

\$~1.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 23.07.2018

%

+ **W.P.(CRL) 2093/2018 & CrI.M.B. No. 1123/2018, CrI.M.A. No. 12670/2018**

MOHD. IRFAN

..... Petitioner

Through: Mr. Ajay Garg and Ms. Shilpa
Sharma, Advocates.

versus

STATE OF NCT OF DELHI & ANR

..... Respondents

Through: Mr. Rahul Mehra, Standing
Counsel, GNCTD with Mr.
Chaitanya Gosain, Adv for R-1
Mr. Anil Soni, CGSC with Mr.
Abhinav Tyagi, Advocate for
R-2/UOI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I. S. MEHTA

VIPIN SANGHI, J. (ORAL)

1. The Petitioner has preferred the present writ petition to challenge the constitutionality and vires of section 3(1)(ii) of the Maharashtra Control of Organized Crime Act, 1999 (MCOCA, for short) which was extended to National Capital Territory of Delhi by notification dated 02.01.2002; and to seek a writ of certiorari for quashing of the order on sentence dated 11.04.2018 passed by Ld. ASJ-03 (South), Saket Court,

in SC No. 6989/2016, in so far as it has imposed a fine of rupees five lakhs with default imprisonment of 2 years under section 3 (1)(ii) of the MCOCA.

2. On 22.04.2010, FIR No. 111/2010 was registered at PS Vasant Kunj, Delhi against the petitioner and others under section 3 of the MCOCA. Post investigation, charge sheet was filed on 28.07.2010 against the petitioner herein and other accused persons for the offences under Section 3 of the MCOCA. Charges were framed against the petitioner and other accused Baldev Raj, Rafiq and Shabhuddin u/s 3(1) of the MCOCA, and against accused Munesh Kumar and Paras u/s 3(2) of the MCOCA vide order dated 5.12.2011. Petitioner pleaded “not guilty” and thus the case went to trial. The Ld. ASJ, vide judgment dated 28.03.2018 held the Petitioner and accused Irfan, Baldev, Rafiq and Shabhuddin guilty for the offence punishable u/s 3(1)(ii) of the MCOCA, while accused Munesh and Paras were acquitted. Vide order on sentence dated 11.04.2018, the petitioner was sentenced to imprisonment for the period already undergone (8 years and 4 months), along with fine of Rs. Five lakhs and, in case of default of payment of fine, to undergo simple imprisonment for two years. The petitioner states that he continues to languish in jail as he is not in a position to deposit the heavy fine of Rs.Five Lakhs upon him.

3. Before we proceed further, and to be able to appreciate the submission of the petitioner, we may reproduce herein below Section 3 MCOCA, which reads as follows:

3. Punishment for organised crime-

(1) Whoever commits an offence of organised crime shall,

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be punishable, With imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived of obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds

shall be punishable with a term which, shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs”. (emphasis supplied)

4. Ld. Counsel for Petitioner submits that Section 3 (1)(ii) of the MCOCA, in so far as it prescribes mandatory imposition of minimum fine of rupees five lakh, is ultra vires of the Constitution of India, as it violates Article 14 and 21 of the Constitution, as well as the principle of proportionality - which flows therefrom. Ld. counsel submits that clause (i) of Section 3 (1) deals with a more grave and serious offence, when compared to the offence dealt with in clause (ii). While clause (i) prescribes the punishment for commission of an offence of organized crime - which has resulted in the death of any person, clause (ii) deals with other cases of commission of organized crime. Yet, the minimum fine prescribed in respect of other offences of organized crime is Rs. 5 lakhs, whereas, in respect of the offence of organized crime which has resulted in the death of any person, the minimum fine is only Rs.1 lakhs. Thus, for the more severe and grave offence dealt with in clause (i) of Section 3 (1), the minimum fine is substantially lesser than the minimum fine prescribed in clause (ii) of Section 3 (1) of MCOCA Act. Learned counsel submits that there is no valid justification for the said discrepancy. He submits that the prescription of minimum fine of Rs. 5 lakhs in clause (ii) of Section 3 (1) is arbitrary and discriminatory, apart from being unreasonable and oppressive.

5. Ld. Counsel places reliance on the decision of the Supreme Court in *Shantilal Vs. State of M.P.*, (2007) 11 SCC 243; the decision of

Patna High Court in the case of *Shailesh Kumar Sinha Vs The State of Bihar & Ors.*, Civil Writ Jurisdiction Case No. 6675 of 2016; the decision of the Supreme Court of Pennsylvania, USA in *Commonwealth of Pennsylvania V. Matthew Steven Eisenberg* in Appeal No. 34 WAP 2012 decided on 19.08.2014; the *Forty Seventh Report of the Law Commission on Trial And Punishment Of Social And Economic Offences*, the decision of the High Court of Bombay in the case of *Amit R. Saurabh Vs. The State of Maharashtra*, Criminal Appeal No. 1167 of 201 decided on 29.03.2012, the decision of the Supreme Court in *Palaniappa Gounder V. State of Tamil Nadu And Others* (1977) 2 SCC 634; the decision of the Supreme Court in *Excel Crop Care Ltd. v. Competition Commission of India & Ors.*, (2017) 8 SCC 47; the decision of the Bombay High Court in *Santosh Rajesh Sinha @ Rakesh Mandal v. The State of Maharashtra* in Criminal Appeal No. 1167 of 2011, the decision of the Supreme Court in *Shahejad Khan Mahebubkhan Pathan v. State of Gujarat* (2013) 1 SCC 570 , and, the judgment of this Court in *Issa @ Raj (Mohd.) V. State* 2013 IV AD (Delhi) 608 in support of his submissions that:

- (i) Punishment has to be fair and not draconian, for, that would be violative of Article 21 of the Constitution. The punishment cannot be disproportionate to the offence.
- (ii) The general principle of law reflected in Sections 63 to 70 IPC is that the amount of fine should not be harsh or excessive.

(iii) The fine, when measured against the conduct triggering the punishment, and the lack of discretion afforded to the trial court, is constitutionally excessive.

(iv) The majority opinion – as reported by the Law Commission, is in favour of not laying down a minimum punishment. Members of the judiciary at all levels regarded any such amendment (to prescribe a minimum punishment) totally unnecessary;

(v) The Law Commission is of the view that the discretion of the court to award a sentence below the minimum should not be totally abolished.

(vi) The State of Maharashtra has gone on record to concede that the prescription of minimum fine of Rs.Five Lakhs under clause (ii) of Section 3(1) of MCOCA is an inconsistency which has crept in at the time of drafting of the Act. It was stated on behalf of the State of Maharashtra before the High Court that the Government intends to make suitable amends in the MCOCA, inter alia, in respect of this discrepancy.

6. Ld. Counsel further submits that the prescription of the amount of minimum fine in different sub- sections of Section 3 and Section 4 have no correlation with the aims and object of the said Act. He submits that the statement of purpose of the MCOCA does not justify such heavy fine which may be impossible for the convict to pay, resulting in further deprivation of his liberty. He submits that in ***Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra & Ors.*** (2010) 5 SCC

246, though the aspect of legislative competence of the State Legislature to enact the MCOCA was upheld, but there was no specific challenge to the constitutional validity of Section 3(1)(ii). Thus, this issue is still open.

7. Ld. Counsel submits that Section 3(1)(ii) of the Act robs the courts of their discretion to reduce the fine in deserving cases with mitigating circumstances and factors and, therefore, the same is arbitrary and discriminatory.. He submits that it is settled principle of law that the court imposes fine keeping in view the aggravating and mitigating factors. He submits that mandatory minimum fine is automatic, indiscriminate, and denies the Trial Courts of their discretion to calibrate the punishment corresponding with the convicts actual criminal conduct and circumstances. Ld. Counsel submits that economic sanctions are insidious in part, because they are often assessed with little or no attention paid to the convict's circumstances, including the extraordinarily severe consequences that such heavy fines often result in for the individuals, their families, and the society at large.

8. Ld. Counsel further submits that Section 400 of IPC does not provide for any minimum fine, although it deals with punishment for offences similar to the offences under the MCOCA. Ld. Counsel submits that the MCOCA is a codified law on socio-economic offences, much like the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and Section 21 of NDPS Act prescribed graded approach to fines, as per the gravity of the offence.

9. Ld. Counsel submits that “punishments” have been discussed in Section 53 IPC, which covers both imprisonment and fine. He submits that in the case of the offences punishable under Section 376(1) and (2) IPC, the statute prescribes minimum sentences, and the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than the mandatory minimum sentence.

10. On the other hand, Mr. Rahul Mehra, Ld. Standing Counsel (Crl.) submits that the MCOCA being a special Act on the subject of organized crime, will have overriding effect on the provisions of IPC, which are in the nature of general law. He relies on the maxim “*generalia specialibus non derogant*” and submits that the provisions of IPC cannot be looked at for the purpose of examining the validity of the provisions of the MCOCA. He further submits that the provisions of the MCOCA are comparable to the provisions of NDPS Act, 1985. The provisions of NDPS Act have already been upheld by the Supreme Court in ***Basheer V. State of Kerala, (2004) 3 SCC 609***. Minimum fines prescribed under section 16 and onwards under the NDPS Act are comparable to the minimum fine imposed under the impugned section. He refers specifically to section 19 of the NDPS Act, which too prescribes the minimum mandatory fine of rupees one lakh, which may extend to two lakh rupees; and the proviso states that the fine imposed can be even higher than two lakhs for reasons to be recorded in the judgment, if the Court may think fit.

11. Mr. Mehra further submits that the petitioner and his associates were indulging in organized crimes, and involved in 17 criminal cases of kidnapping with murder, robbery, dacoity, Arms Act, night burglary and theft etc. with the only object of gaining pecuniary benefits. He, thus, submits that keeping this fact in mind, the imposed fine - of rupees five lakhs, is neither exorbitant, nor discriminatory.

12. We have heard the Ld. Counsels and given our thoughtful consideration to the rival submissions.

13. The issue that arises for our consideration is whether the impugned section 3(1)(ii) is arbitrary, discriminatory or harsh, since it imposes mandatory minimum fine of Rs.5 lakhs.

14. The Indian Penal Code was enacted in 1860, whereas the MCOCA was enacted in 1999, and was subsequently extended to Delhi on 02.01.2002. The MCOCA is, undoubtedly, a special law, enacted “*to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto*”. The need for enactment of the MCOCA arose, because the existing laws – including the IPC, were not found sufficient to cope up with criminal activity of organized crime syndicates or gangs. The MCOCA aims to strike at the root of “organized crime” as defined in Section 2(1)(c) of the said Act, by making the same punishable under Section 3 thereof. It seeks to cover all those directly or indirectly involved in organized crime – as offenders/ perpetrators of organized crime; as conspirators; as abettors;

as facilitators, as propagators (Advocates); as harbourers or concealers/ protectors of members of an organized crime syndicate.

15. It is a settled principle of law that a special statute prevails over a general one, and the same flows from the maxim “*generalia specialibus non derogant*” which literally means that the general does not detract from the specific. We may only refer to one judgment of the Supreme Court on this aspect. The Supreme Court in ***Yakub Abdul Memon Vs State Of Maharashtra*** (2013) 13 SCC 1, held:

“1517. Where two statutes provide for overriding effect on the other law for the time being in force and the court has to examine which one of them must prevail, the court has to examine the issue considering the following two basic principles of statutory interpretation:

- 1. Leges posteriores priores contrarias abrogant (later laws abrogate earlier contrary laws).*
- 2. Generalia specialibus non derogant (a general provision does not derogate from a special one.)*

xxx xxx xxx xxx

1519. The basic rule that a general provisions should yield to the specific provisions is based on the principle that if two directions are issued by the competent authority, one covering a large number of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions must be given effect to.

xxx xxx xxx xxx

1521. In order to determine whether a statute is special or general one, the court has to take into consideration the

principal subject-matter of the statute and the particular perspective for the reason that for certain purposes an Act may be general and for certain other purposes it may be special and such a distinction cannot be blurred.

(emphasis supplied)

16. Thus, reliance placed by learned counsel for the petitioner on the provisions of the IPC and other penal statutes may not be apposite while examining the issue of legality or constitutionality of Section 3 of the MCOCA. Provisions of the IPC and other penal statutes cannot be used for the purpose of undertaking a comparative study – to advance the submission that the IPC or the other penal enactments deal with similar situations in a more lenient manner.

17. Learned counsel for the petitioner has placed reliance on ***Palaniappa Gounder*** (supra). The same is of no relevance to the present discussion, considering the fact that the fine imposed, in the present case, is not under the Criminal Procedure Code but by resort to Section 3 (1)(ii) of the MCOCA. The decision in ***Palaniappa Gounder*** (supra), on the other hand, was only concerned with the aspect of imposition of fine under the IPC. Pertinently, even in this decision, the Supreme Court noticed that “*Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth.*”

18. The petitioner seeks to place reliance on *Shailesh Kumar Sinha* (supra), wherein the Division Bench of the Patna High Court dealt with the challenge to the validity of Section 19(4) of the Bihar Excise Act, 1915 as amended on 31.03.2016 and the consequential notification issued by the State thereunder dated 05.04.2016, imposing a complete ban on wholesale trade and retail trade, and consumption of foreign liquor in the State of Bihar with immediate effect. N.P. Singh, J dealt with all the issues, including the issue whether the punishments provided under the amended provisions of the Act were draconian and grossly disproportionate to the delinquency sought to be punished.

19. N.P. Singh J, while dealing with the issue whether the punishments provided under the amended provisions were draconian and grossly disproportionate to the offence, referred to the 47th Report of the Law Commission of India on the Trial and Punishment of Social and Economic Offences. N.P. Singh J, referred to the provisions of the NDPS Act and went on to observe:

*“89.07. The provisions would show that, **except for commercial quantity**, there is ample discretion on the Court. It is not that any quantity is found, the punishment of imprisonment would be mandatory and, that too, like in the Bihar Excise Act, minimum of 10 years.*

xxxxxxxxxxxxx

89.10. On behalf of the petitioners, apart from the judgment, which I would refer to, the 47th report of the Law Commission of India, on the Trial and Punishment of Social and Economic Offences, has been referred. The relevant parts are summarized as hereunder.

"In its detailed report vide Clauses 4.12, 4.14 & 4.25 has clearly recommended against providing for absolute liability in form of a minimum sentence.

The law Commission in Clauses 7.42, 7.43, 7.44, 7.45, 7.46 & 7.47 of its Report has laid down the prime considerations which are relevant in proper sentencing and has held that sentences which are merely mathematically identical for violation of the same statute are improper, unfair and undesirable. Mathematically identical sentences indeed may in substance themselves be disparate.

In Clause 7.52, the Law Commission has opined that if the punishable act has caused no harmful effects, the punishment may be mild; if the act has caused some harm but the offender can repair the damage done to society, probation would be appropriate; if the harm is serious, imprisonment would of course be required."

89.11. Now, I may come to Section 47 of the Bihar Excise Act, 1915. A reference to the provision would show that for the acts mentioned therein, the punishment is straightway 10 years of imprisonment extending to life. It takes away the power of the Court or the discretion of the Court in the matter and further it has to be accompanied with a fine of Rs. one lakh minimum. Thus, a humble rickshaw-puller found with only a bottle or a pouch of country liquor would, now, be exposed to minimum of 10 years of imprisonment with a fine of Rs. one lakh, an amount, which he had ever never possessed or seen. This has to be seen in juxtaposition of presumption clause as contained in Section 48 of the Act". (emphasis supplied)

20. In our view, reliance placed by learned counsel for the petitioner on *Shailesh Kumar Sinha* (supra) is misplaced and out of context in the present setting. The opinion of the Law Commission was premised on the foundation that if the punishable act has caused no harmful effect, the punishment may be mild, and if the act causes some harm- but if the offender can repair the damage done to society, probation would be appropriate. However, if the harm is serious, imprisonment would, of course, be required.

21. N.P. Singh J examined the legality of the amended provisions of the Bihar Excise Act, 1915– which had the effect of imposing a blanket ban on wholesale and retail trade and consumption of foreign liquor in the State of Bihar, in the context of the opinion of the Law Commission and, thus, gave an example: that a humble rickshaw puller who is found with only a bottle or a pouch of country liquor would be liable to be given a minimum of ten years imprisonment with fine of Rs.One Lakh. Pertinently, the Ld. Judge noticed the fact that in respect of offences involving commercial quantities of drugs/ substances, the NDPS Act prescribes the minimum sentence/ fines and takes away the discretion of the Court in the matter of award of punishment. In the context of MCOCA, in our view, neither the opinion of the Law Commission above referred to, nor the view taken by N.P. Singh J are apposite.

22. We may, at this stage, notice the nature of criminal activity and the characteristics of the crime perpetrator, which the MCOCA seeks to deal with. It is a special law making a special provision for preventing

and control of, and for coping with criminal activity by organized crime syndicates or gangs. The statement of objects and reasons for enactment of the MCOCA read as follows:

“Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fuelled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narcoterrorism which extends beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. The Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.” (emphasis supplied)

23. Organized crime syndicate means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. Organized crime means any continuing unlawful activity by an individual, singly or jointly, either as a member of the 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 for promoting insurgency. 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.

24. In ***Zameer Ahmed Latifur Rehman Sheikh*** (supra), the Supreme Court examined the constitutionality of Section 2(1)(e) of the MCOCA on the ground of legislative competence of the State Legislature in dealing with the subject of “insurgency”. It was argued on behalf of the appellant that the subject of “insurgency” does not fall within the legislative competence of the State Legislature. The Supreme Court observed in its decision that the MCOCA “*principally deals with prevention and control of criminal activity by organized crime syndicate or gang within India and its purpose is to curb a wide range*

of criminal activities indulged in by organized syndicate or gang.”. The Supreme Court further observed ***“Under MCOCA the emphasis is on crime and pecuniary benefits arising therefrom. In the wisdom of the legislature these are activities which are committed with the objective of gaining pecuniary benefits or economic advantages and which over a period of time have extended to promoting insurgency.”***(emphasis supplied)

25. Thus, the MCOCA seeks to deal with offenders who are members of a crime syndicate, or a gang, and who are primarily driven with the object of gaining pecuniary benefit, or gaining undue economic or other advantage-either for themselves, or for any other person, or for promoting insurgency. The offenders covered by the MCOCA operate as an organized crime syndicate or a gang i.e. in a group of two or more persons, either singly or collectively as a part of a syndicate or gang, to indulge in activity of organized crime. An offender involved in only one offence of the kind dealt with under the MCOCA, would not bring the crime, or the offender, within the realm of the MCOCA. The unlawful activity has to be continuing. Unlawful activity is defined in the Act to be a cognizable offence punishable with imprisonment of three years or more. Moreover, mere registration of the FIR is not the benchmark set by the Act, since multiple charge sheets should have been filed before the competent Court within the preceding period of ten years, in respect whereof the Court has taken cognizance of the offence. Thus, the offender sought to be covered by the MCOCA would, of necessity, be highly motivated and driven, who

is part of a crime syndicate or a gang, and who is driven – not by passion; not by vengeance and; not by his/her circumstances alone, but by his objective of gaining pecuniary benefit, or gaining undue economic or other advantage for himself/ herself, or for other persons, or for promoting insurgency. This offender would be involved in multiple cases (at least two). As pointed out by Mr. Mehra, in the present case, the petitioner is found to be involved in 17 criminal cases of kidnapping with murder, robbery, dacoity, Arms Act, night burglary and theft etc.

26. The objective of both– Section 3(1)(i) and 3(1)(ii) in prescribing the minimum fine of Rs. One Lakh and Rs. Five Lakh respectively, clearly appears to be to disincentivise the motivation and drive of the offenders– which is to gain pecuniary benefits, or gain undue economic or other advantage for oneself or for other persons, or for promoting insurgency. The purpose of prescribing the minimum fine in both such clauses (i) & (ii) of Section 3 (1) is to create deterrence in the mind of the offenders, that they would not be able to get away with their unlawful pecuniary gains which are made by resort to continuing unlawful activity as a part of an organized crime syndicate. The endeavour of the law clearly appears to be to catch up with the criminals found guilty under the MCOCA, so that they are not able to enjoy the benefits, gains and accretions made by resort to such unlawful activity.

27. Reliance placed on the aforesaid report of the Law Commission is, even otherwise, inapposite. The said report was made on the subject of trial and punishment of social and economic offences. Offences under the MCOCA can hardly be classified as socio-economic offences. In the introductory Chapter No.1, the Commission has set out the broad question referred to it by the Government. A perusal of the same shows that the Government sought the opinion of the Commission on the question of effectively dealing with certain anti-social and economic offences. Specific reference was made to Essential Commodities Act, Prevention of Food Adulteration Act, Drugs (Control) Act, Import and Export (Control) Act, Foreign Exchange Regulation Act etc. The discussion in this report is in the context of white collar crimes under enactments earlier referred to in the introductory chapter of the Report. The scope of the opinion sought by the Government from the Commission did not cover offences and offenders under the MCOCA. The offences covered by the MCOCA, which are not capable of being dealt with under the ordinary law such as the Penal Code, were not the subject matter of discussion before the Commission. Thus, reliance placed on the said report of the Law Commission, in our view, is misplaced while examining the legality and constitutionality of Section 3 of the MCOCA.

28. Reliance placed on *Shantilal* (supra) by the petitioner is also of no avail, since the minimum fine is prescribed by the MCOCA itself. *Shantilal* (supra) deals with the situation where the Courts are left with discretion in the matter of imposition of minimum fine. In those

situations, the Courts could take into consideration the aspects noticed by the Supreme Court in *Shantilal* (supra). The legislature, while prescribing the minimum fine in Section 3 of the MCOCA, was conscious of the nature of criminal activity of the offenders dealt with, and in that light the minimum fines have been prescribed. Pertinently, in *Shantilal* (supra), the Supreme Court extracted, inter alia, the following passage penned down by the authors of the Code;

“It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth.”
[See Ratanlal & Dhirajlal's Law of Crimes, 26th Edn., (2007), pp. 221-22.]” (emphasis supplied)

29. The aforesaid principle provides a complete justification for imposition of minimum fine under Section 3(1)(i) and 3(1)(ii) of the MCOCA. Pertinently, in *Shantilal* (supra), Supreme Court maintained the amount of fine of Rs.One Lakh-which was the minimum specified in Section 18 of the NDPS Act, by observing that the same could not be

reduced in view of the legislative mandate. The Supreme Court, however, reduced the default period of imprisonment— in the event of non-payment of fine, from 3 years rigorous imprisonment to 6 months rigorous imprisonment.

30. Learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court of Pennsylvania in ***Commonwealth of Pennsylvania*** (supra). The following extract from this decision has been relied upon by the counsel for the petitioner.

“Mandatory fines are not unheard of in Pennsylvania's statutory scheme, but they are unusual. Appellant logically adverts to the fines construct in the Crimes Code, which governs the vast majority of Pennsylvania criminal cases, including non-Gaming Act theft offenses. The Crimes Code generally reposes a considerable amount of discretion in the sentencing judge. Typically, the court is authorized to impose a fine up to a maximum set by statute. Thus, for example, if appellant had been charged with theft under Chapter 39 of the Crimes Code, he would have faced the prospect of a fine up to \$10,000, in the discretion of the trial judge. See 18 Pa.C.S. §§ 3903 & 1101(4). Indeed, as appellant notes, even the most serious of offenses in Pennsylvania, murder in the first degree, affords the sentencing court discretion in determining the appropriate fine, and the maximum fine imposable is \$50,000. 18 Pa.C.S. § 1101(1). The same general construct is found with respect to drug offenses, which are set forth in Title 35. See 35 P.S. § 780–113 (subsection (a) enumerates thirty-nine prohibited acts related to various narcotics; subsections (b) through (o) grade each of thirty-nine offenses and directs court to impose fines “not exceeding” certain amounts).

On the other hand, there are indeed some offenses where the General Assembly has determined that mandatory fines are appropriate. For example, in the realm of drug trafficking, Section 7508(a)(3)(iii) of Title 18 requires that when a person is convicted of possessing at least 100 grams of cocaine, the court must impose, at a minimum, “four years in prison and a fine of \$25,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity[.]” 18 Pa.C.S. § 7508(a)(3)(iii). Notably, the qualifier “as is sufficient to exhaust the assets” employed in Section 7508 reflects a proportionality approach (at least insofar as the fine will exceed \$25,000), that is not present in the provision subject to challenge in the case sub judice.

In our view, the fine here, when measured against the conduct triggering the punishment, and the lack of discretion afforded the trial court, is constitutionally excessive. Simply put, appellant, who had no prior record, stole \$200 from his employer, which happened to be a casino. There was no violence involved; there was apparently no grand scheme involved to defraud either the casino or its patrons. Employee thefts are unfortunately common; as noted, appellant's conduct, if charged under the Crimes Code, exposed him to a maximum possible fine of \$10,000. Instead, because appellant's theft occurred at a casino, the trial court had no discretion, under the Gaming Act, but to impose a minimum fine of \$75,000—an amount that was 375 times the amount of the theft.

In addition to the sheer disproportion of the fine to the amount stolen is the fact that \$75,000, by any common measure, is a considerable amount of money. As illustration, the minimum wage in Pennsylvania is currently \$7.25 per hour, and the average Pennsylvania household earns approximately \$51,000 per year. The fine imposed here would exhaust approximately five years of pre-tax income of a minimum wage worker, and the

average family would not fare much better. In other words, the mandatory nature of the provision could act to effectively pauperize a defendant for a single act. It is not a measure targeted solely at high rollers, at the casino itself, or even at thefts from patrons, which might implicate the integrity of the gaming business. Rather, the statute affords the trial court no discretion to inquire into the specific facts or the individual circumstances of a case, which, in this instance, happens to include a twenty-six year old defendant with no prior record who was, at the time of sentencing, enrolled full-time as a student, living with his fiancée, expecting his first child, and did not own a house.” (emphasis supplied)

31. The aforesaid extract, itself, contains a complete answer to the petitioner’s submission that the minimum fine of Rs. Five Lakhs prescribed in Section 3 (1)(ii) is excessive and arbitrary. The highlighted text quoted above may be referred to Mandatory minimum fines are prescribed, for example, in relation to drug trafficking offences where the quantity involved is, at least, 100 gms. of cocaine (like under the NDPS Act). The spirit of such a law is to prescribe fines which are sufficient to exhaust the assets utilized in, and the proceeds accumulated from the illegal activity.

32. The NDPS Act was amended, whereby, inter alia, section 21 was amended, and a gradation of punishment was made. The Statement of Objects and Reasons for the said Amendment reads as follows:

“Amendment Act 9 of 2001—The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of

*minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. **Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment.** This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.” (emphasis supplied)*

33. The amended section 21 of the NDPS Act reads as follows:

“21. Punishment for contravention in relation to manufactured drugs and preparations.—

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,—

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to [one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.” (emphasis supplied)

34. In *Basheer V. State of Kerala*, (2004) 3 SCC 609 , the Supreme Court observed:

*“5. As a consequence of the amending Act coming into force on 2-10-2001, the sentencing structure underwent a drastic change. The Act introduced the concept of “commercial quantity” in relation to narcotic drugs or psychotropic substances by adding clause (vii-a) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the expression “small quantity” is defined in Section 2, clause (xxiii-a), as any quantity lesser than the quantity specified in the notification. Under the rationalised sentencing structure, the punishment would vary depending on whether the quantity of offending material was “small quantity”, “commercial quantity” or something in between. This is the effect of the rationalisation of sentencing structure carried out by the amending Act 9 of 2001, in Section 27. A notification was issued on 9-10-2001, specifying in respect of 239 narcotic drugs and psychotropic substances, as to what would be “small quantity” and “commercial quantity”.
(emphasis supplied)*

35. Thus, a gradation of the prescribed punishments was introduced, to deal with offences depending on the gravity of the offence i.e. the quantity of drug/ substance involved. Pertinently, in respect of the

severe nature of offences, minimum sentence and minimum fine was also prescribed.

36. Thus, Section 3 of the MCOCA is not an isolated instance where minimum sentence and minimum fine have been prescribed by the Legislature. By prescribing the minimum sentence and minimum fine, the Legislature – keeping in view the object with which the law is framed, seeks to emphasise the seriousness with which the offence deserves to be dealt with. The prescription of the minimum sentence and minimum fine in Section 3 is a conscious endeavour of the Legislature to deal with all the offenders under the MCOCA, who are engaged in continuous unlawful activity as members of an organized crime syndicate or gang driven by their motivation of making illegal monetary gains.

37. Reliance placed by the learned counsel for the petitioner on ***Santosh Rajesh Sinha @ Rakesh Mandal*** is misplaced. The same is a short order passed by the learned Single Judge of the Bombay High Court, wherein the learned Single Judge, prima facie, observed that there was an inconsistency in Section 3 of the MCOCA in as much as, the minimum fine prescribed in Section 3(1)(ii) was Rs. Five Lakhs, whereas, the minimum fine prescribed under Section 3 (1)(i) – which was a more severe offence, was only Rs. One Lakh. The learned Single Judge also took note of the stand taken by the Government of Maharashtra that there was a discrepancy in the law.

38. Firstly, the said order does not contain any *ratio*. Secondly, the view expressed by the learned Single Judge is only a *prima facie* view. Thirdly, the concession made by the State Government before the Court in relation to Section 3 of the MCOCA does not bind the State Legislature. Fourthly, what has been missed out is that Clause (i) of Section 3(1) of the MCOCA prescribes a minimum sentence of imprisonment for life, as opposed to a minimum sentence of imprisonment of 5 years for an offence covered by Section 3(1)(ii). Whereas in respect of an offence covered by Section 3(1)(i), the personal liberty of the offender is taken away for his entire life, the curtailment of the personal liberty of an offender covered by Section 3(1)(ii) would be, at least 5 years, but which may extend to his life. The objective of the law appears to be to denude the offender covered by Clause (ii) of Section 3(1) of his ill-gotten wealth while setting him free by awarding him a sentence which, invariably, would be for a shorter duration, than in respect of an offender covered by Clause (i) of Section 3(1). Both the clauses (i) and (ii) of Section 3(1) of the MCOCA deal with offenders who are guilty of offences of different degree, and are accordingly dealt with in the two clauses (i) and (ii) by providing a combination of sentence of imprisonment and fine. Pertinently, in ***Palaniappa Gounder*** (supra) the Supreme Court observed in relation to the power to impose fine under Section 302 IPC (apart from the substantive sentence) “*Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly*

calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine.” In our view, it cannot be argued that, in respect of an offence covered by Clause (ii) of Section 3(1), the minimum fine should necessarily be less than the minimum fine prescribed in respect of the serious offence covered by Clause (i) of Section 3(1). For the aforesaid reasons, reliance placed by the petitioner on the Division Bench judgment of the Bombay High Court in **Amit R. Saurabh** (supra), also appears to be misplaced.

39. Counsel for the petitioner has also placed reliance on **Shahejadhkhan Mahebubkhan Pathan** (supra). In this case the Supreme Court held that the sentence of fine and the default sentence imposed upon the convict, on account of non-payment of fine, should not be excessive or harsh. The appellants had been convicted and sentenced to 15 years rigorous imprisonment and fine of Rs.1.5 lakhs, and in default to undergo further imprisonment of 3 years rigorous imprisonment. The Supreme Court reduced the sentence to the minimum prescribed term of 10 years, and also reduced the default sentence of 3 years rigorous imprisonment to 6 months rigorous imprisonment. This decision has no bearing in the matter of determination of the legal issue raised by the petitioner. If the petitioner is aggrieved by the default sentence awarded to him, it is for him to invoke his statutory remedy by way of an appeal. This Court while exercising the extraordinary writ jurisdiction cannot deal with either his conviction, or with the sentence awarded to him by the Trial

Court, including the default sentence. The said aspects can only be assailed in a statutory appeal provided under the law. For the same reason reliance placed on *Issa @ (Raj Mohd.)* (supra), is misplaced.

40. On the aspect of proportionality of the sentence/ fine imposed, to the offence of the offender, the petitioner has placed reliance upon the decision of the Supreme Court in *Excel Corp. Care Limited Vs. Competition Commission of India and Ors.*, AIR 2017 SC 2734, wherein the following observations were made:

“111. It should be noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further, it is well-established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In Coimbatore District Central Coop. Bank v. Employees Assn. [Coimbatore District Central Coop. Bank v. Employees Assn., (2007) 4 SCC 669 : (2007) 2 SCC (L&S) 68] , this Court has explained the concept of “proportionality” in the following manner: (SCC p. 678, paras 18-19)

“18. “Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.

19. De Smith states that “proportionality” involves “balancing test” and “necessity test”. Whereas the former (“balancing test”) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest

imbalance of relevant considerations, the latter (“necessity test”) requires infringement of human rights to the least restrictive alternative.” (emphasis supplied)

41. The principle laid down by the Supreme Court, no doubt, is of universal application. However, in the context of the MCOCA, we are not convinced that the prescription of minimum penalty *per se*, or the amount of that minimum penalty, is excessive or arbitrary. The offenders dealt with by Section 3 of the MCOCA would invariably be repeat professional offenders, whose motivation for participating in organized crime- as a part of a gang or a crime syndicate, is to make pecuniary gains. To subject convicts under the said Act to minimum fines appears to be completely justified, as the object appears to be to deter such offenders and to denude them of their ill gotten wealth. The quantum of minimum fine also does not appear to be excessive in today’s context.

42. For all the aforesaid reasons, we find absolutely no merit in the challenge raised to the illegality and constitutionality of Section 3(1)(ii) of the MCOCA. Accordingly, we dismiss this petition leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(I.S. MEHTA)
JUDGE

JULY 23, 2018