

Refresher Course for NDPS Courts (P-1060)
November 24-26, 2017
Programme Co-ordinator – Ms. Shruti Jane Eusebius, Law Associate, NJA

PROGRAMME REPORT

Objective of the Conference

National Judicial Academy organised the Refresher Course for the judges presiding over the special courts constituted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The seminar was organised with the objective of discussing the functioning of the NDPS Courts in India to comprehend the bottlenecks and the issues of concern in the adjudication of NDPS Cases. The seminar aimed to discuss the core objectives and purposes of establishing NDPS Courts with a view to reorient the NDPS Courts in the mission with which NDPS Courts were established. The seminar also aimed to discuss aspects regarding the legal framework on drug addiction and drug trafficking and the effectiveness and limitation of statutory provisions dealing with drug abuse. Special focus was sought to be given to the crucial areas of concerns for the NDPS Courts i.e. provisions of search and seizure, presumptions of culpable mental state, determination of drug quantity, irregularity of investigations in NDPS Cases, framing of charges and sentencing practices in NDPS Cases.

Session 1

Theme: Combating Illicit Drug Traffic and Drug Abuse: Critical Role of NDPS Courts
Speaker: Justice SJ Mukhopadhaya

The speaker discussed the issue of drug addiction by alluding to its historical references in India and China and stated that drug addiction is not a new challenge but the dimensions of the problem have enlarged and diversified in recent times. Narcotics trafficking and sale have now assumed the dimension of money power and political mileage at the cost of the health and life of the common man. The biggest concern is that children who are the future of the nation are at risk. The speaker urged the participant judges to keep in mind that they are not just deciding a case but are deciding matters which have far reaching consequences for the country. The speaker also stressed that in order to be able to effectively adjudicate NDPS cases, the judges need to stay abreast of scientific updates. The drug composition, ingredients and its preparation continually change to evade the law but the base substance remains constant. The judges need to be cognisant about the scientific aspect of drug preparation and composition. Another concern highlighted by the speaker was that in the chain of drug trafficking, the smaller players like the peddlers are usually caught but the bigger players – the manufacturers and suppliers evade the arm of the law. With this background, the speaker stressed that the court is an important party in the effort to curb the menace of drug trafficking. The judge must play a proactive role in this regard. The speaker stated that deterrence must be the objective of the NDPS Courts as prescribed under the NDPS Act.

Session 2

Theme: Presumption of Culpable Mental State under Section 35 of the NDPS Act
Speaker: Dr. J.N. Barowalia
Chair: Justice SJ Mukhopadhaya

The speaker discussed the standard of proof in criminal law and differentiated between the standards of 'preponderance of probabilities' and of 'proof beyond reasonable doubt'. The speaker then discussed the concept of culpable mental state as mentioned in Section 35 of the NDPS Act. The speaker traced the standard of proof in several statutes and the applicability of 'culpable mental state' to certain statutes. The speaker traced the jurisprudence on 'culpable mental state' under Section 35 through the judgments of the Supreme Court.

Session 3

Theme: Irregularity in Investigation: Impact on Court Proceedings (Group Discussion)

Panel: Justice SJ Mukhopadhaya & Dr. J.N. Barowalia

In session 3, the participants were divided into 5 groups to deliberate on the issue of irregularity in investigation of NDPS Cases and its impact on the court proceedings and the outcome in NDPS cases. The participants discussed and presented the following points –

- The provisions relating to search and seizure under the NDPS Act are not following by the investigating authorities and this adversely impacts the case as it results in acquittal of the accused.
- The secret information received from the accused is not noted down and this hampers the case when the case comes in court
- Section 50 compliances are not made in investigation. The requirement of making the accused aware of his legal rights under Section 50 is not followed.
- The Investigating Officer does not deposit the seal of seizure in the court. Seals should be provided to rule out corruption and tampering.
- Compliance of requirement to send the sample to the Forensic Science Laboratory within 72 hours is not done by the investigating officer.
- It is unclear as to who is designated as 'Authorised Person' with respect of conduct of search and seizure.
- In most cases, the Investigating Officer is not provided with weighing machines to weigh the contraband. Hence, they have to resort to making arrangements to procure a weighing machine from other places. In most cases the weighing machine procured is not up to the mark and the investigating officer is forced to estimate the actual weight of the contraband.
- The Investigating Authorities do not adhere to the prescribed methods of sampling of contraband.
- The Investigating Authorities do not follow the prescribed methods of destruction of contraband.
- In cases of cultivation of drugs, the details of the land involved is missing.
- Contrary to Section 42, the investigating officer first communicates secret information to the senior officer, then records the information and thereafter provides a copy to the senior officer.
- The language used by the Investigating officer is not known to the accused. Communication should be made in the language known to the accused.
- For transparency, the Investigating officer should take the accused to the Magistrate.
- Videography of seizure proceedings should be done.
- The officer who apprehends the accused continues as the investigating officer. It is suggested that two separate persons should be the investigating officer and the apprehending officer.

Session 4

Theme: Search and Seizure under NDPS Act

Speakers: Dr. J.N. Barowalia

The speaker commenced the session by stressing that judicial service is a service to society. It is the duty of every judge to protect the innocent and their rights. The speaker then traced the development of the law on drug abuse and trafficking to the currently applicable NDPS Act. The speaker then stated that investigation is a process of finding of truth and is not a decision making process. The role of the investigating officer is to search, explore, find out reasons and bring out the truth in the matter. The biggest problem in NDPS cases is that the investigation is inefficient so the truth in the case is not unearthed. The speaker then discussed the search and seizure provisions under Chapter 5 of the NDPS Act and differentiated between the mandatory and directory provisions in Chapter 5. The speaker then discussed the issue as to who is authorised to conduct search under the NDPS Act. The speaker discussed the landmark judgments on search and seizure under NDPS Act.

Session 5

Theme: Framing of Charges by NDPS Courts: Issues and Challenges

Speaker: Justice Dharnidhar Jha

The speaker commenced the session by discussing Sections 201(1), 203, 204, 227 and 228 of the Code of Criminal Procedure, 1973. The speaker stressed on the term 'sufficient ground proceeding' as used in the CrPC. He stressed that this term means that the court must have a grave suspicion that the alleged offence has occurred. It does not mean the court conducts a trial at this stage but means that there is sufficient basis to presume that the case is likely to be proved. The speaker then discussed how cases under the NDPS Act should be proceeded with by the court. The speaker stressed that while framing charge in a case, the judge must not go into proof and conviction. Sifting through the evidence to find sufficient ground and sifting through evidence for proving beyond reasonable doubt are separate jurisdiction and functions and the judge must be vigilant to not mix up the two functions. The speaker stressed on the need for judges to be sensitive to issues. The human rights of the accused in a criminal trial must be protected. If the case is not made out then the court should discharge as the consequences of the NDPS Act are stringent. The speaker stated that sufficient grounds for proceeding should be based on something more than the FIR. The speaker then in response to a question raised by the participants stated that there is no bar to anticipatory bail in NDPS cases as the NDPS Act is silent on the issue.

Session 6

Theme: Sentencing in NDPS Cases

Speakers: Ms. Tripti Tandon & Prof. S.P. Srivastava

The speaker stated that the purpose and objective of the NDPS Act is to impose harsh punishment for drug trafficking. The speaker discussed the international law provisions and the compliance of the same in the NDPS Act. The speaker discussed the sentencing scheme under the NDPS Act. The speaker discussed the relevance of quantity in sentencing and raised the issue of proportionality of sentence with the quantity and purpose of use. The speaker raised the question as to whether the quantity can be taken to indicate the use and discussed judgments on this issue. The speaker then discussed the safeguards that are in place in the NDPS Act

which seek to protect from abuse of the provisions and to ensure proportionate punishment for offences according to gravity. The speaker then raised the following issues for consideration –

- In case of intermediate quantity and controlled substances, in the absence of a minimum prescribed under the NDPS Act, can a minimum term of 1 year (which is the maximum sentence for small quantity) be assumed?
- In case of small quantity, the courts can consider imposing only a fine as punishment as the NDPS Act allows it.
- In case of imprisonment in lieu of payment of fine, varied duration of imprisonments have been noted.

The speaker then highlighted the alternatives to imprisonment provided under the NDPS Act viz. Sections 39 and 64A. The speaker then discussed Section 32B (Factors to be taken into account for imposing higher than the minimum punishment) and stressed that in order to impose higher sentence, other factors besides the quantity are needed. Section 32B alludes to Additional factors that the Court may deem fit; and Enumerated factors (violence/use of arms; public office; children affected; vicinity of educational facility; organised gang; other illegal activities). The speaker discussed the sentencing provisions under the NDPS Act in cases of repeat offenders. In the course of discussion, the applicability of Section 50 to search which extends to the vehicle of the accused was discussed and the Supreme Court judgments on this issue were discussed. The scope and ambit of the term ‘public conveyance’ under Section 43 was discussed and the case of *State of Rajasthan v. Jagraj Singh* was referred to in this matter for an exposition of the present law on this issue.

Session 7

Theme: Determination of Drug Quantity by Courts

Speaker: Justice K. Abraham Mathew

The speaker discussed the problem of drug trafficking in India and the challenge of preventing cross border trafficking of drugs. The speaker then briefly elaborated on the various types of drugs that are in the market and their sources. The speaker stated that drugs need not be in pure form. It may be in the form of a preparation, solution or a mixture. A mixture containing narcotic drug in a mixture is a contraband itself. Merely because there is a neutral material in which the narcotic drug or psychotropic substance is contained does not mean it is not a narcotic drug or psychotropic substance in itself. The speaker then discussed the scope of the terms ‘Narcotic Drug’ and ‘Psychotropic Substance’ and stated that while a list of psychotropic substances is provided in the schedule, the list of narcotic drugs is not specified for the reason that there is a specific definition of narcotic drugs in the NDPS Act while psychotropic substances are defined with reference to the schedule. The speaker then discussed the Schedule to the NDPS Act to elaborate on the scope of the term ‘Psychotropic Substance’. The speaker stated that the table to the NDPS Act is significant as it provides the small and commercial quantities for the purposes of sentencing. The speaker then discussed the important judgments on determination of drug quantity to elaborate on the standards laid down by the courts. On the issue of possession of drugs and presumption of culpability, the speaker stated that possession depends on the facts of the case. It involves an element of consciousness and awareness.

Session 8

Theme: Challenges before the NDPS Courts in the Application of Sections 42 & 50 of the NDPS Act

Speaker: Justice Ved Prakash Sharma

The speaker raised the question whether there is a requirement for the investigating officer to record his personal knowledge and reduce it in writing under Section 42(1) of the NDPS Act. The speaker stated that in the judgment in *Karnail Singh v. State of Haryana*, the order of words in Section 42(1) has been reversed and hence, the confusion remains whether personal knowledge needs to be reduced into writing. The speaker then raised the question that in cases where the information is vague whether the information is required to be reduced in writing. The case of *Babubhai Odhavji Patel v. State of Gujarat* was discussed to state that vague information is not required to be reduced in writing. The speaker then discussed the provisions of Sections 42 and 50 and stated that substantial compliance should be made of these sections. The speaker then distinguished with errors that vitiate the trial and errors that vitiate the conviction. Errors of process vitiate the trial while error of law whereby the evidence is set aside vitiates the conviction. In Section 42 and 50 the conviction is vitiated. The trial goes on but the evidence used in the conviction is set aside. In response to a query by the participant as to whether the name of the informer who has given secret information must be written down, the speaker stated that we must rely on the wisdom of the legislature. The name is not required to be disclosed under the NDPS Act with the objective of protection of the informer.
