

Report on P-820 : The National Conference of the Presiding Officers of NDPS

Courts scheduled between July 25-27, 2014.

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The first academic programme of the NJA of this academic year 2014-15 is P-820, the National Conference of the Presiding Officers of NDPS courts scheduled between July 25-27, 2014. 29 participants nominated by the different high courts attended the conference. The first session commenced at 10:00 am with introductory remarks by Prof. S.P. Srivastava, Professor, NJA. In the introductory remarks Prof. Srivastava explained the basic features of the conferences in the NJA and about the process of learning in the NJA in which there is no teaching no preaching and no training. Prof. Srivastava called upon the judges to participate in the discussion and gain more knowledge. He also made an appeal to the participants to understand the basic concepts more deeply and extend the frontiers of their knowledge. After introductory remarks by Prof. Srivastava, the resource persons addressed the audience. Hon'ble Justice P.K. Misra highlighted the importance of anti drug laws and the need for updating of the knowledge of the judges in the area. He also highlighted the important areas for discussions and Dr. J. N. Barowalia, the other resource person narrated about the dangers of narcotic drugs and psychotropic substances. He explained the problem with the statistics of production and illicit trafficking of illicit drugs. At 10:20 am Mr. K. Pattabhi Rama Rao, Assistant Professor, NJA started making his presentation on the "Illicit drug trade; A global concern". Mr. Rao dealt with Single Convention 1961, Convention of Psychotropic Substances 1971 and UN. Convention on Illicit Trafficking of Narcotic Dugs and Psychotropic Substances 1988. He dealt with number of conventions, commencing from the efforts of the USA at Shanghai in the year 1909 initiating first opium conference 1909. He elaborated the further developments on the first opium convention 1912 concluded at The Hague. Mr. Rao also explained that the war against drugs started 100 years ago and has been continuing now but with little achievement. His argument was that unless the antidrug laws take care of the human rights of the people and global community considers the drug menace as the problem of public health, law does not become competent to deal with drug menace. He further opined that the problem of drugs as organized crime shall be dealt with iron fist.

The second session was on the general features of anti drug laws. Dr. J. N. Barowalia, a retired District Judge and the author of a voluminous book on NDPS Act y made presentation on the legislations relating to Narcotic Drugs. He explained about the earlier Opium Acts which was made essentially for the control of use of opium. He opined that in some parts of the country like H.P. P & H. and Rajasthan consumption of opium is still considered to be healthy practice by the ignorant people and because of this the effect of the legislation is not impressive. He further opined that though strict laws are made, implementing them is always a real problem and for this the judges, prosecutors and law enforcing officers are to be trained. He further gave expanded version of NDPS Act, explaining all the important provisions and made the participants to understand the importance provisions of the Act.

Later, the participants were divided into five groups and all of them were given 30 minutes time for holding discussions separately. As facilities were made in different rooms for discussion, the participating judges discussed on the theme "Measures to Strengthen the NDPS Courts" for half an hour. All the groups assembled in the conference hall. Representatives of each group made their presentations one after the other. The following are the important aspects and suggestions made by the groups:-

1. Separate malkhanas are to be constructed for NDPS courts.
2. There are no Prosecutors appointed specially for the NDPS Court. The Judge from Tamil Nadu mentioned that the Public Prosecutors of the High Court is appointed as Public Prosecutors of the NDPS Courts and thus his presence in the court is very less and it has its impact on the disposal of the cases.
3. Though, the Act provides for creation of exclusive and special courts the government did not take steps to establish exclusive courts. The participants stated that not even one exclusive NDPS court was created by the Government so far. Some of the participants stated that in many Districts, the cases are so less that establishing of a special court is not warranted. Justice P.K. Misra who was chairing the session opined that in view of the

strong anti bail provisions in the NDPS Act, it is imperative that exclusive NDPS court are to be established in the places where moderate pendency of cases is found.

4. The Judges opined that the legal provisions should be amended to give some discretion for the judges to impose slightly less sentences in cases of necessity.
5. The judges further opined that only the carriers are being caught and the kingpin of drug crimes are never caught. Thus, to strengthen the courts wide powers shall be conferred on the judges to deal with and order further investigation. One judge suggested that in NDPS cases, the special judges shall be conferred with the power to monitor the investigation.
6. It was opined that in many cases the witnesses of special agencies to deal with narcotic drugs on psychotropic substances are not attending the courts as they are from far away places. The judges also opined that the reports of forensic science Labs are not coming quickly causing hindrance in quick disposal of the cases. Judge Satish Singh from Bangalore, Karnataka stated that in few cases the substance required to be sent only to Hyderabad Lab from about nearly seven States and there is lack of enough number of scientific experts there for giving reports expeditiously. The judges felt that establishment of two or three labs in each state to test narcotic drugs as well psychotropic substances is essential.
7. The judges opined that the Public Prosecutors are to be trained and lack of coordination between the Public Prosecutor and the anti drug law enforcing agencies is causing difficulties for the courts in the trial of NDPS cases.
8. The judges also expressed their opinion that the procedure adopted by the courts across the country is not uniform and the best practices are to be adopted.

Justice P.K. Misra advised the judges to share their experiences also. The open discussion continued till 3:30 PM. After tea break a pre-prepared simulation exercise

was given to all the participants and at the same time the copies of the NDPS Amendment Act 2014 were also distributed to the participants. The simulation exercise was prepared with the object of gearing up the participants for serious discussion on the provisions of the NDPS Act. The Coordinator planned for a role play. Mr. Narendra Kumar, Additional District Judge, Delhi agreed to act as Judge in the simulation exercise. One Mr. V. Ramamurthy, Judge NDPS court Chennai and Satish Singh, Judge, NDPS Court Bangalore agreed to act as Public Prosecutors to do simulation exercise. Mr. Vijay Kumar, Judge, Chittoor, A.P. agreed to play the role of Counsel of B. the accused in simulation exercise. Mr. Bharat P. Deshpande, Judge from Goa acted as an Advocate for A, the accused in simulation exercise and Mr. Vindhyachal Singh Acted as an Advocate for C. the accused in simulation exercise. They have extensively discussed the provisions of the NDPS Act in the context of the simulation exercise. The first day conference was concluded after brain storming session of simulation exercise. In this report at the end a separate paragraph is added to describe the usefulness of the role play.

The second day of the conference was commenced at 9:30 AM with the presentation by Mr. Pradeep Saxena, Dy. Narcotic Commissioner, CNB, Neemuch. The objective of the session is to introduce the perspective of the investigator of Drug Law Enforcement Officer (DLEO) to the participants. Mr. Saxena described various narcotics available in the region and also the division of work between Central Bureau of Narcotics, Central Narcotics Bureau, Directorate of Revenue Intelligence, Deptt. Of Customs, Deptt. of Excise and the Police. All the agencies can detect, investigate and prosecute the offences under NDPS Act. He admitted that though the law and prudence require that all the agencies shall work in coordination there is serious lack of coordination between different agencies working to prevent drug abuse. He explained the difficulties in detection of narcotic drugs and psychotropic substances and more particularly the controlled substances. He also drawn the attention of the participants to the international obligations that our country need to discharge. He opined that the presumptions under NDPS Act are of great help to prove the case of prosecution as often it is very difficult to prove the intention |knowledge| motive. He also stated that mainly

the carriers who are caught and the kingpins are not brought to justice. He has shown various clippings to make the participants distinguish different narcotic substance. He made a power point presentation which is indicating and illustrative. He narrated his experiences as an investigator of the cases relating to narcotic cases and provided live examples to the participants. He has shown the clandestine ways of trafficking psychotropic substances. In one video clipping screened for participants it was shown how a photo frame vendor trafficked heroine upto Indore concealing the contraband beneath the photo frames. By showing such examples, Mr. Saxena succeeded in convincing the participants on his point that detection of illicit trafficking is difficult. Mr. Saxena also has mentioned the defects in investigation and the obsession of the drug officers for complying with the section 50 of NDPS Acts though no such compliance is required in cases of search other than personal search. Justice P.K. Misra and Justice Joymalya Bagchi chaired the sessions and they also expressed their opinion regarding the investigation in cases of narcotic cases and psychotropic substances.

The sixth session of the conference was on pre-trial procedures. Justice Anjana Prakash, Judge, High Court of Patna addressed the participants whereas Justice P.K. Misra and Justice Joymalya Bagchi, Judge, Calcutta High Court chaired the sessions. Justice Anjana Prakash first dealt with the provisions of bail and NDPS cases. She explained the stringent provisions on grant of bail in the NDPS Act and that only when the court comes to a conclusion that the accused would not be convicted and there is no likelihood of commission of crime bail can be granted. She also explained that to ensure a drug free society strict provisions are incorporated in NDPS Act and the participants have to understand object behind these provisions. Thereafter, Justice Anjana Prakash dealt with drawing of samples from the seized lots and there was good discussion on different modes of drawing the sample. Some of the participants have raised the question as to whether the samples can be drawn in the Police Station. Justice Bagchi and Anjana Prakash explained that there is nothing wrong if sample is drawn in the police station but the officers seizing the contraband shall state in writing the circumstances under which such drawing of sample in the police station took place. Justice Bagchi opined that

the best practice is to draw the sample at the place of seizure and in case it is not possible to draw sample there the sample can be drawn even in the police station. Wherever the sample is drawn, as Justice Bagchi maintains, the Court shall always ensure the fairness, transparency, reliability of the drawing of samples.

The deliberations in the session also touched the aspects such as police custody, remand etc. In some of the States in all the cases the accused in NDPS cases were produced before the magistrate where as in some states they were produced before the special judges. Justice Bagchi opined that the first remand in NDPS shall always be before the magistrate but not before the special judges and property also is to be produced before the magistrate, preserving the sample. Justice P.K. Misra narrated his experience as a judge and as well as an Advocate while dealing with the cases of narcotic drugs.

Dr. J.N. Barowalia was the resource person in the 7th session earmarked for discussing matters related to trial. He made a power point presentation on role of court in ensuring procedural safeguards during the trial of NDPS cases. Dr. Barowalia mentioned about the compliance of Section 42 and 50 of the NDPS Act and r the judgments under these provisions by the Apex Court. He narrated that by and large the Supreme Court settled the position that Section 50 of the NDPS Act is needed only the in case of personal search but not for the searches of the belongings. However, he pointed out that in a recent judgment by the Apex Court in Paramanda (given in the reading material) the Supreme Court has afforded the protection under Section 50 even for searching of belonging. He opined that though few judgments slightly created the confusion regarding the application of Section 50 of the NDPS Act it should be understood as the protection while searching the "person" and it is not applicable for searches of the "belongings" of the detained person. It was mooted by one of the participants that the search shall be always carried personally by the empowered officer, Justice Bagchi gave illustrations in which search by empowered officer in all the cases is not possible. He gave an example of search of persons in a crowded bus and if empowered officer required to search all the persons it would be difficult and therefore it shall be understood that the search can be

made under the supervision of empowered officer. A question that cropped up for discussion was whether the female suspects made to be searched by a female empowered officer or any female/a woman who does not belong any department mentioned in section 41 of the NDPS Act can search the female suspects. Justice Anjana Prakash opined the search can be made by any female whereas Justice P.K. Misra suggested that the search shall be carried by a competent female officer. As there is no authoritative pronouncement on this aspect it is left to the discretion of the participants to imagine and decide if such situations arise before them. The discussions continued till 3:35 PM.

The 8th session of the conference was on mensrea. The title of the session was "Understanding Culpable Mental State and other Presumption under the NDPS Act". Justice Bagchi addressed the participants whereas Justice P.K. Misra and Justice Anjana Prakash chaired the sessions. Justice Bagchi started his discourse on presumptions of innocence and its true character. Referring to the judgments in Noor Aga, Justice Bagchi stated that presumption of innocence is identified and recognized as one of the human rights though it is not considered as fundamental right enshrined in our constitution. He made it clear that despite this presumption the initial burden to prove basic fact always lies on the shoulders of the prosecution and therefore it is always incumbent on the courts to satisfy that the basic facts relating to possession were proved by the prosecution before the presumptions relating to culpable mental state is drawn. Justice Bagchi in his discourse mentioned a number of judgments relating to mensrea required to be proved in criminal cases and their application to the cases under NDPS Act. Justice Bagchi also dealt with the other presumptions envisaged under the NDPS Act and explained the circumstances under which such presumptions can be drawn.

The last day of the conference commenced at 9:30 A.M. with Justice Anjana Prakash as speaker and Justice Bagchi and Justice Misra as chair of the conference. Justice Anjana Prakash elaborated the importance of preservation of contraband and samples in the investigation. She advised the judges to ensure proper destruction of all psychotropic substances, dangerous drugs etc. She cautioned the special judges to be

careful in passing the orders disposing the medicinal substances used as the psychotropic substances. She asserted that the judges shall not pass orders for destruction of the property which can lawfully used by the doctors and public. There was discussion on the powers of the courts to order release of vehicles seized. She has drawn the attention of the participants to the provisions of the NDPS Act regarding seizure of the contraband. She made reference to the live instances in which the property produced in one case was diverted to the illegal drug market and again was seized by the law enforcement agencies creating confusion and possibility for the investigators to fabricate evidence. Justice Anjana Prakash later dealt with confiscation of other property produced by the investigators before the courts. Replying to a query by the participant, Justice Bagchi distinguished between forfeiture and confiscation. Justice Bagchi explained that in forfeiture actual position does not transfer whereas in confiscation possession and ownership of the property transfer to the Government. Justice Bagchi referred to the recent amendment of 2014 to highlight that one of the new offences regarding illegally acquired property is created by the statute. Justice Anjana Prakash has drawn the attention of the participants to the judgment of Thana Singh and it was elaborately discussed. The provisions of prevention of money laundering Act and the role of enforcement directorate were also discussed in detail. The session continued upto 11:15 AM and the session on ensuring the procedural fairness in NDPS cases was commenced at 11:30 AM deviating slightly from the time mentioned in the schedule.

Justice Bagchi in the 10th session reiterated the precautions need to be taken by the judges while trying the cases. Justice Bagchi appealed to the judges to consider the compliance of the provisions of the NDPS Act, particularly Section 42 (2) and Section 50 as the rights of the accused and not as mere statutory provisions. Since the punishments under the Act are severe and consequences of the conviction are serious, Justice Bagchi advised the judges to look for strict compliance of the provisions by the investigating officers and at the same time be realistic and pragmatic in the cases of chance recovery of drugs and actions initiated by the investigators in situations of urgency. Justice Bagchi opined that after ensuring procedural fairness in the trial if the court is satisfied

that the guilt is proved, sentences under the NDPS Act, though they are very harsh, are to be imposed and in no case less than minimum can be imposed. Justice P.K. Misra later dealt with the sentencing of the repeat offenders. The conference noted the recent changes in law, doing away with mandatory death penalty but retention of the death penalty in NDPS Act. In this connection the judgment of the Supreme Court in Mithu vs. state was discussed, The participants questioned regarding the manner in which the previous conviction is to be proved by the prosecution and Justice Bagchi answered their queries. After completion of discussion on sentencing Justice Bagchi asked the participants to put their doubts for discussion and few participants raised issues for discussion. Justice P.K. Misra summarized the important learnings in the conference and the participants also added their learnings. Director, Dr. Balram K. Gupta joined the conference and the formal vote of thanks by the Coordinator and the Director. The Conference concluded at 1:30 P.M.

Regarding "Role Play":

"Role Play" as a method of education is usually not employed for adult learners. In this conference with little hesitation, when I have suggested "Role Play" in limitation exercise the participants have readily accepted. The senior professionals happily and enthusiastically participated in the "Role Play". During the "Role Play", they have read the statutory provisions very keenly to argue and defend. They made out a perfect learning process in which the participants by way of exchanging views/arguments taught each other. At the same time they enjoyed doing this. As described in this report the "Role Play" made the participants to involve themselves in the learning process. I strongly recommend this process in the conferences of the Judicial Officers up to the level of District Judges.

The following materials were distributed during the conference:

1. Simulation Exercise