

# SEVERE LAWS AND STRICT PUNISHMENTS: MANDATORY REQUIREMENTS FOR CHANGES IN SOCIETAL BEHAVIOUR

**\*Dr. N. Krishna Kumar, \*\*George Johnson**

*\*Research Supervisor, Himalayan University*

*\*\*Research Scholar, Himalayan University, Arunachal Pradesh*

## ABSTRACT

*Indian society is not immune to the widespread issue of drug usage. However very often the accused is acquitted on technical grounds. For example compliance with Sections 41 and 42 of the NDPS Act is required for every search, seizure, or recovery of contraband that takes place. The legality of the search and seizure of the illegal goods would be called into question if the terms were not followed. However when such an authorised officer is conducting a search and seizure in a public area, he or she is not subject to the requirements set out in Sections 41 and 42. The sentencing procedure needs to be strict and proportional to the proven guilt of the perpetrator, and it is expected that the courts would operate the system so as to inflict such penalty as represents the conscience of the society. Illegal trade has to be stopped and there needs to be global effort to do it. This, in turn, should be coupled with demand reduction measures that deal with the problem of drug addiction in a forthright and efficient manner. Similarly strict enforcement of drug laws in full coordination with all associated agencies and with the broadest possible co-operation and support on a regional and worldwide basis will be essential for the control of drug trafficking and drug traffickers.*

**Keywords:** *Forfeiture; search; seizure; societal behaviour; trafficking*

## INTRODUCTION

The purpose of the Narcotic Drugs and Psychotropic Substances Act of 1985 (NDPS Act of 1985) was to establish provisions for the forfeiture of property derived from or used in illegal narcotics and psychotropic substance trafficking and to set strict guidelines for the management and control of activities related to narcotics and psychotropic substances. Sections 15–30 detail different offences and their corresponding consequences. Crimes covered by the Narcotic Drugs and Psychotropic Substances Act of 1985<sup>1</sup>, namely sections 20 and 25 when read in conjunction with section 29 are violations of a law in their own right. This Act is a unique Act, however the provisions of Chapter XXXIII that deal with violations of the Act have not been expressly excluded.

In accordance with the Act, the trial will also be presided over by a Sessions Judge rather than a Special Judge. Therefore, the provisions of Criminal Procedure Code Chapter XXXIII are especially pertinent to crimes of this nature. However, the Division Bench of the Gujarat High Court has noted that when the accused is charged with crimes punishable by

Section 22(b)(ii) read with other Sections of the NDPS Act 1985, taking into account the seriousness of the offence, the punishment provided under the Act, and the beginning of rampant use of Charas, Ganja, or similar drugs by the young in these types of cases, normally accused should not be released on bail because they are risk to the public.<sup>2</sup>

## **CHANGE IN THE PAST TWO DECADES**

Indian society is not immune to the widespread issue of drug usage. Herbal Cannabis and Opium have been traditionally abused in India, with the latter being available in small quantities from regulated shops until quite recently. As long as the problem was contained to a small subset of the population and controlled through less formal channels of social interaction. However, things have changed drastically over the past two decades as a result of rising underground demand for hard drugs like heroin and concentrated cannabis in wealthy Western countries. This has led to the growth of the illicit conversion of opium into heroin in underground laboratories in the so-called "Golden Triangle," and the drug has spread throughout the world.<sup>3</sup>

Regarding the NDPS Act, the Act does not establish strict responsibility crimes. Section 35 of the Act establishes a rebuttable presumption that the requisite 'mens rea' was present during the commission of each crime (disposition, cultivation, transportation, etc.). The burden of proof is with the accused.

When the prosecution has established beyond a reasonable doubt the existence of the requisite actus reus, section 35 of the Act provides the necessary mens rea. Because of section 54 of the Act, if these two conditions are met, the court may increase the presumption of possession from the back factum that the accused has committed the offence, and the burden of proof shifts to the accused.

## **GREATER BURDEN ON ACCUSED**

The accused has a greater burden than those who are not.

The facts stated in Preamble and the Statement of objects and reasons appended to any legislation are evidence of legislative judgement. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst other will be taken into consideration by the Court in judging the reasonableness of any restrictions imposed on the fundamental rights of the individuals.<sup>4</sup> The Court would begin with the presumption of reasonability of the restriction, more so when the facts stated in statement of objects and reasons and preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved.

The object of the N.D.P.S Act is to make stringent provisions for control and regulation of operations relating to certain drugs and substances. Harm to innocent persons and abuse of

the provisions by the officers are to be avoided. It was with this intent that safeguards like the one available in Sec. 42 (2) were built into the Act. The purpose is to ensure that the empowered officer on receiving an information should reduce the same to writing and also record reasons for his belief while carrying out the search and arrest.<sup>5</sup>

Similarly sending of the report would ensure that false cases are not fabricated by the empowered officers. It was found in *State of Punjab v. Balbir Singh*<sup>6</sup>, that Sec.42(2) in so far as it requires sending of a copy of the information to the immediate official superior is mandatory; but if there is delay, whether it was undue or whether the same has been explained or not, will be a question of fact in each case. It was held that if the statutory requirement under Sec. 42 (2) is not complied with the accused is entitled to benefit of doubt.<sup>7</sup>

Where the witnesses did not say that the sample was taken from the bags which were recovered from the possession of the accused, there is no evidence that the seized ganja and the bags kept in the Malkhana in sealed cover and the sample was sent for chemical examination after two months of the seizure of the article and the witness gave different descriptions of the bags and even the forwarding note mentioned different colours of the bags obviously ganja allegedly recovered from the possession of the accused is neither narcotic drug nor psychotropic substance within meaning of Section 2(iii) (b) of the Act the conviction of the accused could not be sustained.<sup>8</sup>

## **BAIL PROVISIONS**

The ability to post bail or the inability to post bail had to be decided in light of Part- II of the Schedule to the Criminal Procedure Code, which states that offences punishable with the death penalty, imprisonment for life, or imprisonment for three years or more are not bailable, while offences punishable with imprisonment for less than three years or with fine only are bailable. A provision was added to the Act that makes it illegal to release drug offenders on the basis of a technicality.<sup>9</sup>

The technical ground is the one that can be found in the proviso (a) to section 167 (2) of the Code of Criminal Procedure, which mandates the release on bail of an accused person when the investigation has not been finished within the allotted time period of ninety days or sixty days, depending on the circumstance. It would be clear from reading the declaration of goals and reasons for Amending Act 2 of 1989 that the legislature's intention was to "overcome this technical ground contained in proviso (a) to sub-section (2) of Section 167 of the code."<sup>10</sup> Proof of "possession" must involve both awareness and exclusivity. A conscious and exclusive possession is required for it to be considered an act of criminal wrongdoing. It is necessary for the individual whose responsibility is being investigated to be aware of this information. This individual must have jurisdiction and control over the item in question, and they must have sole ownership of it. When there is a case against the accused that illegal opium was recovered from his possession in his house, it is possible to say that proof of exclusive possession is necessary for making a conviction under the NDPS Act. This can be said because it is possible to say that proof of exclusive possession is essential for making a conviction. Under the NDPS Act, "Unlawful possession " of the contraband is a necessary

condition for a conviction, and the prosecution is required to prove beyond a shadow of a doubt that the defendant was in possession of the illegal item. In spite of the fact that the contraband that was seized is evidence, an accused person cannot be found guilty under the NDPS Act if there is no proof that they possessed the contraband in question.<sup>11</sup>

## COMPLIANCE OF MANDATORY PROVISIONS OF SEARCH

Compliance with Sections 41 and 42 of the NDPS Act is required for every search, seizure, or recovery of contraband that takes place. The legality of the search and seizure of the illegal goods would be called into question if the terms were not followed. When such an authorised officer is conducting a search and seizure in a public area, he or she is not subject to the requirements set out in Sections 41 and 42. The Supreme Court of India has ruled on this case, titled *State of Punjab v. Balbir Singh*.<sup>12</sup> as well as provided guidelines for the prosecution's compliance with required requirements, such as Sections 41 and 42, which were deemed to be of such importance to the prosecution's case that any deviation from them would taint the trial. In the case of *Sajjan Abraham v. State of Kerala*, a three-judge panel of India's Supreme Court heard the case.<sup>13</sup> noted that a violation of Sections 41 and 42 of the NDPS Act would not have any bearing on the case if the urgency and grounds of information and reasons therefor could not be recorded.

These powers can be exercised only by the empowered officer and only if certain essential conditions are satisfied. Further, in view of the scope for the interference with personal liberty and privacy, the section lays down certain safeguards.<sup>14</sup>

Any search or seizure conducted in defiance of Section 50 of the NDPS Act is unlawful. A formality at best, Section 50 of the Act mandates that the investigating agency inform the accused of his or her right to choose whether or not to be searched in the presence of a Gazetted Officer or a Magistrate. The search of a vehicle, container, bag, or premises does not need compliance with Section 50 of the Act, but the search of an accused person must. Search and seizure procedures must be adhered to by investigative authorities, and no female subject shall be searched by anybody other than another female. When a male investigator conducted a search on a female defendant, the search was deemed unlawful and the woman was found not guilty. Not only have many lower courts, including the Supreme Court, noted that providing notice under Section 50 of the Act is required for a personal search, but it has also been noted that many of those who have been wrongfully charged are being exonerated on flimsy legal grounds.

The NDPS Act's Section 55 contains merely suggestive, not obligatory, guidelines. Since each case has its own unique set of facts and circumstances, it is not always essential to have objective witnesses testify. A third party witness is always preferable when conducting a search and seizure, but if none is available, the court is required by law to examine the testimony of law enforcement officers with extreme caution. Convictions of accused people may be justifiable even in the absence of independent corroboration if the evidence of police official witnesses is trustworthy and credible. The courts are taking a more proactive attitude

these days, wherein they are not routinely pressing public witnesses but rather appreciating the evidence of police official witnesses in light of the particular facts and circumstances of each case.

After reviewing several instances, it became clear that many accused criminals in NDPS cases were wrongfully released from custody because mandatory elements of the NDPS Act were not followed. As a result, the NDPS Act mandates that all officers involved in the investigation and prosecution of NDPS cases must closely comply to those rules. Chapter 5 of the study paper focused on the constitutionality of the death sentence under the NDPS Act and the effectiveness of the Act's penalties in decreasing drug consumption. The NDPS Act is a law with severe penalties and strict responsibility provisions that was created to deal with issues caused by the black market.

The NDP's Act is one of the rare laws with both a relatively high percentage of conviction (77.2%) and a relatively high rate of pendency (80.6%). Notwithstanding the fact that these figures do not appear to be particularly high or unusual from those under other criminal statutes, they do prompt us to question the effectiveness of "deterrent laws" that have had no effect after three decades.

Others may also argue that we need to rethink the underlying concept of a linear narrative in which severe laws and strict punishments lead to changes in societal behaviour, hence discouraging future criminal acts. For a legislation to be effective, it must take into account the social context in which it will be implemented. In light of this, it is clear that the number of drug-related cases recorded across the state has increased in recent years, despite the fact that the number of convictions for drug offences should be high.

One explanation for this is the length of time required to complete the various stages of the legal process, such as the filing of a charge sheet. Another possible cause for slow and inefficient case resolution is the small number of courts available in each district and the little number of police officers available to conduct thorough investigations.

The drug trade is a two-sided problem, with drug lords avoiding punishment and inmates in need of treatment languishing behind bars. Decriminalization can help addicts to a considerable extent, but law enforcement must do everything it can to capture the true big fishes who need punishment and put them behind bars. Making progress towards a drug-free society requires cooperation from the legislative, executive, and judicial branches of government.

## **CONCLUSION**

Punishment should serve to safeguard society and discourage illegal behaviour, as is stated in legal texts. The sentencing procedure needs to be strict and proportional to the proven guilt

of the perpetrator, and it is expected that the courts would operate the system so as to inflict such penalty as represents the conscience of the society.

Illegal trade has to be stopped and there needs to be global effort to do it. This, in turn, should be coupled with demand reduction measures that deal with the problem of drug addiction in a forthright and efficient manner. Similarly strict enforcement of drug laws in full coordination with all associated agencies and with the broadest possible co-operation and support on a regional and worldwide basis will be essential for the control of drug trafficking and drug traffickers. International conventions give a framework and rules for legislation, which should be followed.

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<sup>1</sup> Hereinafter referred to as "the NDPS Act 1985"**REFERENCES**

<sup>2</sup> *Abdul Hamid Khan v. State of Gujarat* 1989 Cr.LJ.468.

<sup>3</sup> Ramesh Kumar Bhardwaj, *Drug Addiction- Socio Legal Dimensions* (2015), pp. 13-15.

<sup>4</sup> K.C. Agarwal, *Katju's Encyclopaedia on Law of Drugs* (2016), p.1275.

<sup>5</sup> R.M. Tufail, *Comprehensive Classic on Narcotic Drugs and Psychotropic Substances Act, 1985* (2015), pp.21.

<sup>6</sup> 1994 AIR 1872 1994 SCC (3) 299 JT 1994 (2) 108 1994 SCALE (1)793

<sup>7</sup> Sharma and Mago, *Lawmann's Narcotic Drugs and Psychotropic Substances Laws* (2008), p.67

<sup>8</sup> *Ibid.*

<sup>9</sup> R.V. Kelkar, *Criminal Procedure*, 5<sup>th</sup> ed. 2008, p.471

<sup>10</sup> *Ibid*

<sup>11</sup> R.P. Kataria, *Law Relating to Narcotic Drugs and Psychotropic Substances in India*, 3<sup>rd</sup> ed.2010

<sup>12</sup> *State of Punjab v. Balbir Singh* AIR 1994 Supreme Court 1872

<sup>13</sup> *Sajjan Abraham v. State of Kerala* , AIR 2001 Supreme Court 3190

<sup>14</sup> Somnath Verma (Ed.), *P.M.Bakshi's Narcotic Drugs and Psychotropic Substances Act and Rules* (2009), p.212