

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 297 OF 2017

Madhukar s/o. Babu Shinde
age : 19 years, Occu: Agriculture,
r/o. Lakhangaon, Tq. Washi,
District Osmanabad. ...Appellant

versus

1. The State of Maharashtra
through District Superintendent of Police,
Osmanabad.
2. The Sub-Divisional Police Officer,
Sub-Division-Kalam,
Dist. Osmanabad.
3. The Police Inspector,
Yarmala Police Station,
Tq. Kalam, Dist. Osmanabad. ...Respondents

.....
Mr. S. A. Gaikwad, Advocate for the Appellant.
Mr. S.W. Munde, A.P.P. for Respondent-State.
.....

**CORAM : S. S. SHINDE AND
V. K. JADHAV, JJ.**

**RESERVED ON : 05th JULY, 2018
PRONOUNCED ON : 31st JULY, 2018**

JUDGMENT (PER V.K. JADHAV, J.) :-

. Heard.

1. **Admit.** With the consent of learned counsel for the respective parties, the Appeal is taken up for final hearing.

2. This appeal has been preferred by the appellant/accused with the following prayers:

- b. The impugned order passed below Exh.62 in Special M.C.O.C.A. Case no. 4/2014 passed by the Special M.C.O.C.A. Court Aurangabad on 6-6-2017 rejecting the application of the appellant for discharge may kindly be quashed and set aside.
- c. The application Exh.62 filed before the Special M.C.O.C.A. Court Aurangabad in Special M.C.O.C.A. Case no.4/2014 for discharge may kindly be allowed and the appellant may kindly be discharged from Special M.C.O.C.A. Case no.4/2014 in crime no.39/2014 (Special M.C.O.C.A. Case no.4/2014) for the offence u/s 396, 397, 364, 412, 201 of I.P.C. r/w 3(1) (i), (ii), 3(2), 3(4), 3(5) of M.C.O.C.A. Registered with Yarmala police station, Ta. Kalam Dist. Osmanabad.
- d. During the pendency of the appeal, the trial of the Special M.C.O.C.A. case no. 4/2014 pending before the Special M.C.O.C.A. Court Aurangabad may kindly be stayed.

3. Brief facts giving rise to the present appeal are as follows:

- a. The complainant Dinesh Kumar Ganeshan lodged a report at Yarmala Police Station, District Osmanabad on 02.05.2014 stating

therein that he was proceeding in a truck alongwith his assistant driver Punrasu Kannan, from Salem (Tamil Nadu) to Bhilwada (Rajasthan) for delivering 324 bags of sago (sabudana). During the journey, on 01.05.2014 at about 2.00 to 2.30 a.m., while they were 8 kms. ahead of village Yedshi, one coffee coloured Bolero vehicle overtook their truck and made them to stop it by parking their Bolero vehicle in front the truck. Four persons alighted from the said vehicle holding wooden rods in their hands and entered into the truck cabin, assaulted the applicant and his assistant driver and took control of the truck. It is further alleged in the F.I.R. that the four accused persons took the truck towards Kalam while the Bolero vehicle was following them. The accused persons stopped the truck 10 to 12 kms. ahead of Yarmala square, snatched the mobile phones and cash amount of Rs.15,000/- from the complainant and his assistant driver by threatening them, took the complainant and his assistant driver into their Bolero car and threw them in an empty well situated at the backside of Yedeshwari temple. On the next day at about 11.00 am to 12.00 noon, when the complainant gained consciousness, he found his assistant driver missing. The complainant got out of the empty well and lodged report with Yarmala Police Station where the offence under Sections 396, 397, 364, 412 and 201 of I.P.C. came to be registered.

b. The present appellant/accused came to be arrested in connection with the aforesaid crime on 05.05.2014. On being produced before the learned Judicial Magistrate, First Class, Kalam, the appellant was remanded to P.C.R up to 17.05.2014 and thereafter he was remanded to M.C.R. The Special Inspector General of Police, Aurangabad, vide order dated 25.07.2014, accorded sanction under Section 23(1)(a) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as “MCOCA” for brevity) to invoke the provisions of the said Act in the aforesaid crime. The appellant filed application Exhibit 62 on 06.01.2017 before the Special Judge, MCOC Act, Aurangabad for seeking discharge under Section 227 of the Criminal Procedure Code. The said application Exhibit 62 came to be rejected by the Special Judge on 06.06.2017. Hence this appeal under Section 12 of MCOCA.

4. The learned counsel for the appellant/accused submits that the legal aspect of the case that, not a single charge sheet was pending against the appellant on the date of the alleged offence or on the date when the provisions of MCOCA were invoked, has not been appreciated by the learned Special Judge. Application of the provisions of MCOCA in the present case is therefore bad in law. At the time of the alleged offence, the appellant was only 19 years old and having no

criminal antecedents. As such, he has no nexus with the previous crimes alleged to have been committed by the accused persons mentioned at serial nos. 1, 2 and 4 to 9 in the sanction order dated 25.07.2014. It can be seen from the sanction order itself that there is no organized crime syndicate as such. There is not a single charge sheet pending on the date of invoking the provisions of MCOCA against ten out of eighteen accused mentioned in the sanction order.

5. The learned counsel further submits that during interrogation, nothing has been recovered or discovered at the instance of the present appellant. He has been falsely implicated in the aforesaid crime only on the basis of the confessional statement of the co-accused Govind Venkat Pawar which, if kept aside, there is nothing on record to connect the present appellant with the alleged offence. Even the identification parade, which was conducted after the photograph of the appellant was published on 08.06.2014 in daily news paper 'Police Times', cannot be considered as reliable piece of evidence. No witness has come forward and stated that the present appellant is a member of the organized crime syndicate operated by the accused persons and that they have committed organized crime during last ten years. There is no organized crime syndicate in existence as projected by the prosecution in the charge sheet. Even if the charge sheet is accepted as

it is, no offence under MCOCA is made out against the appellant. Thus, the learned counsel for the appellant/accused, by relying on the above grounds and also a decision of the Supreme Court in the case of ***Mahipal Singh vs. C.B.I. and Another***, reported in ***AIR 2014 SC 2660***, submits that the appeal be allowed.

6. The learned APP has strongly opposed the appeal by contending that there is sufficient evidence in the form of confessional statement of the co-accused recorded under Section 18 of MCOCA and the evidence of identification parade. The said confessional statement shows involvement of the appellant/accused in the offence and his role cannot be separated from the other accused. There is direct evidence against the present appellant corroborated by the other evidence on record. There are two cases pending against him in different courts. The competent authority has properly granted approval and sanction order. Thus, he submits that the appeal filed by the appellant is misconceived and not tenable in the eyes of law and requires to be rejected.

7. We have carefully considered the submissions advanced by learned counsel for the appellant/accused and the learned APP for respondent State. With their able assistance, we have perused the

appeal memo, grounds taken therein and the annexures thereto. We have also gone through the record and proceedings.

8. The appellant/accused has filed application Exhibit 62 under Section 227 of Criminal Procedure Code read with the provisions of Section 11 of MCOCA seeking discharge in Special Case No. 4 of 2014 on the ground that there is not a single charge sheet pending against him as on the date of the alleged offence or as on the date on which the provisions of MCOCA were invoked. Further, the appellant/accused is seeking discharge under the offence of IPC on the ground that he has been implicated in the crime falsely and only on the basis of confessional statement of the co-accused Govind Pawar. There is no evidence at all against the appellant/accused so as to connect him with the alleged crime.

9. On careful perusal of the sanction order issued by the Special Inspector General of Police, it appears that he has considered the overall effect of filing of charge sheets against various accused persons by treating the present appellant/accused as an active member of the gang consisting of those accused persons. The Special Inspector General of Police has thus drawn the conclusion on its basis about the continuing unlawful activities of the appellant/accused as a member of

an organized crime syndicate as defined under Section 2 of MCOCA and accordingly granted sanction for prosecution under Sections 3(1) (i), (ii), 3(2), 3(4) and 3(5) of MCOCA. Section 2(1)(d) and 2(1)(e) of MCOCA are reproduced herein below:

“2(1)(d) “continuing unlawful activity” means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that Court has taken cognizance of such offence;

2(1)(e) “organised crime” means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

10. It is thus clear from a plain reading of the aforesaid provisions that to come within the mischief of continuing unlawful activity, it is required to be established that the accused is involved in activities

prohibited by law which are cognizable offences punishable with imprisonment of three years or more and in respect thereof, more than one charge sheets have been filed against such person before a competent court within the preceding period of ten years and that court has taken cognizance of such offence.

11. In the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of MCOCA have not been satisfied. In this case, the sanction order under Section 23(2) of MCOCA is a classic example of non application of mind by the Special Inspector General of Police. He has considered various crimes registered against in all 18 accused persons separately, including the present appellant/accused. The special Inspector General of Police has considered the overall effect of the cases registered against all the 18 persons, though separately, as one gang and by treating the appellant/accused as a member of the said gang, considered the charge sheets filed against those persons separately under various provisions. The Special Inspector General of Police has, thus, granted sanction under Section 23 of MCOCA erroneously. The learned Special Judge has treated the present case as second case by giving reference to one another pending case bearing C.R. No.58 of 2014. However, in view of the observations made by the learned Special Judge in para 10 of the

impugned order, it appears that in both crimes, i.e. C.R.No. 39 of 2014 and C.R. No. 58 of 2014, charge sheets were not submitted as on the date of issuance of sanction by the Special Inspector General of Police.

12. In the case ***Mahipal Singh*** (supra) reported in ***AIR 2014 SC 2660***, relief upon by learned counsel for the appellant, in para nos. 9, 10 and 11, the Supreme Court has made the following observations:

“9. From a plain reading of the aforesaid provision, it is evident that to come within the mischief of continuing unlawful activity, it is required to be established that the accused is involved in activities prohibited by law which are cognizable offence punishable with imprisonment of three years or more and in respect thereof, more than one chargesheets have been filed against such person before a competent court within the preceding period of ten years and that court has taken cognizance of such offence.

10. We have given our most anxious consideration to the rival submissions and in the light of what we have observed above, the submissions advanced by Mr. Subramaniam commend us. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the constitution of India permits conviction of a person for an offence for violation of law in force at the time of

commission of the act charged as an offence. In the case in hand, examinations alleged to have been rigged had taken place in January, 2010, June, 2010, November, 2010 and January, 2011 and the date on which the first information reports were registered, more than one chargesheets were not filed against the accused for the offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases. As observed earlier, for punishment for offence of organised rime under Section 3 of MCOCA, the accused is required to be involved in continuing unlawful activity which inter alia provides that more than one chargesheets have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence. Therefore, in the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of MCOCA have not been satisfied. We are conscious of the fact that there may be a case in which on the date of registration of the case, one may not be aware of the fact of chargesheet and cognizance being taken in more than one case in respect of the offence of specified nature within the preceding period of ten years, but during the course of investigation, if it transpires that such chargesheets and cognizance have been taken, Section 3 of the MCOCA can be invoked. There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in our opinion, in such a case the date on which the offence comes to the notice of the investigating

agency, the ingredients constituting the offence have to be satisfied. In our opinion, an act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. We may hasten to add here that there may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected. Submission of chargesheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known.

11. Now we proceed to apply the principle aforesaid to the facts of the present case. We find that on the date the offence was committed or came to be known, one of the ingredients of the offence, i.e. submission of chargesheet and cognizance of offence of specified nature in more than one case within the preceding period of ten years, has not been satisfied. Therefore, we have no other option than to hold that the accused cannot be prosecuted for the offence under Section 3 of MCOCA.”

13. In view of the ratio laid down by the Supreme Court and considering the facts of the present case as discussed above in detail, we are of considered opinion that one of the ingredients of the offence as on the date of commission of the offence, i.e. submission of charge sheet and cognizance of offence of specified nature in more than one case within the preceding period of ten years, has not been satisfied. In view of the same, the appellant/accused cannot be prosecuted for the offence under Section 3 of MCOCA.

14. In the facts and circumstances of the present case, however, we find *prima facie* case against the appellant/accused for the offence punishable under Sections 396, 397, 364, 412 and 201 of IPC. The learned Special Judge, MCOC Act, Aurangabad ought to have exercised powers under Section 11 of MCOCA to transfer the case to the regular court for trial against the appellant/accused for the offence punishable under Sections 396, 397, 364, 412 and 201 of IPC. Accordingly, we deem it appropriate to transfer the case of the appellant/accused to the regular court for trial of the offence punishable under Sections 396, 397, 364, 412 and 201 of IPC in accordance with law. Hence the following order:

ORDER

- I. The criminal appeal is hereby partly allowed.
- II. The impugned order dated 06.06.2017 passed below Exhibit 62 in Special Case No. 4 of 2014 by the Special Judge, MCOC Act, Aurangabad is hereby quashed and set aside.
- III. The application Exhibit 62 filed before the Special Judge, MCOC Act, Aurangabad in Special Case No. 4 of 2014 is hereby partly allowed and the appellant/accused Madhukar s/o. Babu Shinde stands discharged from the Special Case No. 4 of 2014 in C.R.No. I/39 of 2014 for the offences punishable under Sections 3(1) (i), (ii), 3(2), 3(4), 3(5) of MCOCA.
- IV. We direct the transfer of the case for trial of the offence punishable under Sections 396, 397, 364, 412 and 201 of IPC to the court in Osmanabad District having jurisdiction and the court, to which the case is transferred, may proceed with trial of the offence as if it has taken cognizance of the offence.
- V. The appeal is disposed of accordingly.

(V. K. JADHAV, J.)

(S. S. SHINDE, J.)