

**ASSESSING THE EFFECTIVENESS OF NARCOTIC DRUGS AND
PSYCHOTROPIC SUBSTANCES (NDPS) ACT IN ADDRESSING
DRUG ABUSE IN INDIA**

**A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF
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I wish him/her success in life.

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ABBREVIATIONS

ADGP	:	Additional Director General of Police
ALR	:	Amity law Review
ART	:	Antiretroviral Therapy
ATS	:	Amphetamine Type Stimulants
BSF	:	Border Security Force
CBD	:	Central Bureau of Investigation
CBIV	:	Central Bureau of Narcotics
CCF	:	Chief Controller of Factories
CILI	:	The Central India Law Institute
CLJ	:	Chotanagpur Law Journal
CMLJ	:	Civil and Military Law Journal
CNS	:	Central Nervous System
CRLJ	:	Criminal Law Journal
CULR	:	Cochin University Law Review
DAMS	:	Drug Abuse Monitoring System
DD	:	Drug De-addiction
DDC	:	Drug De-addiction Centre
DDT	:	Dischlorodiphane Trichloroethane
DLR	:	Delhi Law Review
DPJ	:	Delhi Psychiatry Journal
DXM	:	Dextromethorphan
EPW	:	Economic and Political Weekly
EXLM Policy	:	Export Import Policy
FERA	:	Foreign Exchange Regulation Act, 1973
GHB	:	Gamma Hydroxy System
GRT	:	Golden Research Thought
HC	:	High Court
HGH	:	Human Growth Hormone
HIV	:	Human Immunodeficiency Virus
ICJ	:	Indian Criminal Journal
IIMK	:	The Indian Institute of Management Kozhikode
IJM	:	Indian Journal of Medicine
IJP	:	Indian Journal of Psychiatry

IJSW	:	The Indian Journal of Social work
INN	:	International Non-Proprietary Name
IOC	:	International Olympic Committee
IPJ	:	The Indian Police Journal
JILI	:	Journal of the Indian Law Institute
JMB	:	Journal of Behavioral Medicine
KLT	:	Kerala Law Times
KULR	:	Kashmir Law Review
MLA	:	Member of Legislative Assembly
MOU	:	Memorandum of Understanding
NACB	:	National Aids Control Board
NACO	:	National Aids Control Organisation
NACR	:	National Aids Control Regions
NCB	:	The Narcotics Control Bureau
NGO	:	Non-Government Organisation
OST	:	Opioid Substitution Therapy
OTC	:	Over the Counter
PAEMT	:	Punjab Academy of Forensic
Med.Toxicology.PHC	:	Public Health Community
PITNDPS	:	Prevention of Illicit Traffic in
POTA	:	Prevention of Terrorist Activities
PPP	:	Punjab People Party
PULJ	:	Punjabi University Law Journal
PWID	:	People Who Inject Drugs
PYM	:	Promotion of Youth and Masses
SC	:	Supreme Court
SCJ	:	Supreme Court Journal
SD	:	Social Defence
SES	:	Socio Economic System
SHO	:	Station House Officer
SSP	:	Superintendent of Police
STF	:	Special Task Force
SUBERA	:	Sutlej, Beas & Ravi
TADA	:	Terrorist & Disruptive Activities Act

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CHAPTER 1

INTRODUCTION

India is one of the oldest civilization with rich cultural heritage, with a large population spread over from East to West and from North to South, found victims of different kinds of drug usages. Such population comes from diverse socio, economic, cultural, religious and linguistic background. India is the biggest supplier of licit demand for opium.

The origin and development of the Indian drug trafficking scenario are closely connected with the well-planned and geographical location of India which has large inflow of heroin and hashish from across the Indo-Pak border originating from Golden Crescent on the north-west comprising of Iran, Afghanistan and Pakistan. It is one of the major illicit drug supplying areas of the world on the North Eastern side of the country and it is the Golden Triangle on the east-west comprising of Burma, Laos and Thailand. It is again one of the largest sources of illicit opium in the world. Nepal also is a traditional source of cannabis. Also, the processes of industrialisation and urbanisation are changing the social attitude. They are contributing to the increasing of drug abuse.

It is a social evil. It destroys not only the society but also affects the economic growth of the country. Because this is a trade and it generates large unaccounted money. This money generated is used for various purposes including anti-national and terrorist activities just as any virus, it spread all over a country. Until the end of the 19 century, trade in the narcotics was considered a legitimate business. Modern technology and the expansion of transport and world trade introduced a new dimension. An increasing number of alkaloids and derivatives were being produced from opium and coca leaves and easily distributed. In addition, a large number of psychotropic substances were developed and their consumption increased very largely, hence the problem become global.

HISTORY OF DRUG DEPENDENCE IN INDIA:

There is no exact record of when men started using drugs for non medical purposes, but in all civilization drugs have been used in many ways. It is becoming a part of the culture and aiding in its growth.

The history of drug dependence in India is similar to that of other countries. In the oldest Indian religions texts such as Vedas, Somras is generally believed to be alcohol or a similar intoxicants, the earliest use of cannabis is more difficult to trace but by the 8th century A.D. Its use was recorded in many Indian Medical Treaties. In India, the use of opium also dates back many centuries. When the Europeans came to India in 16 and 17 centuries, opium was one of the important commodities for early commercial companies. Opium was widely used by the princes and noblemen of the 18th and 19 centuries. Recent report indicates that opium and hashish which were previously restricted to the uneducated and backward communities in India are now used by younger generation. Figures on the extent of drug addiction in India are not really available.

Whatever be the origin source of drug abuse, its practice seriously affect the most productive and dynamic section of our society i.e. the age group between 15 to 40. Thus it is the loss of our social, economical and cultural life of the people and to the wealth of the nation. Drug abuse has been identifying as playing a significant role in the spread of diseases like AIDS. The recent trend in drug abuse among young masses indicates that the abuse of illegal drugs has become more popular among main stream youth. There is also risk that drug abuse in recreational setting is increasing and it is becoming part of life style of certain youth groups. The social context of the dance world fashion, peer group norms play a significant role in recreational use of drug. Due to this, addiction has become a major problem in all over India.

SIGNIFICANCE OF THE PROBLEM:

Health is wealth is the famous proverb. It means a healthy body is the very foundation for all human activities. There are increasing cases of drug abuse and drug addiction. During recent years, new drugs of addiction which have come to be known as 'Psychotropic Substances' have appeared on the scene and created severe problem in the society. Due to this problem, the attitude of the society has been changing and it denigrates of social values.

a) Various incidents: A survey conducted in 2003-04 by the Narcotic Control Bureau and found that India has at least 4 million drug addicts by foreign drug peddlers to flourish their business. In the last few years, upper middle class Indian have largely clubbing and there are more women among them.

In India, Goa is the first to receive the rave party culture introduced by the Hippies. The rave culture has spread almost all parts of the country including the small districts and towns. Rave usually takes place in dark rooms, filled with laser lights, location including warehouse, night clubs and farm fields. The number of rave parties in India is definitely on the rise. It involves illegal drug usage, alcohol and other substance abuse. There are also various sort of sexual activities. Students and particularly school girls who attended a rave party without informing their parents are usually ending up in a bed with a friend. In recent past, youngsters prefer to have this sort of party. Rave parties in Bangalore and Mumbai, many foreigners have been arrested for peddling various drugs and substances. Rave party in Pune (Donje village), 280 people aged between 20 to 30 years were arrested under the Narcotic Drugs and Psychotropic Substances Act. The arrested persons include airhostesses, IT professionals, call centres' employees and students from Mumbai, Pune, Uttar Pradesh, Delhi and Haryana

It has been seen that it is primarily the neo-rich middle class youth. Such culture is highly flowed in small cities and town over the last few years. The age of youngsters attempting

rave parties is coming down and instances of rape, substance abuse, drug peddling, drunken driving leading to accidental death is growing with each passing years. There is no moral Judgment involved in the ethos of partying, clubbing or enjoying life.

Over the past few years, many urban middle class youngsters have taken to harmful substances called Club drugs' including Ecstasy, gamma- hydroxy butyrate (411B). Ketamine and Rohypnol which are said to enhance energy, endurance confidence, sociability and sexual arousal. Each of these drugs has difference psychological and physiological consequences. The effects of these drug range from relatively minor disorder like hypertension, agitation, anxiety nausea, confusion to major problem like coma, schizophrenia symptoms, liver toxicity, and death. In the year 1996 to 2006, the following narcotic drugs have been seized by the various enforcing agencies:

Sr. No.	Type of Narcotic Drug	Quantity seized (Kgs)
1	Opium	21895
2	Ganja	855667
3	Hashish	48278
4	Heroin	10147

Year	No. of incidences	Percentage
2014	27608	2.5%
2015	29421	2.7%
2016	31044	2.8%
2017	23831	2.6%
2018	30645	2.7%
2019	29401	2.5%

In the cases arising from these seizures, a total of 142337 persons were involved including the foreigners.

b) Report of the National Crime Record Bureau: According to the National Crime Record Bureau, Ministry of Home Affairs, Government of India, it gives an annual publication presenting detailed information on various aspects of crime and criminal administration in the country. The incidences and rates of cognizable crimes under the NDPS Act are as follows.

Thereafter, the record of crime rate is not available, but such crimes are increasing in a very high rate. India is a developing country. Youth is the wealth of our nation to develop our country. If today's youth is involve in various crimes or becoming addicted, then what about the future of our nation. If they become addicted, they will destroy themselves, their family and the society. There is a close relationship between drug and crime. Drugs are related to crimes in different ways i.c. producing, selling, consuming, driving under the influence of drug, drug trafficking, etc. This problem is increasing in a very high rate among teenagers, prostitutes, street children and all classes of the society. Our country is facing a great problem of illicit drug trafficking. It is so complex in nature. It involves a large variety of drugs from many sources throughout the world. It involves illicit activities such as conspiracy, bribery, corruption, tax evasion, illegal money transmission, violation of import and export laws, violation of crimes, terrorism, etc.

There is a question whether there is a drug problem or it is only a drug law problem. The researcher wants to study the various causes of the drug abuse and finds out the generic answer to overcome this problem. It is necessary to save the society from crimes.

THE PROBLEM:

In recent years, India is facing a major problem with the illicit use of drug, drug trafficking, consuming and so on. Therefore, the Narcotic Drugs and Psychotropic Substances Act, 1985 is enacted. This Act provides enhanced and stringent penalty for the offences relating to Narcotic Drugs and Psychotropic Substances. But these crimes are constantly increasing among all classes of the society. The problem of such cases in the courts is increasing day by day, but the ratio of acquittals is so high. So it is very difficult to control this problem.

OBJECTIVES OF THE STUDY:

- 1) To study the various causes of the drug abuse and to find out the generic answers.
- 2) To study the Narcotic Drugs and Psychotropic Substances Act, 1985.
- 3) To investigate reasons of the failure of the prosecution in punishing criminals
- 4) To investigate the Government policy regarding this problem.

HYPOTHESIS:

- 1) The problem of the drug abuse is more social than legal and drug abuses are increasing day by day due to lack of public awareness and successive failure of prosecution.
- 2) The mandatory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 relating to investigation, search and seizure as well as the technical requirement of the law during trial, are responsible for failure of prosecution and resulting into miscarriage of justice.
- 3) Reforms are required in the existing Narcotic Drugs and Psychotropic Substances Act, 1985 so as to enable the State to control the menace of the problem.

RESEARCH METHODOLOGY:

- The researcher is used Doctrinal Research Method and Non-doctrinal Research Method are used as per needs.
- The provisions, the procedure of investigation, search, seizure and arrest given in the Narcotic Drugs and Psychotropic Substances Act, 1985 are to be studied.
- Various trial cases decided by the trial courts in Maharashtra are to be studied. Various case laws and Judgments of the Supreme Court and High Courts are to be studied
- People's awareness, attitude of society and attitude of witnesses are to be studied.
- To study the law of different countries, internet facilities are to be used.
- Various articles published by the experts are to be studied.
- Expert Advocates' opinions are to be studied.
- Various reports, journals and newspapers are to be studied.
- Numerous acquittal cases relating to Narcotic Drugs and Psychotropic Substances decided by the Judiciary are to be studied.
- Reasons for the acquittal in the cases are to be studied

SUMMARY:

Illicit drug trafficking is the largest business in the world. Drug abuse is a complex phenomenon which has various social, cultural, biological, geographical, historical and economic aspects. The disintegration of the old joint family system, absence of the parental love and care in modern families where both parents are working, decline of old religions and moral values, etc. lead to a rise in number of drug addicts who take drugs to escape hard realities of life. Drug use, misuse or abuse is also primarily due to the nature of the drug abuse, the personality of the individual and the addict's environment. The processes of industrialization, urbanization and migration have led to loosening of the traditional methods of social control. The fast changing of social surroundings among other factors is mainly contributing to the proliferation of drug abuse. India is facing the problem of drug abuse, drug trafficking both at the national and international levels. According to the experts, it is widely prevalent, cutting across age, class and gender. Yet, it is difficult to estimate the number of drug abuses or formulate a comprehensive approach to deal with the issue primarily because it involves a 'hidden population' that does not seek treatment and hence remains under reported. This makes it difficult to assess the problem estimate, cost, both social and economic and design intervention strategies. The spread and entrenchment of drug abuse needs to be prevented. Therefore, the Narcotic Drugs and Psychotropic Substances Act, 1985 is enacted with stringent provisions to control and overcome this problem.¹

¹ The United Nations and Drug Abuse Control, UN Department of Public Information, New York, 1987 at p.1 1.

STATUTORY LAW

INTRODUCTION:

All the branches of law closely related with man and his day-to-day affairs. The law tries to define Crime. What kinds of act or omission amount to a crime. The notion of crime is changing from time to time and from place to place. E.g. Drunkenness is not a punishable in India. However, and under the influence of the alcohol, negligent driving, rioting, public nuisance and serious offences like murder and rape lead to offence. In the USA, drunkenness is punishable in many jurisdictions'.

During the first two decades of the 20th century, State as well as national policy was steadily opposed to manufacture, sale and consumption of narcotics and alcohol except for medical purposes.²

HISTORY OF DRUG LAWS IN INDIA (PRE-INDEPENDENCE):

The use of psychoactive or mood altering substance has long existed in the country. Cannabis and opium were consumed for medical as well as recreational purposes. Cannabis was associated with religious occasion whereas opium was served at family/community ceremonies. Besides, these substances were administered to persons suffering from migraine, malaria, cholera or other minor sickness. Their use was regulated by social rather than legal norms. Excessive or problematic drug use was rarely reported. Opium poppy was one of the main commodities for export and generated considerable revenue during the sixteenth to nineteenth centuries period.³

The first statutory law that regulated narcotic drugs in India was the Opium Act, 1857. The Act was introduced against the backdrop of the Opium wars (1839-1842 and 1856-1860)

² For a detailed discussion on Controlled Substances, see infra Chapter IV P. 125

³ See Harmala Gupta, "Nursing the Morphine Dream", The Hindu, 31/07/2013 at p.13.

between Britain and China; and consolidated the colonial state's control over the profitable poppy trade. The Opium Act of 1857 introduced licenses for growing poppy - a practice that continues till date. It appointed Opium Agents and Opium Officers to supervise licensing and collection of opium, on behalf of the Government.

The Opium Act of 1878 strengthened Government control over cultivation, possession, transport, import, export, sale and warehousing of opium. It conferred enforcement powers on officers of Departments of Central Excise, Narcotics, Drugs Control, Customs and Revenue

In 1930, the Dangerous Drugs Act extended regulation to coca leaves and hemp, besides opium and its synthetic varieties. It united in one punishment for unlicensed cultivation, possession, manufacture and import of dangerous drugs upto a maximum of three years imprisonment.

None of these Acts penalized consumption of drugs and/or possession for personal consumption.

HISTORICAL VIEW OF INTERNATIONAL DRUG LAWS:

In the nineteenth century, various efforts were made to create multilateral framework for narcotic substances. They were led by China and the United States of America. In 1909, the Shanghai Opium Commission was established to collect data and estimate the extent of international opium trade⁴. Three years later, thirteen States adopted the Hague Convention, 1912 to control the production, manufacture and distribution of opium. The Hague Convention came into force only after principles of ratification were clarified under the Treaty of Versailles, 1919. In 1920, the League of Nations passed a Resolution creating an Opium Advisory Committee to oversee the implementation of the Hague Convention.

By 1925, two international agreements led to the international community to commit itself to a reduction, as opposed to control of opium production. The first agreement concerning the

⁴ See Black's Law Dictionary, Henry Campbell Black , (5* edn) Publishers Editorial Staff, St. Paul Minn, West Publishing Co, 1979 at p.922.

Manufacture or Internal Trade in and Use of Prepared Opium, was concluded in Geneva on 11 February 1925 where signatory nations stated that they were Fully determined to bring about the gradual and effective suppression of the manufacture of, internal trade in and use of prepared opium. The second treaty, called the International Opium Convention, 1925 also referred to as the Geneva Convention relating to Dangerous Drugs, extended control to cannabis and institutionalized the international system of regulation by creating a Permanent Central Opium Board to maintain statistics on international trade in narcotics. The series of conventions led down administrative measures, without criminalizing users and/or producers of opiates, cocaine and cannabis.

The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931 sought to limit supplies of potentially addicting but medicinally useful substances, such as morphine and codeine to amount necessary for medical and scientific purposes. It introduced a system for countries to submit estimates of the quantity of drugs produced and consumed for medical reasons. This practice continues under the existing international framework for drug control.

In 1936, Convention for the Suppression of the Illicit Traffic in Dangerous Drugs was the first treaty to focus on illegal trade in drugs. Proposing a semi-punitive approach, the Convention mandated signatories to designate certain activities as offences while regulating other acts. Signed by thirteen states, the Convention came into force in 1939.

In 1946, the League of Nations' drug control functions passed on to the United Nations (Hereinafter referred to as the UN'). The League's Advisory Committee on Opium became the UN Commission on Narcotics Drugs, which presently leads drug policy making within the UN system. Thereafter, in 1953, the Opium Limitation Protocol was adopted, which authorized seven countries including India to grow opium for export.

The UN Single Convention on Narcotic Drugs, 1961 was introduced to consolidate existing drug control measures into a 'Single' treaty. The 1961 Convention aims to balance the use of narcotic drugs by ensuring their availability for medical and scientific pursuits while simultaneously discouraging production, manufacture, export, import, distribution of, trade in, use and possession for non-medical purposes. The treaty laid down a 15 years period for states to remove non-medical use of opium and 25 years for coca and cannabis. Drugs are classified according to their perceived liability to abuse and risk to public health under a fourfold system of Schedules. Schedule I contains drugs subject to the strictest controls including heroin, cocaine and cannabis, Schedule II lists out substances that require less stringent regulations, Schedule III covers drugs that are perceived to be at least risk of abuse and Schedule IV applies to drugs that are permitted for medical and scientific use.

The 1961 Convention also created the International Narcotics Control Board, a body comprising thirteen independent experts to oversee the implementation of international drug conventions.

The 1972 Protocol amending the 1961 Single Convention on Narcotic Drugs called upon member states to take increased efforts to prevent the illicit production of, traffic in and use of narcotic drugs and to provide treatment and rehabilitation to persons addicted to drugs.

In 1971, the Convention on Psychotropic Substances was adopted as a companion instrument to introduce controls over the manufacture, export and import of psychotropic substances such as amphetamines, barbiturates and hallucinogens like LSD. Its provisions are similar to those of the 1961 Convention.⁵

Growing concern over transnational drug crimes and the difficulty in prosecuting persons involved in international drug trafficking led to the adoption of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. The 1988 Convention seeks

⁵ Dr.Kamaljeet Singh and Nutan Kanwar, "A Peep into Menace of Drug Abuse and Legal Provisions" 50 CMLJ 70 (2014).

to harmonize national laws and enforcement actions against drug trafficking, including provisions on extradition, mutual legal assistance, co-operation and assistance for transit states, controlled delivery, money laundering, asset seizure, the diversion of precursor chemicals and illicit traffic by sea and via the mail.

Together, the three drug conventions of 1961, 1971 and 1988 constitute the international legal framework for drug control. Like other international treaties, these drug conventions are not self-executing. Their provisions must be incorporated into domestic law by legislative acts, in accordance with constitutional principles and the basic concepts of the legal system of that state.

LEGISLATIVE HISTORY OF THE NDPS ACT:

The NDPS Act was enacted by Parliamentary in 1985 in keeping with International Drug Conventions, namely the Single Convention on Narcotic Drugs, 1961; the Protocol amending the Single Convention on Narcotic Drugs, 1972 and the Convention on Psychotropic Substances, 1971. It came into force on 14 November 1985. The NDPS Act, 1985 replaced the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930.

According to the statement of objects and reasons of the NDPS Act, 1985, India was becoming a transit for drug trafficking and then the legislation was ineffective in countering the problem. The following deficiencies were noted in the law prevailing at the time-

- 1) Absence of stringent penalties against drug trafficking.
- 2) Weak enforcement powers,
- 3) Development of a vast body of international law, which India was a signatory to and
- 4) Lack of regulations over psychotropic substances⁶

The NDPS Act, 1985 was introduced as a comprehensive legislation to tighten control over abuse on narcotic drugs and psychotropic substances, enhance penalties, especially for

⁶ Id., at 13.

trafficking in drugs, strengthen regulations over psychotropic substances and provide for the implementation of international conventions, to which India was a party.

The NDPS Act, 1985 combines elements of regulation with prohibition of narcotic drugs and psychotropic substances. The Act prescribes cultivation, production, manufacture, possession, sale, purchase, transport, warehousing, use, consumption, inter-state import and export, import and export outside India and transshipment of narcotic drugs and psychotropic substances except for medical and scientific reasons and in accordance with the statute and rules there under. At the same time, it empowers the Central and State Governments to frame rules and permit the above mentioned activities. For example, although consumption of morphine is illegal, the drug can be administered to patients suffering from severe pain as the latter constitutes legitimate medical use under the Act.

To deter drug crimes, the Act introduced a mandatory minimum penalty of rigorous imprisonment for ten years and a fine of Rs. One lakh.⁷

The NDPS Act, 1985 was supplemented by the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, which provides for preventive detention of persons involved in illicit traffic in narcotic drugs and psychotropic substances.

In 1989, the NDPS Act underwent the first set of amendments for combating drug traffic and abuse recommended that the law be made more stringent. At the time, among other provisions, the impugned Section 31A was also incorporated into the statute. On the procedural side, powers were conferred upon the Government to constitute special courts for speedy trial of cases and all offences under the Act were made cognizable and non cognizable.⁸

Thereafter in 2001, Parliament passed the NDPS (Amendment) Act. The NDPS (Amendment) Act, 2001 sought to rationalize the sentencing structure, which was considered

⁷ Paul Gootenberg, *Talking Like a State 10* (Indiana University Press, Blomington & Indiana Polis, 2005).

⁸ The Collins Paperback English Dictionary, Wn\&m Collins Sons and Co Ltd, 1986atp.951.

harsh and disproportionate. Earlier, a person with a small amount of contraband could be sentenced to ten years imprisonment and a fine of rupees one lakh if he failed to prove that the drug was meant for personal consumption. The NDPS (Amendment) Act, 2001 prescribes punishment according to the drug and quantity seized - according to whether the amount is Small and Commercial. Under the present Act, a person dealing in small quantity of illicit drugs is subject to imprisonment of upto six months and/or fine of Rs. Ten thousand while a person dealing in commercial quantity can be sentenced to jail for a period of ten to twenty years and a fine from one to two lakh rupees. A person caught with an amount between small and commercial quantity is punishable with imprisonment upto ten years and with fine extending to one lakh rupees.⁹

ACT AT A GLANCE:

The Narcotic Drugs and Psychotropic Substances Act is consisting 83 sections which are divided into 6 chapters as follows-

Chapter I: contains the title of the Act, definitions of various terms and expressions used therein.

Chapter II: empowers the Central Government as well as the State Government to make appointments of certain officers for the purpose of the Act

Chapter II-A : provides for the constitution of a national fund for control of drug abuse.

Chapter III: provides for prohibition, control and regulations for cultivation, production, manufacture, etc. of any narcotic drugs and psychotropic substances.

Chapter IV: deals with the offences punishable under the Act and prescribed severe penalties viz-minimum imprisonment of ten years and fine upto Rs. two lakhs. When commission of offence is repeated by a person, death penalty has also been prescribed.

⁹ Rajeshwar Rao, "Drug: A Socio-Cultural and Political Overnotes- A Strategy for Community:Awarness", (Souvenir National Seminar on drug Abuse, Prabhat, 1992).

Chapter V: prescribes the procedure to be followed by the officers appointed for the implementation of various provisions of the Act.

Chapter V-A deals with forfeiture of properly derived illicit traffic of drugs.

Chapter VI: contains miscellaneous provisions.

IMPORTANT PROVISIONS:

This Act prohibits -

- Cultivation of opium, poppy, cannabis and coca plant.
- Production, manufacture, possession, sale, purchase, transport, warehousing, use, consumption, import, export or transshipment of any narcotic drug or psychotropic substance except for medical and scientific purposes and as per the rules or orders and conditions of licence issued.

The NDPS Act empowers Central Government to frame rules for certain purposes and State Governments to frame rules for certain others. Thus, there are Narcotic Drugs and Psychotropic Substances Rules, 1985 of the Central Government and Narcotic Drugs and Psychotropic Substances Rules of different states.

Violation of any rule of either the State or Central Narcotic Drugs and Psychotropic Substances Rules attracts punishment under this Act.¹⁰

¹⁰ Policy for drug demand reduction, 2014. Available at: www.socialjustice.nic.in (Last visited on 2 November 2015).

COMPARATIVE STUDY WITH THE LAW OF AMERICA:

INTRODUCTION:

Drug and alcohol abuse causes many social problems not only in India but also in American Society. There is no exact record of when men started using drugs for non-medical purposes. Alcohol and drug gives a lot of pleasure and have their advantages when reasonably used. However, when they are used excessively, they become poison. Thus, the history of drug use can be understand through the history of attempts to regulate it. In modern times, no country has ever attempted prohibition on a larger scale than the United States. In America, the first significant prohibitory drug legislation was enacted in 1875. This legislation primarily attacked the use of Chinese opium in the United States. Then according to the provisions of Hague Convention, the US enacted the Harrison Act in 1914 to demonstrate the nation's attempt to carry out the international effort of suppressing the abuse of opium, morphine and cocaine.¹¹

After 2 world war, 2 Acts were passed viz- the Buggs Act in 1951 and the Narcotic Control Act in 1970, imposing heavy penalties for drug-law-violations.

In 1960, with the awareness of treatment, a new policy in the history of event of alcohol and drug addiction was born. It is remarkable that the government shifted its strategy towards alcohol and drug rehabilitation. Between 1969 to 1974, the number of federally funded Drug Rehabilitation Programmes dramatically increased from 16 to 925.¹²

ALCOHOLISM AND DRUG ADDICTION AS DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT:

The significance of the Act is that-

1) Ensuring help for addicts who don't normally want to expose their problems for fear of losing their jobs or because of disadvantages, they may suffer and;

¹¹ Sandra Rasmussen, Addition Treatment, Theory and Practice 31 (Sage Publication, New Delhi, 2000).

¹² D.C.Jayasuriya and R.K.Nayak, Global Drugs Law 35 (Har-Anand Publication, New Delhi, 1997).

2) In providing additional rehabilitation to the individual who might relapse after years of successful recovery.

3) The ADA authorizes the employer to control alcohol and drug abuse in the workplace. The employer can prohibit the use of alcohol and the illegal use of drugs in the workplace and it can require employees not to be under the influence of alcohol or drugs while at work.

DRUG COURTS AS A NEW WAY TO ALCOHOL AND DRUG PROBLEM:

The United States has developed unique problem solving courts to treat cases involving alcohol and drug abusing offenders and to help them to deal with their substance abuse problems by judicial intervention. Now there are more than 1200 drug courts in operation and more than 470 drug courts in the planning process through out the United States. Drug Court has received enormous public support. It is so successful that many judges celebrate it as a new way of justice.

A Drug Court is a special court given the responsibility to handle cases involving less serious drug using offenders through a supervision and treatment programme. These programs include: frequent drug testing, judicial and professional supervision, drug counseling, treatment, educational opportunities and the use of sanctions and incentives. The Drug Treatment Courts (DTCs) are approaching the problem of drug offenders with the view that substance abuse is a chronic, progressive, relapsing disorder, a condition requiring therapeutic remedies rather than severe punishment. Drug Courts Judges are also open to reduce or set aside sentences once the offender complete their treatment programs successfully.¹³

The court found it would be cruel and unusual punishment to make a criminal offence of such disease. Otherwise, a person could be continuously guilty of the offence without being guilty of actual criminal conduct. Also, the court found addiction to narcotics and alcohol to be not

¹³ Anu Singh Lather, Drug Abuse among Students 13 (Dr. Arun Publishing House Pvt. Ltd., Chandigarh, 1993).

only a mental but also a physical illness appropriate for treatment. Under such cases, the main actors are the clients and the judge, who interacts with the client like a proactive therapist. In Drug Treatment Courts, the judge is considered to be the leader of this team.

THE ROLE OF DRUG COURT:

In DTCs, the roles are totally different because lawyers are mostly silent and play less prominent roles. The main actors are the client and the judges, who interacts with the client like a proactive therapist. In DTCs, the judge is considered to be the leader of this team, taking up duties beyond his traditional role as objective arbiter and requiring him to develop new expertise. As stage director and primary actor, the drug court judge is expected to engage the community, campaigning on behalf of the programme, pulling different resources and services together and developing relationships with the media, garnering support from the police.

The prosecutor is expected to ensure that the offender does not have a violent history and will not pose risks to the public while attending a treatment programme and to ensure that the client follows all drug court requirements. Similar to the prosecutor, the defense attorney departs from his traditional duty of exercising his client's full judicial rights, trying instead to help the addicted defendant stay in the treatment programme and encouraging him not to fail and relapse until graduation. In sum, these transformed roles ask both sides to achieve the top priority of helping to solve the client's drug addiction problem.

THE DRUG COURT TREATMENT PROGRAMME:

The Drug Court Treatment Programme has divided into following 3 phases-(1) Detoxification, (2) Stabilization and (3) After care. Phase 1-Detoxification lasts twelve to fourteen days, but may be longer if the client suffers difficulties getting off drugs. Every defendant is appointed a counselor, who makes sure that the defendant's appointments are kept and that the client appears every day to leave a urine specimen, the results of which the

counselor tracks. Also, the counselor offers individual or group counseling and a 12-step programme. An important component of this phase is the development of the defendant's treatment plan. Acupuncture is commonly used during this phase to reduce cravings, minimize withdrawal symptoms, and minimize the feelings of fear and uncertainty commonly experienced by defendants during the first several days or weeks after withdrawals from drugs. If the defendant is unable to control his cravings, he may be imprisoned for two weeks in the jail's treatment beds reserved specifically for the drug court programme. After the defendant has proved to the judge that he is able to function in a less structured environment, he is able to advance to Phase II-Stabilization.

Programme rules required the defendant to complete 12 scheduled sessions with his primary counselor and to produce seven clean urine samples in order to proceed to the second phase. During Phase II, individual and group counseling continues and the defendant also attends 12-step fellowship meetings in an effort to maintain his drug-free status with continuing acupuncture a couple times a week. Yet, the defendant has freedom in choosing the treatment options he wishes to participate in as long as his urine tests clean. Typically, Phase II is programmed to last 14 to 16 weeks, but may be extended for months or even a year, based on the client's needs. Furthermore, if the client experiences extreme difficulty staying off drugs, the judge will send him back to Phase I. Once treatment staff members have determined that the defendant has made sufficient progress, he is able to advance to Phase III. During this phase, the defendant focuses more on preparing himself for the future, academically and occupationally, than on staying away from drugs. The defendant still returns to court on a regular basis and urine tests are required during aftercare. However, the defendant is encouraged to act without the aid of a treatment staff and to focus on his educational and vocational needs. Since drug court started in 1989, the drug court movement has become an international movement.

THE US EXPERIENCE COULD BE USEFUL TO INDIA:

The problems of alcoholism and drug addiction are major concerns in India. Drug abuse has been identified as playing a significant part in the spread of diseases like AIDS. The recent trend in drug abuse among youth people indicate that, the abuse of illicit drugs has become more popular among mainstream youth. There is also risk that drug abuse in recreational setting is increasingly becoming part of the lifestyle of certain youth groups. The new patterns of drug abuse require enhanced efforts in prevention and the development of new approaches to it. If we adopt US experience as a Drug Treatment Court, it will help to control the drug problem successfully.

SUMMARY:

Thus, it is observed that the Indian Government cannot handle the drug related criminals. An Addiction treatment policy is needed rather than severe punishment. The Addiction treatment should be mandatory so that drug addicts and alcoholics will be given the opportunity of treatment without any fear of arrest. In America, there is an effective enactment such as the Americans with Disabilities Act (ADA). Still there is no such enactment in India. It is remarkable that the American Government concentrated towards alcohol and drug rehabilitation. Between 1969 to 1974, the number of federally funded drug rehabilitation programs dramatically increased from 16 to 926 in 1974. In India, there are 122 de-addiction centres. They are established in big cities only and not a single de-addiction centre is established in rural and tribal areas today also. In America, Drug Court is a new way to solve Alcohol and drug problem. In 1989, the first Drug court was established in Florida. At present, there are more than 2000 courts throughout the United States. In India, there is need to adopt such new idea of the Drug Court. In America, there is Drug Court Treatment Programs. It is mandatory and it is divided into 3 phases such as (1) detoxification (2) stabilization and (3) after care. The treatment is purely scientific basis. The treatment is given

for 2 to 3 years. During the period the defendant still return to court on a regular basis. Now the Drug court movement has become an international movement. The US experience could be useful our society. In India, there is the legal procedure of treatment, they are not operating effectively. There is no mandatory after care program. Usually such patient gets treatment for only one or two months.¹⁴ India has seen a sharp increase in drug-related crimes, mainly caused by recreational drug users. The numbers of habitual drug users are exceeding. This result from cheaper and new drug offering strong effect which are smuggling from other countries. At present, there is stringent law to regulate of alcohol and drug addiction. However in enforcing the law, it is not so effective. There is no separated hospital for the treatment of drug addicts in rural areas and tribal areas. The present Government policy favours punishment. This policy is increasing the problem because alcoholics and drug addicts refuse admitting their addiction. There is need for taking action for improving the capability of treatment and rehabilitation processes for drug addict¹⁵.

¹⁴ R.M. Tufail, Iyer's Comprehensive Classic on Narcotic Drugs and Psychotropic Substances Act, 1985 4 (Delhi Law House, 2013).

¹⁵ M.M. Glatt, Drug, Society and Man: Guide to Addiction and its Treatment 35 (Medical and Tech Publication, Lancaster, 1974).

PROCEDURAL LAW

INTRODUCTION:

The Indian Judicial System stands on three pillars i.e. Substantive law, Procedural law and Evidentiary law. The Procedural law lays down the procedure of arrest of an offender, the procedure of investigation, the procedure of bail provision, constitution of the various courts, the procedure of trial of an offender, etc. Such Procedural law is codified in the Code of Criminal Procedure, 1973.

ADMINISTRATION OF JUSTICE:

Justice must not only be done but also must appear to be done. No citizen go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. If such a feeling is creating in the mind of a common man, who approaches the court for justice, he would certainly feel that the judge, who could not render justice, is biased. It is imperative that in order that people may not loose faith in the administration of criminal justice, no one should be allowed to subvert the legal process.

CRIMINAL JURISPRUDENCE:

Under existing jurisprudence in a criminal matter, innocence of the accused is presumed; but the presumption is to be judged on the basis of conceptions of reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land. If arms and ammunities are recovered at the instance of or on disclosure by accused,¹⁶ it can be stated that presumption of innocence would not thereafter exist and the accused has to explain its

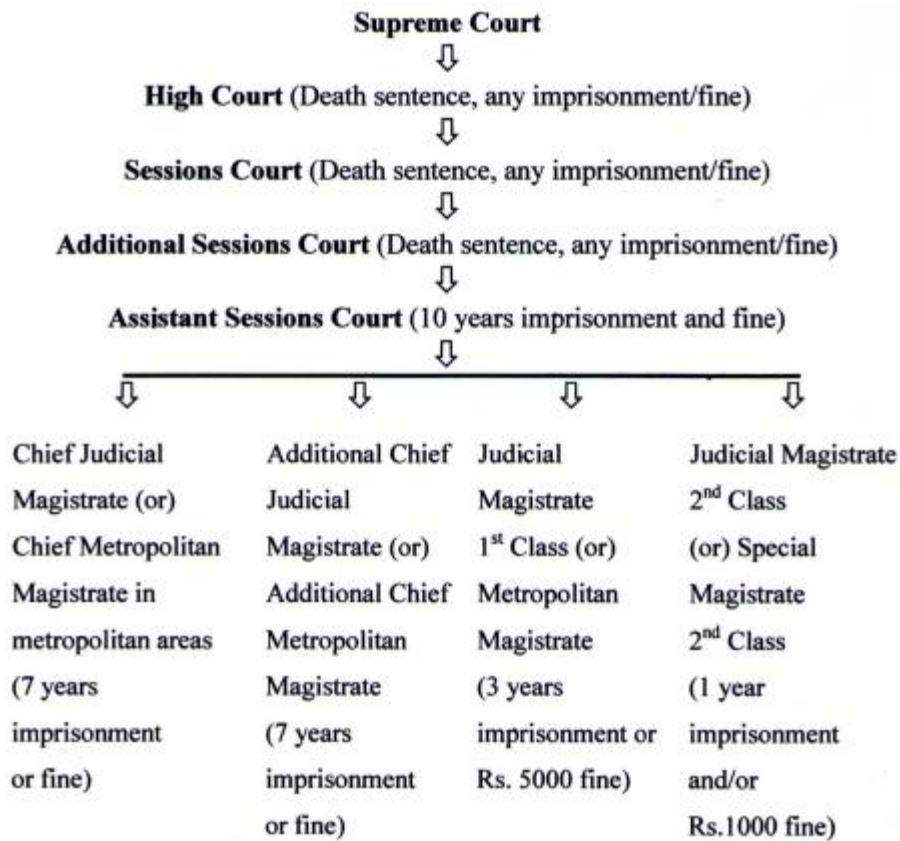
¹⁶ Vikram Kumar Gupta, Paramjeet Kaur, "A Study of profile of patients admitted in the drug deaddiction centers inthe state of Punjab,"1 IJRHS 54 (2013).

possession or discovery and it would depend upon facts of each case which are to be on the scale of common sense of a prudent man.

OBJECTIVES OF THE CODE OF CRIMINAL PROCEDURE:

- 1) Accused to get fair trial according to natural justice.
- 2) Avoid delay in investigation and trial.
- 3) Procedure to be made simple ensuring fair deal to the poor.

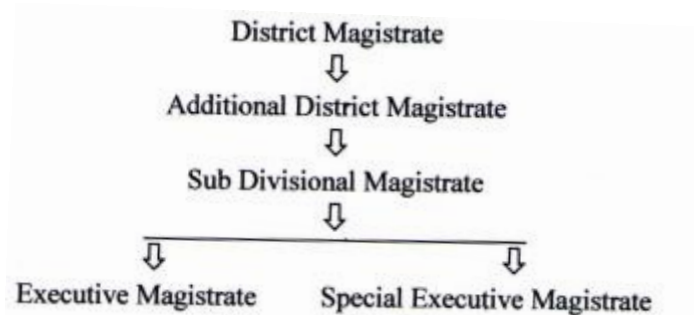
3.5 Constitution of criminal courts: Sections 6 to 23 and Sections 26 to 35 of Criminal Procedure Code, there are of Criminal Courts and their powers:



Special Court: It may be noted that the State Government with the consultation of the High Court may establish one or more special courts for any particular class of cases. While such special courts exist, no other court shall try cases of their jurisdiction. If the area of jurisdiction of such court extends beyond the district within which it holds the court, then all

appeal, revisions or applications of the jurisdiction of the extended area shall lie in the district where the special court sits.¹⁷

• Executive Magistrate (Sections 20 to 23): The hierarchy of executive magistrate is as follows-



The State Government appoints them and their operational and disciplinary control vests in it. Their superiority is in accordance with the above hierarchy. The State Government can place any Executive Magistrate as Sub Divisional Magistrate and define the area of his operation.

PUBLIC PROSECUTOR (SECTIONS 24 AND 25):

All offences are dealt with as an invasion on the public peace. A Public Prosecutor stands for the state in whose name all prosecutions are conducted. The criminal trial is not to support the theory at all costs, but to investigate the offence and determine the guilt or innocence of the accused and the duty of the public prosecutor is to represent the state and not the police. He should discharge his duty fairly and fearlessly with full sense of responsibility. He is an agent of justice. These are the following clauses of Public Prosecutors under the sections, who shall conduct cases in District Courts¹⁸

- 1) Public Prosecutor appointed by the Central Government,
- 2) Public Prosecutor appointed by the State Government,
- 3) Additional Public Prosecutor appointed by the State Government,
- 4) Special Public Prosecutor appointed by the Central Government,

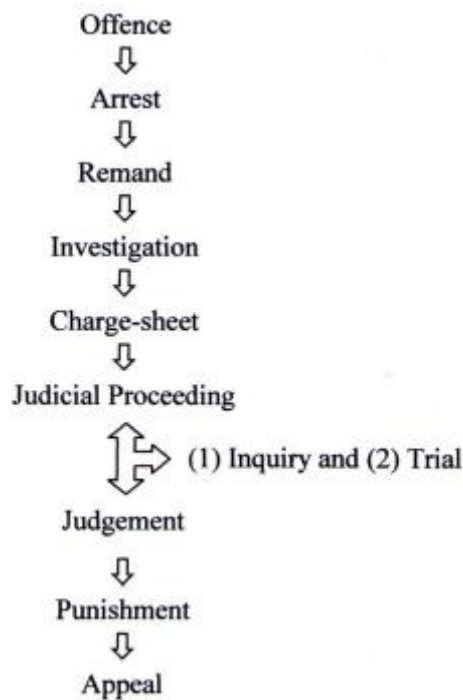
¹⁷ World Drugs Report, 2013, www.unodc.org accessed on 31/07/2013

¹⁸ See Joseph Antony, "Marunna Lehari Vazhikkal", Mathrubhoomi, 26/06/2010 at p.5

- 5) Special Public Prosecutor appointed by the State Government;
- 6) Public Prosecutor includes any person acting under the direction of the Public Prosecutor.

CRIMINAL LAW:

The main object behind criminal law is to maintain law, public order, Offence stability and also peace and progress in the society. Stages in the criminal trial are as follows-



OFFENCE (SEC. 2 OF CR.P.C.):

An offence is any act or omission made punishable by any law for time being in force. There are three types of offences viz - Cognizable and Non-cognizable, Bailable and Non-bailable, and Compoundable and Non-compoundable offences¹⁹

a) Cognizable and Non-cognizable offences: A cognizable offence means an offence for which a police officer may arrest without warrant [Section 2(a)].

A non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant [Section 2(1)].

¹⁹ See Girija Shivakumar , "The Hazy Haven of Heroes and Heroin", The Hindu, 21/04/2013 at p.3.

b) Bailable and Non-bailable offences: A bailable offence is an offence for which the accused has a right to get himself released on bail. The court cannot order the accused to be put in police custody or jail custody if the offence is designed under Cr.P.C. as 'Bailable and Non-bailable' if the accused offers a surety that is acceptable to the court. As against this, the court can not, as a rule, order the release of a man against whom there is prima facie evidence of serious offences are non-bailable offences. Offences which are 'Bailable and Non-bailable' have been laid down in the Schedule I, column 5 of Cr.P.C.

c) Compoundable and Non-compoundable offences (Section 320 of Cr.P.C.): Compounding means settling with the complainant or with the aggrieved party. Cases which can be settled between the rival parties are called compoundable cases. In other words, cases pertaining to offences which are compoundable are called compoundable cases. The compoundable offences are listed in section 320 of Cr.P.C. Offences which are not listed in section 320 of Cr.P.C. can not be settled under the four corners of the law and in the court.

ARREST:

The Criminal Procedure Code prescribes the mode of arrest.

• **Meaning:** Arrest means a physical restraint put on a person as a result of allegation of accusation that he has committed a crime or an offence of quasi-criminal nature. Arrest consists of the actual seizure or touching of a person's body with a view to his detention.

There are three elements should be present in an arrest²⁰ -

- 1) Intention to arrest under authority,
- 2) Detention in legal manner and
- 3) The arrested person understands his arrest.

An arrest can be made either under a warrant of arrest issued by any court or without by police or any other person under the authority vested in him by Cr.P.C. or any other law.

²⁰ "Whitener by Children", The Hindu, 28/03/2011 at p.18.

Arrest how made.:

- 1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
- 2) If such person forcibly resist the endeavour (an attempt) to arrest him, or attempt to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
- 3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.
- 4) Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise; and where such exceptional circumstances exists, the women police officer shall, by making a written report, obtain the prior permission of the judicial magistrate of the first class within whose, local jurisdiction the offence is committed or the arrest is to be made.

Remand:

The word 'Remand' does not occur any where in Criminal Procedure Code. When police arrest a person in cognizable offence and investigation can not be completed within 24 hours, they make a written application to the magistrate and request the magistrate to permit them to keep the accused in police custody for a further period. This request is called 'Request for remand'. 'Remand' means that the police custody of the accused is extended by days not exceeding 14 days.²¹

Remanded to Jail Custody: The accused can be sent in jail custody and this remand in jail custody can exceed 60 or 90 days, depending upon the offence. At the end of this period, if the charge-sheet is not filed, the accused is entitled for bail.

²¹ See *Bandhua Mukthi Morcha v. Union of India*, 1984 SC 802,- *Francis Coralie v. U.T of Delhi*, AIR 1981 S.C 746; *Vikram Deo Singh Tomar v. State of Bihar*, AIR 1988 SC1782^and *Tapan Kumar v.FCI*, (1996)

INVESTIGATION:

The criminal justice system in India is based on two agencies-

- 1) Police which investigate the offence and
- 2) Judiciary sits to give Judgment. Both have their statutory existence and are independent in their sphere of activity but are interdependent in administering justice.

- **Meaning of investigation:** All cognizable offences are considered as invasion of the state's power of protecting citizens. The state therefore acts through police which conducts all proceedings under this code for collection of evidence against the accused person within the stipulated period. When information about a cognizable offence is received, the police officer proceeds to the place of occurrence and ascertains all the facts and circumstances of the case. He discovers and arrests the suspect and collects evidence relating to the commission of offence. Investigation is conducted by police or by any other person authorized by law. It relates to an offence. It results in either charge-sheet or final report. It is a non-judicial proceeding. It generally starts either on FIR or on order of magistrate,
- **Police investigation:** The police investigate cognizable offences under section 156 of Criminal Procedure Code without an order from the magistrate. It also investigate non-cognizable offences under order of the magistrate under section 155 of Cr.P.C. Besides this, the magistrate may order the police to investigate any offence under section 156(3) and 202 of Cr.P.C.²²
- **Investigation by Non-police agency:** Various Acts have conferred powers of investigation on non-police agencies. The magistrate has been empowered under section 202 of Cr.P.C. to get a case investigated by a person other than police. Investigation includes all the proceeding under Cr.P.C. for the collection of evidence

²² Pritma Murthy, N. Manjunatha, "Substance use and Addiction Research in India," 189 IJP 52, (2010).

conducted by a police officer or any person authorized by a magistrate [Section 2(h) of Cr.P.C.). The following are the common items for the investigation--

a) FIR (First Information Report): Investigation begins with or without FIR. FIR means the information, given to the police, that person known or unknown has committed an offence which is listed as cognizable offence in Schedule-1 of Cr.P.C. It is necessary signed by the informant. A copy of the FIR has to be given to the informant. The second copy of the FIR has to be sent to the magistrate for his perusal and record (Section 154 of Cr.PC). This is one of the crucial statements to the police at the stage of investigation because it is first in sequence and is generally regarded as the foundation to the prosecution case. Courts have believed that FIR in the first, untainted, unguided version of the offence and, generally, cannot be false.

b) Send a report to the magistrate: When the officer-in-charge receives a report about cognizable offence (FIR), he should first of all communicate the same information to the competent magistrate and then either himself or depute his subordinate officer to proceed to the place of occurrence.

c) To investigate, discover and arrest: The police officer proceeds to the spot, arrests the suspect, ascertains facts and circumstances of the case.

d) Statement of witnesses: By examining of persons including accused and reducing their statements into writing.²³

e) Panchanama: Panchanama refers to what an independent witness has seen at the scene of offence or during investigation. In their presence, the police record the joint statement of two witnesses and conditions observed by the panchas. The two witnesses are known as panchas. The word Panchas is an ancient word and would historically indicate five people who would

²³ United Nation, "Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances," 29 IJILI 425 (1989).

impartially decide the disputes in a village. But today panchas does not mean five persons. Panchanama is mandatory in most of the cases.

Search of the house (Section 165 of Cr.P.C. r/w section 100(4) of Cr.P.C.): Whenever police search the house without warrant from a magistrate where any person is residing or any enclosed place, the police must carry with them two or more independent respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitants of the said locality is available or is willing to be a witness to the search.

The police can issue an order in writing to any person to be such a witness. No panchanama is required by law to be done when police discover an article or thing in pursuance to a statement made by an accused who is in their custody (Section 27 of Evidence Act), The practice of the police under a wrong interpretation of law is to make a panchanama of discovery of an article or thing when police act under section 27 of the Indian Evidence Act. The police follow this practice, because the courts many times do not believe the police about their evidence, about their discovery of an incriminating article unless it is corroborated by an independent witness. However, it is a matter of the courts believing a particular police officer and the law does not mandate the police officer to make a panchanama.²⁴

Many times, in cases of Narcotics and other contraband, the statement of the police that they recovered the contraband from the person of the accused in presence of the pancha witness is not truthful. What often happens is that the police first discover the contraband and then call the panchas. Section 50-A of the Narcotic Drugs and Psychotropic Substances Act 1985 stipulates that provisions of Cr.P.C. would be applicable to all arrests, searches and seizures under this Act. This section would therefore mandate panchanama of searches and seizures.

²⁴ T.S.Saini, "Drug Abuse: A Threat to Social Ecology", XXX SD 22 (1912)

f) Collection of experts' opinion: In most of the serious cases, the investigating officer has to collect experts' opinion from or specially skilled persons.

1) Medical certificate/opinion: It may be noted that the experts' evidence is never at the top but at the tap. The trial court shall always examine the ground of opinion in number of cases.

h) Search and seizure: Search of the house or place and seizure of property during investigation is of the greatest legal value. **i) Disposal of the case property:** If the case property so seized is subject to speedy and natural delay or if it is otherwise necessary, the court may pass an order to be sold or otherwise disposed of

j) Report submitted: After such investigation the investigator collects sufficient evidence, he shall submit charge-sheet in court through his superior officer.

k) Speedy investigation: Article 21 of the Constitution guarantees speedy investigation and trial to the accused person. If the investigation is unduly delayed, the trial would automatically be delayed violating Article 21. Such delayed investigations are liable to be quashed by the courts. It may be noted that section 468 of Cr.P.C. has laid down the limitations of time for various kinds of offences within which the investigation should be completed. For examples -

1) Within 6 months, when the offence is punishable with fine only.

2) Within 1 year, when the offence is punishable with one year imprisonment.

3) Within 3 years, when the offence is punishable with 3 years imprisonment.

4) For heinous offences, no time limit is prescribed under section 468 of Cr.P.C. but Article 21 of the Constitution would be violated in such cases.

5) Section 167(5) of Cr.P.C. lays down that if an offence is punishable with 2 years imprisonment, triable by the magistrate as summons case, the magistrate shall stop further investigation if the investigation of such offence is not completed within 6 months.²⁵

CHARGE-SHEET (SECTION 173 OF CR.P.C.):

The word 'Charge-sheet' is not defined in Cr.P.C. However under Cr.P.C. section 173, when a police officer concludes an investigation, of a cognizable offence, he sends a report to the magistrate of that investigation in which the investigation officer finds that there is material to proceed against the accused. This report includes FIR, other statements recorded by the police and other data collected by the police, the names of the parties and the conclusion of the investigating officer that the offence has been committed and by whom. Also whether the accused has been arrested. The word Charge-sheet is a common and popular expression connoting an abstract of all the statements and the material collected during investigation and which material the prosecution intends to use during the trial.²⁶

The persons who gave the statements are generally required to come to the court, take an oath and then give evidence in respect of what they have seen and stated before the police during investigation. Except the FIR and the panchanama, other statements to the police are not signed. This statement assumes significance during discussion of a hostile witness.²⁷

²⁵ Glen R. Hanson and Peter J. Venturelli, *Drug and Society* 5 (Jones & Bartlett Learning, America, 11th Edn., 2012).

²⁶ Mark S. Gold, *The Good News about Drug and Alcohol* 72 (Villard Books, New York, 1991).

²⁷ Thomas J. Sullivan, *Introduction to Social Problems* 356 (Allyn & Bacon, America, 4th Edn., 1988).

JUDICIAL PROCEEDINGS:

Introduction: It includes any proceeding in the course of which evidence is or may be legally taken on oath. Oath is also defined in the Oaths Act. An oath is an affirmation or oath given in the schedule to section 6 in the Oaths Act, 1969. thus, the hallmark of judicial proceedings is that the witnesses are examined on oath. It includes Inquiry and Trial.

A) Inquiry Inquiry means every inquiry other than the trial conducted under Cr.P.C. by a magistrate or court [Section 2(g) of Cr.P.C.]. At the end of inquiry, the judge does not convict or acquit any one. The judge may reach preliminary finding and may leave it to the parties to make further action or initiate it himself. It is comparable to police investigation, except that witnesses may be given oath.²⁸

B) Trial: The word Trial is not defined. The essence of a trial is that it is judicial proceeding per excellence. As said earlier, the hallmark of a judicial proceeding is that every witness who gives evidence is required to give evidence on oath. This needs to be distinguished immediately from the stage of investigation. During investigation, the police record, statements and gathered X these statements are not on oath. The police have no authority to give oath. Only a judge or a magistrate has authority²⁹

to give oath. The word 'Trial' is generally applied in criminal law i.e. proceeding before a criminal court. In the context of criminal law, we may define a trial as adjudication of guilt or innocence of an accused in accordance with criminal law i.e. Criminal Procedure Code and the Indian Evidence Act, 1973

Meaning of trial: Though the word 'Trial' is not defined in the Code of Criminal Procedure, 1973, it means as commonly understood the proceeding taken in court from the stage of framing of a charge and ending with the conviction or acquittal. According to Stroud's Judicial Dictionary, Trial means The conclusion by a competent tribunal of question in issue

²⁸ Gurdeep R. Chatwal, Synthetic Drugs 1 (Himalaya Publishing House, Bombay, 1986).

²⁹ S.V. Joga Rao, "Drug Abuse and the law", XV CULR 145 (1991).

the legal proceedings whether civil or criminal. Trial may be said to be a judicial proceeding which ends in conviction or acquittal of the accused. 16

Different types of Trial: On the basis of various provisions of Code of Criminal Procedure, 1973 and experience of working of Criminal Courts and conducting of criminal trials. The different classes of trials may be enumerated as under-

- 1) Trial of warrant cases by magistrate (Section 238 to 250 of Cr.P.C)
- 2) Trial of summons case by magistrate (Section 251 to 259 of Cr.P.C.)
- 3) Trial started on cognizance taken on police report [Section 190(1)(b)].
- 4) Trial started on cognizance taken on a complaint or upon information received by the court from any person other than police officer or upon his own knowledge about the commission of an offence [Section 190(1)(a) and (e)].
- 5) Session's Trial (Section 225 to 237 of Cr.P.C.)
- 6) Trial of offences punishable under Indian Penal Code [Section 4(2) of Cr.P.C.]
- 7) Trial of offences punishable under special or local laws [Section 4(2) of Cr.P.C.].
- 8) Trial of juvenile offenders under Juvenile Justice Act, 1985
- 9) Trial before special courts enacted by special and specific Acts for conducting speedy trials of offences scheduled in such special acts.

Summons cases do not recognize separate, procedures for cases instituted on police report or on complaint. The Code of Criminal Procedure, 1973, in form of section 251 to 259 provides one and same procedure for all summons cases irrespective of the fact whether such cases are result of a complaint or police report. However, distinction in procedure is being maintained as to trial of warrant cases instituted on police report or on complaint.³⁰

³⁰ A.R.K.Mitchell, Drug-The Parents Dilemma 28 (The Care and Welfare Library, Priori Press Ltd., 1972).

Stages of criminal trial: Very briefly and without reference to the procedure of a trial i.e. whether the trial is as per summons procedure or warrants procedure, the stages of a criminal trial are as under-

- 1) Supplying to the accused copies of charge-sheet by the investigating agency (Sections 173, 207 and 208 of Cr.P.C.)
- 2) Framing or explaining of the charge to the accused.
- 3) Recording the plea of the accused i.e. whether the accused pleads guilty or not guilty by the court.
- 4) Examination-in-chief of the witnesses i.e. examination of the witnesses by the party calling that witness. 5) Cross-examination of the witness means the examination of that witness by the party which is adverse to that witness,
- 6) Examination of witnesses summoned by the court if any and their cross-examination either by the defence or the prosecution (Under section 165 of the Evidence Act, the court can, on its own, summon any person who is likely to throw some light upon the dispute, such persons are called court witnesses as distinguished from prosecution witnesses or defence witnesses. But even court witnesses are subject to cross-examination).
- 7) The examination of the accused by the court. This takes place after the prosecution closes its case. The examination of the accused is not on oath. Neither the prosecution lawyer (The prosecutor) nor the aggrieved party can cross-examine an accused (Section 313 of Cr.P.C.). The essence of examination of the accused by the court is that the court gives opportunity to the accused to explain circumstances appearing in evidence against him. The accused cannot be convicted for giving false answers to the court questions, even if the answers given to the court are proved to be false.

8) Examination of defence witnesses if any after the prosecution closes its case, the defence is given an opportunity by the court to summon any witness whom the defence may want to examine in its report.

9) Argument by the prosecutor and the defence lawyer (Section 314 of Cr.P.C.).

10) Judgment by court (Sections 355 of Cr.P.C.)

The Judgment by the court must end in the final order which may be of acquittal or conviction or admonition or binding over for good conduct.

JUDGMENT:

The Judgment must contain points for determination, the decision on those points and the reasons for the decision.

PUNISHMENT:

Generally, by punishment, we mean suffering loss or serious damage caused to a person. In criminal law, punishments (Chapter 3 of IPC) are listed as follows³¹-

- 1) Death
- 2) Imprisonment for life
- 3) Simple imprisonment
- 4) Rigorous imprisonment Le. imprisonment with hard labour
- 5) Fine

³¹ B.R.Sharma, "Narcotic Drugs: Their Classification, Effects and Screening Tests" 1 IPJ 28 (2003).

APPEAL:

An appeal is a creation of law where the correctness of the Judgment of the lower court can be challenged in the higher courts. The constitution provides conditions where a Judgment of the High Court can be challenged in the Supreme Court (Art. 132 and 136) while Cr.P.C. specifies the conditions where Judgments of the lower courts can be appealed against in the Sessions Court and the High Court. An appeal can be filed on the questions of law and facts, and the appellate court has wide powers to reverse the order of the lower court direct further inquiry, order retrial, commute or enhance the sentence or order compensation to the aggrieved person³².

SUMMARY:

All the processes such as summons, warrants of arrest, proclamation and attachment and search warrant issued by the court are meant to facilitate the investigation by police. The police station is the unit where all powers as to investigation under the Code are concentrated, subject of course, to the supervision of the superior police officers and the court. The sole aim of the law is approximation of justice. A judge is looked upon as an embodiment of justice. Right of speedy trial is an integral part of fundamental right guaranteed by Article 21 of Constitution of India. The duty to be discharged by a criminal court in a trial is indeed difficult, especially when it has to see to the conflicting claims and has to strike a just balance. At the same time, to take care that no innocent person is punished, so that people do not lose faith in the rule of law. Our rules of criminal justice remind the courts of their solemn duty on one hand to punish a crime and on the other hand to find and punish the real offender so that no innocent life is extinguished or impaired.

³² Dr. S.R. Mynemi, Crime & Crimonology (Allahabad Law Agency, Faridabad, 2017).

INVESTIGATION OF DRUG CASES

INTRODUCTION:

As a key agency of the criminal justice administration the police is responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, conduct of investigation of crimes, production of under-trials before the courts and post sentence surveillance over the criminals etc. In a rule of law of society, the police functions within the legal framework of the constitutional and the municipal laws that comprises mainly of the Constitution of India, The Code of Criminal Procedure, 1973, The Indian Evidence Act, 1872, The Protection of Human Rights Act, 1993 and the Police Act etc. The main function of the police is proper investigation. It is half the secret of success in any case.³³

SCOPE OF THIS CHAPTER:

The investigation of crime is not aimed at convicting anyone other than the persons who committed such crime. It is truly search for truth and the investigator must always struggle for just that the true facts in any case. The investigator must protect the innocent and prosecute those guilty of criminal acts. The duty of police is to prevent and detect crime and bring the accused before court. The main object is to collect all material necessary for establishing the accusation against the offender. It is hazardous and unsafe for the court to base or sustain the conviction when nature of the investigation is highly trained. Today the investigation system is not trusted by the laws and the courts. The manner in which the police investigates are critical importance to the functioning of criminal justice system.

³³ Isador Chein, The Road to H 26 (Basic Books, New York, 1964).

MEANING OF INVESTIGATION:

Section 2(h) of Criminal Procedure Code, defines the term investigation as under: Investigation includes all the proceedings under the Code of Criminal Procedure 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 this behalf).

Investigation starts after the police officer receives information in regard to an offence. The duty of the police is to prevent and detect crime and to bring the accused before the court. In safeguarding our freedoms, the police plays an important role. Society for its defence needs a well trained and well disciplined force of police whom it can trust. The police of course must act properly. They must obey the rules of right conduct. They must not extort confession by threats or promises. They must not search a man's house, premises without authority.

VARIOUS STAGES OF INVESTIGATION:

In the criminal cases, following are the stages of investigation-

Offence → Investigation → Trial → Judgment

- F.L.R.
- Station diary
- Search, seizure and arrest
- Panchnama
- Statement of witnesses by police
- Statement made to police and their role in criminal trial

F.L.R. (FIRST INFORMATION REPORT):

Investigation starts after the police officer receives information in regard to an offence.

First information report is an important document. It is not means that it contains every detail of the case for the prosecution. Every information relating to the commission of cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the state government may prescribe in this behalf. Courts have regarded the F.I.R. as the foundation of the prosecution case³⁴.

STATION DIARY:

Station diary is maintained at every police station and it is a permanent record of events in the police station or events reported to the police. It is maintained under the police manual and standing orders. Every officer must record his movement in the station diary particularly his arrival and departure. If he leaves for investigation, he has to make a diary entry. If he returns to the police station after investigation, he has to make a diary entry about the progress of investigation. This is to enable the senior police officer to know what the staff is doing. This is also to keep a check over them.

SEARCH, SEIZURE AND ARREST:

It consist all these steps such as -

- 1) Proceeding to the spot
- 2) Ascertainment of the facts and circumstances of the case
- 3) Discovery and arrest of the suspected person
- 4) Collection of evidence relating to the commission of the offence

³⁴ The white powder of death, (oped-Health)" The Tribune, January 31, 2013.

Which may consist of -

- a) The statement of the various persons (including the accused)
- b) The search of places or seizure of thing considered necessary for the investigation and to be produced at the trial and
- c) Formation of the opinion as to whether on the materials there is a case to place the accused before a magistrate for trial and if so, taking necessary steps for the same by the filing of a charge-sheet under Section 173 of Criminal Procedure Code.

PANCHANAMA:

The assistance of any independent witness which is available at the relevant time is taken and such witnesses are treated as Panch. Panchanama is written by police officer in the presence of panch witnesses and they signed thereon is called as Panchanama. There are various types of Panchanama such as Arrest Panchanama, Seizure Panchanama and Spot Panchanama. It is a document which records evidences and findings that an investigating officer makes at the scene of an offence/crime. Such document so prepared needs to be signed by the investigating officer. Different law enforcing agencies draw panchanama according to the specific needs of the Act under which it is being drawn. Therefore, one would find differences in the approach of officers in the panchanama under the IPC, Customs Act, NDPS Act etc³⁵.

EXAMINATION OF WITNESSES BY POLICE (SECTION 161 OF CR.P.C.):

- i) Any police officer making an investigation under or any police officer not below such rank. As the state government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquitted with the facts and circumstances of the case.

³⁵ Dorothy E. Dusek and Daniel, Drug: A Factual Account 30 (Asian Books, New Delhi, 1989).

ii) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

iii) The police officer may reduce in to writing any statement made to him in the course of an examination under this section, and if he does so, he shall make a separate and true record of the statement of each. Such person whose statement he records.

STATEMENT MADE TO THE POLICE AND THEIR ROLE IN CRIMINAL TRIAL:

The statement recorded under section 164 of Cr.P.C. and Section 161 of Cr.P.C. etc. is to give an idea to the accused as to what precise case he has to meet during his trial. The accused has to prepare himself for his defence. He must know who the witnesses against him are and what is according to the police, the version of the witnesses which has landed him before the court³⁶.

PROCEDURE OF INVESTIGATION UNDER NDPS (NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES) ACT, 1985:

Introduction:

The Narcotic Drugs and Psychotropic Substances Act, 1985 was enacted as a special Act on lines of socio-economic offences Acts. The Act gave enormous powers to the investigating officers.

Investigating officers under NDPS Act:

- Officers under Central government: Officer (Superior in rank to a peon, sepoy or constable) of gazetted rank of the department of central excise, narcotics, customs, revenue, intelligence or any other department of the Central government, officer of the para- military forces or the armed forces to be empowered in this behalf by general or special order of the Central government or

³⁶ Ishwar Modi Shalini Modi, Drugs, Addiction and Prevention 58 (Rawat Publications, Jaipur 1997).

- Officers under state government: Officer (superior in rank to a peon, sepoy or constable) of the revenue, drugs, control, excise, police or any other department of a state government to be empowered in this behalf by general or special order of the state government.

POWERS OF INVESTIGATING OFFICERS:

Chapter V of the NDPS Act (Section 41 to 68) sets out the powers as well as procedures for the investigation of offences under the Act. This chapter empowers officers duly authorized by the central government or a state government to issue warrants, to enter and search premises, to stop and search conveyances, to seize, narcotic drugs and psychotropic substances, to take statements and to arrest persons suspected of having committed an offence, punishable under the Act.³⁷

The power to issue search and arrest warrants is in terms of Section 41, been vested both in magistrates as well as in specially designated Gazetted officers of the central and state government. This is designated to ensure both timely and effective action in response to any information. In addition, both the central and state governments are authorized to entrust any officer duly empowered under the Act. With the powers of an officer-in-charge of a police station for the investigation of offences under the Act.

It needs to be noted, however, that while the powers to search, seize, arrest etc. are inherent in the Act, all these are subject to both the substantive and procedural safeguards mandated by the Code of Criminal Procedure, in relation, inter-alia to the presence of independent witnesses at a search the drawing up of search list or panchanamas, and the constitutional obligation to produce an arrested person before a magistrate within 24 hours.

³⁷ The Encyclopedia of Psychoactive Drugs, Prescription Narcotics. The Addictive Painkillers 33 (New York, 1986).

PROCEDURE OF INVESTIGATION UNDER NDPS ACT:

The procedure for search and seizure under sections 50 are mandatory in nature.

Under Section 41(1), only an empowered magistrate can issue warrant of arrest or for the search in respect of offences punishable under chapter IV of the Act.

According to Section 41(2), when an empowered magistrate has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place when such warrant for arrest or for search is issued by a magistrate, only empowered officers duly authorize officer can act under the provisions of NDPS Act.

According to Section 41(3), such officer shall have all the powers of entry, search, seizure and arrest with warrant or authorization.³⁸

According to Section 42(1), the empowered officer if has a prior information given by any person, that should necessarily be taken down writing. But if he has reason to believe from personal knowledge that offences under chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. If such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To these extents, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. According to Section 43, the empowered officers of any shall have power of seizure and arrest in public place, it includes any public conveyance, hotel, shop or other place which is used by public.

On prior information empowered officer acting under Section 41(2) or Section 42 should comply with provisions of Section 50 are mandatory. On prior information, the empowered officer authorize officer while acting under Section 41(2) or 42 should comply with the

³⁸ Paul Fuquq, Drug Abuse: Investigation and Control 66 (McGraw Hill Book Company, 1978).

provisions of Section 50 before the search of the person is made, such person should be informed that if he so requires he shall be produced before a gazetted officer or magistrate as provided there under. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires failure to take him to the gazetted officer or the magistrate, would be a question of fact. It is an imperative requirement on the part of the officer intending to search to inform the person to be searched in his right that if he so chooses, he will be searched in the presence of a gazetted officer or a magistrate. Thus, the provision of Section 50 is mandatory.

THE ENGLISH LAW UNDER SEARCH AND SEIZURE:-

Under the English law, a search of any suspected premises can be conducted only on the basis of a search warrant³⁹.

In emergency cases, a superintendent of police or other officer of equal or superior rank may give a written order to enter the place, if need be, by force. Nowhere has it been laid down that a search is required to be conducted in the presence of at least two respectable inhabitants of the locality. In Scotland, the testimony of one officer is required to be corroborated by another officer. There are some built-in-safeguards provided in the law itself in that although search warrant may be granted on sworn information under over 50 Acts of parliament, in each case, the direction given in the Act must be observed.

A comparison of the English and Indian law on the subject will reveal the uncertainty of the law maker to ensure that the police powers of search and seizure conferred on police are controlled. But the safeguards provided by the law of both the countries are substantially different

³⁹ Dr. Yusuf A. Merchant Phillipa, Narcotics: An In-depth Study 95 (Dorkings Commission of European Communities).

The English law requires that the bonafide of the search should be examined before the search is undertaken and for that purpose, requires that sworn information be placed before the justice or other legally competent authority, or operate under the restrictions referred above, the Indian law, have given powers to search even without a warrant in emergency cases, requires the presence of two independent members of the public to witness the search and to sign the memorandum. The logical sequence of this requirement is that, it is Panch witness who can either support or damage the evidence of recovery, while giving evidence in the court, and the court is called upon in such cases, to weigh the evidence of the police officer against that of a suborned witness. This would show, once again, the fundamental difference in the basic attitude of law in both the countries.

PROCEDURAL ASPECTS OF SEARCH AND SEIZURE, DIFFERENCE BETWEEN THEM UNDER CR.P.C. AND UNDER NDPS:

1) According to Cr.P.C., search and seizure are carried out by police officer in normal course of investigation into offence or suspected offence.

According to NDPS Act, if there is chance of recovery of Narcotic drugs or psychotropic substance, the empowered officer from such stage onward should carry out investigation as per provisions of NDPS Act (Section 50).

2) If a police officer without any prior information has contemplated under the provisions of the NDPS Act makes a search or arrest a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage, Section 50 of NDPS Act would not be attracted and the question of complying with the requirements there under would not arise.

If during such search or arrest there is a chance of recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should be informed

the empowered officer.⁴⁰ Thereafter, the empowered officer proceeds in accordance with the provisions of the NDPS Act. If that police officer is an empowered officer, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

3) The provisions of the Cr.P.C. shall be applicable in so far as they are not inconsistent with the NDPS Act to all warrants, searches, seizure or arrests made under the Act.

But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of Cr.P.C. comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise.

If he happens to be one of those empowered officer under the NDPS Act, then he will also must follow thereafter the provisions of the NDPS Act and continue the investigation provided there under.

If on the other hand if he is not empowered officer then the obvious thing should do that he must inform to the empowered officer under the NDPS Act who should thereafter proceed from that stage, in accordance with the provisions of the NDPS Act.

But at this stage the question of restoring to Section 50 and informing the accused person that if he so wants, he would be taken to a gazetted officer. Thus would not arise because by then search would have been over.

According to NDPS Act in Section 50, the steps contemplated there under namely informing and taking him to the gazetted officer should be done before search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C., then the question of complying with Section 50 would not arise.

⁴⁰ Levitt's Shart, Encyclopedia of Medicine for Lawyer 279 (Delhi Law House, Law Lexicon and Legal Maxims, 2nd Edn.).

4) According to Cr.P.C., empowered officer or an authorized officer under Section 41(2) carrying out search would be doing, so under Section 100 and 165 of Cr.P.C. However, if there is no strict compliance with provisions of Cr.P.C., search would not be illegal.

According to NDPS Act, under Section 42(2) such empowered officer who takes down any information to writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case, to that extent it is mandatory.

5) Under Cr.P.C., if there is delay whether it was under or whether the same has been explained or not, will be a question of fact on each case. If a police officer even if he happens to be an 'empowered officer while effecting on arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. tells to strictly comply with the provisions of sections 100 and section 165 of Cr.P.C. The requirement to accord reasons such failure would only amount to an irregularity.⁴¹

Under NDPS Act, if an empowered officer of an authorized officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Section 100 and 165 of Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per be illegal and would not vitiate the trial.⁴²

6) Under the provisions of Cr.P.C. when the police acting as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrest or search or searches they would be acting under the provisions of Cr.P.C. At this stage, if there is any non-compliance of the provisions of Sections 100 or 165, Cr.P.C. that by itself can not be ground to reject the prosecution case outright.

The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case.

⁴¹ Supra note 35 at 48.

⁴² The Encyclopedia of Psychoactive Drugs, Heroin, The Street Narcotic 20 (New York, 1986).

In carrying out such searches, if they come across any substance covered by the NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise.

Under the provisions of NDPS Act, when the contraband seized during such arrest or searches attracts the provisions of NDPS Act then from the stage, the remaining relevant provisions of NDPS Act would be attracted and further steps have to be taken in accordance with the provisions of the said Act.

7) Under the provisions of NDPS, neither Section 41(2) nor Section 42 mandates such empower officer to record the grounds of his belief. It is only proviso to Section 42(1) read with Section 42(2) which makes it obligatory to record grounds for his belief. To that extent, the provisions are mandatory. Under the provisions of Cr.P.C., the empowered officer though is expected to record reasons of belief as required under Section 165 failure to do so can not vitiate the trial particularly when Section 41 or 42 does not mandate to record reasons while making a search. Section 165 in the context has to be read along with Section 41(2) and 42(1) where under he is not required to record his reasons.

8) Under NDPS Act, steps under Section 52 that every person arrested and article seized under Section 41, 42, 43 or 44 shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police-station or the officer empowered or the authority or officer. take such measures as may be necessary for the disposal according to law of such person or article.

Steps under Section 57 that, whenever any person makes any arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure, make a full report of all particulars of such arrest or seizure to his immediate official superior. The provisions of Section 52 and 57 which deals with the steps to be taken by the officer after making arrest or seizure under Section 41 are by themselves not mandatory. If there is non-compliance or if there are lapses

like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. Section 52 and 57 comes into operation after the arrest and seizure under the Act.

The provisions of these two sections show certain procedural instructions for strict compliance by the officers. Under the provisions of Cr.P.C. similar provisions are there. If there is any violation of these provisions, then the court has to examine the effect of the same. But if there is not strict compliance of any of these instructions that by itself can not render the act done by these officers null and void and of the most it may affect the probative value of the evidence regarding arrest or search and in some cases. It may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be show that such non- compliance has caused prejudice and resulted in failure of justice. The officers however, can not totally ignore these provisions and if there is no proper explanation for non-compliance or where the officer totally ignore the provisions then that will definitely have an adverse affect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

DIFFICULTIES IN INVESTIGATING NDPS CASES:

Enforcement agencies face number of implementation of the Act. It can be classified into difficulties in the

4.5.1 Legal difficulties

4.5.2 Field work related difficulties

4.5.3 Other practical difficulties

LEGAL DIFFICULTIES:

a) **Difficulties in finding independent witnesses:** It is very difficult to find independent witnesses who volunteer themselves during searches and seizures due to a variety of reasons such as

- Threats from the accused.
- Long period of time taken in attending courts.
- Lack of concern for the problems posed by drugs to the society.

Many times, the accused even bribe the witnesses to turn hostile to the prosecution. Naka's are organized at a number of places, it is difficult to associate an independent witnesses at every Naka. The law, however, requires an independent witness even to search a vehicle or person during a naka. It is difficult to associate witnesses in each and every case.

b) **Possession of precursor chemical is not an offence:** A plain reading of Sections 9A, 25A and 54 of NDPS Act such as- According to Section 9A:

1) If the central government is of opinion that having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

2) Without prejudice to generality of the power conferred by sub Section (1), an order made thereunder may provide for regulating by licenses, permit or otherwise, the production, manufacture, possession, transport, import inter-state, export inter-state, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance.

According to Section 25A, punishment is given for contravention of orders made under Section 9A.

According to Section 54, in trial under this Act, it may be presumed unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of -

(a) Any narcotic drug or psychotropic substance or controlled substance.

(b) Any Opium Poppy, cannabis plant or coca plant growing on any land which he has cultivated.

(c) Any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or concealed substance or

(d) Any material which has undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substances or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured for the possession of which he fails to account satisfactorily.

It does not give the impression that unauthorized possession of a precursor chemical is an offence. The law only requires persons such as manufacturers, importers, exporters, consumers and dealers to maintain records and file reports to the Zonal Director of narcotic control bureau. The seller only is responsible to ensure the identity and purpose of the buyer. He is under no obligation to intimate the purpose of the buyer to the Zonal Director of Narcotic Control Bureau. On the other hand, if there is shortage of the precursor chemical, there is no adverse, presumption against the person regarding it has been diverted for illegal manufacture of drugs. Thus, neither a person found with excess stocks of any controlled

substance nor one found with deficient stocks of these substances can be prosecuted under the law⁴³. A rebuttable presumption must be introduced that if any person is found with unexplained stocks of a controlled substance, it shall be presumed to be meant for sale to illicit drug manufacturers conversely, if the stocks are found to be short, it should be presumed that the short precursors have been diverted for illicit manufacture of drugs.

c) Bail Provisions: One of the key features of the NDPS Act is stringent bail provisions. Courts can not grant bail to those accused of offences under commercial quantities.

- **Section 19:** Any cultivator licensed to cultivate the opium poppy on account of the Central Government who embezzles or otherwise illegally disposes of the opium produced or any part thereof or
- **Section 24:** Whoever engages in or controls any trade whereby a narcotic drug or a psychotropic substance is obtained outside India and supplied to any person outside India without the previous authorization of the central government or otherwise than in accordance with the condition of such authorization, or
- **Section 27-A:** Whoever indulge in financing, directly or indirectly, any of the activities of illicit traffic in relation to narcotic drugs and psychotropic substances. And for offences involving commercial quantities. The term 'commercial quantities' applies only to drugs and not precursors under the NDPS Act. If precursor chemicals are seized in large quantities from a person, the strict bail provisions under Section 37 of the NDPS Act, 1985 do not apply. There is need to include offences under Section 25-A in Section 37 of the NDPS Act, 1985.

d) Pre-trial disposal: Section 52-A of the NDPS Act provides for the pretrial disposal of the narcotic drugs and psychotropic substances but not of controlled substances. Precursor chemicals are useful to the society and their early disposal avoids in deterioration, minimizes

⁴³ R.C. Dikshit, "International Co-operational efforts in Curbing Drug-Related Crime and illicit Trafficking," III CBI bulletin 9 (1995).

wastage and contributes to the exchequer. Hence, pre-trial disposal should be made applicable to controlled substances as well. If the accused are acquitted in the trial, the sale proceeds can be returned to the owner in lieu of the seized substance.

FIELD WORK RELATED DIFFICULTIES:

a) Drug Detection kits: Drug detection kits cost between Rs. 3000 to 4000 it's life of 6 month from the date of manufacture. State police often do not have funds for the kits and when they are supplied, they expire within 3-4 months from the date of supply as some time is lost in supplying the kits to the field formation. Field officers are often not even trained in using these kits. Adequate supply of kits, quick disbursal and training are essential for effective use of kits.

b) Lack of training in identification of precursors: Most police officers are not aware about precursors. Hence, even if they find a precursor being diverted or transported, they may not even realize the significance of it. Police officers need to be trained on these issues.

c) Report of the doctor under Section 27 of NDPS Act, 1985: Consumption of narcotic drugs and psychotropic substances is an offence under the NDPS Act but no investigating officer knows how to prove it. Doctors in government hospitals are not trained in identifying whether the suspect consumed drugs. It is observed that the doctor takes time to test the suspect, it is too late to get an accurate report. Often, doctors of government hospitals and dispensaries give reports only on the general medical conditions of the accused which does not help in prosecuting the case in a court of law.

d) Malkhana: Narcotic Control Bureau issued detailed instructions on storage and disposal of seized drugs. These instructions require such drugs to be stored in a proper Malkhanas under the supervision of a gazette officer. State police often do not follow these instructions

and store them in the Malkhanas of the police stations which have inadequate storage facilities with little security.⁴⁴

e) Service Funds: Secret service funds meant for collecting intelligence are grossly inadequate with the state police and if information has to be collected on any major syndicate, substantial money will be required. If the secret service funds with the state police are improved, it can be achieved in terms of busting drug syndicates.

f) Reward for seizure of precursors: Rewards are major incentives to both informers and officers. However, as per the existing reward policy, no reward is available for seizure of precursor chemicals. Precursors may be included in the reward scheme.

OTHER PRACTICAL DIFFICULTIES:

a) Honest errors by the police as well as witnesses: The witnesses and the police may commit honest errors while giving or recording the statements. The errors can be wrong identity or wrong description of the accused. It can also be an error in the sequence of events.

b) No independent Agency to supervise the recording the statements of the police: At no point of time, any agency, independent of the police oversees the correctness completeness, caliber or honesty of investigation or comes out of a random check with witnesses.

c) Statement recorded by the police during the course of investigation: The police have no powers to give oath. They are only the investigation agency. They have no power to give punishment. The statement which they record are a part of investigation. At the time of deciding the application for bail, the court has to arrive at a conclusion that there is reason to believe that the accused has been guilty of an offence punishable with death or imprisonment with life or any other sentence. The court gives such enormous importance to the statement recorded by the police at the time of the application for bail. The bail can be rejected on the

⁴⁴ S.K. Ghosh, Trafficking in Narcotics and Drug Addiction 93 (Ashish Publishing House, New Delhi, 1987).

statements recorded by the police during the course of investigation. But the same statement is not believed at the state of trial. This is a paradox.

d) Community's Support: Without proper support from the community, it is not possible for the police to implement crime control measures effectively. Information is the most important of the law enforcement and information depends on the people. There is criticism of the police without proper understanding by the society of their moral and professional problems. The inadequacy of the strength and resources, the tremendous pressure of work, are making police work extremely difficult.

e) Difficulties regarding procedure and evidence: There are some problems faced by the police. Flowing out of certain provisions of criminal procedure code and the Indian Evidence Act. Under Cr.P.C it is required that whenever the police enter any premises for the purpose of search and seizure, they must be accompanied by at least two respectable inhabitants of the locality. Since it is not always possible to find two respectable persons willing to associate with the police for the purpose, the police find themselves in a different situation and hence try to observe the formality with the co-operation of some 'respectable' persons who might be dubious character and reputation. Court being aware of such police practices treat the evidence produced by search and seizure with utmost suspicion and even genuine prosecution cases are adversely affected in the process

f) Judicial and public image of the police: The image of an Indian police is full of adverse comments made against them for their dishonesty, corruption, unscrupulous methods in investigation and general lack of efficiency. It has utterly failed to secure the confidence and cordial co-operation of the people.

g) Extra workload: There is a common complaint of the police officers that the department has extra workload such as traffic arrangements, protection of V.I.P the growth of crime, new

types of offences are increasing day by day, population is increasing at the same time, and crimes are increasing. The police officers cannot concentrate properly in each case.

h) Strength of police staff: With the growth of the population, with the growth of crime, need to increase the police staff. The police department is very small.

CAUSES OF ACQUITTAL:

4.7.1 Technical ground:

Under the investigation, the possession and search are very important. Because stringent punishment have been provided for the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. In most of the offences, the minimum punishment of rigorous imprisonment for 10 years and fine of rupees one lakh. Therefore, the government in its wisdom, has imposed corresponding strict special procedure to be adopted at the time of search, seizure and arrest of the culprits. Under these procedure, some provisions are mandatory and some provisions are directory. Large number of cases instituted for various offences under the Act have ended in acquittal not on merits but on technical grounds of non compliance of mandatory provisions of section 42 and 50 of the Act. And in some cases on the prejudice caused to the accused for non-compliance of the directory provisions of section 52, 55 and 57 of the Act.

4.7.2 Unnecessary delay in the examination of important witnesses: It creates doubt in the mind of the court and the evidence of such witness may be rejected by it.

4.7.3 Lack of Public co-operation :

People are generally not willing to testify against the offender due to risk of threats and violence and tiresome criminal law procedure. People are unwilling to help police in crime detection and apprehending the offender due to fear of possible harassment of the instance of

police officials. The lack of sense of social responsibility among people is also one of the reasons to increase such crimes.⁴⁵

4.7.4 Method of investigation:

Many police officers do not have sufficient training in the matter of investigation. There are no sufficient trained facilities in investigation. There is unnecessary delay by the need of obtaining reports from the chemical examiners. Lack of theoretical and practical knowledge results into miscarriage of justice. While investigating, defective record of facts results into prosecution case.

4.7.5 Statement made by witnesses:

The percentage of acquittals in such cases has a high figure and this is not always due to the police being unable to place adequate evidence before the court. What often happens is that the witnesses when they appear to give evidence by deposing to a version different from that given by them in their statements to the police. The holiness of the oath has almost disappeared and persons seem prepared readily to make false statement on oath in court of law.

4.7.6 Political Interference:

Political interference at the stage of investigation has become a routine affair. A policeman ought to know that he derives his powers from the law of the land and of an agent of the law, he must honestly exercise his powers given by the law in accordance with the best his discretion and conscious and not to please any executive authority. The recent criminalization of politicians provides undesirable protection to professional offenders and all sorts of favors and pressures are exerted on the police to be lenient with the offender and sometimes they are even compelled to drop the proceeding against the criminal.

⁴⁵ "Meeting of the Central Committee on Prohibition and Drug Abuse," XXV SD 47 (1988)

SUGGESTED REFORMS:

4.8.1 Need an independent Agency to supervise the recording

statements of the police:

For the quality of investigation, effective supervision is essential. There is hierarchy of officers, the duty of the supervisory officers will to guide properly in the investigation right from the beginning so as to ensure the innocent persons are exculpated and the real guilty ones brought to justice.

4.8.2 Giving copies to statements to witnesses:

A copy of the F.I.R. must be given to the informant forthwith and free of cost. If this is so, why can not copy of the statement be given to the witness, there is no law which prevents the police from giving such a copy. But if someone asks the police that they can not give the copy.

4.8.3 Witness should be allowed to read his statements to refresh his memory:

The witness can refresh his memory in the witness-box by reading his statements recorded by the police. Pancha witness can read panchanama in the witness-box before giving evidence. It is particularly important because the cases come for hearing after years, minor details like description of the accused, the clothes he wore, number of articles, quantity, colour, can not be recollected after a lapse of such a long time. The witness therefore shall be allowed to refresh his memory in the witness-box. By itself, this fact should not reduce the value of his evidence.

4.8.4 The statement of the witness in his own handwriting and should be signed by the witnesses:

The witness who is willing to write out his own statement, should be allowed to do so. In an effort to encourage more stability in testimony, the law commission as well as the

Maharashtra. Police commission recommended that statements made to the police, should be signed by the witness as, if they were literate.

4.8.5 Recording statements of witnesses:

Recording statement of witnesses by the police during investigation shall not be required to be signed by the witnesses and further that such statement can be used by the accused and with the permission of the court only for the purpose of contradicting the witnesses. To remove this distrust and to ensure credibility of the police, the report of the law commission recommended that where the person can read the statement recorded by the police, his signature can be obtained after he has read the statement, and sending the witnesses to the magistrate for recording his statement on oath. Frequent changes in statements, by the witnesses during the course of investigation and more particularly, at the trial are really disturbing this results in miscarriage of justice. Hence, modern science and technology should be used in such cases as tape recording or video recording of statement of witnesses would be meaningful and purposive steps in this direction.

4.8.6 Facilities for interrogation:

Interview of witnesses and interrogation of suspects or accused should be done in professional manner. So as to elicit the truth. This is possible only when investigation officer possesses professional competence, has adequate time at his disposal and interview/or interrogation is conducted in a proper manner. A room equipped with proper facilities such as video cameras, voice recorders etc. should be set apart in each police station for the purpose of interrogation or interview,

4.8.7 Separation of Investigation wing from law and order:

An investigation is a preliminary step to help the ultimate judicial process before a court of law. It will bring the investigating police under the protection of the judiciary. It will reduce the possibility of political or other types of interference with police investigation. It will

result in speedier investigation and as such a speedier overall disposal of cases as the investigating police would be completely relieved from performing law and order duties, V.I.P. duties and such other miscellaneous duties which causes unnecessary delay in investigation of cases. Separation will increase the expertise of the investigating police, it will result in more of successful detections and state prosecution. According to the 14th report on reform of judicial administration 1958, the law commission of India observed that the Investigation staff should be separated form the law and order staff to enable the investigating officer to devote undivided attention to investigation work. It will provide additional strength to the police establishment which needs an increase in must of the states:

ADEQUATE NUMBER OF TRAINING INSTITUTIONS SHOULD BE SET UP BY THE STATE governments and also by the Central Government for the training of various ranks of police officers. Lack of legal knowledge results into lack of knowledge in handling and collecting of material evidence, neglect of important evidence for prosecution. They are not competent to use scientific knowledge. Thus, lack of investigative experts, lack of proper legal advise, lack of technical advise are the main causes for acquittals. Therefore, there should be expertise police officers in investigation work.

MANIPULATION IN CASE DIARY AND POLICE STATEMENTS:

Case diary and police statements are both very important documents. Though Section 172 of Cr.P.C. does not require the case diary to be written on the spot but many police regulations require that it should not only be prepared simultaneously as the investigation proceeds. But also dispatched to the scrupulously followed as their non- observance may even lead to manipulation subverting the cause of justice. If the proceedings are not recorded form day to day and writing of the diary is postponed it may create confusion as in the overlapping events of the next day. The investigating officer is likely to ignore or forget many things of the previous day or his memory may get lost thereby making accurate recording difficult.

Superior officer should therefore insist on strict observance of this rule so that investigating officer must give a satisfactory explanation for it in the case diary so that investigation does not come under a cloud of suspicion.

TO INCREASE THE STAFF:

There is inadequacy of investigating staff. The police officers are hard pressed for time with multifarious commitments and thus, not able to devote adequate time for investigation at work. The National Police Commission had suggested a workload of 60 cases per investigational officer.

TO INCREASE THE POLICE IMAGE AND THEIR RELATIONSHIP AND INTERACTION WITH THE GENERAL PUBLIC.:

To improve the existing situation, the National Police Commission suggested that the training should imparted to the policemen which includes inculcating a democratic sense and idealism to understand that unnecessarily not to threat to public as well as inculcating the idea that police is basically to help the public. These targets require improve training and orientation programmes for the police personnel.

NEED TO INCREASE THE NUMBER OF FORENSIC SCIENCE LABORATORIES:

At present, the forensic science laboratory is very low in the country. The report of FSL plays important at the investigation stage and trial stage in the determination of the facts. Delay investigation results into delay trial.

NEED OF CO-OPERATION AMONGST INVESTIGATORS, FORENSIC EXPERTS AND PROSECUTORS⁴⁶:

If the case is not properly investigated, the case can not succeed at the trial. Forensic experts evidently play a key role both at the investigation stage as also at the prosecution stage.

⁴⁶ Sujith Geroge, "The Impact & Control of Drug Menace: Human Rights Perspective," XXIV CULR 209 (2000).

Therefore, the investigators, forensic experts and prosecutors should act in co-operation with each other. For this purpose, the following stages can be implemented.

- i) Initial investigation, at the crime scene level.
- ii) Search of the suspect, suspect's premises and collection of evidence.
- iii) Framing request for laboratory analysis
- iv) Interpreting the analytical results of the laboratory
- v) Evaluating the probative value of the result in accordance with the prosecution needs.
- vi) Pre-trial discussion with the prosecutors
- vii) Offering the testimony before the court
- viii) Prosecutors argument on the case
- ix) Review of effectiveness of forensic evidence as indicated in the Judgment.²²

SPREAD OF AWARENESS:

Citizens who may have to participate in the criminal justice system as complainants/informants/victim/accused/witnesses are often not aware of their rights and obligations. They also do not know whom and how to approach and what to expect from them. Awareness of these matters will help the citizens to assert their rights and to protect themselves from unreasonable, arbitrary, and corrupt officials. The rights and responsibilities of the complainants, informants, victims, accused, witnesses and the concerned officials be incorporated and annexed as schedules to the Code and it should be in the regional languages of the respective states and it should be printed and made available free of cost to the citizens.⁴⁷

SPEEDY INVESTIGATION:

The speedy investigation is beneficial both to the prosecution as well as to the accused. It is also in the largest interest of the society. The Code of Cr.P.C. provides that every

⁴⁷ Drug Addiction: Penal Policy," 34 JILI 279 (1992).

investigation under this chapter XII shall be completed without unnecessary delay. The fundamental right of the accused to speedy trial enshrined in Art. 21 of the Constitution is applicable not only to the proceeding in court but also includes within the proceeding of police investigation.

SUMMARY:

The work of investigation involves a visit to the location of the crime by investigating officer regarding of testimony, making of arrest wherever possible and desirable. The job of investigation is quite different and challenging. The investigating officers have to devote time to other kinds of routine work also, their quantity is also not very large in view of the large population within their areas and the variety of problems in the Indian set up. In very few cities in India, there have been provided with forensic laboratories with the result that sometimes the relevant objects are to be sent over a long distance for expert analysis and report. The problem created by the lack of co- operation with the police by the people is a most serious and of great complexity and therefore, requires to be examined in depth. People in India are generally not willing to testify against their friends, relatives or neighbours. There is a universal tendency among people to keep away from the problems of others. The qualitative and quantitative degree of investigations depends on the activities of the police, the resources available and valuations and strategies. There is a continuous link in the investigation and prosecution. Thus, there should be closely co-ordinated in order to successful prosecution.⁴⁸

⁴⁸ Suresh V. Nadagoudar, "Legal Strategy to Combat Drug Trafficking," XXIII CULR 183 (1999). 8 M. Charles, D. Bewley-Taylor and A. Neidpath, (October, 2005), Drug policy in India:

JUDICIAL DECISIONS

5.1 INTRODUCTION:

The researcher has studied various judgments decided by the various High Courts and the Supreme Court.

5.2 Judicial decisions:

5.2.1 Special Court:

According to section 36 of the NDPS Act, 1985, there is a special provision of constitution of Special Court for the purposes of providing speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Sessions to be the Special Court to try the offences under this Act.

In the cases of Moly Vs State of Kerala' and M. A. Kuttapian Vs E. Krishnan Nayanar, the Hon'ble Supreme Court has held that the Act contemplates only trial of the case by the Special Court and the reason for specifying a Court of Sessions as a Special Court is to ensure speedy trial⁴⁹.

A bare perusal of Section 36 of the NDPS Act exhibits the legislative intention that Special Courts are constituted for providing speedy trial only, of offences covered under this special law. The view of the court that if a Sessions Court acting as Special Court is to deal with remand orders, taking part in preparing samples, inventory, etc., it would defeat the purpose behind the constitution of Special Courts. The Apex Court held that the special courts of NDPS Act can not take cognizance of cases directly unless the same are committed to them by magistrates since Section 36 of NDPS Act. If Special Courts are constituted separately, the procedure of commitment of cases should be followed, otherwise the very objective of

⁴⁹ Narcotic Drugs and Psychotropic Substances Act, 1985; s.

speedy trial of offences will be defeated if the Special Judges engaged themselves in magisterial functions. The wide spread confusion in this regard can be cleared by: way of suitable amendment of Section 36A or 36C or inserting an explanation therein.

On perusing the above cases, it is clear that even the lapse of 25 years, most of the state governments have not constituted the special courts. Every State Government has a primary duty to administer of criminal justice. It can not avoid its constitutional obligation to provide speedy trial. It is the constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State Government.

5.2.2 Remand Order⁵⁰:

Under Section 36A(1)(b), the Judicial Magistrates have been. empowered to detain and remand an arrestee to custody for a period not exceeding 15 days in the whole. Unlike Section 167(2) of the Code of Criminal Procedure (Cr.P.C. in short), the NDPS Act has not specified the outer period of detention, except for selected offences of Commercial quantity. This vagueness in the law has led to different interpretations throughout the country. There is virtual horizontal split in the higher judiciary in this regard. Many High Courts have held that a Judicial Magistrate becomes functus-officio after 15 days and for further remands the accused persons are to be produced before Special Court. However, the Punjab and Haryana High Court in the case of Janta Singh Vs State of Punjab has held that till Special Courts are constituted the Judicial Magistrates can remand the accused person beyond the period of 15 days. Similar view was also taken in the case of Alimuddin Vs State of Rajasthan. Both these High Courts declared that even after constitution of Special Courts, the Special Judges should not be asked to perform the functions of Magistracy. It frustrates the objective of speedy trial of cases. It causes confrontation with Magistrates in their day to day procedural matters relating to narcotic offence. In Bimbadhar Behra Vs State of Orissa in the year 1993, the

⁵⁰ The Constitution of India, 1950; Art. 253

Orissa High Court held that the Magistrates can remand the accused persons beyond 90 days, not to speak of 15 days.

In the case of Union of India Vs Thame-Sharasi and again in the case of Dr. Bipin S. Panchal Vs State of Gujarat, the Hon'ble Supreme Court has held that bail provisions under the Act do not exclude proviso to Section 167(2), Cr.P.C. In this way, the application of Section 167, Cr.P.C. in the narcotic offences has been approved by the Apex Court. Besides this, a close reading of Section 36A(1)(b) of the Act shows that the remand powers of Magistrates are almost pari-materia and in tune with Section 167(2), Cr.P.C. At the same time, the Act has not put a complete bar upon the magistrates from extending the remand. Hence, the legislative intent should be drawn that the Judicial Magistrates can extend the remand of accused persons upto 180/90/60 days and even upto one year, as the case may be after the insertion of sub-section (4) to 36A.

On perusing the above cases, it is observed that there are different views about powers and jurisdiction of remand, but as per the view of Supreme Court, bail provisions under this Act do not exclude proviso to section 167(2) of Cr.P.C. Therefore, it is necessary that section 36A of the NDPS Act should be amended.

5.2.3 Anticipatory Bail⁵¹:

The Act is remarkably silent either to extend the protective shield of anticipatory bail to the prospective accused persons or to keep away this privilege from the persons whom somehow attract the rigour of law. So far Special Courts are concerned they can invoke Section 36C, wherein such Courts have been permitted to work under the umbrella of Cr.P.C. In absence of any specific embargo in the Act, like certain restrictions and pre-conditions imposed under Section 37(2) for granting regular bail, it can only be inferred that Special Courts, which are

⁵¹ G.S. Tiwari, "Drug Trade & Terrorism : An Assault on Human Right," 45 JILI 36 (2003)

deemed to be Court of Sessions, can entertain applications for pre-arrest bail and dispose of the same under Section 438, Cr.P.C.

The position of High Courts in the matter of anticipatory bail is sharp. Somehow Special Courts have been declared to be the Court of Session for all practicable purposes and thereby these Courts can draw the powers of Section 438, Cr.P.C. However, the High Court's power has been limited to entertain bail applications which fall in the category of Section 439, Cr.P.C. i.e. post-arrest bail applications. This is certainly a ridiculous proposition of law.

In the case of *Baljit Singh Vs State of Assam*, the Hon'ble Gauhati High Court held that it would be wholly incompatible with the idea that it has been uncovered of its power under Section 438, Cr.P.C. Their Lordships further held that in conformity with the legislative intent expressed in section 36B (Powers relating to appeals and revisions) to clear that in the scheme of the Act as envisaged under Chapter IV thereof, the power of High Court to grant pre-arrest bail under Section 438, Cr.P.C. is preserved. It is high time that this lacuna in the law should be cured legislatively⁵².

As per the view of high court about the anticipatory bail, it is clear that there is a lacuna in this Act. Therefore, law should be cured legislatively.

5.2.4 Bail provision:

In case of *Narcotic Control Bureau Vs Kishanlal and others*. the Supreme Court laid down the following propositions of law- Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (As amended) starts with a non-obstacle clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. The NDPS Act is a special enactment and was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic

⁵² N.K. Rastogi, *An Exhaustive Commentary on the NDPS Act & Rules* (Unique Law Publishers, Jodhpur, 2nd Edn., 2004).

substances and psychotropic substances. That being the underlying object and particularly when the provisions of section 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, it can not be said that High Court's powers to grant bail under section 439 of Cr.P.C. are not subject to the limitations mentioned under section 37 of the NDPS Act.

In brief, as per above case, there is a limitation to grant bail under Section 37 of NDPS Act. The view of the Supreme Court is that a magistrate has a discretionary power according to Section 439 of Cr.P.C., there is controversy about Section 37 of NDPS Act and the view of the Supreme Court⁵³.

In *Rajnikant Jivanlal Patel and another Vs Intelligence Officer, Narcotic Control Bureau, New Delhi*, the accused, arrested for offences punishable under sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 were enlarged on bail by the magistrate on failure of the prosecution to present the charge-sheet within 90 days under proviso to section 167(2), Cr.P.C. The High Court cancelled the bail order. While upholding the order of the High Court, the Supreme Court observed: An order for release on bail under proviso (a) to S. 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail, under S. 167(2) proviso (a) thereto, is absolute. It is legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds. The accused can not, therefore, claim any special right to remain on bail.

⁵³ T.D. Robin and K.S. Sabitha, "The Narcotics Drugs and Psychotropic Substances Act, 1985, (Amendment) Act, 2001: Some reflections", 5 KLT 3 (2002)

If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to S. 167(2) could be cancelled. The legislation remained as vague and hazy regarding the powers of Judicial Magistrate to entertain bail applications.

As per above case, investigation officer has power to investigate for a period of 60/90/180 days and with the permission of public prosecutor to investigate upto 1 year. When investigation officer does not file a charge-sheet within 90 days, as per above case, the view of the Supreme Court is that if the investigation agency fails to file charge-sheet within 90 days, the magistrate has no power to remand a person beyond a period of 90 days. The magistrate should exercise his power under sub-section (a) to (s) of Section 167(2) of Cr.P.C. Then the period mentioned in NDPS Act such as to investigate within 60/90/180 days has no meaning. Hence, there is need to amend in such provision.

5.2.5 Order of the High Court, Patna relating to the Fake Forensic Test Reports in NDPS Cases before courts in Bihar:

In Radhe Prasad Chaurasia S/o Late Bhagat Chaurasia Vs State of Bihar, the fact was that two persons namely Radhe Prasad Chaurasia and his son Arvind Kumar were arrested in the case under Section 20/22 of NDPS Act on the recovery of a quantity of 274 Kgs of alleged Ganja from the residential premises. Both the persons filed bail applications separately before the Hon'ble High Court, Patna on the ground that the test report of the sample opines that the exhibit was found not to be Ganja and produced certified copy of test report FSL No.1099/10 dated 06/01/2010. On this ground, the court had granted bail to Arvind Kumar. But the bail application of accused Radhe Prasad Chaurasia was placed before another Bench. The Hon'ble Judge raised a doubt on the test report in view of recovery of such a huge quantity of Ganja and called for a report from the Director, Forensic Science Laboratory (FSL), Patna in this regard. The Director, FSL forwarded a test report under the

same FSL No.1099/2010 opining that the exhibit has been found to be Ganja. The court raised suspicion over a couple of things in the entire episode including procedure of drawal of sample of recovery of Narcotic Substances, subsequently, the court directed the Narcotic Commissioner of India, Central Bureau of Narcotics, Gwalior to hold a full fledged inquiry in the matter and reports to the court about the results.

Thereafter, the Narcotic Commissioner of India submitted report to the Hon'ble court in a sealed cover that the report besides describing the facts, and made recommendations for systematic improvements and implementation of various standing orders/instructions issued by the ministry of finance, Government of India and Narcotic Control Bureau relating to procedures to be observed in course of effecting seizures of Narcotic drugs. The High Court, accordingly, directed the IG Police, Patna, IG, CID, Patna to remain present personally before the court to consider further action on the inquiry report.

Thereon, the Hon'ble court has passed order dated 13/12/2010 such as -

- 1) The Hon'ble court has agreed that there has to be a total revamp of the existing system so for the procedure of Seizure, sampling and sending of the seized articles to the FSL is concerned.
- 2) To further obstruct of the wicked persons in sending the fake reports to the court.
- 3) The Hon'ble court has transferred several cases to the vigilance Department for further investigation and directed for change of very old method of dispatch of test reports by the FSL as recommended by the enquiry.

The Hon'ble court held that the effective implementation of the NDPS Act will reduce the problem of trafficking of drugs and would fulfill the intention of legislation to ameliorate the impact of drug abuse from the society.

In short, it is observed that it is necessary to change the existing system of investigation and procedure of seizure sampling, sending the articles to the FSL; it should be come under the control of government system and there should be strict control of the court.

5.2.6 Non compliance of Section 42:

According to Section 42-

(1) Any empowered officer in this behalf by general or special order of the state Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any Narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset-

a) enter into and search any building, conveyance or place⁵⁴.

b) in case of resistance, break open any door and remove any obstacle to such entry.

c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act.

d) detain and search and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

⁵⁴ R.P. Kataria, Law Relating to Narcotic Drugs and Psychotropic Substances in India cxii (Orient Publishing Company, New Delhi, 2nd Edn., 2006).

Provided that if such officer has reason to believe that a search warrant or authorization can not be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer take down any information in writing under sub- section

(1) Or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

In the cases of State of Punjab Vs Balbir Singh and Hamidbhai Azamalbhai Malik Vs State of Gujarat, the court held that, according to Section 42(1), the empowered officer if he has prior information given by any person that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reason of belief. But under the proviso to Section 42(1) if such officer has to carry out search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

After perusing this case, it is clear that the meaning of Section 42 is not clear. There are different views about Section 42. Therefore, there is need to amend this Section.

In the case of Abdul Rashid Ibrahim Mansuri Vs State of Gujarat, the court of a three-judge Bench held that compliance of Section 42 of the Narcotic Drugs and Psychotropic substances Act 1985 is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case

of Sajan Abraham Vs State of Kerala, the court of a three-judge Bench held that Section 42 was not mandatory and substantial compliance was sufficient⁵⁵.

In the case of Abdul Rashid, there was total non-compliance with the provision of Section 42 whereas in the case of Sajan Abraham, the Sub Inspector of Police on patrol duty acted on the information immediately so that, that accused could not escape and therefore, omitted to record in writing the information received (Para 25, 12, 13, 17, 22 and 23). Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. While total non-compliance with requirements of Section 42(1) and (2) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. Where the police officer does not record the information at all and does not inform the official superior at all then, it will be a clear violation of Section 42. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

The advent of cellular phones and wireless services in India has assumed certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. As a result if the statutory provision under Section 41(2) and 42(2) of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as a discretionary measure which should check misuse of the NDPS Act rather than providing an escape to the hardened drug peddlers (Para 34). The NDPS Act was amended in 1989 and in 2001. The case of Abdul Rashid was decided on 1/2/2000. Thereafter, Section 42 has been amended with effect from 2/10/2001 and the time of sending such report of the required information was specified to be within 72 hours of writing down the same. The relaxation by the legislation is evidently only

⁵⁵ Narcotic Drugs and Psychotropic Substances Act, 1985; Ss.21, 23.

to afford the object of the NDPS Act. The question of mandatory application of the provision can be answered in the light of the said amendment.

As per various decisions of the above cases, the view of the Supreme Court is not clear about Section 42 of the NDPS Act.

5.2.7 Non compliance of Section 50:

The conditions under which search of a person shall be conducted -

- 1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest gazetted officer or any of the departments mentioned in Section 42 or to the nearest Magistrate.
- 2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).
- 3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search forthwith discharge the person but otherwise shall direct that search be made.
- 4) No female shall be searched by any one excepting a female.
- 5) When an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or magistrate without the possibility of the person to be searched parting with possession of any Narcotic drug or psychotropic substance or controlled substance or article or document, he may instead of taking such person to the nearest Gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

6) After a search is conducted under Sub-section (5) the officer shall record the reasons for such relief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

In the case of State of Punjab Vs Baldev Singh, the following conclusions are arrived by the Constitution Bench-

1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person concerned 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 necessary be in writing

2) That failure to inform the person concerned about the existence of his right to be searched before a gazette officer or magistrate would cause prejudice to an accused.

3) 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 Act

4) 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 the 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 safeguard provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

5) That in the context in which the prosecution 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 person concerned 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,

6) 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.

The strict procedural requirement has been diluted by the insertion of sub-section (5) and (6) to the Section 50 by Act 9 of 2001.

Through this amendment the strict procedural requirement as amended by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 of Cr.P.C. was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it can not be said that the protection or safeguard given to the suspect have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh's case is diluted.

In the case of Joseph Fernandez Vs State of Goa, a bench of three Hon'ble judges held that even when the searching officer informed him that if you wish you may be searched in the

presence of a gazetted officer or a magistrate, it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act.

In *Krishnan Kanwar (Smt) Alias Thakuracen Vs State of Rajasthan*, the same question was considered and it was held that there is no specific form prescribed or initiated for conveying the information required to be given under Section 50 of the NDPS Act and it was held that what is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no Through this amendment the strict procedural requirement as amended by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 of Cr.P.C. was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it can not be said that the protection or safeguard given to the suspect have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh's case is diluted.

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In view of the large number of cases coming up under the provisions of the NDPS Act the interpretation of section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the constitution Bench in *Baldev Singh's case (supra)*, they have noticed the conflicting decisions have been rendered by this court. They feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble chief justice of India for taking further action in this regard. But it was contended that the ambit of statutory protection granted by the parliament under Section 50(1) of the NDPS Act. Having been explained unambiguously and clearly by the constitution bench in the case of *Baldev Singh (supra)* there is no scope for any other interpretation or clarification of Section 50 of the NDPS Act.

As per above observations, it is clear that Section 50 of NDPS Act is mandatory provision. The Constitution Bench in *Baldev Singh's case* gives a conclusion about the mandatory provisions of Section 50 of NDPS Act. But thereafter, number of cases acquitted on the ground of non-compliance of Section 50 of NDPS Act. The main reason is that there is no

specific guideline about the requirement of mandatory provisions of Section 50 of the NDPS Act. So it is necessary to amend the Section 50.

5.2.8 ILLEGAL SEARCH AND ITS EFFECTS IN TRIAL:

In *State of Punjab Vs Balbir Singh*, the Supreme Court has laid down that a search or arrest in violation of the provisions of the NDPS Act vitiates the trial. In this case, a two-judges bench was hearing appeals against decisions of the Punjab High Court acquitting the accused in a number of cases. The fact is the case was not given in the judgment. The Supreme Court proceeds to consider the effect of violation of provisions relating to arrest and search contained in the reference of the facts. While disposing of the appeals it noted that though in most of the cases provisions of Section-50 were not attracted the accused were acquitted on the ground of non-compliance of that Section still the court refused to interfere with acquittals on the ground that the offences had been committed long time back. The court summed up its decisions explicitly in its Judgment.

In *Balbir Singh's* case, the decision relating to the search that a search conducted under a warrant issued by a magistrate not empowered by an officer not authorized under Section 41(2) or 42(1) or under authorization of an officer not empowered or between sunset and sunrise without recording grounds of belief, or without sending the information recorded under Section 41(2) or 42(1) to his immediate superior, or with prior information, without following the provisions of Section 50 either by not informing the person to be searched or after he has indicated his desire to be produced before a magistrate or a Gazetted officer not taking him before them, would be illegal and trial would be vitiated. This was followed in the case of *Saiyad Umar Saiyad Vs State of Gujarat*. These decisions run counter to the settled law and have the potential to impede enforcement the Act with serious social consequences. It is therefore necessary to closely examined them⁵⁶.

⁵⁶ *Gulam Mohiuddin v. State of Jammu and Kashmir*, (1994) 1 Crimes 204 (J&K).

In the case of Saiyad Mohd. Vs State of Gujarat, violation of Section 50 was pleaded but in the absence of any evidence, a presumption was raised under Section 114. Illustration (e) of the Evidence Act to find due compliance, the Supreme Court found that this presumption could not supply the proof of compliance of provisions of Section 50 and set aside the conviction only on the finding of non-compliance of the provisions of Section 50. It also quoted from Balbir Singh's case and endorsed the findings that the provisions of Section 50 are mandatory and that its language obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a gazetted officer or a magistrate. These decisions have far reaching and serious consequences in as much as for breaking on the part of the searching or arresting officer, a person may be relieved of a grave liability in respect of a serious offence against the society without trial. So it is necessary to examine as to why the court did not follow the precedents to arrive at the present ruling.

Again in State of H.P. Vs Priti Chand, appeal was filed against discharge of a person on the ground that the provisions of Section 50 had not been complied with. The supreme court noted the decision in the cases of Balbir Singh and Saiyad Mohd but relied on the decision in the case of Pooran Mal etc. cases and hold that the evidence collected on search in violation of law did not become inadmissible under the evidence Act and that even if it was found to be in violation of law what weight should be giving to the evidence was yet another question which the court had to consider. Thus, the Supreme Court has again reverted to the earlier position on this question⁵⁷.

These decisions however require reconsideration to clarify the confusion about the correct proposition of law relating to the consequences of illegality in search and arrest under the Act.

⁵⁷ Gulam Mohiuddin v. State of Jammu and Kashmir, (1994) 1 Crimes 204 (J&K).

Search is an integral part of investigation and is meant to get evidence of offence. To ensure that the searches and seizures are credible, safeguards are provided in Cr.P.C. and in special laws including the NDPS Act. If the safeguards are not followed the logical consequences would be that the search would not have the same credibility which a search would have if the safeguards are dully followed. Non compliance can not have the effect of totally effacing the search or seizure. And the courts have been following these principles for a fairly long time.

Normally, a person accused of an offence is tried and his guilt is determined on the basis of the evidence produced. However when there is a procedural lapse which vitally affects the trial to the prejudice of the accused and is irreversible, the accused would be entitled to be acquitted. In such a case the court has to be satisfied of the prejudice caused. This principle has been consistently followed by the courts. Giving the accused benefit of every small irregularity is no longer permissible. The interest of the society is also to be considered, with equal concern for the liberty of an individual. These principles were not considered by the Supreme Court in the case. Nor did it examine its own precedents which run to a large number and some of which were rendered by larger benches. These cases clearly hold that illegal searches do not affect the trial. The only consequences of illegality in search is reduced credibility so that the court have to examine the evidence more carefully, and right of the person searched to resist it.

In the case of Balbir Singh some of these decisions were not noticed at all. Among the case it considered there was none which dealt with the question whether non-compliance with these provisions was an illegality or irregularity. To brush aside some important decisions saying that contraventions of the provisions of Cr.P.C. are irregularities while non compliance with the provisions of the Act is illegal and would vitiate the trail, was not justified especially when the earlier decisions were explicit in stating that even if the search is illegal it would not

affect the trial. None of these case has distinguished violation of Cr.P.C. from violation of the provision of the Act and therefore did not provide justification for this conclusion. It is therefore necessary to reassess this dictum in the light of the consistent view of the supreme court and to state reasons for deviating from the established principle, if it is necessary and just to do so.

5.2.9 ILLEGAL ARREST AND ITS EFFECT IN TRIAL⁵⁸:

In the Balbir's case, the provisions which require arrests and I searches were considered together. Illegality in arrest was not considered independently. This has given rise to some anomaly. As regards illegal arrest the rule that emerges out of the formulations of the court is that if an arrest has been made in violation of the statutory provisions regulating arrests it is illegal arrest because it is not in accordance with the procedure established by the law that the arrest has been made. Thus it may be violation of Art.21 of the Constitution also. This much seems alright. But what needs to be examined is the consequences stipulated in the decision that an arrest being illegal the trial would vitiate and as a necessary result the person would be entitled to be acquitted of the offence for which he is arrested. It has been consistently held that illegal arrest would not have any impact on the legality or otherwise of the proceedings. This view came to be accepted by the Supreme Court in the cases of H.N. Rishbud Vs State of Delhi and Mobarik Ali Ahmed Vs State of Bombay. None of these cases were brought to the notice of the court when it held illegality in arrest vitiates the trial.

Two main reasons have been mentioned by the Supreme Court for its departure from precedents. They are-

- 1) The provisions in the Act are mandatory and
- 2) The punishments prescribed in the Act are severe. Both these reasons do not seem to be compelling. Any arrest which violates any statutory safeguard is violative of Art. 21 and is

⁵⁸ P.K. Jain, Commentaries on the Narcotic Drugs and Psychotropic Substance 168 (Prashant Publications, Delhi, 1985).

illegal. Mandatory provisions governing arrests are not peculiar to the Act but are also contained in the Constitution, Code of Criminal Procedure and other statutes.

Similarly, severe punishments are provided in other laws also. In the Indian Penal Code itself sentence of death or life imprisonment is provided for some offences and arrest for those offences are governed by the Cr.P.C. Singling out trials for offences under the Act for their being vitiated if arrest is illegal was, therefore, not justified. The judgment in Balbir Singh's case cited some cases decided by the Rajasthan, Punjab and Haryana High Courts none of which dealt with consequences of illegal arrests to conclude that an arrest or search contemplated under Section 41 and 42 made under a warrant issued by any other Magistrate or by an officer not empowered or authorized, would per se be illegal and would affect the prosecution case and vitiate the trial. If the ratio of this decision is extended to its logical conclusion, in every case where an arrest is made in violation of the provisions have also been held to be mandatory the person arrested would be relieved of the offences for which he is arrested howsoever grievous it may be and even if there is clinching evidence to prove his guilt. This conclusion is not per se correct and cannot be accepted without explicit reasons because there is no cogent nexus between the manner of arrest and prejudice in trial. The manner of arrest is totally irrelevant to the process of prosecution and proof of guilt.

Frequently, cases are taken to courts in which legality of arrest is challenged. The only accepted remedy asked for as relief is release of the person arrested. In some cases damages are also awarded for unlawfully interfering with the liberty and in cases where arrest is mala fide the arresting officer may be prosecuted. In no case is quashing of the prosecution asked for or ordered.

5.2.10 NON COMPLIANCE WITH SECTION 55:

According to Section 55, an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within

the local area of that police station and which may be delivered to him, and shall allow any officer, who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

In the case of Karnal Singh Vs State of Rajasthan, the Supreme Court held that Section 55 is a mandatory provision. In this case, after the seizure the goods were sent to the Superintendent, Central Narcotic Bureau, Kota, who as per law, was in charge of a police station but had not affixed his seal on the article and the samples. Therefore, the whole of the procedure followed become illegal, entitling the appellant to be acquitted. Thus, the Supreme Court held that Section 55 is a mandatory provision.

In the case of Joseph Vs State of Kerala, the Supreme Court held that the provisions of Section 55 of the Act the requirement may not be mandatory. However, in that case in view of peculiar facts of the case and as the contraband articles were kept in totally unsealed condition for near about two months it was held that the same create doubts.

In the above cases, the view of the Supreme Court is different.

The meaning of Section 55 of NDPS Act is not cleared. It is necessary to clear that whether the Section 55 is mandatory or not.

5.2.11 IMMUNITY FROM PROSECUTION TO TREATMENT: ADDICTS VOLUNTEERING FROM

On 10th Aug 2010 in the case of Aatish Suraj Vs State of NCT Delhi, the Supreme court allowed the Indian Harm Reduction to intervene and assist the court in a case related to the interpretation of Section 64A of the Narcotic Drugs and Psychotropic substances Act, 1985 a crucial provision that intersects between criminal justice and health for persons who use drugs Indian Harm Reductionists' application was admitted in this case, an appeal arising from the rejection of the petitioner's plea for exemption from prosecution for possession of 20

grams of cannabis despite undergoing addiction treatment at the National Drug Dependence Treatment centre run by the All India Institute for medical services, as provided in Section 64A of the NDPS Act. Use and possession of drugs are punishable under the NDPS Act. Criminal proceedings can, however, be waived under Section 64A if the accused is- i) dependence on drugs,

ii) is charged with consumption or for offences involving small quantity of drugs and

iii) volunteers to receive treatment for drug dependence at a government recognized institution proceedings may be re-instated if treatment is left halfway.

For people who use drugs, this provision depenalises personal use and possession of small amounts and encourage treatment seeking. unlike countries in south East Asia, where drug users can be forced into rehabilitation by law, under Section 64A, enrolment into treatment is at the instance of the user, and not ordered by law enforcement or judicial authorities. Courts in India have, thus far, ignored the compassionate spirit and intent of the law by imposing arbitrary restrictions on immunity claims. As a result, drug users have been denied the protection accorded by Section 64A and left blighted with jail terms and criminal record. In interpreting Section 64A, the Supreme Court will have to address legal as well as biomedical questions such as who is entitled to immunity and at what stage, what is drug dependence and how is it sought to be proved.

The Supreme Court admits Harm Reductionists intervention in immunity from prosecution for drug offences cases, 5.2.12 Constitutional validity of Section 32A :

Section 32A states that notwithstanding anything contained in the code of criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

In the case of *Dadu alias Tulsidas Vs State of Maharashtra*, the Supreme Court held that the constitution validity of Section 32A of the NDPS Act, 1985 is under challenge in this petition filed by convicts of the offences under the Act. The section is alleged to be arbitrary, discriminate and violative of Art. 14 and 21 of the Constitution of India. It creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for offences punishable under various other statutes. The classification between the prisoners convicted under the NDPS Act and prisoners convicted under any other law, including the L.P.C. is reasonable.

But Section 3, the court held that the section 32A is unconstitutional to the extents in the country.

In the case of *Firoz Hassanali Rupani Vs State of Maharashtra*, the apex court held that the declaration of Section 32A to be unconstitutional, insofar as it affects functioning of the court in the country. In this petition, the court held that, Section 32A does not in any way affect the powers of the authorities to grant parole. It is unconstitutional to the extent it takes away the right of the court to suspend sentence of a convict under the Act.

Various High Courts' view: A full bench of the Kerala High Court in the case of *Bertin Joseph alias Ravi Vs State of Kerala* has adopted the view that Section 32A of the Act has cut off the powers of the court to suspend the sentence passed on a convicted person of offences under the Act, except the offences under Section 27.

A division bench of Rajasthan High Court in the case of *Anwar Vs State of Rajasthan* and a full bench of Madhya Pradesh High Court in the case of *Rajendra Singh Vs State of M.P.* have also adopted the same view.

But, the division bench of Delhi High Court in the case of *Amarjit Singh Vs State of Delhi* has taken a different view on Section 32A. Though the full bench decision in the case of

Berlin Joseph Vs State of Kerala (Supra) was brought to the notice of the Division Bench, it was skipped by a court observation in the following brief. With respect they were unable to agree to this view. Section 32A of the Act is neither a proviso to Section 36B of the Act nor it controls it.

But the full bench of the Gujarat High court in the case of Jyotiben Ramlal Purohit Vs State of Gujarat considered the question, rather at length and differed from the ratio in Berlin Joseph (supra). Three premises were put forward by the Gujarat High court in the said decision. First is that. Section 36B has clearly conferred all powers provided in chapter XXIX of the code. Second is, the word award used in Section 32A of the Act denotes only the sentence passed by the final court and not the trial court. Third is that, under Section 389(3) of the Code of Criminal Procedure. The trial court is empowered to suspend the sentence for the offence under Section 26 of the Act and if that be so the legislature can hardly have thought about bringing such an anomalous consequences, namely that the trial court can grant bail but the appellate court cannot.

View of the Supreme Court: The Supreme Court has ruled in a significant judgment that Section 32 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is unconstitutional to the extent that it takes away the right of the court to suspend the sentence of a convict under the Act.

The Court however, held that a sentence awarded under the Act could be suspended by appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act. Bail can be granted and sentence suspended in a case under Section 37 of the Act where there are reasonable grounds for believing that the accused is not guilty of the offence for which he is convicted and he is not likely to commit any offence while on bail and during the period of suspension of sentence, the court said.

A three-judge bench comprising further held that Section 32A did not in any way affect the powers of the authorities to grant parole delivering the judgment for the bench observed, Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would never entitled such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligation to exercise the power of suspension of sentence within the parameters of Section 37.

The court explained that declaration of Section 32A to be unconstitutional in so far as it affected the functioning of the criminal courts in the country would not render the whole of the section invalid. as the restriction imposed by the offending section was distinct and severable.

Section 32A took away the powers both of the appellate court and the state executive in the matter of suspending, remitting and commuting the sentence of a person convicted under the drugs Act other than for an offence under Section 27 of the Act.

Reiterating that judicial review was the heart and soul of the constitutional scheme, the court said that there was no international agreement to put ban on the power of the court to suspend the sentence awarded to a criminal under the Act, notwithstanding the constitutional principles and basic concepts of the system.

5.2.13 DEATH PENALTY FOR CERTAIN OFFENCES AFTER PREVIOUS CONVICTION (SECTION 31-A):

The Section 31-A is described in Chapter 2nd. As per this section, an amendment of 1989 to the NDPS Act imposes a mandatory death penalty for certain quantity of drugs. In a landmark verdict the Bombay High court has held that a Section of Narcotic Drugs and Psychotropic Substance (NDPS) Act, which provides for death sentence for an accused in case of second conviction, was violative of Article-21 of the constitution (Right to Life).

The court ruled that the designated court under NDPS Act has the discretionary power to decide whether the accused convicted twice shall be given death penalty or not. The judgment was delivered by Justice A. M. Khanwilkar and Justice A. P. Bhangale on a petition filed by Indian Harm Reduction Network (IHRN), a group of NGO's working for humane drug policies.

The petitioners challenged Section 31-A of NDPS Act which provides death sentence for certain drug offences on second conviction. The petition was filed after Gulam Malik, a resident of Kashmir, was sentenced to death by a special court in 2007 for being convicted second time under NDPS Act.

The High Court Bench observed that second conviction in NDPS case need not be death penalty and it was the sole discretion of the judge of the Special Court to decide about the capital punishment.

In an unprecedented decision, the Bombay High court has struck down the mandatory death penalty for drug offences, becoming the first court in the world to do so.

A division bench of justices declared Section 31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, that imposes a mandatory death sentence for a subsequent conviction for drug trafficking unconstitutional.

SUMMARY:

To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law enforcement machinery on the other hand. It is the everlasting problem of our nation.

According to NDPS Act, there are many loopholes in the Act. There are different views of various courts about the provisions of search, seizure and arrest. Due to these conflict views, criminals are escaping from law.

There is more dangerous that criminals will escape justice. At present, crimes are increasing as the tendency of law breaking is increasing. At the same time, abuse of powers by law enforcement officials is increasing.

By studying various cases, it is clear that the provision of this Act is not sharply defined. Due to this problem, there are some of the difficulties in investigation and prosecution of such cases. Therefore, there are conflicts in judicial pronouncements.

CONCLUSION

Every year 26 June is observed as World Anti-narcotic day. The U.N.O has observed 1991 to 2000 as a 'Decade Against Drug Abuse'. The world super-power America has declared a 'war on drugs'. In India responsibility is given to both Central Government and State Governments to set counter measures against drug problem. Also, unlike any other offence a number of agencies both at the Centre and State are entrusted with the task of combating drug problem. All this show that the drug abuse has assumed frightening proportions and has become a global menace.

It has a deleterious effect on society and contributes to depravity on a large scale. On the one hand, there is growing awareness of human dignity and the need to improving human stock, while on the other, drug abuse poses a serious threat to its very existence. It constitutes major challenge of the times. Drug addiction adversely affects all round development. Drug trafficking promotes criminalization.

It is to be noted that vitality any country's socio-economic fabric is particularly depended on all citizens ,especially, the younger generation. The evil of drug abuse however cripples the youth and prevents them from realizing their aspirations and dreams. They are the worst victims of this menace. Drug abuse is a complex and multifaceted problem, touching on the economic, social, cultural and educational environment and damaging the society by targeting youth, the most vulnerable section of the society.

The proximity of India to internationally recognized drug producing regions of the world aggravates the problem of drug availability and concomitantly the evil of drug abuse, trafficking and spread of the HIV-AIDS. Advanced technology, improved means of communication, transportation and diabolical ingenuity available to drug traffickers all over the world has steadily made the task of enforcement more complicated, challenging and

hazardous. With men falling prey to drugs, women and children bear the brunt of living in a toxic atmosphere of crime and violence fuelled by addiction.

According to the United Nations Drug Report, 2013 India is the biggest consumer of heroin. According to the report, the distinction between traditional 'consumer' countries and 'producer countries' is likely to soon fade with galloping increasing of consumption in developing countries such as India.

Globally, UNODC estimates that, between one hundred and forty nine and two hundred and seventy two million people , or 3.3% to 5.1 % of the population aged 15->64 uses illicit substances at least once in the previous year. Cannabis is by far the most widely used illicit drug type consumed by people. Moreover, in recent years, several new synthetic compounds have emerged in established illicit drug market. Many of these substances are marketed as substitutes for illicit stimulant drugs such as cocaine. Till recent times, main centres of trafficking were developed nations, now it is changing to developing nations like India. Anti-narcotic movement faces new challenges in the wake of new drugs and methods of trafficking.

On the other side, drugs still remain an enigma. They have been hailed as being of enormous social, medical and religious value and also as the most destructive, pathogenic and misleading discovery of all times. Over centuries men have sought and drugs have offered health, relief of pain, security, mystical revelation, eternal life , the approval of the Gods, relaxation , joy, sexuality, restraint, blunting of the senses, escape, ecstasy, stimulation, freedom from fatigue, sleep, fertility, the approval of others, clarity of thought, emotional intensity, self-understanding etc. Drugs have been employed as tools for achieving perhaps an endless catalogue of motives.

The habitual use of stimulants, sedative and euphoric drugs were prevalent in India long before any other country. Consumption of cannabis and opium were often practised along

with religious ceremonies. Moreover, psychoactive substances especially, cannabis and opium have been in the pharmacopeia of Indian medicine for a very long period.

Thus, majority of the narcotic drugs and psychotropic substances are having two sides of virtue and vice. So a total prohibition could never be imagined. The other alternative is control and regulation. This is most complex and challenging task for any government. The drug control regime is very vast and does not confine to any particular research study. The present study has focused on some of the areas in anti-narcotic measures. The emerging propositions out of the study are mentioned below:-

Internationally, a number of conventions, right from 1909 Shanghai Conference to 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances were convened to counter the global drug problem. There are international mechanisms entrusted with the task of charting out programmes of action to combat drug menace. There are institutions like Commission on Narcotic Drugs, International Narcotic Control Board, United Nations Office on Drugs and Crime, the U.N. Inter-regional Crime and Justice Research Institute, the International Labour Organisation, UNESCO, International Maritime Organisation, International Civil Aviation Organisation, Universal Postal Union, Food and Agricultural Organisation, United Nations Development Programme, the UNICEF, and the INTERPOL. These organizations are directly or indirectly contributing their part in war against drugs.

But domestically, a visible split in approach to combat drug menace has arisen among the nations. Many nations are heading towards harm reduction programmes and decriminalization. It is true that every nation could devise its own counter drug measures suitable to their domestic conditions. But taking „into account the unique trans-national character of drug offences, dilution of counter measures in any part of the world will only lead to make the effort of international community to combat drug menace more miserable.

SUGGESTIONS

Taking into account the multidimensional aspects of the drug problem, the 1985 Act rightly saves other existing and state laws regulating and controlling drugs. It also makes applicable the Drugs and Cosmetics Act, 1940 and the Customs Act, 1962. Other relevant Acts discussed in Chapter III of the present study are , The Prisons Act, 1894, The Pharmacy Act, 1948, The Drugs Control Act, 1950 , The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, Drugs Price Control Orders, Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and CrPC, 1973. All these Acts have its own bearing in some form or other in the matter of drug control. Many of these Acts are remaining a dead letter. Hence it is suggested that the above Acts be strictly implemented.

Taking into account the transnational nature of drug problem, it is suggested that the enforcement agencies be sensitized about the S.166A, S.166 B, and Chapter VII-A sections 105 A to 105 L of CrPC. Employment of these provisions will facilitate smooth conduct of investigation in respect of a drug offence having trans-national touch.

S.27 penalising personal consumption of narcotic drug or psychotropic substances provides for two types of punishments. As per S. 27 (a), if the substances consumed is cocaine, morphine, diacetyl-morphine or any other substances as may be specified by Central Government, the punishment provided is imprisonment for a term which may extend to one year or with fine which may extend to twenty thousand rupees or with both. Under S. 27(b) where the narcotic drug or psychotropic substance consumed is other than those specified in S.27 (a), the punishment provided is imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both. It is suggested that the double standard in awarding punishment be avoided. Anyway the act which is criminalized is personal consumption of drugs. If that be the case how the nature of drug alter the gravity of the crime .

Further, there is a lot of hue and cry is raised to decriminalize personal consumption in its totality. That kind of argument could not be accepted. Let the provision be there at least for the purpose of educating the public that personal consumption is something objectionable and be avoided. It is suggested that, irrespective of the nature of substance consumed punishment be made uniform to the effect of imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both. There is nothing cruel or inhuman about the punishment. For, an offender under S.27 of the Act may be released on probation under S.33. Moreover, under S.39 such a person maybe released to undergo medical treatment for deaddiction. Again, fine is provided as an alternative sentence in S.27. So the only thing required is an amendment of S.27 to effect uniform sentence.

In S.31 for awarding enhanced penalty, it is sufficient that previous conviction may be in respect of actual commission, attempt, abetment and criminal conspiracy. In this respect it is suggested that first conviction for 'preparation' should also be made sufficient for enhanced penalty. There is no reason whatsoever for leaving 'preparation' from the 'group'.

S.31-A provides for mandatory death penalty if a person previously convicted of the Commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit any of the offences punishable under S.19, 24, 27A and for offences involving commercial quantity of narcotic drugs or psychotropic substances is subsequently convicted of the commission of or attempt to commit, or abetment of or criminal conspiracy to commit an offence relating to engaging in the production , manufacture, possession, transportation, import into India , export from India or transshipment of substances and quantity mentioned in the table attached or financing directly or indirectly, any of the above said activities.

After Mithus's Case imposing mandatory death penalty is unconstitutional.

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