IN THE SPECIAL COURT FOR TRIAL OF NIA CASES, ERNAKULAM, KERALA

Present:-
Shri. P. Krishna Kumar, Judge, Special Court for NIA Cases.
Thursday, the 15th day of October, 2020/ 23rd Aswina, 1942

Crl.M.P. Nos. 121/2020, 131/2020, 139/2020, 140/2020, 141/2020, 145/2020, 146/2020,173/2020, 175/2020, 176/2020 & 186/2020
in
RC No.02/2020/NIA/KOC

Crl.M.P. 121/2020

Petitioner/ Accused No. A16:-

Mohamed Anwar T.M (A16), S/o.Kammu, Aged 41 Yrs,
Tharamannil House, P.V.R.Metro Villa,
Koomamkulam Post, Manjeri, Malappuram.

By Adv. Babu S Nair

Respondent/Complainant :-

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 131/2020

Petitioner/ Accused No.9:-

Abdu P. T. (A9), Aged 48 years, S/o.Moosa P.T.,
Pattathodi House, Valakkulam P.O., Kotakkal,
Kozhichenna, Malappuram.

By Adv. M. Balagopal

Respondent/Complainant :-

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 139/2020

Petitioner/ Accused No. 7:-

Mohammed Shafi P (A7), aged 37 years,
S/o.Aboobakkar, Pannikkottil House,
Ayikkarapadi.P.O., Malappuram.

By Adv. Phijo Pradeesh Philip

<u>Respondent/Complainant :-</u>

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

<u>Crl.M.P. 140/2020</u>

<u>Petitioner/ Accused No.19:-</u>

Hamjad Ali (A19), Aged 51 years, S/o. Moidien Kutty,
Babu Nivas, Kaloth Post, Kondotty, Malappuram, Kerala.

By Adv: V. T. Raghunath

<u>Respondent/Complainant :-</u>

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

<u>Crl.M.P. 141/2020</u>

<u>Petitioner/ Accused No. 24:-</u>

Abdul Hameed P M (A24), Aged 54 years,
S/o. Abdul Rahman, Padikkamannil House,
Koottilangadi.P.O., Malappuram, Kerala.

By Adv: Ahamed Fazil E. C.

<u>Respondent/Complainant :-</u>

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

<u>Crl.M.P. 145/2020</u>

<u>Petitioner/ Accused No. 21:-</u>

Jifsal.C.V.(A21), Aged 38 years, S/o.Usman Koya C.V.,
Konkandy Paramba, Vattakinar, Arts College.P.O.,
Kozhikode – 673 018.

By Adv.Babu S Nair

<u>Respondent/Complainant :-</u>

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 146/2020

Petitioner/ Accused No. 23:-

Muhammed Abdul Shameem (A23), Aged 26 years,
S/o.Ussain K V, Kaivelikkal House, Manipuram P.O.,
Koduvally, Vavad, Kozhikode-673 572.

By Adv.Babu S Nair

Respondent/Complainant :-

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 173/2020

Petitioner/ Accused No. 22:-

Aboobacker Pazedath (A22), Aged 61 years,
S/o.Kadeeja.K, Pazedath House, Pazhamallur,
Koottilangadi P O, Malappuram-676 506.

By Adv: Saju Wahab

Respondent/Complainant :-

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 175/2020

Petitioners/ Accused No. 11 & 12:-

1. Muhammed Ali Ebrahim. (A11), Aged 36 years,
S/o. E. M. Ebrahim, Edakkattil House,
Kizhakkekara, Muvattupuzha – 686661.

2. Muhammed Ali (A12), Aged 44 years, S/o.Abdul Kader,
Mullarikkattu House, Muvattupuzha, Ernakulam.

By Adv. Nireesh Mathew

Respondent/Complainant :-

Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 176/2020
Petitioners/ Accused No. 13 & 14:-

1. Sharafuddeen K. T. (A13), Aged 38 years,
S/o. Moideen K. T, Kuruppanthodi House,
Kakkooth Road, Perinthalmanna Post, Malappuram.

2. Muhammed Shafeeq A. (A14), Aged 33 years,
S/o.Abdul Razak A, Ambazhakode House,
Kandamangalam P O, Mannarkkad, Palakkad.

By Adv. Nireesh Mathew

Respondent/Complainant :-
Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

Crl.M.P. 186/2020
Petitioner/ Accused No. 8:-
Said Alavi E. (A8), Aged 60 years, S/o. Abdulla,
Edakkandan House, Parmbilpadi, Vegara.P.O,
Malappuram – 676 304.

By Adv. R. Anil

Respondent/Complainant :-
Union of India represented by
National Investigation Agency, Kochi.

By Shri.Arjun Ambalapatta, Sr. Public Prosecutor, NIA.

This petition having been heard on 15/10/2020 and the Court on the same day passed the following:-

C O M M O N O R D E R

1. These petitions are filed under section 437 r/w 439 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C') by the accused Nos.7, 8, 9, 11 to 14, 16, 19, 21 to 24 in Crime No. RC 02/2020/NIA/KOC, which is registered in respect of the offences punishable under sections 16, 17 and 18 of the Unlawful Activities (Prevention) Act (for short 'UA(P) Act'). The petitioners will be

hereinafter referred to as per their rank in the case. Accused No. 7, 8 and 9 were arrested by NIA on 30.07.2020, 04.08.2020 and 31.07.2020, respectively and are being in judicial custody thereafter. The accused No. 11 and 12 have been in judicial custody since 01.08.2020. The accused No. 13 and 14 have been in judicial custody from 03.08.2020. The accused No. 16 and 19 have been detained in judicial custody since 13.08.2020. The accused No. 21 to 24 were arrested on 24.08.2020 and are also in judicial custody.

2. The prosecution allegation is that on 05.07.2020, the Customs officials in the Thiruvananthapuram International Airport has seized 30 kg of 24 carat gold worth Rs.14.82 crores from a consignment which was camouflaged in diplomatic baggage sent from United Arab Emirates (UAE) and the gold was consigned in the diplomatic baggage pursuant to a conspiracy hatched by A1 to A4 and other accused persons, by making use of the intense connection retained by A1 and A2 with the Consulate of UAE at Thiruvananthapuram. It is further alleged that the initial inquiries have revealed that the proceeds of the smuggled gold might have been used for financing terrorism in India.

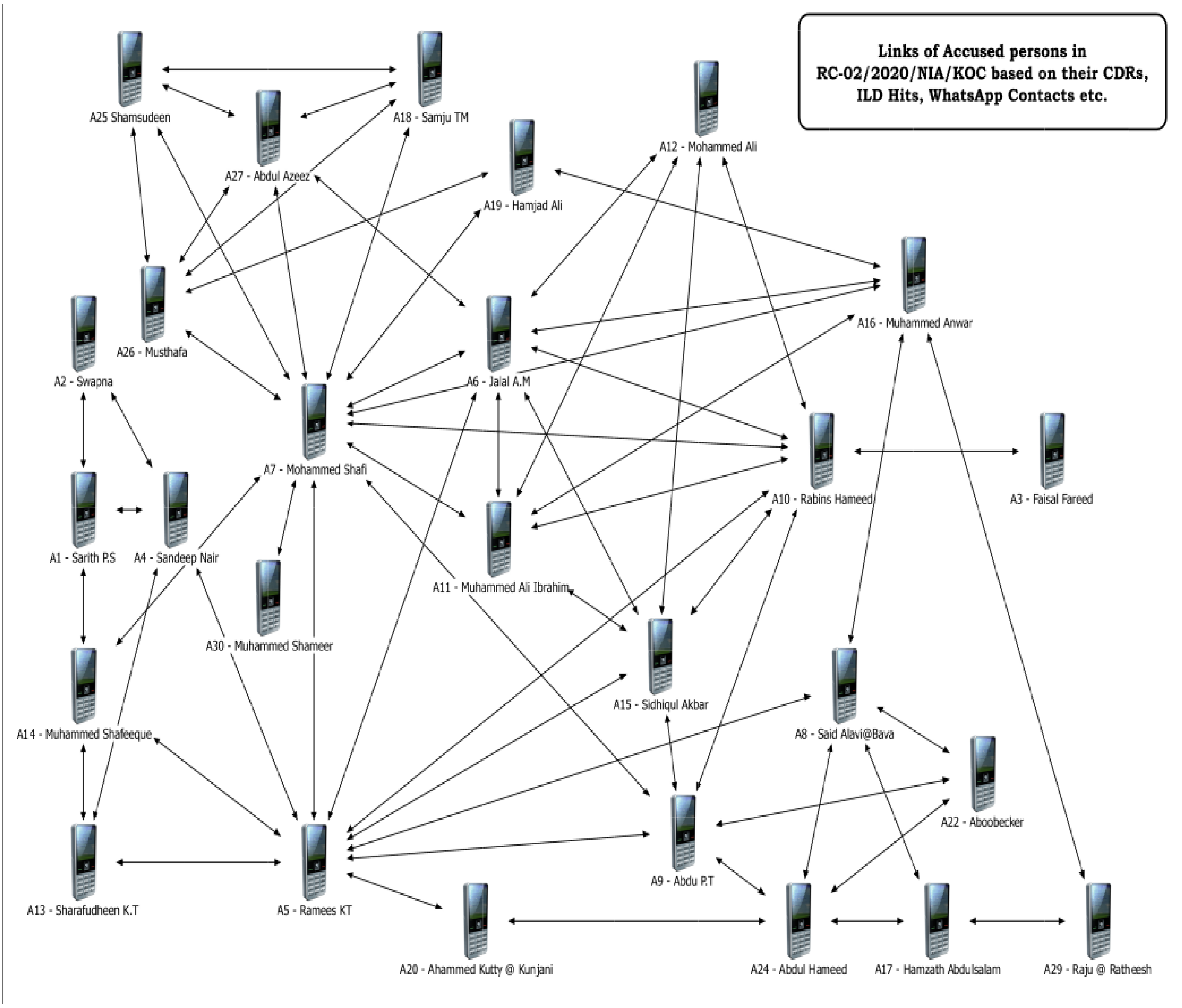
3. The prosecution case against the present petitioners are as follows. A7 is one of the main organizers of the smuggling along with A5, A6, A8, A9 and A10 and they had smuggled gold about 21 times through diplomatic baggage of UAE Consulate from November 2019 with the intention of threatening economic security of India. He had direct contact with A1, A2 and A4, besides A17 to A19 and A25. A7 and the persons connected with him had funded for the smuggling of gold of 47.5 Kg. A8 has funded for smuggling 15 Kg gold through the diplomatic baggage of the Consulate since November 2019, by conspiring with A5. A9 is a *hawala* operator and had conspired with A5, A7 and A20 and funded gold smuggling through diplomatic baggage since November 2019. A11 and A12 had associated with A6 and A10 for smuggling the gold and had suspected to use the proceeds of smuggling for financing terrorism, directly or indirectly, especially

when A12 was one of the accused in the infamous hand-chopping case of a Professor, despite the fact that he was acquitted by the trial court.

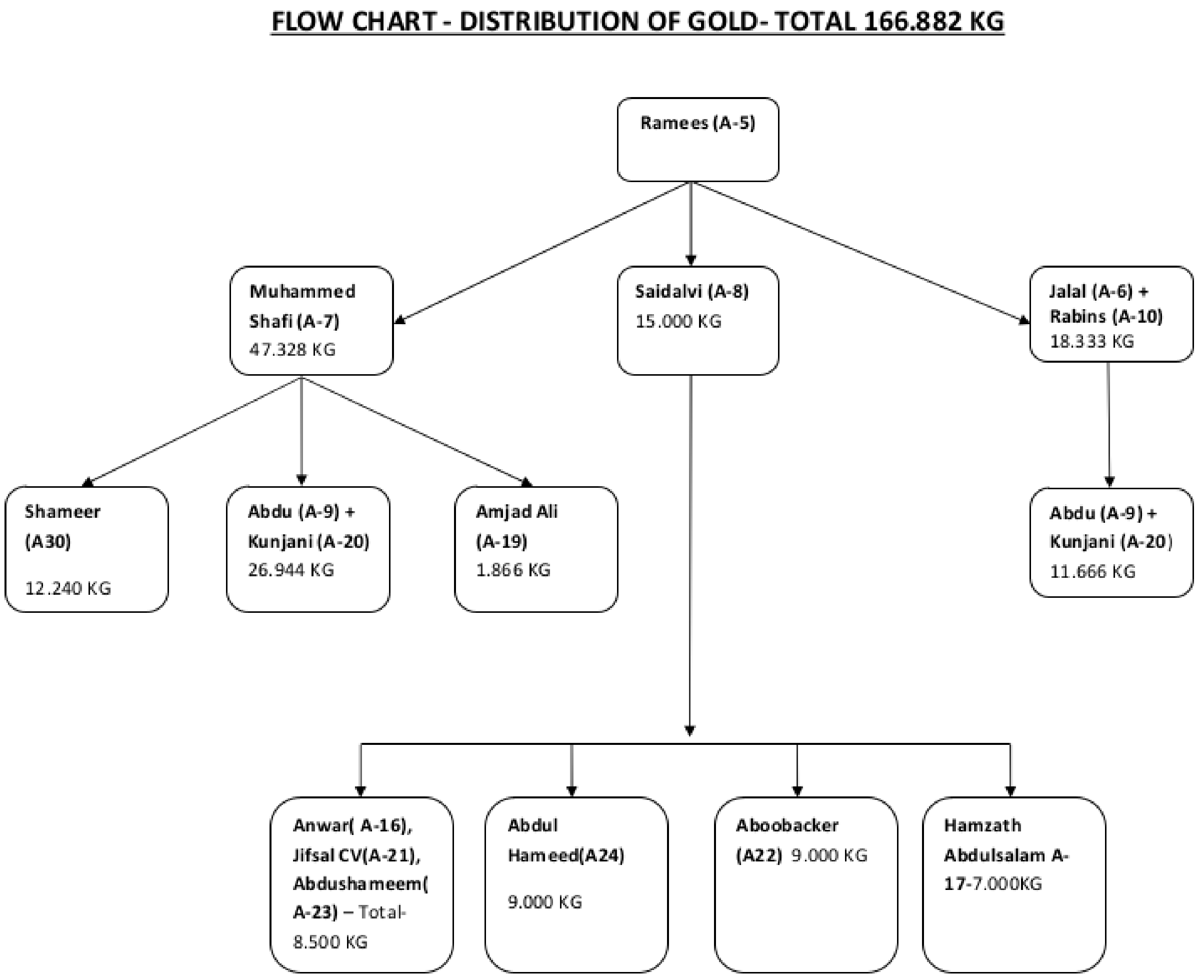
4. The allegation against A13 and A14 is that they had associated with A1, A4, A5, A6 and A7 and in particular, they intentionally associated with A4 and A5 for about 21 times for extracting the smuggled gold from camouflaged baggage by moulding gold into the shapes of different types of materials, after November 2019 and they further assisted the other accused persons for exchanging the smuggled gold at various places. A16 had conspired with A8 and had arranged funds for smuggling of gold multiple times in June 2020 through the baggage of UAE Consulate. A19 had funded Rs.65 lakhs for smuggling of gold since June 2020 and he had received the smuggled contraband of 1.5 Kg at Thiruvananthapuram in multiple times and that he did so by conspiring with A5, A6, A7 and A16 .

5. It is further alleged that A21 has conspired with A8, A16 and A23 and provided fund of Rs.70 lakhs during June 2020 for purchasing gold smuggled through the said channel. He also travelled to Thiruvananthapuram along with A16 & A23 to receive the smuggled gold from A4 & A5, during June 2020. The allegation against A22 is that he had funded Rs.1.25 crores each for three occasions for obtaining smuggled gold through the same channel and that he associated with A7, A17 and A22. A23 also conspired with A8, A16 & A21 since June 2020 and provided fund worth 1.8 crores for purchasing gold through the said channel. He also travelled to Thiruvananthapuram along with A16 & A21 for receiving and disposing of the smuggled gold.

6. As per the prosecution, A24 has also conspired with A7, A8, A17 and A22 during June 2020 and had invested 1.25 crores each for three occasions for obtaining smuggled gold. The prosecution firmly asserts that each of the accused had contacted many other accused persons and this is evident from the Call Data Records of the respective person. The following diagram depicts that how the accused persons are related to each other, as per the prosecution case.



7. In short, the prosecution contention is that the above said petitioners have funded for smuggling gold through diplomatic channel or conspired for arranging the same and they contacted either directly or through intermediaries with A1 to A5 or A7, for achieving their goal. The distribution of the gold obtained through the diplomatic baggage on various occasion among the accused can be explained well with the aid of the following chart :



8. Heard Shri. B. Raman Pillai, Shri. S.Sreekumar, Shri. Babu.S.Nair, Shri. V.T.Reghunath, Shri. Nireesh Mathew, Shri. M.Balagopal, Shri. Phijo Pradeesh Philip and Shri. Ahamed Fazial, learned counsel who appeared for the petitioners. They submitted that even if the petitioners had funded for smuggling of gold through diplomatic baggage, it would not amount to any offence under the UA(P) Act. According to them, an act done with *the intention to* cause damage to the economic security of India alone would attract the offence defined under section 15 of the UA(P) Act and hence, smuggling of gold *per se*, even if in large quantity,

should be dealt with under the corresponding provisions of the Customs Act, and not under the UA(P) Act. It is also argued that the legislative intent behind the introduction of the clause relating to economic security in section 15 was not to deal with smuggling of gold. Custody of all the petitioners were given to NIA for a sufficiently long period, they submitted.

9. Shri. B.Raman Pillai, learned senior counsel for A8, submitted that NIA has only a case that the proceeds of the smuggled gold *could* be used for terrorism, but such a chance alone is not sufficient to attract the penal provisions invoked. Shri. S. Sreekumar, the learned senior counsel appearing for A22, submitted that no person could be detained in custody solely for the apprehension of the Investigating Agency that the proceeds of the smuggled gold would be used for terrorism. Shri. Babu.S.Nair, the learned counsel for A16, A21 and A23, contended that the Customs Act is not a scheduled Act under the National Investigation Agency Act, 2008 and hence, when section 17 with explanation (b) is read in a meaningful manner, giving emphasis to the word 'smuggling' as defined under section 2(39) of the Customs Act, the investigation by NIA itself is illegal.

10. Shri.V.T.Reghunath, the learned counsel appearing for A19, submitted that even if the court has declined to grant bail to one of the front-line accused persons on a finding that the case against her is prima facie established by the NIA, that does not preclude the court from distinguishing the case of the other accused persons whose alleged role is only funding for smuggling of gold with a view to make profit. Shri. Balagopal submitted that the alleged acts done by A9 is only an offence under the provisions of the Customs Act and it would not constitute an offence under the UA(P) Act, even if he did it with the *knowledge* that it would cause damage to the economy of India. Shri. Phijo Pradeesh Philip, who is appearing for A7, further submitted that NIA does not have a case that A7 had received any smuggled gold or that he funded for the same and hence he should not be detained any further.

11. Perused the records including the case diary produced by NIA and the statements given by four accused persons under section 164 of the Cr.P.C. Shri.P.Vijayakumar, the learned Assistant Solicitor General who appeared for NIA, submitted that this is a case where the court has to strike a delicate balance between the question of personal liberty of the petitioners and the larger national interest, as the quantity of gold smuggled through the network of these 30 accused persons comes around 200 Kg, especially when they did it by misusing the privilege given to the diplomats of a friendly nation of India. He further contended that a deeper probe is required to unearth the money trail involved in the matter, and the Agency has every reason to beleive that it originates from some terror outfits. It is also contended that in order to prove the larger conspiracy behind the said acts, which involves an unusual and unprecedented *modus operandi*, it is highly necessary to keep all the accused persons under detention because, if they are set at liberty, they could interact with some dark forces behind them, making the efforts of the Investigating Agency to trace out few other persons who are still elusive, in vain. It is also argued that all the accused persons are astute businessmen and are not credulous simpletons, deserving any sympathy. The act of A22, who has spent 1.25 crores each on three occasions without even waiting for getting the profit out of each lot shows that the money must have come from some doubtful sources, the learned Assistant Solicitor General further urged by placing reliance on a report of the Financial Action Task Force (FATF), July 2015, which describes the risk of money laundering/terrorist financing for no apparent economic reasons (page No. 21).

12. Shri. Arjun Ambalapatta, the learned Senior Public Prosecutor for NIA, further submitted that the Agency has registered the FIR with an apprehension that the proceeds of gold smuggled might be used for terrorism and it was done not on the basis of mere suspicion, but it was well founded on a report given by the Additional Director General of the Central Economic Intelligence Bureau to the

Director General of NIA, on 28.10.2019. He further pointed out that, as per the said letter, the Bureau apprehend that smuggling of gold through Kozhikode Airport might have possible ramification on the national security, as it might have links to terror financing. He also submitted that A3 would be brought to India from UAE on any day and hence, the Agency requires the custody of the petitioners for making a joint interrogation of the said accused person with them, especially when the digital evidence seized from them has not been forensically retrieved, so far.

13. It is also pointed out by the learned Assistant Solicitor General that this court had earlier dismissed a bail application submitted by one of the accused persons (A2) on a finding that the case diary reveals sufficient grounds for believing that the accusation made against her is prima facie true. The said contention cannot be accepted for the obvious reason that the detention of each accused person can be authorised by the court only on an independent satisfaction of the materials available against him/her, and not on the ground that the court has reached to a finding in favour of the Investigating Agency as against one among them. That apart, even in the said order which was passed at the initial stage of investigation, this court has made it clear that different yardstick might be required at different stages, taking note of the necessity to further investigate into the anti-national elements, if any, involved in the matter.

14. Now, more than 90 days have elapsed after the commencement of investigation by NIA. From the case diary produced by them, it is obvious that what is so far established by NIA is only that, the petitioners have funded the front-line accused persons for smuggling the gold through the diplomatic channel and they have conspired with them in that respect. Even though it is repeatedly alleged in the counter statement submitted by NIA that the petitioners have acted with an *intention* to damage the economic security of India, there is no material whatsoever in the case diary to prima facie satisfy that they did it with such an intention. True, there are sufficient materials to show that these petitioners have conspired with

some of the accused persons to smuggle gold to India. But there is nothing in the case diary to show that the money spend by them was coming from any terror outfits or that they received the gold for transferring it to any such dark forces or even their connection whatsoever with any terrorist forces. On the other hand, the case diary reveals that most of these persons are influential businessmen having considerable assets. In the course of argument, the learned Senior Public Prosecutor himself narrated in detail the assets possessed by each one of them, including the details of their luxury cars. The evidence so far collected by the Agency against these petitioners, to a larger extent, is in the form of statements of the accused persons themselves and the matters relating to it and from such evidence, what appears is that they have smuggled the gold for making business profit.

15. Therefore, the question for consideration is that whether the mere act of funding for smuggling gold through diplomatic channel amounts to the offences alleged against the petitioners. Though it is contended by the learned Assistant Solicitor General that, at this early stage of the case the court should not delve deeper into the precise scope of the penal provision, and instead, it should consider it only in a broader perspective, section 43D(5) of the UA(P) Act casts a duty on this court to undertake the task of verifying whether *there are reasonable grounds for believing that the accusation made against the bail applicant is prima facie true*, before taking a decision. For the said purpose, the court has to get a satisfaction that the alleged act, if taken on its face value in the totality of the circumstances revealed during the investigation and in the broader probabilities they project, would attract the penal provision. Such an exercise is all the more incumbent on the court especially when the investigation has reached at an advanced stage. When Section 167(2)(a) of the Cr.P.C. commands that the court can authorise the detention of the accused persons during the stage of investigation only if it is *"satisfied that adequate grounds exist for doing so"*, the obligation cast upon the court authorising such detention is a continuing one at every stage of the

investigation and thus, the court has to reassess the *adequacy of ground for detention* each time, on the basis of the materials available on record, and also in the light of the particular stage of the investigation.

16. It is relevant to note that section 167(2) of Cr.P.C has not been made inapplicable to the UA(P) Act, and instead, section 43D(2) makes it very clear that it also applies to the proceedings under the UA(P) Act. This is why section 43D(2) provides only a modification in section 167(2) by altering the figure '15' days to '30' days, and retains the remaining clause as such. No doubt, section 43D(5) brings some extra fetters on the provisions of Cr.P.C in the matter of granting bail, but when section 43D(2) specifically saves the operation of section 167(2) as such, it is evident that a harmonious operation of both these provisions is the legislative intent. But it is argued by the learned Assistant Solicitor General that this court has already taken a decision to extent the detention of some of the accused persons beyond 90 days, on the basis of the report submitted by the Prosecutor. It was in fact done by making a specific reservation in the order that it would be subjected to the orders passed in these proceedings, as a common application for extension of time was filed against many accused persons and against some of whom 90 days period was already over. Thus, let us now consider that what is the core of the offence alleged against these petitioners.

17. The prosecution allegation against the petitioners is that they have committed *terrorist act* by funding and conspiring with the other accused persons for smuggling gold through diplomatic cargo. Let us now examine the relevant part of section 15 of the UA(P) Act where the term '*terrorist act*' is defined, by stressing on the area to which the Agency gives emphasise to invoke the offence under sections 16 and 18 of the said Act.

> Section 15. **Terrorist act**: (1) **Whoever does any act with intent to threaten or likely to threaten the** unity, integrity, security, **economic security,** or sovereignty **of India** or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or **by any other means of whatever nature to cause or likely to cause**-

(i) ***

(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

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Even if it is argued that the legislative intent behind the introduction of the clause relating to economic security was not to deal with smuggling of gold, when the enacted provision plainly gives scope for such a thing, the court cannot ignore it. But, a careful reading of section 15 of the UA(P) Act leaves no doubt that the act of smuggling of gold to India from abroad would attract the said provision only if it was done '*with intent to threaten or likely to threaten the economic security of India*'. Nevertheless, the learned Assistant Solicitor General raised a contention that when the term '*likely to threaten*' is used in section 15(1), it denotes that even the *knowledge* of the smuggler that his act would cause damage to the economic security of India is sufficient to attract the said provision. The said contention cannot be countenanced for the obvious reason that the term used preceding to it is '*whoever does any act with intent to*' and thus, even the act which is *'likely to threaten'* the economic security of India should also be done with the required intent. This is further evident from the next part of the same provision, which says *'or with intent to strike terror or likely to strike terror*'. When the term '*with*' is used in between the words '*any act*' and '*intention*', it is not possible to interpret the clause by detaching the word '*intention*' from it.

18. If the interpretation canvassed by the learned Assistant Solicitor General is accepted, it amounts to supplementing the term 'with knowledge' into the said penal provision, which is actually enacted to deal with a very grave crime.

Even though the learned Assistant Solicitor General placed reliance on the decision in **Vikraman vs. State of Kerala (2015 (1) KHC 611)** to substantiate that the term 'likely to threaten' used in section 15(1) attracts mere knowledge, I did not find any such proposition in the said decision. Further, what was considered by the Hon'ble High Court in that case was not the matter in question in this case. The Hon'ble court was called upon to consider an entirely different term appearing in section 15, viz., the meaning of the usage 'likely to strike terror in the people'. Then the Hon'ble court has held in paragraph 6 of the judgment that *"the definition of terrorist act under the U.A.P.A. in fact gives wider scope to bring in different situations of such activities under the definition of terrorist act. Even the likelihood of causing terror in the people or any section of the people by using bombs, dynamite, or explosive substances, or inflammable substances, or firearms or other lethal weapons or poisonous, or noxious gases or other chemicals, or any other substance of a hazardous nature will constitute a terrorist activity defined under Section 15 of the U.A.P.A. Such a wider definition bringing in even likelihood of causing terror in the mind of the people by using bombs etc was not there in Section 3 of the repealed TADA"*. The ratio of the said decision has no application in the present case.

19. Viewed in this backdrop, it is beyond any dispute that mere act of smuggling gold would not attract the offence of terrorist act, unless it is coupled with certain other elements, which at least suggest the broad probability of an intentional act to threaten the economic security of India. However, I have no hesitation to hold that the following contentions of the prosecution makes the present case clearly distinguishable from a mere act of smuggling of goods from abroad, which is otherwise punishable only under the Customs Act : (a) the involvement of huge quantity of gold that was brought to India in multiple times consequent to a conspiracy of large number of accused persons (b) it was done by using the diplomatic channel, which may even affect the friendly relationship between India and another country (c) the apprehension entertained by the Agency

that the proceeds of gold might be used for terror funding. All these elements can be seen even in the FIR submitted by the Agency in this court and thus, the contention of the petitioners that the very investigation by NIA as such is a meaningless exercise, cannot be accepted. Only a specialised Agency like NIA can identify and extricate the complex questions intertwined in such a matter. Smuggling gold in huge quantity would certainly damage the economy of our nation and if it reaches to the terrorist forces as apprehended by the Agency, it would damage the security of India itself. But the question to be determined by this court is whether the Agency has succeeded in prima facie establishing the above said three distinguishable aspects as against all the present petitioners, even when the investigation is advanced to the present stage. Hence, unless they produce sufficient materials to compel this court to keep all the petitioners under detention in order to unravel the money/gold trail leading to terror outfits, this court cannot detain all of them indefinitely irrespective of the lesser role played by them in the alleged criminal act, for the mere reason that the Investigating Agency apprehends such a thing.

20. Indeed, this court has no doubt that the investigation in this case is proceeding in the right direction and there should be an extensive probe into the aspect of terrorist financing, under the cover of gold smuggling. The case diary produced by NIA in 6 volumes consists of nearly 2500 pages and it shows the extraordinary efforts taken by the Agency even amid the pandemic crisis. It is also evident from the letter issued by the Additional Director General of the Central Economic Intelligence Bureau that there was sufficient reason for registering the FIR, suspecting terror funding out of the proceeds of the smuggled gold, and continuing the investigation in that direction. However, after investigating for a period of more than 90 days, the Agency is not able trace out any material to substantiate the said suspicion. Thus, at least in the case of certain petitioners, against whom what the case diary reveals only that their involvement in the

conspiracy is nothing but smuggling of gold with profit motive, it is essential to draw a line of distinction, by separating them from the front-line accused persons who alleged to have devised the plan of smuggling gold through the diplomatic cargo, and against whom the Agency entertains a serious doubt about the purpose for which the smuggling was done. It is meaningful to keep those persons under detention who allegedly spearheaded the said acts, and to proceed further with the investigation to verify the suspected terrorists links. But the other petitioners who seemed to have smuggled gold for individual purpose deserve a different treatment, especially when some of them are cancer and cardiac patients, whose safety during this pandemic period is a serious issue.

21. NIA has every justification to proceed against few persons who have main role in the conspiracy of smuggling gold for various persons through diplomatic channel and to further probe into the chance of involvement of any terrorist organisations behind them. But in the case of the other petitioners who are so far shown only as persons who individually or together with some of the accused persons smuggled gold for their personal benefit, the court cannot detain them any further, unless there are some materials which prima facie show that they have any live link with the apprehended terror forces. Hence, in the absence of such materials, this court cannot, at this stage, find that there exists reasonable grounds for believing that the accusation made against these petitioners is prima facie true.

22. Though it is forcefully argued by Shri. P.Vijayakumar that the petitioners have not obtained any financial gains despite the fact that they have smuggled around 167 Kg of gold between November 2019 to June 2020 and it is a highly relevant aspect in terms of the ML/TF Red Flag Indicator of FATF report, I did not find anything in the case diary showing that any investigation was conducted into the aspect whether the petitioners have obtained any financial gain out of the said transactions. On the other hand, the confession statements of some

of them clearly reveal that they obtained profit. Further, what FATF has reported (among nearly three dozen Red Flag indicators) is only that *"Gold is transshipped through one or more of such high risk/sensitive jurisdictions for no apparent economic reason"*. Here, the case diary shows that these petitioners smuggled the gold with profit motive. Even the prosecution alleges only that one of the petitioners (A22) have reinvested the proceeds of smuggled gold, again into smuggling of further lot of gold, and it is doubtful. In the absence of any material showing that the gold smuggled in this case was also *'gold transshipped without any apparent economic reasons'*, FATF report may not have any relevance here.

23. It is submitted on behalf of NIA that some times the agency might require further police custody of the petitioners, as the mirror images of the digital devices seized from them by the Customs Officials are yet to be obtained by NIA and hence, releasing them on bail would defeat the chance of any discovery within the meaning of section 27 of the Evidence Act. This situation can be prevented by making adequate conditions in the bail order, as the Constitution Bench of the Hon'ble Supreme Court has held in **Gurbaksh Singh Sibbia vs State Of Punjab (AIR 1980 SC 1632)** that even a person released on bail (in that case, it was anticipatory bail), if appears before the Investigating Officer as part of the condition imposed in the bail order, it amounts to a *deemed custody* for the purpose of section 27 of the Evidence Act. (*"One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery"*). As it is now permissible under section 161(3) of Cr.P.C to electronically record the interrogation/examination of any persons including the accused, whether the petitioners are duly co-operating with the investigation can also be effectively monitored.

24. The learned Assistant Solicitor General has further cautioned that what is apparent might not be real and so, if something material to connect these

petitioners as well with terror funding or like things are obtained later, the national security will be at stake, especially when all the digital devices seized from them by the customs officials were not analysed so far. But it is fairly submitted by the NIA that they made request for getting the mirror images only in the last month. When certain persons are released on bail, on adequate conditions and on a finding that there are no materials against them prima facie, but later such materials showing their real involvement is found out, section 437(5) of Cr.P.C authorises this court to order their rearrest and to commit them back to custody.

25. However, there is a cardinal distinction between the case of certain petitioners and the remaining persons. The Case Diary reveals that A7 has got vital role in the conspiracy and that he was instrumental in smuggling of gold on behalf of various other petitioners such as A6, A9, A10, A16, A19, A20, A26 and A30. As regards to his case, thus a deeper probe in respect of the facts narrated in the FIR is required and at this stage, it is improper to enlarge him on bail, particularly when taking into account section 43D(6) of the UA(P) Act, where it is provided that the court should also be mindful of other restrictions imposed in general law, while granting bail.

26. Similarly, the prosecution has strenuously objected the release of A12 and A13 on the ground that they also have very suspicious background. According to them, A12, who was formerly prosecuted under the UA(P) Act, still has connections with an extremist group and it is evident from the fact that his mobile phone contains an image sympathizing two persons who were convicted for their membership in SIMI, a proscribed organisation, and that there is yet another image in his mobile phone which is a Malayalam news item that a person of Indian origin was killed in Syria, who was an ISIS terrorist. NIA pointed out that A13 is a person who has close nexus with A5 and he went along with him to Tanzania, from where also A5 has smuggled gold to UAE. It is also submitted that NIA suspects that A5 might have some connections with the proscribed terrorist Dawood Ibrahim, as a

person named Firoz Oasis, a South Indian, is known to be in his company, and hence A13, who accompanied A5 to Tanzania, should not be released on bail. Taking into account those aspects, A12 and A13 are also not entitled to be released on bail, at this stage of investigation.

In the result, Crl.M.P 139/2020 is dismissed. Crl.M.P 175/2020 and 176/2020 are allowed in part by granting bail to A11 and A14 and dismissing the applications of A12 and A13. Crl.MP Nos.121, 131, 140, 141, 145, 146, 173 and 186/2020 are allowed. All the said petitioners are enlarged on bail on the following conditions :

(1) All the said petitioners shall be released on bail on their executing a bond for a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) each with two solvent sureties each for the like-sum.

(2) If they hold Passport, they shall deposit the same in this Court within 3 days of release from the custody, and if they do not have it, file an affidavit to that effect within the same period.

(3) They shall not leave Kerala without the permission of the court.

(4) They shall not make any attempt to contact any of the prosecution witnesses, directly or through any other person, or in any other way try to tamper with the evidence or influence any witness or other persons related to the investigation.

(5) They shall not commit any offence of the like nature, including smuggling of gold, while on bail.

(6) They shall fully co-operate with the investigation, including subjecting themselves to the deemed police custody for the purpose of discovery, if any, as and when demanded.

(7) They shall appear before the Investigating Officer as and when required by him. Further, they shall appear before the SHO of the local police station in whose limit they reside, between 10 a.m. and 11 a.m. on every Sunday, until further orders.

(8) Lastly, they shall not change their place of stay or residence without prior intimation to the Investigating Officer.

Dictated to the Confidential Asst., transcribed and typewritten by her, corrected and pronounced by me in open court on this the 15th day of October, 2020.

Sd/-
P. Krishna Kumar
Judge

Appendix – Nil

Sd/-
Judge
(By Order)

// True copy //

Sheristadar

Typed by: jav
Comp.by: kbs

COMMON ORDER
IN
Crl.M.P. Nos. 121/2020, 131/2020, 139/2020, 140/2020, 141/2020, 145/2020, 146/2020,173/2020, 175/2020, 176/2020 & 186/2020
in
RC No.02/2020/NIA/KOC
Order dated 15.10.2020