IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1250 OF 2018

RAFIQALI SHAFIQALI SAYYAD)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ashwin Thool i/b. Mr.Deepak Gautam and Mr.Kunal Shejwal, Advocate for the Appellant.

Mrs.M.M.Deshmukh, APP for the Respondent – State.

Mr.Natkar, Assistant Police Inspector, DCB CID Unit I, Mumbai.

CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.

DATE : RESERVED ON 18th JUNE 2019
PRONOUNCED ON 28th JUNE 2019

<u>**JUDGMENT**</u> : **(PER : A.M.BADAR, J.)**

1 The appellant/accused no.4, by this appeal under Section 12 of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as the MCOC Act for the sake of brevity) is challenging the order dated 21st April 2017 passed below Exhibit 11 by the learned Special Judge under the MCOC

Act, Mumbai, in MCOC Special Case No.12 of 2016, thereby rejecting the said application for discharge. Incidentally, the appellant/accused no.4 has also made prayer for quashing and setting aside the impugned Approval order and Sanction order for prosecuting him under the provisions of the MCOC Act.

2 Heard the learned counsel appearing for the appellant/accused no.4 at sufficient length of time. He argued that no extortion was committed by the appellant/accused no.4 and consequently, there was no delivery of money, and as such, the learned trial court totally erred in rejecting the application at Exhibit 11 seeking discharge. It is argued on behalf of the appellant/accused no.4 that his name is not appearing in the First Information Report (FIR) and there is no evidence on record for framing Charge against him. There is nothing to show that allegation against the appellant/accused no.4 are true, in any manner, in the light of improvement in the story by witnesses and the Investigating Officer. There is nothing on record to demonstrate that organized crime has been committed by the

appellant/accused no.4. Our attention was drawn to the judgment of the learned Division Bench of this court in the matter of **Madan S/o. Ramkisan Gangwani vs. State of Maharashtra**[1] to demonstrate that feeling of being rendered helpless cannot come within the sweep of activities covered in the expression “by use of violence or threat of violence.....”. The learned counsel argued that violence implies use of greater degree of force and intimidation always need not be criminal intimidation. Therefore, in submission of the learned counsel for the appellant/accused no.4, as there is no material to frame Charge against appellant/ accused no.4, he ought to have been discharged by the learned Special Judge.

3 As against this, the learned APP by relying on statement of the First Informant/alleged victim of the crime in question as well as statement of servant of the appellant/accused no.4, submitted that there is material to frame Charge against the appellant/accused no.4. She also relied on confession of co-accused Faim Naim Khan.

1 2009 ALL MR (Cri) 1447

4 We have considered the submissions, so advanced, and also perused the material made available.

5 The crime in question is registered on the basis of raid conducted by the Senior Police Inspector of Anti Extortion Cell on 20th April 2016 on the basis of information received from the Police Informer. The Police Officer had received information that under directions of absconding accused Chhota Shakil and his brother Anwar, his goons are gathering with deadly weapons, near Meena Hotel, S.V.Road, Jogeshwari (West), Mumbai, to eliminate a businessman namely Iqbal Attarwala. Accordingly, a trap was arranged and three accused persons came to be apprehended. Accordingly, the FIR was lodged with Amboli Police Station which resulted in registration of Crime No.153 of 2016 for offences punishable under Sections 115 read with 302 and 120B read with 34 of the Indian Penal Code, under Sections 3 and 25 of the Arms Act as well as under Section 37 of the Maharashtra Police Act, against accused persons including accused no.1 Michael John D'Souza, accused no.2 Naim Faim Khan and

accused no.3 Nitin Gopal Gurav. During course of investigation, it was transpired that under leadership of absconding accused Shakil Babu Shaikh @ Chhota Shakil, an organised crime syndicate was being run for continuing unlawful activities. Therefore, Joint Commissioner of Police, Crime, Mumbai, gave prior approval on 10th May 2016 under Section 23(1)(a) of the MCOC Act for applying provisions of Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act and accorded sanction to prosecute them by exercising powers under Section 23(2) of the MCOC Act.

6 According to the prosecution case, during investigation of the subject crime, it was revealed that arrested accused no.1 Michael John D'Souza @ Raju Pille, accused no.2 Naim Faim Khan, accused no.3 Nitin Gopal Gurav, accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD (i.e. the appellant/accused no.4) and wanted accused (1) Shakil Babu Shaikh @ Chhota Shakil, (2) Anwar Babu Shaikh, (3) Razzak Baloch, (4) Riyaz Memon and (5) Tabrez Aalam hatched a criminal conspiracy to commit unlawful activities jointly by use of

violence and planned to commit murder of victim Iqbal Attarwala. According to the prosecution case, appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD is involved in the conspiracy and had aided and abetted the organised crime syndicate. The crime was planned and executed under instructions as well as supervision of wanted accused Shakil Babu Shaikh @ Chhota Shakil, who is the gang leader of the organised crime syndicate, with the intention of obtaining pecuniary benefits and undue economic advantages. The appellant/accused no.4 as well as other accused persons, according to the prosecution, are members of an organised crime syndicate headed by Chhota Shakil.

7 During the course of investigation, statement of alleged victim Iqbal Attarwala came to be recorded by the prosecuting agency. His statement categorically reveals that he was doing the work of Estate Broker as well as Event Manager. He had event companies and one of the events sought to be organized by him in a foreign country was cancelled because of

Tsunami. He, as such, landed in financial crisis. In the year 2014, absconding accused Razzak Baloch showed willingness to finance him by transferring funds in some account in Venezuela. As the victim was not having any bank account in Venezuela, absconding accused Razzak Baloch directed him to contact Zulfikar by giving his cell phone number. When the victim contacted said Zulfikar as well as another person named Krishna Prasad Rai, he was informed that amount is being transferred in some bank account. However, ultimately, no finance was arranged by absconding accused Razzak Baloch. The victim could not get any money for meeting his financial needs. However, after a lapse of about one year, absconding accused Razzak Baloch started demanding refund of amount of Rs.4.50 crore from the victim by threatening him and informing him that the money belongs to absconding accused Chhota Shakil.

8 The victim, in his statement, has categorically stated that he got several phone calls from gangster Chhota Shakil and his brother Anwar, threatening him to repay the amount of

Rs.4.50 crore given to him by absconding accused Razzak Baloch. He was asked to talk with absconding accused Anwar. The victim has stated that absconding accused Anwar, by making several telephonic calls to him, had threatened him that if the amount demanded is not paid, then his men will kill the victim. The victim further stated that under threats of Anwar, he asked Anwar as to how the amount should be paid. Upon that, absconding accused Anwar informed the victim that the victim should contact appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD and deposit money with Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD. The victim, in terms, has stated to the Investigator that accordingly, he met Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD at Mira Road and at that time, appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD informed him that absconding accused Anwar had arranged men for killing the victim and he may be killed any time, if he fails to pay the money. The victim stated that appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD used to meet him and used to demand money.

9 Statement of servant of appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD came to be recorded during the course of investigation. His statement reveals that the appellant/accused no.4 used to talk with absconding accused Anwar telephonically. This servant has spoken about visit of co-accused Naim Khan at the shop of appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD and in respect of talks between both of them. As per version of servant of the appellant/accused no.4, the appellant/accused no.4 had directed co-accused Naim Khan to keep watch on victim Iqbal Attarwala and had paid an amount of Rs.5,000/- to co-accused Naim Khan for this work. In presence of co-accused Naim Khan, the appellant/accused no.4 had a talk with absconding accused Anwar on the cell phone. During the course of that call, co-accused Naim Khan also had a talk with absconding accused Anwar and assured absconding accused Anwar that he will do the work as directed. The servant of the appellant/accused no.4 has stated in his statement that co-accused Naim Khan met the appellant/accused no.4 on five to six occasions during the period

from March to April 2016 and the appellant/accused no.4 had informed him that work of keeping watch on Iqbal Attarwala, entrusted to him, should be done.

10 Then, there is statement of witness at page 164 of the charge-sheet, which reveals about conversation amongst Anwar, gangleader Chhota Shakil and appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD. As per version of this witness, co-accused Naim Faim Khan was working with Akhtar. He stated that amount of Rs.70 lakh paid by Akhtar to him, infact, belonged to absconding accused Anwar, who happens to be brother of Chhota Shakil. This witness vouched that appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD used to inform him that if he failed to pay money, then he as well as his mother would be killed, as per directions of absconding accused Chhota Shakil. As per version of this witness, appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD had threatened him that he is a special member of gang of Chhota Shakil and he is entrusted with the work of

recovering amounts. There is statement of other witness at page 167 of the charge-sheet indicting the appellant/accused no.4 in the subject crime. Confessional statement of Faim Naim Khan is also referring appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD as a member of the organised crime syndicate.

11 Material collected by the Investigating Officer forming part of the charge-sheet, as such, prima facie goes to show that appellant/accused no.4 Rafiqali Shafiqali Sayyed @ Rafique @ Shahid @ CD is a member of organised crime syndicate headed by gangster Chhota Shakil and he used to threaten the victims by intimidating them and by coercing them for obtaining pecuniary benefits and for gaining economic advantage by indulging in continuing unlawful activities.

12 At this juncture, it is apposite to refer to the judgment of the Honourable Apex Court in the matter of **State of Tamil Nadu vs. N. Suresh Rajan & Others**[2] wherein, it is held thus :

2 (2014) 11 SCC 709

"We have bestowed our consideration to the rival submissions and the submissions made by Mr.Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of **Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171)**, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in **Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96)**:

> "11 It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for

> presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." " .

13 Though the appellant/accused no.4 has prayed for quashing and setting aside the Approval order and Sanction order for prosecuting him under the provisions of MCOC Act, no oral arguments were advanced on this aspect. Moreover, this being an appeal challenging order of discharge, validity and legality of the Approval order and Sanction order cannot be gone into, at this stage. At this juncture, it is apposite to quote observations in paragraph 13 of the judgment of Division Bench of this court in the matter of **Anil Sadashiv Nanduskar vs. State of Maharashtra**[3]. It reads thus :

3 2008 (3) MAH.L.J.(CRI) 650

"13 The settled law by a catena of decisions of the Apex Court is to the effect that it is desirable that every order whether the approval or sanction it should speak for itself, i.e. ex-facie it should disclose consideration of the materials placed before it and application of mind thereto. However, failure to reproduce or refer those recitals in the resolution or order itself would not render the order of approval or sanction to be invalid unless the prosecution fails to establish by leading evidence that all the materials necessary for the grant of approval or sanction were placed before the concerned authority for due application of mind by such authority before the grant of approval and or sanction. It apparently discloses that question of validity of approval or sanction cannot be decided unless the prosecution is afforded opportunity to lead evidence in that regard. Undoubtedly, an accused desiring to raise objection regarding the defects in such approval or sanction, or grant, he can raise such objection; however, for conclusive decision on the said point the accused has to wait till the trial is complete and on that ground he cannot insist for discharge unless the objection relates to inherent lack of jurisdiction

> to the concerned authority to grant sanction or approval and such issue can be decided on undisputed facts. The law being well settled to the effect that the prosecution in a case where sanction or the approval order does not ex-facie show consideration of all the materials and/or application of mind, is entitled to establish the same by leading necessary evidence regarding production of materials before the concerned authority, the question of discharge of accused merely on the basis of such objection being raised cannot arise. The decision on the point of defect, if any, in the order of approval or sanction will have to be at the conclusion of the trial."

14 In view of foregoing discussion, in the light of ratio laid down by the Honourable Apex Court in the matter of **N. Suresh Rajan (supra),** it cannot be said that there is no ground for presuming that the offence alleged has not been committed by the appellant/accused no.4. No infirmity, as such, can be found with the impugned order, rejecting the application under Section 12 of the MCOC Act, preferred by the appellant/accused no.4 at

Exhibit 11, by the learned Special Judge under the MCOC Act. Consequently, legality in the appeal, challenging the order of rejection of application for discharge, order granting prior approval and sanction for prosecuting the appellant/accused no.4 under the MCOC Act, 1999, cannot be gone into. Resultantly, the appeal fails, and therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.) **(INDRAJIT MAHANTY, J.)**