

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.78 OF 2017

**MUNNAVVARALI MOHAMMED SHARAFAT)
ALI KHAN @ MUNNA @ NANGI TALVAR)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Megha Bajoria i/b. Mr.K.S.Patil, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 1st MARCH 2019

ORAL JUDGMENT :

1 By this appeal, appellant/accused no.1 Munnavvarali Mohammed Sharafat Ali Khan is challenging the judgment and order dated 12th April 2016 passed by the learned Special Judge for Maharashtra Control of Organised Crimes Act (hereinafter

referred to as MCOC Act for the sake of brevity), Mumbai in MCOC Special Case No.12 of 2015 thereby convicting him of offences punishable under Section 394 read with Section 34 of the Indian Penal Code as well as under Section 3(1)(ii) and 3(4) of the MCOC Act. On the first count, he is sentenced to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.5,000/- and default sentence of simple imprisonment for one year. On the second count, he is sentenced to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.5,00,000/- and default sentence of simple imprisonment for one and half years. On the third count, appellant/accused No.1 is sentenced to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.5,00,000/- and default sentence of simple imprisonment for one and half years. The learned trial Court has directed that all substantive sentences shall run concurrently.

2 Facts leading to the prosecution and resultant conviction of the appellant/accused can be summarized thus :

- (a) PW5 Rajeshkumar Swami is the victim of the crime in question. He reached Mumbai by Chennai Mail at about 3.55 a.m. of 23rd February 2015 and alighted at the Chhatrapati Shivaji Maharaj Terminus Railway Station (hereinafter referred to as CSMT Railway Station for the sake of brevity) at about 4.23 a.m. He then boarded local train for going to Belapur from platform no.2 of the CSMT Railway Station, Mumbai. Appellant/accused no.1 Munnavvarali Mohammed Sharafat Ali Khan along with his three associates namely accused No.2 Kishan Kumar Godhara, accused No.3 Afsar Iqbal Shaikh and accused No.4 Raja Ram Thakor were also sitting in the same compartment of that train in which PW5 Rajeshkumar Swami took his seat.
- (b) The incident of robbing PW5 Rajeshkumar Swami took place in the journey of said local train from CSMT Railway Station to Masjid Bunder Railway Station. By voluntarily causing hurt to PW5 Rajeshkumar Swami, appellant/accused no.1 Munnavvarali Ali Khan and three co-accused committed robbery and relieved PW5 Rajeshkumar Swami of his black coloured sack bag and mobile phone of Samsung Galaxy

Grand make. Black coloured sack bag of PW5 Rajeshkumar Swami was containing important documents such as his Passport, mark-sheets, leaving certificate, Aadhar card, Voting card, ATM card apart from shoes, clothes and cash amounting to Rs.6,500/-. On reaching the train at Masjid Bunder Railway Station, appellant/accused no.1 Munnavarali Ali Khan and the co-accused alighted the train with looted articles. PW5 Rajeshkumar Swami also got down from the train and informed the incident to police personnel, who took him to the CSMT Railway Station. There, PW5 Rajeshkumar Swami lodged report which was recorded by PW10 Dadu Sarak, Police Sub-Inspector, and accordingly, Crime No.31 of 2015 for the offence punishable under Section 392 read with Section 34 of the Indian Penal Code came to be registered with the CSMT Railway Police Station, Mumbai.

- (c) During course of investigation, PW15 Baban Koyale, Police Sub-Inspector, apprehended all accused persons at over-

bridge of Nalasopara Railway Station on 1st March 2015. On the basis of voluntary disclosure statement (Exhibit 38) of appellant/accused no.1 Munnavvarali Ali Khan made on 3rd March 2015 in presence of PW6 Manoj Dhayavat, panch witness, which was recorded by PW15 Baban Koyale, black coloured sack bag containing clothes, mobile phone of PW5 Rajeshkumar Swami and cash amounting to Rs.1,000/- came to be recovered from beneath the triangular stones of Marine Drive Chowpatty vide Panchnama (Exhibit 38A).

- (d) On 10th March 2015, Test Identification Parade was conducted by PW7 Kiran Vaiude, Nayab Tahsildar, at the Central Prison, Byculla. PW5 Rajeshkumar Swami identified all accused persons in the Test Identification Parade and accordingly Memorandum (Exhibit 25) came to be prepared.
- (e) On request of PW18 Rajeshwari Redkar, Assistant Sub-Inspector, PW12 Ganesh Bayaskar, Senior Sectional

Engineer, furnished CCTV footage of CSMT Railway Station as well as Masjid Bunder Railway Station covering the period from 4.00 a.m. to 6.00 a.m. of 23rd February 2015. The pen-drive containing that CCTV footage came to be seized in presence of PW1 Mohd. Alauddin Ali by Seizure Panchanama (Exhibit 23) on 18th April 2015. PW12 Ganesh Bayaskar, Senior Sectional Engineer, had also furnished Certificate (Exhibit 68) under Section 65(B) of the Indian Evidence Act in respect of the said CCTV footage to the Investigating Officer.

- (f) During course of investigation, it was found that appellant/accused no.1 Munnavvarali Ali Khan was running Organized Crime Syndicate for continuing unlawful activities in order to secure pecuniary benefits. Hence, with prior approval as envisaged under Section 23(1) of the MCOC Act, provisions of MCOC Act were added to the case diary of the crime. During course of investigation, accused No.3 Afsar Iqbal Shaikh made confessional statements

before PW9 Dipak Devraj, Deputy Commissioner of Police, which came to be recorded on 25th March 2015 and 27th March 2015. These statements are at Exhibits 57 and 58.

- (g) On completion of investigation, after obtaining prior sanction (Exhibit 24) as envisaged under Section 23(2) of the MCOC Act, from PW16 D. Kanakratnam, Additional Director General of Police, charge-sheet came to be filed against accused persons.
- (h) The learned Special Judge framed Charge and explained the same to accused persons. They abjured their guilt and claimed trial.
- (i) In order to bring home the guilt to appellant/accused no.1 Munnavvarali Ali Khan as well as the co-accused, prosecution has examined in all nineteen witnesses. Defence of appellant/accused no.1 Munnavvarali Ali Khan so also the co-accused is that of total denial. However, appellant/accused no.1 Munnavvarali Ali Khan as well as

the co-accused accepted their presence at the relevant time at the CSMT Railway Station as well as Masjid Railway Station of Mumbai.

- (j) After hearing the parties, by the impugned judgment and order dated 12th April 2016, the learned Special Judge was pleased to convict appellant/accused no.1 Munnavvarali Ali Khan as indicated in the opening paragraph of this judgment. Similarly, co-accused were also convicted and sentenced, but for lesser term than that has been imposed on appellant/accused no.1 Munnavvarali Ali Khan.

3 I have heard Ms.Bajoria, the learned counsel appearing for appellant/accused no.1 Munnavvarali Ali Khan. She vehemently argued that evidence on record is discrepant and insufficient to convict appellant/accused no.1 Munnavvarali Ali Khan for the offences with which he is charged. The recovery is not proved by the prosecution. The evidence regarding the Test Identification Parade is also discrepant. Merely on the basis of

suspicion, appellant/accused no.1 Munnavvarali Ali Khan came to be convicted. It is further argued that though the same offence is held to be proved against all accused persons, appellant/accused no.1 Munnavvarali Ali Khan was given different treatment while imposing the sentence. Though other accused are sentenced to suffer rigorous imprisonment for five years in respect of offences held to be proved against them, for the very same offences, appellant/accused no.1 Munnavvarali Ali Khan is sentenced to suffer rigorous imprisonment for seven years. The learned counsel argued that the learned trial court ought to have kept in mind the principle of parity and should not have imposed severe punishment on appellant/accused no.1 Munnavvarali Ali Khan. She placed reliance on the judgment in the matter of **Ajmer Singh vs. State of Haryana**¹.

4 As against this, Mr.S.V.Gavand, learned Additional Public Prosecutor supported the impugned judgment and order by contending that by clear, cogent, consistent evidence, the prosecution is successful in bringing home the guilt to

1 (2010) 3 Supreme Court Cases 746.

appellant/accused no.1 Munnavvarali Ali Khan as well as the co-accused. He further argued that principle of parity is not applicable to the case in hand as case of appellant/accused no.1 Munnavvarali Ali Khan is standing on different footings. On earlier occasion, he was convicted twice for similar offences and those two convictions had not yielded deterrent effect on appellant/accused no.1 Munnavvarali Ali Khan. Therefore, the learned trial court has properly sentenced him to rigorous imprisonment for seven years.

5 I have considered the submissions so advanced and also perused the record and proceedings including the oral as well as documentary evidence.

6 Let us ascertain whether, by this evidence, the prosecution has proved that appellant/accused no.1 Munnavvarali Ali Khan along with co-accused had voluntarily caused hurt to PW5 Rajeshkumar Swami and committed robbery by relieving him of his black coloured bag containing important documents,

clothes, shoes and cash as well as his mobile phone. It will also have to be seen whether prosecution has proved that appellant/accused no.1 and co-accused were members of the Organized Crime Syndicate headed by appellant/accused no.1 Munnavvarali Mohammed Sharafat and they had committed organized crime by robbing PW5 Rajeshkumar Swami after voluntarily causing hurt to him.

7 Considering the nature of allegations against accused persons, evidence of PW5 Rajeshkumar Swami, who is the victim of the crime in question, is of prime importance. He has categorically deposed that at about 4.00 a.m. of 23rd February 2015, he reached CSTM Railway station by Chennai Mail and as he wanted to go to Belapur, he boarded the local train from the very same station at about 4.20 a.m. His evidence shows that all accused persons including the appellant/accused were also traveling in his compartment. As per his version, during journey in that local train, appellant/accused no.1 Munnavvarali Mohammed Sharafat slapped him and snatched mobile phone

from his shirt pocket. He, further, deposed that accused no.2 Kishan Kumar took his black coloured bag and gave a punch on his face. This witness further deposed that accused no.3 Afsar Shaikh caught hold of his right hand and gave a punch on his face and accused no.4 Raja Ram Thakor held his left hand. The accused persons pushed him causing his fall in the compartment. In this way, as per version of PW5 Rajeshkumar Swami, accused persons relieved him of his bag containing important documents, clothes, cash and shoes apart from a mobile phone. PW5 Rajeshkumar Swami further that all four accused persons alighted from the train at Masjid Bunder Railway Station. He also got down from the train and with help of police, he returned to CSMT Railway Station where he lodged his report Exhibit 36 on 23rd February 2015 itself.

8 PW5 Rajeshkumar Swami then spoke about the Test Identification Parade conducted by the Investigating Officer on 10th March 2015 and identification of accused persons by him in that Test Identification Parade. To be specific, PW5 Rajeshkumar

Swami has deposed that at the inception of the Test Identification Parade, the Tahsildar ascertained from him whether he had shown photographs of accused persons and he answered in negative. Thereafter, he was asked to sit in another room. After sometime, he was called. At that time, two panchas were with the Tahsildar. There were two rows of six persons and he identified appellant/accused no.1 Munnavvarali Ali Khan by touching his shoulder and informed the Tahsildar that he was the accused who had taken his mobile phone and slapped him. As per version of this witness, the Tahsildar then asked the name of the said accused who told his name as Munna. This is the evidence regarding identification parade coming from the mouth of the First Informant. In a similar way, he has spoken about identification of other persons during the Test Identification Parade. During the course of recording of his deposition, PW5 Rajeshkumar Swami has duly identified all accused persons including appellant/accused no.1 Munnavvarali Ali Khan and has categorically ascribed role played by them in the robbery. He has

also identified his bag, clothes as well as the mobile phone during the course of recording of his evidence.

9 While PW5 Rajeshkumar Swami was in the witness box, the learned trial court had shown CCTV footage of CSMT Railway Station and Masjid Bunder Railway Station to him and in the said CCTV footage of CSMT Railway Station and Masjid Bunder Railway Station, PW5 Rajeshkumar Swami had identified appellant/accused no.1 Munnavarali Ali Khan as well as the other accused persons.

10 In cross-examination, it was suggested to PW5 Rajeshkumar Swami that police had shown photographs of accused persons as well as CCTV footage to him prior to the Test Identification Parade. The First Informant denied these suggestions. Scrutiny of his evidence shows that his version regarding the incident as well as identification of appellant/accused no.1 Munnavarali Ali Khan is not at all shattered in the cross-examination.

11 The next evidence pressed in service by the prosecution is that of recovery at the instance of appellant/accused no.1 Munnavvarali Ali Khan. Evidence of PW15 Baban Koyale, Police Sub-Inspector, as well as PW6 Manoj Dhayavat - panch witness shows that on 3rd March 2015, appellant/accused no.1 Munnavvarali Ali Khan made a voluntary disclosure statement and showed his willingness to discover the articles. Memorandum of Statement of appellant/accused no.1 Munnavvarali Ali Khan was recorded and as proved by both these witnesses, it is at Exhibit 38. Both these witnesses congruously deposed that then appellant/accused no.1 Munnavvarali Ali Khan took them to Marine Drive Chowpatty. He then took out a bag kept under the triangular stone at the sea-shore of Marine Drive Chowpatty. That bag was containing clothes, mobile phone and cash amounting to Rs.1,000/-. Same was seized vide Panchnama Exhibit 38. An attempt was made to discredit this witness by asking him that he had not obtained platform ticket on 3rd March 2015. This witness replied that as a loader doing work of loading and unloading, he was not required to obtain platform ticket. He,

further stated during cross-examination that sea-water level was far inside the sea-shore and there were no waves. These questions were obviously asked to the witness to make the recovery suspect. However, there is no effective cross-examination to PW6 Manoj Dhayavat as well as PW15 Baban Koyale, Police Sub-Inspector, to doubt recovery of articles at the instance of appellant/accused no.1 Munnavvarali Ali Khan. While in the witness box, the articles recovered at the instance of appellant/accused no.1 Munnavvarali Ali Khan including the bag were shown to PW5 Rajeshkumar Swami. He stated that those articles belonged to him and those were looted in the incident. It is, thus, proved by the prosecution that appellant/accused no.1 Munnavvarali Ali Khan was having knowledge of the place where looted articles were kept.

12 Evidence of injured PW5 Rajeshkumar Swami is further corroborated by evidence of PW8 Dr.Harshvardhan Bansode of the St.George Hospital, Mumbai. Evidence of this

Medical Officer shows that on 23rd February 2015 he had examined PW5 Rajeshkumar Swami and found that he was sustaining injury over his occipital region. PW8 Dr.Harshvardhan Bansode was cross-examined in respect of the history received by him regarding the incident. However, PW5 Rajeshkumar Swami was not confronted with the said history and as such, no overbearing importance can be given to the material elicited from the cross-examination. Suffice to state that evidence of PW8 Dr.Harshvardhan Bansode corroborates version of PW5 Rajeshkumar Swami to the effect that after assaulting, he was robbed of his valuables by the accused persons.

13 Evidence of PW5 Rajeshkumar Swami in respect of identification of appellant/accused no.1 Munnavarali Ali Khan is gaining corroboration from evidence of PW7 Kiran Vaiude, Nayab Tahsildar. Immediately after arrest of accused persons, the Test Identification Parade was conducted on 10th March 2015. Evidence of PW7 Kiran Vaiude, Nayab Tahsildar, shows that he put two accused persons for Test Identification Parade by calling

twelve dummies. Memorandum of Test Identification Parade Exhibit 25 makes it clear that all necessary precautions were taken while conducting the Test Identification Parade. His cross-examination shows that police personnels were not present at the time of conducting the Test Identification Parade. The spot where the Test Identification Parade was conducted was not visible to outsiders. It is further seen from cross-examination of this witness that all dummies were similar in built to accused persons. Evidence of PW7 Kiran Vaiude, Nayab Tahsildar, as well as that of PW5 Rajeshkumar Swami goes to show that appellant/accused no.1 Munnavvarali Ali Khan was identified as one of the robbers and specific role was assigned to him by the victim upon his identification.

14 In the light of foregoing discussion, it needs to be held that the prosecution has proved the offence punishable under Section 394 read with 34 of the Indian Penal Code against the appellant/accused no.1 Munnavvarali Ali Khan.

15 Now let us examine whether the prosecution has proved the offence punishable under Section 3(1)(ii) and 3(4) of the MCOC Act. Offence of organized crime is punishable with death or imprisonment for life, if in the course of commission of such offence, death of a human being results. In other cases, the said offence is punishable with imprisonment which shall not be less than 5 years apart from the liability to pay fine. Organised crime is defined by Section 2(e) of the MCOC Act and it 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. In commission of such organised crime, use of violence intimidating coercion or application of unlawful means becomes relevant and object of commission of such crime is required to be pecuniary benefits or undue economic or other advantage. Membership of the organised crime syndicate invites punishment as prescribed by Section 3(4) of the MCOC Act. Continuing unlawful activity requires filing of more than one charge-sheet qua the organised crime syndicate. In the case in

hand, evidence of PW11 Janardan T. Kolekar, Police Inspector, shows that Crime No.33 of 2012 for the offence punishable under Section 392 read with 34 was registered against appellant/accused no.1 Munnavvarali Ali Khan and others with the CSMT Railway Police Station. It is further seen from oral evidence of this witness as well as from judgment at Exhibit 65 in C.C.No.407/PW/2012 passed by the learned Metropolitan Magistrate, 35th Court, C.S.T.Mumbai, that appellant/accused no.1 Munnavvarali Ali Khan was convicted in that crime for the offence punishable under Section 392 read with 34 of the Indian Penal Code. Similarly, it is seen from evidence of PW14 Deepak Naik, Police Inspector, that Crime No.43 of 2012 came to be registered against appellant/accused no.1 Munnavvarali Ali Khan and others with the Wadala Railway Police Station for the offence punishable under Section 392 read with 34 of the Indian Penal Code. Charge-sheet in that matter was filed and ultimately, vide judgment at Exhibit 75 passed by the learned Metropolitan Magistrate, 35th Court, C.S.T.Mumbai, on 1st October 2012, appellant/accused no.1 Munnavvarali Ali Khan came to be

convicted for the offence punishable under Section 392 read with 34 in the said crime. It is, thus, seen that, more than one charge-sheet was filed against the organised crime syndicate headed by appellant/accused no.1 Munnavvarali Ali Khan alleging commission of cognizable offence punishable with imprisonment for 3 years or more and after taking cognizance of such offence, appellant/accused no.1 Munnavvarali Ali Khan was convicted twice for the offence of robbery by the Metropolitan Magistrate. The case in hand is the third case as per the record, in which appellant/accused no.1 Munnavvarali Ali Khan with the aid of his group had committed robbery after voluntarily causing hurt to PW5 Rajeshkumar Swami. Thus, involvement of the organised crime syndicate is established by the prosecution in commission of the subject crime. With evidence of PW16 D. Kanakratnam, Additional Director General of Police, Mumbai, the prosecution has established valid sanction (Exhibit 24) for filing the charge-sheet in the light of provisions of Section 23(2) of the MCOC Act. With this evidence, it is established by the prosecution that appellant/accused no.1 Munnavvarali Ali Khan was a member of

the organised crime syndicate and as a member of that syndicate, he had committed the offence of robbery after voluntarily causing hurt to PW5 Rajeshkumar Swami. Thus, offences punishable under Section 3(1)(ii) and 3(4) of the MCOC Act are duly proved against appellant/accused no.1 Munnavvarali Ali Khan.

16 Let us now advert to the submissions of the learned counsel for appellant/accused no.1 Munnavvarali Ali Khan that appellant/accused no.1 Munnavvarali Ali Khan ought not to have been sentenced to suffer rigorous imprisonment for 7 years when other members of the organised crime syndicate were sentenced to suffer rigorous imprisonment for 5 years in respect of proved offences. In the instant case, appellant/accused no.1 Munnavvarali Ali Khan was leader of the organised crime syndicate. He was convicted twice for the offence punishable under Section 392 read with 34 of the Indian Penal Code. The learned trial court has considered this aspect and observed that, in past, twice, lenient view was taken in awarding punishment and on each occasion, sentence of two months was imposed on

appellant/accused no.1 Munnavvarali Ali Khan, but such punishment could not create any deterrent effect and appellant/accused no.1 Munnavvarali Ali Khan continued to commit the similar offence. In view of past two convictions for the offence punishable under Section 392 read with 34 of the Indian Penal Code, no error can be found in exercising the discretion in imposing heavier punishment on appellant/accused no.1 Munnavvarali Ali Khan, who was leader of the organised crime syndicate. This aspect can be reflected from the judgment in the matter of **Ajmer Singh vs. State of Haryana (supra)** cited by the learned counsel appearing for appellant/accused no.1 Munnavvarali Ali Khan. Paragraph 28 of the said judgment can be quoted with advantage, which reads thus :

“28 The Court of Appeal of the Supreme Court of Victoria, Australia in the case of **R v Hildebrandt [187 A Crim R 42 : 2008 WL 3856330 : [2008] VSCA 142]** observed:

“Judicial expositions of the meaning of the parity principle are not entirely uniform. The term "the parity principle" is used in at least two senses in the relevant authorities. First, to express the

recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to describe the requirement to consider the "appropriate comparability" of co-offenders, and in that sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition."

17 In complying the principle of parity, the accused must be similarly placed with the co-accused. Equal justice is the principle but for claiming equal justice, the accused must be similarly situated like other accused persons. However, if there are material differences between his position and position of rest of the accused persons, then, such an accused cannot claim parity with other accused. With having two convictions for the offence punishable under Section 392 read with 34 of the Indian Penal Code to his credit, it cannot be said that case of appellant/accused no.1 Munnavvarali Ali Khan is on par with the case of the co-accused. As such, it cannot be said that punishment imposed on

appellant/accused no.1 Munnavvarali Ali Khan in respect of proved offences is not proper.

18 In the result, the appeal is devoid of merits, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)