

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.1990 OF 2021
IN
CRIMINAL APPEAL NO.464 OF 2021
WITH
CRIMINAL APPEAL NO.464 OF 2021**

Prakash @ Pakya @ Bhau
Ashok Nikam .. Applicant/Appellant
Versus
State of Maharashtra and Anr. .. Respondents

**WITH
CRIMINAL APPEAL NO.479 OF 2021
WITH
INTERIM APPLICATION NO.1721 OF 2021
IN
CRIMINAL APPEAL NO.479 OF 2021**

Rajendra Sadashiv Nikalje @
Chhota Rajan @ Nana @ Sheth @ Sir .. Applicant/Appellant
Versus
Central Bureau of Investigation
New Delhi
State of Maharashtra .. Respondents

**WITH
CRIMINAL APPEAL NO.456 OF 2022
WITH
INTERIM APPLICATION (ST.)NO.1165 OF 2022
IN
CRIMINAL APPEAL NO.456 OF 2022**

Rohi @ Satish Kaliya @
Satish Tangappan Joseph .. Applicant/Appellant
Versus
Central Bureau of Investigation
New Delhi
State of Maharashtra .. Respondents

**WITH
CRIMINAL APPEAL NO.394 OF 2021,**

Arvind @ Arvya Pandurang Shinde	.. Applicant/Appellant
<i>Versus</i>	
State of Maharashtra	
DCB CID Unit ARS, Mumbai	.. Respondent

**WITH
CRIMINAL APPEAL NO. 395 OF 2021**

Kaushik Baldev Rajgour	.. Applicant/Appellant
<i>Versus</i>	
State of Maharashtra	
DCB CID Unit ARS, Mumbai	.. Respondent

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Mr.Prakash L. Shetty a/w. Mr.Sarthak P. Shetty, Mr.Rohin R. Chauhan, Mr.Krishna Sarkote, Advocate for the Applicant in IA 1990 of 2021 in Appeal 464 of 2021.

Mr.Santosh Deshpande, Advocate for the Applicant in IA St. No.1165 of 2022 in Appeal 456 of 2021.

Mr.Sudeep Pasbola a/w. Mr.Ayush Pasbola i/b. Mr.Tushar Khandare, Advocate for the Appellant in I.A.1721 of 2021 in Appeal 479 of 2021.

None for the Appellant in Criminal Appeal Nos.394 and 395 of 2021.

Mr.Pradeep Gharat, Spl. P.P. a/w. Mr.S.H. Yadav, APP for the Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 23, 2022.

P.C. :

The applicants in the aforesaid applications are convicted
vide judgment and order dated 16th March, 2021, passed by Special

Judge MCOC Act. The applicant in Interim Application No.1990 of 2021 (accused no.8) is convicted for the offence punishable under Section 120 - B and 307 of Indian Penal Code ("IPC", for short) and Section 3(1)(ii), 3(2) and 3(4) of Maharashtra Control of Organized Crime Act, 1999 ("MCOC Act", for short), he has been sentenced to suffer imprisonment for 10 years for the conviction under Section 307, 120-B of IPC. For conviction under Section 3(1) (ii) of MCOC Act, he was sentenced to suffer imprisonment of 10 years and to pay fine of Rs.5,00,000/-. He was acquitted for the offences punishable under Sections 3, 5 read with 25 and 27 of the Indian Arms Act. No separate sentence was awarded for the offences punishable under Section 3(2), 3(4) of MCOC Act.

2 The applicant in Interim Application No.1721 of 2021, has been convicted for the offence punishable under Section 120-B read with 307 of IPC, and, Section 3(1)(ii), 3(2), 3(4) OF MCOC Act. For the conviction under Section 307, 120-B of IPC, he has been sentenced to suffer imprisonment of 10 years. For conviction under Section 3(i)(ii) of MCOC Act, the said applicant was sentenced to suffer imprisonment of 10 years with fine of Rs.5,00,000/-. He is acquitted for the offence punishable under Section 3, 5 read with Sections 25 and 27 of the Arms Act. No separate sentence was

awarded for the offence punishable under Section 3(2)3(4) of MCOC Act.

3 The applicant in Interim Application (Stamp) No.1165 of 2022, has been convicted for the offence punishable under Section 120-B read with 307 of IPC, and, Section 3(1)(ii), 3(2), 3(4) OF MCOC Act. For the conviction under Section 307, 120-B of IPC, he has been sentenced to suffer imprisonment of 10 years. For conviction under Section 3(i)(ii) of MCOC Act, the said applicant was sentenced to suffer imprisonment of 10 years with fine of Rs.5,00,000/-. He is acquitted for the offence punishable under Section 3, 5 read with Sections 25 and 27 of the Arms Act. No separate sentence was awarded for the offence punishable under Section 3(2)3(4) of MCOC Act.

4 The applicants have preferred Appeals challenging the impugned judgment of conviction. The Appeals are admitted. Applications are preferred for suspension of sentence and grant of bail.

5 Learned advocate for the applicant in Interim Application No.1990 of 2021, submitted that the incident had allegedly occurred

on 28th August, 2013. The applicant is in custody for eight years. The appeal may not reach for hearing. One of the accused had turned approver and tender of pardon was granted on 15th June, 2015. The approver is history-sheeter. P.W.9 and P.W.10 failed to identify the applicant. P.W.9 is complainant. P.W.33 has identified the accused. P.W.49 and 50 has not identified the applicants. The assailants had allegedly covered their faces and it was not possible to identify the accused. There has been delay in conducting test identification parade. It was conducted on 31st May, 2015. The incident had occurred within few seconds. It was not possible for the witness to identify the accused. There are no criminal antecedents against the applicants. P.W.33 has stated that nobody is wearing mask. There are serious discrepancies in the evidence of witnesses. The substantive part of sentence of imprisonment is already undergone by the applicants. P.W.38 is the Tehsildar, who had conducted the investigation. Identification parade was not conducted in accordance with Criminal Manual. Reliance is placed on the order passed by this Court in Criminal, Application No.1602 of 2018, wherein the sentence was suspended considering the fact that the convict therein had undergone substantive sentence.

No.1721 of 2021, submitted that the prosecution case suffers from serious infirmities. The evidence of approver is hearsay. The evidence of witness suffers from omissions. He pointed out the version of P.W.1 reflected in paragraph 9 of his evidence. It is submitted that the version of the witnesses is hearsay. In paragraph 10 the said witness has deposed that he used to talk to the co-accused (P.W.10) when he was in Arthur Road Jail. He had talked to him through Satish Kalya. He was abused by the said co-accused as the job was not successful. The evidence of this witness suffers from omissions. Learned counsel then brought to the notice of the Court the version of the said witness reflected in paragraphs 85, 86, 91 and 109 and submitted that there are serious omissions in his version, which creates doubt about the prosecution case. The applicant had undergone the substantive sentence of imprisonment. Learned counsel for the applicants then pointed out the evidence of P.W.No.33 reflected in paragraphs 25 and 28, wherein he had deposed that he knows one Raju Mishra, who is doing the business of building construction, and, that he had lodged the complaint of extortion against him. In the said complaint, it was alleged that he was working for accused Chota Rajan. He admitted that cases were registered against him at various police station. In paragraph 28, he deposed that though he did not receive any threats, from any gang for three years, he had received threats in 2006. While

giving statement dated 29th August, 2013, he had stated that, till three years prior to the incident, he did not receive any complaint. Learned counsel also referred to paragraphs 66, 67 and 68, relating to the deposition of the same witness, and, submitted that there are omissions in his version. He also pointed out the evidence of P.W.39 and P.W.42. The said witness had admitted that Ajay Gosaliya is his friend. While giving statement to the CBI he stated that the accused no.10 wanted to kill him as he was friend of Pradeep Sharma. He cannot assign any reason as to why this fact is not recorded in his statement. P.W.42 has stated that about 10 to 12 years back, accused no.10 had gave threatening to eliminate P.W.42 Ajay Gosaliya and others to create panic and extract money. The witnesses admitted that he knows Ajay Gosaliya and others since 1993. The said witness has given him information from 1993 about various gangs. It is submitted that taking into consideration the nature of evidence, the applicant may not be detained in custody further. He is undergone custody since 2014.

7 Learned advocate for the applicant in Interim Application (Stamp) No.1165 of 2021, submitted that the applicant is arrested on 2nd September, 2014. He was allegedly the conspirator in the crime. He was in jail at the time of incident. There was no identification parade.

There are omission in the evidence of P.W.1. There is no corroboration to the involvement of the said applicant except P.W.1, which is uncorroborated. There is no evidence against him. The statement of police officers are not against him. He was not in a position to deposit fine amount. It may be reduced. The evidence of witnesses suffers from serious omissions, there are improvisation in the evidence of witness. There are infirmities in the evidence of approver. There are contradictions in the evidence of approver. The applicant is in custody for substantial period of time. The Appeal may not reach for hearing. The appeal would become infructuous.

8 Learned Special P.P. Mr.Gharat submitted that P.W.33 is the injured witness. P.W.1 is the approver. Apart from the evidence of the approver, there is strong evidence against the accused. The prosecution has relied upon the electronic evidence in the nature of video shooting and CCTV footage. The CCTV footage were played before P.W.1. The defence has merely attacked on the character of P.W.1 and P.W.33. The defence has not succeeded in demolishing the evidence of witnesses. P.W.1 has supported the prosecution case. P.W.33 is the victim. He had suffered bullet injury. The evidence of P.W.Nos.9 and 10 supports the prosecution. There was identification on CCTV. P.W.33 has identified the accused. P.W.1 had identified the

accused. The video recording shows the presence of accused. P.W.49 is the bodyguard of P.W.33. He has corroborated the incident. Identification parade is not the only evidence. There are other strong circumstances against the accused. There is incriminating evidence in the nature of CDR. The accused are members of gang. There are incidents against the accused. The evidence of P.W.42 was accepted by the Court. *Prima facie* case is made out against the accused. The appreciation of evidence has to be done at the stage of final hearing of the Appeal.

9 The applicants are prosecuted for the offence under the IPC and under the provisions of MCOC Act. The prosecution case is that the applicants were members of crime syndicate. P.W.33 is the injured person. P.W.1 is the approver. The prosecution has adduced evidence on the basis of which the applicants were convicted. The offence is of serious nature. *Prima facie* there is strong evidence against the applicants. The process of appreciation of evidence will have to be conducted at the final hearing stage. On the basis of submissions advanced by counsel for the applicant, the sentence of imprisonment, cannot be suspended. Apart from the oral evidence of the witnesses, the prosecution has relied upon the electronic evidence. Approver's evidence cannot be discarded at this stage. The evidence of

P.W.33, who is the injured person, cannot be disbelieved at that stage. Considering the nature of evidence, no case is made out for suspension of sentence and grant of bail. However, considering the fact that the applicants are in custody for a substantial period, hearing of Appeals can be expedited.

10 Hence, I pass the following order:

:: ORDER ::

- (i) Interim Application Nos.1990 of 2021, 1721 of 2021 and Interim Application Stamp No.1165 of 2022, are rejected;
- (ii) Hearing of Appeals, is expedited;
- (iii) Liberty to prepare private paper book;
- (iv) After paper book is ready, liberty to apply for fixing Appeals for final hearing.

(PRAKASH D. NAIK, J.)