

**Abdul Sattar Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/700386](http://sooperkanoon.com/700386)

**Court :** Delhi

**Decided On :** Apr-06-1992

**Reported in :** 1992(40)ECC12

**Judge :** V.B. Bansal, J.

**Appeal No. :** Criminal Misc. (M) No. 2585 of 1991

**Appellant :** Abdul Sattar

**Respondent :** State

**Advocate for Def. :** Shri. B.K. Sharma

**Advocate for Pet/Ap. :** Shri. Gurvinder Singh

**Disposition :** Application dismissed

**Judgement :**

**V.B. Bansal, J.**

1. The only ground on which the petitioner claims bail for the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as the NDPS Act) is the non-filing of a challan against him within 90 days of his arrest.

2. According to the case of the prosecution the petitioner was arrested on 6th July, 1991 when he was found in possession of 1 kg. of charas. Challan against the petitioner was filed on 11th October, 1991.

3. I have heard Shri Gurvinder Singh, learned Counsel for the petitioner and Shri B.K. Sharma, learned Counsel for the respondent.

4. Submission of learned Counsel for the petitioner has been that a person against whom challan has not been filed within the period of 60 days or 90 days he [has] vested right in terms of Section 167(2) of the Code of Criminal Procedure and, thus, metropolitan magistrate has no option but to pass an order of bail. He has, thus, submitted that it is an order in default regardless of the seriousness of the allegations against the petitioner. He has also submitted that by virtue of Section 36A of the NDPS Act provisions of Section 167(2) Cr. PC have been made applicable to the Special Judge who has dealt with the remand of accused after 7 days if it is by an Executive Magistrate and 15 days if it is by a judicial magistrate. He has placed reliance upon a number of judgments which I would refer to in the latter part of the judgment.

5. Learned Counsel for the respondent has, on the other hand, submitted that Section 37 of the NDPS Act has provided the grounds on which bail can be allowed for the offence under the NDPS Act and that the provisions of Section 36A would not be available to the petitioner in view of the fact that Special Courts have not been created in Delhi and the procedure would be under the Code of Criminal Procedure read with Section 36D and 37 of the NDPS Act. He has, thus, submitted that there was no applicability for filing of the challan within 90 days and in these circumstances the petitioner cannot claim an order of bail in default. A prayer has, therefore, been made that the application may be rejected.

6. It would at this stage be appropriate to quote the relevant Sections which are as under:-

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

(a) all offences under this Act 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:

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under Sub-section (2) or Sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers-

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under Clause, (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section:

(d) A Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial.

Section 37: (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 a term of imprisonment of five years or more under this Act 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 the offence and that he is not likely to commit any offence while on bail,

(2) The limitation 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 (2 of 1974), or any other law for the time being in force on granting of bail.

7. A bare reading of the aforesaid provisions makes it abundantly clear that all the offences under this Act have to be tried by Special Courts constituted under the Act and after the initial period of remand of 7 days or 15 days which would be even by Executive Magistrate or Judicial Magistrate further proceedings for remand and bail have to be before the Special Judge. There is no dispute that Special Court consists of Single Judge who has to be appointed by the Government with the concurrence of the Chief Justice of the High Court and to be eligible for appointment as a Judge of the Special Court a person has to be a Sessions or an Additional Sessions Judge immediately before such appointment as provided under Section 36 of the NDPS Act. There has to be no committal proceedings and a Special Court has to try the case as a warrant case. It is in these circumstances that notwithstanding other proceedings it has specifically been provided that the proceedings before the Special Court would be governed by the provisions contained in Section 167 Cr. PC.

8. It is admitted case of the parties that no Special Court has been constituted in Delhi and thus the cases are being tried by the Session Court on committal by the Metropolitan Magistrate.

9. Learned Counsel for the petitioner placed reliance upon the judgment *Md. Abdul v. The State of West Bengal* 1991(2) Crim 741, a Division Bench judgment of the

Calcutta High Court and submitted that the prosecution having failed to file the challan against the petitioner within 90 days he should be released on bail. I am afraid this judgment does not help the petitioner in any manner. All that has been stated in the judgment is that a Special Court has no option but to grant bail to a person against whom challan is not filed within the period prescribed under Section 167(2) of the Code of Criminal Procedure. There is possibly no dispute about this proposition since under Clause (c) of Section 36A the Special Court can exercise in relation to the person forwarded to it under Clause(b) the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 Cr. PC in relation to an accused person in such case who has been forwarded to him under that section. It is, thus, clear that the provisions under Section 36(a) is available only to the Special Judge and none else. There, is no doubt that to be appointed as Special Judge a person has to be a Sessions Judge or an Additional Sessions Judge but the procedure applicable is that of a warrant case. He has no power to grant bail under Section 439 Cr.P.C Sub-section (3) of Section 36A clearly provides that the powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure are not affected. There is no mention of the power under this section being available to the Sessions Court. It is, thus, clear that to claim bail petitioner has to bring his case within the ambit of Section 37 of the NDPS Act.

10. Learned Counsel for the petitioners has also placed reliance upon the judgment in case Smt. Nanda and Anr. v. State of Maharashtra 1991(2) Crim 678 a Single Bench Judgment of the Nagpur Bench of the Bombay High Court. In the said case there is a specific mention that a reference is pending since there was difference of opinion before Single Bench decision. Till the decision of the reference the learned Judge allowed bail since the challan was not filed within the requisite period. This judgment again, to my mind, cannot be of any help since the authoritative pronouncement is yet to come from the Division Bench. Reliance has also been placed on the Judgment Kalika Prasad and Ors. v. The State of Madhya Pradesh and Ors. 1992 (1) Crim 73, a judgment of Madhya Pradesh High Court. A bare perusal of the judgment indicates that without discussing the law it has been held that if challan is filed beyond 60 days of the arrest of the accused he is entitled to be released on bail on that account alone. I am afraid this judgment

cannot be of any help to hold that Section 167(2) Cr. PC will be applicable even to the cases not tried by the Special Court but by the Session Court after committal proceedings.

11. Learned Counsel for the petitioner has also submitted that this Court has already decided that if investigation is not completed within 60/90 days bail is granted and there is no option with the magistrate but to allow bail regardless of the seriousness of the offence and he has referred to the case Anil Kumar Gandhi & Kulwant Singh v. N.C.B. and Ors. 1991 JCC 466. I am afraid the judgment is not being read with reference to the matter which was under discussion. The question for consideration in the said judgment was as to whether an accused was entitled to be released on bail in view of the delay in the disposal of the case. While dealing with the matter it was held that wherever the legislature intended to fix specific time they made a provision in this regard like Section 167 Cr. PC under which if a challan is not filed within 60 or 90 days of the arrest of an accused he shall be entitled to be released as of right without going into the merits of the case. Reliance was also placed on the Supreme Court judgment in case Rajnikant Jivanlal Patel and Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi : 1990 CriLJ62 . It was held in the said judgment that a person released on account of default in the filing of challan within the prescribed period cannot claim a special right to remain on bail and if the investigation reveals that the accused has committed a serious offence and charge sheet is filed. The bail granted under proviso (a) to Section 167(2) Cr. PC could be cancelled. The point under consideration in the said judgment was not as to whether the provisions under Section 167(2) Cr. PC would be applicable to a case and in the area where Special Courts have not been constituted and the cases are being tried under the ordinary law.

12. Considering all the facts and circumstances, I am clearly of the view that the benefit of Section 167(2) of the Code of Criminal Procedure is not available to the petitioner.

13. As a result the application for bail of the petitioner stands dismissed. A copy of order be sent to Sessions Judge for information of the Concerned Courts.

