IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, AT NAGPUR.

CRIMINAL APPLICATION (BA) NO. 370 OF 2020

(Rajendra s/o Gulbrao Armarkar ..vs.. State of Maharashtra, through PS In-charge, PS Sitabuldi, Nagpur)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Mr. S.P. Dharmadhikari, Senior Counsel assisted by Mr. R.S. Kalangiwale, Counsel for the applicant,
Mr. Pravin Chawhan, Special Prosecutor for the non-applicant/State,
Mr. P.D. Sharma, Counsel for the complainant.

CORAM : ROHIT B. DEO, J.
DATED : 09-11-2020

Hearing was conducted through video conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. Heard.

3. This application is preferred under Section 439 of the Criminal Procedure Code, seeking bail in Crime 676/2019 registered with the Sitabuldi Police Station, Nagpur for offences punishable under Sections 420, 467, 468, 471, 384, 386, 506-II and 120-B read with Section 34 of the Indian Penal Code and Sections 3(1)(i)(ii), 3(2), 3(4), 3(5) and 4 of the Maharashtra Control of Organised Crime Act (MCOC Act).

4. Mr. Jigar Pareshbhai Patel lodged report dated 12-10-2019 with the Sitabuldi Police Station, Nagpur,

alleging that Santosh Ambekar, Bhaiyabhai, Ramesh Patel, Balaji Angadiya, Rajput @ Salim and their associates extracted Rs.5 crores from Mr. Jigar Pareshbhai Patel (hereinafter referred to as the complainant) on the basis of fabricated documents of title and then demanded extortion amount of Rs.1 crore, which demand was accompanied by threats to kill the complainant and his family.

5. It is not even the case of the prosecution that the applicant has played any role in the transactions or events referred to in the report. It would, therefore, not be necessary to make an elaborate reference to the contents of the report and it would suffice if the contours of the alleged crime are briefly delineated.

6. The complainant is a Director of HM Industrial Private Limited, which company is engaged in manufacture of castor oil and stainless steel, with annual turn over of Rs.400 crores, from its industrial unit situated in District Kheda, Gujarat. The said company was desirous of purchasing commercial property at Mumbai. Ramesh Patil made the complainant believe, by showing documents which were fabricated, that a commercial property which is owned by Nagpur based Santosh Ambekar may suit the requirement of the company. The complainant fell prey to the trap and readily offered to purchase the property for Rs.10 crores, the market value of which was Rs.18 to 20 crores. The

complainant further agreed to pay Rs.5 crores in cash and to deposit the balance consideration in the bank account of the seller. The complainant accompanied by Mr. Anil Kadam, Mr. Paresh Patel and Ramesh Patil deposited the cash amount of Rs.5 crores with Balaji Angadiya, as instructed by Ramesh Patil. The complainant accompanied by Mr. Anil Kadam and Mr. Paresh Patel then visited Nagpur to meet Santosh Ambekar. However, on one pretext or the other, the complainant was prevented from meeting Santosh Ambekar. In the interregnum, the amount of Rs.5 crore was collected by Santosh Ambekar from Balaji Angadiya. The complainant suspected foul play. On returning to Mumbai, he searched for Santosh Ambekar on google. The complainant learnt that Santosh Ambekar is a notorious gangster with number of crimes to his discredit. The complainant immediately called Ramesh Patil and conveyed that he is not interested in purchasing the property and that the amount of Rs.5 crores be returned. Ramesh Patil asked the complainant to meet Santosh Ambekar at Nagpur. The complainant did meet Santosh Ambekar only to be told that the amount paid will not be returned and additionally, the complainant will have to pay extortion amount of Rs.1 crore. The demand was accompanied by boast that Santosh Ambekar has committed several murders and is politically well connected.

7. On the basis of the report dated 12-10-2019

lodged by the complainant, initially offences punishable under Sections 384, 386, 420, 467, 468, 471 and 506-II read with Section 34 of the Indian Penal Code were registered vide Crime 676/2019. During the course of investigation, the Investigating Officer submitted a proposal to the Additional Police Commissioner (Crime), Nagpur City seeking approval to invoke the provisions of the MCOC Act, which approval was granted vide order dated 23-10-2019. The sanction under Section 23(2) of the MCOC Act was granted by the Commissioner of Police, Nagpur, who was holding the substantive rank of Additional Director of General of Police, vide order dated 27-3-2020.

8. The applicant was arrested on 20-10-2019. Perusal of the sanction order dated 23-10-2019 reveals that Santosh Ambekar is referred as the team leader of the organized crime syndicate. It is noted that Santosh Ambekar and the eleven accused named in the sanctioned order are involved in continuous unlawful activities within the meaning of Section 2(d) and (e) of the MCOC Act since the unlawful activities involved recourse to violence or threat of violence or intimidation or coercion with the objective of gaining unlawful economic, pecuniary or other advantage. The sanction order documents the details of the offences registered against the team leader and the co-accused. The applicant, who has a clean record, save and except the crime qua which MCOC is invoked, is referred to as a

new member of the organized crime syndicate.

9. The sanction order refers to the confession statement of the applicant recorded under Section 18 of the MCOC Act and the seizure of Rs.84 Lakhs (Rupees Eighty Four Lakhs) which is allegedly part of the extorted amount. The only other relevant reference is to the applicant's statement in the confession that Santosh Ambekar forced Jain Trust to sell its property to Santosh Ambekar for total consideration of Rs.1,68,00,000/- (Rupees One Crore Sixty Eight Lakhs).

10. The sanction under Section 23(2) of the MCOC Act is thus granted, to the extent of the applicant, referring to two incriminating circumstances. The first is the confession and the second is the seizure of Rs.84,00,000/- (Rupees Eight Four Lakhs).

11. Before adverting to the submissions of the learned Senior Counsel Mr. S.P. Dharmadhikari and the Special Prosecutor Mr. Pravin Chawhan, and analyzing the material on record in the context of the submissions, it would be necessary to note the provisions of Section 21(4) of the MCOC Act, which read thus :

> ***"21. Modified application of certain provisions of the Code-***
> *(1) ……*
> *(2) ……*
> *(3) …..*
> *(4) Notwithstanding anything contained in the*

Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

12. The rigors of Section 21(4), are intended to effectuate the purpose of the MCOC Act, which was brought on the statute book to make special provisions for prevention and control of and for coping with, criminal activity by organized crime syndicate or gang and for matters connected therewith or incidental thereto. Perusal of the Statement of Objects and Reasons for enacting the MCOC Act reveals that in the wisdom of the legislature the existing legal framework of the penal and procedural laws and the adjudicatory system were inadequate to curb or control the menace of organized crime.

13. In the context of the allegations against the applicant, the relevant provisions of the MCOC Act may be noted.

Section 2(1) defines "abet", and the definition is inclusive, in the following terms:

(1) In this Act, unless the context otherwise requires,

(a) "abet", with its grammatical variations and cognate expressions, includes,—

(i) the communication or association with any person with the actual knowledge or having reason to believe that such person is engaged in assisting in any manner, an organised crime syndicate;

(ii) the passing on or publication of, without any lawful authority, any information likely to assist the organised crime syndicate and the passing on or publication of or distribution of any document or matter obtained from the organised crime syndicate; and

(iii) the rendering of any assistance, whether financial or otherwise, to the organised crime syndicate."

Section 2(d) defines "continuing unlawful activity" thus :

"(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been field before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence."

Section 2(e) defines "organized crime" thus :

"(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or

other advantage for himself or any other person or promoting insurgency."

Section 2(f) defines "organized crime syndicate" thus :

"(f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate of gang indulge in activities of organised crime."

14. Section 3 of the MCOC Act provides for punishment for certain offences, and reads thus :

"3. Punishment for organised crime-

(1) Whoever commits an offence of organised crime shall,-

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be punishable, With

imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a, fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived or obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with a term which, shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

15. Section 4 of the MCOC Act is a charging and punishment provision for possessing unaccountable wealth on behalf of member of organized crime syndicate, and reads thus :

"*4.* ***Punishment for possessing unaccountable wealth on behalf of member of organised crime syndicate.***

If any person on behalf of a member of an organised crime syndicate is, or, at any time has been, in possession of movable or immovable property which he cannot satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also be liable for attachment and forfeiture, as provided by section 20."

16. Section 17 of the MCOC Act, starts with an non obstante clause and provides for special rules of evidence and sub-section (2) thereof reads thus :

> *"17(2) Where it is proved that any person involved in an organised crime or any person on his behalf is or has at any time been in possession of movable or immovable property which he cannot satisfactorily account for, the Special Court shall, unless contrary is proved, presume that such property or pecuniary resources have been acquired or derived by his illegal activities."*

17. Section 18 of the MCOC Act makes certain confessions made to police officer substantive evidence and provides that such confession shall be admissible in the trial of the confessor or co-accused, abettor or conspirator provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

18. Section 21 of the MCOC Act modifies application of certain provisions of the Code and sub-section (4) which is reproduced supra, provides that where the Public Prosecutor opposes the application, no person accused of an offence punishable under the MCOC Act shall be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

19. Plain reading of Section 21(4) of the MCOC Act reveals that no distinction is made between the more serious of the offences and a relatively less grave offence like that punishable under Section 24, which provides that a public servant failing in the discharge of duty shall be punished with imprisonment which may extend to three years. Notably, Section 24 does not provide for a minimum sentence.

20. The scope, width and amplitude of the rigors of Section 21(4) of the MCOC Act fell for consideration before the Apex Court in ***Ranjitsing Brahmajeetsingh Sharma v. State of Maharashtra and another, (2005) 5 SCC 294.***

21. The Apex Court articulated that, as held in ***Narendra Singh and Another v. State of M.P., (2004) 10 CC 699***, presumption of innocence is a human right and that the expansive meaning judicially assigned to the guarantee to life enshrined in Article 21 of the Constitution of India envisages not only protection of life and liberty, but a fair procedure. The Apex Court then proceeded to observe that Section 21(4) of the MCOC Act must be interpreted keeping in view the aforementioned salutary principle.

It would be fruitful to reproduce paragraph 38 of the said decision, which reads thus :

"38. We are furthermore of the opinion that the

restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

22. The Apex Court opined that the restriction on the power of the Court to grant bail should not be pushed too far and bail may be granted if the Court, having regard to the material brought on record is satisfied that in all probability the accused may not be ultimately

convicted.

23. The Apex Court then articulated that the provisions of the MCOC Act must receive a strict construction to muster the test of reasonableness and proceeded to note that Section 21(4) of the MCOC Act does not make any distinction between an offence entailing life imprisonment and an offence entailing imprisonment for a year or two. The Apex Court further held that in case of circumstantial evidence, not only culpability or *mens rea* should be *prima facie* established the Court must also consider the question as to whether the circumstantial evidence is such as would complete all the links in the chain.

24. The Apex Court further opined that the Court is not expected to render a positive finding that the accused has not committed an offence under the Act nor to record a finding as to the possibility of the accused committing a crime after grant of bail. Notably, the Apex Court articulated that the offence in futuro must be an offence under the MCOC Act and not any offence

25. The Apex Court further articulated that while the evidence may not be weighed meticulously and the finding may rest on the basis of broad probabilities, having regard to the provisions of Section 21(4) of the MCOC Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the

material collected against the accused may not justify a judgment of conviction.

26. The MCOC Act is not the only special enactment which seeks to restrict the power of the Court to grant bail. Similar restrictions and rigors are provided by several special enactments and an illustrative reference may be made to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 212(6) of the Companies Act. The provisions akin to Section 21(4) of the MCOC Act are considered and analysed in several decisions and the crystallized position of law appears to be that while the accused is required to make out a case, which goes beyond 'a *prima facie* case', it is not expected of the accused to satisfy the Court that acquittal is inevitable. The satisfaction, which is envisaged, is the satisfaction of the Court that on broad probabilities, the material collected during investigation may not culminate in conviction. Implicit in the exercise is the permissibly to consider the defence of the accused.

27. The rigors of Section 21(4) and the fetters on the power of the Court to grant bail are not unshackled merely on demonstrating a *prima facie* case. Reasonable grounds to arrive at the satisfaction that the accused may not be convicted of the offence contemplate that on the basis of the material collected during investigation the court must be satisfied that there are substantial probable causes to arrive at such satisfaction.

Axiomatically, while the accused is not expected to demonstrate that acquittal is a forgone conclusion, the material on record must impel the Court on broad probabilities to arrive at the satisfaction that the accused may not be ultimately convicted.

28. Mr. S.P. Dharmadhikari would submit that if the accused is in a position to satisfy the Court that the material on record gives rise to serious doubt as regards the culpability of the accused, there are reasonable grounds to arrive at the satisfaction that the accused may not be ultimately convicted. In rebuttal, Mr. Pravin Chawhan, learned Special Prosecutor would submit that the Court is precluded from granting bail unless a positive finding is recorded that there are reasonable grounds to believe that the accused is not guilty. The learned Special Prosecutor would submit that at the stage of consideration of the applicant seeking bail, the material in the charge-sheet will have to be taken at face value, and the restrictions on the power to grant bail would be lifted only if, even after taking the allegations at face value, the Court is satisfied that there are reasonable grounds to believe that the accused is not guilty.

29. The material in the charge-sheet may now be scrutinized on the anvil of the provisions of Section 21(4) of the MCOC Act and the enunciation of law by the

Apex Court.

30. The incriminating material broadly falls in three categories, to wit, confessions, seizure and the statements of witnesses.

31. Before adverting to the first category of incriminating material which is the confessions recorded under Section 18 of the MCOC Act, it must be borne in mind that while confession recorded under Section 18 of the MCOC Act is statutorily a substantive evidence, which can be used not only against the accused, but against the co-accused, abettor or conspirator who may be tried alongwith confessor, the confession must be read and considered holistically. A statement admitting certain facts which seemingly constitute the ingredients of the offence may be accompanied by exculpatory statements. Unless the statement admits the offence unambiguously or admits substantially all the facts which constitute the offence, the statement cannot be equated with confession, notwithstanding that a gravely incriminating fact is admitted illuminating are the observations of Lord Atkin speaking for the Privy Council in ***Pakala Narayana Swami v. Privy Council, AIR 1939 PC 47***, which read thus :

> *"As the point was argued however and as there seems to have been some discussion in the Indian Courts on the matter it may be useful to state that in their Lordships' view no statement that contains*

self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, i.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

32. The Privy Council decision referred to supra is quoted with approval by the Apex Court in ***Palvinder Kaur v. The State of Punjab***, ***AIR 1952 SC 354***. In the factual matrix of the case, the Apex Court held that the High Court seriously erred in accepting the inculpatory part of the statement rejecting the exculpatory part and in doing so, the High Court contravened the well accepted rule regarding the use of confession, that the confession must either be accepted as a whole or rejected as a whole and that the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible.

33. While Section 18 of the MCOC Act makes confession made to police officer admissible as substantive evidence, and the provision starts with a non obstante clause which overrides anything inconsistent or contrary in the Criminal Procedure Code, 1973 ("Code")

and the Indian Evidence Act, 1872, the legislative intent was to dilute the rigors of Section 162 of the Code and Sections 25 and 26 of the Indian Evidence Act. However, no statutory provision or precedential law is brought to my notice which would permit the prosecution to cherry-pick. While Section 18 of the MCOC Act makes a confession recorded before a police officer of certain rank admissible as substantive evidence, notwithstanding the provisions of Section 162 of the Code and Sections 25 and 26 of the Indian Evidence Act, in my considered view, such statement will have to be tested and scrutinized on the anvil of the settled legal position that the alleged confession will have to be considered holistically.

34. The confession of the applicant is recorded by D.C.P. Mr. Nilotpal on 01-11-2019. Mr. S.P. Dharmadhikari did make an attempt to persuade me to hold that the procedural safeguards were not followed and the probative value of the alleged confession is nullified. I have consciously refrained from considering the said submission any further since the issue will have to be addressed by the trial Court after the evidence is recorded. Whether the statutory provisions are directory or mandatory and assuming *argundo* that there is some deviation, is the accused prejudiced, would be the question to be answered in the trial.

35. Extending the said submission, Mr. S.P. Dharmadhikari also argued that since the applicant retracted the confession when he was produced before the Magistrate, and at the first available opportunity, the probative value of the confession is diluted, which argument too, will have to be dealt with by the trial Court since a retracted confession may nonetheless be the basis of conviction if the confession was voluntary in the first instance.

36. The confession of the applicant starts with a brief reference to the family business of jewellery and then refers to the progression of the crime syndicate leader Santosh Ambekar from a humble petty shop owner to the much maligned and feared gangster. The applicant then refers to Santosh Ambekar murdering his business partner Anil Ninawe and states that after securing bail, Santosh Ambekar started extorting protection money from the businessmen based at the Itwari Sarafa Bazar. The applicant then refers to his tenure as the office bearer of the Sarafa Association, from 1999 to 2011, and states that the said association received numerous complaints of extortion demands from Santosh Ambekar. The applicant states that he and other office bearers of the Sarafa Association approached senior police officers who invoked the provisions of the MCOC Act against Santosh Ambekar and his crime syndicate members. While Santosh Ambekar was incarcerated in jail, he

planned and executed an assault on Mr. Ramnikbhai Parekh, a key witness in the MCOC trial. The assault on Mr. Ramnikbhai Parekh led to a fresh MCOC offence being registered against Santosh Ambekar. Santosh Ambekar was released from the jail after nine years. Whenever Santosh Ambekar used to meet the applicant, he used to disclose that he was dealing in disputed properties and road construction.

The applicant then states that after release from jail, Santosh Ambekar used to be accompanied by five to ten body guards. The criminal antecedents to the discredit of Santosh Ambekar and the battery of body guard instilled fear and indeed mortal fear in the mind of the law abiding citizens in the city and particularly the businessmen based at sarafa bazar. Any person opposing the invidious activities of Santosh Ambekar was threatened with bodily harm. Such was the terror of Santosh Ambekar, that property owners were compelled to sell their properties to Santosh Ambekar at less than the market price. Santosh Ambekar used to lend money to the needy by obtaining signatures on blank stamp papers and post-dated cheques. A specific reference is made to Santosh Ambekar lending Rs. 1 crore to Mr. Avinash Joharapurkar on monthly interest of 3%. The applicant states that without he knowing, Santosh Ambekar gave the borrower to understand that the amount lent belonged to the applicant. The applicant further states that he was forced by Santosh Ambekar to telephonically call Mr. Avinash Joharapurkar to demand the interest due. The next reference is to the property of the Jain Trust which was purchased by Santosh Ambekar. According to the applicant, he introduced Santosh Ambekar to the office bearers of the Trust, acted as a broker and received Rs.11,00,000/- (Rupees Eleven Lakhs) from the Jain Trust as commission.

The applicant states that Santosh Ambekar used to visit his business establishment alongwith body guards who stood guard outside the shop. Santosh Ambekar used to make himself comfortable in the business establishment of the applicant and then used to make telephonic calls to Madan Khandar and Neelam Lunavat.

The applicant then states that since last two years as and when Santosh Ambekar apprehended arrest, he used to send the available cash to the applicant alongwith his nephew Nilesh Kedar or the body guards and used to collect the same later on. Santosh Ambekar was implicated in the Balya Gawande murder, he absconded, and a locked bag containing jewellery was sent to the applicant which was taken back after Santosh Ambekar was released on bail. The applicant then states that fifteen days prior to the arrest in the present matter, Nilesh Kedar deposited Rs.70,00,000/- (Rupees Seventy Lakhs) and Rs. 14,00,000/- (Rupees Fourteen Lakhs) with the applicant, which amount was seized during the investigation. The statement is with the rider that the applicant did not receive, at any point in time, any financial benefit and he obliged Santosh Ambekar out of fear. The applicant further states that Santosh Ambekar's son Sanjit had deposited two to three bags for safe keeping, which were taken back by him.

37. The confession of Mrs. Juhi Chandan Chaudhary, which is recorded under Section 18 of the MCOC Act purports to state that she was informed by Santosh Ambekar that the applicant is an old friend who looks after the investment on his behalf. While the statement of Mrs. Juhi Chandan Chaudhary may be substantive evidence, her knowledge or information is hearsay and *prima facie* of doubtful probative value in the context of the allegations against the applicant.

38. Considering the confession of the applicant holistically, while the applicant admits the possession of cash and jewellery on behalf of Santosh Ambekar, for safe keeping, the explanation which is exculpatory is that he did not receive any benefit and was in essence forced to succumb due to fear.

39. Mr. S.P. Dharmadhikari would submit that *mens rea* is an essential ingredient of any offence, unless otherwise provided in the statute, and implicit in Sections 3 and 4 of the MCOC Act is the ingredient of *mens rea* or guilty mind. The position of law is well settled. *Mens rea* or guilty mind is indeed a *sine qua*

non ingredient of any offence punishable under the MCOC Act. Suffice it to refer to the decision of the Apex Court in ***State of Maharashtra v. Bharat Shantilal Shah and others, (2008) 13 SCC 5*** and in particular to para 31, which reads thus :

> *"31. With respect to Section 3 of MCOCA, even before the High Court the attack was in particular in respect of the provisions of Section 3 (3) and (5) on the ground that the requirement of mens rea is done away with, thus automatically rendering a person without any intention or knowledge liable for punishment. It is a well-settled position of law insofar as criminal law is concerned that in such provisions mens rea is always presumed as integral part of penal offence or section unless it is specifically and expressly or by necessary intendment excluded by the legislature. No such exclusion is found in sub-sections (3) and (5) of Section 3. As held by the High Court, if the provisions are read in the following manner no injury, as alleged, would be caused:*
>
> *"3(3) Whoever (intentionally) harbours or conceals or attempts to harbor or conceal any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs."*
>
> *3(5) Whoever (knowingly) holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extent to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lakhs."*

Similar is the articulation of the Apex Court in ***Ranjitsingh Brahmajeetsngh Sharma v. State of Maharashtra and another.***

40. Mr. Pravin Chawhan, fairly does not join issues with Mr. S.P. Dharmadhikari on the submission, as a proposition of law. However, inviting my attention to the CDR indicating that the applicant was in the regular contact with Santosh Ambekar, Mr. Pravin Chawhan submits that the defence that the applicant was in mortal fear is *prima facie* incredible and is belied by the conduct.

41. Perusal of the charge-sheet reveals, that even according to the prosecution, Santosh Ambekar unleashed a reign of terror and the jewellers, particularly jewellers operating from sarafa bazar, were petrified of his pernicious infamy. It would not be appropriate to forensically examine the defence while considering the entitlement to bail. However, it is difficult to accept the submission of Mr. Pravin Chawhan that the defence is incredible. It would, of course, be the call of the trial Court to consider the defence and to record a finding on the existence or otherwise of *mens rea*. Whether the principle *actus non facit reum nisi mens sit rea* comes into play is for the trial Court to decide. However, considering that the applicant was not arraigned as an

accused with Santosh Ambekar or any member of the crime syndicate and had a blemish free criminal record till the arrest in the present matter, the defence that he obliged Santosh Ambekar due to fear is, *prima facie*, exculpatory, and to that extent the confession will have to be tested on the principle that contents thereof cannot be selectively projected as incriminating material.

42. The other incriminating material is the seizure of Rs.84,00,000/- (Rupees Eight Four Lakhs) from the applicant, which seizure indubitably corroborates the statement in the confession. However, as observed supra, the seizure *ipso facto* is not decisive.

43. The statements of witnesses on which the reliance is placed are consistent with the confession and all that can be *prima facie* inferred that there is material to indicate that cash and jewellery was sent to the applicant for safe keeping as and when Santosh Ambekar apprehended arrest.

44. It is not even argued on behalf of the prosecution that the applicant has played any role in the crime which is registered on the basis of the report lodged by Mr. Jigar Pareshbhai Patel. The provisions of the MCOC Act are invoked on the basis of the material referred to supra, and the sanction order presumably brands the applicant as a new member of the organised crime

syndicate on the basis of the said material. In my considered view, and which is a *prima facie* expression articulated only for the purpose of deciding the entitlement to bail, neither Section 3(1)(i) nor 3(1)(ii) nor 3(2) nor 3(4) nor 3(5) of the MCOC Act is *prima facie* attracted, and there are reasonable grounds to record a satisfaction that in all probabilities the applicant may not be convicted of the said offences.

45. Section 3 of the MCOC Act provides for punishment for organised crime. Organised crime contemplates a continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person. An important ingredient, albeit not the only ingredient, is continuing unlawful activity. The activity, for being considered continuing unlawful activity, must be an activity prohibited by law, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance

of such offence.

46. Notably, continuing unlawful activity in itself is not an offence. Such activity must be accompanied by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective spelt out in Section 2(1)(e) of the MCOC Act, the existence of which conditions are *sine qua non* for the continuing unlawful activity to be penalized as organised crime. Organised crime syndicate is a group of two or more persons, who, acting either singly or collectively, as a syndicate or gang indulge in activities of organized crime. The expression "member of an organised crime syndicate" will have to be understood in the context of the definitions of "organized crime" and "organized crime syndicate." Considering the material on record, and particularly the fact that the applicant did not face any accusation prior to the implication in the crime in question, that he indulged in any continuing unlawful activity muchless organized crime, *prima facie*, there are reasonable grounds to believe that he is not a member of an organised crime syndicate.

47. It is not the case of the prosecution that the applicant played any role in the crime registered on the basis of the report lodged by Mr. Jigar Patel. Indeed, it is not even the case of the prosecution that the applicant was aware, or had reason to believe, that the amount of

Rs.84,00,000/- (Rupees Eighty Four Lakhs) deposited with him, presumably for safe keeping, are the proceeds of the crime. Section 3(1)(i)(ii) and Section 3(2) of the MCOC Act are *prima facie*, not attracted. As observed supra, *prima facie,* the material on record leads to no inference that the applicant is a member of an organised crime syndicate and Section 3(4) of the MCOC Act may not come into play.

48. Section 3(5) of the MCOC Act envisages that the property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds must be **held** to attract the penal provision. In contradistinction with Section 4 of the MCOC Act the expression employed is "holds" and not "possession". The expression 'holds', in the context of the provision, apparently connotes something more than to possess a property for safe keeping. It connotes that the person must exercise some control or dominion or semblance of title, as the case may be, ostensibly in his own right, with the knowledge or reasonable belief that the property is derived or obtained from commission of an organised crime or is acquired through the organized crime syndicate funds. In the context of the allegations against the applicant, and taking the material in the charge-sheet at face value, it is extremely doubtful whether Section 3(5) of the MCOC Act could have been invoked.

49. Section 4 of the MCOC Act provides that if any person on behalf of a member of an organised crime syndicate is, or, at any time has been, in possession of movable or immovable property which he cannot satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years. Since an essential ingredient is the existence of *mens rea*, the possession of the property must be with the requisite intent. It would be safe to assume, that the possession must be with the requisite knowledge or the belief that the property is tainted. The material on record does suggest, that the applicant was well aware of the nefarious activities of Santosh Ambekar and that he did know or had reason to believe that the property deposited with him, albeit temporarily for safe keeping, was in every probability derived from the activities of the organised crime syndicate. The defence of helplessness, and involuntary indulgence due to fear, is put forth by Mr. S.P. Dharmadhikari to buttress the submission that there are reasonable grounds to arrive at the satisfaction that the applicant may not be ultimately convicted. In the teeth of the notoriety of Santosh Ambekar, the defence cannot be brushed under the carpet and will have to be given due consideration in the course of the trial, particularly since the learned Special Prosecutor Mr. Pravin Chawhan fairly conceded that there is no material on record to show that the applicant derived

any benefit or that the cash deposited was used by the applicant for the purpose of money lending.

50. Plain reading of Section 4 of the MCOC Act does indicate that the said provision may not be controlled by the definitions of 'continuing unlawful activity and 'organised crime' or the provisions of Section 3 of the MCOC Act in the sense that any person who may not be a member of an organised crime syndicate and who may not be engaged in continuing unlawful activity or organised crime may conceivably come within the dragnet of Section 4 of the MCOC Act if found in possession, with requisite *mens rea, of* property on behalf of a member of an organised crime syndicate, which cannot be satisfactorily accounted for. However, a learned Single Judge of this Court appears to have taken a different view in ***Ramakant Jamunasingh Singh v. The State of Maharashtra, 2002 ALL MR (Cri) 1269***. The observations in the said decision appear to suggest that the penal provisions under Section 4 of the MCOC Act could be invoked only if the activities of the accused fall within the definition of Clauses (d),(e) and (f) of Section 2(1) of the MCOC Act. The observations of the learned Single Judge in the said decision read thus :

> *"9. Therefore, the Penal provision under Section 3(2)(4) and (5) as well as Section 4 of the said Act would be invoked if the activities of the accused involved come within the definition of clauses (d), (e) and (f) of Section 2(1) of the said Act. In other words, in order to being the accused within the four*

corners of the said provision, the prosecution is required to establish that the accused is a member of an organised crime syndicate as defined in the said manner. The organised crime would be that wherein the member is involved in continuing unlawful activity as a member of an organised crime syndicate or on behalf of such syndicate and uses violence or threat of violence or intimidation or coercion or other unlawful means, with the object of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. The continuing unlawful activity would mean an activity prohibited by law which is a cognizable offence punishable with imprisonment for three years or more undertaken either singly or jointly, as a member of an orgnaised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within a period of ten years and that Court has taken cognizance thereof.

If the prosecution has proved this ingredient and the fact that the accused comes within the four corners of this provision, then and only then certain presumption would be raised as contemplated under Section 22 of the said Act. However, before availing of the said presumption, it is the duty of the prosecution to establish and prove the involvement of the accused as contemplated by clauses (a) and (b) of Section 21 of the said Act. In other words, the presumption contemplated under the said provision under MCOC Act would not be available for the prosecution if the requirements of clauses (a) and (b) of Section 22(1) are not established on record. On the background of this legal and statutory matrix, let us now turn to the evidence on record vis-a-vis various objections raised on behalf of the appellant in order to show that the prosecution has failed to prove the involvement of the appellant under the impugned provision of MCOC Act."

51. I did call upon the learned Counsel to make submissions on the correct import of Section 4 of the MCOC Act. While Mr. S.P. Dharmadhikari did submit that Section 4 is a stand alone provision which is not controlled by the earlier provisions including the definition clauses, no decision which takes a contrarian view is brought to my notice. While considering the entitlement to bail, it would not be necessary to make any definite observation on the correct import, implication and interpretation of Section 4. Suffice it to state, that since the view taken by this Court, and which view holds the field till date, creates a reasonable doubt qua invoking the penal provisions against the applicant, there is substantial probable cause, particularly in the light of the defence of the applicant that he acted out of mortal fear, to record a satisfaction that the applicant may not be ultimately convicted. Notably, the constitutional validity of the twin test is in issue in Criminal Writ Petition 4639/2018 (Pankaj Gangar v. State of Maharashtra) which the Division Bench of this Court has admitted for final hearing. The order of admission notes that the Apex Court has held that a similar twin test incorporated in Section 45 of the Prevention of Money Laundering Act, 2002 (PMLA) is unconstitutional. It is further noted by the Division Bench that the provision contained in Section 21(4) of the MCOC Act is in *pari materia* with Section 45 of the PMLA, which is declared unconstitutional by the Apex Court in ***Nikesh Tarachand Shah v.***

Union of India, (2018) 11 SCC 1.

52. Coming to the other test inbuilt in Section 21(4) of the MCOC Act, considering the blemish free record of the applicant save and except the registration of the present crime, and the fact that he is a business-man having roots in the civil society, I am inclined to arrive at the satisfaction that he is not likely to commit an offence under the MCOC Act in futuro.

53. In the light of the discussion supra, the applicant is entitled to bail. Pertinently, it is not even argued that the applicant is a flight risk or that if released on bail, he would be in a position to tamper with the evidence.

54. Before parting with the order, it is imperative to note a development which, viewed from the perspective of the applicant or the prosecution, is either way, interference in the administration of justice.

55. The order was to be pronounced on 05-11-2020. However, the Additional Public Prosecutor Mr. N.B. Jawade placed on record an affidavit sworn by Shri Sudhir Nandanwar, ACP (Crime), Nagpur. Paragraph 2 of the affidavit reads thus :

> *"2. I say and submit that the complainant in the instant case namely Jigar Pareshbhai Patel who is resident of Gujrat had approached my office and*

stated about the offer of Rs.10 Crore given to him for filing an affidavit for withdrawing the case in the High Court and further to state that he has no objection for grant of bail to Rajendra Armarkar and his associate. If the said offer is not accepted, then treats with dire consequences were given to him. I further say and submit that upon receipt of such information, a detailed statement of complainant namely Jigar Pareshbhai Patel is recorded. Copy of the said statement is annexed herewith and marked as Annexure NA-1 to this affidavit for kind perusal of this Hon'ble Court."

56. Mr. Jigar Pareshbhai Patel's statement dated 02-11-2020 is placed on record alongwith the affidavit. The gist of the statement is that on 16-10-2020 a person who disclosed his name as Ketan Patel, resident of Surat, Gujarat approached Mr. Jigar Patel's parental uncle Mr. Vireshbhai Patel and obtained Mr. Jigar Patel's residential address. In the afternoon, Ketan Patel visited the residence of Mr. Jigar Patel and conveyed that the applicant herein is his partner and that the applicant's incarceration has put him (Ketan Patel) to monetary loss of Rs.5,00,00,000/- (Rupees Five Crores). Mr. Jigar Patel then states that Ketan Patel offered him Rs.10,00,00,000/- (Rupees Ten Crores) to file an affidavit in the High Court for withdrawal of the case and granting no objection to bail. According to Mr. Jigar Patel, Ketan Patel issued a threat that if the said offer is not accepted, then Mr. Ketan Patel and his family members may be bodily harmed.

57. The wife of the applicant has filed an affidavit

in rebuttal stating that her husband is not acquainted with any person from Gujarat muchless Mr.Ketan Patel, that the allegations leveled by the applicant are mischievous and motivated and that the attempt is to obstruct the administration of justice by misleading the Court. It is further stated in the said affidavit that in view of the pandemic situation, even family members are not permitted to meet the prison inmates nor is the counsel allowed an audience. It is further pointed out in the counter-affidavit that Mr. Jigar Patel moved a motion seeking intervention, on 14-10-2020 and filed on record written submissions on 19-10-2020. The allegation which is now made is conspicuous by its absence in the written submission.

58. Grave as the allegation is, *prima facie*, the possibility that the allegation is made to prejudice the Court, is a real possibility. To assume that the High Court, or for that matter any Court, will give weightage to a no objection accorded by the complainant while deciding that bail application borders on the preposterous. The applicant, even according to the prosecution, played no role in defrauding Mr. Jigar Patel, and it is Santosh Ambekar who duped Mr. Jigar Patel of Rs.5,00,00,000/- (Rupees Five Crores). The applicant, who has the benefit of effective legal advice, would be extremely naive to offer Rs.10,00,00,000/- (Rupees Ten Crores) to Mr. Jigar Patel for filing on record a no objection, which would not be worth even the paper on which

the same is recorded. More significantly, the bribe was allegedly offered on 16-10-2020 and yet there is not even a whisper of the said offer in the submissions filed on record by Mr. Jigar Patel on 19-10-2020. *Prima facie*, the contention of the wife of the applicant that the attempt is to mislead the Court, will have to be given due consideration.

59. On the other hand, if the allegation levelled by Mr. Jigar Patel is true, it is clear that the applicant is interfering in the administration of justice. Both, the learned Special Prosecutor Mr. Pravin Chawhan and the learned Senior Counsel Mr. S.P. Dharmadhikari are in unison in the submission that the incident be probed by taking the assistance of the State Criminal Investigation Department since at stake is the credibility of the justice dispensation system. I am inclined to accept the joint request of the learned Special Prosecutor Mr. Pravin Chawhan and the learned Senior Counsel for the applicant Mr. S.P. Dharmadhikari.

60. The Additional Director General, Criminal Investigation Department, State of Maharashtra is requested to depute a responsible officer who is not connected with the investigation of the present crime, to probe into the correctness or otherwise of the allegations leveled by Mr. Jigar Patel, in the statement dated 02-11-2020 and to submit a report to the Registrar (Judicial) of this Court, preferably within thirty days.

61. Appropriate orders shall be passed after considering the report of the said agency. Needless to record, if the enquiry concludes that the allegations levelled by Mr. Jigar Patel are correct, and if this Court accepts the conclusions after hearing the parties, this Court may consider the request of the prosecution to revoke or cancel the bail, if such request is made.

62. The application is allowed.

63. At this state, the learned Public Prosecutor, holding for the Special Prosecutor submits that the order be stayed for six weeks to enable the State to approach the Apex Court. I am not inclined to stay the order granting bail. It is not the case of the prosecution that the applicant poses a risk to the civil society or that he is likely to be a flight risk. If this order is set aside by the Apex Court, there will be no difficulty in taking the applicant in custody.

64. The applicant shall be released on bail on executing personal bond of Rs.10,00,000/- (Rupees Ten Lakhs) with a solvent surety of like amount. Considering the prevailing circumstances, the surety may be furnished within four weeks of the release.

65. The applicant shall not make any attempt to tamper with the evidence or to influence witnesses,

directly or indirectly.

66. The applicant shall attend each date of hearing scrupulously.

67. The applicant shall not leave the country without the permission of the trial Court.

JUDGE

adgokar