

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl. M.C. No.1157 of 2008

% Reserved on: 08.04.2008
Date of Decision: 11.04.2008

MRS. MANI SHANDLY & ANR. ...PETITIONERS
Through: Mr. Arjun Bhandari &
Mr. B.K. Singh Advocates.

Versus

THE STATE & ANR. ...RESPONDENTS
Through: Mr. Sanjay Lao, APP for the State.

CORAM :
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. Temperance is the hallmark of judicial authority. The exercise of judicial authority is not 'show of strength' but a duty to be performed with humility and yet firmness. This cardinal principle seems to have been lost while passing orders in the present case.
2. The petitioners, both ladies, have been charged under Sections 347/461 of the Delhi Municipal Corporation Act (hereinafter referred to as the said Act) by the MCD on the

allegation of misuse of property consisting ground floor of property bearing No.B-23, Greater Kailash, Part-I, New Delhi in the capacity of the owner/occupier. The criminal complaint No.1291/2001 is filed by the MCD, which was pending in the Court of the learned MM. The offence is a bailable offence punishable with simple imprisonment, which may extend to six months or fine which may extend to Rs.5,000.00 or with both. It is the case of the petitioners that they were only employees working in the said premises at the relevant time and had been falsely implicated on the inspection carried out since the owner/accused No.1 was not present in the premises. The complaint was filed in the year 2001 and the misuse is stated to have been stopped by the owner and the premises are even stated to have been transferred on a subsequent date.

3. The petitioners state that they have been appearing in the complaint case commencing from their first appearance on 17.9.2002 without any default. On 30.10.2006 notice was framed under Section 251 of the Cr.P.C. against the petitioners and the matter was adjourned to 24.3.2008 for evidence. The petitioners alleged that they had wrongly noted the date as 25.3.2008 and thus failed to appear on 24.3.2008. An application for exemption on behalf of the first accused was moved which was allowed on 24.3.2008 but since neither the counsel nor the petitioners as

accused Nos.2 & 3 were present, the personal bonds and surety bonds were forfeited and NBWs were issued against the petitioners. Simultaneously notices under Section 446 of the Cr.P.C. were issued against the accused persons as well as the sureties returnable on 28.7.2008.

4. The petitioners claimed that when they went to appear before the trial court on 25.3.2008 without their counsel (who was alleged to be out-of-station since 18.3.2008) they did not find the matter in the cause list. On contacting the counsel on 27.3.2008 they came to know what had transpired on 24.3.2008. The petitioners, thus, immediately filed application for cancellation of NBWs and for restoration of the personal bonds and surety bonds with an undertaking to appear before the trial court on the next date of hearing. However, the said application was dismissed by the impugned order dated 3.4.2008. The rationale for the impugned order is that for decision of the application it was necessary to decide whether the non-appearance of the petitioners was deliberate or due to a *bonafide* mistake. The trial court has noted that since the accused had come to court knowing that their counsel was out-of-station, the counsel must have informed the petitioners of the date of 24.3.2008 and his non-availability and thus it must be implied that they were aware of the next date of hearing. It has also been noticed that the counsel for the petitioners had been

appearing for all the accused persons including accused No.1 although there is no *vakalatnama* on record. On 24.3.2008 another counsel Shri Pradeep Jaiswal appeared for accused No.1 and filed his *vakalatnama* along with exemption application and the counsel who filed the exemption application had the same address as of Shri B.K. Singh, who had appeared for the petitioners though without a *vakalatnama*. These counsels were, once again, present at the time of hearing of the application and thus it is assumed that Shri B.K. Singh, Advocate had knowledge of the hearing but instructed Shri Pradeep Jaiswal, Advocate to only appear for accused No.1 and not for the petitioners herein, who were accused Nos.2 & 3. It is, thus, concluded that it was a deliberate ploy on the part of the accused to prolong the matter as witnesses had to be returned unexamined on that day. The petitioners were thus held not entitled to any leniency despite the judgements cited at the bar. The personal bonds of the petitioners were forfeited and they were directed to deposit the personal bond amount in the court on or before the next date of hearing and in default of the same to undergo civil imprisonment of seven (7) days.

5. Learned counsel for the petitioners has pleaded that the petitioners had never committed any default of appearance before the trial court on any other occasion and there was no reason to believe that non-appearance

of the petitioners on 24.3.2008 was with any intention to evade the process of law and that the NBWs were issued in a routine and mechanical manner without assigning any reason. It is further pleaded that on 24.3.2008 there was no complainant witness present and thus in any case there was no question of any prejudice being caused by the non-appearance by the petitioners. Learned counsel has also sought to draw strength from Rule 3 of Chapter 1 of Part C (i) in Part III, Delhi High Court Rules, which reads as under:

“Rule 3. Warrant should not be issued unless absolutely necessary – Great care should be taken not to issue a warrant when a summon should be sufficient for the ends of justice. Magistrate should remember that the issue of a warrant involves interference with the personal liberty of a person and should take care to see that no greater hardship is caused than is necessary. Under Section 76 of the Code (Now Section 71 of New Code) a court has the discretion to make the warrant bailable, and this discretion should be exercised with due regard to the nature of the offence, the position of the accused person and the circumstances of the case.”

6. It is, thus, pleaded that a bare reference to the Rules would show the emphasis has been laid on the fact that issuance of warrants involves interference with personal liberty of a person and thus due care should be taken to see that no greater hardship is caused than is necessary. Since the court has a discretion to make the warrants bailable under Section 71 of the Cr.P.C., the discretion can be exercised with due regard to the nature of the offence, the position of the accused persons and the circumstances

of the case.

7. The attention of this Court is drawn to the provisions of Sections 87 & 89 of the Cr.P.C. which read as under:

“87. Issue of warrant in lieu of, or in addition to, summons. - A court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest-

(a) If either before the issue of summons, or after the issue of the same but before time fixed for his appearance, the court sees reason to believe that he has absconded or will not obey the summons; or

(b) If, at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

.....

89. Arrest on breach of bond for appearance. - When any person who is bound by any bond taken under this Code to appear before a court, does not appear, the officer presiding in such court may issue a warrant directing that such person be arrested and produced before him.”

8. It is, thus, submitted that it is the discretion vested with the trial court for issuance of warrants but the discretion is fettered with the requirement of recording reasons in writing for issuance of warrants of arrest.
9. Learned counsel for the petitioners has emphasized that the trial court while noting the various judgements has not discussed the relevant aspect and has merely brushed aside the judgements of this Court as well as of the Apex Court. A recent landmark judgement, which should be a guidance for all the courts is in the case of Inder Mohan

Goswami & Anr. Vs. State of Uttaranchal & Ors. 2007 (12)

Scale 15. The guidelines as to when a non-bailable warrant ought to be issued has been succinctly set out by the Supreme Court in the said judgement by emphasizing that arrest and imprisonment means deprivation of the rights of an individual and thus the courts have to be extremely careful before issuing non-bailable warrants. The courts are, thus, required to maintain proper balance between individual liberties and interest of public and State while issuing non-bailable warrants. It was emphasized that non-bailable warrants should be issued to bring a person to court when summons and bailable warrants would be unlikely to have the desired results. The discussion in this behalf is contained in the following paragraphs of the said judgement:

“When non-bailable warrants should be issued

52. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or
- it is considered that the person could harm someone if not placed into custody immediately.

53. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be

preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

54. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

55. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

56. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.”

(emphasis supplied)

10. It is not as if the attention of this Court has not been earlier drawn to this permeating problem relating to issuance of non-bailable warrants as is apparent from the judgement of A.K. Sikri, J. in Naresh Kumar Vs. State 131 (2006) DLT 678. It was noticed that if an accused tries to

evade the process of law or intentionally delays proceedings the Magistrate has the power to issue non-bailable warrants but such powers have to be exercised only in those circumstances and not lightly and not *in terrorem*. A reference was made to Rule 3 referred to aforesaid to emphasise that the trial court is not supposed to take extreme steps of issuing non-bailable warrants on the very first call and in pre-lunch hours and such orders are passed indiscriminately and a number of such cases are coming to this Court. The non-bailable warrants were, thus, quashed.

11. Learned counsel has also referred to the judgement of the learned single Judge of this Court in Shri Radhakrishnan Vs. State 1995 JCC 568 where the counsel present did not want to cross-examine the witnesses in the absence of the petitioner and the learned Magistrate cancelled the bail bond and ordered NBW against the petitioner and notice to the surety under Section 446 of the Cr.P.C. It was held that there was no justification for forfeiture of the personal bond and the learned Magistrate at most could have closed the evidence.
12. Learned counsel for the petitioners not referred to the judgement of the learned single Judge of this Court in Puneet Singh Chauhan & Anr. Vs. State & Anr. 107 (2003) DLT 220 where the scope of Section 89 of the Cr.P.C read with Section 436 of the Cr.P.C. was discussed. It was held

that in case of arrest on breach of bond for appearance in bailable offence the courts of MM and Sessions Judges issuing the process of warrants of arrest under Section 89 of the Cr.P.C. for procuring the appearance of the accused shall either on appearance by the accused on his own or on his production by the police in execution of warrants or arrest shall release the accused on his furnishing bond with or without sureties. A contrary conduct was held to be unsustainable since on the appearance of such a person he could not be sent to judicial custody as he was entitled to immediately be released on executing bond with or without sureties as it would otherwise amount to converting bailable offence into non-bailable ones.

13. Learned counsel for the petitioners has also referred to the judgement of the learned single Judge of this Court in Court on its own motion Vs. CBI 2004 (72) DRJ 629 where directions were issued to the criminal courts and the relevant ones are reproduced hereinunder:

“

(ii) In case the court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the chargesheet, he or it shall have to record the reasons in writing as contemplated under Section 87 Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or

absconding or failure to obey summons and the court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436 Cr.P.C.

....”

(emphasis supplied)

14. In G. Sagar Suri v. State & Anr., 106 (2003) DLT 439, it was observed as under :-

“13. It is manifest from the provisions of Section 82 Cr.P.C that before publishing the written proclamation requiring the accused to appear under the provisions of Section 82 Cr.P.C the court has to record the reasons either after taking evidence or without evidence that a person against whom warrants have been issued has absconded or is concealing himself so that such warrants cannot be executed. The procedure for publication of the proclamation is laid down in sub-section (2) of Section 82. Sub-section (1) provides that the Court shall wait for thirty days after publication of the proclamation for the appearance of the accused and it is only after processes under Section 82 Cr.P.C are exhausted that the next step under Section 83 is to be taken by the Court.

14. Section 83 enjoins upon the court to record the reasons in writing for ordering the attachment of any property belonging to the person who has been proclaimed as an offender under Section 82 Cr.P.C. Even the order of attachment of property has two pre-requisites. Firstly the court has to satisfy itself either by affidavit or otherwise that the person in relation to whom the proclamation is to be issued is about to dispose of whole or any part of the property or secondly that he is about to remove whole or part of the property from the local jurisdiction of the court. Thus the orders passed by learned MM in this regard suffer from gross illegality and inherent infirmity.

15. Every criminal court is a creature of Criminal

Procedure Code. It is neither above it nor can it rise about it. It has to remain within its precincts and cannot afford to traverse beyond it. Any order passed beyond the provisions and in violation of mandatory provisions empowering the court to issue warrant of arrest or proclamation under Section 82 or attachment of property under Section 83 have to be reasoned one and in accord with essential requirements. Curtailment of any person's liberty with the sledge of hammer does not comport with judicial discretion vested by the provisions of Criminal Procedure Code in the criminal court. More absolute power the court enjoys more circumspective and sparing use of it is expected. Absolute power does not admit element of arbitrariness."

16. If the aforesaid legal principles are applied to the facts of the present case the impugned order leaves much to be desired. It is certainly in breach of the guidance given by the Supreme Court which is binding on the MM. It is further in breach of the directions issued by this Court from time to time referred aforesaid.
17. The learned MM seems to have proceeded with the sole object of somehow dismissing the application of the petitioners and trying to smell rats when there are none. The petitioners were appearing in person and were present on all dates. They have stated in the application that the date had been wrongly noted. The counsel was out-of-station. To draw the conclusion that the counsel must have informed the petitioners about his going out-of-station and thus must have told them the correct date and thus they must have known the correct date is on the basis of surmises and conjuncture on which the learned MM seems to have proceeded while considering the

application seeking recall of the NBWs. Once again, on the aspect of the counsel representing accused No.1 being present and seeking exemption of his appearance and the factum that the counsel having some linkage to the other counsel who was out-of-station and was appearing for accused No.1 and had also appeared for accused Nos.2 & 3 on earlier dates though without Power of Attorney is not of much significance. There, in fact, have been no previous occasions noted in the impugned order when the petitioners have not remained present in court. It has also been pointed out that even the complainant's witnesses were not present on the relevant date and thus there has been no prejudice to the trial. The impugned order is not only unsustainable but borders on perversity.

18. It has been necessary to pen down a more detailed judgement in this case because of a number of such cases coming to the notice of this Court of indiscriminate issuance of NBWs. The accused must remain present for purposes of early conclusion of trial. An accused who seeks to defeat the course of justice by repeatedly absenting himself must be dealt with firmly. I, however, consider that non-presence should not result in issuance of NBWs straightaway when issuance of bailable warrants could secure the presence of the petitioners. The petitioners were appearing on earlier dates and it is not as if the issuance of bailable warrants could not have

ensured their presence on the subsequent dates. The trial court must take into consideration the important aspects such as the past conduct of the accused, the nature of offence or the failure to appear in pursuance to the order of summoning. The present case is one of bailable offences and the petitioners appeared in pursuance to the summons issued and continued to appear but were absent on one date. Not only that they even moved an application for recall of the non-bailable warrants, which has been dismissed by the impugned order. The trial court at the stage of issuance of NBWs at the initial stage did not record any reasons for taking this extreme step and thus the order was in violation of the direction (ii) contained in the judgement of this Court in Court on its own motion Vs. CBI (supra). The caution given in the Rule 3 aforesaid has also been thrown to the winds by the trial court. It is clearly provided that when issuance of summons or bailable warrants would suffice, there is no necessity to issue NBWs as it involves interference with personal liberties of persons.

19. The present case was not one where the trial court had reason to believe that the petitioners would not voluntarily appear in court or that they could not be located by the police authorities or would harm somebody if not taken into custody as per the parameters laid down in Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.

case (supra). The power has, thus, not been exercised judiciously and the impugned order suffers from total lack of judicious approach to the matter in question. The caution extended in Naresh Kumar Vs. State case (supra) has once again been thrown to the winds. It needs to be emphasised that the trial court in such cases must endeavour to secure presence and issue bailable warrants in case of such one time default before resorting to the process of issuance of non-bailable warrants. The object of issuance of NBWs is not to satisfy the ego of a judge but to secure the presence of an accused. R.C. Chopra, J. in Geeta Sethi v. State, 91 (2001) DLT 47 has emphasized that courts administering justice on criminal side must always remain alive to the '*presumption of innocence*' which is the hallmark of criminal jurisprudence and, thus, a natural consequence is that every accused is clothed with the presumption of innocence and entitled to just, fair and decent trial and the aim of the criminal trial is not humiliating or harassing an accused, but to determine the guilty of the innocence. It is in this context further observations were made to the effect that though the presence of an accused in a criminal trial is certainly important and must be insisted upon if the offence is serious and the accused is likely to be punished severely so that in his absence his defence is not jeopardized. The accused involved in summons cases, cases under special

Acts and offences where violations are statutory, the offenders should not be treated as hardened criminals.

20. In the end I am only reminded of a Judge's prayer and a portion of it is extracted below:

“.....Give me grace to hear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I may not be misled by my willfulness, vanity or egotism.....”

21. The aforesaid prayer should never be lost sight of by a Judge and humility is a virtue which should not be overpowered by vanity or egotism. The presence of a group of police officers in court while a Judge presides over the criminal jurisdiction should not give a misconceived heady feeling of a sense of power where a Judge seeks obedience losing sight of fundamental principles of Constitution rights, criminal jurisprudence and fair play. I refrain from saying anything further with the favourable hope that the learned Judge (and in fact other learned Judges of the Sub-ordinate Courts) would exercise such jurisdiction with care in future.
22. The impugned order is quashed, the NBWs are cancelled, personal bonds and sureties restored with the direction to the petitioners to appear before the trial court on the next date of hearing.
23. Petition accordingly stands allowed.

APRIL 11, 2008
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SANJAY KISHAN KAUL, J.