

Sentencing policy for drug offenders under the NDPS Act

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NDPS Act, 1985

“Statement of Objects and Reasons. – .. *The principal Central Acts, namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. ...many deficiencies in the existing laws have come to notice, some of which are indicated below:-*

(i) The scheme of penalties under the present Acts is not sufficiently deterrent...The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been sometimes let off by the Courts with nominal punishment.

(ii)

(iii) ..a vast body of international law .. has evolved through various international treaties and protocols... obligations which are not covered or are only partly covered by the present Acts.

(iv)

2. In view of above,.. urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, .. considerably enhance the penalties particularly for trafficking offences,

3. The Bill seeks to achieve the above objects.

International Drug Conventions

- **Single Convention on Narcotic Drugs, 1961** (as amended by 1972 Protocol)
- **Convention on Psychotropic Substances, 1971**
- **Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances, 1988**
- Require Member States to **criminalise** production, manufacture, export, import, distribution, trade, use & possession of narcotic drugs & psychotropic substances, except for medical & scientific use
- Allow **alternatives to incarceration**, incl *treatment, education, rehabilitation and social reintegration* for minor offences
- Punishment, in the nature of ***“imprisonment or other forms of deprivation of liberty”***
- ***“...having due regard to the constitutional, legal and administrative systems”***

International Drug Conventions

- Preamble underscores:
 - “..serious evil for the individual ...fraught with social and economic danger to mankind” (1961 Convention)
 - “...rigorous measures necessary to restrict use” (1971 Convention)
 - “...poses a serious threat to the health and welfare of human beings” (1988 Convention)
- Allude to ‘offences’ that are:
 - *serious*
 - *not sufficiently serious*
 - *appropriate cases of a minor nature*
 - *factual circumstances which make commission of offence particularly serious*

NDPS Act: *Offences*

- Cultivation (coca; opium poppy & cannabis)
- Production
- Manufacture
- Possession
- Sale
- Purchase
- Transport
- Warehouse
- Use
- **Consumption**
- Import inter-State
- Export inter-state
- Import into India
- Export from India
- Transshipment
- Including attempt, abetment and conspiracy

Except for medical & scientific purposes , in accordance with the Act or Rules or conditions of license, if so prescribed

Sentencing Scheme under NDPS Act, 1985

- Min 10 yrs & Rs 1 lakh fine, may extend to 20 yrs & Rs 2 lakh fine
- Repeat offence: Min 15 yrs & Rs 1.5 lakh fine, may extend to 30 yrs & Rs 3 lakh fine
- Cannabis cultivation & ganja: max 5 yrs & Rs 50,000 fine
- Repeat offence of cannabis cultivation & ganja: max 10yrs & Rs 1 lakh fine
- For 'addicts', consumption OR possession of small quantity [notified by Central govt] for personal consumption:
 - cocaine, morphine, heroin: max of 1 yr or fine or both
 - other drugs: max 6 monthsbut only if accused could prove drug was for his own use
Also, court could divert from prison to treatment

NDPS (Amendment) Bill, 1988

- Introduced in less than 4 yrs of 1985 Act
- Trigger:
 - International convention on illicit drug trafficking, 1988
 - SAARC & Bilateral agreements
 - Vulnerability due to proximity to opium producing regions

NDPS (Amendment) Act, 1989

- **Act made harsher**
 - Restrictions on bail (u/s37)
 - Bar on suspension, commutation or remission of sentences (u/s32A)
 - Mandatory death penalty on subsequent conviction for specific crimes (u/s 31A)
 - Regulation & prohibition over 'controlled substances' (u/s 2(viid), 9A, 25A)
 - New offence of financing illicit traffic & harbouring of offenders (u/s 27A)
 - Forfeiture of property of offenders
 - Procedure for pre-trial disposal of drugs (u/s52A)
 - Special Courts (u/s 36A)

Sentence passed under the NDPS Act

- Judicial review limited -- mandatory minimum
- Sentence can be suspended u/s 389, Cr PC (Dadu @Tulsidas v State of Maharashtra (2000) 8 SCC 437)
- Executive power to suspend, remit, commute u/s 432 & 433 Cr PC barred by **section 32A** (murderers/rapists are eligible)
- Pardon under Article 72 – possible but never granted??
- Can Ministry of Home advice in favour, when statute has barred the executive from granting relief??

Consequences:
Small quantity; long sentence

- *“seizure of 0.04 gm. brown sugar wrapped in a paper inside a match box. When accused was searched & contraband was recovered, he had no satisfactory explanation to offer for possession of the same.”*
- *“sentenced to undergo RI of 10 years & pay a fine of Rs. 1 lakh, & a further period of 2 years’ RI, in default.”*

Jt 2002 (8) SC 292

Courts - Quantity indicates use?

- In *Gaunter Edwin Kircher v. State of Goa* 1993 Cri LJ 1485, SC held that possession of <5 gm heroin with paraphernalia for smoking intended for personal use, not sale
- In *Raju v. State of Kerala* AIR 1999 SC 2139, where appellant was sentenced to 10 yrs & Rs. 1 lakh fine for possession of 100 mg heroin worth Rs. 25. Absence of withdrawal seen as evidence that accused not drug dependent. SC held such small qty could not have been meant for sale

Courts – Strict about safeguards

- *State of Punjab v Balbir Singh* (1994) 3 SCC 299

“The object of NDPS Act is to make stringent provisions for control & regulation of operations relating to drugs. At the same time, to avoid harm to the innocent persons & avoid abuse of the provisions by the officers, ***certain safeguards*** are provided which in the context have to be observed strictly.”

- *State of Punjab v Baldev Singh* (1999) 6 SCC 172

“This Court cannot overlook the context in which the NDPS Act operates & particularly the widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that ***all the safeguards*** provided in the statute are scrupulously followed.”

Long period of incarceration as under-trial

- *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India* (1994) 6 SCC 731 – continuous incarceration due to strict bail provisions & no Special Courts for trial
- **National Human Rights Commission** (1995-96) reported on undertrial prisoners & recommended '***better graded punishment under the NDPS Act***'

NDPS (Amendment) Bill, 1998

- Need to grade punishment on the basis of quantity of drugs involved in the offence
- Ref to Australian law for quantity categorisation
- Hon. Min of Finance [Shri Yashwant Sinha]:-
*“punishments prescribed are harsh, disproportionate at times to the gravity of the offence.... **reduce extraordinary harshness vis-a-vis small time offenders”***

Mood of the legislature

- Tenth Report, Standing Committee on Finance (1998-99), 12th Lok Sabha, NDPS (Amendment) Bill, 1998:

“Keeping in view that rural population of parts of UP, Bihar & Orissa consume cannabis on special occasions like Holi & other family functions, we suggest that punishment u/s 27(b) should be a maximum of 3 months imprisonment or fine of upto Rs 5,000.”

But overall, much criticism of revising sentencing scheme

NDPS (Amendment) Act, 2001

- Punishment (& bail provisions) graded as per quantity: –
 - Small: “means any quantity lesser than the quantity specified *by the Central Government by notification in the Official Gazette*” (u/s 2(xxiii))
 - Commercial: “means any quantity greater than the quantity specified *by the Central Government by notification in the Official Gazette*” (u/s 2(vii))
- And introduction of **section 32B** “**Factors to be taken into account for imposing higher than minimum punishment**”

Sentencing, post NDPS (Amendment) Act, 2014

- Small: 1yr (max) or Rs 10,000 fine or both
- Intermediate & controlled substances: 1 yr (min?) to 10yrs (max) & upto Rs1 lakh fine
- Commercial:
 - 10 yr (min) to 20 yr (max)
 - Fine Rs 1lakh (min) to Rs 2 lakh to more
 - Fine amount unlimited (?), if reasons recorded in the judgment
- Imprisonment in lieu of payment of fine

More than minimum punishment – Sec 32B mandatory ??

- *“The learned Trial Judge did not find that any of the factors enumerated in section 32B of the N.D.P.S. Act exist in this case. Hence in view of the above the sentence awarded to the appellants & the fine imposed on them by the Trial Court which is higher than the minimum punishment & fine prescribed for an offence u/s 20(C) of the N.D.P.S. Act cannot be sustained & is accordingly modified.”*
- *“In fact no reason whatsoever is forthcoming in the impugned judgment which led the trial court to impose higher than the minimum punishment prescribed under the Act upon the appellants.”*
- At least 5 decisions of Allahabad High Court (2014 – 2016), where sentence [of 12 yrs-14 yrs] were reduced, due to non-consideration of section 32B.

However...

- *“A bare reading of the above-said provision [S32B] makes it clear that there is no bar to impose a punishment higher than the prescribed minimum.”*
- In a decision dt 2.6.2016, the Punjab High Court upheld a sentence of 20 yrs, despite non-consideration of section 32B
- In the absence of section 32B, what is the basis of imposing higher punishment??

NDPS Act: Repeat Offenders

- Dealt with strictly under Sections 31 & 31A
- Section 31: **Enhanced punishment** of imprisonment & fine (one & a half times) of max punishment for previous offence
- Section 31A: **Death penalty**, upon **subsequent** conviction, if:
 - First offence: Section 19 (embezzlement of lawfully cultivated opium), Section 24 (unauthorised external dealings), Section 27A (illicit financing of trade or harbouring drug traders) and offences of commercial quantity
 - Second offence: engaging in production, manufacture, possession, transportation, import, export or transshipment of a **large quantity of drugs** (eg: 20 kg cannabis; 1 kg heroin)
- Mandatory death penalty 'read down' in *Indian Harm Reduction Network v Union of India* 2012 Bom CR(Cri) 121 & made *discretionary* under NDPS Amendments, 2014

Repeat offenders, post 2014

- Offenders falling only u/s 31
- Offenders falling u/s 31A, trial Court may:-
 - First, consider ***death sentence*** & reject, by reocridng reaosns;
 - Thereafter, consider senetence u/s 31, which could be **30 yrs** (max) or **15 yrs** (min) or ***anything in between***
- What guidance available to courts for sentencing within such a wide range?
- Recent case (Apr 2016, Barasat, North 24-Paragans), trial court awarded death to A-1 for third conviction & 30 yrs to A-2 for second conviction

Status of previous conviction

- Bombay High Court imposed “conditional sentence”, subject to outcome of appeal pending in SC in first conviction

[Vipin Nair, Intelligence Officer v Gulam Mohammed Malik, Confirmation Case No.2 of 2008 with Criminal Appeal No. 582 of 2008, order dated 7.5.2012]

- Gujarat High Court adjourned hearing, until appeal pending in SC in first conviction is decided

[State of Gujarat v Anwar Sheikh Amirbaig Mirza, Criminal Confirmation Case No. 3 of 2008 with Criminal Appeal No. 2799 of 2008, order dated 8.3.2010]

Benefit of order on concurrent sentence

- Court's power **u/s 427(1), CrPC** to direct first & subsequent sentence to run concurrently is not whittled down by section 32A, NDPS Act
[*Mohan Bhanudas Mohite v State of Maharashtra*, 2004, BomHC]
- Cases where benefit given:
 - *Pritam Singh v State of Punjab* (2007, PHHC)
(Total sentence: 10 + 15 = 25yrs)
 - *Jagdish v State of MP* (2009, MPHC)
(Total sentence: 10+ 10 =20 yrs)
- Denied:
 - *Paramjit Singh v State of Punjab* (2015, PHHC)
(3 Convictions; Total sentence: 10+12+15 yrs = 37 yrs)

Emergent issues

- Distinction b/w 'legitimate' & illicit entities
- NDPS Act penalises acts done "*in **contravention** of any provisions of the Act or rule or order made or condition of license thereunder*" (u/s15,17,18,20,21,22,23)
- No requirement to show 'diversion' or 'intention to divert' to illicit market
- Inadvertent error/mistake by licensee also amounts to:- "*contravention of license or condition in license*"
- **Guilt is presumed**; onus on 'accused' to prove innocence (u/s 35)
- Licensees will be dealing in 'commercial quantity', for which min punishment of **10 yrs**, whether contravention serious or minor
- Severely affecting medical drugs/pharmaceutical sector

Options for reform

- Distinguish b/w 'legitimate' & illegitimate entities, along the line of 'drug user' & 'trafficker'
 - Make offences compundable??
 - Court to have power to impose less than min sentence by recording special reasons??
 - Sanction of licensing authority needed before prosecuting ??
 - For licensee, onus on prosecution u/s 35??
 - Expand ambit of **section 26** – punishment for certain acts by licensee or his servants??