPS Act. Clause (xxix) of section 2 of the NDPS Act provides that the words and expressions used in the Act and not defined but defined in the Cr.PC have the meanings respectively assigned to them in the Cr.PC. Under clause (h) of section 2 of the Cr.PC, the expression 'investigation' includes all the proceedings under the Cr.PC for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in that behalf.

2.3.5.4. As held by the Supreme Court in *H.N. Rishbud and another Vs. State of Delhi [1955 SCR (1) 1150]* and *State of Madhya Pradesh Vs. Mubarak: Ali [1959 SCR Supl. (2) 201]*, 'investigation' comprises generally, the following steps:

- 1) proceeding to the spot
- 2) ascertainment of the facts and circumstances of the case
- 3) discovery and arrest of the suspected offender
- 4) collection of evidence relating to the commission of the offence which may consist of:
 - a. the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit.
 - b. the search of places for seizure of things considered necessary for the investigation and to be produced at the trial and
- 5) formation of the opinion as to whether on the material collected there makes a case to place the accused before a Magistrate for trial and if so taking the necessary steps by the filing of a charge sheet under section 173.

2.3.5.5. Chapter XII of the Cr.PC provides detailed procedure for investigation. The procedure laid down therein is required to be followed by the Police for investigation as also by officers of various departments of Central and State Governments who are invested with the powers of an officer-in-charge of a police station. However such officers (i.e., invested with the powers of an officer-in-charge of a police station) cannot be regarded as a 'police officer' within the meaning of section 25 of the Indian Evidence Act, 1972 (**"the Evidence Act"**). The Supreme Court in the case of *Illias Vs. Collector of Customs, Madras [1969 SCR (2) 613]* held that "the primary test to determine whether an officer under a special Act is a "police officer" for the purpose of section 25 of the Evidence Act is whether that officer has been invested with all the powers exercisable by an officer-in-charge of a police station under Chapter XIV of the Cr.PC, 1898 (Chapter XU of Cr.PC,1973), including the power to initiate prosecution by submitting a report (charge sheet) under section 173 of the Code. It is not enough to show that he exercises some or even many of the powers of a police officer conducting an investigation under the Code." [Source- *Law of Control on Narcotic Drugs & Psychotropic Substances in India* by Dr. M. C. Mehanathan.]

2.3.5.6. The Apex Court in the case of *Raj Kumar Karwal Vs. Union of India [1990 SCR (2) 63]* has held that the DRI Officers invested with powers under the NDPS Act to investigate are not police officers within the meaning of section 25 of the evidence Act and consequently confessional statement recorded by such officers are not hit by section 25 of the Evidence Act.

2.3.5.7. After completion of the investigation, the investigating officers other than the police officers are not required to file a charge sheet before the court under section 173 of the Cr.PC. They are required to file complaints before the Competent Court for trial of the cases.

2.3.5.8. Section 67 of the NDPS Act confers power on enforcement officers duly authorized by the Government to -

- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of the NDPS Act or any rule or order made thereunder;
- (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry; and
- (c) examine any person acquainted with the facts and circumstances of the case.

2.3.5.9. The Madhya Pradesh High Court in the case of *Smt. Jahida Bi And Others Vs. Central Narcotics Bureau [2001 CriLJ 1882]* has summarized the scope and evidentiary value of the statement recorded under section 67 of the NDPS Act and has held that such statement could not form the basis for conviction of the accused in the absence of some corroborated evidence available on record. While the Madras High Court has held that the statement under section 67 are admissible in evidence if made voluntarily without any fear or inducement or coercion (*Gopal Gany Ram & Ors. Vs. Supdt of Customs & CE. Trichnapalli*), the Andhra Pradesh High Court however in the case of *Shahid Khan Vs. Director Of Revenue Intelligence [2001 CriLJ 3183]* has held that the statement of accused under section 67 cannot be used as evidence for prosecution in the form of confession as against the statement recorded under section 108 of Customs Act. Statement recorded under section 67 after a person is arrested is hit by Article 22 of the Constitution as no person accused of any offence shall be compelled to be a witness against himself. Under section 161 of Cr.PC, "any person" includes the accused. Section 161 of the Cr.PC enables the police to examine the accused during investigation but the prohibitive sweep of Article 20 (3) of the Indian Constitution goes to the stage of police investigation not commencing in court only. In fact, the provisions of Article 20 (3) and Section 161(2) of the Code substantially cover the same area so far as police investigations are concerned. The ban on self-accusation and the right to silence, while an investigation or a trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of incriminatory matter. "Compelled testimony" is evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. A police officer is clearly a person in authority and insistence on answering is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to.

2.3.5.10. Section 53A of the NDPS Act makes a departure regarding admissibility of statement recorded in the course of investigation as evidence before a court of law from the general principle of criminal jurisprudence. This section corresponds to section 9D of the Central Excise Act, 1944 and section 138B of the Customs Act, 1962 ("**the Customs Act**"). Certain circumstances have been envisaged in this section when any statement made and signed by a person before any officer empowered for investigation under section 53A, shall be relevant for the purpose of proving the truth of the fact which it contains. These circumstances are- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of

delay or expense which, under the circumstances of the case, the court considers unreasonable; or (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. This section was inserted with a view to eliminate the chances of retraction by the persons who make statements in the course of an enquiry or investigation when they are produced as witnesses before the trial court. Moreover, the offences relating to international trafficking in drugs are offences under both the NDPS Act and the Customs Act and the prosecutions are launched under both the Acts in respect of such offence. It was, therefore, necessary that similar provisions with regard to relevancy of statements as provided under section 138 B of the Customs Act should be incorporated in the NDPS Act also. Besides, the officers empowered under section 53 of the NDPS Act are not regarded as police officers under section 25 of the Evidence Act. Therefore, any statement made or signed before them will have full evidentiary value.

2.3.5.11. The Maharashtra High Court while dealing with section 33 of the Evidence Act held that before the court can direct the evidence of a witness to be read in evidence, it must arrive at a finding that the witness could not be procured without delay or expense or for any other reason as contemplated by the section. Merely saying in the order that the witness is not available without proper material on the record to support the contention is not sufficient. Where it is desired to have recourse to section 33 of the Evidence Act on the ground that a witness is incapable of giving evidence, that fact must be proved and proved strictly. It is the duty of the prosecution to prove strictly to the satisfaction of the court that the witnesses could not be found in spite of attempt to trace and serve the summons on them. Temporary inability of witness is no ground to bring his previous statement on record. Before the previous statement of a dead witness can be put, strict proof of his death must be given.

2.3.5.12. In the course of recording of a statement by officers other than police officers, it is possible that they may get confessional statements from the offenders or persons connected with the offence. The confessions so made may be voluntary and not caused by any inducement, threat or promise. Such confessional statements would not be hit by section 24 of the Evidence Act.

2.3.6. Bail and trial in the court of law

2.3.6.1. Offences visitable with punishment of imprisonment less than 3 years do not fall within the category of cognizable offences under the Cr.PC. But, section 37 of the NDPS Act provides that all the offences under the Act are cognizable. Implication of all offences under the NDPS Act being cognizable is that the police can arrest a person who commits any of the offences under the NDPS Act without warrant even for the offence relating to small quantities and also for the offences under sections 8A, 26, 27, 32, 46, 47, 58 and 59 (1) and other contraventions attracting punishment up to 3 years.

2.3.6.2. Section 37 of the NDPS Act prescribes two conditions before granting bail, namely, (i) that the public prosecutor has been given an opportunity to oppose

the bail application; and (ii) where the public prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. Further, these limitations are in addition to the limitations prescribed under the Cr.PC. Proviso to section 167 (2) of the Cr.PC is not applicable to the cases covered by section 37 of the NDPS Act. The general condition laid down for grant of bail is that where an offence is bailable, bail has to be granted under section 436 of the Cr.PC. If the offence is non-bailable, further considerations arise and the court has to decide the question of grant of bail in the light of considerations such as, nature and seriousness of the circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State etc.

2.3.6.3. Section 36 of the NDPS Act provides for setting up of special courts for speedy disposal of the offence cases by the courts. Such special courts are empowered to try offences which are punishable with imprisonment for more than three years. It thus follows that if the punishment for any offence is up to 3 years, the same shall be triable by courts established under the Cr .P C. Section 36A of the NDPS Act contains procedures for trial of the drug offences. Under the present scheme an officer specially authorized has to move the special courts without approaching a committal court. The trial under section 36A is generally complementary to the provisions of the Cr.PC in terms of section 36C and the special courts are deemed to be the session courts and the persons conducting prosecution before special courts are deemed to be public prosecutor. Section 36B provides for appeal and revision against the order of the special courts to the High Courts.

2.3.7. Immunity from prosecution

Sections 64 and 64A of the NDPS Act provide for grant of immunity from prosecution in certain cases. While section 64 accords immunity for the purpose of obtaining evidence, section 64A enables an addict offender to receive immunity from prosecution if he voluntarily seeks to undergo medical treatment for de-addiction etc. The object of section 64 is the same as that of section 307 of the Cr.PC and the provisions could be applied any time during the course of trial. Immunity under section 64 can be granted even after taking cognizance of the case by the court of trial. In the case of *Jasbir Singh Vs. Vipin Kumar Jaggi & Anr. (2001 Cr.L.J. 3993)*, the Supreme Court held that there is no conflict between the power exercised by the court under section 307 of the Cr.PC and under section 64 of the NDPS Act. The Court also ruled that section 64 would prevail both on the ground that NDPS Act is a special Act to override the Cr.PC which is the general law and also because the enactment later in time must prevail over the earlier one. In this judgment, Supreme Court further ruled that there is nothing in section 64 of the NDPS Act to circumscribe the power of the Central Government under this section to a point of time prior to commencement of trial.

2.3.8. Forfeiture of illegally acquired property

- 2.3.8.1. The NDPS Act vide Chapter VA provides for tracing, identifying, seizure or freezing and forfeiture of illegally acquired property. As per the scheme of this Chapter, illegally acquired property held by the persons to whom the Chapter applies is liable to be traced, identified and seized or frozen by the officers empowered under section 53 of the NDPS Act and every officer-in-charge of a police station, and forfeited by the competent authority. Appeals against the order of the competent authority are to be preferred before the Appellate Tribunal for Forfeited Property. The property seized or forfeited shall be received and managed by the Administrators appointed under the NDPS Act. The sale proceeds of the property forfeited are to be credited into the National Fund for Control of Drug Abuse.
- 2.3.8.2. The provisions of Chapter VA are analogous to the provisions of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 ("SAFEMA") which provides for "forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators". The scope of SAFEMA is restricted inasmuch as (i) it does not cover the properties acquired by the persons from internal drug trafficking which does not fall within the meaning of smuggling, and (ii) it also does not lay down any measure for identification, tracing, freezing and seizure of such properties. Such a measure is necessary to prevent any likely concealment or transfer of properties which may result in frustrating any proceedings relating to forfeiture of such properties. Bearing in mind the restrictive application of the SAFEMA and also for implementing the provisions of the 1988 Convention, the Central Government has, through the introduction of Chapter VA in the NDPS Act, taken power to forfeit illegally acquired properties owned by a person or held on his behalf, which are established as relatable to illicit traffic.
- 2.3.8.3. It has been stipulated in the NDPS Act that such properties acquired by a person before a period of 6 years from the date he was arrested or against whom a warrant of authorization of arrest was issued or from the date the order of detention was issued, as the case may be, shall not be forfeited. This time limit has been laid down taking into account international practices in the matter. Chapter VA dealing with the forfeiture proceedings of the illegally acquired properties contains all the important ingredients of Article 5 of the 1988 Convention. While the provisions of the NDPS Act have been made applicable to Indian citizens living outside India for the purposes of punishment, etc. for contravention of the provisions of the Act, the procedure relating to extradition of such persons are required to be followed as per the Extradition Act, 1962. Chapter VA has also been made applicable to a person who has been convicted of a similar offence outside India or a person who has been arrested or against whom warrant of arrest has been issued for similar offences under any corresponding law of any other country. The procedure however laid down in Chapter VA are not specific and self-contained for initiating proceedings for tracing, identification, freezing, seizure or forfeiture of the properties situated outside India in the name of an Indian citizen to whom the NDPS Act applies. In this regard Para 4 of Article 5 of the 1988 Convention lays down certain procedure in respect of the properties

situated outside the territory of a country. The procedure envisages obtaining cooperation of the concerned country in the matter of tracing, identifying, freezing and forfeiture of the properties. The above Article also envisages for bilateral or multi-lateral treaty arrangement to bind the requesting and requested Government.

2.3.9. Release and confiscation of seized articles

Sections 60, 61 & 62 of the NDPS Act as amended deal with confiscation of articles, drugs, substances and conveyance, etc. Section 52A of the NDPS Act prescribes self-contained procedure for pre-trial disposal of seized drugs and substances. However, the NDPS Act does not contain any provision for interim release of seized vehicles. While Section 51 of the NDPS Act makes the provision of Cr.PC applicable to seizures, it is silent on application of the provision of the Cr.PC in the matter of interim release of vehicles. Some High Courts have held that in case of innocent owners the operation of section 451 and section 457 (1) of the Cr.PC will come into play which sections are not inconsistent with the scheme of the NDPS Act, but some other High Courts, however, do not hold such views.

3. **NEEDS FOR RE-LOOK**

While the NDPS Act as amended in 2001 is a balanced legislation, certain anomalies or inadequacies still persist. The NDPS Act thus calls for certain improvements by way of suitable legislative amendments. These are outlined in succeeding sub-paragraphs.

- (i) As envisaged in the 1988 Convention, the activities like concealment, disguising the true nature, source, and location, etc. of drug related properties have also been criminalized under section 8A of the NDPS Act. Section 8A was introduced in the NDPS Act in 2001. Somehow, corresponding penal provisions for the offences under section 8A have not been provided. The offences under Section 8A get covered for penal action under section 32 which is a residuary provision providing for a lenient punishment up to 6 months with or without fine. This quantum of punishment is just not enough for a serious offence like money laundering. The punishment for such serious offences should be stricter.
- (ii) The penal scheme for small quantity, commercial quantity, etc. may not be working properly as the dividing line between small quantity, quantity less than commercial quantity and more than small quantity and commercial quantity would be elusive for various reasons. Some offenders involved in possession of small quantity may be repeat offenders deserving deterrent punishment. The punishment under section 31(2) of the NDPS Act prescribing one half of the minimum term and one half of fine is not enough for the repeat offenders falling in such category.
- (iii) The punishment under section 19 of the NDPS Act for embezzlement of opium, section 24 for external dealings and section 27 A for financing drug

trafficking is not dependent on any quantity. Punishment provided under these sections is equivalent to the punishment for commercial quantity. This does not appear to be logical particularly when the penal scheme is based on quantities.

- (iv) Old section 27 of the NDPS Act criminalized possession of small quantity of drugs for personal consumption whereas the present section 27 (after amendment in 2001) criminalizes consumption only. After consumption, the drug consumed goes into the body system of an addict. It is very difficult to ascertain the quantity of drug consumed by an addict even on chemical test. It is, therefore felt that possession for consumption should be criminalized as in the earlier version of the section.
- (v) The punishment prescribed for addict offenders under section 27 of the NDPS Act in respect of hard drugs is up to one year with fine whereas the punishment for small quantity in trafficking offences provided is up to six months with fine. There is thus an anomaly in the scale of punishment on this account. This needs correction.
- (vi) Majority of cases fall under the category of small quantities of drugs attracting punishment up to six months. There are other offences as well which attract punishment up to 3 years. As per section 36A (5) of the NDPS Act, the offences punishable with imprisonment for a term less than 3 years may be tried summarily. This section overrides the provisions of Cr.PC, yet the procedure for summary trial as prescribed under Cr P C has to be followed under section 262 thereof. Maximum punishment for cases under summary trial is 3 months only which is too lenient for a drug offender even for small quantity. Section 36A (5) therefore should prescribe penalty higher than 3 months imprisonment.
- (vii) In the NDPS Act as it stands today, there is no self contained procedure to initiate proceedings under Chapter VA thereof against properties held by a person outside India. A self contained procedure needs to be prescribed in the matter on the line of Chapter VII A (section 105A to section 105L) of the Cr.PC. Alternatively, the provisions of Chapter VIIA of the Cr.PC be made applicable in this regard by suitable amendment. Presently, Chapter VA of the NDPS Act does not import the provisions of Chapter VII A of the Cr.PC.
- (viii) There is no provision in the NDPS Act for release of vehicles belonging to an owner who is innocent, though used for the carriage of contraband drugs. Such provisions may be incorporated on the line of the provisions contained in section 115 of the Customs Act.

4. **PROCEDURAL AND INFRASTRUCTURAL IMPROVEMENTS**

4.1. Revamping of laboratories and handling of samples

The concept of graded punishment introduced by the 2001 amendment in the NDPS Act is based on the quantities of various drugs as notified in the categories of 'commercial quantity', 'small quantity' and the quantity lying in between the commercial quantity and small quantity. The determination of purity in the test analysis is an essential part of investigation which needs to be done objectively and honestly through modern technological process by trained chemical examiners. Human errors in the course of testing a drug may defeat the very objective of the new penal scheme. The determining factor for quantity ascertainment of the drugs like heroin, morphine, cocaine, charas etc. is based on the prescribed purity standard. Any mistake on plus or minus side may defeat the purpose. In the course of trial, the evidence given by the chemical experts are admissible as relevant evidence under section 293 of the Cr.PC. Their examination/cross-examination is very important before the Court of law. It is, therefore, imperative that the samples are drawn properly as per the prescribed procedure and a sample is not handled by many hands. Chances of substitution of a sample must be absolutely eliminated and the linkage of samples with the man and the drug involved must be maintained throughout the process until the last stage when the samples are produced before the Court of law. The testing laboratories, therefore, need to be revamped in terms of trained men and materials.

4.2. Working of Special Courts

The drug offences attracting punishment for a term over 3 years are triable by Special Courts. The total number of Special Courts established in the country is not commensurate with the work load and the very purpose of creation of special courts is defeated. Though the establishment of the courts of law and their maintenance is responsibility of the State Governments yet the Central Government for quite some time had undertaken to share 50% of the cost for establishment of the Special Courts. It is understood that a number of States do not have Special Courts. Some States have for the sake of formality designated certain Courts like Food Adulteration Act courts as Special Courts for narcotics offences. In certain States, for 4 to 5 districts, only one Court is designated as Special Court. There is thus inadequacy of judicial infrastructure in all the States so far as narcotics offences are concerned. This may be due to financial constraints. This matter needs to be seriously addressed for augmentation of judicial infrastructure by the Central and State Governments.

4.3. Strengthening of Enforcement Agencies

The NDPS Act provides for participation by both Central and State Governments in anti-drug enforcement. At the Central level, the Customs, Excise, DRI and CBI are the main enforcement agencies. The drug problem has been escalating day by day but the Government's policy of 10% cut in the staff strength for downsizing all the departments is coming in the way of effective administration of the NDPS Act which has to deal with offences of complex nature having linkage with arms smuggling and terrorism posing threat to country's security. The Governments

both central and States are unwilling to make a realistic assessment of manpower requirements and provide the same to effectively enforce the NDPS Act. Accordingly, the NDPS Act remains a theoretical declaration of governments' intent to tackle the drug problem while number of addicts proliferates and quantum of trafficking continues to swell. There is urgent need to address the issues of manpower and infrastructure for implementing the NDPS Act.

4.4. Treatment and Rehabilitation of Addicts

Section 71 of the NDPS Act provides for referral treatment for the addict offenders in the Government hospitals or the institutions recognized by the Government. The number of such hospitals and institutions is woefully meager. The Central and State Governments should provide adequate facility to take care of increasing number of addicts for their treatment. The Government and NGOs working in the field of rehabilitation should make all endeavours to provide facilities for the addicts for their rehabilitation and social re-integration.

4.5. Protection of Witnesses

Indian judicial system requires the offences to be proved beyond doubt in courts on the basis of evidence. Evidence tendered by the witnesses therefore plays a very important role in bringing the drug offenders to book. However, it is a common experience that the witnesses back out or turn hostile during the course of trial. This mainly happens under threat from the traffickers. The Hon'ble Supreme Court in several cases has observed that the witnesses should be shielded from harassment. Protection of witnesses is therefore a must. Governments must make institutional arrangements for witness protection.

5. **CONCLUSION**

The NDPS Act has been designed to combat the drug problem in a holistic manner. The supply reduction strategies and the demand reduction strategies have to work in tandem. The availability of drugs needs to be limited to meet the medical requirement by strict enforcement action. Drug addicts found in possession of small quantities for personal consumption, in any case, have to be given a sympathetic consideration. The concerned agencies in Government as also the NGOs working in demand reduction field for medical treatment, rehabilitation and social re-integration of increasing number of addicts have to pool their resources to fight the drug abuse problem. Mere enforcement of NDPS Act will not be enough. Nonetheless, proper and effective investigation and trial of the offences in the court of law to bring the major offenders to book as per the prescribed procedure would also go a long way to reduce the supply of the drugs. Proper and effective co-ordination internally among the various Central and State Government agencies and also bilateral and multi-lateral co-operation from the other affected countries is the need of hour. The apex co-coordinating and enforcement agency, namely the Narcotics Control Bureau (NCB), needs to be revamped in terms of men and material. The objective of administration of criminal justice under the NDPS Act can be achieved only when the culprits are punished, especially the king pins and the innocents do not suffer at the hands of enforcement agencies.