

Mike Anthony (In Jc) vs Narcotics Control Bureau on 1 April, 2025

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.04.

+ BAIL APPLN. 3254/2024
MIKE ANTHONY (IN JC)

versus

NARCOTICS CONTROL BUREAU

Advocates who appeared in this case:

For the Applicant : Mr. Vikram Hegde, Mr.Chitwan Sharm
Mr.Harsh Jain, Advocates

For the Respondent : Mr. Arun Khatri, Sr.Standing Coun
Ms. Shelly Dixit, Ms. Shreya Lamba,
Anoshuka, Mr. Sahil &Mr. Akshay,
Advocates

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present bail application is filed seeking regular bail in Case No. VIII/23/DZU/2023, registered for offences under Sections 8 (c), 22(c), 23(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The brief facts of the case are as follows:

2.1. On 24.05.2023, on the basis of secret information, a parcel bearing no. AWBZ16279354 was intercepted at DTDC Express Pvt.

Ltd., Village Samalkha, New Delhi. The said parcel was checked in the presence of independent witnesses and 9 LSD Blots (0.15 g) were recovered from the same.

2.2. On the same day, details of the parcel were enquired from DTDC, and in reply to the same, DTDC informed about the email received from the receiver of the parcel. The parcel was destined for the applicant at his address in South Goa.

2.3. On the basis of the collected evidence, a team of NCB intercepted the applicant at the DTDC Office, Margao. During preliminary investigation, the applicant stated that he had come to collect the parcel in question. The applicant also showed his wicker me chat with the sender of the parcel with the profile name- 'saulbadman007' and the email that was sent to DTDC. 2.4. Notice under Section 67 of the NDPS Act was served to the applicant where he disclosed that he was using the

wicker me app with the user name 'blotterson'. He stated that the payment for the order was made through cryptocurrency and the sender had informed him that he had sent 09 LSD Blots through the parcel. The applicant was arrested on 26.05.2023 and is in custody since then. 2.5. During investigation, it was found that the concerned parcel was booked by co-accused Gajender Singh with his associate Shainu, who used the wicker me profile 'Saulbadman007'. It was found that the aforesaid persons were in NCB in relation with their Delhi Zonal Unit Case VIII/24/DZU/2023.

3. The learned counsel for the applicant submitted that the applicant is innocent and he has been falsely implicated in the present case.

4. He submitted that the application under Section 52A of the NDPS Act was filed on 04.08.2023, that is, after more than a delay of 73 days and the samples were thereafter sent to CFSL Laboratory after more than 72 hours. He submitted that the same creates a doubt on the credibility of the prosecution.

5. He further submitted that the weight of the contraband recovered from the applicant came out to be 0.15 g, however, in the absence of any quantitative determination of LSD in the said paper blots, it cannot be ascertained as to what is the quantity of LSD recovered from the applicant. He submitted that in such circumstances, it cannot be said that the recovery was of commercial quantity.

6. He submitted that the blotter paper is a carrier and its weight is to be excluded. He submitted that LSD is a crystal which is mixed with alcohol and then dropped on paper. He submitted that while the weight of alcohol can be included, however, the weight of paper cannot be included. He submitted that if the weight of blotter paper is included, there could be no recovery of small quantity, which is, 0.002g. He relied upon the judgment of the Hon'ble High Court of Kerala in the case of Jagath Ram Joy : Bail Application No. 2530/2022 where it was held that the weight of blotting paper is to be excluded while determining whether the recovered blots contain commercial quantity.

7. He submitted that there is nothing on record except the disclosure statements of the accused persons to attribute the username 'blotterson' to the applicant. He submitted that the disclosure statements are not admissible as evidence and they cannot be used to deny bail to the applicant. He further submitted that even otherwise, wickr me chats and the email to DTDC are all part of phone data which is a matter of trial.

8. He relied upon the judgment of the Hon'ble Apex Court in the case of Bharat Chaudhary v. Union of India : (2021) 20 SCC 50 where it was held that printouts of WhatsApp chats, in absence of corroborative evidence, cannot be treated as sufficient material to establish a live link.

9. He submitted that the applicant was arrested on 25.05.2023. He submitted that there are fifteen witnesses and the trial is likely to take long.

10. Per contra, the learned Senior Standing Counsel for the respondent vehemently opposed the grant of bail to the applicant and submitted that the present case involves recovery of commercial quantity of contraband and therefore the rigours of Section 37 of the NDPS Act are attracted against the applicant.

11. He submitted that the combined weight of the blotter paper, which is a neutral substance, and LSD is relevant to determine whether the quantity is small or commercial. He relied upon the judgments in the cases of NCB v. Anuj Keshwani : Criminal WP No. 2077/2021 (Bombay High Court), Nihaal. S v. State by Inspector of Customs : Criminal Petition No. 8285/2022 (Karnataka High Court), Rajesh Ravindran v. Union of India : AIRONLINE 2021 Kar 1832 (Karnataka High Court) and HS Arun v. State of Goa : 2022 SCC OnLine Bom 4696 (Bombay High Court) in this regard.

12. He submitted that the applicant is actively involved in the commission of the offence and he was apprehended when he had come to retrieve the parcel at DTDC Goa. He further submitted that the applicant had inquired about the status of the concerned parcel from DTDC by email.

13. He further submitted that Wicker Me chats between the applicant and co-accused Shainu have been recovered from his mobile phone where the details regarding booking the parcel, payment chats and parcel AWB number have been discussed.

14. He submitted that the charge has been conceded on behalf of the applicant, however, the matter has not proceeded as arguments on charge are pending qua another co-accused.

ANALYSIS

15. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc. At the same time, the period of incarceration is also a relevant factor that is to be considered.

16. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfil the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

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

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

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

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

(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail."

17. In the present case, it is essentially argued that the applicant has been falsely implicated in the present case. It is argued that there is a delay in preferring the application under Section 52A of the NDPS Act and that the weight of the blotter paper cannot be included while determining the recovered quantity.

18. The Hon'ble Apex Court in the case of Narcotics Control Bureau v. Kashif : 2024 INSC 1045 has held that delayed compliance or non-compliance of the procedure under Section 52A of the NDPS Act cannot be treated as an illegality which would entitle the accused to bail or vitiate the trial on the said ground alone. It was held that the Court would need to consider all circumstances to find out whether any serious prejudice is caused to the accused. This Court had followed the said view in *Sovraj v. State* :2024:DHC:5009. Evidently, there is a delay of about 73 days in compliance of the procedure under Section 52A of the NDPS Act. It is open to the applicant to press the aforesaid defence and show prejudice at the time of trial. However, at this stage, the applicant has failed to establish a prima facie case as to how he has been prejudiced by the delayed compliance. In the opinion of this Court, at this stage, any observation as to the veracity of the recovery on account of delay will be premature.

19. Insofar as the inclusion of weight of blotter paper in the recovered quantity, it is argued by the learned counsel for the applicant that if the weight of the paper is not counted, the recovered quantity would at least be intermediate in nature. It is argued that if the weight of paper is included, then recovery of even a single LSD blot would fall in the ambit of intermediate quantity and there will be no small quantity.

20. The NDPS Act provides for a tiered sentencing mechanism wherein drug traffickers and peddlers dealing in significant quantities of drugs are dealt with a different hand than addicts and individuals who use the drugs for personal use. The object of stipulation of small quantity will be frustrated if even addicts and personal users are treated the same as traffickers.

21. On being pointedly asked, the learned SSC for NCB has not been able to point out any medium in which LSD, if recovered, would be categorised as small quantity. He, however, has referred to certain judgments where it has been held that the blotter paper weight is to be included in recovered quantity.

22. The Division Bench of the Hon'ble Bombay High Court in the case of H.S. Arun Kumar v. State of Goa:2022 SCC OnLine Bom 4696, while placing reliance on the judgment in the case of Hira Singh v. Union of India:(2020) 20 SCC 272, has held that the weight of the blotter paper is to be included while calculating the weight of the contraband. The Division Bench also referred to a catena of precedents from the United States of America as well as Australia to observe that the blotter paper is made of material that is edible and is an integral part of the mixture as the same is ingested with LSD. It was further observed that the objective of the NDPS Act seems to be to include not just the pure drug but also the blotter to quantify the quantity of the recovered substance. The relevant portion of the said judgment is reproduced hereunder:

"52. On this factual aspect, even Hira Singh (supra), in paragraph 10.3, records that illicit drugs are seldom sold in pure form....

53. The Supreme Court noted that, therefore, what is harmful or injurious is the entire mixture/tablets with neutral substances and Narcotic Drugs or Psychotropic Substances. Therefore, going only by the weight of the pure drug or psychotropic substance would frustrate the intention and purpose of enacting the NDPS Act. There may be few punishments for "commercial quantity".

Indeed, that would not have been the intention of the Legislature.

54. The Supreme Court noted that even considering the definition of "manufacture", "manufactured drug", and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material, is required to be considered while determining the small quantity or commercial quantity. Only such an interpretation would achieve the objectives and purpose of the NDPS Act. Any other interpretation to defeat the object and purpose of enactment of the NDPS Act as a deterrent.

55. Thus, both Nationally as well as Internationally, there appears to be a common ground as to the mode or how L.S.D. is usually dealt with in the market or on the streets or the mode or manner in which L.S.D. is consumed by impregnating it into a blotter and after that, at least in most cases, ingesting L.S.D. along with the blotter....

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57. Therefore, the swallowing or chewing of the blotter cannot become a significant distinguishing factor. Besides, the extreme instances or examples raised in the abstract cannot govern statutory interpretation in all cases. Nevertheless, the review of precedents, Nationally and internationally, establish that the combined weight of the blotter and the L.S.D. is crucial to the quantification upon

which the punishment depends.

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59. Section 2(xxiii) defines "psychotropic substance" means any substance, namely natural or synthetic or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. Thus, a psychotropic substance includes a preparation thereof. Alternatively, the preparation of psychotropic substances is also covered under the definition of psychotropic substance.

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64. There is an express indication in the NDPS Act about taking into account the entire quantity of the drug or the psychotropic substance seized in a case for determining the quantum of punishment and not just the pure drug content alone...

65. The statutory provisions and the scheme of the NDPS Act referred to above clearly provide, in more places than one, that the weight of the entire mixture and not just its pure drug content must be taken into account for determining whether the quantity is small, intermediate quantity or a commercial quantity. Moreover, the statement of object and reasons for introducing the amendment to the NDPS Act in 2014 explicitly clarifies the legislative intent to take the entire quantity of drug seized in a case for determining the quantum of punishment and not just the pure drug content.

66.Ultimately, E. Michael Raj (supra) was overruled by Hira Singh (supra). Hira Singh (supra) held that the legal position before E. Michael Raj (supra) that the entire quantity of the drug seized would be relevant to determine the quantum of punishment and not just the pure drug content. Thus, considering the legislative intervention after E. Michael Raj (supra) and the judicial overruling of E. Michael Raj (supra) by Hira Singh (supra), any argument that only the weight of pure L.S.D. is relevant to determining the quantum of punishment, would not not sustain.

67. In the context of the definition of "preparation" in Section 2(xx), the expression "mixture, in whatever physical state" cannot be ignored. This expression would include a mixture of L.S.D. and blotter. Ultimately, there is no dispute that the L.S.D. dissolved in a solution like alcohol is dropped on the blotter. The mixture of L.S.D. on the blotter is then ingested. Therefore, the expression "in whatever physical state" cannot be ignored or rendered meaningless or redundant. The fact that the Legislature chose to use this expression expressly will have to be respected and given some meaning.

68. Similar is the position of the statutory provisions referred to above or the statutory Notification issued under the NDPS Act. The suitable meaning having regard to the context, will have to be assigned to expressions like "mixture or substance" and "containing one or more such drugs or substances". The expression "one or more" cannot be read or construed as "two or more". In the statutory Notification dated 19.10.2001, the expression in Entry 239 of the Table concerning "any mixture or preparation that of with or without a neutral material" must be considered and respected. Similarly, in note 4, a reference to "entire mixture" and "not just its pure drug content"

must be considered and respected. If the interpretation or construction suggested by the learned Counsel for the accused persons is accepted, most of these expressions used by the Legislature or the Executive in the statutory Notification would be rendered otiose or meaningless.

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74. The precedents on the subject also overwhelmingly support the inclusion of the weight of the blotter and not just the weight of the pure L.S.D....

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86. Most decisions on the material referred to also speak about the blotter being made up of extra absorbent material, including ingredients like rice, cotton, and flax seeds. Such blotters absorb L.S.D. in their tiny perforations, separable only on dipping it into a liquid or placing it on the tongue. The blotter becomes an integral part of the mixture of the L.S.D.-impregnated blotter. Moreover, blotters made up of rice, flax seeds etc., are consumable. They qualify as neutral substances in ordinary parlance, just as chalk or talcum powder would, in the context of the drugs with which they are mixed. The ruling in *Hira Singh* (supra) is quite clear on the status of such neutral substances. The NDPS Act also refers to psychotropic substances, including preparations of one or more psychotropic substances. Preparation includes a mixture in whatever state.

87. Thus, the text, precedents and the literature on the market or street practices in which L.S.D. is stored, transported, concealed, sold, purchased, consumed or otherwise dealt with support the discussion and construction in *Anuj Keshwani* (supra).

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94. Note 4 below Notification dated 19.10.2001 as introduced by Notification dated 18.11.2009 very clearly provides that quantities shown in Columns 5 & 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

95. Thus, this Note clearly expresses that the weight of the entire mixture is relevant, not just the pure drug content in such mixture. The Legislature is presumed to be aware of the market or street conditions in which psychotropic substance like L.S.D. is dealt with on the streets and in the markets. The accused persons have not challenged any provisions of the NDPS Act or Note 4 below the Notification dated 19.10.2001. In any case, the validity of these provisions has already been upheld in *Hira Singh* (supra). Therefore, any reference to this Note could not have been avoided by opining that L.S.D. drops on a blotter do not constitute a mixture or that a blotter is not a neutral substance.

96. Incidentally, Hira Singh (supra), in paragraph 11, holds that Note 4 below Notification dated 19.10.2001 was clarificatory and added by way of abundant caution only. Even absent the Note, the Court concluded that while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), it includes the weight of the neutral substance(s) also and not only the actual content by weight of the offending drug has to be taken into account. The Court held that theretofore even if Note 4, which was added by Notification dated 18.11.2009, were not to be added, the legal position would favour taking into consideration the combined weight of the offending drug and the neutral substance with which it is mixed.

97. Thus, according to us, Hira Singh (supra) is a complete answer to most of the contentions raised by Mr. Merchant, Ms. Collasso and Mr. Poulekar on behalf of the accused persons. Based upon Hira Singh (supra), therefore, their contentions cannot be accepted by us.

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99. In fact, the Statutory scheme and provisions of the NDPS Act are pretty clear and clearly reflect the legislative intent on the subject. They are comparable, at least when it comes to the essentials. There is no doubt, however, that the precedents from the United States or Australia do not bind the Courts in India...such precedents are certainly not irrelevant. Even though they may not be binding, they have a persuasive value.

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115. In conclusion, therefore, we endorse the view taken in Anuj Keshwani (supra) that the combined weight of the L.S.D. and the blotter is relevant to determine small or commercial quantities and not the view in Hitesh Malhotra (supra) and Harsh Meshram (supra) that only the weight of the pure L.S.D. is the determinative factor. The reference is answered accordingly."

(emphasis supplied)

23. The said view has been subsequently followed by a number of different Courts as well. There is prima facie merit in the argument in relation to the objective of small quantity and that if such interpretation is accepted, then under no circumstances, LSD would be found in small quantity thereby making the classification provided in the NDPS Act nugatory since even a single Blot, which would necessarily be for a personal or one time use, would not be treated as small quantity. However, this Court does not consider it apposite to comment on the same at this stage considering the ambit of the present proceedings, especially given the view taken by the Hon'ble Division Bench and the stage of the trial. The Court at present is not discussing the interpretation of the small quantity so stipulated and is seized with merely the question of bail.

24. It cannot be ignored that the present case is one where the applicant was arrested on 26.05.2023, despite which, the charges have not yet been framed. Fifteen witnesses have been listed by the prosecution. In such circumstances, speedy trial does not seem to be a possibility. The

applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

25. It is trite law that grant of bail on account of delay in trial and long period of incarceration cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of Mohd. Muslim v. State (NCT of Delhi) :2023 SCC OnLine SC 352 has observed as under:

"21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in *A Convict Prisoner v. State*²¹ as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

24. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal"²² (also see Donald Clemmer's 'The Prison Community' published in 1940²³). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

(emphasis supplied)

26. The Hon'ble Apex Court in the case of Man Mandal & Anr. v. The State of West Bengal : SLP(CRL.) No. 8656/2023 had granted bail to the petitioner therein, in an FIR for offences under the NDPS Act, on the ground that the accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

27. The Hon'ble Apex Court in Rabi Prakash v. State of Odisha :

2023 SCC OnLine SC 1109, while granting bail to the petitioner therein held as under :

"4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

(emphasis supplied)

28. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the ground of undue delay in the completion of the trial.

29. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guarantee under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedence over the statutory restrictions under Section 37 of the NDPS Act.

30. This respondent has been given an opportunity to be heard. While it is stated that there are certain texts between the applicant and other co-accused, whether the same shows the applicant's involvement in the commission of the offences will only be tested after evidence has been led by the parties. The applicant has also been able to raise doubt as to the quantity of recovered contraband. Whether the quantity is commercial or otherwise, cannot be stated with certainty and would be determined during the course of trial.

31. At this stage, it cannot be ignored that the applicant has spent substantial time in custody.

32. The applicant is also stated to be of clean antecedents. This Court is thus satisfied that the applicant, if released on bail, will not indulge in similar offence.

33. In such circumstances, this Court considers it apposite to grant bail to the applicant on the ground of delay in trial.

34. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of 50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever; b. The applicant shall under no circumstance leave the boundaries of the country without the permission of the Trial Court;

c. The applicant shall appear before the learned Trial Court as and when directed;

d. The applicant shall, after his release, appear before the concerned IO once in every week;

e. The applicant shall provide the address where he would be residing after his release to the concerned IO and shall not change the address without informing the concerned IO;

f. The applicant shall, upon his release, give his mobile number to the concerned IO and shall keep his mobile phone switched on at all times.

35. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the respondent to seek redressal by filing an application seeking cancellation of bail.

36. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

37. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J APRIL 01, 2025