

## Protection and Safeguards for NDPS

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### Abstract

Even in the most extreme circumstances, where adequate evidence is available, the Courts have acquitted the accused on technical ground due to incorrect application of the provisions of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985. Once an individual is caught with drugs, investigation process should always result in conviction. Hence, the investigation as to be as per provisions of the law and should not suffer from improper procedures and technical lacunae. One of the main objectives of the NDPS Act is to make stringent provisions for the control and regulation of operation relating to Narcotic Drugs, Psychotropic Substances and Controlled Substances. And the same is reflected in the strict terms of imprisonment and fine. The law aims to make drug trafficking extremely dangerous for drug traffickers, who would naturally perform their activities in a highly confidential manner to avoid detection and subsequent investigations. In this paper the author tries to explain the protection & safeguards and the importance of standard operating procedures for increasing number of convictions in NDPS cases. In this paper doctrinal and analytical method adopted for analysing the secondary sources and judgments of various courts.

Keywords: Conviction, Evidence, Investigation, Legislation, Standard Operating Procedures.

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“Knowing is not enough; we must apply. Wishing is not enough; we must do.”

-Johann Wolfgang Von Goethe

The Narcotic Drugs and Psychotropic Substances Act was formulated in the year 1985. It is an important legislation which seeks to strengthen the laws related to drugs and narcotics. It aims at creating strong provisions to control and regulate operations in relation to narcotic drugs and psychotropic substances in India. Perhaps, one of the foremost disadvantages of the Act is that it deduces the guilt of the accused which brings complete responsibility of proving an individual's

innocence on him. On the other hand, bails cannot be given to accused of offences which fall under Sections 19, 24 or 27A of the NDPS Act and those relating to commercial quantities of drugs. Though these provisions can be termed as the milestones under the NDPS Act but causing great concern in dealing with prosecution of cases and punishing the accused.

### **The UN Commission on Narcotic Drugs**

India has chosen in favour of a move by the UN Commission on Narcotic Drugs<sup>1</sup> to eliminate cannabis from Schedule IV of the 1961 Convention where it was listed alongside drugs like heroin.<sup>2</sup> A 53-member body of the Commission decided by 27 votes to 25, and with one abstention. By this the UN Commission on Narcotic Drugs has unlocked the door for recognising the medicinal and therapeutic potential of the frequently used but still mainly illegal drug. Conceivably the decision could also drive further scientific research into the plant's long-heralded healing properties and act as a catalyst for countries to legalise the drug for medicinal use.

While India chosen for eliminating the cannabis from Schedule IV of the 1961 Convention, but its inland laws remain tough, consequential in action by enforcement agencies as seen in the case of Narcotics Control Bureau in Mumbai in the background of small amounts being seized and Bollywood personalities detained for possession.

### **Marijuana Legalisation**

California's Marijuana legalization in the year 2016 for adult recreational use might have led to its increased usage in teens.<sup>3</sup> This astonishing conclusion is based on the findings of a study. In this study data from over three million of students belongs to 7<sup>th</sup> grade, 9<sup>th</sup> grade, and 11<sup>th</sup> grade and the information collected from them is about their grade, sex, ethnicity, race and lifetime and past 30 day

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<sup>1</sup> This Convention aims to combat drug abuse by coordinated international action. There are two forms of intervention and control that work together. First, it seeks to limit the possession, use, trade, in, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes. Second, it combats drug trafficking through international cooperation to deter and discourage drug traffickers.

<sup>2</sup><https://economictimes.indiatimes.com/news/politics-and-nation/indias-united-nations-vote-to-reclassify-marijuana-raises-eyebrows/articleshow/79577575.cms>

<sup>3</sup><https://economictimes.indiatimes.com/news/international/world-news/marijuana-legalization-for-adult-recreational-use-might-have-led-to-its-increased-usage-in-teens-study/shocking-revelations/slideshow/80989075.cms>

marijuana use.<sup>4</sup> There were prominent increases in marijuana use rate among adolescents in 2018-19, which may replicate national upsurges in the use of vaping products.<sup>5</sup>

### **Declaration of Psychotropic Substances**

Vide its notification S.O. 1761 (E) on 26<sup>th</sup> April 2018<sup>6</sup>, the Department of Revenue, Ministry of Finance, declared Tramadol as a Psychotropic substance to control its abuse/misuse.<sup>7</sup> To that effect, the sale and distribution of Tramadol will now be under the supervision and control of Narcotics Control Bureau. Moreover, this will also empower the of Narcotics Control Bureau to curb the ongoing drug-abuse trend in the country. In addition to that, it will also enable rigorous punishment to the offenders if the drug is found illegally stocked or distributed.

The Drugs and Cosmetics (Fourth Amendment), 2013 on 19<sup>th</sup> March 2014 had introduced Schedule H1 for regulating sale of certain antibiotics, anti-TB Drugs and habit-forming drugs, where Tramadol was one of those habit-forming drugs listed under Schedule H1.<sup>8</sup>

According to Schedule H1, the drugs should carry a Boxed Label Warning saying ‘Not to be sold without a prescription issued by Registered Medical Practitioner and self-medication of the drug preparation can be dangerous.’<sup>9</sup>

### **Comprehensive List of Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985**

<b>Section</b>	<b>List of offences <sup>10</sup></b>
15	Infringement in relation to poppy straw
16	Infringement in relation to coca plant and coca leaves
17	Infringement in relation to prepared opium
18	Infringement in relation to opium poppy and opium
19	Misappropriation of opium by cultivator

<sup>4</sup> Findings of this study published in the Journal of Studies on Alcohol and Drugs. Lead researcher Mallie J. Paschall and his colleagues analysed the data.

<sup>5</sup> Ibid

<sup>6</sup> In exercise of the powers conferred by Section 3 of the Narcotic Drugs and Psychotropic Substances Act, 1985

<sup>7</sup> <http://www.egazette.nic.in/WriteReadData/2018/185016.pdf>

<sup>8</sup> <http://cdsco.nic.in/writereaddata/Inclusion%20of%20Schedule%20H1%20under%20the%20DC%20rules.pdf>

<sup>9</sup> <http://cdsco.nic.in/writereaddata/MinutesDTAB%2062nd.pdf>

<sup>10</sup> Chapter – IV of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).

20	Infringement in relation to cannabis plant and cannabis
21	Infringement in relation to manufactured drugs and preparations
22	Infringement in relation to psychotropic substances
23	Unlawful import into India, export from India to transshipping of narcotic drugs and psychotropic substances
24	External transactions in narcotic drugs and psychotropic substances in flouting of Section 12 of the N D P S Act, 1985
25A	Breach of orders made under Section 9A of the N D P S Act, 1985
27A	Funding for illicit traffic and sheltering offenders
29	Abetment and felonious collusion

### Scheme of Conviction of Accused

He who excuses the guilty, condemns the innocent. Recent judgment of Supreme Court of India about ground for conviction and duty of prosecution is worth noting. In one case *Vijay Pandey v. State of Uttar Pradesh*<sup>11</sup> Supreme Court held that, for the purpose of sentence fact of an earlier conviction may be relevant but cannot be a ground for conviction *per se*. Moreover, at the occurrence of seizure of Opium, failure of prosecution to relate seized sample with that seized from appellant makes case no different from failure to produce seized sample itself.<sup>12</sup>

For punishing the accused under benefit of doubt, the Supreme Court held that<sup>13</sup>, doubt should not be an imaginary, trivial or a merely probable doubt; but a fair doubt that is based upon reason and common sense. The Court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt; but a fair doubt that is based upon reason and common sense.<sup>14</sup>

### Protection and Available Safeguards

In *Mukesh Singh v. State* (Narcotic Branch of Delhi) case, Apex Court held that accused under NDPS Act not entitled to acquittal merely because informant was investigation officer. Court

<sup>11</sup>2019 (7) Supreme 51 decided on 30.07.2019

<sup>12</sup>Ibid

<sup>13</sup>Hanumant Govind Nargundkar v. State of M P. AIR 1952 SC 343.

<sup>14</sup>Ibid

reversed the contention that in case the investigation is conducted by the police officer who himself is the complainant, the trial is vitiated and the accused is entitled to acquittal.<sup>15</sup>

There are in-built provisions under the NDPS Act to protect the accused's interests. The issue of whether a criminal case would be conducted in accordance with the standards of justice, fairness, and a fair investigation where the informant and the investigating officer were to be the same person was raised in Mohan Lal case. Apex court held that:

“A fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.”<sup>16</sup>

In another case the apex court held that criminal jurisprudence mandates balancing the rights of the accused and the prosecution. The bench further said:

“Undoubtedly individual rights of the accused are important. But at the same time societal interest is also equally important for bringing the offender to book and for the system to send the right message to all in the society – be it the law-abiding citizen or the potential offender. “Human rights” are not only of the accused but, extent apart, also of the victim, the symbolic member of the society as the potential victim and the society as a whole.”<sup>17</sup>

The pronouncement to reclassify cannabis and withdraw it from the strictest drug control list followed a recommendation by World Health Organisation for a change in, the scope of control of cannabis and cannabis related substances.

### Standard Operating Procedures for NDPS Cases

<sup>15</sup> Mukesh Singh v. State (Narcotic Branch Of Delhi) on 31 August, 2020.

<sup>16</sup> Mohan Lal v. State of Punjab, (2018) SCC Online SC 974

<sup>17</sup> Varinder Kumar v. State of Himachal Pradesh, 2019 SCC Online SC 170 decided on 11.02.2019.

Despite the fact that major offences under the aforementioned Act are non bailable, it has been observed that drug offenders have been acquitted on technical grounds in some cases. Due to non-compliance of mandatory provisions and the prescribed procedure, large number of offenders under the Narcotic Drugs and Psychotropic Substances cases are acquitted. In the process of administration of criminal justice, the discharges in serious offences particularly in NDPS cases create a sense of insecurity in the society and undermine the faith of the common man. Henceforth, it is mandatory upon the investigating agencies / prosecutors to discharge their assigned duties in a professional manner for achieving the desired objective of law.

In this context the Division Bench of the Hon'ble High Court at Jammu in PIL No. OS/2013,<sup>18</sup> has been monitoring the progress of steps taken by the State to ensure that in NDPS cases, the investigation is conducted in a proper and professional manner by adhering to the mandatory provisions of the Act and to minimise the acquittals in such cases.

Hence, it is enjoined upon all the investigating officers / prosecution in NDPS cases to strictly adhere to the provisions of the NDPS Act, 1985 and the procedures laid down in Standard Operating Procedures.

Provisions of Sections 41 and 42 of the NDPS Act will be attracted when there is a prior information about the existence of illegal imports in any building, conveyance or enclosed place, while as provisions of Section 43 applies when information as such is not about the presence of an illegal imports at any of such place but such article is likely to be carried in any public place.

Under proviso to sub-section (1) of Section 42 of the NDPS Act, if the investigation officer has a reason to believe that a search warrant for authorisation cannot be obtained without affording opportunity for the concealment of evidence of facility for the escape of an offender, after recording the grounds on his belief he may go in to the building and search such building, conveyance or enclosed place at any time amid sunset and sunrise.

In addition to the above provisions, Section 41 (2) proviso to Section 42 (1) and Section 50 of the NDPS Act have to be mandatorily complied with. If these provisions are violated, it would invalidate the trial. Moreover, the procedure provided in Section 50 are mandatory in nature and not

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<sup>18</sup>titled 'Court on its own Motion v. State and Others'



purely procedural and breach thereof invalidates the trial. Nevertheless, procedure under Section 50 applies only in cases of search of the person. It does not encompass to search of a vehicle or container or bag or premises.

### Exoneration in NDPS Cases

The reasons for acquittal in NDPS cases viz., faulty investigation, delay in trial, insufficient evidence, witness turns hostile etc. These reasons to be for effective implementation of the control provisions for illegal Drug Markets and Drug use.

### Rulings on NDPS

There have been various judgments given in the past which have strengthen the Narcotic Drugs and Psychotropic Substances Act, 1985 by acting as precedents in various cases of importance.

In *Arif Khan v. State of Uttarakhand*<sup>19</sup> case Supreme Court of India restated that the provisions of Section 50 of the NDPS Act, 1985 are mandatory in nature. Provisions of Section 50 of NDPS Act clearly states that the accused is required to be searched only before Gazetted Officer / Magistrate. In this case, the accused were acquitted on grounds of non-compliance of the provisions of Section 50 of NDPS Act, 1985.

The High Court of Himachal Pradesh in *Joginder Singh v. State of Himachal Pradesh*<sup>20</sup> case, illustrated the object behind enactment of Section 50 of NDPS, 1985. The High Court of Himachal Pradesh discharged the accused on the ground that the required provision under Section 50 of the NDPS Act was not followed by the concerned officials and established a strong precedent to be followed.

In *State of Rajasthan v. Parmanand*<sup>21</sup> case it has been held that considering the stringent provisions under the Narcotic Drugs and Psychotropic Substances Act, the right available to an accused person under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, is to be examined before a Gazetted Officer or a Magistrate. Notwithstanding that combined communiqué of a

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<sup>19</sup> 2018 SCC Online SC 459

<sup>20</sup> 2018 SCC Online HP 836

<sup>21</sup> (2014) 5 SCC 345

right may not be clear or unequivocal as it may create confusion and may result in water down the right.

In *Harish Kumar v. State of Himachal Pradesh*<sup>22</sup> case; Himachal Pradesh High Court held that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by court while exercising its discretion. Court held that object of bail is to be secure the presence of accused in the trial and the test is of probability if a person will appear to take its trial.

In *Mohan Lal v. State of Punjab*<sup>23</sup> case a bench of three judges of Apex Court held that informer and sleuth must not be the same person for a fair inquiry and trial. The court further held that the provisions of Narcotic Drugs and Psychotropic Substances are punitive with its minimum of 10 years imprisonment and reverse burden of innocence. Henceforth fair trial is required at all costs. The accused was acquitted because the IO was same as the informant.

In *State of Punjab v. Rakesh Kumar*<sup>24</sup> case the Supreme Court held that people found in possession of unauthorised bulk of manufactured drugs containing narcotic drugs or psychotropic substances is triable under NDPS Act, 1985 apart from Drugs and Cosmetics Act, 1940. The accused were apprehended with “manufactured drugs” and convicted by the trial court under Section 21 and Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

In *Yusuzi Hinagata v. State*<sup>25</sup> case the court allowed an appeal filed by the appellant against the order of the Special Judge (NDPS) whereby he was convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 for possession of prohibited possession of LSD liquid and charas. Yusuzi Hinagata conviction was overturned when contents of charge were being not described to him in a language understood by him. The court ruled that this was a clear case of violation of provisions of Section 50 of NDPS Act.

The apex court in *Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence*<sup>26</sup> case held that in the absence of an applicable piece of evidence conviction cannot be based solely on co-accused’s ‘Confessional Statement’. Court further held that, even if we are to advance on the principle that such statement under Section 67 of the Narcotic Drugs and Psychotropic

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<sup>22</sup>CrMP (M) No. 604 of 2018

<sup>23</sup> 2018 SCC Online SC 974

<sup>24</sup> 2018 SCC Online SC 2651

<sup>25</sup> 2019 SCC Online Bom 2474

<sup>26</sup> 2018 SCC Online SC 757



Substances Act may amount to confession, in our view, certain supplementary features should be established while punishing the co-accused relying on such a confessional statement.

The apex court in *Hanif Khan & Annu Khan v. Central Bureau of Narcotics*<sup>27</sup> case observed that, though Narcotic Drugs and Psychotropic Substances Act transmits reverse burden of proof, but it does not forgive the prosecution from establishing a *prima facie* case against the accused. The apex court allowed the appeal and acquitted the accused as the FSL Report lost much of its significance and the accused is entitled to the benefit of doubt. The honourable Supreme Court relied on *Narcotic Control Bureau v. Sukh Dev Raj Sodhi*<sup>28</sup>.

Patna High Court on 23rd December 2020 has held that negation and conditions enunciated in Section 37 of NDPS Act not applicable in Juvenile's case as Section 12 'Juvenile Justice Act' overrides the Section 37 of 'Narcotic Drugs and Psychotropic Substances Act.'<sup>29</sup>

In another case the Madras High Court restrained the Special Public Prosecutor(SPP) for Narcotic Drugs and Psychotropic Substances cases from functioning for allegedly enabling NDPS accused to get default bail.<sup>30</sup>In this case the SPP cleared the 10th standard and attained M A Degree in an open University and LL B degree from Mysore and has been appointed as SPP for prosecuting NDPS cases. In 43 cases where the SPP's erratic conduct resulted in the accused being let off on bail. The main allegation against SPP is that he is in the habit of receiving final reports from the Inspector of Police in time and would not file before the Court which will enable the accused to get statutory bail. Division Bench of Madras High Court comprising of Justice N. Kirubakaran and Justice B. Pugalendhi gave directions to the Vigilance and Anti-Corruption department to conduct an enquiry in the matter.<sup>31</sup>

## Suggestions and Conclusion

In the words of Johann Wolfgang Von Goethe, Knowing is not enough; we must apply. Wishing is not enough; we must do. Obviously, the quantity of Narcotics Substances recovered is a relevant factor to impose punishment higher than the minimum. At this juncture to meet the ends of

<sup>27</sup> 2019 (4) RCR (Criminal) 250

<sup>28</sup> (2011) 6 SCC 392

<sup>29</sup> Anamul Haque vs The Union Of India Through Directorate of Revenue Intelligence  
<https://indiankanoon.org/doc/71982390/>

<sup>30</sup> W.P.(MD)No.19480 of 2020 web copy of Madras High Court. <https://www.judis.nic.in>

<sup>31</sup> Ibid

justice a pro-active approach of the Court can be useful where the investigating officer has deliberately rendered the investigation defective. Though under the Narcotic Drugs and Psychotropic Substances Act, 1985 number of registration of cases are increasing every year but the rate of acquittals is a matter of great concern as it illuminates the gap between the investigation and the law. Exoneration of numerous suspects due to faulty investigation needs remedial measures at once so that rule of law and efficacy of the criminal justice delivery system are not only preserved but enhanced.

To effectively combat this menace with flawless standard operating procedure the need of the hour is to build a team of dedicated officers in the field of narcotics law enforcement who are well trained and furnished with efficient knowledge and related skills. Operative steps shall also be taken to process the cases for preventive detention of typical lawbreakers under the provisions of Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act, 1988. Knowing of statutory provisions is not enough, we must apply. Similarly wishing to punish the wrongdoer is not enough, but we must do.

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