IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 2899 OF 2019

Manish K Agarwal ....Petitioner
V/S
The State Of Maharashtra ....Respondent
WITH
WRIT PETITION NO. 4058 OF 2019
Jayesh Hirji Savla ....Petitioner
V/S
The State Of Maharashtra and Ors. ....Respondents
WITH
WRIT PETITION NO. 3443 OF 2019
Viral Prakash Savla ....Petitioner
V/S
The State Of Maharashtra and Ors. ....Respondents
WITH
WRIT PETITION NO. 3747 OF 2019
Sharad Devasrao Korane and Ors. ....Petitioners
V/S
The State Of Maharashtra and Ors. ....Respondents
WITH
WRIT PETITION NO. 3775 OF 2019
Rakesh Madanlal Agrawal ....Petitioner
V/S
The State Of Maharashtra and Ors. ....Respondents
WITH
WRIT PETITION NO. 3418 OF 2019
Zakir Abdul Mirajkar ....Petitioner
V/S
The State Of Maharashtra and Ors. ....Respondents
WITH
WRIT PETITION NO. 3654 OF 2019
Ankush Maruti Vagre ....Petitioner
V/S
The State Of Maharashtra ....Respondent
WITH
WRIT PETITION NO. 5461 OF 2019
Samrat Subhash Korane ....Petitioner
V/S
The State Of Maharashtra and Ors. ....Respondents

WITH

WRIT PETITION NO. 3867 OF 2019

Shailesh Gunvantrao Maniyar ....Petitioner

V/S

The State Of Maharashtra and Ors. ....Respondents

WITH

WITH

WRIT PETITION NO. 3868 OF 2019

Jitendra Kantilal Gosalia ....Petitioner

V/S

The State Of Maharashtra and Ors. ....Respondents

WITH

WRIT PETITION NO. 3869 OF 2019

Jayesh Sevantilal Shah ....Petitioner

V/S

The State Of Maharashtra and Ors. ....Respondents

WITH

WITH

WRIT PETITION NO. 4384 OF 2019

Prakash @ Pappu Hirji Savla ....Petitioner

V/S

The State Of Maharashtra and Ors. ....Respondents

Sr.Adv. Shirish Gupte i/b Kedar Patil for petitioner in WP 2899/2019.

Sr.Adv. A.P.Mundargi i/b Jayant Bardeskar for petitioner in WP 3418/19.

Adv. Manoj Mohite i/b Hrishikesh Mundargi for petitioner in WP 3747/19.

Sr.Adv. A.P.Mundargi i/b Omkar Nagwekar for petitioner in WP 3775/19.

Adv. Sanjeev Kadam i/b Prashant Raul for petitioner in WP 3867/2019,WP 3868/2019.WP 3869/2019.

Sr.Adv. A.P.Mundargi A/w Niranjan Mundargi i/b Veerdhawal Deshmukh for petitioner in WP 5461/2019.

Sr.Adv. A.P. Mundargi a/w Shaym Dewani,Vinay Kumar,Chirag Chanani & K.Trivedi i/b Dewani Asso. for petitioner in WP 3443/2019.

Adv. Tejas Hilage for Petitioner in WP 3654/2019
Adv. D.V.Sawant i/b Adv. S.B. Ghadage for Petitioner in WP 4058/2019.

Smt. Aruna S. Pai, Spl. P.P. for the Respondent -State.

CORAM : B.P.DHARMADHIKARI, CHIEF JUSTICE & N.R. BORKAR, J.

DATE OF RESERVED : 25.2.2020
DATE OF PRONOUNCEMENT : 21.4.2020

ORDER (PER N.R. BORKAR, J.)

1] A challenge in the present petitions is to the prosecution of the petitioners for the offences punishable under Sections 307, 395, 143, 147, 349, 353, 332, 109, 324, 420, 427, 120-B of the Indian Penal Code, 1860, Sections 4 and 5 of the Maharashtra Prevention of Gambling Act, 1887, Section 37 read with 135 of the Police Act 1861, Section 65(e) of the Maharashtra Prohibition Act, 2016, Section 21(2), 21(3) and 23 of the Banning of Unregulated Deposit Schemes Act, 2019 and Sections 3(1)(II), 3(2), 3(4) and 3(5) of Maharashtra Control of Organized Crime Act, 1999 (MCOCA).

2] As challenge in all these petitions is common, they are being decided by this common order.

3] It is the case of the prosecution that on 8.4.2019 pursuant to secret information, Assistant Supdt. of Police of Karvir Police Station of Kolhapur along with other police personnel raided the Matka (Gambling) Den of Salim Yashin Mulla (accused No.26). It is alleged that while recording of the panchanama of incriminating articles which were found during the raid was going on, the wife of accused No.26 namely Shama Salim Mulla (accused No.1) came there with other co-accused and they assaulted the raiding party.

4] Initially, on the basis of complaint lodged by one of the members of the raiding party with Rajarampuri Police Station, Kolhapur, the said police station registered the crime vide crime No.136 of 2019 for the offences punishable under Sections 307, 395, 143, 147, 349, 353, 332, 109, 324, 427, of IPC, Section 4 and 5 of Maharashtra Gambling Act, Section 37 read with 135 of Police Act and Section 65(e) of Maharashtra Prohibition Act.

5] According to the prosecution, during the course of investigation of the said crime, it was revealed that the accused therein were members of Organized syndicate led by accused No.26 against whom there are various offences of dacoity, extortion, betting etc. The Investigating Officer, therefore, submitted a proposal for invoking the offences under the MCOC Act to competent authority under Section 23(1)(a) of the said Act. After grant of approval by the competent authority on 10.4.2019, the offences under the MCOC Act came to be added in the crime.

6] It is alleged that during the course of investigation, it was revealed that accused No.26 used to transfer money received by him from Matka business to accused No.30 Rakesh Agrawal (petitioner in Writ Petition No. 3775 of 2019) and accused No.42 Manish Agarwal (petitioner in Writ Petition No. 2899 of 2019), in certain contingencies i.e if he perceived that he would not be able to repay the amount in the event particular number on which maximum amount was betted and accepted by him declared to be winning number. Thus, accused No.30 and 42 used to accept that risk and discharge the obligation to pay if said number turn out to be winning one. It is alleged that in a similar circumstances, accused Nos.30 and 42 used to transfer risk and money received by them from persons like accused No.26 to accused No.43 Samrat Korane (petitioner in Writ Petition No.5461 of 2019). Suffice it to say that the petitioners before us are roped in the present crime to be members of organized crime syndicate led by accused No.26 on the basis of their complicity in Matka activity of accused No.26.

7] We have heard the learned advocates for the petitioners and learned Spl. P.P., for the respondent – State.

8] Before adverting to rival contentions, we would first like to refer to the provisions of the MCOC Act, which are relevant for deciding the issues involved in the present matter and their interpretation by Hon'ble Supreme Court.

Section 2 (1) (d) defines expression 'continuing unlawful activity' means an activity prohibited by law for the time being in force, which is a cognizable offence and punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organized 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.

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

Section 2 (1) (f) defines expression ‘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 organized crime.

9] The Hon’ble Supreme Court in the judgment reported in ***2015 (7) SCC 440*** in the case of ***Prasasd S. Purohit vs State of Maharashtra and another,*** while interpreting the above three definitions, has observed:

“The definition of 'continuing unlawful activity' under Section 2(1)(d) mainly refers to an activity prohibited by law. The said activity should be a cognizable offence, punishable with imprisonment of three years or more. The commission of such offence should have been undertaken either by an individual singly or by joining with others either as a member of an 'organized crime syndicate' or even if as an individual or by joining hands with others even if not as a member of a 'organized crime syndicate' such commission of an offence should have been on behalf of such syndicate. It further states that in order to come within the definition of 'continuing unlawful activity' there should have been more than one charge-sheet filed before a competent Court within the preceding period of 10 years and that the said Court should have taken cognizance of such offence.

Before getting into the nuances of the said definition of 'continuing unlawful activity', it will be worthwhile to get a broad idea of the definition of 'organized crime' under Section 2(1)(e) and 'organized crime syndicate' under Section 2(1)(f). An 'organized crime' should be any 'continuing unlawful activity' either by an individual singly or jointly, either as a member of an 'organized crime syndicate' or on behalf of such syndicate. The main ingredient of the said definition is that such 'continuing unlawful activity' should have been indulged in by use of violence or threat of violence or intimidation or coercion or other unlawful means. Further such violence and other activity should have been indulged in with an objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency. Therefore, an 'organized crime' by nature of violent action indulged in by an individual singly or jointly either as a member of an 'organized crime syndicate' or on behalf of such syndicate should have been either with an object for making pecuniary gains or undue economic or other advantage or for promoting insurgency. If the object was for making pecuniary gains it can be either for himself or for any other person. But we notice for promoting insurgency, there is no such *requirement of any personal interest or the interest of any other person or body. The mere indulgence in a violent activity etc. either for pecuniary gain or other advantage or for promoting insurgency as an individual, either singly or jointly as a member of 'organized crime syndicate' or on behalf of a such syndicate would be sufficient for bringing the said activity within the four corners of the definition of 'organized crime'.*

By conspectus reading of the above three definitions, if in the preceding 10 years from the date of third continuing unlawful activity if more than one charge-sheet has been filed before a competent Court which had taken cognizance of such offence which would result in imposition of a punishment of three years or more, undertaken by a person individually or jointly either as a member of an 'organized crime syndicate' or on its behalf, such crime if falls within the definition of 'organized crime', the invocation of MCOCA would be the resultant position."

10] As regards requirement of more than one charge-sheet within the preceding period of 10 years, this Court in the judgment reported in ***2009 ALL MR 1903*** in the case of ***Govind S. Ubhe vs. State of Maharashtra*** has held:

"In the light of this, we are of the opinion that the words `more than one charge-sheet' contained in Section 2(1)(d) refer to unlawful activities of the organized crime syndicate. Requirement of more than one charge-sheet is qua the unlawful activities of the organized crime syndicate and not qua individual member thereof."

11] In the above backdrop, now we will examine the rival contentions raised by the parties. In the present matter, invocation of the provisions of the MCOC Act against the organized crime syndicate led by the accused No. 26 has not been challenged before us. The principal contention on behalf of the petitioners is that they were not present at the time of incident dated 8.4.2019 and they do not have any connection or association either with the accused No. 26 or his alleged organized crime syndicate. To counter this submission and to show the association of the petitioners with organized crime syndicate of accused No.26, learned Spl.P.P has pointed out the statements of witnesses and confessions of some of the petitioners.

12] We have perused the said statements and confessions. The fact that the petitioners were not present at the time of incident dated 8.4.2019 is not in dispute. The statement of witness Sanjay Adsule referred to by learned Spl.P.P. shows that accused No. 32 Ankush Waghre was working with accused No. 30 Rakesh Agrawal and accused No.42. A confession of accused No.32 Ankush Waghre came to be recorded during the course of investigation and it shows that accused No.26 Salim Mulla used to transfer money received by him from Matka business to accused Nos. 30 and 42 in certain contingencies as stated supra. Suffice it to say that the statement of witnesses and confessions of some of the petitioners referred to by learned Spl.P.P. are on a similar terms.

13] The question is, therefore, can the petitioners on the basis of above materials be said to be members of organized crime syndicate led by accused No. 26 ? The contention of the petitioners is that on the basis of the material collected by the prosecution, the petitioners, at the most, can be said to have committed the offences under the Gambling Act. It is submitted that maximum punishment for the offences under Gambling Act is two years. It is submitted that competent authority under Section 23(a), therefore, while granting approval for invocation of the offences under the MCOC Act against the organized crime syndicate led by accused No.26, considered the I.P.C. offences only. It is submitted that the sanctioning authority under section 23(2), therefore, ought not to have granted sanction to prosecute the present petitioners. It is submitted that the petitioners cannot be roped in the present crime as members of organized crime syndicate led by accused No. 26, on the basis of their alleged complicity in his Matka business.

14] Though the gambling by itself may not be an organized crime, however, an organized crime syndicate may take recourse to it as one of it profit making venture. It may earn some profit or benefit out of it to support its other activities. It may indulge in contract killing, abduction or dacoity or other similar offences along with gambling business. If the existence of an organized crime syndicate comes to the knowledge of State for the first time while conducting raid on a gambling establishment and the investigation shows previous two or more charge-sheets for cognizable offences punishable with imprisonment of three or more years, the police may take recourse to the MCOC Act and complete the investigation. The MCOC Court may after trial punish accused only for being a member of or for abetting if it finds that there is no proof of actual participation. Section 3 itself shows the possibility of such punishment though there may be acquittal of charge under section 3 (i) or (ii) is concerned.

15] In the present matters, the petitioners are alleged to have extended actual assistance to the main accused, i.e., accused No.26 Mulla and provided him the accommodation in contingency of excessive risk being incurred by the main accused. This help to the main accused is definitely sufficient at this stage to deny the relief sought by the petitioners. Some of the accused who are petitioners before us are still absconding. Their interrogation and investigation may also help prosecution in producing more incriminating material on record. We also cannot ignore the variance in the concept of to abet and to be a member of syndicate.

16] The judgment relied upon on behalf of the petitioners in the case of ***Mangesh Manik Kanchan vs. State of Maharashtra*** is the judgment of learned Single Judge of this Court on *Bail Application No. 1696 of 2014 delivered on 13.7.2015*. The learned Single Judge has observed:

> *"Thus, "the activity" should be prohibited by law for the time being in force. That activity is a cognizable offence punishable with imprisonment of three years or more. Therefore, continuing unlawful activity necessarily contemplates commission of cognizable offence. A person can be a member of a particular gang but he*

may not participate at all in a commission of offence committed by a particular member of the gang. For each and every commission of the offence, all the gang members, who are from that gang, cannot be roped in. It will lead to a tyrant situation. These members may work under one leadership, however, they may commit offence independently which should fall under the definition of "continuing unlawful activity" as either singly or jointly as a member of an organized crime syndicate. However, it is necessary for a member to either participate actively or passively in such crime, then only he can be charged for the offence punishable under the Indian Penal Code and then the member who has knowingly participated either actively or passively can also be prosecuted under section 3(4) of the MCOC Act. For better understanding of this legal position, the definition of continuous unlawful activity & organized crime needs to be considered. The definition of organized crime reads as under:

> *"organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized 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 person or promoting insurgency"*

Continuous unlawful activity contemplates commission of cognizable offence and therefore, if at all there is a commission of cognizable offence along with other ingredients, then it is a continuous unlawful activity may amount to organized crime and the person who is involved in such commission of offence and if at all he is a member of the organized crime syndicate, he can be punished under section 3(4) of the MCOC Act. These all definitions are circular and interlinking with each other and therefore, a prosecution simplictor under section 3(4) of the MCOC Act though is available in the Act, is practically not possible. A member of syndicate may commit cognizable offence jointly, then section

3(4) can be invoked for the offence and he can be chargesheeted accordingly. However, if cognizable offence is not committed and though he is known as a member of organized crime syndicate, cannot be prosecuted and charge-sheeted for being a member of organized crime alone. Though there is penal provision yet due to circular definitions of the terms under sections 2(d) and 2(e) of the Act, a member of a gang practically cannot be prosecuted under section 3(4) of the Act simplicitor.

Life flows and a member may repent and he may withdraw himself from the gang. A person may not remain a member of the gang throughout his life and therefore, it is draconian to permanently keep him under a hanging sword that he can be prosecuted under section 3(4) of the MCOC Act for any crime committed by any member of the gang. Therefore, penal section 3(4) is necessarily controlled by defining sections 2(d) and 2(e) of the Act. A power to grant bail in cases under the Act to be used if conditions under section 21(4) are fulfilled."

17] We need not deal with this judgment at length in this matter since the prosecution here has alleged that the petitioners before us have assisted accused No.26 actively by accepting the money and risk in gambling business. If the case of the prosecution is accepted, the organized crime syndicate of accused No.26 against whom invocation of the MCOC Act is not in dispute, would not have succeeded in gambling activity or business in absence of the helping hand of the petitioners. The express language employed in the interpretation clause reveals non-use of concept of organized crime insofar as such member is concerned. The legislature has defined abetment in wide language and thereafter also added "being a member" as an independent crime and made it punishable under Section 3(4). Observations by learned Single Judge show that in the said matter there was no evidence of conspiracy and no charge under Section 120-B of IPC and the applicants were not attributed any active or even passive role. Facts of matter before us show that the State has invoked Section 120-B of IPC so also Sections 3 (4) of MCOC Act.

18] As regards the contention that the provisions of the MCOC Act cannot be invoked against the petitioners since their names were not included in the order under Section 23(1)(a) needs no consideration in view of the judgment of the Hon'ble Supreme Court in ***2007 (3) SCC 633*** in the case of ***Vinod G. Asrani vs. State of Maharashtra.*** The Hon'ble Supreme Court has observed thus:

> *"8. We have carefully considered the submissions made on behalf of the respective parties and the relevant provisions of MCOCA and we are of the view that the High Court did not commit any error in dismissing the petitioner's writ application. We are*

inclined to accept Mr. Altaf Ahmed's submissions that non-inclusion of the petitioner's name in the approval under Section 23 (1) (a) of MCOCA was not fatal to the investigation as far as the petitioner is concerned. On the other hand, his name was included in the sanction granted under Section 23 (2) after the stage of investigation into the complaint where his complicity was established. The offences alleged to have been committed by the petitioner has a direct bearing and/or link with the activities of the other accused as part of the Chhota Rajan gang which was an organized crime syndicate.

9. As pointed out by Mr. Ahmed, this Court in the case of Kari Choudhary vs. Mst. Sita Devi & Ors., (2002) 1 SCC 714, had while considering a similar question observed that the ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who had committed it. The scheme of the Code of Criminal Procedure makes it clear that once the information of the commission of an offence is received under Section 154 of the Code of Criminal Procedure, the investigating authorities take up the investigation and file charge sheet against whoever is found during the investigation to have been involved in the commission of such offence. There is no hard and fast rule that the First Information Report must always contain the names of all persons who were involved in the commission of an offence. Very often the names of the culprits are not even mentioned in the F.I.R. and they surface only at the stage of the investigation. <u>The scheme under Section 23 of MCOCA is similar and Section 23 (1) (a) provides a safeguard that no investigation into an offence under MCOCA should be commenced without the approval of the concerned authorities. Once such approval is obtained, an investigation is commenced. Those who are subsequently found to be involved in the commission of the organized crime can very well be proceeded against once sanction is obtained against them under Section 23 (2) of MCOCA.</u>"

19] One more contention came to be raised on behalf of the petitioners to the effect that the confessions recorded in the present matter are inadmissible and they need to be ignored. It is submitted that Section 18 of the MCOC Act contemplates recording of confessions by a police officer not below the rank of Superintendent of Police. It is submitted that in the present matter almost all confessions are recorded by Additional Superintendent of Police. As against this, the learned Spl.P.P. has pointed out clause 25 (2) of Bombay Police Manual, 1959, which *inter-alia* states that Additional Superintendent of Police is in the same position as the Superintendent of Police in the area for which he is appointed. In absence of any challenge to the said clause, we are compelled to reject this contention.

20] No case is, therefore, made out to quash the prosecution in question against the petitioners. In the result, all the petitions are dismissed.

(N.R. BORKAR, J.) **(CHIEF JUSTICE)**