IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2609 OF 2023

DANISH ALI JAMALUDDIN AHMED

..APPLICANT

VS.

THE STATE OF MAHARASHTRA
THROUGH DCB CID,
MUMBAI 400 001 ..RESPONDENT

Mr. Karan Lalit Jain, for the Applicant.
Ms. Rutuja Ambekar, APP for the State.
Mr. Niranjan Mundargi, as Amicus Curiae.

CORAM : M. S. KARNIK, J.

DATE : NOVEMBER 9, 2023

ORAL JUDGMENT :

1. Heard learned counsel for the applicant, learned APP for the State and Shri Mundargi, learned Amicus Curiae.

2. This is an application for bail by the applicant in connection with FIR No. 326 of 2018 dated 22/06/2018 registered with Malad police station which later came to be numbered as FIR No. 36 of 2018 of DCB CID for offences under sections 387 and 120B of the Indian Penal Code,

1860 ('IPC', for short) along with sections 3, 25 read with 37(1)(a) of the Arms Act, 1959 and section 3(4) of the Maharashtra Control of Organized Crime Act, 1999 ('MCOC', for short) in which the charge-sheet came to be filed and it culminated into MCOC Special Case No. 2 of 2019.

The facts in nutshell are as under :

3. The applicant is the accused no. 3. The applicant came to be arrested on 01/12/2018. There are in all 5 accused. As many as 7 accused are still absconding. I am not referring to the accusations in detail, suffice it to mention that the same are not only serious but also can be regarded as transnational crime.

4. The applicant on 18/02/2020 made an application under section 307 read with section 306 of the Code of Criminal Procedure, 1973 ('CrPC', for short) seeking pardon of the applicant before the Special Court, Greater Mumbai ('Special Court', for short). The application seeking pardon came to be allowed. The applicant's statement was recorded under section 9(3) of the MCOC read with sections 307 and 306 of CrPC. After the charges were framed by

the Special Court, recording of the evidence of the witnesses commenced. The applicant's evidence came to be recorded as P.W.-1 between the period from 20/08/2022 and 03/02/2023.

5. An application was made on 03/02/2023 by some of the accused persons at Exhibit 196 before the Special Court praying that the pardon which has been granted to the applicant be revoked. The said application at Exhibit 196 was rejected on 28/03/2023 by the Special Court. The order dated 28/03/2023 was challenged by the accused no. 4 in this Court which challenge was turned down by this Court on 26/06/2023. Though nothing much would turn on the said facts mentioned in this particular paragraph in the context of this application, however, it was necessary to touch upon this aspect as Mr. Nitin Sejpal, learned counsel for the accused nos. 2 and 4 tried to intervene thereby registering his opposition to this application for bail. It is one of the contention of Shri Sejpal that the Courts have wrongly tendered pardon to the present applicant. At the outset, I may indicate that I have not permitted Shri Sejpal

to intervene and make his submissions at length as requested. It was indicated by me that in the facts of the present case, the accused nos. 2 and 4 through Mr. Sejpal may assist learned APP representing the prosecution and nothing more. In my opinion, the accused nos. 2 and 4 have no locus to oppose this application for bail filed by the applicant who is granted tender of pardon and has already deposed in favour of the prosecution. In respect of any other grievance concerning the accused Nos. 2 and 4, they may approach the Special Court by filing appropriate application which can be considered in accordance with law.

6. The applicant preferred an application for bail before the Special Court which came to be rejected by an order dated 30/06/2023. Hence, this application for bail is filed. No doubt, the accusations even against the applicant are very serious. For the reasons recorded, the Special Court tendered pardon to the applicant who is the accused no.3. The said pardon has been confirmed by this Court. It is now the contention of the learned counsel for the applicant that he should be enlarged on bail. I have cursorily glanced

through the deposition of the present applicant before the Special Court as P.W.-1. There is no dispute that the applicant has deposed in terms of section 306 thereby fulfilled the conditions stipulated. Admittedly, there is no application filed by the Special Public Prosecutor under section 308 of CrPC indicating that the conditions in the matter of tender of pardon are not complied with by the applicant. On the contrary, on instructions, it is accepted by learned APP that the applicant has fulfilled the conditions of pardon over which the prosecution has no grievance.

7. Learned APP opposed the application for bail on two counts. My attention is invited to section 306 of CrPC. Relying on sub-section 4(b) of section 306 of CrPC, learned APP submitted that the applicant has to be detained in custody until the termination of the trial in view of the mandate of section 306. It is further submitted that having regard to the nature of the accusations and in view of the fact that the applicant has deposed in favour of the prosecution, there is a threat to his life in prison as well as outside the prison. She submitted that it is in the interest

of the applicant, having regard to his safety concerns, that the applicant should remain in custody until the termination of the trial.

8. The question is whether the applicant in the facts and circumstances of this case can be enlarged on bail in the face of sub-section 4(b) of section 306 of CrPC., though he has complied with the conditions of pardon.

9. To answer this question, it is important to note the relevant provisions in respect of tender of pardon to accomplice. Section 306 provides for tender of pardon to accomplice which reads thus :

> "**306. Tender of pardon to accomplice**-- (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.
> (2) This section applies to--
> (a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record--

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)--

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case--

(a) commit it for trial--

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself. "

10. Section 307 is a power to direct tender of pardon at any time after commitment of a case but before judgment

is passed. The same reads thus :

> "**307.Power to direct tender of pardon--** At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

11. Section 308 which may not be of much relevance to the controversy involved in the present case, nevertheless, for a better and proper understanding of the issue involved, needs to be reproduced which reads thus:

> "**308. Trial of person not complying with conditions of pardon.** – (1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:
> Provided that such person shall not be tried jointly with any of the other accused:
> Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.
> (2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section

> (4) of section 306 may be given in evidence against him at such trial.
> (3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with.
> (4) At such trial, the Court shall--
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> (a) if it is a Court of Session, before the charge is read out and explained to the accused;
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> (b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.
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> (5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

12. A reading of the aforesaid provisions indicate that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which section 306 applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a

pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

13. In the present matter, the case was already committed to the Special Court. It is the Special Court which tendered the pardon to the applicant under section 307 of the CrPC. The prosecution is satisfied that the applicant has made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence in the commission thereof. Though tender of pardon is under section 307, in view of the stipulation contained in this provision, the power to direct tender of pardon is on the same condition as provided in section 306.

14. In terms of sub-section 4(a) of section 306, the applicant- accused no.3 was examined as a prosecution witness before the Special Court as P.W.-1. The applicant has fulfilled the condition of his making a full and true disclosure of the whole of the circumstances within his

knowledge relative to the offence. The applicant is not on bail and therefore, in terms of the mandate of sub-section 4(b) of the section 306, the applicant shall have to be detained in custody until the termination of the trial. On a plain reading of sub-section 4(b) of section 306, the applicant will have to be detained in custody until the termination of the trial.

15. Prior to the coming into force of the CrPC, 1973, the CrPC 1898 ("old code" for short) provided for tender of pardon to accomplice in section 337 under Chapter XXIV. The provisions of sub-section 3 of section 337 of the old Code is more or less similar to sub-section 4(b) of section 306 of the CrPC.

16. Section 308 deals with the provisions regarding the trial of person not complying with conditions of pardon. The present is not a case where the applicant has not complied with the conditions of pardon and therefore to such extent section 308 has no application. However, to appreciate the issue involved, it would nonetheless be useful to refer to the provisions of section 308 which applies in a case where the

person has not complied with the condition on which the tender was made. If the Public Prosecutor certifies in his opinion that such person who has accepted the tender of pardon, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence. Sub-section 3 of section 308 provides that at such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with. The procedure in such a case and consequences thereof is provided for under sub-sections 4 and 5 of section 308. At such trial, the Court shall ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made. Sub-section 5 provides that if the accused does so plead, the

Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

17. Coming back to the facts of the present case, the accused has complied with the conditions of pardon. The accused has deposed in favour of the prosecution. Having complied with the conditions and deposed in favour of the prosecution, it is only logical in such eventuality that the applicant must be enlarged on bail as he is no more an accused but a prosecution witness who has complied with the conditions upon such tender was made. Sub-section 4 of section 306, as indicated earlier, provides that every person accepting a tender of pardon shall unless he is already on bail, be detained in custody until the termination of the trial. The reason why such a person who is now a prosecution witness needs to be detained in custody till the termination of the trial is discussed in the later part of this

judgment.

18. Once such a person has been examined as a witness and fulfilled the conditions of the tender, despite the provisions of sub-section 4 of section 306, if at all such a person is to remain in custody for an indefinite period till the conclusion of trial, the continued detention in my opinion, will have to be considered on the touchstone of Article 21 of the Constitution of India. The provisions of of sub-section 4(b) of section 306 will have to be harmoniously construed with the guarantee of personal liberty enshrined by Article 21 of the Constitution of India. In the present case, more than 50 witnesses are yet to be examined. The trial definitely is going to take a long time to conclude. If even after complying with the conditions of pardon upon his examination as a prosecution witness, if such a person is to continue to remain incarcerated indefinitely, this would be a travesty of justice. In a case of the present nature where the accusations are serious, as there exists threat to the life of the applicant while in custody as well as if enlarged on bail, despite which the

applicant has still come forward to accept a tender of pardon, in such situation, the applicant's plea for his liberty will have to be necessarily tested on the anvil of the rights conferred by Article 21 of the Constitution of India. The object and intendment provided by sub-section 4 of section 306 of detaining the applicant in custody till the termination of the trial will have to be harmonised with his rights conferred by Article 21.

19. It is a well established principle evolved by the Supreme Court that an attempt has to be made to strike a balance between the rights of the accused and the rights of the prosecution to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the rights of the accused guaranteed under Part III of our Constitution have to be well protected. In my opinion, now that the applicant has complied with the conditions and has been examined as a prosecution witness before the Special Court, the fetters of the applicant's continuing in detention until the termination of the trial needs to be watered down. Even an accused facing serious charges has a right to

speedy trial and can seek his release on bail on the ground of long incarceration in the light of the principles laid down by the Hon'ble Supreme Court in the case of [1]**Union of India Vs. K.A.Najeeb**. The applicant is no more an accused but he is a prosecution witness. The applicant cannot be placed in a situation which is worse off than the accused who has a right to a speedy trial and may apply for bail on the ground of long incarceration, citing safety concerns of the applicant for his continued detention. The applicant was arrested on 01/12/2018. Howsoever grave the accusations against the applicant may be, the same is inconsequential in view of the tender of pardon that is granted. Looking at the matter from any angle, when the applicant is asking for his liberty, his continued detention when it is obvious that the trial is likely to take a long time to conclude, would be absolute travesty of justice. The applicant cannot be deprived of his liberty in a case of this nature where he has fully complied with the conditions of pardon, with the applicant's period of detention which is now almost 5 years.

1 2021 (3) SCC 713.

20. The dominant object of requiring an approver to be detained in custody until termination of trial is explained by the Supreme Court in [2]**Suresh Chandra Bahri Vs. State of Bihar,** paragraph 34 reads thus:

> "34. As regards the contention that the trial was vitiated by reason of the approver Ram Sagar being released on bail contrary to the provisions contained in clause (b) of sub-section (4) of Section 306 of the Code. It may be pointed out that Ram Sagar after he was granted pardon by the learned Magistrate by his order dated 9-1-1985, was not granted bail either by the committing Magistrate or by the learned Additional Judicial Commissioner to whose court the case was committed for trial. The approver Ram Sagar was, however, granted bail by an order passed by the High Court of Patna, Ranchi Bench in Criminal Miscellaneous Case No. 4735 of 1986 in pursuance of which he was released on bail on 21-1-1987 while he was already examined as a witness by the committing Magistrate on 30-1-1986 and 31-1-1986 and his statement in sessions trial was also recorded from 6-9-1986 to 19-11-1986. It is no doubt true that clause (b) of Section 306(4) directs that the approver shall not be set at liberty till the termination of the trial against the accused persons and the detention of the approver in custody must end with the trial. The dominant object of requiring an approver to be detained in custody until the termination of the trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from the possible indignation, rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon and released from custody. It is for these reasons that clause (b) of Section 306(4) casts a duty on the court to keep the approver under detention till the termination of the trial and thus the provisions are based on statutory principles of public policy and public interest,

2 1995 Supp (1) Supreme Court Cases 80

> violation of which could not be tolerated. But one thing is clear that the release of an approver on bail may be illegal which can be set aside by a superior court, but such a release would not have any affect on the validity of the pardon once validly granted to an approver. In these circumstances even though the approver was not granted any bail by the committal Magistrate or by the trial Judge yet his release by the High Court would not in any way affect the validity of the pardon granted to the approver Ram Sagar."

21. No doubt, the considerations of an accused seeking bail will be different from an accomplice seeking bail who has been granted pardon under Section 306. As held by Their Lordships in Suresh Chandra Bahri (supra), the dominant object of requiring an approver to be detained in custody until the termination of the trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from possible indignation and rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon and released from custody. In the present case, the applicant even in custody faces threats from the inmates and therefore, has been further insulated from other

prisoners. The applicant through his counsel prays that he wants his liberty and should be enlarged on bail as the trial is not going to conclude any time soon. It is important to notice the observations of the Supreme Court in Union of India Vs. K.A. Najeeb (supra) in paragraphs 15 and 17 which reads thus :

> "15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India. it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However. owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time. the courts would ordinarily be obligated to enlarge them on bail
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> 17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a

> substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the d UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."
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> (emphasis mine)

22. The matter can be looked at from another angle. Sub-section 4 of section 306 is part of the CrPC since it came into force on the 1st day of April 1974. Even prior thereto a similar provision existed in the old code of 1898. The Supreme Court has already explained the dominant object of requiring an approver to be detained in custody until the termination of the trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from the possible indignation, rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon and released from custody.

23. In the present case, the applicant has applied for bail after he has deposed in favour of the prosecution and complied with the conditions of pardon. The contingency of

the temptation of saving his one time friends and companions after he has been granted pardon and released from custody does not arise now. Though in the present case, section 308 will not apply, it is material to note that even in respect of the situation where the public prosecutor certifies that such a person has not complied with the condition on which the tender was made, the concerned Court has to ask the accused whether he pleads that he has complied with the condition on which the tender of pardon was made. Sub-section 5 of section 308 provides that if the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

24. The question of recording such a plea or finding out whether the applicant has complied with the conditions of pardon in terms of section 308 does not arise in the present case. If the applicant is to be detained in custody in terms

of sub-section 4 of section 306, the applicant will have to remain incarcerated for an unduly long period of time as the trial is unlikely to conclude in the near future as 50 more witnesses are yet to be examined.

25. The Supreme Court in [3]**Mahender Chawla and Ors. Vs. Union of India and Ors.** made some extremely significant observations regarding the importance of the witnesses, particularly in criminal trials while referring to what Bentham stated more than 150 years ago that "witnesses are eyes and ears of justice". The Supreme Court was concerned with the existing ground reality which was affecting criminal trials as a result of the witnesses turning hostile. It was observed that the conditions of witnesses in Indian Legal System can be termed as "Pathetic". Their Lordships took notice of the many threats faced by the witnesses at various stages of the investigation and then during the trial proceeding. Further, apart from facing life threatening intimidation to himself and to his relatives, he may have to face the trauma of attending the court regularly. It is in this context, it was observed that because

3 Writ Petition (Criminal) No. 156 of 2016

of the lack of Witness Protection Programme in India and the treatment that is meted out to them, there is a tendency of reluctance in coming forward and making statement during the investigation and/or testify in courts. These witnesses neither have any legal remedy nor do they get suitably treated.

26. In paragraph Nos. 4 to 8, the Supreme Court observed thus:

> "4) In Swaran Singh vs. State of Punjab [(2000) 5 SCC 68 at 678], this Court speaking through Wadhwa, J. expressed view on conditions of witnesses by stating that:
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> "The witnesses are harassed a lot. They come from distant places and see the case is adjourned. They have to attend the court many times on their own. It has become routine that case is adjourned till the witness is tired and will stop coming to court. In this process lawyers also play an important role. Sometimes witness is threatened, maimed, or even bribed. There is no protection to the witnesses. By adjourning the case the court also becomes a party to such miscarriage of justice. The witness is not given respect by the court. They are pulled out of the court room by the peon. After waiting for the whole day he sees the matter being adjourned. There is no proper place for him to sit and drink a glass of water. When he appears, he is subjected to prolong stretched examinations and cross examinations. For these reasons persons avoid becoming a witness and because of this administration of justice are hampered. The witnesses are not paid money within time. The High Courts must be vigilant in these matters and should avoid harassment in these matters by subordinate staff. The witnesses should be paid immediately irrespective of the fact whether he examines or the matter is adjourned. The

time has come now that all courts should be linked with each other through computer. The Bar Council of India has to play important role in this process to put the criminal justice system on track. Though the trial judge is aware that witness is telling lie still he is not ready to file complaint against such witness because he is required to sign the same. There is need to amend section 340(3)(b) of Cr.P.C."

5) It hardly needs to be emphasised that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorize or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective measure to ensure the safety of these witnesses, commonly known as 'witness protection'.

6) Over the last many years criminal justice system in this country has been witness to traumatic experience where witnesses turn hostile. This has been happening very frequently. There may be many causes for this sordid phenomena.

7) In Ramesh and Others vs. State of Haryana [(2017) 1 SCC 529], this Court had indicated some of the reasons which make witnesses turn hostile, as can be discerned from the following discussion.

"40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In Krishna Mochi v. State of Bihar [Krishna Mochi v. State of Bihar, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220] , this Court observed as under: (SCC p. 104, para 31)

"31. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in

public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

"41. Likewise, in Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court highlighted the problem with the following observations: (SCC pp. 396-98, paras 40-41)

"40. "Witnesses" as Bentham said: "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface.… Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.… There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and that the trial is not reduced to a

mockery. …

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

"42. Likewise, in Sakshi v. Union of India [Sakshi v. Union of India, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645] , the menace of witnesses turning hostile was again described in the following words: (SCC pp. 544-45, para 32)

"32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to

undergo the trauma of seeing the body or the face of the accused. Often the questions put in crossexamination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC."

43. In State v. Sanjeev Nanda [State v. Sanjeev Nanda, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Civ) 899] , the Court felt constrained in reiterating the growing disturbing trend: (SCC pp. 486-87, paras 99-101)

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in State of U.P. v. Ramesh Prasad Misra [State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence

may be accepted. In K. Anbazhaganv. Supt. of Police [K. Anbazhagan v. Supt. of Police, (2004) 3 SCC 767 : 2004 SCC (Cri) 882] , this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [Sanjeev Nanda v. State, 2009 SCC OnLine Del 2039 : (2009) 160 DLT 775] and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in Manu Sharma v. State (NCT of Delhi) [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:
(i) Threat/Intimidation.
(ii) Inducement by various means.
(iii) Use of muscle and money power by the accused.

(iv) Use of stock witnesses.
(v) Protracted trials.
(vi) Hassles faced by the witnesses during investigation and trial.
(vii) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "witnesses are the eyes and ears of justice". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah case [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

"11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. … Time has come for a comprehensive law being enacted

for protection of the witness and members of his family."

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report [Report on "witness identity protection and witness protection programmes".] , as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."

8) All this has created problems of low convictions in India. This has serious repercussions on the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender. In this whole process, protection of witnesses assumes significance to enable them to depose fearlessly and truthfully. That would also ensure fair trial as well, which is another concomitant of the rule of law."

27. Having regard to the aforesaid observations, if at all anything, it is the applicant who may be justified in asking for protection but his detention cannot be indefinitely continued at the cost of his liberty. The Maharashtra Witness Protection and Security Act, 2017 (for short "Witness Protection Act") was enacted to provide the protection to the witnesses in criminal trials, their relatives in relation to serious offences and for matters connected therewith or incidental thereto. Section 9 of the said Act provides that during the trial, upon the application made by a witness or by the Public Prosecutor or Additional Public Prosecutor of the case, if the Court on its own motion is satisfied that the lives of the witnesses in the case are in danger may, direct the District Committee to provide protection to the witnesses. The State of Maharashtra has issued a Government Resolution dated 04/01/2018 providing for the procedure in respect of the grant of protection to those persons whose life is in danger. The said Government Resolution apart from various categories also provides that those persons who have a criminal

background can also be considered in an appropriate case for grant of police protection. There is then a Government Resolution of 22/06/2018 issued under the Witness Protection Act constituting State Witness Protection Committee and District Witness Protection Committee for every district. In such circumstances, if the applicant is enlarged on bail, it is always open for him to make an appropriate application to the Special Court for protection, if he feels that his life is in danger, which application shall obviously be considered in terms of the Witness Protection Act.

28. There was no legislation in place for witness protection when the CrPC was brought into force. Now with the Witness Protection Act in place, the dominant object of the applicant's detention in custody until the termination of trial is to a large extent obliterated more so when the applicant has complied with the conditions of the tender. Having regard to the facts and circumstances of the present case, if the prosecution apprehends danger to the life of the applicant if he is enlarged on bail, it is incumbent on the

prosecution to undertake the exercise of finding out the threat perception and ensure that adequate measures are provided for the protection of the applicant.

29. I am, therefore, of the view that with the Witness Protection Act in place, when the applicant himself is a prosecution witness and an important one at that, it is the responsibility of the State to ensure that the applicant is fully protected in accordance with the Witness Protection Act. It is in this view of the matter, that sub-section 4 of section 306 can be harmoniously construed by achieving the balance of personal liberty of the applicant enshrined in Article 21 of the Constitution of India without in any manner tinkering with the object of sub-section 4 of section 306. In my humble opinion, detaining the applicant for an indefinite period when there is nothing on record to indicate when the trial will be terminated is not only be unfair to the applicant but will be deterrent to those witnesses seeking tender of pardon in future. This cannot be the object of sub-section 4 of section 306, more so when legislation like the Witness Protection Act is now in place. Learned counsel for the

applicant emphasized that the applicant does not want any protection, nonetheless in the facts of the present case, the decision can be best left to the prosecution and the concerned agencies to take an informed decision of providing protection to the applicant or otherwise in consonance with the procedure prescribed.

30. In my considered view, the application deserves to be allowed, and accordingly the applicant can be enlarged on bail on the following conditions.

O R D E R

(a) The application is allowed.

(b) The applicant- Danish Ali Jamaluddin Ahmed in connection with C.R. No. 326 of 2018 registered with Malad police station shall be released on bail on his furnishing P.R. Bond of Rs.1,00,000/- with one or more local sureties in the like amount.

(c) The applicant shall be available for the trial. It is open for the trial Court to decide the dates on which the applicant shall attend the trial.

(d) 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. The applicant shall not tamper with evidence.

(e) On being released on bail, the applicant shall furnish his contact details and residential address to the trial Court which shall be kept in a sealed cover.

(f) The passport of the applicant is already with the investigating agency which shall remain with the agency. The applicant shall not leave the country without permission of the trial Court.

(g) It is open for the applicant to apply for protection which application shall be considered in accordance with law.

31. The application is disposed of.

32. I appreciate the valuable assistance rendered by Mr. Niranjan Mundargi, who appeared as an Amicus Curiae in this proceeding.

33. I find it appropriate that the applicant's actual release be made effective after 6 weeks from the date of uploading of this judgment to enable the applicant to apply for protection if he so desires or for enabling the prosecution to consider such measures for his protection in accordance with law.

(M. S. KARNIK, J.)