

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 732 OF 2018

- 1] Sachin s/o Namdeo Rathod,
Age: 23 Years, Occ: Labour,
R/o: Ram Nagar, Osmanabad.
- 2] Ganesh @ Prashant s/o Shivaji Waghmare,
Age: 21 Years, Occ: Business,
R/o: Sanja Road, Bhawani Chowk,
Osmanabad.
- 3] Narayan s/o Ramesh Chavan,
Age: 18 Years, Occ:
R/o: Naikwadi Nagar, Near Akshata
Mangal Karyalaya, Osmanabad.
- 4] Ajinkya @ Makya s/o Jeevan Adsul,
Age: 21 Years, Occ:
R/o: Shivneri Nagar, Tapare Building,
Osmanabad.
- 5] Sandip @ Fantya Dattatraya Kashid,
Age: 21 Years, Occ:
R/o: Shivaji Nagar, Osmanabad.
- 6] Limbraj s/o Apparao Dukare,
Age: 26 Years, Occ: Agri,
R/o: S. T. Colony, Sanja Road,
Osmanabad.
- 7] Vijay s/o Dayanand Waghmare,
Age: 19 Years, Occ: Labour,
R/o: Sanja Road, Court Colony,
Osmanabad.
- 8] Vishal s/o Dnyaneshwar Pawar,
Age: 22 Years, Occ: Labour,
R/o: S. T. Colony, Osmanabad.

9] Nilesh s/o Dattatraya Tapare,
Age: 19 Years, Occ: Education,
R/o: Shivaji Nagar, Osmanabad.

... **APPELLANTS**

VERSUS

The State of Maharashtra.

... **RESPONDENT**

...

Mr. Nilesh S. Ghanekar, Advocate for Appellants.

Mr. M. M. Nerlikar, APP for Respondent / State.

...

CORAM : **T. V. NALAWADE &
SMT. VIBHA KANKANWADI, JJ.**

RESERVED ON : 19th November, 2018.

PRONOUNCED ON : 27th November, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is admitted. Notice after admission, made returnable forthwith. Heard both the sides for final disposal.

2 The appeal is filed under the provisions of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter

referred to as “MCOC Act”) to challenge the following orders made by the learned Judge of the Special Court created under the MCOC Act:

- i) The orders of extension of time of remand made under the provisions of Section 21 of the MCOC Act; and
- ii) The orders of rejection of applications filed for bail under Section 167(2) of the Code of Criminal Procedure by the Appellants.

3 The facts of the case show that the crime at C.R. No.179 of 2018 came to be registered in Anandnagar Police Station, Osmanabad, for the offences punishable under Sections 302, 307, 143, 147, 148, 149, 324, 452, 504 and 506 of the Indian Penal Code, Section 37(1) and 135 of the Maharashtra Police Act, Section 3/7 of the Criminal Law Amendment Act, Section 4 read with 25 of the Indian Arms Act and Sections 3(1) (r)(s), 3(2) (b)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act on 20th June, 2018. Appellant Nos.1 to 3 came to be arrested in this crime on 20th June, 2018. Appellant Nos.4 and 5 came to be arrested on 21st June, 2018, Appellant No.6 came to be arrested on 22nd June, 2018,

Appellant No.7 came to be arrested on 27th June, 2018 and Appellant Nos.8 and 9 came to be arrested on 28th June, 2018. As per the case of the investigating agency, on 15th September, 2018, the offence punishable under Sections 3(1)(i) and 3(4) of the MCOC Act came to be added in the crime.

4 On 18th September, 2018, application was moved for the investigating agency under Section 21 of the MCOC Act and it was prepared by the investigating officer, Sub-Divisional Police Officer, Osmanabad. This application was countersigned by the learned Special Prosecutor appointed by the State for MCOC cases. Extension of the period of 90 days was claimed. In this application, name of Appellant, Sachin Rathod was mentioned. In the application, it was mentioned that notice was ordered already by the Special Court to the Appellants except Appellant, Limbraj. This application came to be decided on 19th September, 2018 and the time came to be extended by 90 days. The other record shows that on 17th September, 2018, application in respect of Limbraj was also filed and by order dated 18th September, 2018, time was extended of similar period by the learned Special Judge. Copy of the application, which

was filed in respect of Limbraj is not produced on record. There is a copy of application dated 19th September, 2018 and it came to be allowed on 19th September, 2018. It was submitted that the application in respect of Limbraj was allowed on 18th September, 2018 and the application in respect of other Appellants was allowed on 19th September, 2018. No record is produced to show that prior to 18th September, 2018 order of notice to Accused was made by the learned Special Judge against Appellants except Limbraj.

5 The application for bail under Section 167(2) of the Code of Criminal Procedure for Appellant Nos.1 to 6 came to be filed on 21st September, 2018 and it came to be rejected on 27th September, 2018 after giving hearing to the learned Special Prosecutor. Application for Appellant, Vijay was filed on 26th September, 2018 and it came to be rejected on 27th September, 2018. Application for Vishal and Nilesh came to be filed on 28th September, 2018 and it came to be rejected on 29th September, 2018. All the bail applications are rejected by the learned Special Judge of the Special Court on the ground that as extension of time was already granted under Section 21 of the MCOC Act, it was not possible to grant bail under Section 167(2) of the Code

of Criminal Procedure. It is also observed by the learned Judge of the Special Court that consideration of application filed for bail was not possible as it would amount to review of the order already made under Section 21 of the MCOC Act and that was not permissible in view of the provisions of Section 362 of the Code of Criminal Procedure.

6 It is already mentioned that the orders of extension of time and the orders of rejection of bail applications are challenged in the present matter. The learned counsel for Appellants submitted that if the Appellants succeed in getting the relief in respect of orders of extension, they will be automatically getting the relief under Section 167(2) of the Code of Criminal Procedure. There is force in this submission. The learned counsel for Appellants placed reliance on the observations made by the Apex Court and this Court in the following cases:

- a) **1994 AIR (SC) 2623**, (Hitendra Vishnu Thakur Vs. State of Maharashtra);
- b) **LEX(BOM) 2005 2 66**, (Naresh Sharma Vs. State of Maharashtra);

- c) **2009 ALL MR (Cri) 1187**, (Mr. Bhagyesh @ Bablu Nitin Shah Vs. State of Maharashtra);
- d) **2003 ALL MR (Cri) 474**, (Mohammad Allimuddin Vs. State of Maharashtra);
- e) **2017 ALL MR (Cri) 4324**, (Pahadiya Tulshiram Champala and others Vs. State of Maharashtra).

7 On the other hand, the learned APP placed reliance on the observations made by the Apex Court in the following cases:

- a) **AIR 2009 Supreme Court 2772**, (Mustaq Ahmed Mohammed Isak & Ors. Vs. State of Maharashtra);
and
- b) **(2018) 4 Supreme Court Cases 405**, (Rambeer Shokeen Vs. State (NCT of Delhi).

8 The learned counsel for Appellants is mainly relying on the irregularities in the procedure, which is shown to be followed. He showed the procedure, which is laid down in the MCOC Act and which is interpreted by the Apex Court in the case of *Hitendra Thakur* (supra) and subsequent cases. It was submitted that the procedure is

mandatory in nature and as the procedure is not followed, the orders of extension of time made under Section 21 of the MCOC Act cannot sustain in law. This Court will quote the relevant portion from the case of *Hitendra Thakur* (supra) after quoting the relevant facts and circumstances of the present matter. Those were pointed out by the learned counsel for Appellants.

9 Both the applications filed under Section 21 of the MCOC Act, were addressed to the learned Special Judge, but the applications were prepared and signed by the investigating officer, Sub-Divisional Police Officer, Sub-Division Osmanabad. On the application dated 18th September, 2018, there is signature of Motichand Rathod, SDPO and on the left side of this signature, there is signature of Special Prosecutor appointed by the State showing that through Special Prosecutor application was presented before the learned Special Judge by SDPO. The contents of the application also show that the application was drafted, prepared by the investigating officer. Except the signature of the learned Special Prosecutor on both the applications, there is nothing to show that the learned Special Prosecutor has considered the contentions of the

investigating officer made for getting extension of time and he was satisfied that there were reasons for extension of time. Thus, the applications as they are, do not show that the Special Prosecutor had applied his mind, he was satisfied about the grounds mentioned for getting extension of time. On the application dated 19th September, 2018, in addition to the signature of the learned Special Prosecutor, two more words are written like “submitted by”.

10 If the two orders made by the learned Special Judge on the two applications, which were filed for extension of time are compared, it can be said that from the first order almost every portion is copied and pasted on the second order. The order in which the name of Appellant, Limbraj is shown and particularly paragraph 5 of the order is as follows:

“05. On 15.09.2018, report was tendered before the Special Court, Osmanabad, stating that investigation officer is going to make report before this Court U/sec. 21 (2) of MCOC Act, for extension of period of 180 days in respect of custody of the accused persons. In the said report, it was requested to issue notice to the accused persons to file their say, if any, on the report, which would be filed before this Court. Accordingly,

Special Court, Osmanabad, issued notice to the accused Limbraj Apparao Dukare to serve through Jail Superintendent, Osmanabad. The notice came to be served on accused Limbraj Apparao Dukare through Jail Superintendent on 16.09.2018. Limbraj Apparao Dukare did not file say to the report under consideration.”

11 The aforesaid order does not show that Limbraj was produced before the learned Special Judge. The order does not show that any counsel was there to represent Limbraj. The order shows that the learned Special Judge gave hearing to the learned Special Prosecutor and also the investigating officer. Thus, the application was decided only on the basis of the contentions made by the investigating officer and arguments advanced by the learned Special Prosecutor and also the investigating officer. Similarly, the order dated 19th September, 2018 shows that hearing was given to the learned Special Prosecutor and the investigating officer.

12 The two orders made by the learned Special Judge giving extension of time show that all the Appellants were kept in Osmanabad Jail. In both the orders, it is mentioned by learned

Special Judge that the notice of the application was already given by the investigating agency to Limbraj, who was kept in Osmanabad Jail. The two orders do not show that notice was given to other Appellants. It is already mentioned that the second order is only copy paste order and the matter of the first order is there in the second order as it is. Osmanabad Jail is at a distance of more than 150 kilometers from Aurangabad. At Aurangabad, Special Court under the MCOC Act is created for Aurangabad and few districts including Osmanabad district. As the crime was registered in Osmanabad and Accused hail from there, they were kept in Osmanabad Jail. Though these circumstances were there, the learned Special Judge did not take care to see that the Accused were brought before him for hearing them. When the Accused is in jail, it is the duty of the Court to see that he is properly represented by a counsel. If the counsel is not appointed, it is the duty of the Court to see that somebody is appointed for giving legal aid to the accused. This procedure was not followed. Further, the circumstance that in one matter the application was shown to be presented on 18th September, 2018 and it came to be decided on 19th September, 2018, is itself sufficient to infer that the learned Special Judge did not verify the things and did not take care

to see that the principles of natural justice were followed. In the case of *Hitendra Thakur* (supra), it is made clear that notice needs to be given. In the previous and subsequent cases, the Apex Court has laid down that notice is a part of following the principles of natural justice. Liberty of Accused was involved and so it was necessary for the Court to see that the principles of natural justice were followed as that is the mandate of Article 21 of the Constitution of India. This was not done by the learned Special Judge.

13 It is already observed that there is nothing additional in the second order made by the learned Special Judge. It was a murder case and many persons are arrested for murder of one youngster. The remand reports, which were available to the learned Special Judge could have shown the nature of allegations. The incident had taken place out of a quarrel, which had taken place when some youngsters were playing cricket. Number of injuries, which were inflicted to the deceased ought to have been considered and the part played by each Accused ought to have been considered. Only because the investigating agency had indicated the intention to use the provisions of the MCOC Act, it was not mandatory to the learned

Special Judge to go with the presumption that the provisions of MCOC Act can be used against all the Appellants. There is no discussion of any material collected against the Appellants in the orders and it can be said that only because the investigating agency was seeking extension of time, without application of mind, the learned Judge of Special Court gave the extension. When liberty of persons is involved in the matter, it is the duty of the Court to apply his mind and ascertain as to whether there is a case for extension of time and that includes consideration of the contentions that the provisions of the MCOC Act can be used. Such contention in respect of each Accused ought to have been considered by the learned Special Judge. This was not done. Very casual approach was used by the learned Special Judge.

14 In the case of *Mohammad Allimuddin* (supra), the Division Bench of this Court has compared the provisions of the MCOC Act with the provisions of TADA and the provisions of other similar Acts like Unlawful Activities (Prevention) Act, 1967. They are also considered by this Court in the case of **Surendra Pundlik Gadling & Ors. Vs. The State of Maharashtra** (Criminal Writ Petition No.4148

of 2018, decided at Principal Seat on 24th October, 2018). In all these special enactments, there is a provision of modification of the provisions of Section 167 of the Code of Criminal Procedure and those provisions are *para materia* similar. In the case of *Hitendra Thakur* (supra), the Apex Court has discussed the procedure, which needs to be followed for getting extension of time and those observations can be found in paragraphs 20 and 23 of that reported case. Those observations are as under:

“20. SECTION 57 of tile Code of Criminal Procedure provides that a person arrested shall not be detained in custody by the police for a period longer than that which is reasonable but that such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the court of the Magistrate in the absence of a special order under Section 167 of the Code. The Constitution of India through Article 22(2) mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to that court and that no person shall be detained in custody beyond that period without the authority of the Magistrate. Thus, the Constitution of India as well as the Code of Criminal Procedure expect that an arrested person, who has been detained in custody, shall not be kept in detention for any

unreasonable time and that the investigation must be completed as far as possible within 24 hours. Where the investigation of the offence for which accused has been arrested cannot be completed within 24 hours and there are grounds for believing that the accusation or information against the accused is wellfounded, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused and the case diary, must scrutinise the same carefully and consider whether the arrest was legal and proper and whether the formalities required by law have been complied with and then to grant further remand, if the Magistrate is so satisfied, the law enjoins upon the investigating agency to carry out the investigation, in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude in the prescribed period. Ss. (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to subsection (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure. The said chapter

comprises of Sections 436 to 450 but for our purposes it is only Sections 437 and 439 of the Code which are relevant. Both these S. empower the court to release an accused on bail. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed. Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution

to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of Ss. (4) of Section 20 read with the proviso to Ss. (2) of Section 167 of Criminal Procedure Code an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Criminal Procedure Code. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (Hussainara Khatoon case). This legal position has been very ably stated in *Aslam Babalal Desai v. State of Maharashtra* where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in *Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi* wherein it was held that:

"THE right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not

court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.”

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23. WE may at this stage, also on a plain reading of clause (bb) of subsection (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons

for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was

satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in Ss. (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court shall release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently

decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the default of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by Ss. (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi that even if the public prosecutor presents the request of the investigating officer to the court or forwards the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a post office of the investigating agency nor its forwarding agency but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of Ss. (4) of

Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb),

the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.”

15 The Apex Court has laid down in the case of *Hitendra Thakur* (supra) that principles of natural justice need to be followed before giving the decision on the application filed for extension of time and this applies in favour of both the sides. As the rights of the accused in respect of liberty are involved, the Court is expected to get satisfied that the principles of natural justice, “due process of law” is followed. In the present matter, this Court has no hesitation to hold, in view of peculiar circumstances mentioned, that the due process of law was not followed in the present matter, which is the requirement of Article 21 of the Constitution of India. The applications filed for extension of time by the investigating agency, were virtually decided behind the back of the Appellants. Such orders cannot sustain in law. These orders show that the due process of law was not followed and further the *prima-facie* merits of the matter were also not considered by the learned Judge of the Special Court. In view of the aforesaid circumstances and the material collected against the Appellants, it can be said that they had good case to object the extension of time.

This Court has carefully gone through the grounds given for extension of time by the investigating agency. They are as follows:

- a) The investigating agency wanted to make investigation and inquiry with the investigating officer, first informant and *Panch* witnesses;
- b) The investigating agency wanted to collect call details in respect of mobile phones of the Accused persons;
- c) Some Accused were absconding;
- d) The investigating agency wanted to collect information in respect of bank accounts, insurance etc. of the Accused;
- e) The investigating agency wanted to take permission from the Additional Director of Police, Maharashtra State, for filing charge-sheet under the provisions of the MCOC Act; and
- f) As the offence was serious, the investigating agency wanted to collect more evidence.

16 It was mentioned in the two applications that for using the provisions of the MCOC Act, permission of the District Superintendent

of Police was obtained under Section 23(1)(a) of the MCOC Act and it was obtained on 15th September, 2018 and after that those sections were added in the crime. The dates of arrest are already mentioned by this Court. In remand reports, the material available with the investigating agency is mentioned and it can be said that the case will be based on evidence on motive, direct evidence and other circumstantial evidence. The reason behind the quarrel is already mentioned. In the application, it was mentioned that they had information that the Appellants had formed a gang and this gang had committed offence in the past, but not a single such crime registered against any of them was mentioned in the report, application. Thus, the grounds given are very vague in nature and it was necessary for the learned Special Judge to ask the investigating agency to produce the material to substantiate atleast last contention. The evidence for the offence of murder was already collected.

17 The aforesaid discussion also shows that it would have been difficult for the State to oppose the bail applications filed by many Accused if the provisions of MCOC Act were not used. This circumstance was also required to be considered by the learned

Special Judge as from this circumstance also, the learned Special Judge could have ascertained the intention behind seeking extension of time by using the provisions of the MCOC Act. The scheme of MCOC Act and particularly provisions of Sections 21, 23 and 11 read together show that the Special Court cannot blindly accept the contention of investigating agency that provisions of MCOC Act can be used in the case. Even at the stage of investigation the State needs to make out *prima-facie* case for application of MCOC Act. Opportunity needs to be given to accused to have his say on that material. The word “shall” used in proviso to Section 21 of MCOC Act has precondition that the case involves an offence punishable under MCOC Act. Thus, before granting extension of period under Section 21 of MCOC Act, the Special Court must first get satisfied that use of the provisions of MCOC Act is possible. Such procedure needs to be followed in view of the provisions of Articles 14, 21 and 22 of the Constitution of India. Unfortunately, that was not done in the present matter. So, the orders of extension made under Section 21 of MCOC Act cannot sustain in law. As the investigation was not completed within 90 days as provided in Section 167 of the Code of Criminal Procedure, the applications filed for bail on default ground need to be

allowed.

18 The learned APP submitted that the aforesaid decision given by the learned Single Judge at Principal Seat in Writ Petition No.4148 of 2018 dated 24th October, 2018 by which the learned Single Judge granted relief of bail in similar circumstances, is challenged by filing SLP (Cri) No.9199 of 2018 and the order of learned Single Judge is stayed by the Apex Court. This circumstance cannot come in the way of the present Appellants to get the relief claimed in view of the peculiar circumstances of the matter already quoted by this Court. Further, for the reasons already given, each case needs to be considered on the basis of facts of that case.

19 In the present case, it is necessary to observe that the investigating officer probably did not act fairly. Till today, charge-sheet is not filed. It is already observed that the evidence in respect of murder was already collected. If the investigating agency had made up the mind for using the provisions of the MCOC Act, it can be said that the investigating agency had information about the antecedents of the Appellants. They ought to have taken steps

immediately and ought to have expressed before the learned Special Judge well in advance that there were circumstances for using the provisions of the MCOC Act. They ought to have also taken steps for getting permission to invoke the provisions of the MCOC Act and also for filing the case under the MCOC Act. The submissions made show that probably no such steps were taken. When the liberty of a person is at stake, only by using the provisions of Act like involved in the present matter, a person cannot be kept behind bars. It is the duty of the investigating officer to take immediate steps if there is material for seeking permission of the authority to file the case under the provisions of the MCOC Act. At eleventh hour, after completion of more than two months, it was informed to the learned Special Judge that the investigating agency had intention to use the provisions of the MCOC Act. This was not done in fairness and it can be said that steps were not taken intentionally and SDPO wanted to use a circumstance like some period would be required for getting permission of the competent authority to file the case under the MCOC Act. This cannot be allowed by the Court. Such steps need to be taken immediately by the investigating agency. If at eleventh hours the investigating takes such steps, it must suffer for it. There is

clear probability that the investigating officer did not show diligence in taking necessary steps and there was aforesaid intention for not taking such steps immediately. In any case, the Appellants are now getting the relief of bail in view of the provisions of Section 167(2) of the Code of Criminal Procedure and for that also, only investigating officer can be blamed. Charge-sheet could have been filed for the offence of murder against the Appellants in view of the nature of material, which was already available. This Court holds that for such conduct of the investigating officer, appropriate action needs to be taken by the superior officer and for that this Court is directing to send a copy of this judgment to the Home Department for doing the needful. This Court hopes that appropriate disciplinary action is taken against the investigating officer for his unfairness and also for negligence. In the result, the following order is passed:

ORDER

- I. The appeal is allowed.
- II. The orders of extension of time made by the learned Special Judge, are hereby set aside. The applications filed for getting extension of time under

the provisions of Section 21 of the Maharashtra Control of Organized Crime Act stand rejected.

- III. The applications filed for bail by the Appellants on the ground of default, under Section 167(2) of the Code of Criminal Procedure, are allowed by setting aside the orders of rejection made by the learned Special Judge on those applications.
- IV. All the Appellants are to be released on furnishing P.R. and S.B. of Rs.1,00,000/- (Rupees One Lac Only) by each of them with one or more solvent sureties.
- V. The Appellants are not to tamper with prosecution witnesses. They are not to commit any offence while on bail. They are not to enter Osmanabad city except for attending the case, if any, filed against them in future. They are to give their address of residence outside of Osmanabad to the concerned police station and they are not to leave that district and State of Maharashtra without taking

prior permission of the learned Special Judge.

They are to surrender their passports before the police.

- VI. A copy of this order is to be sent to the Home Department of State Government for taking action against the investigating officer of the present matter.

[SMT. VIBHA KANKANWADI, J.] [T. V. NALAWADE, J.]

. At this stage, the learned APP requested for stay of this order for few days by submitting that he wants to challenge the order of this Court. Time of 10 days is given to the State and during this period, the order is not to be executed.

[SMT. VIBHA KANKANWADI, J.] [T. V. NALAWADE, J.]