

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

CRIMINAL APPEAL NO. 716 OF 2018

Shahjad Shaikh s/o Shamin Shaikh,
Age; 35 years, Occ; Labourer,
R/o. Sadatnagar, Near Shahat Dargah,
Aurangabad, Taluka & District
Aurangabad.

...APPELLANT
(Orig. Accused No. 4)

VERSUS

The State of Maharashtra,
Through the Police Inspector,
Osmanpura Police Station,
Aurangabad, Taluka and
District; Aurangabad.

...RESPONDENT
(Orig. Complainant)

...
Advocate for Appellant : Mr. T.W.Pathan
APP for Respondent-State Mr. R.B.Bagul
...

CORAM : SURENDRA P.TAVADE , J.

Date of Reservation : 20th September, 2021.
Date of Pronouncement : 07th October, 2021.

JUDGMENT :

1. The appellant is challenging the judgment and order passed by the learned Special Judge, (MCOC), Aurangabad in Special

Case (MCOC) No. 7 of 2015 dated 27.08.2018, whereby the appellant has been convicted for the offence punishable under Section 392 read with Section 34 of the Indian Penal Code (for short "IPC") and he was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 25,000/-, in default, he was directed to undergo rigorous imprisonment for 2 years.

2. Facts giving rise to the present appeal are that the appellant was prosecuted for the offence punishable under Section 3 (1) (ii), 3 (2), 3 (4) of the Maharashtra Control of Organized Crime Act, 1999 (for short "MCOC Act"). The appellant was acquitted for the aforesaid offences of MCOC Act. The State has not preferred an appeal against the said acquittal, therefore, the appellant has challenged his sentence under Section 392 of the IPC.

3. It is alleged that on 25.06.2015, the informant Mangalabai w/o Laxmanrao Deshmukh had gone for morning walk. When she reached near gymnasium-hall on Jyoti Mandir road, two persons came on motorcycle from her behind, they stopped their motorcycle near her. The pillion rider of the motorcycle alighted from the motorcycle and snatched her gold chain (Mangalsutra) from her neck. She raised shout for help. Meantime, the snatchers sat on the motorcycle and both of them ran away from the spot. The victim

Mangalabai thereafter returned her home. She disclosed the incident to her family members. Thereafter she went to the Osmanapura Police Station, Aurangabad and lodged report. On the basis of that report/FIR, a crime bearing No. 139 of 2015, came to be registered against unknown persons under Section 392 read with Section 34 of the IPC.

4. PSI, Deshmukh, carried out the investigation of the said crime. He visited the spot of the offence, prepared the scene of panchanama in presence of two panch witnesses. During the investigation, API, Aware arrested the appellant and other co-accused near Hanuman temple. After arrest of the appellant and other co-accused, PSI, Aware, came to know the involvement of the appellant and others in crime No. 113 of 1995. Accordingly, the appellant along with three others were handed over to PSI, Deshmukh (PW-05).

5. During the course of investigation, PSI, Deshmukh (PW-5), the investigating officer conducted the test identification parade of the appellant and other co-accused at Harsul jail through the Executive Magistrate on 08.07.2015. The informant was asked to identify the culprits, accordingly she identified the appellant and other co-accused Sk. Imran. Accordingly panchanama to that effect

was prepared at Harsul jail.

6. During the course of investigation, the appellant made disclosure statement in presence of panch witnesses that he had kept the stolen gold chains in his house. Accordingly his memorandum statement was recorded under panchanama. The appellant took panchas, police staff and investigating officer to his house and produced four gold chains before the investigating officer and panch witnesses. The said stolen gold chains were seized under the seizure panchanama. The seized gold chains were shown to the informant. She identified her chain. Accordingly panchanama was prepared to that effect.

7. While carrying out the investigation, the investigating officer realized that the co-accused Sk. Imran @ Sultan s/o Sirajuddin Shaikh has formed organized crime syndicate and he was indulged in unlawful activities for pecuniary gains, hence provisions of MCOC Act were invoked. After necessary permission, the investigation was handed over to API Baheti (PW-7). He recorded statements of witnesses and after completion of the investigation, sent a proposal to the Commissioner of Police, Aurangabad for grant of permission under Section 23 (2) of the MCOC Act to prosecute the appellant and other co-accused. Accordingly the Additional D.G.,

Mumbai granted permission to file charge-sheet against the appellant and other co-accused. Accordingly the charge-sheet came to be filed against the appellant and other co-accused for the offences under Sections 3 (1) (ii), 3 (2), 3 (4) of the MCOC Act and under Section 392 read with Section 34 of the IPC.

8. After appearance of the appellant and other co-accused, the charge came to be framed against them. The appellant and other co-accused pleaded not guilty and claimed to be tried. Their defence is of total denial. To prove the charge against the appellant and other co-accused the prosecution examined in all 11 witnesses as follows :

WITNESS NO	NAME OF WITNESS	EXHIBIT	STATUS
PW-01	Mangalabai Deshmukh	36	Complainant
PW-02	Mahesh K. Kulthe	39	panch witness on seizure of motorcycle.
PW-03	Prashant Kanthawar	41	Eye witness of the incident.
PW-04	Gautam R.Fasale	43	Police Inspector (Partial IO) (He sought permission from Commissioner of Police for invoking provisions of MCOC Act.
PW-05	Amol R. Deshmukh	50	PSI & initial IO (who carried investigation of the crime under Section 392 of IPC)

PW-06	Prashant A. Aware	60	PSI Crime Branch (Arrest of appellant and others)
PW-07	Dr. Khushalchand Baheti	68	(Investigating Officer) API, who carried investigation under the provisions of MCOC Act.
PW-08	Amitesh Kumar	110	Commissioner of Police, Aurangabad (MCOCA sanction) (who granted approval to invoke provisions of MCOC Act.)
PW-09	Krishnalal L. Bishnoi	129	Add. DG, (granted sanction to prosecute the appellant and others)
PW-10	Swapnil B. Vibhute	136	panch Witness on memorandum panchanama and seizure panchanama of gold chains.
PW-11	Gajanan S. Namade	141	panch Witness (Spot Panchanama of the scene of offence.)

9. The case of the prosecution rests upon the evidence of the informant Mangalabai Deshmukh, who deposed that on 25.06.2015, she had been to the morning walk at Jyoti Mandir road, Jyotinagar. When she reached near gymnasium-hall, Jyoti Mandir Road, two persons came on motorcycle from her behind, they stopped

the motorcycle nearby her. The pillion rider alighted from the motorcycle and snatched her gold chain, weighing about 10 grams, and the snatcher immediately sat on the motorcycle and ran away from the spot. She deposed that she raised shout. She returned back to her home and informed the incident to her son, who took her to the Osmanapura Police Station, where she lodged the First Information Report (for short "FIR"). She further deposed that on 08.07.2015 she was called by police at Harsul Jail, where test identification parade was conducted by the Executive Magistrate. She further deposed that she was asked to identify the culprits, accordingly she identified the appellant as the same person, who snatched her gold chain.

10. To substantiate its evidence, the prosecution has relied on the evidence of alleged eye witness Prashant Kanthawar (PW-3). According to him on 25.06.2015, at about 7.00 to 7.30 a.m., he was going towards school to leave his child to school. At that time, he saw two persons riding on the motorcycle. The said motorcycle was in fast speed. He heard shouts of one lady namely Mangalabai (informant). He made inquiry with her, who disclosed her name as Mangalabai. She told him that two persons who were riding on the motorcycle had snatched her gold chain (Mangalsutra) from her neck. He further deposed that in the month of July, he was called in

Osmanapura Police Station for test identification parade of accused persons, accordingly he identified two persons, who were ridding on the motorcycle at the time of the incident. He further deposed that he is unable to identify persons, who were ridding on motorcycle on the day of incident, out of the accused persons who were present in the Court. Subsequently he identified the appellant as person who snatched the gold chain of the informant. On the basis of the above evidence, the learned counsel for the appellant submitted that neither the Executive Magistrate, nor panch witness to the memorandum of test identification parade were examined by the prosecution, therefore, the identification of the appellant by the complainant is not established. On the other hand, the learned APP for respondent State submitted that the memorandum panchanama of the test identification parade was executed under Section 291-A of the Code of Criminal Procedure (for short "Cr.P.C."). He also submitted that it was expected from the appellant to call Executive Magistrate for cross-examination but the appellant did not call the Executive Magistrate for cross-examination, therefore, they cannot make any grievance about the procedure adopted by the Executive Magistrate, while holding the test identification parade.

11. I have gone through the memorandum panchanama and the test identification parade panchanama. I have also gone through

the Chapter 16 of the Criminal Manual, which provides the procedure to conduct the test identification parade. It appears from the memorandum that the identification parade was held for two accused persons at a time namely the appellant and original accused Shaikh Imran @ Sultan. In all 12 dummy witnesses were called by the Executive Magistrate. The age of the appellant and the other accused Shaikh Imran were shown as 30-35 years respectively. The average age of the dummy witnesses is shown around 27 years. The informant was kept in one room, thereafter she was taken to a hall, where the dummy witnesses and the appellant were standing in a row. She was taken to the said hall by one panch witness. Thereafter she identified the appellant and co-accused Shaikh Imran @ Sultan by pointing finger towards them. The informant has also deposed that in Harsul jail, the Tahsildar Madam was present. She took her at one hall, about 13-14 persons were standing in a row. The Tahsildar madam asked her to identify the accused persons, she identified two persons standing in a row, thereafter, her signature was obtained on one document. In the Court also she was asked to identify the culprit, she accordingly identified the appellant in the Court. Therefore, it can be said that there is no flaw in the test identification parade and the identification of the appellant.

12. Learned counsel for the appellant also submitted that

there is delay in conducting the test identification parade. He also submitted that the appellant and other co-accused persons were produced before the Magistrate, without covering their faces. He invited my attention to the admission given by the Investigating Officer [Amol Deshmukh (PW-05)], who admitted that he produced the appellant and other co-accused before the Magistrate for remand under veil, but there is no reference in the remand application that the appellant and other co-accused were produced by covering their faces. It does not affect the evidence of the informant, because it is not the case of the appellant that the informant had appeared in the Court room during the remand. In fact, the informant is an aged lady. Therefore, it is highly improbable that she had attended the remand Court, where the appellant and others co-accused were produced before the Magistrate for remand. Therefore, it can be said that for the sake of argument, the appellant has taken defence that he was produced before the Magistrate without covering his face. Therefore, I do not find any merit in the said submission of the appellant.

13. Learned counsel for the appellant also submitted that there is delay in holding the test identification parade, which is not explained by the prosecution. Admittedly, the appellant came to be arrested on 27.06.2015 and test identification parade was held on

08.07.2015. The learned counsel for the appellant relied on the ratio in the case of **Md. Sajjid vs State of West Bangal - 2017 All SCR (Cri) 161**, wherein, it is held that

“identification parade held 25 days after arrest of accused persons. No incident or crime had actually taken place in presence of witness identifying accused persons nor they disclosed the features specially attributes of accused, even their chance meeting was in night and was only for some fleeing moments. In the circumstances the identification simpliciter can not form basis or be taken as fulcrum for entire case of prosecution.”

14. In the present case, the test identification parade was held within 11 days from the arrest of the appellant and other co-accused persons. The test identification parade is the only piece of supporting evidence and not the substantive piece of evidence. It helps to corroborate the test identification by the witnesses, so the same cannot be relied upon to convict the accused persons. Learned counsel for the appellant has placed reliance on **Sarjerao Kakare Vs. State of Maharashtra – 2012 ALL MR Cri. 917**, wherein, it was held that

“evidence of the test identification parade is not substantial evidence but supporting evidence.”

15. In the present case the informant has identified the appellant in test identification parade, which was taken place within 11 days from the arrest of the appellant and other co-accused. Similarly she also identified the appellant in the Court. Therefore, I must mention here that an independent eye witness, Prashant Kanthawar (PW -03) also identified the appellant in open Court, though initially, he was hesitant to identify him but by stretching his memory he identified the appellant. It is vehemently submitted on behalf of the appellant that the evidence of independent alleged eye witness is concocted. He had no opportunity to witness the incident, therefore, his evidence on the point of test identification of appellant has no legal value. But I do not find any force in the said submission because, the incident had taken place on 25.06.2015. The evidence of the witnesses was recorded on 26.10.2017. So it can be said that the evidence of witness Prashant Kanthawar (PW-3) was recorded after 2 and 1/2 years from the date of incident, still he firmly admitted in the cross-examination that the appellant is the person, who had snatched the gold chains from the neck of the informant. It appears that, at the time of the incident, this witness might have seen the appellant for a while and the features of the appellant must have imprinted in his mind and he tried to recollect features of that person during the course of evidence. As such, he deposed that the appellant may be the same person. So the witness has given evidence, which

appears to be trustworthy. Therefore, the identify of the appellant in this crime is established by the prosecution through the evidence of the informant and eye witness Prashant Kanthawar (PW-3).

16. The prosecution also tried to prove the nexus between the appellant/accused and seizure of the stolen gold chain. To prove such nexus, the prosecution has relied on the evidence of the investigating officer, Amol Deshmukh (PW-05), who deposed that during the investigation he made interrogation with the appellant, who disclosed his desire to make a disclosure statement. Accordingly he called two panch witnesses. The appellant disclosed that he had kept the gold chains in his house which were snatched from the different persons in Aurangabad city and he showed his willingness to produce the same. Accordingly, his statement was recorded under the memorandum panchanama (Exh. 52). He further deposed that after memorandum panchanama the appellant, he and both panch witnesses along with police staff boarded on a police jeep. The appellant took all of them to the Sadatnagar, near Railway Station, Aurangabad. He asked to stop the jeep near his house, accordingly the jeep was stopped. All of them alighted from the jeep. The appellant opened the door of his house. All of them entered into his house. The appellant produced gold chains from one cupboard, which were in his house. There were in all 3 to 4 gold chains. The

investigating officer deposed that he seized the gold chains, in presence of panch witnesses under seizure panchanama (Exh. 53).

17. To substantiate the evidence of the investigating officer, the prosecution has examined panch witness Swapnil B. Vibhute (PW-10), who deposed that he was called in Osmanpura Police Station for preparation of panchanama. Prashant Kharat was another panch. The appellant was present in the police station, who disclosed before him that he is ready to show the gold stolen chains, stolen by him and others. Accordingly memorandum panchanama was prepared (Exh. 52). He further deposed that, he along with panch witnesses, police party and appellant boarded on a police jeep. As per the instructions of appellant the driver drove the jeep. The appellant took all of them to Sadatnagar Nagar. There was a milk diary. The appellant asked to stop the jeep near his house situated opposite the milk diary. He, the appellant, both witnesses and police persons entered in the house of the appellant. The appellant produced one gold chain of the informant from his Almira. He further deposed that the appellant produced in all 4/5 gold ornaments. All the articles were seized by the investigating officer under the seizure panchanama. In cross-examination, he admitted that he was called by police around 3.00 to 3.15 p.m. He had gone to the house of the appellant in the evening at about 5.30 p.m. He also admitted that as

there is gap of 2 years, he identified the appellant to the best of his memory. On the basis of said admission, the learned counsel for the appellant submitted that the panchanama was prepared between 10.40 p.m. to 11.30 p.m. It is true that there is variance in the time given by the witness and time mentioned in the panchanama, but the witness has given explanation that he was deposing 2 and 1/2 years after preparation of the panchanama, therefore, there can be a variance of time of panchanama given by the witnesses and that can be ignored.

18. Learned counsel for the appellant submitted that the panch witness deposed that the gold ornaments were seized, but there is material on record that the said ornaments were subsequently weighed by the investigating officer in the shop of jeweller to know its weight. A separate panchanama to that effect was prepared. The seized gold chains were weighed by Gauri Jewellers. The investigating officer has admitted in the cross-examination that he had called the employee of Gauri Jeweller, after reaching to the house of the appellant. Therefore, it cannot be said that the sealed ornaments were again re-opened or re-sealed and weighed by the investigating officer in the jeweller's shop. In the cross-examination, it was suggested to the investigating officer that he prepared seizure panchanama of gold chains in the house of the appellant and the

said suggestion was accepted by the investigating officer, therefore, there is no ambiguity regarding the sealing of the ornaments during the seizure panchanama. It has come in the cross-examination of the informant/complainant that she was called by police for test identification parade of the gold chains. She deposed that police asked her to identify her gold chain out of 3 to 4 gold chains. She was shown all chains, all chains were broken and she identified her gold chain out of them. The said evidence has unequivocally established the identification of gold chain by the informant. As the informant has identified her gold chain out of seized gold chains, said chain was seized from the possession of the appellant. Therefore it was expected from the appellant to explain said incriminating circumstances appearing against him from the evidence of prosecution witnesses. As per the provisions of Section 114 (a) of the Indian Evidence Act, it was incumbent upon the appellant to give account for as to under what circumstances the gold chain of the informant came into his possession, but no such explanation was given by the appellant. On this point, the trial Court relied on the case of **Limbaji vs. State of Maharashtra, AIR 2002 SC 491**, wherein it is held that

“Test of recent possession--accused came in possession of ornaments since after immediate robbery and murder, one article sold on very next day to shopkeeper, other articles were discovered from them sometime within short period as

disclosed by the accused this created presumption that the accused were themselves involved in the commission of robbery and murder.”

19. In the present case also the gold chains including gold chain of the informant was discovered at the instance of the appellant but he failed to give account for the possession of the gold chain of the informant.

20. Learned counsel for the appellant submitted that the investigating officer has prepared panchanama in the police station and obtained the signatures of the panch witnesses and accused subsequently. To substantiate his contention, he invited my attention to page No. 129 of the paper book wherein, there is form of memorandum of accused, which is completely blank but there are signatures of panch witnesses and the thumb impression of the appellant. But the said form was not brought to the notice of the investigating officer, who could have given explanation about the said blank memorandum form. Similarly the attention of the panch witness Swapnil B. Vibhute (PW-10) should also have invited towards said document. It can be said that the investigating officer must have obtained the signatures of panch witnesses mistakenly, otherwise had the investigating officer intention to create such bogus document, then he would not have included blank memorandum

form in the charge-sheet. On going through the said form, it can be said that the signatures were obtained on blank form, but it cannot be said that in order to implicate the appellant, false documents were created by the investigating officer. The panch witness on the memorandum panchanama and seizure panchanama Swapnil B. Vibhute (PW 10) has substantiated the evidence of the investigating officer on the point of disclosure statement by the appellant and discovery in pursuance thereof from the house of the appellant/accused. Therefore, I am not inclined to accept the submissions of the learned counsel for the appellant that the investigating officer created bogus documents and falsely implicated the appellant in this crime.

21. The prosecution has also examined panch witness to the spot panchanama Gajanan Namade (PW-11), who deposed that on 25.06.2015 he was called in Jyoti Nagar, to act as panch witness, the Ravindra Kamble was another panch. A road passes from a gymnastic hall, near Jyoti Mandir one lady was present on the spot and she showed them from where her gold chain (mangulsutra) was snatched and accordingly police prepared panchanama. On this point the evidence of Prashant Kanthawar (PW-3) is also crucial, he also deposed that he saw the culprits while running away on motorcycle after the incident. He also gave description of the spot

which is situated near the Gymnastic Hall on Jyoti nagar road, Aurangabad. So the prosecution also proved the scene of offence with a the help of the informant.

22. The prosecution has also relied on the evidence of Mahesh Kulthe (PW-02) to prove the arrest of the appellant and others. The witness Aware (PW-06) (Investigating Officer) deposed that on 27.06.2015 he arrested appellant and others near Hanuman Temple under panchanama. To prove said panchanama the prosecution relied on the evidence of Mahesh Kulthe (PW-02). He deposed that on 27.06.2015 at about 10.30 p.m. when he was coming from the Railway Station, Aurangabad, his uncle Dilip Kulthe asked him to sign on some panchanama. Accordingly he signed the same. He identified his signature on panchanama. He has not supported the contents of the memorandum panchanama, as well as seizure panchanama. He was cross-examined by the prosecution, but nothing was elucidated from his cross-examination to believe his version as trustworthy. The appellant has not challenged his arrest on 27.06.2015, therefore, the evidence of Mahesh Kulthe (PW-02) has no significance. The arrest panchanama of the appellant is proved by the Aware (PW-06) (Investigating Officer).

23. On going through the evidence of the informant, eye

witness Prashant Kanthawar (PW-03), panch witness Swapnil B.Vibhute (PW-10), the investigating officer, Amol Deshmukh (PW-05) and Prashant A. Aware (PW-06), the involvement of the appellant is proved in the crime. The informant and eye witnesses identified the appellant as culprits. The seized muddemal gold chain belonged to the informant was seized at the instance of the appellant, therefore, the offence punishable under Section 392 of IPC has been proved by the prosecution against the appellant.

24. On the other hand the learned counsel for the appellant submitted that the alleged offence is triable by the Magistrate and if the offence is tried by the Magistrate, then the Magistrate has powers to award sentence to the appellant up to 3 years only. The Sessions Court had tried the offence, hence the appellant was sentenced to 10 years, which is excessive sentence, it may be reduced.

25. Similarly the appellant is having criminal antecedents. At the same time, it can be said that under the offence punishable under Section 392 of IPC, if the appellant would have been tried by the learned Magistrate, then he would have sentenced him for maximum period of 3 years. The appellant had already undergone the substantive sentence of 5 years. Therefore, I find substance in the submissions of the learned counsel for the appellant that the

appellant can be sentenced to imprisonment for the period for which he has already undergone. With this I pass following order :

ORDER

- a. Appeal is partly allowed.
- b. The judgment and order passed by the learned Special Judge, (MCOC), Aurangabad in Special Case (MCOC) No. 7 of 2015 dated 27.08.2018 is confirmed. But the substantive sentence is hereby reduced to the extent of the period undergone by the appellant.
- c. The sentence of fine is confirmed.

**(SURENDRA P.TAVADE)
JUDGE**