

WORKSHOP ON LEGAL FRAMEWORK TO DEAL WITH DRUG ADDICTION
AND DRUG TRAFFICKING



PROGRAMME REPORT – 935

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Session 1

Laws relating to Drugs and Narcotics: An Overview

Dr. Geeta Oberoi, Director, NJA addressed the gathering and gave a brief introduction about the Workshop. After the self-introduction by the participants, Mr. Rajesh Srivastava from National Academy of Custom, Excise and Narcotics addressed the session.

He started his discussion on various Acts prior to NDPS Act:

- The Opium Act, 1878
- The Dangerous Drugs Act, 1930

In his presentation he stated that there were few backdrops in the old Act

- The punishment for drug offences was inadequate
- Enforcement powers were only with a few agencies – No investigative powers to important Central Agencies
- India's obligations under various International Conventions were not fulfilled by the provisions of these Acts.
- The psychotropic substances were not adequately covered by these Acts.

He stated that it is not suffice to continue with old laws, while cases of narcotic substance are increasing day by day. He then highlighted the key points mentioned in the NDPS Act, which was passed in the year 1985. The NDPS Act clearly mentioned the prohibited narcotic substances for example, cultivation of coca, opium or cannabis plants without license. Manufacture of narcotic drugs and psychotropic substances without license and for uses other than meant for medical or scientific. In addition to that the Act will also provide for licensed cultivation of opium poppy and licenced manufacture of various narcotic drugs and psychotropic substances, forfeiture of properties in drug trafficking cases. The Act also empowers both Central Government and State Government to frame Rules with specific purposes.

Mr. Srivastava explained the organization of NDPS Act

Chapter 1	Preliminary (Short title and definitions)
Chapter II	Authorities and Officers
Chapter II-A	NFCDA
Chapter III	Prohibition, Control and Regulation (Section 8 – 14)
Chapter IV	Offences and Penalties (Section 15 – 40)
Chapter V	Procedure (Section 41 – 68)
Chapter V-A	Forfeiture of property
Chapter VI	Forfeiture of property

He further elaborated upon the powers conferred to the Central and State Government with regard to framing of rules:

- The cultivation etc. of Coca plant,
- Cultivation of opium poppy,
- Production and manufacture of opium and production of poppy straw
- Sale of opium/ derivatives from CG factories for export/ sale to state govts/ manufacturing chemists
- Manufacture of manufactured drugs
- Manufacture, possession, sale, purchase, consumption or use of psychotropic substances

The State Government is empowered under section 10 of NDPS Act to frame Rules and Regulations. He further stated his discussion about the landmark judgment passed by Hon'ble Supreme Court of India in E. Micheal Raj Case where the Supreme Court stated that 2001 Amendment introduced a rationalized punishment structure: SOR. Punishment would vary depending upon the quantity of the offending material. It is only the actual content by weight of the narcotic drug, which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. Thereafter Central Government passed a Notification stated that: "The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers

and isomers, wherever existence of such substance is possible and not just its pure drug content.

He also made the reference to State of Uttaranchal vs. Rajesh Kumar Gupta [(2007) 1 SCC 355] where Hon'ble Court stated that Prohibitions in Rule 63 apply only to the psychotropic substances in Schedule I, in view of the general prohibition contained in Rule 53. In general, if a substance is not included in Schedule I, offence under the NDPS Act is not made out for manufacture, possession, storage, use etc.

Further in Union of India & Another V. Sanjeev V. Deshpande (Larger Bench) August 12, 2014, disagreed with the conclusion in the Rajesh Kumar Gupta case, Mandate under section 8 cannot be ignored – this is the source of prohibition, not rules 53 or 64

Mr. Srivastava further addressed the participating judges on the recent Amendments in NDPS rules:

Rule	Old provisions	New provisions
53	<p>Subject to the other provisions of this Chapter, the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I is prohibited:</p> <p>Provided that nothing in this Rule shall apply in case the drug substance is imported into or exported out of India subject to an import certificate or export authorization issued under the provision of this Chapter and for the purpose mentioned in Chapter VIIA</p>	<p>Import into and export out of India of the narcotic drugs and psychotropic substances is prohibited, save with an import certificate or export authorization issued under the provision of this Chapter.</p> <p>Provided that import into India or export out of India of the narcotic drugs and psychotropic substances specified in Schedule I of these Rules shall be for the purpose mentioned in Chapter VIIA</p>

Session 2

Provisions of search and seizure Vis-à-vis NDPS Act

Session 2 was based on hypothetical situation circulated amongst the participating judges. Dr. J.N. Barowali, Mr. Rajesh Srivastava and Mr. S.P. Shrivastava were the speakers in the Session.

The hypothetical situation was based on the provisions of search and seizure under NDPS Act, 1985. The point of determination in the hypothetical situation is that: Whether the non-compliance of requirements of Sub-sections (1) and (2) of Section 42 of NDPS Act is permissible or not.

Relevant facts of the Hypothetical Problem:

Prosecution story

On 24.2.15 at 11:30 am, acting on specific information, S.I of Police Mr. A along with his staff went to DB Mall at Bhopal and conducted search on two women L1 and L2 who were coming out of that Mall in presence of security guards X1 and X2 of the Mall, and shop owners Y1 and Y2 having their shops in the DB Mall. On search, they found a packet of prohibited contraband on person for both L1 and L2. Therefore L1 and L2 were taken to M.P Nagar Police Station and the case was registered under section 20 (b) of the NDPS Act. Thereafter S.I of police Mr. A sent the packets recovered from L1 and L2 to the FSL Bhopal. Pursuant to the FSL report, the charge Sheet is submitted against L1 and L2 for their prosecution under section 20(b)(ii)(b) of the NDPS Act.

Examination of Prosecution Witnesses 1: Mr. A

On 24.2.2015, a secret information from source was received that two ladies were carrying some suspicious substance in two vanity bags. Thereafter, a G.D. Entry was made Vide G.D. Entry No. 990/15 and O/C entrusted him to go to the spot and take action. Accordingly, Mr A along with Ms. S (women head constable) went to DB Mall and apprehended L1 and L2 with two vanity bags. Their vanity bags were

searched by S and found one packet of (Ganja) wrapped with paper and polythene in each vanity bag. Thereafter, he collected the digital weighing apparatus from a nearby jewellery shop of Y1 another manual weighing apparatus from another shop house of Y2. On weighing the seized Ganja, he found 5 Kgs of Ganja in each packet as found in the 2 vanity bags possessed by accused L1 and L2

Cross Examination by defence: PW1 Mr.A stated that

- he cannot say as to whether the extract copy of G.D.Entry No. 990/2012 was enclosed with the charge sheet or not by the I.O.
- However said G.D.Entry was not available with the case record.
- He searched the apprehended accused persons through lady Home Guard Ms. S.
- The woman Home Guard Ms. S searched their body in his presence of witnesses and found the contraband Ganja.
- The place of occurrence is about 1 ½ K.m. away from the Police Station.
- One of his staff weighed the seized Ganja but he cannot recollect the name of said staff who weighted the seized Ganja.
- After taking sample and putting seal and signature on sample packet, he brought the accused with seized ganja and by and sample with apprehended lady and handed over to O/C.
- He took the sample by weighing in digital weighing apparatus.
- He does not know if the O/C had informed about the occurrence to any superior officer of Police.
- The seized Ganja was not seen in the Court.

Prosecution Witnesses 2:

P.W. 2 Sri Babul, one of the seizure witnesses, in his evidence deposed that on 24.04.2015 in his presence police recovered “Bhang” from two ladies after searching their vanity bags. Both the ladies have one bag each on their hands. After recovery police seized. After making the seizure at the place of occurrence, police prepared seizure list and obtained his signature in the seizure list. He further deposed after

completing search and seizure police took the seized Ganja and the two ladies to Police Station. He also recognized the said two ladies in the Court dock.

Cross-Examination by defence:

In cross-examination PW 2 deposed that being a VDP party member he used to visit Jalukbari PS. He admitted that at the time of search and seizure male police personal were present and search was made by male police persons. Though several other persons were gathered there police did not obtained their signature in the seizure list

Prosecution Witnesses 3:

P.W. 3 Aftab Hussain in his evidence deposed that on the date of occurrence, while police was busy in motor cycle checking duty, he saw two ladies coming with one bag each. Police also searched them and found two packet wrapped with papers and in his presence seized the said two.

Cross-Examination by defence:

In cross-examination, PW 3 also deposed that being a VDP party member, he has good relation with Jalukbari PS. He admitted that though police has shown him two packets wrapped in paper but he cannot say where from those were brought. He further admitted that he put his signature in blank paper as asked by police

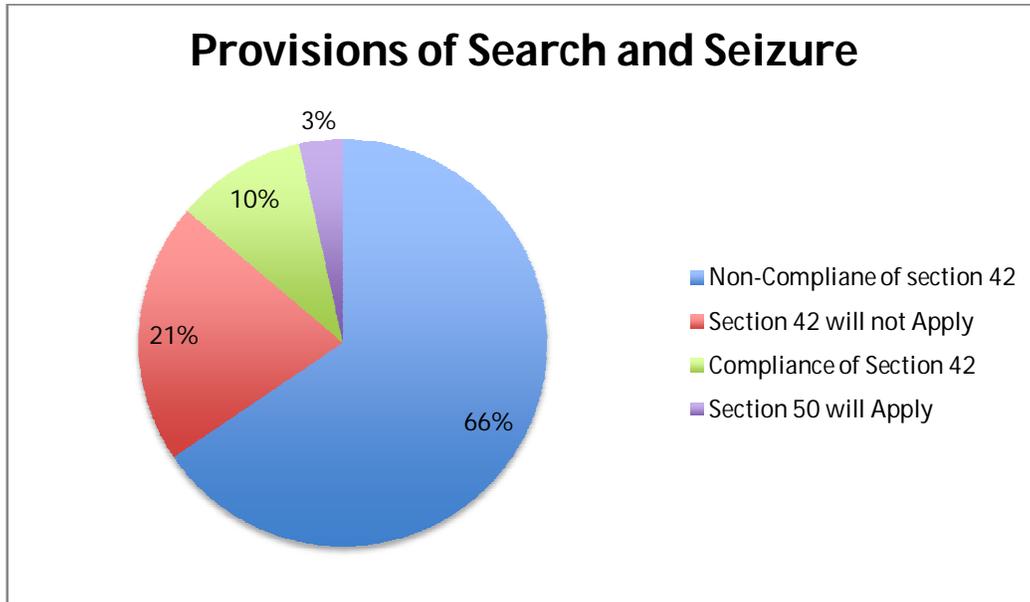
Points of Determination

- Whether the non-compliance of requirements of Sub-sections (1) and (2) of Section 42 of NDPS Act is permissible.

Participating judges stated that in this particular problem, Section 42 would not be applicable as the search was made at public place. So, provisions of Section 43 will be applicable and no need of search warrant.

Another participating Judge stated that non-compliance of requirement of Section 1 and 2 of Section 42 of NDPS Act, and hence accused should be acquitted. Another participating Judge stated that there is total non-compliance of section 42 of the NDPS Act. The prosecution failed to prove that the secret information was reduced

into writing and sent to the higher officials within the stipulated time period, as no copy of G.D was placed before the court.



The above pie graph shows the analytical analysis of hypothetical problem. The total numbers of participants were 30 and the pie graph data is prepared accordingly.

Dr. J.N Barowali cited Hon'ble Supreme Court Judgment and stated that the provisions of search of a lady by a female under Section 50 (4) of the NDPS Act is mandatory and in case of non-compliance of the same, the conviction and sentence of the accused cannot be sustained.

While taking the reference of Karnal Singh v. State of Haryana, Mr. Barowalia stated that while total non-compliance of requirement of sub Section (1) and (2) of section 42 of NDPS Act is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42 of the Act.

Session 3

Importance of Procedural safeguard: NDPS Courts

Session three was based on hypothetical Situation. The problem was circulated among the participating judges. The same hypothetical situation is mentioned below.

Prosecution case:

On 4/2/2014, IO Mr. Y along with other police officials L1 and L2 were on patrolling duty at village Suraj Nagar. During this duty, they received secret information against Mr X that he is in the habit of selling chura post (poppy husk) in his house and if a raid is conducted upon his house, he can be caught red-handed with the contraband. On this information, one Mr. O was associated with the raiding party to raid the house of Mr X.

In the raid, five bags were found lying concealed under a heap of chaff in the courtyard of the house of Mr X. On suspicion of having some intoxicant in his possession, the Investigating Officer served notice upon the accused under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 giving him an offer to be searched before a Gazetted Officer or a Magistrate. Mr X expressed his desire to be searched before a Gazetted Officer.

Upon having known the desired choice of Mr. X, the Deputy Superintendent of Police, Mr. J, through Constable AS requesting him to reach the spot, reached the spot after about half an hour and upon his instruction the search of the bags was conducted.

From each gunny bag, 100 grams of chura post was separated as sample. The samples as well as the remaining gunny bags weighed 39 kgs. and 900 grams each and were sealed. The Investigating Officer prepared a site plan. On return to the police station, the case property was handed over with its seals intact. After receiving the test report from the Forensic Science Laboratory, challan was filed.

Submission on Behalf of Mr X :

- he had been falsely implicated in the case at the instance of Harnand Singh, Ex-Member of the Block Samiti of the area
- the police officer, upon receiving the secret information, neither reduced the same in writing nor communicated to his senior officer about receiving the secret information as required under Section 42 of NDPS Act.
- Though police received the secret information at about 11.30 a.m. and though the distance between the house of X and the spot of receiving the secret information was merely 6 kilometers, police reached the house of X only at 2 p.m. Also police did not call anybody from the neighbourhood at the time of effecting recovery.

Submission on Behalf of State:

The substantially complied the provisions of Section 42 of the Act, by recording the ruqa, embodying the secret information therein, as also by sending the message to the DSP, to come to the spot, as a result whereof, he came to the spot. Since, there was substantial compliance, with the provisions of Section 42 of the Act, it could not be said that there was intentional and deliberate non- compliance thereof strictly.

Point of Determination for participating judges

At what stage and by what time the authorized officer should comply with the requirements of Section 42 of the NDPS Act and report the matter to his superior officer?

Decide this case as per your understanding – as to whether trial is vitiated in above case?

Dr. Geeta Oberoi asked the participating judges that how many of you allowed the appeal while answering this, only thirteen people have allowed the appeal and 11 people have dismissed the appeal and there is no decision by three of them. How do we deal with this difference of opinion? Participating judges answering back stated that even in High Court we have difference of opinions. Supreme Court is there to rectify the difference of opinions.

Participating judge from Madhya Pradesh asked a question that whether it is possible that in whole country we have unanimous judgment without difference of opinion.

Another participating judge from Delhi stated:

That we have to apply the provisions of law. He further stated that when discretions are there then it is bound to have differences. Provisions should be made very clear to resolve the difference of opinions, law should be very clear and there mustn't be any ambiguity. He further gave the example of Section 50 of NDPS Act that such a type of provision should not be there. Differences are bound to be there because of different understanding of the same provisions.

Dr. Geeta Oberoi stated that this hypothetical problem was based on Sukhdev Singh v. State of Haryana which is Supreme Court judgment and the Hon'ble Court held that:

As per the statement of PW1, no effort was made by him to reduce the information into writing and informed his higher authorities instantaneously or even after a reasonable delay which has to be explained with reasons in writing. On the contrary, in the present case, the Investigating Officer PW 1 had more than sufficient time at his disposal to comply with the provisions of Section 42. Admittedly, he had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep. There is not an iota of evidence, either in the statement of PW 1 or in any other documentary form, to show what the Investigating Officer was doing for these two hours and what prevented him from complying with the provisions of Section 42 of NDPS Act.

There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that: (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra). Thus, the present appeal merits grant of relief to the accused

Question by Participating Judge:

Whether the act of the I.O is intentional one and whether the section 59 of NDPS Act will apply in this case or not?

Mr. J. N. Barowalia stated that in our court, what we have seen is that the Advocates are never well prepared, they are not providing any authority of the Supreme Court or the High Court. They argue that you decide the case, so if this is the case then what has to be done. As far as I.O. is concerned, they are not given the training of NDPS cases. There should be specialized persons to deal with investigation of NDPS cases. He stated that they don't even study what is chapter 5 and how it has to be done. Mala fide intention should be proved then only the action should be taken against I.O.

Prof. Shrivastava added that as a Judge we are the guardians of justice and so many innocent persons have been arrested. In Hussain case, decided by Supreme Court six samples was recovered from the accused and originally the person was tried under Section 20 of NDPS Act, and subsequently he was punished under Section 20 of NDPS Act, and the Supreme Court found that there was no advocate who can argue the accused case. Supreme Court found that it was just six samples and it is for the personal consumption and that the innocent person was put behind the bars for the period of five years. So he stated that as a judge no doubt prosecution is important, punishment is important, but the right of accused is also very important. He further stated that why Supreme Court is paying so much stress on Sections 42 and 50 because they know that there are huge backlog of false and fabricated cases under NDPS Act, so, there must be some check on police officers.

So far as sentencing policy in drug matter is concerned in Union of India v. Kuldeep Singh Hon'ble justice Arijit Pasayat has given the detailed factors that must be taken into consideration while awarding appropriate sentence in such matter. So far as the fixation of responsibility of investigating officers and public prosecutor is concerned, there is one judgment passed by Hon'ble Supreme Court in State of Gujrat v. Babu Bhai that judgment categorically stated that, when there is deliberate action or omission with intent to damage the case of prosecution and that these key words should always be taken into account with regard to fixation of responsibility.

Hon'ble Supreme Court in Baldev Singh Judgment stated that cure cannot be worse than the disease itself. What Supreme Court is emphasized that these provisions are meant for the removal of any chance of false acquisition. Therefore these provisions should be complied strictly, though it may result into the frequent acquittal

Mr. J. N. Barowalia further deliberated upon frequent acquittal that there must be some accountability with respect to prosecution and investigating agency that if you have gone through the report of the prosecutor on the files and it is evident that almost in sixty percent of the cases, the prosecutor has given the opinion that though this is not the fit case for conviction but still opinion of the court must be considered. Why the prosecution should not take the responsibility and recommendation of the cases that should be rejected on the ground of no merit. So the responsibility of prosecutor, Investigator and a judge has to be decided.

Session 4

Pre-trial Procedures: NDPS Act

Mr. Manohar Verma while addressing the participating judges stated that it was really difficult to keep the narcotics substance, because of the huge profits that may be derived from their sale, seized narcotic drugs and psychotropic substances are vulnerable to theft. In addition, there is often a shortage of space for storing them. The disposal of property, including seized substances, pending trial is dealt in one of the earliest legal enactments in India, the Code of Criminal Procedure, 1973. The Code provides that a court may, pending the conclusion of an inquiry or trial and after recording such evidence as it thinks necessary, order the disposal of property if such property is subject to speedy and natural decay or if it is otherwise expedient to do so.

Mr. Manohar Verma pointed out the relevant provision of NDPS Act, that all narcotic drugs, psychotropic substances, controlled substances and conveyances shall be disposed of under Section 52A of the said Act. This Section 52 A was introduced by the Ministry of Finance through standing order. As per the standing order, this particular provision for trial disposal was introduced. Again in 2007 the process of pre trial disposal was modified and in the year 2010, the Committee was framed by the state government for the disposal of narcotic substances. While addressing the participating judges, he pointed out that in Madhya Pradesh there were two Committees for the disposal of narcotics:

- One committee was headed by D.I.G and supported by two S.P
- Second committee was headed by I.G Supported by two D.I.G

The Committee headed by I.G deals with higher quantity of the narcotic substance and the Committee headed by D.I.G deals with lesser quantity of narcotics.

He further elaborated the manner in which the narcotic drugs were disposed of:

The S.H.O prepare an inventory of all the drug seized and which are required to be seized off. Mr Manohar Verma pointed out the relevant points which ought to be considered as a part of Inventory report:

- weight of narcotics Substance should be mentioned in the inventory

- Purity of Narcotic Substance
- Process of its packing

Manner of disposal.-(1) Where any narcotic drug, psychotropic substance, controlled substance or conveyance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 of the said Act or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances as per Annexure 1 to this Notification and apply to any Magistrate under sub-Section (2) of section 52A of the said Act as per Annexure 2 to this Notification within thirty days from the date of receipt of chemical analysis report of seized narcotic drugs, psychotropic substances or controlled substances.

After the Magistrate allows the application under sub-section (3) of section 52A of the said Act, the officer mentioned in sub-paragraph (1) shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the seized items to the Chairman of the Drug Disposal Committee for a decision by the Committee on the disposal, and the aforesaid officer shall send a copy of the details along with the items seized to the officer-in-charge of the godown. After the court orders are passed or pre-trial disposal of drugs, those drugs which have no legitimate commercial value (except opium, morphine, codeine and thebaine, which are required to be transferred to the Government Opium and Alkaloid Works undertaking at Neemuch, as the case may be) are required to be destroyed consistent with the guidelines issued.

It was also pointed out that a three members committee of the respective enforcement agencies both Central and States), known as the Narcotics Drugs and Psychotropic Substances Disposal Committee will be headed by an officer not below the rank of:-
(v) Deputy Inspector General of Police with two members of the rank of Superintendent of Police in respect of State Police organization

The copy of the court order will attach in the case diary and after this the case is ready for the disposal. Then the SHO gives the whole case to its G.O, the state office of his

particular station. The state officer then becomes the in-charge of those particular substances and then he produces the case before the committee.

Then drug disposal committee has its meeting and during the meetings all the cases related to drug disposal were laid down before the committee for the final approval. The committee examines each and every case, committee look out every aspect that whether the case was properly made out or not? All the procedure should be followed or not as per the standing order and that the police duly complied with the relevant provision of NDPS or not? Then the committee fixes the date for the disposal of the narcotics.

Questions by participating judges:

Can we dispose of the narcotics substance without FSL report? Because many a times FSL report will take around six to seven months to disclose the identity of narcotic substance. Because there were judgments by High Court and Supreme Court that disposal should be made at the earliest.

- Mr Manohar Verma replied to the question: In M.P we dispose of the drug within in thirty days and FSL report is must without FSL report narcotics substance cannot be disposed of.

Some of these drugs are very expensive drugs, now instead of destroying it, why not the government should use it for medical purpose or some other purposes.

- Mr Manohar Verma replied to the question: Only opium is used for the making of drugs and it has been deposited safely instead of destroying. But rest of the narcotics substance will be disposed of as per the provisions of law.

Don't you think that the disposal procedure is quite complicated?

- Not that much complicated, but you have to prepare the report which is to be presented before the executive magistrate and under the guidance of drug disposal committee you can easily dispose of the narcotics substance.

Participating judge stated that: Hon'ble Supreme Court took the cognizance in the matter of Kishan Singh case and stated that huge quantity of narcotics were laying down in police malkhana and there might be chances that drugs finds its way toward the market again. Hence it should be dispose of at the earliest

Who gave the orders for the disposal of narcotic substance?

- As per the standing order it is executive magistrate. But sub section 2 of Section 52 - A talks about any magistrate not executive magistrate. This proportion is also cleared by M.P High court that not judicial magistrate but the executive magistrate will pass an order for the disposal of narcotic substances. This situation may differ from state to state.

Session 5

Grant of Bail in NDPS matters

Session fifth of the workshop was based on Hypothetical situation. The hypothetical situation was presented by two Participating judges from Delhi High court. One was arguing from the prosecution side and other was arguing on behalf of accused person. The hypothetical situation was based on grant of bail under Section 37 of NDPS Act.

Hypothetical Situation:

On 22.12.2014, at 1300 hours a secret information was received by □complainant Mr. X through some reliable source that 4 persons from Bihar are travelling in a Maruti Van No.UP-41-8741 and they are carrying a huge quantity of Hashish kept in the Maruti Van and they are going to deliver the consignment of hashish to Mr. A and Mr. B hailing from Haryana and they would come to take the delivery of the consignment on a motorcycle bearing registration No.HR-31-D-1282 at Railway Station, Julana, Haryana on 23.12.2010 at 8:00 A.M. and if a search is conducted, a huge quantity of hashish can be recovered.

The said information was reduced into writing and was put before Mr. Z Superintendent, who directed the Mr. X to constitute a team and take action according to law.

Based on the said information, Mr. X, along with the other officers of the NCB, reached Rohtak, Haryana at 11:45 P.M. The team halted at Rohtak for the intervening night of 22-23 December 2010.

On 23.12.2014, at about 7:00 a.m., the team reached the Railway Station, Julana, Haryana and mounted surveillance in the area. The team remained at that place till 11:00 A.M., but no vehicle/person as per the information appeared at the spot. The team returned to Rohtak.

On 24.12.2014, at 3:00 P.M., Mr. X received further information that the Maruti Van bearing registration No.UP-41-8741, which was to deliver the consignment of hashish at Julana, Rohtak on 23.12.2014, now will deliver the same consignment near Metro Station, Udyog Vihar, New Delhi at 6:00 P.M. on 24.12.2014.

The information was reduced into writing and the same was put up before Mr. Y, Superintendent on the spot, who directed the complainant for action.

Thereafter, a team of the NCB officials left Rohtak at 3:15 P.M. and reached Udyog Vihar Metro Station, New Delhi at about 5:45 P.M., where another team of DZU was already present. On reaching at the point, Mr. X approached some local personal and introduced himself after showing his identity card and the purpose of visit and requested them to join NCB team as independent witnesses for the search/seizure proceedings.

On his request, two persons, namely, Mr. P and Ms Q voluntarily agreed to join the NCB team for the search and seizure proceedings as witnesses and remained present for further proceedings. X then introduced his team to the panch witnesses and asked for their personal search, which they declined.

At 5:50 P.M., when the team was stationed in the area, one Maruti Van bearing registration No.UP-41-8741, with four persons F, G, H, I was seen by the NCB team, halted on the road side facing towards Punjabi Bagh Metro Station Udyog Vihar, New Delhi. After some time, A and B came on motorcycle bearing registration No.HR-31-D-1282 and stopped near the said Maruti Van. Both A and B got down from the motorcycle and started conversation with persons sitting inside the Maruti Van.

At this moment, the NCB team intercepted the van and the persons on the motorcycle. On being asked by the NCB officials, all persons disclosed their identity and the NCB officials also showed their identity.

A notice under Section 50 of the NDPS Act was issued to all A, B, F, G, H, I whereby they were to be subjected to about their personal search and the search of their vehicle to be conducted before the Magistrate or the Gazetted Officer, to which A, B, F, G, H, I declined and replied, in writing, on their respective notices that they do not want their presence before the learned Magistrate or the Gazetted Officer and further that they have no objection if the search of their own and their vehicle could be conducted by the NCB officials. They signed on the notices as a token of having seen and understood the same and allowed the officials to carry out their personal search as well as the search of their vehicle.

On the examination of the driver seat, the co-driver seat and the rear main seat of the Maruti Van, 66 polythene packets of some suspicious substance were found, which, on being opened and on being tested, was detected hashish. After recovery of the entire substance, the same was sealed with seal of NCB.

Submission on Behalf of Mr A:

- Mr A deserves to be enlarged on bail on the ground of parity because the co-accused, Mr. B was allegedly the pillion rider of the motorcycle. According to the Prosecution, the accused, who had gone to take the delivery of contraband, has already been enlarged on bail by the Court. It has further been stated that so far as Mr. A is concerned, nothing was recovered from him and, therefore, he also deserves to be enlarged on bail

Submission on Behalf of NCB

- Mr.A had been named by all the four co-accused persons, namely F, G, H, I and K in their voluntary statement recorded under Section 67 of the NDPS Act to the effect that the accused, Mr. Z, was to take the delivery of the contraband.
- Four co-accused persons were occupants of the Maruti Vehicle bearing the Registration No.HR-31D-1282, which was found to be containing 66 packets of hashish hidden in it.
- This fact is, prima facie, corroborated by the statement of Mr.A also which was recorded under Section 67 of the NDPS Act, wherein he had admitted that

it was he who was to receive the consignment. He has also exculpated, so far as Mr B is concerned, by saying that he had only accompanied him to take the delivery of the contraband.

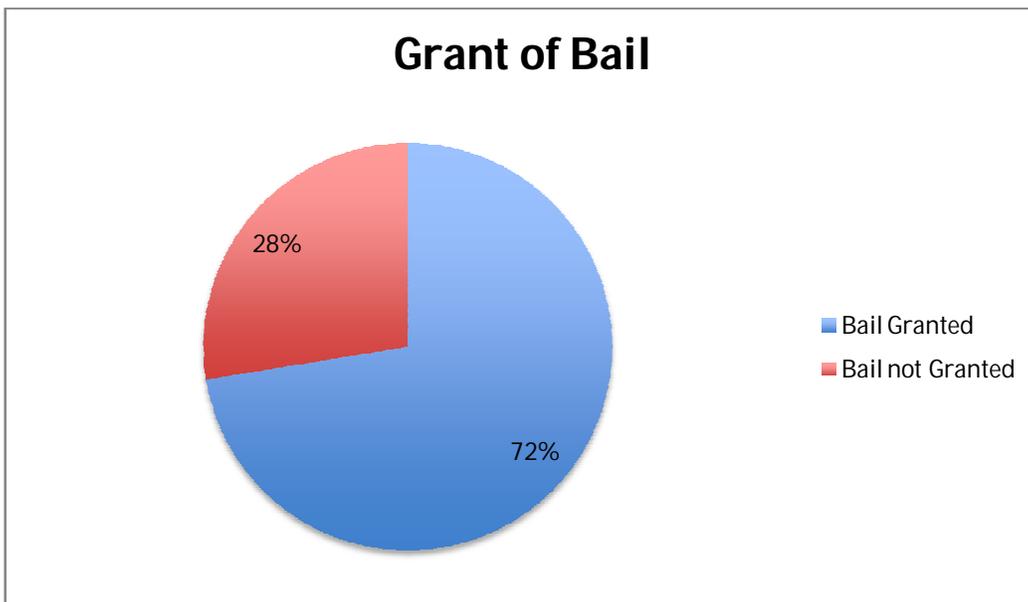
- Therefore, these two facts clearly show that so far as Mr. A is concerned, he was a part of gang which was dealing with the trading of contraband and, therefore, his case cannot be equated with that of Mr.B so as to give the petitioner the benefit of bail.

Point of Determination: Will you grant bail to Mr. A who had gone to take the delivery of contraband goods under the provision of NDPS Act?

Lastly based on the hypothetical situation 21 participating Judges rejected the bail application and only 8 participating judges allowed the application.

They pointed out two points:

- Language of the Act is very rigid in nature.
- An amendment is needed with regard to grant of bail under Section 37 of NDPS Act.



Hon'ble Justice Dharnidhar Jha started his discussion that Section 35 of NDPS Act talks about presumption of culpable mental state or reverse burden of proof. A similar provision was also there in many other Acts like Section 273 E of the Income Tax Act, Sections 30 and 29 from the Protection of Children from Sexual Offences Act. Likewise, Section 9C of the Excise Act and again Section 10 of Essential Commodity Act. So, these are all similar provision with regard to reverse burden and asking the courts to infer the presumption of culpable mental state.

For example, under Section 20 of Prevention of Corruption Act, at the present instance, if one could consider the sub-section one and two. Section one rather creates a very heavy burden of proof on accused to disprove the prove facts, and sub-section 2 of Section 20 asks the accused to disapprove the condition contained under Section 7 of the said Act. This is just the background with regard to NDPS Act.

In Evidence Act there are provisions, which have shifted the burden. So far as criminal matter is concerned the burden never shifts, it is on the prosecution to establish the charges and prove the facts. Hon'ble Justice Dharnidhar Jha then cited a case called K.M. Nanavati v. State of Maharashtra and illustrated that suppose Mr. A is accused and committed a murder so the prosecution has to establish all ingredient of Section 300. He also gave the example of Sections 106, 105, 114. So, these were the provisions relating to shifting of burden on the accused. So, it was not for the first time that Sections 35 and 54 were creating special burden on accused.

Now in order to appreciate the special burden or the presence of culpable mental state every offence is committed with some intent. There are four stages of commission of offences and are well known by all of us:

- Intention
- Preparation
- Attempt
- Commission

Burden of proof never shifts from the prosecution even in case of Section 35, the prosecution has to prove all the ingredients from Section 15 to 23 of the NDPS Act. Prosecution is required to prove that narcotic substances were imported/exported or possessed by the accused person in contravention of the NDPS Act. Unless the prosecution has not established these ingredients of the relevant sections of NDPS Act, there is no need to draw the inference under section 35 of the NDPS Act.

In Noor Aga case, the Supreme Court stated that: Section 35 of the Act provides for presumption of culpable mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 of the Act places the burden of proof on the accused with regard to the possession of the contraband to account for the same satisfactorily.

Sections 35 and 54 of the Act, raises presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof on his behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event of the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution, and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to be proved the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is based on the 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provision being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

The provisions of Sections 35 and 54 are not ultra vires of the Constitution of India, culpable mental state of the accused could be referred only when the prosecution has established the possession of the narcotics substance.

This judgement Noor Aga also considered the International Convention and the judgement is based mainly on the principle of innocence of an accused. The accused is presumed to be innocent and it was observed by the supreme court in Noor Aga case that it is a human right that he has to be presumed innocent.

Hon'ble justice Dharnidhar Jha also referred to various Supreme Court Judgements for the reference of Participating Judges:

- K M Nanawati v. State of Maharashtra [AIR 1962 Supreme Court 605 (1)]
- Sri Rabindra Kumar Dey v. State of Orissa
- Sher Singh v. State of Haryana [Criminal Appeal No. 1592 of 2011]
- Mohan Lal v. State of Rajasthan [Criminal Appeal No. 1393 of 2010]
- Noor Aga v. State of Punjab and Another [(2008) 16 SC Case 417]
- Abdul Rashid Ibrahim Mansuri v. State of Gujarat [Criminal Appeal No. 78 of 1992]

Hon'ble Justice Dharnidhar Jha gave the reference of Section 2 (y) of CrPC "the words and expressions used herein and not defined, but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code" So the Magistrate word appearing in Section 50 have to be construed as Judicial Magistrate. Section 52 A is very important because certification of the Magistrate under section 52 A is mandatory

So, while interpreting the presence of culpable mental state the compliance of the provision of NDPS Act is to be sought. We have to check first that whether charges were framed properly or not, and then the question of presumption of culpable mental state comes up because the punishment is very harsh. The Act has its own special purpose to curb the international drug trafficking.

Session 7

NDPS Courts: Evaluation of Evidence

Mr. M. Maharaja started the session and pointed out that anything the author/speaker uses to support their premises and claims is evidence. The standard of evidence or standard of proof used in a court vary from civil court to criminal courts. Civil trials are cases, which involve questions that are not criminal in nature. In other words, in a civil trial, you are seeking to resolve an issue of liability for wrongdoing.

But a criminal case involves a standard of evidence that is beyond a reasonable doubt. This requires a more stringent evaluation of evidence because in a criminal case incarceration of an individual is being dealt with as once put behind the bars, an individual's personal liberty is at stake and by no means, anybody can get back those days spent in jail.

In criminal cases as life and liberty of the accused are involved, a strict standard of proof is required as to the guilt of the accused. It is not the preponderance of probabilities that establishes the guilt of the accused. It is necessary that the evidence on record must prove it beyond reasonable doubt. A conviction cannot be based on the consideration that the prosecution story may be true. The accused can only be convicted if the court reaches the conclusion that the prosecution story must be true. Considered as a whole the prosecution story may appear to be true but between "may be true" and "must be true" there is a long distance and this distance has to be covered by legal, reliable and unimpeachable evidence. If the evidence on record establishes the truth of the charge and satisfies the reason and judgment of the court such evidence must be taken to have proved the charge beyond reasonable doubt thereby justifying conviction. The law always requires that the conviction should be certain and not doubtful. Otherwise, no man can be safe. The burden of proving the guilt of the accused is upon the prosecution. Upon adducing such a proof, if there is a real and reasonable doubt as to his guilt, the accused is entitled to the benefit of the same. The defence evidence does not come up for the consideration at all as the prosecution has not discharged its onus. The accused need not establish his case beyond reasonable doubt. It is enough if he shows the preponderance of probability is in favour. What is thus required of him is the standard of proof as required in civil case. Thus, where the accused person claims exemption under a general exception or a special exception

under Indian Penal Code it will be sufficient if he succeeds in proving preponderance of probabilities.

He further stated that in fact in case he pleads right of private defence, even if the evidence is read as a whole, both of the prosecution and the defence, leaves the court in doubt that the circumstances are such that the accused may have a right of private defence, the accused is entitled to that benefit of doubt.

Generally, evidence is considered to be of a factual nature and is distinguished from beliefs, assumptions and opinions. That is, evidence should be in the form of facts borne out of record. Mere assumption or opinion of any individual cannot be considered as an evidence.

He further added that firstly, while dealing with a case, following questions should be asked:

- Does the claim need an evidence to support it?
- What are the criteria for evaluating the evidence?
- How good is the evidence?

So, it must be seen and justified that the claim really need an evidence to support it and then look for the evidence. Then he asserted to the participating judges that : you must decide, before evaluating the evidence as to how you will determine its worth and by what standards. You can examine the evidence and decide either way i.e this is good or this is bad. Here it is not good or bad. For deciding it either way, you must be able to say rather you should say why? Yes, in your order you must set out in clear terms as to why and how you came to the conclusion that what amount to acceptable evidence or why you chose to reject it. Next comes, how good is the evidence? Here you must rather ask if it is “True” and when the party claims it absolute, you must ask the question, is it dependable.

Though, not exactly in strict terms, the following can be stated as kinds of evidence:

1, Intuition: this type of evidence is referred as “gut feeling.” Generally, this is not very dependable, in some cases, your intuition will tell you whether this evidence can be accepted or not.

2. Authorities: you should ensure that the authorities, on whom you depend upon should be an expert in the field.

3. Testimonials: testimonials are generally quoted statements from persons. You must look into as to what personal interest does the person making the testimony would have in the outcome of the case.
4. Personal experience and observations: beware of basing evaluation on your own limited experience. Our observations are always filtered through our own beliefs. So be careful.
5. Case studies and example: Again these often provide part of the picture. Each case would vary on the facts. So be clear on those variations.
6. Research Studied: Research generally has the advantage of being verified by the others in the field.

Evidence is the material on the basis of which the court can decide the case. Such evidence must be produced before the court so that it can establish or disprove the point of contention between the parties. The law of evidence is very crucial piece of legislation, which helps and guides the court in arriving at a conclusion with regard to the existence or non-existence of facts. The rules of evidence are necessary to bring out the truth in every case and the court should stick to such rules. Basically, the rules of evidence are required to draw a line between relevant and irrelevant facts. There will be great uncertainty with regard to relevant matters, if the court started depending upon the discretion of the judge in such matters in every case.

He further stated that Section 3 of the Indian Evidence Act, 1872 defines oral evidence and documentary evidence. The Act says that all those documents which are presented in the court for inspection are documentary evidence. Section 60 of the Act provides for the recording of oral evidence. The most fundamental principle of oral evidence is that it must be direct. All facts except the contents of documents or electronic records may be proved by oral evidence.

He further elaborated that evidence can also be classified into primary and secondary evidence. Primary evidence means that the document itself is produced for inspection. It is the best form of evidence. The evidence, which is produced in the absence of primary evidence, is known as secondary evidence. Secondary evidence is not admissible unless the primary evidence is proved to have been lost or destroyed. In absence of existence of facts to be proved by primary or secondary evidence, the document cannot be said to be proved.

Primary evidence speaks for itself and it does not need corroboration. In case of secondary evidence, supplementary evidence needs to be provided so as to strengthen

and confirm the existence of facts. The Supreme Court has given a vivid description of corroborative evidence in the case of *Rameshwar v. State of Rajasthan* where the Hon'ble Court stated that the corroborative evidence refers to additional evidence from an independent source, which connects the accused with the crime and confirms the complainant's testimony. The corroboration need not be direct evidence.

He further elaborated that direct evidence of a fact means which can be perceived by the senses and it is always primary in nature. It is the strongest form of evidence. On the other hand, hearsay evidence is no evidence. In *Saktar Singh v. State of Haryana*, the Supreme Court held that hearsay evidence means the statement of a witness not based on his personal knowledge but on what he heard from others and such evidence is not admissible.

However, there are few exceptional circumstances under which hearsay evidence is admissible. Statements of a person may be proved by a witness if the fact stated by such person surrounds the relevant facts. This is called doctrine of *res-gestae* under Section 6.

He further stated that the Indian Evidence Act, 1872 is dynamic in nature and has evolved with time. Two of the recent developments in the Act came with the Information Technology Act, 2000 and Criminal Law (Amendment) Act, 2013. The procedural laws are as important as the substantive laws. Sometimes simple procedures are neglected which causes problems in the later stage of the trial or also in the appellate stage. Small loopholes can change the entire scenario of the case. In the conclusion, procedural law is required for carving the path for proper functioning of the substantive laws. The law of evidence establishes a working structure for the courts from the grass root level. In some cases it is just a set of technical hurdles to buy time by the parties and delay justice; but these laws are framed for the sole purpose of filtering out the truth and serving justice to the people of the country.

Session 8

Determination of Drug Quantity by Courts: Issues and challenges

In session eight, total four hypothetical problems were distributed among the participating judges based on determination of drug quantity. The first problem was based on heroine, which was recovered form the possession of the accused on 23. 12. 2005. According to the FSL report, the purity of Heroin was only 1.4%. It was contended that the percentage content translated into weight of the heroin is the only parameter to be considered to determine whether the accused possessed small quantity or more than small quantity. According to the accused, if the percentage content of heroin in the recovered heroin is translated into actual weight it would come to 14 grams which is slightly above the small quantity and certainly not commercial quantity. Decide. Would there be any change in the answer if the recovery was effected on 19.12 2012?

Discussing upon the hypothetical problem started when Hon'ble Justice Mr. Dharnidhar Jha stated that "opium" means the coagulated juice of the opium poppy; and any mixture, with or without any neutral material, of that coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 percent of morphine. He further suggested to take the reference of Section 2 (e) and stated that all preparations containing more than 0.2 percent of morphine or containing any diacetylmorphine; so the limit is 0.2 percent and if it is exceeding 0.2 percent then it is defined as narcotics substance under NDPS Act.

Afterwards it was discussed that after 2009 notification, the entire mixture should be considered and not just the purity of the content. Hon'ble Justice Mr. Dharnidhar Jha suggested that FSL report plays a crucial role while determining the drug quantity. In addition to that we have to check the small quantity, commercial quantity of the drug as per the notification provided by Central Government.

Another problem was circulated among the participating judges based on the quantity of drug and provision of search and seizure under the NDPS Act. Afterward Hon'ble Justice Mr. Dharnidhar Jha requested the participating judges to give their opinions.

One of the participating judge stated that:

Accused is convicted under Section 20 (b) (ii) (b) of the NDPS Act.

PW – 1 secretary of Fulertol bazar is supported to prosecution

PW – 4 stated that he seized the ganja in possession of the accused person.

PW – 1 stated that the police in his presence weighted the ganja and seized the same and found 6 kg of ganja.

Henceforth the accused person should be convicted.

Another participating judge pointed out that it becomes very clear that if the accused is found in the possession of contraband article, then he is presumed to have committed the offence under the relevant provisions of the Act. In the instant case, the provision of Section 50 of NDPS Act were not been complied by I.O. which is evident from the evidence adduced by the prosecution that accused was not informed about his right to be searched before the magistrate or gazetted officers. As a result the accused should be acquitted.

Hon'ble Justice Mr. Dharnidhar Jha stated there was no need for the compliance of Section 50 because it was not the personal recovery. Hence it will not attract the Section 50 of the NDPS Act.

Session 9

Critical Analysis of Proportionate Sentencing Policy for Drug offenders

Mr. Anand Grover stated that its always a great pleasure to addresses judges who are actually expert, and pointed out that the judges who have actually worked for the last five to six years know more about it and that he started his talk about proportionatesentencing policy.

Concept of proportionality:

- Article 29(2), UDHR:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just

requirements of morality, public order and the general welfare in a democratic society.”

He stated that proportionality is not applicable only to criminal law rather it is a universally applicable say, for example:

Civil Law: Evictions of persons

Common law: Forcible quarantine

Criminal law: Sentencing

So, the principle of proportionality has universal application.

Mr. Grover while addressing the participating judges cited the general comment of international covenant i.e. General Comment No. 27 on freedom of movement under Article 12, ICCPR, wherein the HRC held:

“Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected”

In General Comment No. 31, the Committee noted:

“Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”

He cited a Canadian case wherein the whole jurisprudence was developed. The matter of proportionality was mainly raised before the constitutional bench and the question which should be asked is:

- i) Is the measure adopted fair, just and non- arbitrary?
- ii) Is it rationally relatable to the object sought to be achieved?(which is the principle in Article 14)
- iii) Is it carefully designed to achieve the objective?
- iv) Do the means employed infringe fundamental rights as little as possible? (Is there a lesser intrusive manner to achieve the object? (The principle of least restrictive alternative))
- v) Is there a balance between the rights impaired and the objective that it intends to achieve?

So he stated that this is the notion of proportionality and let us see how it is incorporated in our law. Justice Bhagwati on the principle of proportionality had said that it is not only the part of rule of law but it is also implicit in Article 14, 19, and 21; so, punishment which is disproportionate is arbitrary.

He further pointed out that in his opinion, NDPS Act is the most draconian piece of legislation, and there is a need to think about it. Prior to NDPS Act, drug was not illegal it was licenced under Opium Act. But, now the principle of proportionality is also implicit in some of the provisions of IPC and CrPC for example:

- Section 63, Indian Penal Code, 1860 - fine imposed must *not be excessive*.
- Section 375, Cr PC, 1973 - “only *extent or legality of the sentence* in case of guilty plea.”
- Section 385 (2), Cr PC, talks of appeals limited only to the “*extent and legality of the sentence*” if so framed.
- Section 385(3), Cr PC talks of appeal only on the ground of *severity of the sentence*.

Thus, the criminal law lays equal importance to sentencing.

Now there are three international conventions based on which the NDPS Act was designed:

- Single Convention on Narcotic Drugs, 1961 (as amended by 1972 Protocol)
- Convention on Psychotropic Substances, 1971
- Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances, 1988

He further elaborated upon what they say about proportionality:

- Preamble underscores:
 - “*...serious evil for the individual ...fraught with social and economic danger to mankind*” (1961 Convention)
 - “*...rigorous measures necessary to restrict use*” (1971 Convention)
 - “*...poses a serious threat to the health and welfare of human beings*” (1988 Convention)
- Allude to offences that are:
 - *serious*
 - *not sufficiently serious*

- *appropriate cases of a minor nature*
- *factual circumstances which make commission of offence particularly serious*

The international convention says that these must be recognised within the country's constitution, so the ambit cannot lie outside the constitution and in such a case it can't be made the law. Subject to the concepts, principles and limitations of domestic law, the Constitution and legal system which incorporate proportionality, States can impose "*more strict or severe measures*" if considered desirable or necessary for prevention and suppression of illicit drugs.

Mr. Grover furthered his discussion based on amendment to NDPS Act in the year 1989 which made punishment more harsher.

- **Mandatory minimum** sentence of 10 years and fine of Rs 1 lakh for some offences.
- Restrictions on bail (Section 37)
- Bar on suspension, commutation or remission of sentences (Section 32A)
- Mandatory death penalty for repeat conviction for specific crimes (Section 31A)
- Forfeiture of property of offenders (Chapter VA)

Now the question arises whether these are actually proportionate to the offence, whether these are required in a society which is democratic and lastly is it achieving its objective or not. He pointed out that these all questions have to be asked. Now the supreme Court started noticing the arbitrary nature of the Act. Mr. Grover then cited few Supreme Court Judgements:

In *Gaunter Edwin Kircher v. State of Goa* [1993 Cri LJ 1485], it was held that possession of <5 gm heroin with paraphernalia for smoking intended for personal use, not sale.

In *Raju v. State of Kerala* [AIR 1999 SC 2139], where appellant was sentenced to 10 years & Rs. 1 lakh fine for possession of *100 mg heroin* worth Rs. 25. Absence of withdrawal seen as evidence that accused was not drug dependent and Supreme Court held such small quantity could not have been meant for sale but for personal consumption.

So the Supreme Court noticed that there is a problem and we have to change the law so changes were brought in. They revised sentencing structure to make *punishment dependent on the quantity of drugs involved*.

Quantity determines:

- ‘User’ or ‘trafficker’
- Punishment including death sentence
- Alternatives to punishment under Sections 39 (Probation) & 64A (Immunity in case of treatment)

Commercial & Small quantity as defined in Section 2 (vii) & 2(xxiii); third category – “intermediate”

But again narrowed application of strict bail and death penalty provisions and widened provisions for treatment for drug dependence have been seen. In addition to that he also talked about the two Notification passed by Central Government in the year 2001 and 2009.

There is wide variation in punishment also and how it is operating for intermediate quantities.

- Small: Maximum 1 year imprisonment; Rs 10, 000 fine
- Commercial: Maximum 20 years imprisonment; Rs 2 lakh fine
- Intermediate: Maximum 10 years imprisonment; Rs 1 lakh fine

Mr. Grover further stated about the independent examination of report give by FSL which is very rarely challenged. Supreme Court has opined that second opinion won't be allowed unless it is really required, but if there are problems with the findings of report, it is hardly being challenged and everything is based on quantity now. So, the question arises that: what principle are being followed for the determination of quantity be it small or commercial? On what basis are we following it? And there is hardly any discussions on these issues. Moving further looking at offence under NDPS Act he pointed out that:

- Cultivation, gathering, production possession, sell, purchase, transport, import of coca plant - 10 years; Rs 1 lakh
- Embezzlement of licitly cultivated opium - 20 years;Rs2 lakhs
- Financing illicit traffic or harbouring offenders –20years;Rs 2 lakhs

Lastly he ended his presentation by quoting:

“An offence relating to narcotic drugs or psychotropic substances is more heinous than culpable homicide because the latter affects only an individual while the former affects & leaves its deleterious impact on the society, besides shattering the economy of the nation.” Union of India v Kuldeep Singh[(2004) 2 SCC 590]

Mr. Rajeev Awasthi started his discussion stating that when we talk of proportionality and the significance of new emerging amendments; India is the only country where hardly there is any innovative development as far as acting legislations are concerned, its implementation and its adverse affect on the society.

There are two ways basically when we talk on this topic.He stated that the Hon’ble Judges who are sitting here have no power to reduce the sentence in a given situation and facts of the case because the Act does not give that leverages, and in such a big country, no system is working and where some body is working on such issues. Like for reforms in USA there is a United State Reform Commission, Sentencing Commission.

In USA, they have small Acts, which basically give some powers to the district judges to sentence minimum-to-minimum, and less than minimum or more than minimum on the given situation and facts. So, the problem is that we don’t have any system where laws are reviewed or proposals are being made.

In NDPS matter, most of the cases are planted and innocent persons are put behind the bar. So, the Court finds its own way with the help of Sections 50, 43, 42 of the NDPS Act. The courtshave clearly stated that strict compliance is necessary otherwise it will hamper the whole intention and purpose of NDPS Act.

Now, again question arises as to how well we have equipped our investigation, he stated that we are a failure as far as scientific investigation are concerns and NDPS is the Act which is completely based on Scientific investigation and the CFL Reports are always contrary. With this Mr. Awasthi Concluded his discussion.

One of the participating judges stated that in Union of India v. Kuldeep Singh it was correctly pointed out that *an offence relating to narcotic drugs or psychotropic substances is more heinous than culpable homicide because the latter affects only*

an individual while the former affects & leaves its deleterious impact on the society. Because it leads very hazardous affects on the society; another participating judge stated that proportionality is already there in the NDPS Act. Another judge from Delhi stated that Sir in my opinion it is not the sentencing or the law part which will have impact, it is the scientific investigation, which is faulty because that is the basis on which the sentence is going to be decided.

Mr. Anand Grover stated that the most important thing is investigation under NDPS Act. Information was received but if we look the information which was unidentical. Strict sentencing does achieve the purpose to some extent, but if crimes are made lucrative because most of the drug are going to be used for medical purposes and hence has to be made available. The difference of price between legitimate opium and the gray market is huge and thatswhy people will indulge in criminal activity. The answer is not to criminalize but to educate.

Session 10

Irregularity in investigation vis-à-vis Court proceedings

Dr. N. S. Parmar stated that narcotic drugs can be classified on the basis of their origin natural opium, cannabis & cocaine, semi synthetic diacetylmorphine and synthetic fentanyl, methadone, pethidine. He described that there is a plant of the species *Papaver somniferum L.* *It is an annual plant growing in many countries around the world with moderate climate. The plant grows to 2 to 5 feet in height and It has white to red flower and round capsule. The plant is also known as opium poppy.*

Dr. Parmar stated that after the petals fall from the poppy, the pod, which is about the size of a golf ball, is lanced, and the opium latex is exuded. Initially the latex is pink; later it changes to black. The latex is scraped from pods with wide, curved blade and placed into a container. This dried latex or coagulated juice is called Opium. Opium contains various organic and inorganic substances like alkaloids, acids, protein, sugar and inorganic elements etc., about 40 opium alkaloids have been known in the opium out of which 5 are major. They are morphine, codeine, thebaine, papavarine and narcotine. The first three alkaloids are covered under NDPS Act. Morphine is the

alkaloid, which determines the identity and quality of opium. It should be more than 0.2% in the sample to be considered as opium as per NDPS Act. Since it is obtained from the natural plant, the amount of these alkaloids may differ from crop to crop and area to area. In Indian continent, the percentage of Morphine ranges from 9 to 14 %.

He further describes that there are various types of opium: raw opium, prepared opium and opium doss. The drugs immediately derived from OPIUM, such as MORPHINE, CODIENE & THEBAINE ; are generally applied to other (including synthetic) compound with comparably potent pain- relieving activity. He then described the type of cannabils plants: Herbal Products (Marijuana) Bhang, Ganja, Cannabis resin Products, Charas (Hashish), Liquid Cannabis.

Dr. Parmar also discussed about Lysergic acid diethylamide (LSD) and stated that it is the most potent hallucinogen known to science, as well as the highly studied one. LSD was originally synthesized in 1938 by Dr. Albert Hoffman. However, its hallucinogenic effects were unknown until 1943 when Hoffman accidentally consumed some LSD. It was later found that an oral dose of as little as 25 micrograms, equal in weight to a couple grains of salt, is capable of producing rich and vivid hallucinations.

Some chemicals are frequently used in the manufacture of illicit narcotic drugs and psychotropic substances therefore Indian Government controls these substances under NDPS order 1993. This order issued under Section 9 A of the NDPS Act 1985 requires manufacturers, distributors, sellers , importers, exporters and consumers of specified controlled substances to maintain records and file quarterly returns with Narcotic Control Bureau.

All these substances and chemicals which are used to manufacture illicit Narcotic drugs and psychotropic substances are referred to as PRECURSORS.

Precursors covered – Acetic anhydride, N-Acetyl anthranilic Acid, Ephedrine, Pseudoephedrine anthranilic acid.

Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act. No. 16 of 2014) provides for relaxed restrictions placed by the Act on Essential Narcotic Drugs (*Morphine, Fentanyl and Methadone*) to make them more accessible for use in pain relief and care and to improve treatment and care for people dependent on

drugs. Dr. Parmar also briefly discussed about date rape drug. These are drugs that sometimes are used to assist a sexual assault, sexual intercourse, rape and attempted rape. These drugs are powerful and dangerous. They can be slipped in your drink when you are not looking. The drugs often have no colour, smell or taste. These drugs make a person weak, confused and unable to refuse sex or defend oneself. Such person may not remember what happened while he or she was drugged. The drug can be used both on male or female.

In FSL various types of samples related to NDPS Act are received for examination. These samples may be Narcotic drugs or Psychotropic substances and generally street samples are received. These street samples have no specific colour and state because they are not pure compounds, they are adulterated with inert and/or active adulterants. Inert adulterants are neutral compounds; they are added just to increase mass of material, while active adulterants are added to increase the effect of the psychotropic substance. e.g. Methaqualone is cut with diazepam .

All the above samples are examined in FSL with utmost care and as per instructions and guidelines issued by DFS, NCB and INCB.

The analyses performed are Physical, Chemical, Microscopic, Chromatographic and modern analytical methods.

- In FSL's, samples related to NDPS are examined as per guidelines issued by DFS and NCB and as per their instructions every sample is examined using two independent parameters to rule out any mistake.
- In FSL, both qualitative and quantitative examinations are conducted. The report is prepared by FSL after careful examination of the samples.
- The report provided by FSL is very concise and shows results obtained after extensive examination of samples using various techniques.
- When it is produced before the honorable court, defense lawyer tries to confuse the court by challenging the techniques used and tries to misinterpret the opinion to derive benefit.

Dr. N.S. Parmar explaining to the participating judges that it is directed in NDPS Act that the sample of narcotic drug must be sent for testing in concerned FSL within 72 hour of seizure. If it is not sent within time limit, the reason must be explained in the case diary.

Session 11

Analysis and Evaluation of NDPS Amendment Act, 2014

Ms Tripti Tandon started the discussion stating that what is interesting to note is that for over hundred years we had a well established system to regulate these substances and regulating substances like opium which was both under direct and indirect control of government. But what is more interesting is that these were a house hold commodity and the distinction that we talk of now between medical use and non medical or social was actually missing because opium is kept in the house hold, and if anyone has any trouble it was just given to them.

She stated that you would be surprised to know that heroine came in the market as a medical drug as something which is to be used for cough and throat pain relief and patient loved it they found relief very quickly, and it was only after more research done and people started talking about it and subsequently banning it.

Now basically our drug laws are based on international agreement; there are three drug convention that India has signed and what is important to note that these convention don't just talk about controlling drugs and restricting there use, rather the principle behind this is to make sure that drugs which are essential for medical use both narcotic and psychotropic that should be made available and medical availability must be there and what is to be controlled is the non-medical use and non-medical availability.

Importantly, both the International Narcotic Control Bureau and the World Health Organization have often guided many countries including India that please do not put undue restriction on the laws that impede medical availability of these drugs.

Importantly, Article 47 talks about that “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, *the State shall endeavor to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drink and of drugs which are injurious to health.*” Therefore, Article 47 is allowing narcotics and other intoxicated drug for medical purposes and prohibitions are based

on fact of being injurious to health. So, health has been a guiding factor both in international law as well as our Constitution.

If we examine closely the Seventh Schedule or the division of law making power between the central and the state, one will find that parliament and state legislature are still competent to enact laws around these drug which do not take on the colour of prohibition.

Under NDPS Act, we do have exceptions under Section 8 (c) for medical and scientific purposes and it talks about: except for medical or scientific purposes and in the manner and to the extent provided by the provisions of the Act or rules or orders made thereunder and, in a case where any such provision imposes any requirement by way of license/ permit/ authorisation, in accordance with terms & conditions of such license/permit/authorisation”Central and State Governments may “permit, control and regulate” through Rules (u/s 9 & 10).

But nor medical use is defined neither the scientific use is defined under NDPS Act in a manner upto the extent allowed either by the Act or by the rules or orders and in a case where there is a license in accordance with the terms and conditions.

Despite this allowance under law, still morphine and other substance are not available. The problem lies in our law being very complicated; as same drug falls under several overlapping categories and this is because our NDPS Act is the mixture of old opium laws introduced by the British. The second reason was the division of rule making powers, so narcotic substances being used for medical purposes are entirely in the hands of Central Government and for manufactured drugs some were regulated by Central Government and some were regulated by the State under state NDPA rule.

There is huge inconsistency between States relating to

- Rules for ‘import inter-state’ and ‘export inter-state’
- Some States - no Rules, no access
- Others – ‘quota system’ for international reporting requirements

Different license from different authority was a major problem, which needs to be addressed. She further stated that why do we have different export and import permits between states.

She further talked about the NDPS (Amendment) Act 2014 :

- New category of “*essential narcotic drugs*”, which the Central Government can notify for medical and scientific use (sec 2(viia))

- Widening the object to include ‘promoting the medical and scientific use of narcotic drugs and psychotropic substances’ (Section 4).
- Providing for harm reduction and regulation of drug dependence treatment, by incorporating the words “*management*” and “*recognize and approve*” (Section 71).
- Making the death penalty discretionary for a subsequent offence involving certain quantity of drugs (Section 31A).
- Enhanced punishment for small quantity offences from maximum 6 months to 1 year imprisonment.

After the Amendment, the Finance Minister stated that public health is furthered not only by preventing the abuse of drugs, but also by making them adequately available for the purpose for which they are meant; I am happy to announce that the Indian Parliament has very recently passed amendments to the principal drug enactment in the country which will enable uniform and simplified rules to be notified by the Central Government, leading to removal of the regulatory barriers that have been acting as hindrances to availability of such drugs for pain relief. Such amendments were drafted with the active participation of civil society and the palliative care community. With these amendments, our drug enactment incorporates the ‘Principle of Balance’ espoused by the UN drug control Conventions.

Further, Ms. Tripti Tandon stated that rules are also framed with regard to essential narcotic drug; **NDPS (Third Amendment) Rules** notified on 5th May 2015 vide **G.S.R 359(E)** under Sections 9 and 76

- Manufacturers of ENDS: require NDPS license issued by State Government for manufactured drug + license issued by State Drug Controller.
- Chemists to stock and sell ENDS: require NDPS license from competent authority under State NDPS Rules; can supply on prescription only.
- Doctors, trained in pain relief or opioid dependence may possess ENDS except Methadone in specified quantities for use in their practice (eg: 0.5 gm of morphine) OR may possess higher quantity after obtaining approval from State Drug Controller.

Issue that may come up before the Hon’ble court after the END rules:

Section 80 – NDPS Act applies *in addition to* Drugs and Cosmetics Act, 1940 (DCA) alongwith Drugs and Cosmetics Rules, 1945 (DCR)Schedules under DCR (*H, HI, K, X*), Licenses and conditions imposed under DCR. Because for some drugs NDPS Act clearly stated that it was rule and it is governed under DCR Act. Rules 65A and 66, NDPS Rules, 1985 – sale, purchase, use, consumption and possession of psychotropic substances in accordance with DCR, now the question arises that if there is violationof even a minor provision of Drug and Cosmetics license then what would happen, because Punjab is facing the same problem now.

Secondly, at what stage does the exception under Section 8(c) comes into operation:

- During interception: person holding license cannot be arrested?
- During bail: reason to believe under Section 37 that no offence is committed?
- During prosecution: person holding license can rebut presumption of culpable mental state under Section 35?
- During trial: person is able to account for possessing satisfactorily under Section 54?

She stated that because we have seen that there is no authoritative judgment passed by the Supreme Court in this regard. In some cases, they give bail and in some cases even if license is there, still they don't allow the bail application and because of this our medical community is still living under fear because of the harsh provision of NDPS Act.

Participating judge asked a question that whether this amendment is notified or not? Ms. Tandon replied to his question and stated that yes it was notified in the year 2014. But rules have come now for essential narcotics drug and are also notified.

Mr. Anand Grover adding to the discussion pointed out that, people are dying very painful death because of non-availability of narcotics drugs that are essential for medical purposes. These drugs should be used for medical purposes.

In Goa, they require the physical presence of the patient before the Excise Commissioner to take a license and then go with his prescription to the cancer center and take the medicine.

Another question asked by the participating judge was, that what is the role of judges now, because we cannot go beyond the provisions of law. Mr. Anand Grover replied that police differently interpreted the law and even doctors are also arrested. There are

instances when people have legitimate license but still they are arrested with no cause of action. It is the duty of the court to protect the innocent person.

Session 12

Issue of Forfeiture of illegally acquired property

Hon'ble Justice K. Abram Mathew welcomed all the participants and stated that abuse and addiction of NDPS has seen rise and fall when we considered the history. It is necessary for the security of the nation to control the illicit trafficking of narcotics substances. He stated that but our topic is issue of forfeiture and illegal acquire property and it comes under chapter five, so, how we are concerned with it and one may just wonder that why we are discussing this topic because is there any provision under chapter five which deals with illegallyacquired property with which judges are directly concerned with any provisions or any offences. He asked can anyone point out any offence with regard to illegally acquired property and stated that you may not be familiar with the provision, because you haven't heard it on any occasion while dealing with such a case?

He further pointed out that there is only one offence that is 68 Y, that is the only Section which creates an offence under this chapter. What is the offence, *the section clearly stated that Punishment for acquiring property in relation to which proceedings have been taken, under this Chapter:-Any person who knowingly acquired, by any mode whatsoever, any property in relation to which proceedings are pending under this Chapter shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to fifty thousand rupees.*

If proceedings are already initiated and someone acquires that property then it becomes an offence, which is punishable. So this is the only section which creates an offence under this chapter, but the trial comes to the special court constituted under NDPS Act.

He stated that fortunately and unfortunately no case has been reported so far, then why should we discuss this topic that is the question. The answer is, it is the totality that has to be taken into consideration when we deal with the topic see if you want to understand the other provision in a better manner you must understand the scheme of

the Act. Not only the provision with which you are directly concerned with but one must have some working knowledge of all the other provisions. Otherwise, one would not be able to interpret the provisions of the Act and that is the importance of the topic we are dealing with today. He further stated that one must know the scheme of the Act and must know the provisions of the Act though one may not have the opportunity to deal with any case with regard to Section 68 Y and specially the other Section under Chapter five A.

This chapter was introduced in the year 1989 few year after the Act came into force. The same chapter was also introduced in Wild Life Protection Act, 1972 except one provision that is Section 58. Chapter 5A of NDPS Act deals with the forfeiture of illegal acquired property. He further stated that Article 5 of the UN Conventions, 1988 requires that every state shall take measures to identify, trace, and freeze or seize proceeds, property, instruments or any other things in accordance with the domestic laws of the state.

Where any person is accused of any offence under this Act, it shall be open to the court trying him, to pass an order that all or any of the properties, movable or immovable or both, belonging to him, shall, during the period of such trial, be attached, and where such trial ends in conviction the property so attached shall be liable to forfeiture to the extent of illegally acquired assets by acting in contravention of the provisions of this Act.

Mr Ramesh cited one question before the participating judges that: let us take that the vehicle has been used for the commission of the crime, and if it has been seized, and produced before the court or it has been intimated to the court, what will be the provision i.e. whether we will be dealing with Chapter 5A under the Act or any other normal provisions will follow.

One of the participating judge stated that we should take the reference of Section 60 of NDPS Act.

Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.

(2)Any narcoticdrug or psychotropic substance or controlled substances lawfullyproduced, imported inter-State, exported inter-State, imported into India, transported,

manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substances which is liable to confiscation under sub-section (1) and their receptacles, packages and coverings in which any narcotic drug or psychotropic substance or controlled substances, materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance or controlled substance, or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.

Mr. Ramesh stated that if at the end of the trial, it is produced, whether any interim custody was granted. If no confiscation proceeding have been initiated or forfeiture proceeding have been initiated then can we consider it to be returned or whether appropriate order under 451 can be passed. Secondly, if it is produced before the court but if it intimated during the course of investigation then whether 457 can be invoked. Therefore, not in all circumstances this forfeiture comes into play if the competent authority decides to pass an order not only the property concerned, but also property acquired, the wealth acquired, whether movable or immovable those things after proceeding under the statute namely, show cause notice to the person who had committed the crime.

He further cited *Aslam Mohd. Merchant v Competent authority* where Hon'ble Supreme Court held that " show cause notice is essential to fulfill the requirements of natural justice and a proper application of mind on the part of the competent authority is imperative before issuance of show cause notice. If the proceedings were not initiated validly, the competent authority did not derive any jurisdiction to enter into the merit of the matter. "

He further added that while dealing with the application for interim custody what issued should be addressed and how it should be addressed is the most crucial thing. Hon'ble justice K Abraham Mathew stated that confiscation and forfeiture are two

different things. Confiscation is the part of court while forfeiture is a part of appellant authority. Both are different in nature.

He further stated that the forfeiture of property is entirely dependent upon the investigation carried out by the investigating officer for tracing and identifying the properties. The investigating officer has to carry out the following activities: To trace and identify the illegally acquired properties of the accused and his relatives and associates, to collect some evidence which could establish that the properties are prima facie illegal. To carry out further investigation and collect more evidence to support the prima facie findings that the properties are illegally acquired properties.

He further stated that the process of financial investigation has the following stages: the trigger, tracing and identifying, seizing and freezing and examination of source.

He further stated that in *Shri Zahid Parwez v. Union of India*, the Hon'ble Delhi High Court held that "authority shall be entitled to pass order of forfeiture of property, if it has reason to believe that properties are illegally acquired properties". Professor S.P.Shrivastava concluded the session by asking if anyone has question or any query, since no one responded, the session was concluded.

Session 13

Protection of witnesses: Concept and Concerns

Hon'ble Justice S.J. Mukhopadhaya started the discussion based on witnesses' protection concept and concerns and opined that I think most of you have already experienced what sort of protection does witnesses required.

He further stated that examination and cross-examination of witness play a very crucial role and many of you may have passed orders for protection of witnesses. He opined that instead of deliberating on the issue it would be more desirable to have interaction between the participating judges who have the experienced in the field. He firstly requested Mr. S. P. Shrivastava to open the session by deliberating on the issue

so that latter on we can develop the concept and get suggestions form the participating judges.

Professor Shrivastava stated that in the court, witnesses are the ears and eyes of the courts, we see through witnesses, we decide the cases based on the witnesses, so the importance of witnesses cannot be undermined. Now, the important question is how to ensure that the witnesses are protected. Witness protection is very much important for the independence of judiciary.

So, very huge responsibility lies on the judiciary to ensure that witnesses should be protected and, if they are not protected, then independence of judiciary is at peril. We cannot ensure that judiciary will be able to function in a proper way without protection of witnesses. We should ensure that witnesses are protected; they should not be exposed to the threat, if they need police protection, it must be given.

Hon'ble Justice S. J. Mukhopadhaya stated that protection of witnesses is known to all the participating judges. The Black Dictionary says "a witness is a person who has a knowledge of the event", so witness is the person who testify the incidence, now the question is what sort of protection is required. Before that one should know what are the threats, what sort of threat is common in a case before the court and many of you have experienced also.

A witness, who is competent but there is nothing in law to protect him from being examined as the witness. Have you seen any sort of direct and indirect threat while they are deposing before the court? So is there any threat to the witness or not? Now witness is deposing in the way lawyer of the defense is making such a comment which is actually threatening in nature can it be stated to be a threat to the witness or not?

Hon'ble Justice S. J. Mukhopadhaya further deliberated upon the perception of threat. He stated that the perception of threat is not limited to the physical threat, but we should also lookout the concept of mental threat, as witnesses were facing same mental threat while deposing before the court and disclosing their name, fathers name and home address in front of accused person in the given case. Hon'ble Justice S. J. Mukhopadhaya suggested that e-court is the best way to protect the witnesses, because in e-court there is a separate box for the witness and separate box for accused and lawyers are present before the court.

One of the participating judge stated that when the court puts a question it couldn't be a threat to the witnesses in any way. Court is always advising both the defense and the prosecution to take an independent decision.

Hon'ble Justice S.J Mukhopadhaya again asked a question that what type of threat faced by witnesses, if accused is released on bail? Is there any threat?

One of the participating judge replied to the question and added that the accused is not expected to create threat for the witness at the time of the trial and if he poses threats on the witness it mean he is violating the condition imposed on him while he was on bail. If he is given bail, then we can cancel his bail and we can remand him to the judicial custody.

What are the protection given to the witness under Sections 151 and 152 of the Indian Evidence Act? Section 151 clearly states that the Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Further Section 152 states that the Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

This is the direct protection given under Indian Evidence Act for the protection of witnesses. So, there are protections under the law and therefore please do not leave the lawyers to ask any sort of irrelevant questions. Hon'ble Justice S. J. Mukopadhaya concluded that the protection of witnesses lies on the judiciary and it is the duty of the court to protect them.

Session 14

Framing of charges and issues of Remand under NPDS courts

Professor S.P. Shrivastava started the discussion stating that framing of charge particularly after 2001 has become very important, because earlier this sentencing was not linked with the amount; any weight of the substance, if recovered punishment was almost the same. Now, the concept of small quantity, intermediary quantity and

commercial quantity is incorporated in the NDPS Act. So, it becomes very evident and important that under which section charge should be framed. In Amar Singh case the Hon'ble Supreme Court clearly stated that the report of FSL is not binding.

Section 29 of NDPS Act is very important because statements recorded under section 67 of the NDPS Act are also very relevant. Whether at the time of framing of charges we can rely upon the Section 67 of the Act or not? Because in Noor Aga case the Supreme Court held that the "*statement recorded before Custom and Excise officer, they are practically performing the function of police office and therefore the statement will be barred by evidence Act.*" Professor Shrivastava further suggested that sincere application of mind is required at the time of framing of charges under NDPS Act.

Hon'ble Justice S. J. Mukopadhaya stated that in Umar Abdul case, the Hon'ble Court held that it is well settled that at the stage of framing charge the court is not expected to go deep into the probative value of the materials on record. If on the basis of the materials on record the court could come to the conclusion that the accused would have committed the offence the court is obliged to frame the charge and proceed to the trial.

In another case called State of Maharashtra & ors. v. Som Nath Thapa & ors. [1996 (4) SCC 659], the Hon'ble Supreme Court held that: "If on the basis of materials on record a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

Afterward the hypothetical problem was circulated among the participation Judges the facts of the said problem was stipulated below:

The prosecution's case is that on 15.12.2005, a secret information was received by Sub-Inspector Shanti Swaroop that four pahari boys, whose leader was Pratap, would be coming from Manali, carrying with them charas in large quantities and would be delivering the same between 6.00 p.m. to 7.00 p.m. that day itself at Thomson Road, Ajmeri Gate near the Metro Railway Station to one "Israeli youth..". It is further

alleged that at 6.30 p.m., four boys were seen coming from Ajmeri Gate towards Thomson Road and that each of them was carrying a bag. One of them, whose name was later on disclosed as Pratap, handed over a bag to a foreigner who was later on found to be a national of Israel and whose name was Yaniv Kohlani. Immediately on delivery of the said bag, the four boys and Yaniv Kohlani as well as the petitioner herein (Eran Eliav) were apprehended. The petitioner is also from Israel. His name figures only towards the end of recording of the recovery proceedings and it is indicated that his role was confined to his being present on the spot.

Point of determination:

- Whether Eran Eliav can be charged under NDPS Act? If so kindly frame appropriate charge against Eran Eliav.

Thereafter Hon'ble Justice S. J. Mukhopadhaya requested all the participating judges to frame the charges under NDPS Act based on the above situation. Thereafter, based on the above hypothetical situation 21 judges decided that charge should be framed against Eran Eliav and 08 judges were in the opinion that charge should not be framed against Eran Eliav.