

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

CRIMINAL APPEAL NO.604 OF 2016

1. Kailash s/o Parshuram Bansode
Age: 30 Yrs., occu. Labour,
R/o Kata, Tq. Washim.
2. Vithal s/o Narayan Chandekar,
Age: 38 Yrs., occu. Labour,
R/o Mandvale, Tq.Chandgad,
District Kolhapur.
3. Virendra s/o Kashinath Pawar,
Age: 29 Yrs., occu. Labour,
r/o Mahgaon, Dist.Akola.
4. Rajkumar s/o Ajaysingh
Age: 23 Yrs., occ. Labour
R/o Ajamgadh, Uttarpradesh.
5. Shivaji s/o Ramchandra Nirmule,
Age: 33 Yrs., occ. Labour
R/o Varandi, Tq. Aurad.
Dist. Bidar, at present
Bank Colony, Nilanga,
Dist. Latur. = **APPELLANTS**

VERSUS

The State of Maharashtra = **RESPONDENT**

Mr. Nilesh S.Ghanekar, Advocate for Appellants;

Mr. SM Ganachari, APP for Respondent-State

CORAM : P.R.BORA, J.

DATED : 30th August, 2019.

ORAL JUDGMENT

1. The present appeal has been filed by five convicts in Special Case No.1/2008. The appellants-accused were tried in the aforesaid Special case for the offences punishable under

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Sections 395, 397 of Indian Penal Code read with Section 3(25) and 5(27) of the Arms Act as well as under Sections 3(1)(ii), 3(2) and 3(4) of M.C.O.C. Act. The learned Special Judge has passed the following order, -

"1. Accused No.1 Kailash Parshuram Bansode, accused No.2 Vithal Narayan Chandekar, accused No.3 Virendra Kashinath Pawar, accused No.4 Rajkumar Ajaysingh and accused No.5 Shivaji Ramchandra Nirmule are convicted under the provisions of Section 235 (2) of the Cr.P.C. for the offence punishable U/Sec.395 R/w. 120-B of I.P.C and sentenced to suffer R.I. for 10 years and fine of Rs.2000/- each, in default to suffer R.I. for 02 months.

2. Accused No.1 is convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec.397 of I.P.C and sentenced to suffer R.I. for 07 years and fine of Rs.1000/-, in default to suffer R.I. for 01 month.

3. Accused No.2 is convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec. 3 R/w. 25 of Arms

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Act, and sentenced to suffer R.I. for 03 years and fine of Rs.1000/-, in default to suffer R.I. for 01 month.

4. Accused No.1 is convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec.5 R/w. 27 of Arms Act, and sentenced to suffer R.I. for 5 years and fine of Rs.1000/-, in default to suffer R.I. for 01 month.

05. Accused nos.1 to 4 are convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec 3(i) (ii) of MCOC Act, and sentenced to suffer R.I. for 10 years and fine of Rs.5,00,000/- each, in default to suffer R.I. for 02 years.

06. Accused No.05 is convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec.3(2) of MCOC Act, and sentenced to suffer R.I for 07 years and fine of Rs. 5,00,000/-, in default to suffer R.I. for 01 year.

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07. Accused no.01 to 04 are convicted under the provisions of Section 235(2) of the Cr.P.C. for the offence punishable U/sec.3(4) of MCOC Act, and sentenced to suffer R.I. for 07 years and fine of Rs. 5,00,000/- each, in default to suffer R.I. for 02 years.

08. As per prosecution case, in this dacoity, cash amount of Rs.11,74,754/- was stolen. Out of seized cash amount, Rs.11,39,652/- already returned to M.S.R.T.C., Nilanga Depot. Cash amount of Rs. 12,412/- is still pending in this Court, besides that currency notes of cash amount of Rs.2,700/- were sent to C.A. for their analysis. Accused did not claim that amount. Therefore, that amount of Rs.12,412/- and Rs.2,700/- be returned to M.S.R.T.C Nilanga Depot, along with cash box, its lock, key, handle, side hook etc. after appeal period is over.

09. Seized fire arms, their magazines, bullets be given in custody of District Magistrate, Aurangabad, for disposal according to law, after appeal period is over.

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10. Driving licenses, voter's identity cards and other documents of respective persons may be return to them after appeal period is over.

11. Seized mobiles of accused persons are not claimed by them during the pendency of case and even at the conclusion of it. Mobile phones of witnesses became old and out-dated by the passage of time, hence, became useless, hence, they be after appeal period is over.

12. Currency notes of Pakistan and Nepal and burnt pieces of currency notes be entrusted to Treasury for onward transmission to Mint, Mumbai, for disposal according to law, after appeal period is over.

13. The clothes of accused and witness and other articles being worthless be destroyed after appeal period is over.

14. Metallic items viz., Screw driver etc., be sold as scrap and sale proceeds be credited to State.

15. All above sentences of accused

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nos.1 to 5 shall run concurrently.

16. Accused nos.1 to 5 are entitled to get benefit of set off of period of detention already undergone by them during investigation and pendency of trial of this case.

17. Accused No.3 to 5 are hereby acquitted under the provisions of Section 235 (1) of the Cr.P.C. for the offence punishable U/Sec.397 of I.P.C. and U/sec.3 R/w.25 and 5 R/w. 27 of Arms Act.

18. Accused No.5 is hereby acquitted under the provisions of Section 235 (1) of Cr.P.C. for the offences punishable U/sec.3(i)(ii) and 3(4) of MCOC Act."

2. When this appeal is taken up for hearing today, it is informed that accused No.5 viz. Shivaji Ramchandra Nirmule has undergone the entire substantive sentence as well as the default sentence and has been released by the jail authorities.

3. Learned counsel appearing for the appellants submitted that though the appellants

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have a very good case on merits, in view of the fact that the appellants have, till date, undergone the imprisonment for a period of more than 11 years and 4 months, he is restricting his submissions only in respect of reduction of the period of default sentence. The learned counsel, relying upon the judgment of the Hon'ble Apex court in the case of Sharad Hiru Kolambe Vs. State of Maharashtra and Ors. (Criminal Appeal No. 1209 of 2018 arising out of Special Leave Petition (Criminal) No. 8067 of 2018, decided on 20th September, 2018, submitted that in the similar set of facts, the Hon'ble Apex court has reduced the default sentence, observing that the appellants therein deserve for reduction of such sentence. The learned counsel has, therefore, prayed for passing similar order in the present appeal also.

4. Learned APP Shri Ganachari, in view of the afore mentioned judgment of the Hon'ble Apex court, submitted for passing appropriate orders.

5. I have carefully gone through the judgment delivered by the Hon'ble Apex court in the

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cited case. In the said matter also, the appellants therein were prosecuted and convicted for the offences punishable under Sections 395 and 397 of IPC read with offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of MCOC Act. The quantum of sentence imposed upon the said appellants was also similar as in the present matter. I deem it appropriate to reproduce herein below paras 16 and 17 of the said judgment of the Hon'ble Apex court, which read thus, -

"16. The quantum of fine imposed in the present case in respect of offences punishable under Section 364A, 395, 397 and 387 of the IPC is not excessive and is quite moderate. However in our view, the default sentence for non-payment of such fine, ought to be reduced to the level of one month on each of those four counts in respect of the appellant. We now come to the imposition of fine and default sentences for the offences punishable under Sections 3(i)(ii), 3(2) and 3(4) of the MCOC Act. The text of these Sections shows that these provisions contemplate, upon conviction, mandatory minimum fine of Rs.5 lakhs on each count. We do

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not therefore find anything wrong with the imposition of fine of Rs.5 lakhs in respect of each of those three counts under the MCOC Act. We however find that the imposition of default sentences of three years is slightly on a higher scale. We therefore reduce the default sentence to a period of one year each in respect of these three counts of offences under the MCOC Act.

17. Resultantly, while maintaining the quantum of fine, in respect of four counts of offences punishable under the IPC cumulatively at Rs.4000/-, the aggregate default sentence shall be four months; and in respect of three counts of offences punishable under the MCOC Act the fine shall be Rs.15 lakhs cumulatively with default sentence of three years in aggregate. Even if no amount of fine is paid by the appellant, the total default sentence for the appellant would thus be three years and four months, out of which three years of default sentence has already been undergone by the appellant."

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6. After having considered the submissions, on behalf of the appellants, I have no doubt in my mind that the facts involved in the present appeal are akin to the facts, which were existing in the case of Sharad Kolambe (cited supra) before the Hon'ble Apex court. In the present matter, it is not in dispute that the appellants have till date undergone the imprisonment for the period of 11 years and 4 months. The maximum substantive sentence imposed upon the appellants is of the period of ten years. The period of Substantive sentence has thus admittedly undergone by each of the present appellants. After the order of conviction passed on 30th September, 2016, the appellants had undergone the imprisonment for the period of more than three years. The appellants must have been given benefit of remission in accordance to the provisions under the Prison Manual of the said period. The learned counsel for the appellants submitted that according to his information, the remission period may be of one year, benefit of which is liable to be given to the appellants. Believing the submissions so made by the learned counsel, the appellants appear to have

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undergone the period of more than two years towards the default sentence.

7. There cannot be any debate on the issue that the default sentences cannot be directed to run concurrently. However, the submissions made on behalf of the appellants that, they are not in financial condition to pay the huge amount of fine to the tune of rupees ten lakhs and in the circumstances, the quantum of their default sentence be reduced, certainly deserve consideration. It appears to me that the period of more than 11 years undergone by the appellants behind the bars would certainly operate as deterrence for all of them for rest of their life and possibility of their indulging again in such type of offences, is remote. Considering the period of default sentence of four years, had the appellants be in a position to pay the amount of fine, they would have certainly paid the amount of fine. Non-depositing the fine amount thus evinces financial inability of the appellants to pay the amount of fine. Having regard to the provisions under the MCOC Act, the fine amount cannot be less

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than Rs.5,00,000/- on each count in case the accused is held guilty of the offences under Section 3(1)(ii), 3(2) and 3(4) of the MCOC Act. The reduction in the fine amount is thus out of question. However, as observed by the Hon'ble Apex court in the case of Sharad Kolambe (cited supra), the imposition of default sentence of two years on each count appears to be slightly on higher side. In the matter before the Hon'ble Apex court, the default sentence was prescribed of three years under each count and the Hon'ble Apex court reduced it to the period of one year under each of said counts, i.e. Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act.

8. In the present matter, the appellants are held guilty for the offences under Section 3(1)(ii) and 3(4) of the MCOC Act and the default sentence on the aforesaid two counts is two years each, i.e. four years in aggregate. Having considered the facts, as aforesaid, it appears to me that there may not be any impediment in following the course adopted by the Hon'ble Apex court in the case of Sharad Kolambe (cited supra). In the case of

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Sharad Kolambe, the accused therein were held guilty on three counts, i.e. Section 3(1)(ii), 3(2) and 3(4) of the MCOC Act and were sentenced with fine amount of Rs.5,00,000/- each for each of the aforesaid offences and in default, to suffer imprisonment for three years for each of the said offences. The period of default sentence in the said matter was thus of total nine years. The Hon'ble Apex court has reduced it to three years in total, i.e. one year each in respect of each of the three counts of MCOC. In view of the above, it appears to me that there may not be any difficulty in the present matter to reduce the period of the default sentences from four years to one and half years in aggregate so far as MCOC offences are concerned and the period of default sentences, awarded for the offences under IPC, can be with the same proportion, reduced from four months to one month in aggregate.

9. In the result, following order is passed,

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ORDER

i. The order of conviction passed by the

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learned Special Judge on 30th September, 2016 in Special Case No.1/2008 and the sentences awarded by the said Court for the respective offences, are maintained as it is;

ii. The default sentences are however modified as under, -

- a. The default sentences awarded for the offences under IPC, are reduced from four months to one month in total;
- b. The default sentences awarded for the offences under the MCOC Act, more particularly for the offences under Section 3(1)(ii) and 3(4) of the Act, are reduced from four years to 1 $\frac{1}{2}$ years in total;

iii. The jail authorities shall accordingly compute the period of substantive sentence with remission therein, permissible if any, and the period of default sentence, as has been

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reduced by this court mentioned herein above and shall release the appellants after their completing the said period of sentences, if they are not required in any other case or crime.

iv. The Appeal stands disposed of in the aforesaid terms.

(P.R.BORA)
JUDGE

BDV