IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 132 OF 2023
WITH
INTERIM APPLICATION NO. 629 OF 2023

Amjad Yusuf Pathan ...Applicant
Versus
The State of Maharashtra ...Respondent
WITH
BAIL APPLICATION NO. 905 OF 2023
WITH
INTERIM APPLICATION NO. 3918 OF 2023

Vivek @ Vicky Janak Paneri ...Applicant
Versus
The State of Maharashtra ...Respondent
WITH
BAIL APPLICATION NO. 1367 OF 2023

Pravin s/o Laxmichand Shanklesha ...Applicant
Versus
The State of Maharashtra ...Respondent
WITH
BAIL APPLICATION NO. 1705 OF 2023

Dhanraj @ Munna s/o Nitin Shah ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Ganesh Gole, a/w Mr. Arif Ali, for the Applicant in BA/1367/2023.
Mr. Niranjan Mundargi, for the Applicant in BA/132/2023.
Mr. Vinod Kashid, for the Applicant in BA/905/2023.
Mr. Pranil Sonawane, a/w Ruchi Rajput, i/b KLS Legal, for the Applicant in BA/1705/2023.
Mr. S. R. Aagarkar, APP for the State/Respondent.

CORAM: N. J. JAMADAR, J.
Reserved On: 18th JANUARY, 2024
Pronounced On: 21st FEBRUARY, 2024

ORDER:-

1. The applicants, who are arraigned in Special Case (MCOC) No.559 of 2020 arising out CR No.377 of 2020 registered with Mahatma Phule Chowk Police Station, Kalyan, for the offences punishable under Sections 120B, 302 and 506(2) read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code"), Sections 3, 25 and 27 of the Arms Act, 1959, Section 37(1) read Section 135 of the Maharashtra Police Act, 1951 and Sections 3(1)(i), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 ("the MCOC Act"), have preferred these applications to enlarge them on bail.

Prosecution case and background facts:

2. Abushahma Shabbir Ansari (the first informant) was a partner of Jignesh Thakkar alias Muniya (the deceased). They were dealing in real estate. The first informant had also known Dharmesh Shah alias Nannu, accused No.1. Accused No.1 Dharmesh and Jignesh were childhood friends. However, on account of financial transactions and criminal activities there were disputes between accused No.1 and the deceased.

3. On 31st July, 2020 between 9.45 to 10.00 pm., the first informant and the deceased while leaving the latter's office at

Suyash Plaza, Kalyan (West), the deceased received a call. While speaking on the phone, the deceased proceeded towards the corner of Suyash Plaza. Dharmesh (A1) and Jaypal alias Japan (A2), who was the driver of accused No.1, came near the deceased. They were engrossed in conversation.

4. After a while, the first informant alleges, a sound of firing emanated from the spot where the deceased, Dharmesh (A1) and Jaypal (A2), were standing. The first informant and his associates noticed that Dharmesh (A1) and Jaypal (A2) were shooting the deceased by means of their pistols, they were armed with. When the first informant and his associates attempted to rush to the rescue of the deceased, Dharmesh (A1) and Jaypal (A2) pointed the pistols towards them and threatened to shoot, if anybody intervened. Thereafter Dharmesh (A1) and Jaypal (A2) fled away through the main gate of Suyash Plaza Building. The first informant claimed two other persons in the age group of 32 to 35 years accompanied the accused Dharmesh (A1) and Jaypal (A2) when they left the scene of occurrence. The deceased was shifted to Fortis Hospital, where he was declared dead.

5. It transpired during the course of investigation that Dharmesh (A1) was the leader of an organised crime syndicate and rest of the accused were its members. Prior approval under Section 23(1) of the MCOC Act was granted by the Competent Authority. During the course of the investigation three of the accused volunteered to make confessional statements, which was duly recorded under Section 18 of the MCOC Act.

6. By an order dated 2nd January, 2023, the learned Special Judge declined to exercise discretion in favour of the applicants holding *inter alia* that there was adequate material to draw an inference that the applicants were the members of the organized crime syndicate and that the offences were committed by the organized crime syndicate and, thus, the interdict contained in Section 21(4) of the MCOC Act came into play.

7. The applicants have thus preferred these applications.

8. The respondents have filed affidavits and resisted the prayers for bail.

9. I have heard Mr. Gole, the learned Counsel for the applicant - Pravin s/o Laxmichand Shanklesha in BA/1367/2023, Mr. Mundargi, the learned Counsel for the applicant – Amjad Yusuf Pathan in BA/132/2023, Mr. Kashid, the learned Counsel for the applicant – Vivek alias Vicky Janak Paneri in BA/905/2023, Mr. Sonawane, the learned Counsel for the applicant Dhanraj alias Munna Nitin Shah in BA/1705/2023 and Mr. Aagarkar, the learned APP for the State, at some length.

10. Before adverting to note the submissions canvassed across the bar, which were largely centered around the implication of the applicants as the members of the organized crime syndicate and the applicability or otherwise of the rigor contained in Section 21(4) of the MCOC Act, it may be expedient to note the role attributed to each of the applicants in the alleged occurrence. The aspect as to whether the applicants could have been roped in on the count that the offences were committed as members of the organized crime syndicate, can thereafter be delved into.

<u>Role of the applicants:</u>

11. The role of the applicants, as emerged from the statements of the first informant and witnesses, especially witness No.11 and the confessional statements of the three of the accused and, as articulated in the affidavits-in-reply filed on behalf of the respondents, is that the applicants alongwith the gang leader Dharmesh (A1) and co-accused Jaypal (A2), the assailants, hatched a conspiracy to eliminate the deceased. On 30th July, 2020 between 2.00 pm. to 3.00 pm. Dharmesh (A1), Jaypal (A2), Dhanraj (A4), Amjad Pathan (A3) and two unknown persons had assembled in the premises of Shivshakti building and witness No.11 had then overheard the conspiracy being hatched to kill the deceased.

12. In the alleged conspiracy, the applicant Amjad Pathan (A3) was tasked to provide the location of the deceased to facilitate the assault. Applicant Dhanraj (A4) was tasked with keeping a watch while Dharmesh (A1) and Jaypal (A2) fired at the deceased. Applicant Vivek Janak Paneri alias Vicky (A8) was allegedly the driver of the SUV car in which the assailant had reached at the scene of occurrence and fled away after firing at the deceased. Applicant Pravin Sanklesha (A6) has also been arraigned as a confederate in the conspiracy to kill the deceased.

Submissions:-

13. A common submission which was canvassed on behalf of the each of the applicants was that in the FIR none of the applicants were named. Emphasis was laid on the fact that the first informant claimed to have known the deceased as well as Dharmesh (A1) and was also aware of the background of

Dharmesh (A1). Yet, in the FIR it was alleged that the first informant had seen two persons in the age group of 32 to 35 years fleeing away alongwith assailants Dharmesh (A1) and Jaypal (A2), after they had fired at the deceased. The omission to name any of the applicants as the persons, who accompanied the assailants, by the first informant who had known not only Dharmesh (A1) but his brother Dhanraj (A4) according to the learned Counsel for the applicants, indicates that the applicants came to be roped in by way of an afterthought.

14. Secondly, the learned Counsel submitted there is no material to indicate that there was a conspiracy, as alleged. The statements of witness Nos.11 and 12, which were recorded on 5th August, 2020, after about four days of the occurrence, pressed into service on behalf of the prosecution, were stated to be unworthy of credence.

15. Thirdly, the admissibility of the confessional statements of the applicants Vivek alias Vicky (A8), Chetan Patel (A5) and Pravin (A6) was assailed on the grounds of non-compliance of the requirements envisaged by The Maharashtra Control of Organized Crime Rules, 1999 ("the Rules, 1999"). It was further submitted that all the three confessional statements are divergent and incompatible with each other. Each of the accused has retracted his confessional statement promptly. Therefore, *prima facie* no reliance can be placed on the confessional statements. If the confessional statements are eschewed from consideration, according to the learned Counsel for the applicants, there is no material to connect the applicants with the alleged offences.

16. In addition to the aforesaid broad submissions, the learned Counsel have advanced submissions, peculiar qua the concerned applicant represented by each of them. An endeavour was made to show that the provisions of MCOC Act could not have been invoked qua the particular applicants as there is not a shred of material to indicate that they were members of the organized crime syndicate.

17. Mr. Mundargi, the learned Counsel for the applicant Amjad Pathan (A3) in BA/132/2023 urged that even if the prosecution case is taken at par, the provisions of MCOC Act can have no application as the alleged act would not fall within the dragnet of the "organized crime" under Section 2(e) of the MCOC Act, 1999. Amplifying this submission, Mr. Mundargi urged that the tenor of the prosecution case is that on account of personal rivalry between Dharmesh (A1) and the deceased, who were alleged to be childhood friends, the latter was killed.

In such circumstances, the alleged offences cannot be said to have been committed with the objective of gaining pecuniary benefits or undue economic advantage.

18. Ms. Sonawane, the learned Counsel for the applicant Dhanraj (A4) in BA/1705/2023, submitted that the applicant has been roped in only for being the brother of Dharmesh (A1). There are no criminal antecedent qua the applicant Dhanraj (A4). In fact, the applicant had lodged a complaint of unlawful detention in connection with CR No.377 of 2020.

19. The learned APP stoutly resisted the prayers for bail. It was submitted that the deceased was killed in a coldblooded manner. The crimes registered against Dharmesh (A1) and Amjad Pathan (A3) indicate that they have been indulging in continuous unlawful activities, over the years. There is overwhelming material to show that the applicants and the co-accused had entered into a criminal conspiracy to eliminate the deceased and in pursuance of the said conspiracy killed the deceased. The fact that initially the first informant had not named the accused, apart from Dharmesh (A1) and Jaypal (A2), is not of much significance as there are statements of witnesses (witness Nos.11 and 12) which indicate that the conspiracy was hatched on 30th July, 2020 between 2.00 pm. to 3.00 pm. In addition, the confessional statements of the applicants and co-accused clearly incriminate the applicants and, therefore, the interdict contained in Section 21(4) of the MCOC Act, 1999 applies with full force. Resultantly, the applicants do not deserve to be released on bail.

Consideration:

20. At the outset, in view of the invocation of the provisions contained in the MCOC Act, 1999, the applicability of the bar under Section 21(4) of the MCOC Act, 1999, is required to be appreciated. Sub-section (4) of Section 21 incorporates an interdict against release on bail of a person accused of an offence punishable under the MCOC Act, 1999, unless the Court forms an opinion that the said person is not guilty of the offence for which he is arraigned and is not likely to commit an offence upon his release on bail.

21. The nature and import of the restrictions on the grant of bail envisaged by Section 21(4) of the MCOC Act, 1999 was expounded by the Supreme Court in the case of ***Ranjitsing Brahmajeetsing Sharma V/s. State of Maharashtra and Anr.***[1]. The following observations of the Supreme Court are instructive and hence extracted below :

1(2005) 5 SCC 294

> "44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.
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> 45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.
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> 46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

22. It may also be expedient to immediately notice the ingredients of the offence of organized crime. In the case of

Zakir Abdul Mirajkar vs. State of Maharashtra[2] the Supreme Court, after analysing the definitions of organized crime (Section 2(1)(e), organized crime syndicate (Section 2(1)(f)) and continuing unlawful activity (Section 2(1)(d)) illuminatingly postulated the essential elements of the "organized crime" as under:

> "17. The expression 'organized crime' is defined with reference to a continuing unlawful activity. The definition is exhaustive since it is prefaced by the word 'means'. The ingredients of an organized crime are:
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> a. The existence of a continuing unlawful activity;
> b. Engagement in the above activity by an individual;
> c. The individual may be acting singly or jointly either as a member of an organized crime syndicate or on behalf of such a syndicate;
> d. The use of violence or its threat or intimation or coercion or other unlawful means; and
> e. The object being to gain pecuniary benefits or undue economic or other advantage either for the person undertaking the activity or any other person or for promoting insurgency.
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> 18. The above definition of organized crime, as its elements indicate, incorporates two other concepts namely, a continuing unlawful activity and an organized crime syndicate. Hence, it becomes necessary to understand the ambit of both those expressions. The ingredients of a continuing unlawful activity are:
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> a. The activity must be prohibited by law for the time being in force;
> b. The activity must be a cognizable act punishable with imprisonment of three years or more;
> c. The activity may be undertaken either singly or jointly as a member of an organized crime syndicate or on behalf of such a syndicate.
> d. More than one charge-sheet should have been filed in respect of the activity before a competent court within the preceding period of then

2 2022 ALL MR (Cri) 3798 (S.C.).

> years; and
> e. The court should have taken cognizance of the offence.
>
> 19. The elements of the definition of 'organized crime syndicate' are:
> a. A group of two or more persons;
> b. Who act singly or collectively, as a syndicate or gang; and
> c. Indulge in activities of organized crime.
>
> 20. Both Section 2(1)(d) while defining 'continuing unlawful activity' and Section 2(1)(e) while defining 'organized crime' contain the expression ' as a member of an organized crime syndicate or on behalf of such syndicate, Section 2(1)(f) refers to 'activities of organized crime'."

23. In the light of the aforesaid enunciation, the submission of Mr. Mundargi that the alleged act would not fall within the dragnet of the organized crime under Section 2(e) of the MCOC Act, 1999, deserves to be considered.

24. At first blush, the submission appears attractive. However, if subjected to scrutiny, in the light of the allegations, the submission does not merit countenance. It *prima facie* appears that Dharmesh (A1) and the deceased were allegedly dealing in real estate business and had a fall out. The deceased had started the business on his own. It is alleged that Dharmesh (A1) was annoyed at the conduct of the deceased in insulting him. Commission of offences as a part of a turf war amongst gangsters is not uncommon.

25. In any event, the term, "other advantage" employed by the legislature in the definition of "organized crime" under Section 2(e) of the MCOC Act, 1999 cannot be read *ejusdem generis* pecuniary benefits or economic advantage. A profitable reference can be made to a Full Bench judgment of this Court in the case of ***State of Maharashra vs. Jagan Gagansingh Nepali alias Jagya and another***[3] wherein it was enunciated the term, "other advantage" cannot be read as *ejusdem generis* the words "pecuniary benefits" and "undue economic".

26. Another submission, assiduously canvassed on behalf of accused, especially Dhanraj (A4) and Pravin (A6) was that, since no crime has been registered against those applicants, they cannot be roped in by invoking the provisions contained in Section 2(1)(d) for being member of organized crime syndicate punishable under Section 3(4) of the MCOC Act, 1999, also deserves to be noted at this stage.

27. Suffice to note that it is not the requirement of law that one or more charge-sheets for the offences, which entail punishment for more than three years, ought to have been filed against each of the accused. The requirement of more than one charge-sheet is in respect of the organized crime syndicate and

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3 2011(5) Mh.L.J. 386.

not qua each accused, who is alleged to be a member of organized crime syndicate.

28. In the case of ***Govind Sakharam Ubhe vs State of Maharashtra***[4] it was enunciated as under:

> "37. ..... Charge is in respect of unlawful activities of the organized crime syndicate. Therefore, if within a period of preceding ten years, one charge-sheet has been filed in respect of organized crime committed by the members of a particular crime syndicate, the said charge-sheet can be taken against a member of the said crime syndicate for the purpose of application of the MCOCA against him even if he is involved in one case. The organized crime committed by him will be a part of the continuing unlawful activity of the organized crime syndicate. What is important is the nexus or the link of the person with organized crime syndicate. The link with the \`organized crime syndicate' is the crux of the term \`continuing unlawful activity'. If this link is not established, that person cannot be roped in."
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> (emphasis supplied)

29. In the case of ***Zakir Mirajkar*** (supra) the Supreme Court approved the aforesaid enunciation and observed that it is settled law that more than one charge-sheet is required to be filed in respect of the organized crime syndicate and not in respect of each person who is alleged to be a member of such a syndicate.

30. Nonetheless, there should be *prima facie* material to indicate that the offences were committed either singly or jointly as a member of an organized crime syndicate. In the case of

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42009(3) Bom C.R.(Cri.) 144.

Govind Ubhe (supra) the existence of nexus with organized crime syndicate was emphasized by observing in clear and explicit terms that what is important is the nexus or the link of the person with organized crime syndicate and if this link is not established, that person cannot be roped in.

Dhanraj (A4) and Pravin (A6):

31. In the light of the aforesaid position in law, the entitlement for bail of each of the applicants is required to be appreciated in the context of the role attributed to, and the material arrayed against, each of them. The consideration is albeit *prima facie.*

32. To begin with, the claim of Dhanraj (A4) and Pravin (A6), who are alleged to be the confederates in the conspiracy to eliminate the deceased. There is an element of commonality in the allegation qua Dhanraj (A4) and Pravin (A6) as accessories after the alleged act. In addition to the statements of witnesses, qua Dhanraj (A4), the discovery leading to the recovery of the knife is pressed into service. Whereas Pravin (A6) is alleged to have made a confessional statement.

33. It is necessary to note that the prosecution does not allege that Pravin (A6) was one of the associate of Dharmesh (A1), who accompanied the assailants at the time of the alleged occurrence. The allegations of conspiracy are in two parts. One, the conspiracy which was allegedly hatched on the night 30th July, 2020. Two, the conspiracy which was allegedly hatched on 30th July, 2020 between 2.00 pm. to 3.00 pm. in the premises of Shivshakti building where the applicant Pravin (A6) and Dhanraj (A4) were stated to be present alongwith assailants Dharmesh (A1), Jaypal (A2), Chetan (A5), Amjad (A3) and two unknown persons.

34. In the confessional statement dated 9th October, 2020 applicant Pravin (A6) allegedly stated that on 30th July, 2020 when he had visited the office of Dharmesh (A1) at Jhunzarrao Nagar, Dharmesh (A1) and co-accused were present and at that time with reference to the alleged incident of assault upon Chetan (A5) on 28th July, 2020 by the deceased and his friend, Dharmesh (A1) stated that the deceased should not have abused and insulted him and something was required to be done about the deceased.

35. Mr. Gole, the learned Counsel for the applicant Pravin (A6), submitted that applicant Pravin (A6) had promptly retracted the alleged confessional statement before the learned Magistrate on 10th October, 2020. An endeavour was also made to urge that the confessional statement was not recorded in conformity with the MCOC Rules, 1999.

36. At this stage, the Court may not delve into these aspects elaborately. *Prima facie,* even if the confessional statement of Pravin (A6) is taken, as it stands, the element of agreement to eliminate the deceased appears *prima facie* missing. Pravin (A6) stated that Dharmesh (A1) was annoyed and thought that the deceased was required to be taught a lesson.

37. The confessional statement of Chetan Patel (A5) *prima facie* does not seem to advance the cause of the prosecution to the extent desired, as Chetan Patel (A5) stated that on 30th July, 2020, at the main gate of Shivshakti Building in the presence of Pravin (A6), Amjad (A3), Jaypal (A2), Dhanraj (A4) and others, Dharmesh (A1) enquired with Chetan Patel (A5) as to why the deceased and his associates had assaulted him, and he had replied that he was assaulted for bringing a friend to celebrate the birthday of Dharmesh (A1). The confessional statement of Chetan (A5) stops at that qua the alleged conspiracy and role of Pravin (A6), Dhanraj (A4) and Amjad (A3).

38. The confessional statement of Vivek @ Vicky (A8) refers to the alleged meeting dated 30th July, 2020 at the office of Chetan

Patel (A5) at Kalyan. Pravin (A5), Dhanraj (A4), Barkat @ Imtiyaz Pathan (A10) and Amjad (A3) were allegedly present alongwith Dharmesh (A1). After enquiring about the incident of assault on Chetan Patel (A5), by the deceased and his associates, Dharmesh (A1) exhorted that they should kill the deceased. The conspiracy was allegedly hatched to the effect that Dharmesh (A1) and Jaypal (A2) would shoot the deceased. Barkat Pathan (A10) was to arrange the fire arms. Amjad (A3) was to track the location of the deceased. Vivek @ Vicky (A8), the applicant, was to bring his car. As planned applicant Vivek @ Vicky (A8), Dharmesh (A1), Dhanraj (A4), Jaypal (A2) and Sunil @ Devid Narvekar (A7) reached Neelam Galli near the office of the deceased. Vivek @ Vicky (A8) stated that Pravin (A6) was not with them. After the occurrence Sunil @ David (A7) informed Pravin (A6) that the deceased was killed. Sunil @ David (A7) also informed Dhanraj (A4).

39. In addition, as noted above, witness No.11 claimed to have overheard the conversation of the accused including Pravin (A6), Dhanraj (A4), Amjad (A3), Chetan (A5) and two unknown persons. The accused allegedly declared that they would end the (bullying) '*dadagiri'* of the deceased.

40. In the backdrop of the aforesaid material on record qua applicants Pravin (A6) and Dhanraj (A4), *prima facie* it appears that Pravin (A6) was not at all present at the time of the alleged occurrence. The allegation that he was a confederate in the conspiracy primarily rests on the statement of witness No.11 and the confessional statement of Vivek @ Vicky (A8). As noted above, the confessional statements of Pravin (A6) and Chetan (A5) do not *prima facie* lend support to the prosecution version.

41. In the circumstances, the weight to be given to the claim of witness No.11 who allegedly overheard the conversation would be a matter for adjudication at trial. Undoubtedly, conspiracies are hatched in secrecy and rarely there is a direct evidence. However, in the facts of the case, qua the applicant Pravin (A6) and Dhanraj (A4) the material pressed into service in support of the charge of conspiracy, *prima facie,* appears contestible.

42. The role attributed to Dharaj (A4) in the alleged conspiracy of keeping a watch while the assailants fired bullets at the deceased, also appears contestible as the statement of witness No.13 indicates that at the time of the alleged occurrence Dhanraj (A4) was with the said witness at a different place. Witness No.13 and Dhanraj (A4) met at about 9.30 pm. and were standing in front of the office of Shah Brothers, Jhunzarrao

Market at about 10.15 pm. They had seen the wife and son of the deceased passing from in front of them. After about 10 minutes the brother of the deceased called Dhanraj (A4) and threatened Dhanraj with dire consequences as Dharmesh (A1), the brother of Dhanraj (A4), had fired at the deceased. The statement of witness No.12 thus *prima facie* runs counter to the role attributed to Dhanraj (A4) in the alleged occurrence.

43. The applicant Pravin (A6), as is prima facie evident from the statement of PW12, had joined Dharmesh (A1) at Mira Road after the alleged occurrence on the night intervening 31 July 2020 and 1 August 2020. The statements of witness Nos.17, 18 and 19, pressed into service by the learned APP, also indicate that Dharmesh (A1), Jaypal (A2) and Vivek (A3) and another person had reached Mira Road and, subsequently, Witness No.12 and Dhanraj (A4) and Pravin (A6) reached Mira Road.

44. In the backdrop of the prima facie material to show that Pravin (A6) was not at all in the vicinity of the place of occurrence and Dhanraj (A4) was with Witness No.12 at the time of the alleged occurrence, at a different place, the question as to what extent, can the applicant Pravin (A6) and Dhanraj (A4) be roped in for the commission of the alleged offences on the strength of their acts, post the alleged occurrence, would be a matter for adjudication at the trial.

45. The learned APP submitted that Dhanraj (A4) was a new entrant to the organized crime syndicate. Therefore, the applicant – Dhanraj (A4) cannot draw any mileage from the fact that he has no criminal antecedents.

46. In the peculiar facts of the case, where Dharmesh (A1), the real brother of Dhanraj (A4), had allegedly been indulging in continuous unlawful activities since long, it appears rather difficult to readily accede to the submission of the learned APP that Dhanraj (A4) was a new entrant as it could be urged that there were numerous opportunities for Dhanraj (A4) to join the syndicate.

47. Resultantly, in the absence of any link between the applicants Dhanraj (A4) and Pravin (A6), and the organized crime syndicate, a prima facie case to justify an inference that the applicants may not be guilty of the offences with which they have been charged, can be said to have been made out. Since there are no criminal antecedents, the court may further draw an inference that the applicants Dhanraj (A4) and Pravin (A6) may not indulge in identical offences if released on bail.

Amjad Pathan (A3):

48. As against Amjad (A3), in addition to the aforesaid material, the statements of witness No.9 recorded under Sections 161 and 164 of the Code, 1973 are relied upon by the prosecution. Witness No.9 states that on the day of occurrence, the applicant Amjad had called and asked him to meet Amjad (A3). They exchanged calls, but could not meet. At about 10.00 p.m., while witness No.9 was at his home, Amjad (A3) again called him and told him to see whether any incident had transpired near the office of the deceased. Thereupon, witness No.9 called witness No.2, who informed him about the alleged occurrence. Amjad (A3) had also allegedly made a disclosure statement leading to the recovery of the knife, with which he was armed at the time of the alleged occurrence. CDR data revealed that the applicant – Amjad (A3) was in the vicinity of Kalyan.

49. In the alleged conspiracy, the Applicant Amjad (A3) was allegedly tasked with tracking the location of the deceased. The witnesses who had allegedly witnessed the occurrence have not stated that the applicant – Amjad (A3) was with the assailants or seen in the vicinity of the scene of occurrence at the time of the alleged occurrence. In the context of the role attributed to

Amjad (A3), the fact that the incident occurred in front of the office of the deceased, where he was expected to be normally present, may have some significance.

50. It would be relevant to note that witness No.13, who had known the applicant – Amjad (A3), does not state that when he and Dhanraj (A4) reached Mira Road, applicant – Amjad (A3) was with Dharmesh, Jaypal and David @ Sunil and Vicky Paneri. Thus, prima facie, there is no material to indicate that the applicant Amjad (A3) was either at the scene of occurrence or was in the company of the assailants even after the occurrence, when they reached Mira Road. In the circumstances, the question as to whether the applicant – Amjad (A3) can be roped in for the alleged occurrence for having enquired with Witness No.9 about the occurrence, when the news of such occurrence might have spread fast and wide, would again be a matter for adjudication at the trial.

51. That takes me to the allegation that Amjad (A3) was a member of the organized crime syndicate and indulged in continuous unlawful activities for the organized crime syndicate, of which Dharmesh (A1) was the gang leader. Undoubtedly, antecedents of Amjad (A3) indicate that he had been allegedly involved in as many as 19 offences.

52. Mr. Mundargi, learned Counsel for Mr. Amjad, submitted that the Applicant Amjad (A3) has been acquitted in almost all the cases for which he had been arraigned. It was further urged that there is no commonality in the crimes registered against Amjad (A3) and Dharmesh (A1). In none of the crimes registered against Dharmesh (A1), the applicant – Amjad is the co-accused. Nor Dharmesh (A1) has been implicated as the co-accused in the crimes registered against Amjad (A3). This fact is prima facie borne out by the chart annexed to the affidavit in reply filed on behalf of the Respondent.

53. The situation which thus obtains is that there are a number of crimes registered against Amjad (A3) and Dharmesh (A1) individually or jointly with other persons. However, in none of the crimes, Applicant Amjad (A3) and Dharmesh (A1) are shown as co-accused. That renders the question of the applicant Amjad (A3) being a member of the organized crime syndicate led by Dharmesh (A1) debatable.

54. I have perused the chart of the cases registered against the applicant Amjad (A3) (Exhibit-F to the affidavit-in-reply). Out of 19 cases shown in the said chart, the applicant is shown to have been acquitted in 14 cases. 'A' Summary was filed in another case. Apart from the instant case, three cases arising out of the crimes registered against the applicant in the year 1995, 1999 and 2002 are shown to be pending. Apart from the subject crime, the last of the crimes was registered against the applicant at Sanpada Police Station, Navi Mumbai, vide CR No.1208/2012, in which the applicant came to be acquitted. It is true there are criminal antecedents of the applicant Amjad (A3), which puts the Court on guard. However, at the same time the fact that in 15 of the cases the applicant has been acquitted and/or discharged cannot be lost sight of. The time-lag between the last crime (2012) and the instant offence (2020) also deserves to be taken into account.

55. In such circumstance, can the applicant Amjad (A3) be deprived of his personal liberty on the ground that he has criminal antecedents? In the absence of prima facie material to rope in Amjad (A3) for the criminal conspiracy and the alleged offences committed by the organized crime syndicate led by Dharmesh (A1), in my considered view, the applicant Amjad (A3) cannot be deprived of his personal liberty on the basis of antecedents only.

56. The reasons which have been ascribed to above, qua Pravin (A6) and Dhanraj (A1) govern the claim of the applicant Amjad (A3) as well.

57. In any event, the applicants Dhanraj (A4), Amjad (A3) and Pravin (A6) have been in custody since 5th August, 2020, 5th August, 2020 and 10th August, 2020 respectively. Almost three and half years have elapsed. The gravamen of indictment against the applicants Dhanraj (A4), Pravin (A6) and Amjad (A3) is that of being alleged confederates in the conspiracy. The offences punishable under Sections 3(1)(i), 3(2) and 3(4) of the Act, 1999 entail minimum sentence of five years. It is unlikely that the trial can be concluded in the near future. I am therefore inclined to exercise discretion in favour of the applicants, Dhanraj (A4), Pravin (A6) and Amjad (A3).

Vivek alias Vicky (A8):

58. The role attributed to the applicant – Vivek (A8) is that of having accompanied the assailants to the scene of occurrence, in fact, driven them to and from the scene of occurrence in his Mahindra XUV Car. In addition to the allegation of being a confederate in the conspiracy and the aforesaid material with regard to the alleged conspiracy, the prosecution relies on the CCTV footages and the statements of witnesses who have identified the applicant Vivek (A8) as the person who was at the wheel of the car, immediately after the alleged occurrence, and the one who drove the assailants to Mira Road. The applicant

Vivek (A8) was allegedly identified by two witnesses in the Test Identification Parade.

59. Mr. Kashid, learned Counsel for Applicant Vivek (A8) submitted that the applicant was not one of the assailants. There was no recovery at the instance of the applicant. The alleged confessional statement has been retracted by the applicant on that very day. The allegation that the applicant was at the wheel of the XUV car is riddled with irreconcilable inconsistencies.

60. Mr. Kashid invited attention of the Court to the panchanama of the CCTV footages dated 5 August 2022 which indicates that a grey Mahindra XUV 500 passed from in front of Santosh Bar towards Vaishnav Hotel. In contrast, in the alleged memorandum of disclosure statement, Jaipal (A2) disclosed that they had reached the scene of occurrence in a blue Mahindra XUV car. Yet in the description of the property which has allegedly been seized from the possession of the applicant, the investigating agency claimed that a bottle green XUV 500 car was seized. These inconsistencies, according to Mr. Kashid, render the prosecution version wholly unsustainable.

61. Mr. Kashid further submitted that the provisions contained in MCOC Act, could not have been invoked against the applicant Vivek (A8) as no crime has been registered against the applicant Vivek (A8) along with Dharmesh (A1), the gang leader or any other member of the alleged organized crime syndicate. All the four crimes registered against the applicant were prior to 10 years of the alleged occurrence. In one of the crimes i.e. C.R. No.189 of 2008, the applicant has been acquitted.

62. The learned APP countered the submissions of Mr. Kashid by placing reliance on the material adverted to above.

63. The material on record prima facie indicates that the applicant Vivek (A8) was using XUV bearing registration No.MH-03/BS4485. The mother of the applicant was the registered owner of the said car. The witnesses have consistently stated that the assailants were accompanied by two unknown persons. Undoubtedly, the applicant was not named in the FIR. However, there is material which prima facie establishes the identity of the applicant Vivek (A8) as the person who accompanied the assailants to the scene of occurrence. Witness No.2 stated that he had seen a Mahindra XUV 500 car proceeding towards Deepak Hotel after the deceased was shot at. In the Test Identification Parade, witness Nos.1 and 2 have identified the applicant Vivek (A8).

64. Mr. Kashid attempted to salvage the position by canvassing a submission that the applicant Vivek (A8) had lodged complaints with the authorities that before the Test Identification Parade, his photographs were shown to the witnesses by the police. I am afraid, the aforesaid aspect cannot be delved into at this stage. The memorandum of the Test Identification Parade, *prima facie*, indicates that witness Nos.1 and 2 have identified the applicant Vivek (A8).

65. In addition, there are statements of witnesses which indicate that the assailants had reached the scene of occurrence in the car of the applicant Vivek (A8) and the applicant was with the assailants after the alleged occurrence. Witness No.20 has stated that at about 4.30 p.m., the assailants and David had left Mira Road in the XUV car driven by the accused. Witness No.13 stated that when he reached Mira Road, the applicant, Dharmesh (A1), Jaypal (A2) and Sunil @ David (A7) were in the Mahindra XUV Car. The statements of witnesses Nos.17, 18 and 19 are on identical lines. Moreover, there are CCTV footages which indicate that XUV car had passed the road in the vicinity of the scene of occurrence. At this stage, the discrepancy in the colour of the car cannot be extolled to such a pedestal as to render the prosecution version improbable.

66. The aforesaid material, prima facie, establishes the complicity of the applicant – Vivek (A8), de hors the admissibility and reliability of the confessional statement allegedly made by the applicant – Vivek (A8).

67. In the circumstances, the fact that there is no commonality in the crimes registered against the applicant Vivek (A8) and the gang leader or any other member of the organized crime syndicate, at this stage, pales in significance. The nexus between the applicant and the organized crime syndicate is prima facie made out.

68. In the face of the aforesaid material, there is no reasonable ground to hold that the applicant – Vivek (A8) is not guilty of the offences for which he has been arraigned. Nor can it be inferred that the applicant will not indulge in identical offences if released on bail. Resultantly, the twin test envisaged by Section 21(4) of the Act, cannot be said to have been satisfied. I am, therefore, impelled to reject the application of the applicant – Vivek (A8).

69. Hence, the following order:

: O R D E R :

(i) BA/132/2023, BA/1367/2023 and BA/1705/2023 stand allowed.

(ii) Amjad Yusuf Pathan; the applicant in BA/132/2023, Pravin Laxmichand Shanklesha; the applicant in BA/1367/2023 and Dhanraj @ Munna Nitin shah; the applicant in BA/1705/2023, be released on bail in CR No.377 of 2020 registered with Mahatma Phule Chowk Police Station, Kalyan, on furnishing a P.R. Bond of Rs.50,000/- with one or more sureties in the like amount, each.

(iii) The applicants shall mark their presence at Mahatma Phule Chowk Police Station, Kalyan, on the first Monday of every month in between 10.00 am. to 12.00 noon till the conclusion of the trial.

(iv) The applicants shall not enter the limits of Mumbai, Thane and Navi Mumbai Districts for the period of three years or till the conclusion of the trial, whichever is earlier, except for the purpose of attending the proceedings before the Court and marking their presence at the Police Station.

(v) The applicants shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(vi) On being released on bail, the applicants shall furnish their contact numbers and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vii) The applicants shall regularly attend the proceedings before the jurisdictional Court.

(viii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

(ix) BA/905/2023 stands rejected.

(x) In view of the disposal of the Bail Applications, IA/629/2023 and IA/3918/2023 also stand disposed.

[N. J. JAMADAR, J.]