$~3

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

% ***24th January, 2022***

\+ **CRL.M.C. 176/2022**

AFZAL AHMED ..... Petitioner

Through: Mr. Aditya Aggarwal, Adv. and Mr. Ankit Mutreja, Adv.

versus

STATE ..... Respondent

Through: Ms. Rajni Gupta, APP for the State.

CORAM:
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. This is a petition filed by the petitioner under Section 482 Cr.P.C. seeking cancellation of NBWs issued against the petitioner and for setting aside of the impugned order dated 22.12.2021.

2. It is submitted by the counsel for the petitioner that the matter was listed for hearing on 22.12.2021 before the trial court but the petitioner could not appear before the trial court timely and at 11.30 am the trial court issued non bailable warrants against the petitioner and also forfeited the bonds. The petitioner at around 12.30 pm appeared before the trial court, and moved an application for cancellation of his warrants on the ground that he got late because his motorcycle went out of order, so he could not reach the court on time. It is further submitted by the counsel for the petitioner that

non-appearance of the petitioner on time was neither intentional nor deliberate, however he was diligent and has moved the application for cancellation of warrants on the very same day in pre-lunch session. It is further submitted by the counsel for the petitioner that petitioner was taken into custody by the learned trial court.

3. I have perused the order dated 22.12.2021. The impugned order reads as follows:-

> *"Hearing is resumed at 11:30 am.*
>
> *Present: Sh. Masood Ahmad, Ld. Addl. PP for the State.*
> *Accused Md. Aizaz @ Patila and Md. Faizal in person on bail.*
> *It is submitted by the witnesses that they cannot wait further as they have to attend their duties.*
> *In the above facts, witnesses are discharged unexamined for today and they be summoned again for the next date of hearing.*
> *Bail bonds furnished by accused Afzal Ahmad are forfeited.*
> *Issue NBW against accused Afzal Ahmad and notice u/s 446 Cr.P.C to his surety for the next date of hearing.*
> *Put up for report on the warrants/appearance of the accused on 02-02-2022*
>
> *Sd/-*
> *Special Judge (NDPS)/ASJ*
> *North East/Delhi 22.12.2021*
>
> *At this stage at 12:30 pm, file taken up again on the appearance of accused Afzal Ahmed and moving of application seeking cancellation of warrants.*
> *Accused Afzal Ahmed is present with Ld. Proxy Counsel, Sh. S.Wajid Ali.*
> *It is stated by accused that he could not appear in the Court at the time of call as his motorcycle went out of order and he reached at 12:00 noon in the Court. Upon query, he stated that he left his house situated at Ghaziabad to Come to Court at 10:30 am.*
> *Considering the facts where two witnesses were present in the morning and they could not be examined due to non appearance of accused, his non appearance appears intentional. As such, his application for cancellation of warrants is dismissed. His bail bonds has been forfeited.*

Accused Afzal Ahmed is taken into custody and he be produced on next date of hearing i.e 02-02-2022.

Witnesses be summoned for next date.

Sd/-
Special Judge (NDPS)/ASJ
North East/Delhi 22.12.2021"

4. It has been mainly submitted by the counsel for the petitioner that warrants were issued by the trial court during the early hours of morning, and it is further submitted that petitioner has moved the application for cancellation of warrants on the same very day, which shows his bonafide.

5. Counsel for the petitioner has placed reliance upon the judgment in the case of ***Inder Mohan Goswami and Anr. Vs.State of Uttranchal and Ors., (2007) 12 SCC*** 1 to submit that non-bailable warrants should not be issued casually and mechanically as the same involves interference with the personal liberty of an individual. He has also placed reliance upon the judgment in the case of ***Pratap Verma Vs. State (NCT of Delhi)*** Crl. M.C. 1129/2016.

6. It is submitted by learned APP that two police witnesses were present on the said date, and because of non-appearance of the accused-petitioner the witnesses had to be sent back unexamined.

7. I have heard the counsel for the petitioner, and learned APP for the State.

8. In ***Inder Mohan Goswami (supra)***, Hon'ble Supreme Court discussed the issue as to how and when warrants should be issued by the Court. The relevant observations find mention in para 47 to 57 and it will be advantageous to reproduce the same which is as follows:

47. Before parting with this appeal, we would like to discuss an issue

which is of great public importance, Le., how and when warrants should be issued by the Court? It has come to our notice that in many cases that bailable and non-bailable warrants are issued casually and mechanically. In the instant case, the court without properly comprehending the nature of controversy involved and without exhausting the available remedies issued non-bailable warrants. The trial court disregarded the settled legal position clearly enumerated in the following two cases.

48. In ***Omwati v. State of UP and Anr.,*** *this Court dealt with a rather unusual matter wherein the High Court firstly issued bailable warrants against the appellant. And thereafter by issuing non bailable warrants put the complainant of the case behind bars without going through the facts of the case. This Court observed that the unfortunate sequel of such unmindful orders has been that the appellant was taken into custody and had to remain in jail for a few days, but without any justification. Whatsoever. She suffered because facts of the case were not considered in proper perspective before passing the orders. The court also observed that some degree of care is supposed to be taken before issuing warrants*

49. ***In State of U.P. v. Poosu and Anr****. 2976 Cri L 1373 at para 13 page 5, the Court observed*

> *Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non bailable warrant, is a matter which rests entirely in the discretion of the court. Although, the discretion is exercised judiciously, it is not possible to Computerize and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the court would take into account the various factors such as the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and the State.*

Personal liberty and the interest of the State

50 Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law

51. The issuance of non-bailable warrants involves interference with personal liberty, Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non

52. Just as liberty is precious for an individual so is the interest of the society in maintaining low and order. Both are extremely important for the survival of a civilized society, sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued

53. 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.*

54. 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.

55. 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 court's 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.

56 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.

57. 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.

9. In ***Naresh Kumar(supra),*** the situation was substantially similar. The accused could not appear in the Court in time due to change in Court Room. His non-bailable warrants were issued at 10:30 a.m. He appeared before Learned MM at about 10:40 a.m. He thereafter moved an application for cancellation of non-bailable warrants. Instead of considering the application, the same was adjourned and execution of non-bailable warrants was not

stayed. Facing threat of arrest, the petitioner approached this Court. Provisions of Rule 3 of Chapter 1, part0C(i) in Part III of Delhi High Court Rules were referred 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) o 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."*

10. In ***Puneet Singh Chauhan & Anr. Vs. State & Anr., 207(2003) DLT 220,*** it has been observed that the Trial Courts are acting contrary to the aforesaid mandate of law while issuing non-bailable warrants on the very first call and in the pre-lunch hours. If an accused tries to evade the process of law or intentionally delays the proceedings, the Magistrate has the power to issue non-bailable warrants. Such a power is, however, to be exercised only in those circumstances and not lightly and not in terrorem.

11. In the instant case, perusal of the order shows that two prosecution witnesses namely Inspector Nafe Singh and ASI Fatesh Singh were present for their examination but could not be examined because of non-appearance of the petitioner. The order reveals that petitioner appeared before the trial court at about 12.30 pm on the very same date, and an application for cancellation of the warrants was moved, but the learned trial court dismissed the application and forfeited the surety.

12. The bonafides of the petitioner are reflected from the fact that on the

same very day rather in pre-lunch session itself he has moved an application for cancellation of his warrants explaining reasons for his getting late in reaching the court. As far as the presence of two police officials was concerned, no doubt they were sent unexamined by the trial court, but the trial court should not have issued NBWs against the petitioner in early hours of the day and on appearance of the petitioner could have put him to terms rather than taking him into custody. There is nothing in the impugned order to show that the petitioner is guilty of such conduct on previous occasions also. So keeping in view the totality of facts and circumstances application moved by the petitioner did not find favour with the learned trial court resulting in its dismissal on the very same day i.e 22.12.2021 and petitioner was taken into custody, therefore, the impugned order in these circumstances cannot be sustained and is accordingly set aside. Personal bond and surety bond are restored and petitioner be released forthwith from the Jail, if not wanted in any other case.

13. The petition stands disposed of accordingly.

14. Digitalized copy of this order be also sent to the concerned Jail Superintendent for immediate release of the petitioner.

RAJNISH BHATNAGAR, J

JANUARY 24, 2022/ib