

IZHARUL HAQ ABDUL HAMID SHAIKH & ANR.

V.

STATE OF GUJARAT

Criminal Appeal No.811 of 2008

MARCH 6, 2009

**[ALTAMAS KABIR AND DR. MUKUNDKAM SHARMA,
JJ.]**

Terrorists and Disruptive Activities (Prevention) Act, 1987 – s.20(8), 20-A – Code of Criminal Procedure, 1973 – s. 139 – Bail – Appellant, one of the labourer employed for loading and unloading of boxes – Other labourers granted bail – Designated Court rejected the bail application on the presumption that he had knowledge of contents of the boxes – On appeal, held: No material to presume that appellant had knowledge of contents of boxes – He may be granted bail on parity with other labourers – Moreover, before recording FIR, approval under s.20-A (1) of TADA Act not obtained – Bail granted to the second appellant also.

Shaheen Welfare Association v. Union of India & Ors. (1996) 2 SCC 616; Kartar Singh v. State of Punjab (1994) 3 SCC 569; Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India & Ors. (1994) 6 SCC 731; Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr. (2005) 5 SCC 294; State of Maharashtra vs. Bharat Shanti Lal Shah & Ors. 2008 (12) SCALE 167; Mukhtiar Ahmed Ansari vs. State (NCT of Delhi) (2005) 5 SCC 258 – referred to

Case Law Reference

(1996) 2 SCC 616	referred to	Para 10
(1994) 3 SCC 569	referred to	Para 11
(1994) 6 SCC 731	referred to	Para 12

- A (2005) 5 SCC 294 referred to Para 15
 (2008) 12 SCALE 167 referred to Para 16
 (2005) 5 SCC 258 referred to Para 21

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
 No. 811 of 2008

C From the Judgement and Order dated 09.04.2008 of the
 Hon'ble Designated TADA Court at Valsad, Gujrat in Criminal
 Misc. Application No. 68 of 2008 in Special TADA Case No. 1
 of 2005.

WITH

D Criminal Appeal No. 813 of 2008
 Criminal Appeal No. 453 of 2009
 @ Criminal Appeal D.No. 23837 of 2008
 Rajeev Sharma, for the Appellants.
 Hemantika Wahi, for the Respondent.

E The Judgement of the Court was delivered by
 ALTAMAS KABIR, J.

1. Delay condoned in Criminal Appeal D.No.23837 of
 2008.

F These three criminal appeals have been taken up together
 as the same questions of law relating to the Terrorists and
 Disruptive Activities (Prevention) Act, 1987 (hereinafter referred
 to as 'TADA') regarding grant of bail are involved. All these three
 appeals have been filed under Section 19 of TADA relating to
 G separate incidents which are alleged to have occurred in
 Porbandar and Valsad in the State of Gujarat.

H 2. Criminal Appeal No.811 of 2008 has been filed by Izharul
 Haq Abdul Hamid Shaikh and Amir Gulam Husein Bandukwala
 against the order passed by the Designated Court, Porbandar,

on 15th February, 2008 in Criminal Misc. Application No.164 of 2007 in Special TADA Case No.6 of 2005 in respect of offences alleged to have been committed under Sections 121, 121A, 122, 123, 120B, 34 IPC, Section 25(1) AB, AA of the Arms Act, Section 9-B of the Explosive Substances Act read with Sections 3, 4, 5 and 6 of TADA.

3. The appellant No.1, Izharul Haq Abdul Hamid Shaikh has also filed Criminal Appeal D.No.23837 of 2008 against order dated 9th April, 2008, passed by the Designated TADA Court at Valsad in Criminal Misc. Application No.68 of 2008 in Special TADA Case No.1 of 2005 in respect of charges similar to those made against him in the Porbandar case.

4. Criminal Appeal No.813 of 2008 has been filed by one Jivan Raghu Varli against an order dated 13th September, 2007, in Criminal Misc. Application No.88 of 2007 on charges similar to those made against Izharul Haq Abdul Hamid Shaikh.

5. In all the three appeals, the prayer for bail made on behalf of the appellants under Section 439 Cr.P.C. and Section 20(8) of TADA has been rejected.

6. Mr. Sushil Kumar, learned Senior Advocate, appearing for the appellants in CrI. Appeal No.811 of 2008 and CrI. Appeal D. No.23837 of 2008, submitted that Izharul Haq Abdul Hamid Shaikh has been in custody since his arrest on 29th April, 2005, i.e. for more than 3½ years while the minimum sentence provided in the TADA is 5 years and the maximum is life sentence. He urged that if the appellant was ultimately convicted and given minimum sentence, he would have completed such sentence in custody by the time the trial was concluded. Mr. Sushil Kumar submitted that of the other co-accused in the Valsad case, twenty accused had been acquitted and it was observed in the judgment of the learned Designated Judge that the prosecution had not been able to prove its case beyond all reasonable doubt. Mr. Sushil Kumar also submitted that the appeal against acquittal of the said twenty co-accused was dismissed by this Court and another batch of three trials in the same case also

A ended in acquittal. He contended that the contents of the charge-sheet did not warrant framing of charges by the Special Judge, particularly when no recovery was effected and the only evidence against the appellants was the alleged confession which had not been relied upon in the earlier trial.

B 7. In the other case (Criminal Appeal No. 811 of 2008), the
C First Information Report was filed on 8th March, 1994, by the
D police authorities and thereafter confessions of the appellant
Nos.1 and 2 were recorded on 27th June, 2005. On being
produced before the Magistrate on 29th June, 2005, the
appellants retracted their confessional statements on the ground
that such confessions had been obtained on the basis of threats
and coercion and, in fact, they did not even know as to what
was written in the confessional statements. A second petition
made by the appellants was heard by the Designated Court at
Valsad, but the same was ultimately dismissed.

8. Mr. Sushil Kumar stated that since no recovery had been
effected, the only evidence available against the appellants were
the confessional statements alleged to have been made by them
voluntarily, which have not been relied upon in the earlier trial.
E Mr. Sushil Kumar submitted that most of the accused persons
in these cases have either been acquitted or released on bail
and that in the absence of any concrete evidence linking the
appellants with the incident, their bail applications should have
been allowed.

F 9. Mr. Ranjit Kumar, Senior Advocate, who appeared for
the appellant in Criminal Appeal No.813 of 2008, preferred by
G Jivan Raghu Varli, submitted that the appellant had been
arrested on 28th June, 2005, and that there were as many as 47
accused in the case which was based on facts similar to those
involving Izharul Haq Abdul Hamid Shaikh, and they are all on
bail except the appellant who was alleged to have been
absconding till he was arrested. Of the said 47 accused, the
appellant, Jivan Raghu Varli, was one of the labourers who had
unloaded the materials from a truck and had loaded them on to
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another and although the other labourers had been granted bail, the appellant's prayer for bail had been rejected on the above-mentioned ground. A

10. In this regard, Mr. Ranjit Kumar referred to the decision of this Court in *Shaheen Welfare Association Vs. Union of India & Ors.* [(1996) 2 SCC 616], wherein keeping in mind the dilemma of individual liberty as against protection from terrorism and disruptive activities, this Court categorized people indulging in terrorism and disruptive activities into two categories. The first category was the hardcore terrorists who were directed to be dealt with strictly, while in the other cases it was recommended that a liberal view be taken. But it was also indicated that such an approach was not to be taken in extraordinarily grave cases, such as the Bombay Bomb Blast cases. B C

11. Mr. Ranjit Kumar then referred to the Constitution Bench decision in the case of *Kartar Singh Vs. State of Punjab* [(1994) 3 SCC 569], in which the constitutional validity of the Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorist and Disruptive Activities (Prevention) Act, 1987, and the Terrorists and Disruptive Activities Procedure (UP Amendment) Act, 1976, had been challenged. After examining the provisions of the aforesaid enactments in detail, on the question of bail, the majority view was that although such power was available to the High Court under Article 226 of the Constitution, the same should be exercised in extreme circumstances given the stringent provisions of the legislation. D E F

12. Mr. Ranjit Kumar also referred to the decision of this Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India & Ors.* [(1994) 6 SCC 731], in which the provisions of Articles 21, 14 and 19 with regard to speedy trial of under trial prisoners was under consideration and it was held that deprivation of personal liberty without ensuring speedy trial violates Article 21 of the Constitution. The decision which was rendered in regard to the provisions of the H

- A Narcotic Drugs and Psychotropic Substances Act, 1985 took note of the fact of detention of persons under the aforesaid Act for long periods without trial and observed that the provisions of bail under the Act being strict, refusing bail on the one hand and delaying trial of cases on the other is unfair and unreasonable.
- B Mr. Ranjit Kumar submitted that charge had not yet been framed in the case and there were 216 witnesses to be examined. The likelihood of the trial being concluded at an early date was highly improbable.

- C 13. It was also submitted that the appellant, along with several others, were labourers employed by Izharul Haq Abdul Hamid Shaikh and there is nothing on record to indicate that they had any knowledge of the contents of the boxes which were being transported from one vehicle to another. In fact, in the affidavit affirmed by the Investigating Officer it has also been
- D indicated that the appellant was a labourer working under Izharul Haq Abdul Hamid Shaikh at the relevant point of time. Furthermore, although, it has been suggested that the appellant had absconded for 11 years, the fact is that no steps had been
- E taken to apprehend him during the said period or to have him declared as an absconder.

- F 14. It was also submitted that other labourers similarly situated, such as Suresh Ishwar Varli and Mangu Mahadu Varli, had already been granted bail in connection with this case. However, bail has been refused in the case of the appellant on
- F erroneous considerations.

- G 15. Yet another decision of this Court in the case of *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr.* [(2005) 5 SCC 294] was referred to by Mr. Ranjit Kumar with regard to the interpretation of Article 21 in the light of the
- H presumption of innocence, before being proved guilty. It was observed that Article 21, in view of its expansive meaning, not only protects life and liberty, but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Although, the aforesaid

decision was rendered under the provisions of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as 'MCOCA'), the provisions of TADA being similar with regard to grant of bail, Mr. Ranjit Kumar submitted that the Court went on to observe that Section 21(4) of MCOCA did not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail had not committed an offence under the Act, as in such an event it would be impossible for the prosecution to obtain a judgment of acquittal and conviction, which could not have been the intention of the Legislature. Section 21(4) of MCOCA would, therefore, have to be considered reasonably by the Court to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at the said stage was not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities.

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16. Reference was then made to the decision of this Court in *State of Maharashtra vs. Bharat Shanti Lal Shah & Ors.* [2008 (12) SCALE 167], where similar views have been expressed. Mr. Ranjit Kumar submitted that as far as the appellant, Jivan Raghu Varli, was concerned, he could not be treated on a different footing from the other labourers, who have been granted bail in this case.

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17. The submissions made by Mr. Sushil Kumar and Mr. Ranjit Kumar on behalf of the appellants in these three criminal appeals were strongly opposed on behalf of the State of Gujarat by Mr. Yashank Adhyaru, learned Senior Advocate. Referring to Section 12 of TADA, Mr. Adhyaru urged that when trying an offence under the Act, the Designated Court could also try any other offence with which the accused may, under the Indian Penal Code, be charged at the time of trial. Mr. Adhyaru urged that sub-section (2) of Section 16 provides that if during the trial under the TADA Act it is found that the accused person had committed any other offence under the Act or any rule made thereunder or under any other law, the Designated Court could

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A convict such person of such other offence and pass any sentence authorized by the Act or such rule or such other law for the punishment thereof. Reference was also made to Section 18 of TADA in this regard.

B 18. Referring to the certificate issued by the Superintendent of Police, Porbandar, on 27th June, 2005, which records a confession said to have been made by Izharul Haq Abdul Hamid Shaikh, Mr. Adhyaru submitted that the said certificate satisfies the rigours of Sections 15 and 18 of TADA and the same was sufficient to deny bail, even if there was no other material available. Mr. Adhyaru relied on the decision in Kartar Singh's case (supra) which was referred to by Mr. Ranjit Kumar, wherein the validity of TADA had been upheld and this Court had held that while considering grant of bail, the High Court under Article 226 of the Constitution was required to exercise extreme caution D in view of the stringent provisions of the Act.

E 19. Mr. Adhyaru submitted that as far as Criminal Appeal No.811 of 2008 is concerned, it should be kept in mind that facts, other than the confessional statements, had been taken into consideration by the Special Court while denying bail to Izharul Haq Abdul Hamid Shaikh.

F 20. With regard to Criminal Appeal D. No.23837/08, Mr. Adhyaru submitted that the trial had already commenced in this case and out of 86 witnesses, already 76 witnesses have been examined and that only the official witnesses were left to be examined. Further more, in this case there is a separate confessional statement.

G 21. In his response to Mr. Adhyaru's submissions, Mr. Sushil Kumar pointed out that in terms of Section 20-A of TADA, notwithstanding anything contained in the Code of Criminal Procedure, no information about the commission of an offence under the Act can be recorded by the police without the prior approval of the District Superintendent of Police. Moreover, Sub-Section (2) of Section 20-A provides that no Court shall take H cognizance of any offence under the Act without the previous

sanction of the Inspector General of Police or, as the case may be, of the Commissioner of Police. Mr. Sushil Kumar submitted that the Investigating authorities had filed the First Information Report without having obtained the prior approval of the District Superintendent of Police, which was contrary to Sub-Section (1) of Section 20-A, thus vitiating the entire proceedings. Mr. Sushil Kumar referred to the further cross-examination of P.W.10 Harjeshwar, who was then serving as the District Superintendent of Police, Porbandar, wherein he had admitted the fact that approval had been accorded after the complaint had been registered. He also referred to the First Information Report dated 8th May, 1994, in which, along with the other offences under the Indian Penal Code, Arms Act and the Explosive Substances Act, offences under Sections 3, 4 and 5 of the Tada Act were also included. Mr. Sushil Kumar submitted that it would also be evident from the affidavit filed on behalf of the State of Gujarat that approval had been given for invoking the provisions of the TADA Act under Section 20-A(1) on 8th April, 1994, whereas the First Information Report was lodged on 8th March, 1994. The same question was the subject matter in *Mukhtiar Ahmed Ansari vs. State (NCT of Delhi)*, [(2005) 5 SCC 258], wherein it was held that since prior approval, as required under Section 20-A(1) had not been accorded by the Competent Authority under TADA, all proceedings taken without such sanction were vitiated. Consequently, the conviction of the accused under TADA was set aside.

22. Mr. Adhyaru, on instructions, submitted that the statement made by Mr. Sushil Kumar was correct, but that though sanction had purportedly been granted under Section 20-A(2), it was really intended to be a sanction under Section 20-A(1) of TADA. He also urged that Discharge Applications were also pending before the learned Special Judge at Porbandar and that the trial is being stayed on that account, and not on account of any delay on the part of the prosecution.

23. As indicated hereinbefore, we are only concerned with the question regarding grant of bail to the appellants. We do

A not, therefore, intend to go into the merits of the matters, which are pending disposal before the Special Court. However, from the submissions made on behalf of the parties, certain facts also emerge which are required to be taken into consideration while considering the question of grant of bail.

B 24. Taking up Criminal Appeal No.813/08 preferred by
Jivan Raghu Varli, first, it has transpired from the submissions
of the parties that he was a labourer, who was allegedly under
the employment of Izharul Haq Abdul Hamid Shaikh, the appellant
in the other two appeals. It has also transpired that he was one
C of a number of labourers who were allegedly involved in the
transfer of certain containers from one vehicle to another. The
other labourers who were involved in such operation are said to
have been granted bail as they had no knowledge of the
contents of the said boxes and were merely shifting the same
D on instructions. As far as the appellant - Jivan Raghu Varli is
concerned, he allegedly being in the employment of Izharul Haq
Abdul Hamid Shaikh, a presumption was drawn while denying
him bail that he presumably had knowledge of contents of the
boxes. Without commenting on that aspect of the matter, which
E is the subject matter of the trial, we are of the view that since the
other labourers have been granted bail and there being no
available material to presume that Jivan Raghu Varli had
knowledge of the contents of the boxes, he may be granted bail
on a parity with the other labourers.

F 25. As to the prayer for grant of bail made by Izharul Haq
Abdul Hamid Shaikh, the records show that while the First
Information Report against him under the Porbandar case had
been lodged on 8th March, 1994, approval therefor had been
given a month later, on 8th April, 1994. What will be the effect
G of the same will ultimately have to be decided in the trial and we
are not embarking on such exercise at the present moment.
However, for the purpose of grant of bail, having regard to the
decision in *Mukhtiar Ahmad Ansari's* case (supra) in which the
question of grant of prior approval, as required under Section
H 20-A(1), had been considered and was held to be a pre-

condition for recording the First Information Report, we are inclined to grant bail to the appellant Izharul Haq Abdul Hamid Shaikh, since undoubtedly, approval had not been obtained under Section 20-A(1) of TADA before the First Information Report was recorded. A

26. We, accordingly, grant bail to appellant Jivan Raghu Varli in connection with TADA Case I/G. 6/96 n/s-121, 121(c), 122, 123, 120(B) of the Indian Penal Code and under Sections 4, 5 and of the Explosive Substances Act and Sections 3, 4 and 5 of TADA Act pending before the Designated (TADA) Judge at Porbandar, to the satisfaction of the Trial Court upon such conditions as may be considered necessary to ensure his presence during the trial and also as and when required, including restrictions on his movements and reporting to the local Police Station in a manner, as may be deemed fit and proper. B C

27. We also grant bail to appellant Izharul Haq Abdul Hamid Shaikh in Special TADA Case No.6 of 2005 under Sections 121, 121A, 122, 123, 120B, 34 of the Indian Penal Code and Sections 25(1) AB, AA of the Arms Act, Section 9-B of the Explosive Substances Act, read with Sections 3, 4, 5 and 6 of TADA Act pending before the Designated (TADA) Court, Porbandar and also in connection with Case No.1 of 2005 in respect of similar charges pending before the Designated (TADA) Court at Valsad, subject to the satisfaction of the Trial Court. Regarding the conditions for grant of bail, there will be similar directions, as indicated hereinabove in Jivan Raghu Varli's case, with more stringent conditions, if thought necessary by the Trial Court. D E F

28. We make it clear that any observation made by us while disposing of these appeals at the stage of grant of bail should not influence the Trial Courts in the trials pending before them. The appeals are disposed of accordingly. G

D.G.

Appeals disposed of.