BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

CRL. A. No. / 2021

Swapna Prabha Suresh : Appellant

Vs.

Union of India rep.by NIA & Anr : Respondents

SYNOPSIS

The appellant is the accused No.2 in S.C.No.01/2021/NIA on the files of the Special Court for Trial of NIA Cases, Ernakulam arising out of RC No.02/2020/NIA/KOC charging offences under Sections 16, 17, 18 & 20 of the Unlawful Activities (Prevention) Act, 1967. The prosecution case is that the accused persons hatched up criminal conspiracy in between themselves to smuggle gold in large quantities from foreign countries, with the intention and knowledge that by the aforesaid act, they could threaten and destabilize the economic security of the nation, formed themselves into a terrorist gang, recruited more persons, raised funds by smuggling gold and carried out the said terrorist activity of gold smuggling and made themselves liable for various charged offences.

The appellant is innocent of the allegations raised against her in the crime and the undisputed allegations in the charge sheet would not attract any offence under the UAPA and that the charge sheet do not disclose sufficient material evidence to connect the appellant with the alleged criminal activity of gold smuggling.

The appellant moved the special court for regular bail earlier at the crime stage and later after the filing of the charge sheet. Both were dismissed by the court below. Appellant therefore assails the order passed by the special court declining bail under Section 21 of the National Investigation Agency Act, 2008 and seeks regular bail in exercise of discretionary jurisdiction conferred under Section 439 of the Code of Criminal Procedure.

Dates & Events

05.07.2020	Customs Officials at Trivandrum International Airport seized 30 kilogram of gold camouflaged in a diplomatic baggage addressed to UAE Consulate Trivandrum
06.07.2020	O.R.No.7/2020 registered by Customs (Preventive) Commissionerate, Kochi under Section 135 of the Customs Act and arrested Mr.Sarith, former PRO of UAE Consulate alleging that he was supposed to receive the baggage with the contraband.
10.07.2020	NIA Kochi registered R.C.No.02/2020/NIA/KOC for offences under Sections 16, 17 & 18 of UAPA.
11.07.2020	NIA arrested the appellant who was arrayed as accused No.2 in the crime
12.07.2020	Appellant was produced before the special court for NIA cases and remanded to custody
10.08.2020	Special court dismissed the bail application Crl.M.P.No.64/2020 of the appellant
05.01.2021	NIA submitted Final Report in the form of charge sheet arraying the appellant as accused No.2 and charging offences under Sections 16, 17, 18 & 20 of UAPA
04.02.2021	Appellant moved application for bail
22.03.2021	Special court dismissed the bail application by a common order

Points to be urged

Appellant is entitled for regular bail under Section 439 of the Code of Criminal Procedure and the restrictive provision of Section 43D(5) of UAPA do not fetter the same. The allegations in the charge sheet would not constitute any offence under the UAPA, the appellant suffered judicial remand for substantial period and there is no likelihood for the trial to commence and conclude in near future.

Division Bench Judgment of this Hon'ble Court dated 18.02.2021 in Crl.Appeal.Nos.826, 894, 901, 903, 904, 905, 906, 907, 908, 909, 910, 915 & 922 of 2020, Apex Court judgments in *Sanjay Chandra Vs. CBI AIR 2012 SC 830 and Union of India Vs. K.A.Najeeb reported in Manu/SC/0046/2021*, this Hon'ble Court's judgment in *Basanth Balram & Anr. Vs State of Kerala 2019 (1) KHC 667*and such other precedents are relied upon.

Dated this the 18th day of June, 2021.

Counsel for the Appellant

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A. No. /2021

(Against order dated 22.03.2021 in Crl.M.P.No.27/2021 in S.C. No. 01/2021/NIA on the files of the Special Court for Trial of NIA Cases, Ernakulam arising out of RC No.02/2020/NIA/KOC)

Appellant/Accused No.2

Swapna Prabha Suresh,
Aged 39 years, D/o Late Sukumaran Suresh,
Vayalil House, Munchin Road, Jagathi,
Thycaudu.P.O., Thiruvananthapuram- 695 014.

Vs.

Respondents /Complainant & State:

1) Union of India represented by Superintendent of Police,
National Investigation Agency,
28/443, Girinagar, Kadavanthra,
Ernakulam- 682 020.

2) State of Kerala represented by the Public Prosecutor,
High Court of Kerala, Ernakulam - 682 031

The address for service of notices and processes on the Appellant is that of her counsel Sooraj.T. Elenjickal, Ashwin Kumar M.J, Helan Jude, Sahir Showkath Ali and Arun Roy, Advocates, **M/s. Attorneys' Alliance (Law Firm)**, 2nd Floor, Chundanal Monarch, K.K Padmanabhan Road, Cochin.

The address for service of notices and processes on the respondents are as shown above.

MEMORANDUM OF CRIMINAL APPEAL SUBMITTED UNDER SECTION 21 OF THE NATIONAL INVESTIGATION

2/7/21

Presented On: 18.06.2021

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A. No.   / 2021

(Against order dated 22.03.2021 in Crl.M.P.No.27/2021 in S.C. No. 01/2021/NIA on the files of the Special Court for Trial of NIA Cases, Ernakulam arising out of RC No.02/2020/NIA/KOC)

Swapna Prabha Suresh	:	Appellant/Accused No.2
	Vs.	
Union of India rep.by NIA & Anr	:	Respondents/Complainant & State

MEMORANDUM OF CRIMINAL APPEAL SUBMITTED UNDER SECTION 21 OF THE NATIONAL INVESTIGATION AGENCY ACT, 2008 R/W SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE, 1973

M/s. ATTORNEYS' ALLIANCE
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ASWIN KUMAR.M.J (D-4917/2017)
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ARUN ROY (K-413/2019)
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Advocates
(COUNSEL FOR THE APPELLANT)

2021028437

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A. No. / 2021

Swapna Prabha Suresh : Appellant

Vs.

Union of India rep.by NIA & Anr : Respondents

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Dated this the 18th day of June 2021

Counsel for Appellant

AGENCY ACT, 2008 R/W SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE, 1973

STATEMENT OF FACTS

1. The appellant herein is the accused No.2 in Sessions Case No. 01/2021/NIA on the files of the Special Court for Trial of NIA Cases, Ernakulam arising out of RC No.02/2020/NIA/KOC. The appellant stands charge sheeted by the National Investigation Agency (NIA), Kochi unit along with 19 other accused persons for the offences punishable under Sections 16, 17, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 hereinafter to be referred as UAPA. The appellant was arrested in connection with the crime on 11.07.2020 and continues under judicial remand since then.

2. The gist of the prosecution allegation is that the customs officials in the Thiruvananthapuram International Airport on 05.07.2020 had seized 30 kilograms of 24 carat purity gold worth Rs.14.82 crores which was camouflaged in a diplomatic baggage addressed to the United Arab Emirates (UAE) Consulate, Trivandrum and sent from abroad, that the gold was concealed in the diplomatic baggage and smuggled pursuant to a conspiracy hatched between the accused persons, that the accused persons had smuggled around 167 kilograms of gold including that which was seized on 05.07.2020 during the period November 2019 to June 2020, that the accused persons had formed themselves in to a terrorist group for the purpose of carrying out smuggling activities thereby posing threat to the economic security of the country. Initially, First Information Report in the crime was lodged under the UAPA upon the suspicion that the proceeds of the smuggled gold might have been used for financing terrorism in India. The investigation also proceeded to unearth the involvement of trans- national forces, if any in the alleged

smuggling activity through diplomatic channel. However, the suspicion of financing terrorism and involvement of transnational forces were not found in the detailed investigation conducted by the agency for about six months.

3. The sequence of events with respect to the alleged activity and initiation of prosecution are as follows;

On 05.07.2020, the customs officials at Trivandrum Airport seized the contraband weighing 30 kilograms of gold camouflaged in the diplomatic baggage addressed to the UAE Consulate and registered O.R.No.7/2020 for the offences under the Customs Act. One Mr.Sarith (A1 in the present crime), who was the former PRO in the UAE Consulate was arrested by the customs on 06.07.2020 alleging that it was he who was supposed to receive the baggage containing the contraband. The NIA lodged F.I.R in the present crime on 10.07.2020 as directed by the Central Government upon the suspicion that the proceeds of smuggled gold could be used for financing terrorism in India. True copy of the FIR in RC.No.02/2020/NIA/KOC dated 10.07.2020 is produced herewith and marked as **Annexure-I**. The said Sarith was arrayed as the accused No.1 and the appellant was arrayed as accused No.2 in the FIR along with two more other named accused persons. The appellant was arrested by the NIA on 11.07.2020, produced before the jurisdictional Special Court on 12.07.2020 and was remanded to judicial custody. The formal arrest of the appellant was recorded in the customs crime and she was remanded to judicial custody by the Additional Chief Judicial Magistrate Court (Economic Offences) Ernakulam on 28.07.2020. The Enforcement Directorate registered Enforcement Crime Information Report ECIR/KCZO/31/2020 arraying the appellant as accused charging offences under the Prevention of Money Laundering Act (PMLA) upon the allegation that she and other accused persons have derived proceeds of crime with respect to the UAPA offence. The formal arrest of the appellant was recorded in the said crime and she was remanded to judicial custody by the jurisdictional Special Court for PMLA Cases Ernakulam on 05.08.2020. Central Government issued preventive detention order dated 09.10.2020 under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) and detained the appellant therein as well.

4. The appellant is absolutely innocent of the allegations in the crime and has been falsely implicated therein. Apart from the concocted statements recorded by various investigation agencies from the accused persons while in custody, there is absolutely no legally tangible evidence to connect the appellant with the alleged crime. The allegations even if accepted as such, would not make out any offence under the UAPA, leave alone any offence under the Customs Act and PMLA. The appellant was granted NIA custody and was subjected to detailed interrogation on several occasions. The investigation and recovery of materials stood completed as far as the appellant was concerned. In the said circumstance, the appellant moved the Special Court for NIA Cases seeking regular bail. The learned Special Judge perused the case diary and such other materials and found nothing on record to show that the proceeds of gold was used or intended to be used for terrorism or financing terrorism. However, the learned judge was of the opinion that the matter required deeper probe by the NIA in view of the likely involvement of transnational forces in the alleged criminal activity. The

allegations against the appellant were observed to be 'prima-facie true' making her disentitled for bail in the light of Section 43D of UAPA. Accordingly, the bail application was dismissed by the Court below. True copy of the order dated 10.08.2020 passed in Crl.M.P.No.64/2020 in RC.No.02/2020/NIA/KOC on the files of the Special Judge for NIA Cases Ernakulam is produced herewith and marked as **Annexure-II.**

5. The appellant was granted bail by the jurisdictional Court in the customs case O.R.No.7/2020 on 08.12.2020. She was granted bail in the PMLA case by the Special Court on 13.10.2020. The customs had registered another crime O.R.No.13/2020 alleging smuggling of foreign currency and arrayed the appellant also as an accused therein. She secured bail in the said case as well from the concerned Court on 27.01.2021. In short, the appellant has been granted bail by the respective Courts in the cases registered by other investigation agencies with respect to the very same alleged criminal activity of gold smuggling. The COFEPOSA detention order passed against the appellant has been subjected to challenge before this Hon'ble Court in WP(Crl) No.152/2021 and the same is pending.

6. While so, the Special Court for NIA Cases granted bail to few among the accused persons arrayed in the crime pointing out their lesser role and rejected bail to few others pointing out their higher role. The order passed by the Special Court granting bail was challenged in appeal by the NIA whereas the order rejecting bail was challenged by one among the accused person. This Hon'ble Court upon detailed consideration of all the factual and legal issues involved in the case came to a definite conclusion that smuggling of gold is an offence which has to be dealt with by the Customs Act and the same would

not attract any offence under the UAPA. The relevant portions from the common judgment dated 18.02.2021 in Crl.Appeal Nos.826, 894, 901, 903, 904, 905, 906, 907, 908, 909, 910, 915 & 922/2020 is extracted hereunder;

> *"33. Sum and substance of the above discussion is that by applying the above mentioned well known rules of interpretation of statutes, we are unable to hold that smuggling of gold that smuggling of gold simplicitor will fall within Section 15 (1) (a) (iiia) of UA(P) Act. In other words, gold smuggling clearly covered by the provisions of the Customs Act will not fall within the definition of terrorist act in Section 15 of UA(P) Act unless Section 15 of UA(P) Act unless evidence is brought out to show that it is done with the intent to threaten or it is likely to threaten the economic security or monetary stability of India. In our view, what is made an offence under Section 15(1)(a)(iiia) of UA(P) Act is causing damage to the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or any other material relatable to currency or coin. "Other material" can be any material connected to counterfeit Indian- paper currency or counterfeit Indian coin, like machinery or implements or high quality paper or any other material which could be used for producing or circulating fake currency or coin. Illegal acts referred to in the above provision certainly will have a direct impact on the economic security of India. In our opinion, it does not include gold as the words employed in the Sub-clause specifically mention about production or smuggling or circulation of high quality counterfeit Indian paper currency or coin and therefore gold cannot be grouped along with paper currency or coin even though gold is a valuable substance and has a great potential to get converted into cash. Arrangement of words indicating the*

things mentioned in the provision does not prompt us to think that gold smuggling with a mere illegal profit motive will fall within the aforementioned definition of terrorist act. Besides, we take cognizance of the fact that there can be many other things of enormous value like precious metals and stones that could be smuggled for making an unlawful gain. We do not find any logic to include gold alone along with counterfeit Indian paper currency or coin.

34. One more rule of interpretation of statutes fortifies our view. Casus omissus, meaning a situation omitted from or not provided by statute, cannot be supplied by courts, as to do so will be legislation and not construction. Plethora of case law on this subject need not be mentioned here to buttress this proposition. In our opinion, if the legislature had an intention to include gold smuggling also as terrorist act, there is no difficulty in expressly providing a limb to Section 15 of UA(P) Act. We can only presume that the legislature must have been aware of the existence of the Customs Act when it amended Section 15. Non-inclusion of the Customs Act in the Schedule to NIA Act also must be regarded as a conscious act by the legislature. These aspects also strengthen our above view."

This Hon'ble Court accordingly dismissed the appeals preferred by the NIA upholding the order passed by the Special Court granting bail to few among the accused persons in the crime. However, this Hon'ble Court also upheld the order passed by the court below rejecting bail to the accused No.7 at that stage of the crime wherein the investigation was being proceeded to find out the allegation of financing terrorism and involvement of transnational forces in the criminal activity.

7. Meanwhile, the NIA completed the investigation in the crime and laid charge sheet against 20 accused persons including the appellant before the court below. As per the charge sheet, the accused persons with the requisite knowledge and intention to threaten the economic security of the country and destabilize the Indian economy, conspired together to commit the said terrorist act, recruited people, formed a terrorist gang of themselves, raised funds and smuggled gold from UAE in large quantity using diplomatic channel damaging the friendly relations with UAE and thereby committed terrorist activity punishable under Sections 16, 17, 18 and 20 of UAPA. True copy of the charge sheet dated 05.01.2021 laid by the NIA in the Special Court is produced herewith and marked as **Annexure-III.** Along with the charge sheet, the NIA has given a list of 267 witnesses, 329 documents and 194 material objects as evidence to substantiate their findings and conclusions. True copy of the list of witnesses, documents and material objects attached to the charge sheet is produced herewith and marked as **Annexure-III(a).** The charge sheet does not disclose involvement of transnational forces and financing of terrorism as alleged in the investigation stage of the crime. The charge sheet also reveals the names of nine accused persons against whom the investigation is in progress. The Court below took cognizance of all the offences in the charge sheet as S.C.No.01/2021 on its files as against the 20 accused persons including the appellant herein.

8. The appellant for the second time approached the Court below for bail pointing out the changed circumstances including the legal issue settled by this Hon'ble Court and her application was numbered as Crl.M.P.No.27/2021 on the files of the Court. The bail application

moved by the appellant was heard along with the applications moved by accused Nos.1, 5, 6, 7, 10, 12 and 13. The court below without properly appreciating the cardinal contention raised by the appellant and such other accused persons that the allegations in the charge sheet do not prima facie make out the offences under the UAPA following the dictum laid down by this Hon'ble Court, refused to grant bail observing that this Hon'ble Court had refused to grant bail to similarly placed accused No.7 in the judgment relied upon. Accordingly, all the bail applications including that filed by the appellant was dismissed by a common order.

Aggrieved by the said order dated 22.03.2021 passed in Crl.M.P.No.27/2021 in Sessions Case No. 01/2021/NIA on the files of the Special Court for Trial of NIA Cases Ernakulam, the appellant/accused No.2 prefer the present criminal appeal on the following among other

GROUNDS

A. The impugned order is vitiated by patent illegalities and irregularities resulting in gross miscarriage of justice.

B. The impugned order has been passed on an improper and perverse appreciation of the facts, law and evidence in the matter with a prejudicial and pre determined mind as against the appellant.

C. The court below went seriously wrong in rejecting the bail plea of the appellant when the said plea was based upon genuine grounds and sound reasoning.

D. The court below ought to have the appreciated the basic concept of bail jurisdiction under criminal jurisprudence, 'bail is the rule and jail is the exception'. The question therefore which has to be considered must always be 'should the bail be denied' and not 'should the bail be granted'. When granting bail is the normal rule, the denial of the same must not be resorted in a casual and routine manner. The object of bail is neither punitive nor intended to give the accused a taste of imprisonment and the main guiding factor must be to ensure the presence of the accused for trial and rule out the possibility of any sort of tampering of evidence. The dictum laid down by the Apex Court in ***Sanjay Chandra Vs. CBI AIR 2012 SC 830*** is a guiding precedent.

E. The court below ought to have exercised the discretionary jurisdiction to grant bail to the accused in favor of the appellant keeping in mind the basic concept of criminal jurisprudence that 'a man shall be considered innocent until he is found guilty'. The valuable right of personal liberty of an individual is curtailed by due process of law when he is arrested and detained in judicial remand in connection with a non bailable offence. The discretionary jurisdiction is conferred upon criminal courts to ensure that the remand period is not extended indefinitely resulting in pre-conviction imprisonment of the accused.

F. The court below ought not to have wrongly interpreted Section 43 D (5) of UAPA in the manner prejudicial to the appellant. The said section imposes restrictions in the matter of exercising discretionary jurisdiction of granting bail to the persons involved in UAPA offences and arms the court to refuse bail in appropriate cases. The same shall not be interpreted in such manner that there is prohibition in granting bail to the accused.

The restrictive clause reads as "there are reasonable grounds for believing that the accusation against such person is prima facie true". The court below did not search out reasonable grounds to believe that the accusation is prima facie true. Instead, the court proceeded under the belief that the accusation is true and observed that the case records and materials are not sufficient enough to hold that the prosecution version is untrue. The Apex Court decisions in National Investigation Agency Vs. Zahoor Ahmad Shah Watali and Ranjith Singh Brahmajeetsing Sharma Vs. State of Maharashtra & Others has been misinterpreted by the special court in such manner to justify the decision to refuse bail by taking aid of the restrictive clause.

G. The court below ought to have considered the failure of the prosecution to prima facie make out any offence under the UAPA as against the appellant so as to arrive at the satisfaction enumerated in section 43D (5). The allegations in the charge sheet would make out only offences of gold smuggling punishable under the Customs Act, which provides severe punishment if the value of the contraband or the gold smuggled is higher. Even if the quantity involved is large and the number of persons involved is more, the offence alleged is smuggling of gold from UAE to India for profit, which is an offence, covered by Customs Act.

H. The court below ought to have found that the allegations in the charge sheet and the supporting materials are totally insufficient to make out any offence under UAPA. Section 15 of the Act defines 'terrorist act', Sections 16, 17, 18 and 20 deals with punishments for terrorist act, raising funds for terrorist act, conspiracy, organizing terrorist camps, recruiting persons for terrorist act and for being member of terrorist gang or organization respectively. Ingredients of none among the said sections are prima facie made out from the charge sheet filed by NIA.

I. The court below ought to have found that the witness statements, recorded voice clips, whatsapp chats and all such material evidence produced by the investigating agency would point out only an offence of gold smuggling simplicitor. The statements and the circumstance would also suggest that the smuggling was intended only for individual profit and that none among the accused persons had any intention to threaten the economic security or stability of the nation or even knowledge about the likelihood for the same.

J. The court below failed to appreciate the very purpose for which the FIR had been registered in the crime and the conclusion arrived at by the investigating agency. The crime was registered for UAPA offences under the suspicion that the proceeds of smuggling might have been used for financing terrorism in the country. As the investigation progressed, another suspicion regarding involvement of transnational forces also arose. However, when the investigation concluded and charge sheet filed the possibility of financing terrorism and involvement of transnational forces stands ruled out.

K. The court below went seriously wrong in placing reliance upon the manipulated version of the investigation agency in the charge sheet. The allegations are concocted in such manner so as to make it appear that the offences under the UAPA are made out. The findings and conclusions in the investigation do not tally with the allegations raised in the charge sheet. The words in the charge sheet are scripted in tune with that in the provisions of the Act in such manner prejudicial to the lawful interest of the appellant.

L. The court below went seriously wrong in observing that the appellant is involved in the alleged criminal activity and that she is one among the 'front liners' in the activity. Apart from the unreliable statements recorded from the witness, there is absolutely no legally tangible evidence to connect the appellant with the alleged criminal activity. The evidence at the most would connect few among the accused persons with each other and demonstrate intention to derive individual profit out of the activity.

M. The court below ought to have insisted upon sufficient corroborative material evidence for the prosecution charge of UAPA offence so as to arrive at subjective satisfaction that the allegations are 'prima facie true' and that the offences are prima facie made out. The ratio in Watali judgment has been wrongly relied upon to hold that the degree of satisfaction to be arrived is lighter as far as the concept of truth envisaged in section 43D (5) is concerned.

N. The court below ought to have found that the stringency attached to section 43D(5) of UAPA is comparatively less than the like provision appearing in Narcotic Drugs and Psychotropic Substances Act, Section 37 wherein it is stated 'believing that accused is not guilty.' The Apex Court judgment in *Union of India Vs. K.A.Najeeb reported in Manu/SC/0046/2021* fortifies the said contention. The manner in which subjective satisfaction has to be arrived at and recorded for section 37 of the NDPS Act is dealt with by this Hon'ble Court in *Basanth Balram & Anr. Vs State of Kerala 2019 (1) KHC 667.*

O. The Special Court improperly and casually dealt with the reported judgment of this Hon'ble Court rendered on 18.02.2021 in Crl.Appeal Nos.826, 894, 901, 903, 904, 905, 906, 907, 908, 909, 910, 915 & 920 of 2020. It was a matter of judicial discipline for the Special Judge to follow the ratio laid down by this Hon'ble Court in the issue. This Hon'ble Court while dealing with the bail matters of the co-accused in the very same crime had applied the well known rules of interpretation of statues and laid that smuggling of gold simplicitor would not fall within the ambit of terrorist act defined under Section 15 of UAPA and the material 'gold' would not come under the category of 'other material' specified therein. Though this Hon'ble Court did not consider the charge sheet laid by the NIA while pronouncing the said judgment, the situation remains as such as far as the main allegation and over tact in the criminal activity is concerned. When the matter was considered by this Hon'ble Court and by the Special Court subsequently, the allegation remained the same, smuggling of gold in large quantity from UAE to India by large group of persons. The legal principle contained in the judgment of the superior Court is having binding force and not the stray observations in the judgment which has to be followed. Here the special Court without following the settled principles of law of precedence, improperly dealt with the dictum laid down in the judgment and made use of some observations in the judgment relating to the factual situation of another accused so as to refuse bail to the appellant. It is not the 'ratio decidendi', but the 'obiter dicta' which has been followed.

P. The court below ought to have found that it was not the appellant, but other accused persons who are the so called 'kingpins' in the alleged conspiracy and related criminal activity to be considered as the 'front liners' in the crime. Mere ranking order of the accused persons in the police report is not sufficient enough to infer the seriousness of their individual role. Though currency notes and some gold ornaments were allegedly recovered from the lockers in the name of the appellant, prosecution was unable to connect the same with the allegations in the crime.

Q. The court below committed serious error in relying upon the voice clippings of the social media chats by few among the accused persons to arrive at its subjective satisfaction regarding the complicity of the appellant. The most unreliable confession statements of accused No.4 and such other persons were also relied upon to conclude the conspiracy hatched up between the charge- sheeted accused persons. Leave alone the credibility and evidentiary value of those materials, they are totally insufficient to hold even prima facie that the allegation of appellant having committed any UAPA offence is true. What could be gathered at the most from the said materials is that there had been conspiracy between the accused persons to smuggle large quantity of gold from different foreign countries, derive wrongful gain thereby and the accused persons got themselves involved in such criminal activity. It would not constitute any offence under the UAPA.

R. The Special court ought to have considered the period of judicial remand already underwent by the appellant in connection with the crime and the possibility of the trial not to commence and conclude in near future as mitigating circumstances to grant bail. Appellant was arrested on 11.07.2020, remanded to judicial custody on 12.07.2020 and about a year has elapsed since then. The charge sheet filed by the NIA reveals that they propose to examine 267 witnesses, mark 329 documents and identify 194 material objects. The charge sheet further disclose that NIA is continuing with investigation relating to the remaining suspected persons including those alleged consigners of the contraband. Therefore, there is absolutely no possibility for the trial of the case to conclude or even commence in near future. As held by the Apex Court in *Union of India Vs. K.A.Najeeb*, statutory restrictions like section 43D (5) of UAPA does not oust the ability of constitutional courts to grant bail on grounds of violation of part III of the constitution and that the rigors of such restrictive provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded substantial period.

S. The Special Court went seriously wrong in relying upon paragraph No.42 in the judgment of this Hon'ble Court relating to the bail of the co-accused in the crime. In the said paragraph, this Hon'ble Court considered paragraph 25 of the lower court order declining bail to the accused No.7 in the crime and upheld the decision of the court below regarding the same. At that stage, the court below as well as this Hon'ble Court was considering the need for enlargement of the accused on bail when the investigation was being proceeded to find out the involvement of transnational forces and the possibility of financing terrorism in the country. The bail of accused No.7 who was having pivotal role in the criminal activity was declined for facilitating investigation in all possible directions. After the filing of charge sheet, the entire factual matrix of the case concentrates on the single question as to whether smuggling of gold would attract UAPA offence. The understanding of this Hon'ble Court's judgment in such manner as to draw distinction between front-liners and others in the matter of bail and reject the bail plea of the front-liners is totally wrong.

T. The court below ought to have appreciated the limited role attributed to the appellant in the alleged smuggling of gold. The admitted prosecution case is that the appellant who was the former employee in the UAE Consulate was engaged by the 'kingpins' in the smuggling activity to use diplomatic channel for carrying out the activity. The accused persons, who funded the purchase of gold, purchased the gold and who were supposed to receive the same are the main persons in the alleged activities of gold smuggling and the appellant is only one among the other accused persons who is having 'aid' role. There is absolutely no justification to consider the appellant at par with the identified 'front-liners' in the crime.

U. The special court committed serious error in upholding the prosecutions stand to incorporate offences under UAPA in a gold smuggling case. The legislative intention behind the enactment, to prevent unlawful activities of such grave nature affecting the security of the nation and to provide severe punishments to those indulging in such activities has been ignored. It affects the credibility of the prestigious national investigating agency, when they manipulate allegations in such manner to 'create' offences under UAPA.

V. The special judge ought to have considered at the threshold as to whether any offence under UAPA is attracted from the allegations and contentions in the charge sheet supported by legally acceptable evidence. What has been done is a finding of truth or otherwise of the factual allegations without giving due importance to the said legal aspect.

W. The Special Judge ought not to have carried away by the political sensation created by the news and visual media in the state and the so called power struggle by the Central and State Governments.

X. The court below ought to have considered the family background and personal profile of the appellant and the fact that the appellant is not having any criminal antecedents. Appellant is a lady and mother of a 19 year old daughter and 9 year old son and is suffering from various ailments including serious cardiac problems, recurring mental depressions and epilepsy.

Y. The court below ought to have appreciated the fact that no useful purpose would be served by the continued detention of the appellant. She had been given NIA custody and she co-operated with the interrogation to the full satisfaction of the officers concerned. There is absolutely no chance for the appellant to abscond from the process of law or to tamper with evidence. The appellant would be restricted with opportunity for fair trial and effectively defend herself in the proceedings, if she is asked to face trial under judicial remand.

Z. The appellant, at any rate, is entitled for the discretionary jurisdiction conferred upon this Hon'ble Court under Section 439 of the Code of Criminal Procedure to get herself released on bail. The impugned order is liable to be interfered under the appellate jurisdiction conferred upon this Hon'ble Court.

For these and other grounds to be urged at the time of hearing it is most humbly prayed that this Hon'ble Court may be pleased to set aside the order dated 22.03.2021 passed in Crl.M.P.No.27/2021 in Sessions Case No.01/2021/NIA on the files of the Special Court for Trial of NIA Cases Ernakulam and direct release of the appellant/accused No.2 on bail forthwith.

Dated this the 18th day of June, 2021.

Counsel for the appellant