
ENFORCEMENT OF THE NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT: REALITY FAR FROM IDEAL?

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ABSTRACT

The authors of the instant paper aim to put forth the peculiar predicaments pertaining to the application of the Narcotics Drugs and Psychotropic Substances Act, 1985 and certain recommendations to overcome the same, from the perspective of both- the offender and the prosecutor. Unlike other enactments in the sphere of criminal law, and an exception to the principle of *Ei Incumbit Probatio, Qui Dicit, Non Qui Negat* i.e. innocent until proven guilty, the Legislators wish to make amply clear, the gravity which it wishes to attach to the cases initiated under the aforementioned Act. There have been several conflicting decisions, within the territory of India, on crucial issues concerning the search, seizure and arrest of an offender as well as the contraband goods. The enforcement of the Act has had a multi-faceted impact on the stakeholders. The abuse of the procedure established by the Act is not uncommon and has far-reaching impact. Contrarily, even in the presence of such stringent provisions the cases of drug abuse are not uncommon in India, with the cities of Delhi and Mumbai being one of the leading cannabis consuming cities in the world. The rampant use of drugs and other narcotic substances, has the effect of hollowing a country from within unlike physical warfare, in which the country is destroyed from the outside. By leaving the youth of a country in a state of addiction, they are rendered inefficacious and thus a liability of the nation. The situation is further worsened in light of the distinctive geographical positioning of our Country i.e. between the “golden triangle” (Laos, Thailand and Burma) and ‘golden crescent’ (Afghanistan, Iran and Pakistan)- the two major suppliers of illicit Opium and its derivatives. Nepal, too, is a source of cannabis smuggling, which was duly noticed by the Law Commission of India.

Keywords: Narcotic Drugs and Psychotropic Substances, Procedure, search, seizure, arrest, cannabis, malicious prosecution, drugs, secret information, notice, white collar crime.

I. INTRODUCTION

Three Decades and Six Years have already gone since the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act)¹ was tabled and passed by the Parliament with the assent of His Excellency the Hon'ble President of India. The sole concern was prevention of the abuse of 'Drugs'. After the 1985 Act, sincere efforts were made to deter the manufacturing, production, cultivation, procurement, export-import, transportation and even consumption, however, it could not achieve its full potential as the law has its own short comings. The government introduced tough measures to fight drug use, but, even today, the authorities do little to find out the organized drug trade and police arrest the peddlers in contradistinction to originators. The Act was introduced to consolidate and amend the hitherto laws in force i.e. The Opium Act, 1857², The Opium Act, 1878³ and The Dangerous Drugs Act, 1930⁴, which were ineffective in combating the menace and to make provisions for the purpose of implementing international conventions relating to NDPS, to which our Country is a party.⁵

Narcotics Drugs and Psychotropic Substances pose a major issue, especially, for the younger sect of our Country. As per a 2019 study⁶ undertaken by the National Drug Dependence Treatment Centre, funded by Ministry of Social Justice and Empowerment, Government of India: There are-

- Over 3 Crore Cannabis users in India
- Over 2 crores Opioid users' majority of which constitute its derivative Heroin
- Over 1 crore people consume 'Sedatives and Inhalants'
- Almost 11 Lakh people consume Cocaine
- Around 19.5 Lakh people are users of Amphetamine Type Stimulants (ATS).

¹ Narcotics Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, 1985 (India)

² The Opium Act, 1857, No. 13, Acts of Parliament, 1857 (India)

³ The Opium Act, 1878, No. 1, Acts of Parliament, 1878 (India)

⁴ The Dangerous Drugs Act, 1930, No. 3, Acts of Parliament, 1930 (India)

⁵ Justice K. Jayachandra Reddy, *Law Commission of India One Hundred Fifty-Fifth Report on Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985)*, 155 LCI 1, 4 6 (1997) <https://lawcommissionofindia.nic.in/101-169/Report155.pdf>

⁶ Ambekar A, Agrawal A, Rao R, Mishra AK, Khandelwal SK, Chadda RK, *Magnitude of Substance Use in India*, 1 MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, GOVERNMENT OF INDIA, 1-4 26 (2019) http://socialjustice.nic.in/writereaddata/UploadFile/Magnitude_Substance_Use_India_REPORT.pdf.

The said statistics are only indicative of the problem of drug abuse in India. The ground reality is worse. As per the statistics published by Adolescent brain cognitive development (ABCD)⁷, Delhi ranked third, globally, in qua the consumption of Cannabis. And the conjoint consumption of Cannabis in the states of Delhi and Mumbai totaled over 70 Metric Tons. All the said studies and factors only point towards, how the Enforcement Agencies, established and/or authorized under the NDPS Act, have failed to fulfil the role assigned to them by the People of India through their representatives in the Parliament.

II. ONE ('TREND') FOR ALL AND ALL FOR ONE

The object of the Act is being defeated. The purpose is to prevent the consumption of contraband substances, put an end to the drug cartels; however, all these objects have been unaccomplished on account of acquittal of the offenders, who are otherwise guilty and the false implication of innocent person. In almost case, either the peddlers or the operators are prosecuted, which is indeed a step in the right direction, but the fact remains that the kingpins are not being caught.

Upon perusal through several chargesheets/ Final Report Forms under section 173 of Code of Criminal Procedure,⁸ pertaining to cases under the NDPS Act, namely *Izuchukwu Joseph v. State*⁹, *Vinod Kumar v. State*¹⁰, *Okafor Chukwuka Ugochukwu and Ors. v. Narcotics Control Bureau*¹¹, *State v. Israil & Anr*¹², *State v. Tamanna & Ors.*,¹³ *DRI v. Paramjeet Singh Gulati*,¹⁴ *State v. Mohd. Suffiyan & Ors.*¹⁵, *State v. Henry Emeka & Anr.*¹⁶, *State v. Ahmend Uruakpa alias Don*¹⁷, *State v. Vijay @ Kale*,¹⁸ *State v. Deepak Tijori*,¹⁹ certain 'trends'/ patterns would be visible in all the said cases:

⁷ CANNABIS LAW REPORT, <https://cannabislaw.report/abcd-2018-cannabis-price-index-published/> (last visited Jun. 30, 2021)

⁸ The Code of Criminal Procedure, 1973, § 173, No. 2, Acts of Parliament, 1974 (India)

⁹ *Izuchukwu Joseph v. State* Cr. A. 286 of 2019, Delhi High Court

¹⁰ *Vinod Kumar v. State* Cr. A. 95 of 2021, Delhi High Court (Pending)

¹¹ *Okafor Chukwuka Ugochukwu and Ors. v. Narcotics Control Bureau* MANU/DE/1039/2020 Cr. Appeal No. 1186 of 2015

¹² *State v. Israil & Anr.* SC No. 27919 of 2016, Central Distt. Court, Delhi (Pending)

¹³ *State v. Tamanna & Ors.* SC No. 28274 of 2016, Central Distt. Court, Delhi (Pending)

¹⁴ *DRI v. Paramjeet Singh Gulati* SC No. 47A of 2012, South Distt. Court, Delhi

¹⁵ *State v. Mohd. Suffiyan & Ors.* SC No. 438 of 2019, New Delhi Distt. Court, Delhi (Pending)

¹⁶ *NCB v. Henry Emeka & Anr.*, SC No. 25 of 2014, New Delhi Distt. Court, Delhi

¹⁷ *State v. Ahmend Uruakpa alias Don*, SC No. 24 of 2009, New Delhi Distt. Court, Delhi

¹⁸ *State v. Vijay @ Kale*, SC No. 28138 of 2016, Central Distt. Court, Delhi (Pending)

¹⁹ *State v. Deepak Tijori* Cr. A. 1093 of 2017, Delhi High Court (Pending)

1. That the Investigating Officer (I.O.) receives a secret information in his office pertaining to the transport/ hoarding of drugs.
2. That the IO is unable to take written authorization from the ACP to conduct a raid on account of paucity of time or on account of non-availability of the ACP. However, the raid is conducted even in its absence.
3. That, the Accused person is arrested in a public place, however no person of the public agrees to be a witness.
4. That the Accused is served a notice under section 50 of the NDPS Act and apprised about his right to be searched in the presence of a Magistrate/ Gazetted Officer, however, the accused refused to avail his right.
5. That, in case the accused person is an illiterate or a foreigner, he/she was made to understand the notice under section 50 and about his/her rights in the language the accused person understands.
6. That, the accused was given an opportunity to search the person and the vehicle of the police officials before effecting search, however, the accused refused the same.
7. That, the mobile number of the Accused had been under surveillance, prior to his arrest.
8. That, no CCTV footage could be procured by the I.O.
9. That, the members of the raiding party were not having mobile phones on them.

And, when the matter comes up before a Court, the defence counsel, almost certainly, puts the question regarding the above numbered monotonous theory created in every such case. The case of prosecution is struck at many such angle which results into acquittal of an offender who may otherwise be guilty of the offence he is being charged under. It is time for the Enforcement Agencies as well as for the Hon'ble Court to duly appreciate the fallacy behind employing common theory being displayed in almost every case. Here, it would be worth mentioning that every particular enforcement agency has its own peculiar 'common theory', which is employed in every case.

It is interesting to note that though the Secret Informer/Secret Information as received in almost every second case pertaining to NDPS leading to the detection of an offender; such information are normally utilized only upto the arrest of the person either having the possession of alleged drug/substance or the person accompanying or at the most, some of the conduit having connection through electronic mode. They are not materialized to find out the *actual source* i.e. the kingpin. The non-arrest/non-detection of *actual source* does not lead to the eradication

of the source behind the supply of the drugs into the system. The object of the act cannot be achieved until and unless, the actual source is detected and brought before the Law. This can be done by following the procedure and the law as mandated under the NDPS Act with honest and dutiful performance of duties by the Enforcement Agencies. It has to be kept in mind that *no innocent should be harassed and no guilty should be left.*

III. LAW: APPLIED: REALLY?

It has been held by the Hon'ble Supreme Court of India in a plethora of its judgments that given the special nature of the enactment and the punishment it carries, certain provisions of the NDPS Act like section 41, 41, 50 and 52A, are to be complied mandatorily.²⁰ And the provisions being penal in nature need to be interpreted and complied strictly.²¹ The same are not fully complied with in the cases. The compliance with the same is not optional and if found to be non-complied with, would be fatal to the case of the prosecution. This is one of the core and primary reasons for the acquittal of an accused, who would otherwise have been convicted, if not for the failure of the I.O. to comply with the provisions of the Act. Section 41, 42,43, 50, 51, 52 and 55 are certain provisions of the NDPS Act, the purpose of which is to prevent arbitrariness in arrest, search & seizure and consequently safeguard the rights of the, otherwise, innocent accused persons. At the same time, they give considerable amount to power to the officer empowered under the Act to conduct investigations and proceedings effectively. These sections are therefore, extremely necessary in a criminal trial and can have the effect of completely vitiating the proceedings. These have therefore been dealt with, in depth, in the foregoing paragraph.

Not only does the failure to comply with the mandates of the aforementioned Act cause the discharge of, otherwise, guilty persons; it also perversely affects the rights of the persons who are not guilty of the offence and therefore, fall victim to the illegality at the behest of unscrupulous police officials. The same has been dealt with in the subsequent section of the present Article.

²⁰ State of Punjab v. Balbir Singh (1994) 3 SCC 299; Ashok Kumar Sharma v. State of Rajasthan (2013) 2 SCC 67; Bhajan Singh v. State of Haryana, 1988 (1) Crimes 444; Surajmal Kanaiyalal Soni v. State Of Gujarat (1990) 2 GLR 923

²¹ Noor Aga v. State of Punjab (2008) 16 SCC 417

Search, seizure or Arrest can be done only by an empowered officer.²² While section 41(1) of the Act provides for issuance of warrants by a Magistrate specially empowered under the Act to: 1) Conduct search of building/ conveyance/ place; or 2) to arrest a person, Section 41(2) provides for an authorized officer to do the same.²³ It is to be kept in mind that the right to personal liberty is a Fundamental Right under Article 21 of the Constitution of India²⁴ and the same is at stake here. Therefore, it is necessary that proper authorization of the empowered officer is obtained and the same is not merely treated as a procedural requirement, which can be excused. Even though, the Courts at the Trial/ District level have not frowned upon the same, so as to dismiss the prosecution in *toto*, it is necessary that an uncompromising view is adopted, given the menace of false implication. The safeguard qua the authorization has been placed in the enactment for a reason, and it is the executive to bring the words of the legislature into life. Under the said provision, a Gazatted officer is an empowered officer, who in turn can make another i.e. his subordinate, an authorized officer for the purpose of the Act.²⁵ In many cases, such authorization is, allegedly, given by the ACP to his subordinate officer over the mobile phone i.e. without any written proof whatsoever. Further, another precondition to the authorization would be that the information received by the police officials should be first reduced to writing, which is not done in catena of cases.

Another, technicality qua the search of the accused person and the seizure of contraband products, is with respect to the place where it is conducted i.e., public or private place. In case the search and seizure are affected in private place section 42 will be applicable and in public place section 43 will apply. Furthermore, a private search can be searched only between sunrise and sunset. The only exemption to the same is emergency, which has to be clearly recorded in writing. In view of section 51 of the Act, the provisions of section 100 and 165 of the CrPC, 1973 also apply to the search and seizures effected under the NDPS Act, as the same are not inconsistent or contrary to the provisions of NDPS Act.²⁶ Neither of the aforementioned two conditions are complied by the authorized officer, which makes it difficult, both, for the State to prove the prosecution and in other instances for the Accused, to prove his innocence.

²² I YER, IYER'S COMPREHENSIVE CALSSIC ON NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985 391 (2 ed. Delhi Law House 2013)

²³ Narcotics Drugs and Psychotropic Substances Act, 1985, § 41, No. 61, Acts of Parliament, 1985 (India)

²⁴ INDIA. CONST. art. 21

²⁵ *Supra* note 23

²⁶ DR. JN BAROWALIA & ABHISHEK BAROWALIA, COMMENTARY ON THE NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES ACT 700 (1st ed. Lexis Nexis 2021)

As has been iterated earlier, Section 43 of the Act deals with the power of an empowered officer to search, seize and arrest in public places. What amounts to a public place has been defined in the explanation appended to the section, however the same is merely explanatory and not exhaustive. In certain cases, even a private property to which the public resorts, though not as a matter of right, is also a public place.²⁷ The distinction between, whether a place is a public place or a private place is important because of the following reasons:

- It determines which section will apply- section 42 or Section 43.
- In case of search of Public Place under section 43 there is not bar on search between sunset and sunrise; however, in case of search of a private place, the search cannot be conducted between sunset and sunrise, *unless*, there is an imminent possibility of the Accused fleeing or concealing evidence and the said reasons are recorded in writing by the authorized officer.

Table: Comparison between conditions relating to search/seizure/ arrest to be fulfilled under s.42 and under s.43 NDPS Act

Conditions for search/seizure/ arrest to be fulfilled u/s 42 NDPS Act.	Conditions for search/seizure/ arrest to be fulfilled u/s 43 NDPS Act.
1. Officer must be authorized/ empowered under the Act. ²⁸	1. Officer must be authorized/ empowered under the Act. ³³
2. Two independent and respected persons must be joined as witness. ²⁹	2. Two independent and respected persons must be joined as witness. ³⁴
3. Authorized Officer (A.O.) must serve notice under section 50 of the Act.	3. Authorized Officer (A.O.) must serve notice under section 50 of the Act.
4. A.O. must explain the contents of the notice served upon the accused.	4. A.O. must explain the contents of the notice served upon the accused.
5. The A.O. must offer his own search and that of his vehicle.	5. The A.O. must offer his own search and that of his vehicle.
6. The A.O. must not search any private place between sunset and sunrise,	6. Where the accused person avails his right under section 50, the A.O. must

²⁷ *Id.* at 698

²⁸ *Supra* note 23

²⁹ The Code of Criminal Procedure, 1973, § 100, No. 2, Acts of Parliament, 1974 (India)

³³ *Supra* note 23

³⁴ *Supra* note 29

<p>unless, there is an imminent possibility of the Accused fleeing or concealing evidence and the said reasons are recorded in writing by the authorized officer.</p> <p>7. In case of search without warrant, the A.O. must record his reasons to do so.³⁰</p> <p>8. Where the accused person avails his right under section 50, the A.O. must proceed to take the accused person to the nearest Magistrate or Gazatted Officer and get the search conducted in their presence.</p> <p>9. The person being arrested must be informed about his grounds of arrest as per section 53 of the Act.</p> <p>10. The person arrested/ the contraband seized shall be forwarded to the officer-in-charge of the nearest police station.³¹</p> <p>11. The in-charge of the police station must keep the accused and the contraband in safe custody and affix his seal and that of the officer accompanying, on the seized contraband article.³²</p> <p>12. The seized substance shall be produced before the magistrate in terms of section 52A and then disposed of.</p>	<p>proceed to take the accused person to the nearest Magistrate or Gazatted Officer and get the search conducted in their presence.</p> <p>7. The person being arrested must be informed about his grounds of arrest as per section 53 of the Act.</p> <p>8. The person arrested/ the contraband seized shall be forwarded to the officer-in-charge of the nearest police station.³⁵</p> <p>9. The in-charge of the police station must keep the accused and the contraband in safe custody and affix his seal and that of the officer accompanying, on the seized contraband article.³⁶</p> <p>10. The seized substance shall be produced before the magistrate in terms of section 52A and then disposed of.</p>
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Upon the perusal of the aforementioned table, it shall be evident that the provisions qua the arrest under section 42 of the Act are more stringent in comparison to one under section 43

³⁰ Narcotics Drugs and Psychotropic Substances Act, 1985, § 42 cl. 1, No. 61, Acts of Parliament, 1985 (India)

³¹ Narcotics Drugs and Psychotropic Substances Act, 1985, § 52, No. 61, Acts of Parliament, 1985 (India)

³² Narcotics Drugs and Psychotropic Substances Act, 1985, § 55, No. 61, Acts of Parliament, 1985 (India)

³⁵ *Supra* note 31

³⁶ *Id.*

of Act. It is for this reason that in majority of the instances the Authorized officer, shows in his report that the search, seizure and arrest were effectuated in public place, even when, in reality, the same were conducted in a private vicinity.

Section 50(1) of the NDPS Act provides that if the person who is being searched by the authorized officer empowered under the Act, “so requires”³⁷, then the latter shall “take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.”³⁸ In compliance thereof, therefore, the suspected person, before being searched, is to be served a notice explaining him his right to be searched before a magistrate or a Gazetted Officer. In case of his refusal to be searched, the same, also, has to be written down by the person so refusing and sign the same. The ground reality is, however, that it is not done in majority of the cases. The suspected/ accused person is usually unaware of his right to be searched in presence of a magistrate or G.O. and is also not apprised about the same. His refusal is also recorded by the police officials in their own handwriting and the accused person is merely coerced to sign the same. It has also been held by the Courts in India that, for truly complying with the substance of the said provision, the accused, in case he is illiterate or does not understand the native language, must be made to understand the same.³⁹ Again said, the same is also not complied with. For instance, in the case of *State v. Israil*⁴⁰, when the I.O. was cross-examined by the Counsel for the Accused, he failed to define who a Gazetted Officer was. It is, hence, evident that a person who, himself, is unaware of the meaning of a word cannot explain the same to another. In such circumstances there can be no, true, compliance of the mandate of section 50.

Though, it has not been stated in the Act, in view of the decision taken by the Hon’ble Supreme Court in matter titled *State of Bihar v. Kapil Singh*⁴¹, the Police officers, let alone the witness too, have to offer themselves to be searched prior to conducting the search of the accused or his property. The same is backed by principles of Natural Justice and ought to be complied with. But the reality is far from ideal. It is not uncommon that the contraband goods, allegedly, recovered from the accused were planted on his person so as to imprison him. Even recently, it has been reported that the Goas’ Anti-Narcotic Cell had been discovered to have planted

³⁷ Narcotics Drugs and Psychotropic Substances Act, 1985, § 50 cl. 1, No. 61, Acts of Parliament, 1985 (India)

³⁸ *Id.*

³⁹ *Ashok Kumar Sharma v. State of Rajasthan* (2013) 2 SCC 67; *State v. Vicky* (2019) SCC OnLine Del 10331

⁴⁰ *Supra* note 12

⁴¹ *State of Bihar v. Kapil Singh* AIR 1969 SC 58 ¶10

contraband drugs on Israeli National namely David Drihan alias Dudu. This is just one of the many cases where the same has been done.

Another issue pertaining to section 50 is dichotomy in the decisions of the Hon'ble Courts within the territory of India. On one hand, there are judgments which state that the presence of the Accused before the Gazetted Officer or Magistrate is mandatory and cannot be excused.⁴² On the other hand, there are cases which state that the said requirement is merely optional i.e. only when the accused asks for the same after being informed of his right to opt for the same.⁴³

IV. PERIL OF MALICIOUS AND MALA FIDE INCRIMINATION

The enforcement agencies play a very crucial role in execution of justice in our society as it is Investigating officer only who has to interrogate a suspect in light of the facts and circumstances before him and after proper application of mind, figure out his role in a said offence. NDPS being a special act has rendered a huge reliability upon Investigating officer and to mirror the same, the presumption of mens rea & restriction to grant bail has been embodied in the Act, which makes the offence under this act as “*cognizable and non-bailable*”⁴⁴.

It is the duty of an I.O. to collect evidence to prove the culpability of a suspect just like ‘separation of grain from chaff’ and produce the same before the Court of law and then Judiciary has to give its verdict by seeing the facts and evidences produced before it. However, with passage of time it has been noticed by the Indian Judicial system that investigating officers are not acting fairly in the course of investigation, they develop personal interest and attempt to benefit themselves at the stake of morality and humanity. They falsely implicate innocent people in heinous crimes to satisfy their means.

In order to give spirit to words, a recent decision of Hon'ble Delhi High Court is reproduced herein wherein the Hon'ble Bench acquitted the Appellants in the matter of *Okafor Chukwuka Ugochukwu v. NCB* vide its judgment dated 13.05.2019, wherein the Hon'ble Court noted: “As noted above, there is considerable doubt as to the manner in which the contraband was recovered and the chain of custody of samples has also not been established. The possibility of tampering with the same also cannot be ruled out. Thus, her conviction for committing of an

⁴² Arif Khan@ Agha Khan v. State of Uttarakhand (2018) 18 SCC 380

⁴³ State of Punjab v. Baldev Singh (1999) 6 SCC 172

⁴⁴ Narcotics Drugs & Psychotropic Substance Act, 1985, § 35 & 37 cl.1, No. 61, Acts of Parliament, 1985 (India)

*offence punishable under Section 23(c) of the NDPS Act also cannot be sustained... Laya and Okafor are two days short of completing their prison sentence. They shall be released forthwith...*⁴⁵

The above-mentioned judgment draws out the falsity of the enforcement agency, wherein they have falsely implicated two innocent persons (foreign Nationals in this case) and because of the same they were imprisoned for a period of 10 years and it was after just two days prior to the completion of ten years of incarceration that the Court acquitted them from the charges and false conviction. It is not only disturbing rather shocking. The acquittal of the accused persons in the above-mentioned case throws light on the factum of false implication at the behest of the Investigating officer. It is also worth mentioning that the Hon'ble High Court of Delhi did not step-back from mentioning that "*possibility of tampering with the samples cannot be ruled out*"⁴⁶. This clearly pens down to one thing that investigating officer had managed the investigation for the reasons best known to him and *snatched* ten years from the life of two innocent persons. Although this sought of executive system looks more akin to a '*harassment agency*' wherein a person is kept within the four walls of prison for a period of ten years and thereafter released as '*wrongly implicated*', without any compensation whatsoever. The case mentioned herein-above is just like a needle in a haystack as there are number of cases in NDPS wherein it has been judicially noted that the Investigating officer has conducted a biased investigation.

In another case titled *State v. Ahmend Uruakpa alias Don*⁴⁷, it was noted, on record, by the Trial Court that the case property was tampered with, that all documents pertaining to the case were manipulated, that no secret information was received and that the Accused was made to sign on blank papers which were later on filled up by the police.

Recently, Justice Anil Kshetarpal of Hon'ble High Court of Punjab & Haryana transferred probe to Central Bureau of Investigation qua false implication in NDPS Case, wherein the I.O. had purportedly recovered a consignment of Heroin smuggled from Pakistan. It was proved before the Court that the accused had been falsely incarcerated.⁴⁸ It is apparent that this said

⁴⁵ *Supra* note 11

⁴⁶ *Supra* note 11

⁴⁷ *Supra* note 17

⁴⁸ Navjeevan Gopal, *False Implication in NDPS Case: trouble mounts for six cops as HC transfers probe to CBI*, INDIAN EXPRESS, (Jan. 13, 2021, 5:00 am), <https://indianexpress.com/article/cities/chandigarh/false-implication-in-ndps-case-trouble-mounts-for-six-cops-as-hc-transfers-probe-to-cbi-7143956/>

case is one of a very few cases wherein the illegality of Investigating Officer could be highlighted before the Courts and a justice could be served to the accused therein.

Investigating officers get drunk by their powers and implicate innocent people for immoral and illegal grants. Recently in another case Hon'ble the Delhi High Court, granted bail to an accused arrested in a FIR for recovery of commercial quantity of ganja by Crime Branch, Delhi Police, wherein the Hon'ble Court observed that accused was arrested from Aligarh, U.P. whereas as per the case of prosecution/police, the accused was arrested on another date from Delhi i.e. both the date and the place of arrest had been fabricated. Sufficient evidences were also served before the Hon'ble Court and then the Court marked the falsity of the Investigating officer qua the arrest of the accused person in the following words "*I find that there is something fishy about the whole chain of events and petitioner has been falsely implicated in the present case...*"⁴⁹.

The time and techniques have evolved to such a stage that justice in terms of law and justice in reality have become two parallel lines which never meet at any single point. In NDPS Cases, investigating officer hold such arbitrary power with him that he can wrench anyone's liberty just by making him an accused and then it will be for that accused to prove his innocence before the Court of Law. The false implications cause such an injury to people that their belief in the judicial system as a whole paralysis and their self-respect disappears. Their life is damaged irreparably for no fault of their own. There are many such cases wherein the so-called accused persons are victims in the hands of Investigating officers and they have no one to convey their hues and griefs. It ought to be said that our enforcement system needs appropriate reformation, so that the words of the legislature are not rendered black letter on a piece of paper. The Parliamentarian are representative of the will of the people and hence it is the responsibility of the executive to implement the same.

V. LIBERTY: DUE PROCESS OF LAW

Due Process of Law, the four words, misuse of which brings an individual within four walls of prison. Thus, before, an individual's liberty is being curtailed, it is to be checked that whether the process of law is itself not being misused. Bail is almost exceptional in a prosecution under the NDPS Act, due to the constraints of Section 37 of the NDPS Act⁵⁰. The Pre-Trial detention

⁴⁹ Pradeep Kumar Gupta v. State of Delhi, Bail Application. 2865/2020, Delhi High Court

⁵⁰ Narcotics Drugs & Psychotropic Substance Act, 1985, § 37, No. 61, Acts of Parliament, 1985 (India)

for an indefinite period certainly eradicates the fundamental right of personal liberty⁵¹. The Trials are pending and remain pending for years at a time and in some instances even a decade and thereafter, if proved innocent, the person is simply released with the judgment mentioning that “*the charges are not proved and hence the accused acquitted*”. Charges are not proved against them but such individual cannot come to the Court, as a matter of right, for seeking Compensation as the Charges are not proved beyond reasonable doubt or with the observation that the prosecution could not prove its case. *So where should one go in the face of such injustice?*

The Supreme Court Legal Service Aid Committee took up this issue and knocked at the door of Hon’ble Supreme Court, whereby the court issued “*one-time directions for cases in which accused persons who are in jail and trials are delayed*”⁵², to release them (undertrials under NDPS Act) on bail. Thereafter, the directions remained idol, however, recently these “*one-time directions*” have been considered by the Division Bench of Hon’ble Calcutta High Court⁵³ and the Court observed that, irrespective of the factum that the directions were not a precedent, the same can be taken into consideration by the Courts, to grant bail, when there has been an indeterminate delay not attributable to the accused person. The relief ought to be extended to all undertrial prisoners equally. Being the custodian and guardian of the Constitution it is the prerogative of the Courts to ensure that the liberty of the people are not abridged by arbitrary “*procedure established by law*”, in terms of Article 21 of the Constitution, which needs to be appreciated in conjunction to art. 14 of the Constitution, which provides for “*equality before law*”.⁵⁴

VI. RECOMMENDATIONS

In light of the difficulty suffered by the accused person on account of false incrimination, provisions which bars⁵⁵ the disclosure of the name of the secret informant or his cross questioning, must be done away with or modified to the extent that the informant is produced before the Court and his/her statement u/s 164 of Cr.P.C.⁵⁶ may be recorded, by protecting his/her identity.

⁵¹ *Supra* note 24

⁵² Supreme Court Legal Aid Committee v. Union of India (1994) 6 SCC 731

⁵³ In Re: Sanawar Ali 2021CriLJ403

⁵⁴ INDIA. CONST. art. 14

⁵⁵ Narcotics Drugs & Psychotropic Substance Act, 1985, § 64, No. 61, Acts of Parliament, 1985 (India)

⁵⁶ The Code of Criminal Procedure, 1973, § 164, No. 2, Acts of Parliament, 1974 (India)

Another, important step to curb the false acquittal of an accused person, as well as prevent the abuse of due process of law, would to that carrying of a camera (having audio facility) shall be made mandatory in the field kit during search and seizures. The picture of the accused person, alongwith the date, time and background (to identify the date, time and place of arrest) shall be taken as evidence. The same would benefit all the parties involved. In the alternative, body-camera could also be made mandatory, to be worn at the time of raid or search, seizure and arrest. The same is already in vogue in the United States of America, and could be adopted in India as well. The same would not help only in cases, pertaining to the NDPS Act, but also in every other criminal matter as well.

The compliance under Section 50⁵⁷, requiring search of the accused before the Magistrate or Gazetted Officer, when he/she opts for it, shall be done away with. The search of the accused before the said authorities must be made mandatory and not optional. This, again, would benefit all the stakeholders involved, be it the prosecution or the defence.

The written authorization by empowered officer under the Act, must be made compulsory. Oral authorization must be treated as void and have the effect of vitiating the trial.

The issue of ‘*trends*’ in case of prosecution must be looked into, by the Courts and Higher executive authorities, and be looked down upon, sternly. For this purpose, 100 chargesheets, pertaining to a particular state, in matters of NDPS, may be examined.

Proceedings under Section 58⁵⁸, shall *ipso facto* be initiated by the Courts, upon finding that entry, search, seizure or arrest of the accused is vexatious. At the same time compensation must be granted to the person, falsely accused, as a matter of right, from the earnings/salary of the I.O. In appreciation to these words the Hon’ble Punjab and Haryana High Court had even compensated an Accused person with an amount of Rs. 5 Lacs who had been falsely implicated in a NDPS offence by an I.O. and had to spent 5 months 10 days in illegal custody⁵⁹

The provisions relating to bail, must be made less stringent, in light of the findings of the Hon’ble Supreme Court in the case of *Nikesh Tarachand Shah v. Union of India*⁶⁰, wherein

⁵⁷ *Supra* note 37

⁵⁸ Narcotics Drugs & Psychotropic Substance Act, 1985, § 58, No. 61, Acts of Parliament, 1985 (India)

⁵⁹ Ashok Kumar Jain v. State of Punjab & Ors 2018 SCC OnLine P&H 2175

⁶⁰ Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1

section 45 of the Prevention of Money Laundering Act, 2002⁶¹ was struck down, which is analogous to section 37 of the NDPS Act.

⁶¹ Prevention of Money Laundering Act, 2002, § 45, No. 15, Acts of Parliament, 2002 (India).