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# Invocation of section 29 of the NDPS Act, 1985 – When and How: An analysis

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## ABSTRACT

*Abetment and Criminal Conspiracy are covered under section 29 of the NDPS Act 1985. This article analyses the requirements to be met while invoking the provisions of section 29 of the NDPS Act 1985. While explaining the fine points of section 29 of the NDPS Act 1985, it also discusses the inter play of various Central Acts viz. The Indian Contract, Indian Evidence Act, Indian Penal Code for a proper understanding of section 29 of the NDPS Act 1985. Suitable case laws are also discussed herein.*

1. Routinely we see the empowered officers invoke the provisions of section 29 of the NDPS Act, 1985. But the Hon'ble Courts – Trial and Appellate – have struck down the same on account of the lack of evidence to substantiate the allegations levelled against the accused.
2. In order to understand the provisions of Section 29 of the NDPS Act, 1985, we reproduce the same for a proper and deeper understanding of the same:

*“29. **Punishment for abetment and criminal conspiracy.**—(1) **Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.***

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which—

*(a) would constitute **an offence if committed within India**; or*

*(b) under the laws of such place, is an offence relating **to narcotic drugs or psychotropic substances** having all the legal conditions required to constitute it such an offence the same as or analogous to*

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*the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India”*

3. Section 29 of the NDPS Act, 1985 falls under Chapter IV of the NDPS Act, 1985 and Chapter IV deals with offences and penalties. A cursory glance of this provision reveals the following:

3.1 Section 29(1) covers all the persons who abet or are a party to a criminal conspiracy. We see that there is an inter play between the provisions of NDPS Act, 1985 and other Acts, to which we shall refer to at appropriate places in the article.

4. Under sub-section (1), the abetment and entering a criminal conspiracy are to commit an offence punishable **under Chapter IV** of the NDPS Act, 1985. It is immaterial as to whether such offence is committed or not in consequence of such abetment or in pursuance of such criminal conspiracy. A summary of the offences covered under Chapter IV of the NDPS Act, 1985 is tabulated as under for ease of understanding:

Sl. No.	Section	Description of the offence	Offence	Punishment
1	15	Punishment for contravention in relation to poppy straw	Small quantity	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.
			Intermediate quantity	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
			Commercial quantity	Rigorous Imprisonment for a term which shall not be for less than 10

				years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.
2	16	Punishment for contravention in relation to coca plant and coca leaves	There is no classification of the quantity in to small and commercial quantity	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
3	17	Punishment for contravention in relation of prepared opium	Small quantity	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.
			Intermediate quantity (IQ)	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
			Commercial quantity	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty

				<p>years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.</p> <p>The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.</p>
4	18	Punishment for contravention in relation to opium poppy and opium	Small quantity(SQ)	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.
			Commercial quantity(CQ)	Rigorous Imprisonment for a term which shall not be for less than 10 years and which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.
				The proviso to this

			<p>section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.</p>
			<p>- In any other case, with RI which may extend to 10 years and with fine which may extend to Rs.1,00,000/-</p>
			<p>Note: In terms of Note 3 of the Notification specifying small and commercial quantity notified vide S.O. 1055 ( E) published in the Gazette of India Extraordinary Part II, section 3(ii) dated 19.10.2001, small quantity and commercial quantity with respect to cultivation of opium poppy is not specified separately as the offence in this regard is specifically covered under clause (c ) of section 18 of the NDPS Act, 1985</p>
5	19	Embezzlement of opium by the cultivator	<p>A licensed cultivator of opium poppy who embezzles or otherwise illegally disposes of the opium produced or any part thereof shall be punished with RI for a term which shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which</p>

			<p>shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-</p> <p>The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.</p>			
6	20	Punishment for contravention in relation to cannabis plant and cannabis	Cultivation of cannabis plant	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.		
			Produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State, or uses cannabis	SQ	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.	
				IQ	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.	

				CQ	<p>Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.</p> <p>The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.</p>
7	21	Punishment for contravention in relation to manufactured drugs and preparations	Small quantity	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.	



			Intermediate quantity (IQ)	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
			Commercial quantity	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.  The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.
8	22	Punishment for contravention in relation to psychotropic substances	Small quantity	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.

			Intermediate quantity (IQ)	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
			Commercial quantity	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.  The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.
9	23	Punishment for illegal import in to India, export from India or transshipment of narcotic drugs and psychotropic substances	Small quantity	Rigorous Imprisonment for one year or with fine which may extend to Rs.10,000/- or both.

			Intermediate quantity (IQ)	Rigorous Imprisonment for a term which may extend upto ten years and with fine which may extend to Rs.1,00,000/-.
			Commercial quantity	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.  The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.
10	24	Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of section 12	There is no classification for the purpose of this section.	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may

				<p>extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.</p> <p>The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.</p>
11	25	Punishment for allowing premises, etc.	The person, being the owner or occupier of having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under the provisions of the NDPS Act, 1985 shall be punishable with the punishment provided for that offence.	
12	25A	Punishment for contravention of orders made under section 9A	There is no classification involved for controlled substances.	The person shall be punishable with RI for a term which may extend to 10 years and shall also be liable to fine which may extend to Rs.1,00,000/-. For the reasons to be

				recorded in the judgment, fine exceeding Rs.1,00,000/- can also be imposed.
13	26	Punishment for certain acts by licensee or his servants	For the offences falling under this section, the person shall be punishable with imprisonment for a term which may extend to three years or with fine or with bot.	
14	27	Punishment for consumption of any narcotic drug or psychotropic substance	Where the narcotic drug or psychotropic substance consumed is cocaine, morphine, diacetyl-morphine (i.e.heroin) or any other narcotic drug or any psychotropic substance as may be specified in the official gazette	RI for a term of one year or with fine which may extend to Rs.20,000/- or with both
			Where the narcotic drug or psychotropic substance consumed is	Imprisonment for a term which may extend to 6 months or with fine which may

			other than those above	extend to Rs.10,000/-
15	27A	Punishment for financing illicit traffic and harbouring offenders	Whoever indulges in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of clause (viii) of section 2 or harbours any person engaged in any of the above activities	Rigorous Imprisonment for a term which shall not be for less than 10 years but which may extend upto twenty years and with fine which shall not be less than Rs.1,00,000/- but which may extend to Rs.2,00,000/-.  The proviso to this section provides for imposition of fine exceeding Rs.2,00,000/-, subject to the conditions that the reasons for the same are recorded.
16	27B	Punishment for contravention of section 8A	RI for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine	
17	28	Punishment for attempts to commit offences	Shall be punishable with the punishment provided for the offence	
18	29	Punishment for abetment and criminal conspiracy	Notwithstanding anything contained in section 116 of the Indian Penal Code, 1860, the person shall be punishable with the punishment provided for the	

			offence.
19	30	Preparation	<p>If any person makes preparation to do or omits to do anything which constitutes an offence punishable under any of the provisions of sections 19, 24 and 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance and from the circumstances of the case] it may be reasonably inferred that he was determined to carry out his intention to commit the offence but had been prevented by circumstances independent of his will, he shall be punishable with rigorous imprisonment for a term which shall not be less than one-half of the minimum term (if any), but which may extend to one-half of the maximum term, of imprisonment with which he would have been punishable in the event of his having committed such offence, and also with fine which shall not be less than one-half of the minimum amount (if any), of fine with which he would have been punishable, but which may extend to one-half of the maximum amount of fine with which he would have ordinarily (that is to say in the absence of special reasons) been punishable, in the event aforesaid.</p> <p>The court may, for reasons to be recorded in the judgment, impose a higher fine.</p>

20	31	Enhanced punishment for offences after previous conviction	<p>shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one-half of the maximum term of imprisonment and also be liable to fine which shall extend to one-half of the maximum amount of fine.</p> <p>Where a person is liable to be punished with a minimum term of imprisonment and to a minimum amount of fine, the minimum punishment for such person shall be one-half of the minimum term of imprisonment and one-half of the minimum amount of fine. The court may, for reasons to be recorded in the judgment, impose a fine exceeding the fine for which a person is liable.</p>
21	31A	Death penalty for certain offences after previous conviction	financing, directly or indirectly, any of the activities specified in clause (a) of section 31A, shall be punishable with death.
22	32	Punishment for offence for which no punishment is provided	Whoever contravenes any provision of the NDPS Act or any rule or order made, or any condition of any licence, permit or authorisation issued thereunder for which no punishment is separately provided in this Chapter, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.
<b>NB: The quantity greater than small quantity and less than commercial quantity has been</b>			



**termed as ‘intermediate quantity’ by the Ld. Courts and hence the same has been used. The NDPS Act, 1985 does not use this term.**

5. Moving further, we find that in section 29 of the NDPS Act, 1985, two words/phrases have been used i.e. abetment and criminal conspiracy. Esteemed readers may note that both the words have not been defined under the NDPS Act, 1985. Before we move forward, it is essential that we understand both these words/phrases.

6. We find that both these words/phrases have been defined under the Indian Penal Code, 1860 and hence we extract the definitions from the IPC, 1860 for a holistic understanding:

**“107. Abetment of a thing.**—A person abets the doing of a thing, who—

First.—**Instigates any person** to do that thing; or

Secondly.—Engages with **one or more other person or persons in any conspiracy for the doing of that thing**, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—**Intentionally aids, by any act or illegal omission, the doing of that thing.**

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

### **Illustration**

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

**108. Abettor.**—A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is **not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.**

Illustrations

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the **person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge**

**Illustrations**

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death.

B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the

same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

### **Illustration**

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is **not necessary** to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. **It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.**

### **Illustration**

A concerts with B a plan for poisoning Z. It is agreed that A shall

administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. **A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.**

7. Criminal conspiracy has been defined under section 120A of the IPC, 1860, which is extracted as under:

“120A. Definition of criminal conspiracy.—When two or more **persons agree to do, or cause to be done,—**

(1) **an illegal act**, or

(2) an act **which is not illegal by illegal means**, such an agreement is designated a criminal conspiracy:

Provided that no agreement except **an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.**

Explanation. — It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

8. A perusal of the provisions of sections 107 and 108 of the IPC, 1860 along with the illustrations appended thereto throws insight into the concept of abetment and who is an abettor.

8.1 Gleaning of the provisions of section 107 and section 108 of IPC, 1860 reveal the following:

8.2 A instigates a person, say B, to do a thing. This is done in pursuance of conspiracy. The doing of that thing, deliberately, knowingly or intentionally or aiding/helping by any act or illegal omission, in the doing of that thing, A is called the ‘abettor’ and B is called ‘abetted’

8.3 It flows from the above that

- A minimum of two people is required to carry out the given task, which is illegal in nature. Meaning thereby a predetermined plan/pre-existing agreement is formulated by A and B and both act in unison in execution of the predetermined plan.
- There is *consensus ad idem* (meeting of minds; unity of thoughts) between A and B. Meaning thereby, *consensus ad idem* should be in existence prior to the commissioning of the crime.
- There is an integrated effort by all members in execution of the illegal act.
- The number of people involved at the threshold level is two and may go up.

8.4 If these basic ingredients are fulfilled, we can safely conclude that A and B have **common intention**. Esteemed readers may note that in terms of section 34 of the IPC, 1860, when two persons (could be more than 2 person) give their consent to perform an act, under common intention, the co-accused is punished equally for the criminal liability. Meaning thereby in such cases both A and B or every member is liable for that act, in a way that they had done the act solely.

8.5 To summarize the features of Common intention, we may conclude as under:

- There is a pre-existing agreement between two or more individuals to commit a crime.
- Meaning thereby before the commission of the crime, the individuals have a prior understanding and agreement to commit a crime in unison and as a part of an integrated approach and plan.
- Common intention is typically inferred from the actions and statements of the members of the group.
- To hold the entire group liable, it is essential that the prosecution can prove common intention.

8.6 In contrast to section 34 of IPC, 1860, section 149 of the IPC, 1860 covers a situation wherein the number of persons required are 5 or more. Under section 149 of the IPC, 1860, there is no requirement of prior meeting of minds or prior agreement/pre-existing agreement. Hence, the vital difference between section 34 and section 149 of the IPC, 1860 is required to be noted. As against common intention, common object refers to the goal of the crime that the individuals have agreed to commit. A common object is established during the commission of the crime.

8.7 The Hon'ble Supreme Court in **Mohd. Husain Umar Kochra, Etc. v. K.S. Dalipsinghji and Anr. Etc. - (1969) 3 SCC 429** held that the pre-requisites of conspiracy

require a common design and integrated effort by all members. The relevant paras are extracted hereunder for a proper appreciation:

*“15. As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in Section 120-A of the IPC is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not done by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons cooperate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In *S.K. Khetwani v. State of Maharashtra* [(1967) 1 SCR 595] and *S. Swaminathan v. State of Madras* [AIR 1957 SC 340] the Court found a single general conspiracy while in *R. v. Griffiths* [(1962) 2 All ER 448] the Court found a number of unrelated, separate,*

*conspiracies.”*

8.8 We find that the term criminal conspiracy has also not been defined under the NDPS Act, 1985. Hence, we take recourse to the definition under the provisions of Cr. P.C., 1973. Criminal conspiracy as defined in section 120A of the IPC, 1860 is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not done by illegal means.

8.9 When two or more persons come together to do an illegal act by illegal means results in hatching of a criminal conspiracy. Esteemed readers may note that conspiracy is always hatched in the dark and it is difficult to obtain direct evidence to establish the same and hence it must be proved by circumstantial evidence too.

8.10 As already stated, criminal conspiracy involves common intention. Common Intention refers to the predetermined plan and acting in unison to proceed with the plan. Common Intention springs before the crime is committed, but the time gap between the two should not be long. It could take place suddenly.

8.11 Section 34 of the IPC, 1860 incorporates the principle of joint liability when a criminal act is performed, and the crux of that liability is the presence of common intention. Its applicability is due to the involvement in the offence. It is among the provisions of the Indian Penal Code, which is exercised to extend the liability of other people.

8.12 The essence of section 34 of IPC, 1860 is that the presence of accused is generally required under this section, especially in cases relating to instigation in terms of the judgment of the Hon'ble Supreme Court in the case of **Jasdeep Singh @ Jassu v. State of Punjab – 2022 LiveLaw (SC) 19**. The relevant para is extracted hereunder:

*“25. Normally, in an offense committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offense consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.”*

8.13 Having understood the broad contours of abetment and criminal conspiracy and the difference between common intention and common object, we now return to section 29 of the

NDPS Act, 1985. Esteemed officers may note that in order to prove the charge of abetment or conspiracy under section 29 of the NDPS Act, 1985 the prosecution must adduce independent, corroborative and affirmative legal evidence.

8.14 Before we further, it is also required to be made known to the esteemed readers the terms ‘agreement’ and ‘contract’.

8.15 A cursory glance of the definition gives a clear picture that criminal conspiracy is the result of an agreement. The term ‘agreement’ has not been defined under the NDPS Act, 1985

8.16 We find that the Indian Contract Act, 1872 deals with agreement and contract. We need to find as to how constitutes an agreement and what constitutes a contract.

8.17 We see that the term agreement is defined under section 2 (e ) of the Indian Contract Act, 1872, which is as under:

*“Every promise and every set of promises, forming the consideration for each other, is an agreement.*

8.18 The term contract is defined under section 2(h) of the Indian Contract Act, 1872, as under:

*“an agreement enforceable through the law”*

8.19 Going a bit deeper for a better understanding of both the terms, we can list out the basic differences between “agreement” and “contract”.

<b>Grounds of difference</b>	<b>Agreement</b>	<b>Contract</b>
Written form	Need not be always in written form	Generally, a contract is written and registered
Legal status	An agreement does not create a legal obligation	Contracts are legally enforceable.
Scope	It is wider in nature and includes both legal and social agreement.	The term contract is used in a narrow sense.
Binding nature	Not all agreements are legally binding on the parties.	Contract is binding.



	To perform the promise of an agreement is not essential.	The parties to the contract must perform the promise that has been made.
	Every agreement is not a contract.	Every contract is certainly an agreement.
Elements	Offer and acceptance.	An agreement which is legally enforceable. Breach of contract is a violation of the terms and conditions upon agreed upon.

8.20 Section 10 of the Indian Contract Act, 1872 states that “*All agreements are contracts, if they are made by the free consent of parties competent to contract, for lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*”

8.21 It follows from the above that an agreement would become a contract when the same has been entered into by

- Free consent,
- The parties competent to contract,
- For lawful consideration, &
- For lawful consideration.

8.22 Consequently, when we are dealing with agreements, which do not have the ingredients mentioned above, they cannot be termed as contracts.

8.23 Since we are dealing with the provisions of section 29 of the NDPS Act, 1985, at this stage a question that would arise in the minds of the esteemed readers are as to whether when a person A enters into an agreement with person B say to, collect a bag containing 5 kilograms of heroin for a monetary consideration. Is this a valid agreement?

It may be noted that B is tasked to collect a bag containing 5 kilograms of heroin. The NDPS Act, 1985 does not permit the same and hence we can safely conclude that the purpose of the agreement between A and B is to do an illegal act and esteemed readers may note at this juncture that an agreement to do an illegal act is *void ab initio*.

9 Having understood the broad contours of criminal conspiracy, agreement, common

intention, etc. we now turn to Section 29 of the NDPS Act, 1985

9.1 Section 29 of the Act punishes a person for abetment and conspiracy of an offence committed under Chapter IV of the Act.

9.2 Section 29 of the Act comes into play if an accused under the NDPS Act, 1985 has conspired to commit an offence under Chapter IV of the Act, whether the offence is complete or not.

9.2.1 A and B enter into an agreement where as a part of the agreement, A says he will pay Rs. 2,00,000/- to B if he takes delivery of the consignment from him and thereupon successfully transports and delivers the consignment to the person to be named by A on B reaching the destination. B gets caught during the transportation with commercial quantity of heroin.

9.2.2 In the example,

- A abets B in the commission of offence;
- Both A and B have common intention;
- Possession, transportation of narcotics is an offence;
- There is criminal conspiracy between A and B;
- B acts on the directions of A and is to be paid on successful completion of the act of delivery

On B being caught/apprehended with the commercial quantity of heroin and B becomes an accused. If the empowered department allege that A is involved in the offence, the allegation of conspiracy or abetment would translate into proof only if the empowered prosecution department establishes the identity of A with whom the accused B had conspired. There should be evidences to connect both the accused A and B to the offence. As already stated there cannot be direct evidence for criminal conspiracy. However, it can be inferred from the facts and circumstances, related material/evidence gathered during the investigation, which is outcome of the investigation carried out by the empowered prosecuting department.

9.23 Illustrating this situation, the prosecuting agency based on credible and actionable input, after due approval of the competent authority, intercepts telephonic conversations, which are duly recorded and transcribed, which categorically reveal that A and B have entered into an agreement to transport heroin from Malda to Delhi and consequently based on the intercepted conversations, a trap is laid, and B is intercepted in Delhi. In a case of this kind, we can rope in A as the person, who had abetted and had entered into criminal conspiracy with B. Even though A is in Malda, the jurisdiction of the courts would be in Delhi.

9.24 During investigations, no recovery has been made from A, but the intercepted conversation, Call Detail Records (CDR), location of B to receive the consignment from A using Cellular Triangulation [examination of CDR from Cellular Tower Geo-location is called Cellular Triangulation] (Cellular Triangulation data is extremely relevant and useful when the relative time period corresponds with one or more cellular towers being utilized for SMS, voice calls, etc.) and its subsequent transportation to Delhi, would indicate that both A and B are part of the same and single transaction. Therefore, *prima facie*, material of abetment and/or criminal conspiracy has been obtained to show that A was part of this two-member syndicate. Here A, on being apprehended and arrested, can be proceeded under section 29 of the NDPS Act, 1985. It is emphasized that mere A getting in touch with B, without substantive material, cannot be treated as corroborative evidence. Once apprehended and arrested, A can be produced before the Ld. Trial Court and his voice samples can be taken and the same can be sent to the FSL. The prosecuting agency can also send the taped and recorded conversation between A and B. The FSL, based on the voice samples and the taped conversation would conclude whether the voice samples of A matches with the taped conversation of A produced by the prosecuting agency. In the event of the affirmative report of the FSL, A can be charged under section 29 of the NDPS Act, 1985 for abetment and criminal conspiracy. The evidences can vary from case to case and it is for the prosecuting department to produce solid evidences in this regard.

9.26 In one of the recent cases, popularly known as drug cruise case, provision of section 29 of the NDPS Act, 1985 was invoked even though there was no recovery from one of the bail applicant *viz.* Aryan Khan. The Ld. Trial Court refused to enlarge him on bail and the matter reached the Hon'ble High Court of Bombay.

9.27 Criminal Bail Application No. 3624 of 2021, Interim Application No. 2606 of 2021, Interim Application No. 2605 of 2021, Criminal Bail Application No. 3625 of 2021, Criminal Bail Application No. 3642 of 2021 came to be decided on 28.10.2021 by the Hon'ble High Court of Bombay - **2021 SCC OnLine Bom 4127. The bail applications** for grant of regular bail in C.R. No. 94 of 2021 for the offence punishable under Section 8(c) read with Section 20(b), Sections 27, 28, 29 and 35 of the NDPS Act, 1985 came to be filed by **Aryan Khan, Munmun Amit Kumar Dhamecha and Arbaaz A. Merchant** under section 439 of the Cr. P.C., 1973.

9.27.1 Para 8 of the judgment in the case records the facts of the case as under:

***“8. Accused no. 1 Aryan was not found in possession of any objectionable substance is not in dispute. Accused nos. 2 & 3 found to***

*be in illegal possession (direct/indirect) of drugs which is covered under the provisions of NDPS Act. Such quantity of drugs which was seized from the possession of Accused nos. 2 & 3 if independently considered, is a small quantity is not disputed fact. However, Mr. Singh by relying on provisions of Section 29 (conspiracy) claims that cumulatively, commercial quantity of drugs was seized from Accused persons in the present case. It is worth to mention here that there are more than 11 Accused named in the present case.”*

9.27.2 The question posed by the Hon’ble High Court of Bombay in this case can be traced to para 9 of the judgment, which is as under:

*“9. As such, this Court is first required to ascertain whether there is enough material on record to prima facie infer that the Applicants have hatched a conspiracy and that the prosecution was justified in invoking provisions of Section 29 of the NDPS Act at this stage.”*

9.27.3 The Hon’ble High Court, answering the question and while enlarging the bail applicants on bail, observed, and held as under:

*“10. For inferring the act of hatching conspiracy on the part of the Applicants and other co-accused, there has to be positive evidence about an agreement to do an unlawful act or to do lawful act by unlawful means and such agreement must precede with meeting of minds. Of course, such agreement can be express or implied or in parts. As far as the case in hand is concerned, the fact remains that Applicant nos. 1 & 2 were travelling together whereas Applicant no. 3 had an independent travel plan which has no connection or relation with the travel of Applicant nos. 1 & 2. After having gone through the Whats-App chats extracted from Applicant/Accused no. 1's phone, nothing objectionable could be noticed to suggest that Applicant nos. 1 & 2 or all three applicants alongwith other Accused persons in agreement have meeting of minds and have hatched conspiracy committing the offence in question.*

*11. There is hardly any positive evidence on record to convince this Court that all the accused persons with common intention agreed to commit unlawful act. Rather the investigation carried out till this date*

**suggests that Applicant/Accused nos. 1 & 2 were travelling independent of Applicant/Accused no. 3 and there was no meeting of minds on the aforesaid issue.**

12. So as to infer the case of conspiracy against the Applicants also, there is absence of material on record of them having such meeting of minds with other Accused who were named in the offence in question. Case of the prosecution that Applicants have admitted to commit an offence also amounts to an offence under the NDPS Act. Even if it is appreciated, the maximum punishment prescribed is not more than one year for such offence. Applicants have already suffered incarceration for almost 25 days. The Applicants were not even subjected to medical examination so as to determine whether at the relevant time, they had consumed drugs.

13. Mr. Singh, learned Additional Solicitor General was justified in relying on the Judgment of the Apex Court in the matter of State of Orissa v. Mahimananda Mishra reported in (2018) 10 SCC 516 to claim that high degree of evidence is not required at this stage of the proceedings to establish the case of conspiracy, however, this **Court is required to be sensitive to the fact that there has to be presence of basic material in the form of evidence so as to substantiate the case of conspiracy against the Applicants. Merely because of Applicants were travelling on the cruise, that by itself cannot be termed as satisfying foundation for invoking provisions of Section 29 against the Applicants.**

14. Having regard to the material brought on record by the Respondent on the issue of conspiracy, **this Court prima facie has not noticed any positive evidence against the Applicants on the said issue. This Court is of the opinion that the claim put forth by the Respondent that Applicants should be considered to have intention to commit an offence under the NDPS Act, having found in possession of commercial quantity, in the backdrop of case of hatching conspiracy is liable to be rejected.**

15. Section 67 of the NDPS Act provides for powers to call for

information. Hence, it also empowers Investing Officer to record confessional statement of the Accused which has a binding effect. Prosecution has claimed that confessional statements given by **Accused persons admitting to have committed offence alleged against them, however, such confessional statements are not having any binding effect in law as the said issue is squarely covered by the Apex Court in the matter of Tofan Singh v. State of Tamil Nadu in Criminal Appeal No. 152 of 2013.** Once the confessional statement of the Applicants/Accused cannot bind them of the offence in view of the Judgment of Supreme Court in the matter of Toofan Singh [cited *supra*], **the claim put forth by the Respondent that Accused persons have accepted their involvement in the crime is liable to be rejected.**

16. However, in view of submissions made by Mr. Singh, it is worth **to clarify here that such confessional statements can be considered by the investigating agency only for the investigation purpose and cannot be used as a tool for drawing an inference that Applicants have committed an offence under the NDPS Act as has been alleged against them.**

17. Though Mr. Singh, Additional Solicitor General has resisted the case based on the requirement under Section 37 of the NDPS Act viz. cognizability and the non-bailable offence, provisions of said Section 37 prima facie will not be attracted in the case in hand as **this Court has already observed that there is no material on record to infer that Applicants have hatched conspiracy to commit the offence. That being so, at this stage, it is difficult to infer that Applicants are involved in an offence of commercial quantity. As such, parameters laid down under Section 37 of the NDPS act will be of hardly any consequence while considering the prayer for grant of bail of the Applicants.**

18. **As such, all these three Bail Applications are allowed.**”

9.28 To go back on times, it will be extremely useful to deal with the judgment of the Hon’ble Supreme Court in the case of **Saju v. State of Kerala – 2000 SCC OnLine SC 1588**. Though rendered not in the context of the NDPS Act, 1985, the same is applicable to the NDPS Act, 1985 as provisions of Cr. P.C., 1973 is applicable insofar as they are not inconsistent with the

provisions of the NDPS Act, 1985 to all warrants issued and arrests, searches and seizures made under this Act. It will be extremely useful to note the interplay between the provisions of the IPC, 1860 *vis a vis* the provisions of section 10 of the Indian Evidence Act, 1872.

*“7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120-B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available. It is also not necessary that each member to a conspiracy must know all the details of the conspiracy. This Court in Yash Pal Mittal v. State of Punjab [(1977) 4 SCC 540 : 1978 SCC (Cri) 5 : AIR 1977 SC 2433] held : (SCC pp. 543-44, para 9)*

*“9. The offence of criminal conspiracy under Section 120-A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the*

*conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under Section 120-A is brought out pithily by this Court in E.G. Barsay v. State of Bombay [AIR 1961 SC 1762 : (1962) 2 SCR 195 : (1962) 2 Cri LJ 828] (SCR at p. 228) thus:*

*‘The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Penal Code, 1860, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.’*

*We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy.”*

*8. In a criminal case the onus lies on the prosecution to prove affirmatively that the accused was directly and personally connected with the acts or omissions attributable to the crime committed by him. It is a settled position of law that act or action of one of the accused cannot be used as evidence against another. However, an exception*



has been carved out under Section 10 of the Evidence Act in the case of conspiracy. **To attract the applicability of Section 10 of the Evidence Act, the court must have reasonable ground to believe that two or more persons had conspired together for committing an offence.** It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other. This Court in *Kehar Singh v. State (Delhi Admn.)* [(1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883] has held : (SCC pp. 649-51, para 45)

“Section 120-A provides for the definition of criminal conspiracy and it speaks of that when two or more persons agree to do or cause to be done an act which is an illegal act and Section 120-B provides for the punishment for a criminal conspiracy and it is interesting to note that in order to prove a conspiracy it has always been felt that it was not easy to get direct evidence. It appears that considering this experience about the proof of conspiracy that Section 10 of the Indian Evidence Act was enacted. Section 10 reads:

‘10. Things said or done by conspirator in reference to common design.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.’

This section mainly could be divided into two : **the first part talks of where there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, and it is only when this condition precedent is satisfied that the subsequent**

**part of the section comes into operation** and it is material to note that this part of the section talks of reasonable grounds to believe that two or more persons have conspired together and this evidently has reference to Section 120-A where it is provided 'when two or more persons agree to do, or cause to be done'. This further has been safeguarded by providing a proviso that **no agreement except an agreement to commit an offence shall amount to criminal conspiracy**. It will be therefore necessary that a prima facie case of conspiracy has to be established for application of Section 10. The second part of section talks of anything said, done or written by any one of such persons in reference to the common intention after the time when such intention was first entertained by any one of them is relevant fact against each of the persons believed to be so conspiring as well for the purpose for proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. **It is clear that this second part permits the use of evidence which otherwise could not be used against the accused person. It is well settled that act or action of one of the accused could not be used as evidence against the other. But an exception has been carved out in Section 10 in cases of conspiracy. The second part operates only when the first part of the section is clearly established i.e. there must be reasonable ground to believe that two or more persons have conspired together in the light of the language of Section 120-A. It is only then the evidence of action or statements made by one of the accused could be used as evidence against the other.** In *Sardar Sardul Singh Caveeshar v. State of Maharashtra* [AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608 sub nom *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra*] Subba Rao, J. (as he then was) analysed the provision of Section 10 and made the following observations : (SCR pp. 389-91)

'This section, as the opening words indicate, will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there

should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts limited by two circumstances, namely, **that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression “in reference to their common intention” is very comprehensive and it appears to have been designedly used to give it a wider scope than the words “in furtherance of” in the English law;** with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only “as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it”. It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analysed as follows : (1) There shall be a prima facie evidence affording a reasonable ground for a court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said,

*done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; (5) it can only be used against a co-conspirator and not in his favour.’ ”*

It was further held : (SCC pp. 734-35, paras 278-80)

*“278. From an analysis of the section, it will be seen that Section 10 will come into play only when the court is satisfied that **there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a prima facie evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator. Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others.** It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it. It is true that the observations of Subba Rao, J., in *Sardul Singh Caveeshar v. State of Maharashtra* [AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608 sub nom *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra*] lend support to the contention that the admissibility of evidence as between co-conspirators would be (sic more) liberal than in English law. The learned Judge said : (SCR p. 390)*

‘The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression “in reference to their common intention” is very comprehensive and it appears to have been designedly used to give it a wider scope than the words “in furtherance of” in English law; with the result, anything said, done or written by a co-conspirator, after

the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it.’

279. *But, with respect, the above observations that the words of Section 10 have been designedly used to give a wider scope than the concept of conspiracy in English law, may not be accurate. This particular aspect of the law has been considered by the Privy Council in Mirza Akbar v. King Emperor [AIR 1940 PC 176 : 41 Cri LJ 871 : 67 IA 336] AIR at p. 180, where Lord Wright said that there is no difference in principle in Indian law in view of Section 10 of the Evidence Act.*

280. *The decision of the Privy Council in Mirza Akbar case [AIR 1940 PC 176 : 41 Cri LJ 871 : 67 IA 336] has been referred to with approval in Sardul Singh Caveeshar v. State of Bombay [AIR 1957 SC 747, 760 : 1958 SCR 161 : 1957 Cri LJ 1325] where Jagannadhadas, J., said : (SCR p. 193)*

*‘The limits of the admissibility of evidence in conspiracy cases under Section 10 of the Evidence Act have been authoritatively laid down by the Privy Council in Mirza Akbar v. King Emperor [AIR 1940 PC 176 : 41 Cri LJ 871 : 67 IA 336] . In that case, their Lordships of the Privy Council held that Section 10 of the Evidence Act must be construed in accordance with the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. They notice that evidence receivable under Section 10 of the Evidence Act of **“anything said, done, or written, by any one of such persons” (i.e. conspirators) must be “in reference to their common intention”**. **But their Lordships held that in the context (notwithstanding the amplitude of the above phrase) the words therein are not capable of being widely construed having regard to the well-known principle above enunciated.**’ ”*

**Emphasis applied.**

9.29 In Cr. Appl. No. 363 of 2001 decided on 31.08.2004 by the Hon'ble High Court of Bombay in the case of Rakesh R. Sharma v. Assistant Commissioner of Customs and another - **2004 SCC OnLine Bom 1197**, an appeal was filed by the accused against his conviction under section 29 read with sections 8(c) and 22 of the NDPS Act by the Special Judge (NDPS), Brihanmumbai, vide his judgment dated 13.3.2001 by which the accused has been sentenced to suffer R.I. for 10 years and to pay a fine of Rs. One lac and in default to undergo S.I. for 3 months.

9.29.1 The facts of the case are recorded in para 2 of the judgment as under:

*“2. The case of the prosecution, in short, is that, the Assistant Commissioner of Customs, Sahar Airport, Mumbai received a letter dated 18-6-1998 from Tauseef Khan, Air Port Manager, South African Airway, Mumbai to the effect that two bags of South African Airways Flight SA-277 dated 18-6-1988 were found to be tagged twice by the counter-staff of the Airline with the Tag. No. SA-157605 and SA-157606 and as such the said tags were overloaded and the concerned passenger was required to identify the tags. Further information in the said letter is that all the four bags were tagged in the name of SOBEY/CP MRS. The said passenger identified two bags out of four as her baggage and, therefore, the other two tags which were tagged under the same tag numbers were taken to the Aircraft Door and all the passengers were asked to identify the-bags. However, none of the passengers from the said flight could identify the other two bags. Two bags were taken charge of and under the letter and directions of Assistant Commissioner addressed to the Air Intelligence Unit of Customs a search was carried out in presence of two panchas and the two bags were found containing 88.334 grams methaqualone tablets. The matter was thoroughly investigated and it was found during investigation that one Shinde loader had brought those bags and he sought help of this accused in getting duplicate tags. The procedure in this regard was brought on record by PW-3 Taqseefkhan Mohd. Anis Khan who was working with South African Airways as Air Port Manager since 1995 and he was in the station at the Airport. His evidence, which is relevant for the purpose of role of this accused and that of Shinde, is in paras 4 and 5 which are as under:—*

*Para No. 4:— On 17-6-98 I reported duty at the Airport at 11.00 p.m. At about 11.45 p.m. I came to the checked-in-counter Shri Sunil Thilal had allotted duty to our staff. Milind Sawant was allotted duty at the ramp area. The ramp area is around make-up area and the Aircraft. The Hariprasad was working as an errand staff-acting as a peon. Richa Yadav was supervising counter area to sort out any grievances of the passengers. The Air India staff manning the counter were Rakesh Sharma and 2 others. Rakesh Sharma is present in the Court. Accd. sitting in the dock is the said Rakesh Sharma. (Witness points out the accd. sitting in the dock). There was one loader by name Shinde. The said Shinde was assisting in tagging the bag on and of there were some passengers at the counter when I went there. Most of the staff members of South African Airways have walkie talkie sets. I was having one, Milind Sawant was having one, Richa Yadav having one. With the help of this sets we can communicate with each other. If somebody is near me we can hear the voice of calling party. If I speak loudly others present near me can also hear. On that day the flight was S.A. 277 and the time of departure was 2.30 a.m. on 18-6-98. While I was at the counter on 18-6-98 Milind Sawant contacted me on walkie talkie and informed that there were 2 bags that has duplicate tag numbers as detected by Air-India security in the make-up area. The name of the passenger given as Sobey C.P. Milind Sawant told me that there were 4 bags in the make-up area and 2 bags had duplicate tag number on the bags i.e. to say 2 bags had same number. When the call came at that time the accd. was present. I told Milind Sawant to get all the 4 bags of loaded. At that time I did not know who from the Air-India staff had issued duplicate number of baggage tag. The accd. stated to me that he has checked in the said passenger Sobey in whose name the 4 pieces of baggage were shown. The accd. stated to me that he has checked in all 4 bags from his counter. When I asked for an explanation from the accd. the accd. stated that the passenger*

*Sobey had actually 4 bags but he initially checked in 2 baggages. Since there were 2 more bags along with this 2 bags he thought that his bags have not been checked in and he took out the same tag numbers again off tagged on the said 2 pieces of baggage. I asked him as to how the discrepancy took place and he stated that there was an error on his part. We had a discussion and the accd. suggested that the problem could be solves by adding 2 more baggages in the computer and issue fresh tag. I allowed him to do that, and I moved away from the counter. I also believed him as he was authorised Air-India staff and allowed him to do what he said.*

*Para 5:— The accd. took 4 tags from the computer 2 of the old number and 2 next consecutive numbers. I do not remember those consecutive numbers. At the relevant time I had seen the number from the tags as well as computer number. The accd. sent the tags through another loader by name Shinde whom I have mentioned above. The loader went and attached the new tags on the 4 bags. Shri Shinde brought the earlier tags having duplicate number on the checked-in-counter. Shri Shinde showed the tags to me to convince me that there was an error because of lines on the tags. Shinde threw the tags in the dustbin. I did not retain the said tags.”*

9.28.1 Overturning the judgment of conviction recorded by the Ld. Special Judge (NDPS), the Hon’ble High Court, after analyzing the provisions of the NDPS Act, 1985 *vis a vis* the evidence brought on record, observed, and held as under:

*“8. It is pertinent to note that though the accused was charged under Section 29 r/w 8(c), 2 and 23, then 22 r/w 8(c) and 29 and, then 28 r/w 22, 23, 8(c) and 29 of the NDPS Act, he came to be convicted by the Special Court only under Section 29 r/w 8(c) and 22 of the NDPS Act and the present appeal is against the said conviction.*

***9. Section 29 of the NDPS Act as already observed is about punishment of criminal conspiracy. The basic requirements of that section is whoever abets, or is a party to a criminal conspiracy and, therefore knowledge of***



**conspiracy and the acts done towards abetment after getting knowledge are the basic requirements for attracting the aforesaid Section 29.**

*10. Section 8(c) of the NDPS Act speaks of prohibition of certain operation and it reads that No person shall— (c) produce, manufacture, possess, sell, purchase, transport, — export from India or tranship any narcotic drug or psychotropic substance. Admittedly, the prohibition will apply to a person who knows or is conscious of articles being narcotic drugs or psychotropic substance with reference to the charge levelled against him. Here in the case what the accused has stated in his answer in the statement reproduced above, during recording of his statement under Section 108 of the Customs Act, is that he was suspecting or he was thinking. That will obviously not amount to the knowledge of the conspiracy or being conscious of the conspiracy. My attention was drawn by the counsel for the accused to the injury report of the accused when he was examined as per the orders of the Court by Medical Officer, Bombay Central Prison Hospital. The report is about examination of the accused on 21-6-98 wherein five injuries were noted on the person of the accused, and the doctor has opined that the injuries were 36-72 hours duration at that time of examination. The counsel, appearing for the accused, therefore, stated that the aforesaid statement, upon which reliance was placed by Mr. Thakur, PP, was obtained after assaulting the accused.*

**11. In fact, the statement that was recorded under Section 108 of the Customs Act and the portion involving the accused, reproduced by me above, does not come to the rescue of the prosecution in proving the case against the accused about he being a party to the conspiracy. Therefore, it is not necessary to go into this aspect that whether such a statement was obtained by coercion or by beating. No other point was urged before me and, in view of the submissions made by Mr. Thakur, PP and the evidence, pointed out by him, this is a case where appeal is required to be allowed and the conviction is liable to be set aside by giving the accused clear cut acquittal.”**

**Emphasis added.**

10. Though the examples cited are not in plenty, the cited examples are sufficient to bring

out the essence to constitute abetment and criminal conspiracy under the NDPS Act, 1985.

11. In conclusion, it can be safely concluded that in order to invoke section 29 of the NDPS Act, 1985, it is essential that the basic ingredients are fulfilled for sustainability of the case.

11.1 As can be seen, in the absence of the cogent evidences, the cases under the NDPS Act, 1985 have not met with success.

12. In view of the aforesaid position, it is essential that the empowered officers of various prosecuting agencies go through the provisions of the NDPS Act, 1985 and the judgments relating on the issue of abetment and criminal conspiracy.

13. Apart from this, it is equally for the empowered officers to understand the inter play between the provisions of various other Acts, as has been discussed herein.

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