

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Criminal Appeal No. 132/2021

Azaz Khan S/o Shri Darab Khan, R/o Khan Mohalla, Kuchaman City, Tehsil Nawa, District Nagaur (At Present Confined In Central Jail Jaipur)

----Appellant

Versus

N.I.A. through Special P.P.

----Respondent

Connected With

D.B. Criminal Appeal (Db) No. 22/2021

Rashid Qureshi S/o Shri Mohammad Yusuf Qureshi, R/o Ghantel Ka Bas, P.O. Ghantel, District Churu, Rajasthan (At Present Confined In Central Jail, Jaipur)

----Appellant

Versus

N.I.A through Its Public Prosecutor.

----Respondent

D.B. Criminal Appeal (Db) No. 77/2021

Amzad Ali Son Of Shri Mohammad Ali, Aged About 24 Years, Resident Of Madina Mohallah, Sherani Abaad, Tehsil Didwana, District Nagaur (Raj) At Present Lodged In Central Jail, Jaipur

----Appellant

Versus

National Investigating Agency, Through Special Public Prosecutor

----Respondent

D.B. Criminal Appeal (Db) No. 105/2021

1. Ramchandra S/o Sh. Kishore, R/o Dokota Ka Was, Chhapra District Nagaur (Raj.)
2. Mukesh S/o Sh. Kaluram, Aged About 27 Years, R/o Sanshi Basti, Tharada Road, Ward No. 25, Sujangarh District Churu. (At Present Confined In Central Jail. Jaipur.)

----Appellants

Versus

N.I.A. through its Public Prosecutor.

----Respondent

For Appellant(s) : Mr. V.R. Bajwa, Senior Advocate,
assisted by Mr. Amar Kumar, Mr.
Manish Parmer
Mr. R.B. Mathur, Senior Advocat,
assisted by Mr. Nikhil Simlot, Mr.
Muzaffar Iqbal, Mr. Mohd. Saeed, Mr.
Prateek Kedawat
Mr. Vinay Pal Yadav

For Respondent(s) : Mr. R.D. Rastogi (Senior Advocate)
ASG, assisted by Mr. Anand Sharma,
Mr. Akshay Bhardwaj
Mr. Tej Prakash Sharma, Special PP

HON'BLE MR. JUSTICE PANKAJ BHANDARI
HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Judgment

JUDGMENT RESERVED ON :: 19/04/2022
JUDGMENT PRONOUNCED ON :: 07/05/2022

1. Accused appellant – Azaz Khan has preferred D.B. Criminal Appeal No.132/2021 aggrieved by the order dated 23.4.2021 passed by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur; accused appellant – Rashid Qureshi has preferred D.B. Criminal Appeal No.22/2021 aggrieved by the order dated 12.1.2021 passed by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur; accused appellant - Amzad Ali has preferred D.B. Criminal Appeal No.77/2021 aggrieved by the order dated 23.4.2021 passed by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur and accused appellants – Ramchandra and Mukesh has preferred D.B. Criminal Appeal No.105/2021 aggrieved by the order dated 20.11.2020 passed by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur

whereby bail applications preferred by the accused appellants were rejected by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur.

2. Succinctly stated the facts of the case are that on 3.7.2020 Custom Officers seized about 18 kg gold bars from the possession of ten persons, namely, Ramchandra, Mohd. Aarif, Sunil Verma, Mohd. Maqbool, Subhash, Mohd. Aalam, Rashid Qureshi, Mukesh, Surendra Kumar and Hetram at Jaipur Airport and case was registered against the above named persons for offence under Section 135 of the Customs Act. On akin facts, an FIR No.RC-36/2020/NIA/DLI was registered for offence under Section 16 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "the UA(P)A") and Section 120B of the Indian Penal Code (hereinafter referred to as "the IPC") by the National Investigating Agency, New Delhi (hereinafter referred to as "the N.I.A."). All the accused appellants moved bail application under Section 439 Cr.P.C., which were rejected by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur, aggrieved by which, present appeals have been preferred before this Court.

3. As all the appeals are arising out of FIR No. RC-36/2020/NIA/DLI dated 22.9.2020, the same are being decided together by this common order.

4. It is contended by the learned counsel for the accused appellants that gold was seized from accused appellants – Azaz Khan, Rashid Qureshi, Mukesh and Ramchandra. The value of the gold seized from each accused was less than Rs.1 crore and the custom duty payable was less than Rs.50 lakhs and therefore, the

offence was bailable. Thus, all the accused appellants were released on bail under the Customs Act.

5. It is contended that after the accused appellants were granted bail, the N.I.A. registered the present FIR under Section 16 of the UA(P)A. It is argued that the statements of accused appellants – Azaz Khan, Rashid Qureshi, Mukesh and Ramchandra were recorded under Section 108 of the Customs Act and in their statements, they have specifically stated that they had gone abroad as labourers and due to COVID, they lost their jobs and had no means to return back to India. They were lured by some persons, who agreed to pay their flight charges, subject to carrying gold. It is contended that the accused appellants are not involved in any terrorist act and they only carried gold as they had no other means to return back to India.

6. It is contended by the counsel appearing for accused appellant - Amzad Ali that no recovery was effected from accused appellant – Amzad Ali. In the initial statements of the co-accused, which were recorded under the Customs Act, his name was not even mentioned, however, subsequently when the statements of co-accused – Mohd. Maqbool Sheikh and Subhash were recorded on 7.10.2020 and 8.10.2020, for the first time, name of accused appellant – Amzad Ali was revealed. It is also contended that statement recorded by the N.I.A. Officers is hit by Section 25 of the Evidence Act as N.I.A. Officers are Police Officers. It is further contended that accused appellant – Amzad Ali has been made an accused in the case only because his mobile location was found near the Airport.

7. Counsel for the accused appellants have placed reliance on the judgment of Kerala High Court in *Mohammed Shafi Versus N.I.A.: Crl.A. No.356 of 2021* and connected matters) wherein the Division Bench of the Kerala High Court while interpreting Section 15(1)(a)(iiia) of the UA(P)A has come to the conclusion that smuggling of gold cannot be treated as a terrorist act unless there are other circumstances, which point towards the terrorist funding etc. Counsel have further placed reliance on *Sudesh Kedia Versus Union of India: AIR 2021 SC 1892*, *National Investigation Agency Versus Zahoor Ahmad Shah Watali: (2019) 5 SCC 1*, *Union of India Versus K.A. Najeeb: (2021) 3 SCC 713* and *Jahir Hak Versus State of Rajasthan: Criminal Appeal No.605 of 2022* (arising out of SLP (Crl.) No.7003 of 2021). It is contended that Section 15(1)(a)(iiia) of the UA(P)A was inserted for the purpose of putting a check on counterfeit currency, which was being made in neighbouring countries. It is argued that the term 'other material' used in Section 15(1)(a)(iiia) of the UA(P)A would not take in its ambit 'gold' as the Legislature never intended to include gold or any other valuable metal within the purview of UA(P)A.

8. It is also argued by the counsel for the accused appellants that amendments sought to be made in the Act were referred to the Joint Parliamentary Committee and from the meeting of the Joint Parliamentary Committee, it can be concluded that the Legislature never intended to include 'gold' under Section 15(1)(a)(iiia) under the term 'other material' as it pertains to other material, which is required for minting counterfeit currency notes,

coin, bonds, stamp papers etc. It is contended that after grant of bail under the Customs Act, the N.I.A. purposely arrested the accused appellants without there being any evidence to the effect that the accused appellants are involved in any terrorist act.

9. Learned counsel appearing for the respondent – N.I.A. has vehemently opposed the appeals. It is contended that Jaipur is now turning into a smuggling hub and passengers are being used for smuggling gold into India. It is also contended that smuggling of gold has a direct impact on the economic security of the country and therefore, the same is covered under Section 15(1) (a)(iii) of the UA(P)A. It is further contended that the gold is purposely distributed among the passengers and the value thereof is kept below Rs.1 crore as then the offence is bailable.

10. It is contended by the counsel for the Union of India that some of the accused of this case have preferred miscellaneous petitions before this High Court for quashing of the FIR on the ground that smuggling of gold cannot be termed as terrorist act and the High Court dismissed the same holding that smuggling of gold has a direct impact on the economic security of the country. It is argued that the judgment of the Kerala High Court in *Mohammed Shafi* (supra) though has persuasive value, but when there is a judgment of the Rajasthan High Court, the same has to be followed. It is also argued that the Apex Court has taken a very stringent view for economic offences. It is contended that only when the trial has protracted and the accused has remained in custody for a long period, then the Apex Court has given the benefit or has affirmed the order of the High Court whereby the

bail has been granted. It is also contended that the accused appellants are in the custody for a period of only one and a half year and the sentence under the UA(P)A ranges from minimum five years to life imprisonment.

11. Learned counsel for the respondents has placed reliance on *Mohammad Aslam Versus UIO & Ors.*: **S.B. Criminal Miscellaneous (Petition) No.5139/2020**, *National Investigation Agency Versus Zahoor Ahmad Shah Watali*: **(2019) 5 SCC 1**; *Y.S. Jagan Mohan Reddy Versus CBI*: **(2013) 7 SCC 439**, *State of Gujarat Versus Mohanlal Jitamalji Porwal*: **(1987) 2 SCC 364**, *Naresh J. Sukhwani Versus UOI*: **1995 Supp. (4) SCC 663**, *State of U.P. Versus Amarmani Tripathi*: **(2005) 8 SCC 21**, *Mahipal Versus Rajesh Kumar @ Polia & Anr.*: **(2020) 2 SCC 118**, *Kanwar Singh Meena Versus State of Rajasthan*: **(2012) 12 SCC 180**, *State of Orissa Versus Mahimananda Mishra*: **(2018) 10 SCC 516**, *State of Jharkhand Versus Lalu Prasad Yadav*: **(2017) 8 SCC 1**, *Monica Bedi Versus State of Andhra Pradesh*: **(2011) 1 SCC 284**, *UOI Versus Said Alavi E.*: **SLP (Cri.) No.003837-003848/2021** and *Dr. Vijay Laxmi Sadho Versus Jagdish*: **(2001) 2 SCC 247**.

12. We have considered the contentions.

13. Section 15(1)(a)(iiia) of the UA(P)A and the Second Schedule of UA(P)A are reproduced hereunder:

15. Terrorist Act: (1) ...

(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or

THE SECOND SCHEDULE

[See section 15(2)]

- (i) Convention for the Suppression of Unlawful Seizure of Aircraft (1970);
- (ii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);
- (iii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973);
- (iv) International Convention against the Taking of Hostages (1979);
- (v) Convention on the Physical Protection of Nuclear Material (1980);
- (vi) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988);
- (vii) Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation (1988);
- (viii) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988); and
- (ix) International Convention for the Suppression of Terrorist Bombings (1997).
- (x) International Convention for Suppression of Acts of Nuclear Terrorism (2005).

14. As to whether Section 15(1)(a)(iiia) of the UA(P)A, which was inserted in the year 2012, was meant to include the smuggling of gold in the category of 'other material' as mentioned in Section 15(1)(a)(iiia) of the UA(P)A is the moot question, which needs to be considered by this Court for disposal of these appeals.

15. Single Bench of Rajasthan High Court in *Mohammad Aslam Versus Union of India & Ors.* (supra) held that gold is a valuable material, smuggling of which can be done with intent to threaten

or likely to threaten the economic security of the country and was thus considered to be a 'terrorist act'. However, in *Mohammad Shafi Versus National Investigating Agency, Kochi* (supra), Division Bench of Kerala High Court held that Section 15(1)(a)(iiiia) of the UA(P)A is not attracted when gold is smuggled in the country. Evidence of conspiracy and smuggling of gold does not prima facie give credence to an allegation of threat to economic security or irreparable damage to economic security of the country and thus cannot be deemed to be a terrorist act. The Court observed that counterfeiting, that too of high quality currency notes or coins and any material so to do is the only specie included under Section 15(1)(a)(iiiia) of the UA(P)A. From the discussion, which took place before the Standing Committee, it is evident that no deliberation took place for considering gold as a material under Section 15(1)(a)(iiiia) of the UA(P)A.

16. If the argument of the counsel for the Union of India is to be accepted, then any smuggling would constitute an offence, which can threaten the economic security of the country and had it been the intention of the Legislature, they would have mentioned that smuggling of any material is a threat to the economic security of the country. We are, therefore, in agreement with the judgment of Kerala High Court passed in *Mohammad Shafi Versus National Investigating Agency, Kochi* (supra).

17. Customs Act is not included in Schedule-II of the UA(P)A, thus smuggling of gold and that too of a quantity, which is bailable under the Customs Act cannot be treated as a Terrorist Act. We are, therefore, inclined to allow the appeals.

18. As far as the facts go, it is not in dispute that except Amzad Ali, all the other accused were apprehended at Jaipur Airport on 3.7.2020 while attempting to smuggle gold into India from Riyadh, Saudi Arabia and an FIR was registered against them under Section 135 of the Customs Act. It is also not in dispute that the gold seized from each of these accused was valued at less than Rs.1 crore and the tax or the custom duty thereon was less than Rs.50 lakh and therefore, all of them were released on bail in the Customs Act case. It is not disputed that after 80 days of their arrest in the customs case, N.I.A. registered an FIR on 22.9.2020 against ten persons.

19. From the relevant record as produced on behalf of the N.I.A., it is evident that except accused appellant – Amzad Ali, all the accused had gone to earn their livelihood and due to COVID, they were not able to continue to work at Saudi Arabia and therefore, were waiting to return back to India. As per the prosecution case, they were approached by some persons and they were made carriers for carrying the gold and free tickets were provided to them for smuggling gold into India. There is no material to suggest that the accused appellants intended to threaten the economic security of India.

20. In *Sudesh Kedia Versus Union of India* (supra), it was held that while considering the grant of bail under Section 43(D)5 of UA(P)A, it is the bounden duty of the Court to apply its mind to examine the entire material on record for the purpose of satisfying itself whether a prima facie case is made out against the accused or not. The Court held in this case that payment of extortion

money to terrorist organization does not amount to terror funding. It was also held that prima facie, it cannot be said that the appellant conspired with other members of the organization and raised funds to promote the organization.

21. No material was seized from Amzad Ali, his name did not appear in the statements of the co-accused during investigation by Custom Officers and for the first time appeared in statements recorded by N.I.A. Prima facie there is no material against Amzad Ali. The other accused persons, who as per the investigation, were labourers and lost their employment due to COVID, were asked to carry gold in lieu of the tickets. There is no material whatsoever to come to the conclusion that they intended to commit any terrorist act so as to damage the economic security of the country. Hence, we deem it proper to allow the appeals. The orders dated 23.4.2021, 12.1.2021, 23.4.2021 and 20.11.2020 passed by the Special Judge (N.I.A. Cases), Rajasthan, Jaipur are hereby quashed and it is directed that accused-appellants shall be released on bail provided they furnish a personal bond in the sum of Rs.1,00,000/- (Rupees One Lac only) together with two sureties in the sum of Rs.50,000/- (Rupees Fifty Thousand only) each to the satisfaction of the trial Court with the stipulation that they shall appear before that Court and any Court to which the matter be transferred, on all subsequent dates of hearing and as and when called upon to do so.

22. However, it is made clear that while deciding these appeals, anything observed herein shall not be construed as an expression on merits of the case. It is further made clear that the

observations made while deciding these appeals are simply the arguments advanced by both the parties and the same shall not, in any way, effect the learned trial Judge in forming his independent opinion based on testimony of the witness during the course of trial.

(ANOOP KUMAR DHAND),J

(PANKAJ BHANDARI),J

SUNIL SOLANKI /PS

RAJASTHAN HIGH COURT



सत्यमेव जयते