

# Shiban Shafi Shaikh vs The State Of Maharashtra on 11 August, 2022

**Author: N.J.Jamadar**

**Bench: N.J.Jamadar**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.3804 OF 2021

SWAROOP SHARAD PHADKE Digitally signed by	Shiban Shafi Shaikh	...	App
	versus		
	The State of Maharashtra	...	Res
SWAROOP SHARAD PHADKE Date: 2022.08.11			

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Mr. Aniket Nikam i/by Mr. Vivek N. Arote, for Applicant.

Mr. Y.Y.Dabke, APP, for State.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 13th JULY, 2022  
PRONOUNCED ON : 11th AUGUST, 2022

P.C.

1. The Applicant who is arraigned in C.R.No.555 of 2020 Upnagar Police Station, Nashik for the offences punishable under S 395, 397, 143, 147, 148, 149 and 201 of the Indian Penal Code, 186 3(25) and 4(25) of the Arms Act and Section 3(1)(i), (ii), 3(2), 3 Maharashtra Control of Organized Crime Act, 1999 along with 23 co-three children in conflict with law, has preferred this Application

bail.

2. The indictment against the Applicant and the co-accused as under :

2.1 Sagar Suresh Mhaske - Accused No.9 is the leader of a syndicate. He along with his brother Harsh @ Tonu Suresh Mhaske -

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and Sahil @ Monu Suresh Mhaske - Accused No.10 have formed an organized crime syndicate, and have been indulging in grave offences of causing grievous hurt, attempt to commit murder, extortion and theft etc. Sagar Suresh Mhaske - Accused No.9, Sahil Suresh Mhaske - Accused No.10 and his associates are always armed with deadly weapons.

2.2 A year and half prior to the occurrence, Rameshwar Sitaram Sisode, first informant, and his cousin Yogesh (the deceased) had confronted Harsh Mhaske - Accused No.6 while he and his associates were stealing petrol from the motorcycles. Thus, the above named accused had a grudge against the first informant and his deceased cousin. Sagar Mhaske - Accused No.9, Harsh Mhaske - Accused No.6 and Sahil Mhaske - Accused No.10 and their associates Uddesh Chandel, Babu Maniar, Raju John Kerala and others had assaulted the first informant by means of scythe and chopper at Subhash Road, Nashik. During 7-8 months preceding the occurrence, Harsh Mhaske - Accused No.6, had a scuffle with deceased Yogesh at Teligalli, Devlali, Nashik. Reports were lodged against the accused by the first informant and the deceased Yogesh at Nashik Road and Upnagar Police Stations. Harsh Mhaske - accused No.6, thus, had a grudge against the first informant and the deceased and had threatened to eliminate the deceased.

2.3 On 15th November, 2020 while the deceased Yogesh was chatting with his friend Suraj Kahane at Khodade Chowk, Devlali, the accused Harsh @ Tonu

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Mhaske (Accused No.6), Sattu Rajput (Accused No.6), Maruti Ghorpade (Accused No.2), Yogesh Bodake (Accused No.8), Rohit @ Bhurya (Accused No.1) and their 3 to 4 other associates came thereat, armed with deadly weapons. They formed an unlawful assembly. In prosecution of the common object of the said assembly, the accused unleashed assault upon the deceased by means of scythes and chopper. The deceased ran towards the Dargah. The assailants chased and caught hold of the deceased in front of a dairy farm and gave blows by means of deadly weapons. One of the assailants threatened the deceased's friend Suraj Badrinarayan Kahane and snatched away his Scooty moped. As persons gathered thereat, the assailants fled away on the said Scooty, and autorikshaw and Platina motorcycle, by which they had reached the scene of occurrence. The deceased was initially shifted to Bitco Hospital and, thereafter, civil hospital, Nashik. The deceased was declared dead.

2.4 Mr. Rameshwar Sisode, the first informant approached the police and lodged the report. Investigation commenced. During the course of investigation, in all 19 accused including the Applicant, came to be arrested. Post completion of investigation, chargesheet came to be lodged against 19 accused alongwith 5 absconders and 3 children in conflict with law.

2.5 The investigation revealed that Sagar - accused No.9 had formed an organized crime syndicate. A number of offences were committed by the members of the said organized crime syndicate either singly or jointly as the members thereof.

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The Applicant was also a member of the said organized crime syndicate. The Applicant and the co-accused Sattu (Accused No.5), Maruti (Accused No.2), Sahil

(Accused No.10), Rohit (Accused No.1), Akshay Parche (Accused No.12), Anuj (Accused No.15), Izaq (Accused No.16), Bobby (Accused No.18) and Behenwal alis Changya (Accused No.20) and others were around the scene of occurrence when the deceased was assaulted by the assailants. Thus, with the prior approval of the competent authority, offences punishable under the Maharashtra Control of Organized Crime Act, 1999 (the MCOC Act, 1999) were added and, post completion of investigation, with the previous sanction of the competent authority under Section 23 of the MCOC Act, 1999, cognizance of the offences punishable under MCOC Act, 1999 has been taken by the Special Court.

3. The Applicant has preferred this Application with the assertion that there is no material to connect him with the alleged offences. No role of assaulting the deceased has been attributed to the Applicant. Neither the first informant nor any of the prosecution witnesses have stated about the Applicant being one of the members of the unlawful assembly in prosecution of the common objection of which the offences were allegedly committed. The only role attributed to the Applicant is that of having been seen in the vicinity of the spot, where the deceased was assaulted, at the time of occurrence. Even the said role has been attributed by only one of the witnesses vaguely. It is further asserted that there is no material to show that the

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Applicant had committed offences as a member of the organized crime syndicate.

Thus, the invocation of the provisions contained in the MCOC Act, 1999 against the Applicant is unsustainable. The Applicant is a young boy of 21 years. Investigating is complete. Further detention of the Applicant is, thus, unwarranted.

4. The prosecution has resisted the prayer by filing an Affidavit in Reply. It

is contended that the Applicant is a member of the organized crime syndicate headed by Sagar - Accused No.9. Three crimes, apart from the offences in question, have been registered against the Applicant at Upnagar Police Station, Nashik. The said fact coupled with the fact that as many as six crimes have been registered against Sagar (Accused No.9) the leader of the organized crime syndicate, renders the invocation of the provisions of the MCOC Act, 1999 wholly sustainable. Thus, the bar under Section 21(4) of the MCOC Act, 1999 comes into play.

5. It is further contended that one of the witnesses Monu Sanjay Verma has categorically stated that when the deceased was being assaulted by the co-accused - assailants, he had seen the Applicant and other co-accused, whom he had known as the members of the gang headed by Sagar - accused No.9, lingering around. One of the co-accused Yogesh Shravan Bodke - accused No.8, in his confession, recorded under Section 18 of the MCOC Act, 1999, has also stated that, as per the plan, the Applicant and the co-accused were to be around when the deceased was to be

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assaulted. Therefore, there is adequate material to show the complicity of the Applicant. Hence, the Applicant may not be released on bail.

6. I have heard Mr. Nikam, learned Counsel for the Applicant, and Mr. Dabke, learned APP for the State at some length. With the assistance of the learned Counsel for the parties, I have perused the report under Section 173 of the Code of Criminal Procedure, 1973 (the Code) and the documents annexed with it. Mr. Nikam, learned Counsel for the Applicant strenuously submitted that it is virtually a case of no evidence against the Applicant. Mr. Nikam laid emphasis on the fact that Mr. Rameshwar Sitaram Sisode, the first informant, had known all the accused from before. Yet Mr. Rameshwar claimed to have seen the deceased being assaulted by Harsh @ Tonu (Accused No.6), Sattu (Accused No.5), Maruti (Accused No.2),

Yogesh (Accused No.8), Sahil (Accused No.10), Rohit @ Bhurya (Accused No.1) and their 3 to 4 other associates only. The Applicant was not named as one of those persons who allegedly formed unlawful assembly and assaulted the deceased. Even Suraj Kahane, with whom the deceased was allegedly chatting at the time of the occurrence, did not name the Applicant as one of the assailants or members of the unlawful assembly. Mr. Kiran Gosavi who claimed to have taken the deceased to the hospital, stated that the deceased made a declaration to the effect that the accused Harsh @ Tonu (Accused No.6) and his brothers assaulted him.

7. Mr. Nikam would urge that on the own showing of the prosecution, the

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role attributed to the Applicant is that of being present around the scene of occurrence. Two of the witnesses namely Suraj Kumavat and Monu Sanjay Varma professed to state about the said fact. One of them, Suraj, does not name the Applicant. Monu named the Applicant along with the other co-accused. It was thus submitted that in the absence of any overt act attributed to the Applicant, it cannot be said that a prima face case is made out against the Applicant.

8. In opposition to this, Mr. Dabke, learned APP placed strong reliance on the statement of Monu Varma that the Applicant was one of the members of the gang who were seen around the scene of occurrence. Mr. Dabke banked upon the confession allegedly made by the co-accused Yogesh Bodke under Section 18 of the MCOC Act, 1999 to the effect that as per the plan, the Applicant and the co-accused Maruti (Accused No.2), Rohit (Accused No.1), Akshay (Accused No.12), Babu Maniar (Accused No.13), Anuj (Accused No.15), Sahil (Accused No.10), Sattu (Accused No.5) and their associates were to be around the place where deceased Yogesh was to be assaulted and ready to help, if warranted. Mr. Dabke would urge that

the antecedents of the Applicant, manifested in registration of three crimes, also militate against the claim of the Applicant that he has no concern with the alleged organized crime syndicate headed by Sagar - Accused No.9.

9. I have given anxious consideration to the rival submissions. At the outset, in view of the invocation of the provisions contained in the MCOC Act, 1999,

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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 he is not likely to commit offence upon his release on bail.

10. 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 :

"44. The wording of Section 21(4), in our opinion, does not lead to 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 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) 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 finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature

1 (2005) 5 SCC 294

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manner in which he is alleged to have committed the offence.

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.

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."

11. On the aforesaid touchstone, the nature of the material pressed into service against the Applicant is required to be appreciated. Undisputably, the first informant has not named the Applicant as one of the persons with whom either he or the deceased had any quarrel in the past, or there was any animosity between them. Nor the first informant named the Applicant as either one of the assailants or the members of the unlawful assembly in prosecution of the common object of which the offences were committed. Nor witnesses Suraj, Kiran and Sopan, who claimed to have witnessed the occurrence, have named the Applicant as one of the assailants.

12. In fact, the prosecution does not profess to attribute the role of assault

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the Applicant. The prosecution, however, alleges that the conspiracy was hatched to eliminate the deceased. In pursuance of the said conspiracy, arms were procured, watch was kept on the deceased and arrangements were made to ensure that the friends of the assailants were around the scene of occurrence when the deceased was assaulted. The presence of the Applicant as one of the persons who was to be present to render help, if required, was sought to be established by banking upon the statements of Suraj and Monu. Suraj claims to have witnessed the occurrence wherein Tonu (Accused No.6) and his associates were assaulting the deceased by means of



deadly weapons and Sagar (Accused No.9) threatened the persons not to come to the rescue of the deceased by brandishing revolver. He claimed to have seen the associates of the assailants namely , Sahil (Accused No.10), Rohit (Accused No.1), Sattu (Accused No.5), Maruti (Accused No.2), Akshay (Accused No.12), Anuj (Accused No.15), Goluappa (Accused No.16), Bobby (Accused No.18) and Changa (Accused No.20), around the scene of occurrence. Suraj did not name the Applicant. Monu, however, named the Applicant along with the above named co-accused who were seen in the vicinity of the scene of occurrence.

13. In addition, the prosecution has relied upon the statement of Yogesh, co-accused, recorded under Section 18 of the MCOC Act, 1999, wherein the co-accused states that it was planned that the Applicant and the co-accused were to remain present to assist the assailants while they assaulted the deceased. It is imperative to

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note that Yogesh does not state that at the time of the occurrence, as planned, the Applicant was in fact present around the scene of occurrence. In the statement of the co-accused, Kalamyala (Accused No.4), in whose autorikshaw the assailants had reached Khodade Square, the Applicant was not named. Nor Sahil (Accused No.10) states that the Applicant was one of the persons who was to be around the scene of occurrence, though he named Maruti (Accused No.2), Golu (Accused No.16), and Babu (Accused No.18) as their associates whom he had seen around the scene of occurrence.

14. Prima facie, at this stage, it appears that the only material that is sought to be pressed into service against the Applicant is the statement of Monu Varma. The fact that neither any of the eye witnesses state about the presence of the Applicant as one of the friends of the assailants, who were present to render help, if required, and

that none of the three co-accused whose confessions under Section 18 of the MCOC Act, 1999 have allegedly been recorded, names the Applicant as the person who was around the scene of occurrence at the time the assailants assaulted the deceased, deserves due consideration. Evidently, it appears that the prosecution case qua the Applicant hinges on the solitary statement of Monu Varma. In the absence of any other material to connect the Applicant either with the offences or with the assailants, the question as to whether such a statement is sturdy enough to bear the weight of complicity of the Applicant in the alleged subject offences furnishes a prima facie

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ground for entitlement for bail.

15. This takes me to the aspect of invocation of the provisions of the MCOC Act, 1999 against the Applicant. The prosecution alleges as many as six crimes, apart from the offence in question, have been registered against Sagar Suresh Mhaske (Accused No.9) - gang leader. The antecedents of the Applicant, according to the prosecution, indicate that the Applicant has also been indulging in continuous unlawful activities. In paragraph No.13 of the Affidavit in Reply, the prosecution contends as under :

"13. That the Accused Shiban Shafi Shaikh is the gang member of the same crime syndicate and there are three cases against him, he was committed this crime when he was bail in following crimes.

Sr. No.	Police Station	C.R.No. And Sections	Status
1	Upnagar	32/2017, Sec. 143, 147, 149 of IPC	RCC No.160 of
2	Upnagar	210/2018, Sec. 354 of IPC	Special Case No. 2020
3	Upnagar	293/2018 Sec. 392 of IPC	RCC No.189 of 20

16. Mr. Dabke, learned APP, banking upon the aforesaid antecedents of the Applicant would urge that the invocation of MCOC Act, 1999 qua the Applicant as a member of the organized crime syndicate, led by Sagar Suresh Mhaske - Accused

No.9, can hardly be questioned. I am afraid mere registration of the offences against a person and lodging of the chargesheet therein, in the past, is sufficient to rope in such person for having committed an organized crime. There ought to be prima facie

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material to indicate that the offences were committed as a member of the organized crime syndicate, either singly or jointly. Undoubtedly, it is not the requirement of law that two or more chargesheets for the offences which entail punishment for more than three years ought to have been filed against each of the accused. However, the existence of nexus with the organized crime syndicate cannot be said to be surplusage.

17. A useful reference in this context can be made to a judgment of a learned Single Judge of this Court in the case of Prafulla s/o Uddhav Shende V/s. State of Maharashtra<sup>2</sup> wherein the ingredients of the offence of organized crime have been succinctly culled out as under :

29. Since the definitions, though intertwined in a cyclic order, are clear unambiguous, it would follow that each ingredient in the definitions, or the alternative thereof provided by the definitions themselves, would have to be proved. Viewed thus, for charging a person of organized crime or being a member of organized crime syndicate, it would be necessary to prove that the persons concerned have indulged in :

- (i) an activity,
- (ii) which is prohibited by law,
- (iii) which is a cognizable offence punishable with imprisonment for three years or more,
- (iv) undertaken either singly or jointly,
- (v) as a member of organized crime syndicate i.e. acting as a syndicate or gang, or on behalf of such syndicate.
- (vi) (a) in respect of similar activities (in the past) more than three charge sheets have been filed in competent court within the preceding period of ten years,

2 (2009) ALL MR (Cri) 870

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- (b) and the court has taken cognizance of such offence.
- (vii) the activity is undertaken by :

- (a) violence, or
  - (b) threat of violence, or intimidation or
  - (c) coercion or
  - (d) other unlawful means.
- (viii) (a) with the object of gaining pecuniary benefits or gaining undue or other advantage or himself or any other person, or
- (b) with the object of promoting insurgency.

43. This fortifies the conclusion that mere proof of filing charge sheets in the past is not enough. It is only one of the requisites for constituting offence of organized crime. If only the past charge sheets were to be enough to constitute offence of organized crime, it could have offended the requirement of Article 20(1) of the Constitution and possibly Article 20(2) as well, (and in any case Section 300 Cr.P.C.) Had these judgments of the Supreme Court and Division Benches of this Court been cited before the learned Single Judge deciding Amarsingh V/s. State (2006 ALL MR (Cri.) 407) the learned Single Judge, without doubt, would not have held that the matter was simply one of an arithmetical equation. The said judgment cannot be reconciled with the judgments of division benches in Jaisingh V/s. State 2003 ALL MR (Cri.) 1506 and Bharat Shah V/s. State, 2003 ALL MR (Cri.) 1061, which I am bound to follow.

44. ....Therefore, since the previous criminal history of the applicants denotes that they had been or are being separately charged/tried for those offence before competent courts, there is no question of such offences constituting offence of organized crime." (emphasis supplied)

18. Thus, the mere fact that there are criminal antecedents would not by itself furnish a justification to invoke the provisions of the MCOC Act, 1999 if the pre-

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requisites spelled out by the definition of organized crime, are not prima facie made out. The crimes registered against the Applicant are required to be viewed through the aforesaid prism.

19. I have perused the copies of the chargesheets in each of the aforesaid crimes registered against the Applicant. In C.R.No.32 of 2017, the Applicant was arraigned with other persons as a child in conflict with law. The crux of the allegations is that 10-12 persons accosted the first informant - Sagar Dharmendra Ujjainwal and his brother Rahul and assaulted them. The accused No.1 Vijay Bahenwal @ Changya

(Accused No.20 herein) allegedly gave a blow by means of a poker on the back of the first informant and fled away. In C.R.No.210 of 2018, the Applicant allegedly outraged the modesty of the victim therein and also threatened and intimidated the victim and her father. Whereas C.R.No.293 of 2018 for committing robbery was initially lodged against an unknown person.

20. The nature of the accusation in the aforesaid crimes registered against the Applicant does not indicate that the Applicant has been arraigned as co-accused with Sagar Suresh Mhaske (Accused No.9) - gang leader in any of the offences. Last two crimes registered against the Applicant are of totally diverse nature. In the first crime i.e. C.R.No.32 of 2017, one of the co-accused in this case - Changya (Accused No.20) is shown as the principal accused. The Applicant has been shown as the child in conflict with law in the said case.

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21. In the aforesaid view of the matter, at this juncture, the material on record, prima facie, does not indicate that the Applicant committed the aforesaid offences as a member of the organized crime syndicate led by Sagar Suresh Mhaske - accused No.9. The aforesaid factors, if considered in juxtaposition with the prima facie fragile nature of the material pressed into service against the Applicant of being around the scene of occurrence when the deceased was done to death by the assailants, in my view, the interdict contained in Section 21(4) of the MCOC Act, 1999 may not operate with full force qua the Applicant.

22. Practically the investigation is complete for all intent and purpose. Having regard to the number of the accused and the witnesses which the prosecution proposes to examine, it is very unlikely that the trial can be commenced and concluded within a reasonable period. The Applicant is a young boy of 21 years, and a prolonged incarceration may entail deleterious consequences. Further detention of the Applicant

as an under-trial prisoner, in the circumstances of the case does not seem to be either warranted or justifiable. I am, therefore, persuaded to exercise the discretion in favour of the Applicant.

23. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant - Shiban Shafi Shaikh be released on bail in C.R.No.555 38 ba 3804 of 2021.doc of 2020 registered with Upanagar Police Station, Nashik, for the offences punishable under Sections 120B, 302, 395, 397, 143, 147, 148, 149 and 201 of the Indian Penal Code, 1860 read with Sections 3(25) and 4(25) of the Arms Act and Section 3(1)(i),

(ii), 3(2), 3(3) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999, on furnishing a PR bond in the sum of Rs.50,000/- and one or two sureties in the like amount to the satisfaction of the learned Special Judge, Nashik.

(iii) The Applicant shall mark his presence at Upanagar Police Station on the first Monday of every month in between 10.00 a.m. to 12.00 noon for a period of one year and, thereafter, first Monday of January, April, July, and October of each year till the completion of the trial.

(iv) The Applicant shall not tamper with the prosecution evidence and/or give threat or inducement to any of the prosecution witnesses.

(v) The applicant shall not contact any of the co-accused and indulge in the activities identical to the one for which he has been arraigned in this case.

(vi) The Applicant shall furnish his permanent residential address and contact details to the Police Inspector, Upanagar Police Station, within a period of one week of his release from the prison, and intimate the change, if any.

(vii) The Applicant shall regularly attend the proceedings before the jurisdictional court.

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(viii) By way abundant caution, it is clarified that the observations hereinabove are confined to the consideration of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant or co-accused and the learned Special Judge shall not be influenced by any of the observations in further proceedings in the Special Case arising out of C.R.No.555 of 2020 .

(ix) All concerned to act on an authenticated copy of this order.

( N.J.JAMADAR, J. )