

LAW ON

NDPS ACT, 1985

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1.1 Search of person & something carried by accused in his hand u/s 50 of the NDPS Act: Search of person u/s 50 of the NDPS Act does not include search & recovery from bag, briefcase and container etc. Sec.50 applies where personal search of a person is involved. See:

1. Jarnail Singh vs. State of Punjab, 2011 CrLJ 1738(SC)
2. Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746
3. Madna Lal Vs. State of HP, (2003) 7 SCC 4653.
4. State of Punja Vs. Baldev Singh, (1999) 6 SCC 172 (Five-Judge Bench)
5. State of Punjab Vs. Makhan Chand, AIR 2004 SC 3061.

1.2 Section 50 only applies in case of personal search and not extended to search of vehicle, container, bag or premises : Where bags containing poppy husk were seized from truck in his the accused were sitting, it has been held by

the Supreme Court that it was not a case of personal search of the accused and Section 50 of the NDPS Act, 1985 was not attracted as Section 50 only applies in case of personal search of person and not applicable to search of vehicle, container, bag or premises. See :

(i).Than Kumar Vs. State of Haryana, (2020) 5 SCC 260

(ii).Kulwinder Singh & Another Vs. State of Punjab, (2015) 6 SCC 674.

1.3 Section 50 of NDPS Act applies only to personal search of accused and not to search of vehicle: The provisions of Section 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985 is required to be complied in the case of personal search of the accused and not in the case of search of vehicle. Merely because independent witnesses were not examined, the conclusion could not be drawn by the court that the accused was falsely implicated. Non-production of contraband in the Court by itself is not fatal. **See:** Kallu Khan v. State of Rajasthan, LL 2021 SC 731

1.4 Effect of no statement regarding breach of Sec. 50 u/s 313 CrPC:Where the officer making the search had asked the accused persons by way of notices whether they wanted to be searched by him or by any officer named in Sec.50 i.e.gazetted officer or magistrate and the accused had not stated u/s 313 CrPC that he was unaware of his rights u/s 50 of the NDPS Act or that he was misled on that account in any manner, it has been held that though observance of Sec.50 is a procedural safeguard yet non statement u/s 313 CrPC is of some relevance in appreciating the grievance of the accused regarding non compliance of Sec. 50. See: Prabha Shankar Dubey Vs. State of MP, (2004) 2 SCC 56

1.5 Observance of safeguards provided by Section 50 of NDPS Act, 1985 when not required : Observance of safeguards provided by Section 50 of the NDPS Act, 1985 is not required when the seizure was made from bags and not from the person of the accuse. See : 2013 CrLJ 2997 (SC).

1.6 Observance of safeguards provided by Section 50 of NDPS Act, 1985 when not required : Where seizure in question was made from scooter and not from the person of the accused, section 50 of the NDPS Act was not applicable. See : 2013 CrLJ 3036 (SC).

1.7 Consent statement by accused to be searched in presence of police officer & its effect: Where narcotic/opium was recovered from a bag carried by the accused and not from his person and option was given by the inspector of police to the accused as to whether he wanted to be searched in presence of gazetted officer or magistrate and the accused had infact signed consent statement expressing his confidence to be searched in presence of the inspector, it can not be said that there was violation of Sec.50 of the NDPS Act, 1985. See: Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)

1.8 Consent statement by accused to be searched in presence of police party alone not to amount to confession u/s 25, Evidence Act: Where narcotic/opium was recovered from a bag carried by the accused and not from his person and option was given by the inspector of police to the accused as to whether he wanted to be searched in presence of gazetted officer or magistrate and the accused had infact signed consent statement expressing his confidence to be searched in presence of the inspector, it can not be said that the consent statement signed by the accused to be searched for narcotic by police officer does not amount to commission of offense and is not hit by Sec.25 of the Evidence Act. Such consent statement of the accused is admissible in evidence. See: Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)

1.9 Confession made to officer u/s 53 of NDPS Act not admissible: An ststatement made before an officer u/s 53 of the NDPS Act cannot be taken into account in order to convict an accused, except to the extent found relevant u/s 53-A and when corroborated in accordance with law. See: Tofan Singh Vs State of TN, (2021) 4 SCC 1 (Three-Judge Bench)

1.10 No Specific mode or manner prescribed to inform accused of his right of search u/s 50:No Specific mode or manner has been prescribed to inform accused of his right of search u/s 50 by the Gazetted Officer or magistrate. Accused should be informed in a way so that he becomes aware that the choice is his and not of the officer concerned. See:

1. Prabha Shankar Dubey Vs. State of MP, (2004) 2 SCC 56
2. 2011 CrLJ 680 (SC)

1.11 Recovery of Narcotic Drugs by police when not supported by public witnesses: Where the accused, on seeing the police party, made an attempt to turn back and escape but was over powered by the police party and on his arrest and search "Charas" was recovered from his possession for which he had

no license and after prosecution he was convicted for the offence u/s 20 of the NDPS Act 1985, it has been held by the Supreme Court that the obligation to take public witnesses (independent witness) is not absolute. If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating their evidence. See:

1. Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)
2. Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746
3. State of Punjab Vs. Makhan Chand, AIR 2004 SC 306
4. Dharam Pal Singh Vs. State of Punjab, 2010(71) ACC 548 (SC).

1.12 Recovery of Narcotic Drugs by police when not supported by public witnesses : Mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. In the instant case at the time of recovery of poppy husk from possession of accused some villagers had gathered there. The Investigating Officer in his cross examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. Section 114 of the Act, 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim *omnia praesumuntur rite et doctè probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. See: *Gian Chand & Others Vs State of Haryana*, AIR 2013 SC 3395 (*paras 28 & 29*)

2 Presumption of commission of offense by the accused: Sec 54 of the NDPS Act creates a legal fiction & presumes the person in possession of illicit article when possession is once established, that the accused had culpable mental state & had committed the offense. See: *Dharam Pal Singh Vs. State of Punjab*, 2010 (71) ACC 548 (SC)

3 Section 106, Evidence Act to attract when recovery of contraband material is recovered from the possession or conscious possession of the accused : From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. Accordingly to Section 35 of the Act, the Court shall presume the existence of mental state from the commission of an offence and it is for the accused to prove otherwise. It is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872. See: *Gian Chand & Others Vs State of Haryana*, AIR 2013 SC 3395 (*paras 14 & 15*)

4.1 Sec. 42(2) of the NDPS Act & effect of it's non-compliance: If no information was taken down in writing by police officer or conveyed to immediate police officer then any oral evidence of police officer will not be in compliance with the provisions of Sec 42(2) of the NDPS Act, 1985. See:

1. *State of Karnataka v. Dondusa Namasa Baddi*, 2011(72) ACC 666 (SC)
2. *Karnail Singh v. State of Haryana*, 2009 (8) SCC 539 (Five- Judge Bench): *Held that substantial compliance with Sec 42(2) is sufficient.*

Note: There were conflicting decisions by Three- Judge Benches of the Supreme Court rendered in the cases of (i) *Abdul Rashid Abraham Mansoori v. State of Gujarat*, (2000) 2 SCC 513 and (ii) *Sajan Abraham v. State of Kerala*, (2001) 6 SCC 692. on the point of consequences of non-compliance or only substantial compliance of Sec 42(2) of the NDPS Act and then the matter was referred to the constitution bench which, in the case of *Karnail Singh*, laid down the law which has been relied upon in the case of *Dondusa*.

4.2 Effect of search & seizure u/s 42 of the NDPS Act by Sub Inspector and not SHO: Where authority u/s 42 of the NDPS Act, 1985 to search, seize and arrest without warrant was given to Sub-Inspector of Police posted as SHO, and such search and seizure was made by the Sub-Inspector who was given temporary charge of SHO, it has been held by the Supreme Court that such search and seizure made by Sub-Inspector cannot be said to be vitiated. The word "posted"

cannot be given undue importance. Acquittal of the accused on the ground that the search and seizure was not done by authorized person, held, improper. See : State of Rajasthan Vs. Bheru Lal, 2013 CrLJ 3223 (SC)

5 NDPS Act & Bail Of Juvenile: In the event of recovery of commercial quantity of Charas from accused, it has been held that bail application of the accused would be considered u/s 12 of the JJ Act, 2000 & not u/s 37 of the NDPS Act, 1985. See:2011 CrLJ 200 (All)

6. Disposal of Narcotic Drugs u/s NDPS Act: For the Narcotic Drugs for its identification, procedure u/s 451 Cr PC should be followed for recording evidence and disposal. Its identity can be on the basis of evidence recorded by the magistrate. Samples also should be sent immediately to the chemical analyzer so that subsequently a contention may not be raised that the article which was seized was not the same. See:

1. Sunder Bhai Ambalal Desai Vs. State of Gujrat, 2003(46) ACC 223 (SC)
2. Smt. Basavva Kom Dyamangouda Patil Vs. State of Mysore, 1977(14) ACC 220(SC)

7 Delay in sending sample of narcotic to chemical examiner when not fatal: Where there was clear evidence of chemical examiner that seals were intact when sample of narcotic/ opium was received by him and the same tallied with the sample impression of seal, it has been held by the Supreme Court that the delay in sending the sample for chemical examination would not be fatal to the case of the prosecution. See:

1. Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)
2. Hardip Singh Vs. State of Punjab, AIR 2009 SC 432

8 NDPS Act, 1985 & Pardon under Article 161 of the Constitution: Questioning the validity of a Three-Judge Bench decision of the Supreme Court in Dadu alias Tulsidas Vs. State of Maharashtra, AIR 2000 SC 3203, on Section 32-A of the NDPS Act, 1985, a Two-Judge Bench of the Supreme Court has referred the matter to be decided first by Three-Judge Bench or by a Five-Judge Bench. **See :** Krishnan & Others Vs. State of Haryana & Others, AIR 2013 SC 2139

9 Restriction on power of remission imposed by Sec 32-A of NDPS Act, 1985 not discriminatory and not violative of Articles 14 & 21 of the Constitution : Restriction on power of remission imposed by Sec 32-A of NDPS Act, 1985 is not discriminatory and not violative of Articles 14 & 21

of the Constitution. See : Budh Singh Vs. State of Haryana, 2013 CrLJ 3061 (SC)

10.1 Necessary conditions for grant of bail u/s 37 of the NDPS Act must be fulfilled : The following twin conditions prescribed u/s 37(1)(b)(ii) of the NDPS Act, 1985 must be fulfilled before grant of bail to an accused of offences under the said Act :

(i) That there are reasonable grounds for believing that the accused is not guilty.

(ii) That the accused is not likely to commit any offence while on bail.
See :

(1) Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798

(2) Superintendent, Narcotics Central Bureau, Chennai Vs. R. Paulsamy, 2001 CrLJ 117 (SC)

10.2 Accused can be released on bail only when conditions u/s 37 of NDPS Act are fulfilled: A plain reading of the aforesaid provision would indicate that the accused arrested under the NDPS Act, 1985 can be ordered to be released on bail only if the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. If the appellant herein was ordered to be released on bail despite the rigours of Section 37 of the NDPS Act, 1985, then the same is suggestive that the Court concerned might not have found any prima facie case against him. Had this fact been brought to the notice of the detaining authority, then it would have influenced the mind of the detaining authority one way or the other on the question whether or not to make an order of detention. The State never thought to even challenge the bail orders passed by the special court releasing the appellant on bail. See: Sushanta Kumar Banik Vs. State of Tripura and Others, 2022 SCC OnLine SC 1333 (Para 24)

10.3 The Supreme Court granted bail to the accused Ragini Dwivedi, a Kannada actress, who had been arrested by the police for allegedly consuming and supplying drugs at parties and events organized by her. The Supreme Court held that Section 37 of the NDPS Act was wrongly invoked by the Sessions Court and the Karnataka High Court. See: Ragini Dwivedi Vs. State of Karnataka, LL 2021 SC 38

10.4 Tests to be applied to grant or refusal of bail u/s 37 of NDPS Act: Bail cannot be granted to an accused under Narcotic Drugs and Psychotropic Substances Act, 1985 merely on a finding of the absence of possession of the contraband on the person of the accused. Such a finding does not absolve the court of the level of scrutiny required under Section 37(1)(b) (ii) of the NDPS Act. The test to apply while granting bail u/s 37 of the NDPS Act is whether there are reasonable grounds to believe that the accused had not committed an offence and whether he is likely to commit any offence while on bail. See: Union of India Vs. Mohd. Nawaz Khan, LL 2021 SC 489

10.5 Confessional statement of accused or co-accused made to NDPS authorities u/s 67 of NDPS Act not to be used for framing charges against accused: The Supreme Court set aside the charges framed against the accused for offences under the NDPS Act by noticing that the case was based on statements by other accused made to the NDPS officers. The factual position was that no narcotic drugs or psychotropic substances were recovered from the premises of the accused persons. A confessional statement made by accused to the NDPS authorities u/s 67 of the NDPS Act is inadmissible in evidence. See: Sanjeev Aggarwal Vs. Union of India, LL 2021 SC 586

10.6 Bail by ASJ under NDPS Act, 1985: When the Special Judge exercises power to grant bail, he is bound by Section 37 of the NDPS Act, 1985. He has to take into account the conditions laid down in Clauses (i) and (ii) of Clause (b) of Section 37(1) of the NDPS Act and if he is satisfied that those conditions have been fulfilled, he can release a person on bail under this Section. The other conditions laid down in Section 37 will also apply to him when he intends to grant bail in such a case. See: Union of India Vs. Rattan Malik, (2009) SCC 624

10.7 Offences under NDPS Act to be cognizable & non-bailable (Sec. 37, NDPS Act) : According to Sec. 37 of the NDPS Act, 1985 offences under the Act are cognizable and non-bailable.

(i) Sec. 32-A, NDPS Act, 1985 : Sec. 32-A of the NDPS Act, 1985 reads thus:
“.....”

(ii) **Sec. 32-A of the NDPS Act, 1985 partly declared unconstitutional :** In relation to Sec. 32-A of the NDPS Act, 1985, the Supreme Court has declared following law:

(iii) Sec. 32-A of the NDPS Act, 1985 does not in any way affect the powers of the authorities to grant parole.

(iv) Sec. 32-A is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(v) A sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Sec. 37 of the Act. See: Dadu Vs. State of Maharashtra, 2000 Cr.L.J. 4619 (SC) (Three- Judge Bench)

10.8 Bail u/s 389 CrP**After conviction under NDPS Act :** Sec. 389 of NDPS Act, 1985 empowers appellate Court to suspend sentence pending appeal and release accused on bail. Sec. 32-A of NDPS Act in so far as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act does not stand the test of constitutionality. Not providing at least one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statutes and when conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits at least in many High Courts. The suspension of the sentence by the appellate Court has, however, to be within the parameters of the law prescribed by the Legislature or spelt out by the courts by judicial pronouncements. The exercise of judicial discretion on well recognized principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislatu cated was also ruled out, it has been held that the accused was not entitled to be released on bail for the offences under the NDPS Act, 1985. See: Safi Vs. State of U.P., 2006 (6) ALJ (NOC) 1358 (All)

10.9 Where huge quantity of contraband was recovered from the physical possession of the accused on due search and possibility of the accused being falsely imply

10.10 Where the accused was charged with the offence u/s 20 of the NDPS Act, 1985 for the recovery of one kg. of smack from his possession and the total quantity of the smack recovered from the possession of the accused and the other co-accused was 4 Kg. and 300 gms. and the same was sealed in

matchboxes in the absence of public witnesses, the bail of the accused was rejected. See: Aman Vs. State of U.P., 2005 (53) ACC 893 (All)

10.11 In compliance with the directions of Hon'ble Allahabad High Court (by Hon'ble Justice G.P. Srivastava) in the matter of Criminal Misc. Bail Application No. 5108 of 2006 Jagdish Vs. State of U.P., the Hon'ble Allahabad High Court has issued C.L. No. 36/2006/Admin 'G', dated 10.8.2006 which reads thus: "It is hereby directed that all the recovered articles under NDPS Act as and when are recovered should be weighed either by the arresting officer or the S.H.O. of the Police Station concerned. In case both the authorities fail to discharge their duty, it is incumbent upon the Special Judge/Magistrate who grants first remand to the accused to get the recovered article weighed."

10.12 Jurisdiction of Magistrates and Special Judges under NDPS Act, 1985 : As regards the jurisdiction of Magistrates and the Special Judges for conducting enquiries or trial or regarding other proceedings under the provisions of NDPS Act, 1985, the Hon'ble Allahabad High Court, in compliance with the directions of the Allahabad High Court (by Hon'ble Justice B.K. Rathi), in the matter of Criminal Misc. Application No. 1239 of 2002, Rajesh Singh Vs. State of U.P. vide C.L. No.31/2006, dated 7.8.2006 has issued following directions to the judicial officers in the State of U.P.:

"...the original provisions of the NDPS Act, 1985 has been substantially amended by the amending Act No. 9 of 2001, Section 36-A of the original Act provided for trial of offences under the Act by the Special Courts. This section has been amended and amended sub clause 1(a), which is relevant for the purpose of this petition is extracted below:

Section 36-A: "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

(a). All offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government." Sub-clause (5) of the said section is also relevant and is extracted below:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this act with imprisonment for a term of

not more than three years may be tried summarily.”

4. From perusal of the above provision alongwith Section 4 of the CrPC, it is clear that in case the punishment provided for the offence under the NDPS Act is more than three years, the offence is triable by Special Court and to that extent the provision of Section 36-A NDPS Act over rides the provisions of the CrPC. The trial for offences under the NDPS Act which are punishable for imprisonment of three years or less should be a summary trial by the Magistrate under Chapter XXI of the CrPC For the purpose to further clarify the position of law it is also necessary to refer to Section 4 CrPC which is as follows:

Section 4 “Trial of offences under the Indian penal Code and other laws: (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, enquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, enquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences.

5. The above clause (2), therefore, show that all the offences should be tried according to the provisions of CrPC except where there is special provision in any other enactment regarding the trial of any offences. Section 36-A of NDPS Act only provide for trial by Special Courts for offences punishable under NDPS Act with imprisonment for a term of more than three years only. Therefore, if an offence is punishable with imprisonment for a term upto three years, it shall have to be tried by the Magistrate in accordance with the provision of Section 4(2) CrPC.

6. It will not be out of place to mention that after the enforcement of amending Act No. 9 of 2001 this procedure for trial has to be followed for all the offences irrespective of the date of commission of the offence. It is basic principle of law that amendment in procedural law will apply to the pending cases also. Not only this there is also specific provision regarding it in amending Act No. 9 of 2001. Section 41 of the Act provides as follows:

Section 41: “Application of this Act to pending cases:(1) Notwithstanding anything contained in sub section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal act as amended by this Act and accordingly, any person found guilty of any offence punishable

under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.”

Now the next question that arise for decision s as to what is the punishment provided for the present offence under amended NDPS Act. It appears that the punishment for recovery of Narcotic Drugs or Psychotropic Substance has been divided in 3 categories as mentioned in the table given at the end of the Act. In this table 2 columns No. 5 and 6 are material, the first is regarding the small quantity and the other is regarding commercial quantity. The third category will follow from this table where the quantity is above small quantify but is less than commercial quantity. The ganja has been given at live No. 55 of this table, 1000 gm of ganja has been categorized as small quantity and 20 kg. of ganja has been categorized as commercial quantity. Accordingly, to the third category in respect of recovery of ganja is above 1 kg. and below 20 kg.”

10.13 Grant of bail by NDPS court for failure of prosecution to show recovery of commercial quantity of psychotropic substance held proper by Supreme Court: In the case noted below, the quantity of the psychotropic substance could not have been ascertained by the analyst. The trial court had for that reason granted bail to the accused on the ground that the prosecution failed to show that any commercial quantity of narcotic substance was recovered from the possession of the accused. But the High Court cancelled the bail granted to the accused u/s 439(2) CrPC. The Supreme Court held that the impugned order of the High Court cancelling the bail granted in favour of Bharat Chaudhary [A-4] is not sustainable in view of the fact that the records sought to be relied upon by the prosecution show that one test report dated 6 December, 2019, two test reports dated 17 December, 2019 and one test report dated 21 December, 2019 in respect of the sample pills/tablets drawn and sent for testing by the prosecuting agency conclude with a note appended by the Assistant Commercial Examiner at the foot of the reports stating that “quantitative analysis of the samples could not be carried out for want of facilities”. In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the

petitioners have been found to be in possession of commercial quantity of psychotropic substance as contemplated under the NDPS Act. Further, a large number of the tablets that have been seized by the DRI admittedly contain herbs/medicines meant to enhance male potency and they do not attract the provisions of the NDPS Act. Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted either at the office or at the residence of A-4 at Jaipur on 16 March, 2020. Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15 July, 2021. This is all the more so when such a reliance runs contrary to the ruling in *Tofan Singh Vs. State of Madras*, (2021) 4 SCC 1. The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2 November, 2020 passed by the learned Special Judge, EC & NDPS Cases is restored. As for Raja Chandrasekharan [A-1], since the charge sheet has already been filed and by now the said accused has remained in custody for over a period of two years, it is deemed appropriate to release him on bail subject to the satisfaction of the trial Court. See: *Bharat Chaudhary Vs. Union of India*, 2021 SCC OnLine SC 1235 (Three-Judge Bench)

10.14 Bail granted u/s 389 CrPC in appeal to convict apprehended with one Kg of heroine on grounds of his 8 years of detention in jail: FIR no. 52 of 2013 was lodged against the appellant for offences punishable under Sections 21, 29, 61 and 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Special Cell on 18/19 November 2013. Besides the appellant, two other co-accused were named. The appellant and another co-accused were charged with joint possession of 1 kg of heroin recovered from a hotel room in Udaipur. The appellant and another co-accused were also charged for conspiracy under Section 29 of the NDPS Act. Offences under the NDPS Act are of serious nature and the case is at the post conviction stage. Yet the Court cannot be unmindful of the fact that the appellant has undergone 8 years out of the total sentence of 10 years. The appeal is unlikely to be heard early. In all probability, the entire sentence would have been undergone by the time the appeal is heard. The decisions on the basis of which the High Court of Delhi has declined to grant suspension of sentence, are, at the highest, a broad guideline and cannot be placed on the same pedestal as a statutory interdict. With the pendency of the

work in the High Court, it may not be feasible to expedite the disposal of the appeal within a short period. In the circumstances, particularly, since the appellant has undergone 8 years out of ten years of the total sentence which has been imposed on him, we are of the view that a fit and proper case has been made out for the suspension of the sentence under Section 389 CrPC. We accordingly allow the appeal and set aside the impugned order of the High Court. The sentence of the appellant shall remain suspended under Section 389 CrPC, subject to such terms and conditions as may be imposed by the Special Judge, NDPS, Patiala House Courts, New Delhi. The appellant would cooperate in the expeditious disposal of the appeal and shall not apply for adjournment when the matter is taken up. See: *Mossa Koya KP Vs. State (NCT of Delhi)*, 2021 SCC OnLine SC 3110

10.15 Quantity of narcotic substance recovered is a relevant factor for imposing higher than the minimum punishment under the NDPS Act, 1985. Court has a wide discretion to impose the sentence of imprisonment ranging between 10 to 20 years and while imposing such sentence may also take into consideration the factors as it may deem fit other than the factors enumerated in Section 32-B(a) to (f) of the NDPS Act, 1985. See: *Gurdev Singh Vs. State of Punjab*, LL 2021 SC 196

10.16 Bail granted to accused by High Court when conditions u/s 37 of NDPS Act were not fulfilled, set aside by Supreme Court: The appellant-NCB was aggrieved by the judgment and order dated 16.03.2021 passed by the High Court of Delhi granting post-arrest bail to the respondent-accused in Case No. SC/1334/2020 where the respondent was facing trial for the offence under Sections 8/22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The case set up by the prosecution was that on the basis of secret information received by the officials of the Narcotic Control Bureau on 09.01.2020, that one parcel had been booked by a person from Agra named Gaurav Kumar Aggarwal to be delivered to one Manoj Kumar at Ludhiana, Punjab and was stored at the godown of a courier company at Village Samalkha, Kapasehra, New Delhi suspected to contain NRX tablets, being a narcotic drug. The NCB team reached the said godown and conducted search proceedings. The suspected parcel was identified and opened in the presence of two independent witnesses from amongst the staff members of the courier company. The said parcel was opened and 50,000 Tramadol tablets weighing 20 kgs were recovered. As the tablets contained in the suspected parcel had been mis-declared and were without any valid bill, seizure proceedings were initiated by the officials of the NCB. Even de hors the confessional statement of the

respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage. In our opinion the narrow parameters of bail available under Section 37 of the Act have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act. As a result of the aforesaid discussion, the present appeals are allowed and the impugned order releasing the respondent on post-arrest bail is quashed and set aside. The bail bonds of the respondent are cancelled and he is directed to be taken into custody forthwith. See: Narcotics Control Bureau Vs. Mohit Aggarwal, 2022 SCC OnLine SC 891

10.17 Scope of amended Section 37 of NDPS Act and rejection of bail: In the present case, the bail application under Section 439 Cr.P.C. was preferred by the applicant seeking his release on bail for his alleged involvement in commission of an offence under Section 8/22/60 of Narcotics Drugs & Psychotropic Substances, Act (hereinafter referred to as the NDPS Act) which was registered against him by way of Case Crime No. 787 of 2019 at P.S. Kotwali, Roorkee, District Haridwar on 15.12.2019. The aforesaid FIR, which was registered as against the present applicant, as Case Crime No. 787 of 2019, on 15.12.2019 at 16 : 46 'O' Clock, it has been complaint of that the Sub-Inspector Mr. Sanjay Singh Negi, on receipt of an information from his sources came to know that a White I-20 Car, bearing Registration No.UK08 AP 3105, was expected to cross over a place commonly called as Malak Chungi and as per information which was received by the Sub Inspector, it was informed that the said vehicle was carrying the contrabanded goods, which were the prohibited articles, as per the provisions contained under the NDPS Act. It is the case of the complainant in the FIR, that on receipt of the said information, prior to his Ravanagi Report No.

54 at 16 : 46 'O' Clock; even much prior to it he had sent the Chatek alongwith two constables in order to keep vigil and to apprehend the car which was alleged to be informed was carrying the contraband goods. Subsequently, the police team headed by Sub-Inspector Mr. Sanjay Singh Negi, the complainant are said to have reached the place called as 'Malak Chungi' on Haridwar Road, near Laksar Bus Stop and they apprehended the car bearing Registration No.UK08 AP 3105. When the police officials wanted to stop the car, the driver of the vehicle attempted to turn the car and make an attempt to run away from the spot, but however after exercising of force, the police party was able to stop the car and apprehended the driver who was driving the said car as it was informed by the police informer. The police team which apprehended the car on asking the name of the person driving the car, the driver very candidly informed that his name is 'Sharukh', and he informed that he was carrying the contrabanded article called as NRX-Buprnrnorphine Injection (Rexogesie). When the car was stopped, the present applicant very candidly had intimated the police party which was headed by Mr. Sanjay Singh Negi, the Sub-Inspector, that his vehicle was carrying a carton in the rear of the car filled with aforesaid contrabanded articles as detailed above which were the injections, which he contended and stated that he used to sell it to the students. On the car being apprehended, the Sub-Inspector informed the applicant of his rights which were enshrined and protected by Section 50 of NDPS Act for the purposes of conducting the search and seizer by a Gazetted Officer. The present applicant on being informed by the Sub-Inspector about his rights conferred under Section 50 of the NDPS Act had expressed his opinion that he wanted the search to be carried on him and his car by a Gazetted Officer. Accordingly, Mr. Sanjay Singh Negi, the Sub Inspector, who had his Mobile bearing No. 9412957506; at about 19 : 40 hours, is said to have given a call to the Circle Officer, Mr. Chandan Singh Bisht; on his Mobile No. 9411112996, informing him about the occurrence of 15.12.2019 at about 16 : 46 and also informed to the applicant that the Circle Officer who happens to be an officer of a rank of a Gazetted Officer would be falling to be an officer who is competent to conduct the search and seizure as per Section 50 of NDPS Act. On receipt of the said information, the Circle Officer reached the spot by his official vehicle bearing Registration No.UK07 GA 2281 and thereafter after seeking a prior consent from the present applicant, he searched the applicant in person, as well as the car which was being driven by him and was involved in the commissioning of the offence. The special features of this case can be reproduced as below:

- (i). The recovery of a contraband was beyond the prescribed commercial

quantity.

(ii). The recovery was beyond the prescribed commercial quantity provided under serial no. 169 of the Schedule, appended to the NDPS Act.

(iii). The seizure of the injections which were about 1000 in number was made by the Gazetted Officer under Section 50 of the Act and in the presence of the applicant after taking his consent by the Gazetted Officer in the light of the provisions contained under Section 50 and he himself had endorsed the recovery memo by fortifying the fact of the recovery having being made from him and in possession in his I-20 car.

(iv). That too when the applicant had been taking a somersaulted stand and in distinction of the various stages where the bail application was being considered by the courts and particularly that too by way of supplementary affidavit which was filed by the applicant developing the case of animosity with Jahid Ali whom the applicant alleges to be a drug peddler and since he was got arrested on a complaint of his father, the present case had been developed against him with a malice. The case which cannot be believed at this stage, particularly as there is no material on record and it was developed by the applicant for the first time by way of supplementary affidavit before the High Court.

(v). Even let us for the time being presume for the sake of argument that on the complaint of the applicant's father, Jahid Ali, the drug peddler, was arrested, it cannot be ruled out that the present applicant and the other drug peddlers i.e. Jahid Ali and Parvej were indulged in commercially dealing with the Narcotics and particularly in the instant case when recovery is beyond the commercial quantity then the provisions of Section 37 of the NDPS Act would come into play which is quoted hereunder :

Section 37 of NDPS: Offences to be cognizable and non-bailable: (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

(a). every offence punishable under this Act shall be cognizable;

(b). no person accused of an offence punishable for the [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.]” Section 37 of the NDPS Act, poses a restriction on the courts while considering the bail application in those cases where the recovery of the contraband is beyond the commercial quantity. Hence, on an overall scrutiny of the case as mentioned above, this Court extracts the implications of Sub Section (1) of Section 37 and this court is of the view that this is not a fit case in which the bail could be granted. Consequently, the bail application stands rejected. See: Shahruxh Vs. State of Uttarakhand, 2021 SCC OnLine Utt 532

10.18 Suggestions received by Supreme Court from various Amicus Curiae and NALSA, SALSA etc. for grant of bail, probation, remission and commutation of sentences and jail reforms: The suggestions made are as under:

“7.1 There are convicts in jails who are undergoing fixed term sentences. In such cases where the convict has been sentenced upto 10 years' imprisonment and is a first time offender and has undergone half the sentence, the State Government can consider whether the remaining sentence can be commuted under Section 432 CrPC. as a onetime measure. The State Government can obviously provide certain exceptions where this benefit would not be available to the convicts (especially heinous crimes rape, dowry death, kidnapping, PC Act, POCSO, NDPS, etc.). The State Government can impose conditions of good conduct upon the convict. In this regard, the provisions of Model Prison Manual, 2016, especially the Chapter XX dealing with “premature release’ can be considered by the State Government, which lays down broad parameters for dealing with such cases. The Model Prison Manual was drafted by a very high Committee, including the officers of the Central Government, State Government, NALSA, NHRC and also the Civil Society and is a fairly progressive document, aimed at standardising prison administration throughout the country. Chapter XX of Model Prison Manual is enclosed as Annexure A2.

In this behalf the following suggestions have been made:

“6.1 The following mechanism can be adopted as one-time measure to convicts who have been convicted for sentence of imprisonment for 10 years' or less and have no other criminal antecedent.

6.2 The High Court along with the High Court Legal Services Authority can make a list of cases with the following details:

- i) Offences for which a convict has been sentenced and sentence imposed;
- ii) Sentence undergone by the convict;

6.3 If the convict is in jail and has undergone 40% of the sentence, his case can be taken up by the District Legal Services Authority. The District Legal Services Authority, through a lawyer of sufficient seniority, can counsel the accused that if he is willing to accept his guilt, request can be made to the High Court to reduce the sentence or for releasing the convict on probation of good conduct for the remainder of the sentence. It should be clearly disclosed that the said acceptance of guilt is only for the purposes of closing the matter and in case the High Court is not inclined to accept the plea, then the matter would be considered by the High Court of its own merits and his plea would not come in the way of hearing of the appeal on merits.

6.4 The District Legal Services Authority would also facilitate the interaction of the convict with his lawyer so that an informed decision is taken by the convict.

6.5 If the accused is willing to accept the plea and make an application to the High Court, then the list of such accused should be forwarded to the Director General of Police to ascertain the criminal antecedent of the convict.

6.6 Such plea bargaining at post-conviction level would not be available to such offences which are notified by the Central Government/State Government. The said plea bargaining will not be available where the law provides for a minimum sentence to be undergone by the accused, for example under the NDPS Act or UAPA Act similar such Acts (State Law/Central Law). See: Interim order dated 14.09.2022 of the Supreme Court passed in Suo Moto Writ Petition (Crl) No. 4/2021 In Re : Policy Strategy for Grant of Bail With MA 764/2022 in Criminal A. No. 491/2022 (II)

10.19 In the case of **Satendra Kumar Antil Vs. CBI**, the Supreme Court has made categories of offences and issued guidelines for disposal of bail applications by the lower courts and the High Courts. The guidelines are as under:

Category/Type of Offences (A)

Offences punishable with imprisonment of 7 years or less not falling in Categories B and D.

Category/Type of Offences (B)

Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years. Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act [Section 212(6)], etc. (D) Economic offences not covered by Special Acts.

(1) Accused not arrested during investigation.

(2) Not co-operated throughout in the investigation including appearing before investigating officer whenever called. (No need to forward such an accused along with the charge-sheet *Siddharth v. State of U.P.*)

Category A After filing of charge-sheet/complaint taking of cognizance (a) Ordinary summons at the 1st instance/including permitting appearance through lawyer. (b) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued. (c) NBW on failure to appear despite issuance of bailable warrant. (d) NBW may be cancelled or converted into a bailable warrant/ summons without insisting physical appearance of the accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing. (e) Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

Category B/D On appearance of the accused in court pursuant to process issued bail application to be decided on merits.

Category C Same as Categories B and D with the additional condition of compliance of the provisions of bail under NDPS (Section 37), Section 45 of the PMLA, Section 212(6) of the Companies Act, Section 43-D(5) of the UAPA, POCSO, etc. See: *Satendra Kumar Antil Vs. CBI*, (2021) 10 SCC 773

10.20 Bail for offences under NDPS Act may be cancelled if provisions of Section 37 of NDPS Act not observed: Bail granted for offences under the NDPS Act, 1985 may be cancelled if it has been granted without adhering to the

parameters under Section 37 of the NDPS Act. Non-application of mind to the rival submissions and the seriousness of the allegations involving an offence under the NDPS Act by the High Court are grounds for cancellation of bail.

(i) Union of India Vs. M.D. Nawaz Khan, (2021) 10 SCC 100

(ii) Union of India Vs. Prateek Shukla, (2021) 5 SCC 430

(iii) Union of India Vs Shiv shanker Kesari, (2007) 7 SCC 798

11.1 Release of vehicle under NDPS Act:Where the narcotics was recovered from the truck when the accused, the brother of the owner of the truck, was sitting therein but the owner of the truck though a co-accused but was not arrested on the spot nor there was any evidence that carrying of the narcotics was in his knowledge, the High Court has held that in view of the law propounded by the Supreme Court in the case of **Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223 (SC)**, the truck should be released in favour of its registered owner u/s 451, 452 CrPC. See : Samarjeet Vs. State of UP, 2014 (86) ACC 505 (All)

11.2 Vehicle seized u/s 18/20 NDPS Act to be released in favour of its owner:Relying on the decision of the Hon'ble Supreme Court in Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223(SC), it has been held by the Hon'ble Allahabad High Court that a vehicle seized u/s 18/20 NDPS Act should be released in favour of its owner. See: Prakash Sahu Vs. State of UP, 2014 (86) ACC 214 (All)

11.3 A private vehicle would not come within the expression “Public Place”: A private vehicle would not come within the expression “Public Place” as explained in Section 43 of the NDPS Act, 1985. Total non-compliance of Section 42 is impermissible though its rigor may get lessened in certain situations. In the present case, the recovery was effected from the accused persons while they were sitting on road in a jeep at a public place. Upholding the conviction of the accused, the High Court held that the case of the accused would be covered u/s 43 and not u/s 42 of the NDPS Act. Section 42 deals with the power of entry, search, seizure and arrest without warrant or authorisation while section 43 with the power of seizure and arrest in public place. See: Boota Singh Vs. State of Haryana, LL 2021 SC 218.

12 POCSO Court to try both the cases where accused charged under SC/ST Act also: A perusal of Section 20 of the SC/ST (Prevention of Atrocities) Act, 1989

and Section 42-A of the Protection of Children from Sexual Offences Act, 2012 reveals that there is a direct conflict between the two non obstante clauses contained in these two different enactments. If Section 20 of the SC/ST Act is to be invoked in a case involving offences under both the Acts, the same would be triable by a Special Court constituted under Section 14 of the SC/ST Act and if provisions of Section 42-A of the POCSO Act are to be applied, such a case shall be tried by a Special Court constituted under Section 28 of the POCSO Act. Dealing with an issue identical to the case on hand, the Apex Court in *Sarwan Singh Vs. Kasturi Lal*, AIR 1977 SC 265 held thus : "When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier. In *KSL & Industries Limited Vs. Arihant Threads Limited & Others*, AIR 2015 SC 498, the Apex Court held thus :In view of the non obstante clause contained in both the Acts, one of the important tests is the purpose of the two enactments. It is important to recognize and ensure that the purpose of both enactments is as far as possible fulfilled. A perusal of both the enactments would show that POCSO Act is a self contained legislation which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure. The legislature introduced the non obstante clause in Section 42-A of the POCSO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POCSO Act though the legislature was aware about the existence of non obstante clause in Section 20 of the SC/ST Act. Applying the test of chronology, the POCSO Act, 2012 came into force with effect from 20.06.2012 whereas SC/ST Act was in force from 30.01.1990. The POCSO Act being beneficial to all and later in point of time, it is to be held that the provisions of POCSO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments." See : *State of A.P. Vs. Mangali Yadgiri*, 2016 CrLJ 1415 (Hyderabad High Court)(AP) (*paras 14, 15, 16, 17, 19 & 20*)

13 Provisions of NDPS Act, 1985 are not in derogation of the Drugs and Cosmetics Act, 1940: Accused was found in bulk possession of the manufactured drugs without any valid authorization and was convicted under the NDPS Act, 1985. The High Court u/s 389 CrPC directed suspension of sentence and granted bail to the convict appellant by holding that the convict must have been tried under the Drugs and Cosmetics Act, 1940 instead of the NDPS Act, 1985. The Supreme Court set aside the order of the High Court by holding that the provisions of the NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940. See: State of Punjab Vs. Rakesh Kumar, AIR 2019 SC 84 (Three-Judge Bench).